

***Case No COMP/M.2779 -
IMPERIAL TOBACCO /
REEMTSMA
CIGARETTENFABRIKE
N***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(2) NON-OPPOSITION
Date: 08/05/2002

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 08.05.2002

SG (2002) D/229715

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) and 6(2)
DECISION

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.2779 – Imperial Tobacco Group plc / Reemtsma Cigarettenfabriken GmbH
Notification of 19.03.02 pursuant to Article 4 of Council Regulation No 4064/89¹**

1. On 19.03.2002, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (“the Merger Regulation”) by which the British undertaking Imperial Tobacco Group plc (« Imperial Tobacco ») acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the German undertaking Reemtsma Cigarettenfabriken GmbH (« Reemtsma »).

¹ OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

2. In the course of the investigation, Imperial Tobacco submitted undertakings designed to eliminate the competition concerns identified by the Commission during the first part of the investigation, in accordance with Article 6(2) of the Merger Regulation. In the light of these modifications, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 as amended and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I. THE PARTIES

3. Imperial Tobacco is a leading British tobacco company, with significant international operations. Imperial Tobacco manufactures and sells a range of tobacco products, including *Superkings*, *Lambert & Butler*, *Embassy*, *John Player Special*, *Regal* and *Richmond* cigarettes, as well as *Drum*, *Van Nelle* and *Golden Virginia* “Roll Your Own” (RYO) tobacco, *Classic* cigars and *Rizla* cigarette paper.
4. Reemtsma is a privately owned manufacturer of cigarettes based in Germany. Reemtsma’s principal business is the manufacture of cigarettes, but manufacture of RYO tobacco and cigarillos is also part of its business. In the EEA, Reemtsma’s main market is Germany, where its best known brand is *West*.

II. THE OPERATION

5. The operation is the acquisition of 90.01 % of the issued share capital in Reemtsma by Imperial Tobacco, with an option to acquire the remaining 9.99%.

III. CONCENTRATION

6. The operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

7. The notified concentration does not meet the thresholds as laid down in Article 1 paragraph 2 of the Merger Regulation since the undertakings concerned have a combined aggregate world-wide turnover of less than EUR 5 billion. However, the notified concentration meets the criteria pursuant to Article 1 paragraph 3 of the Merger Regulation. Imperial Tobacco and Reemtsma have a combined aggregate world-wide turnover of more than EUR 2.5 billion² (2001: Imperial Tobacco EUR 2,390 million; Reemtsma EUR 2,348 million). Each of them have a Community-wide turnover in excess of EUR 100 million (2001: Imperial Tobacco EUR [...] million; Reemtsma EUR [...] million). In each of the three Member States which are Germany, UK and Belgium, the aggregate turnover of each of Imperial Tobacco and Reemtsma is more than EUR 25 million. The aggregate combined turnover of Imperial Tobacco and Reemtsma exceeds EUR 100 million in each of these three Member States. Only Reemtsma achieves more than two-thirds of its aggregate Community-wide turnover within one and the same

² Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

Member State, i.e. Germany. The notified operation therefore has a Community dimension. It does not constitute a co-operation case under the EEA Agreement.

A. Relevant product markets

8. Both parties are active in the manufacture and distribution of factory manufactured cigarettes (FMC), “roll your own” cigarettes (RYO tobacco), cigarette tubes and papers and cigars/cigarillos/economy cigarillos, the latter product group not being affected by the concentration.
9. In all the EEA countries, FMC represent a large majority of the overall markets for tobacco products, usually more than 95 %.

(1) Factory manufactured cigarettes (FMC)

10. Manufactured cigarettes are products similar in outward appearance and with the same intended use. They combine a large number of common external characteristics related to their presentation (i.e. pack size, length, packaging, diameter). They are offered in the market in various combinations of internal characteristics related to the tobacco blend, taste and flavour, tar content, nicotine level which are normally identified within a brand (or a brand family). Brands are linked to an image and quality level and are supported by *ad hoc* advertising and promoting activities.
11. Within the market of factory-manufactured cigarettes further segmentations can be made. For marketing purposes, several cigarette producers and distributors segment the market internally mainly by taste or by price. However, the Commission’s conclusion in *BAT/Rothmans*, that, in most cases, it would be arbitrary and not meaningful to segment the FMC market according to a particular criterion, applies in this case. Therefore, for the purpose of the assessment of this concentration, the market for FMCs is regarded as representing one single relevant product market.

(2) RYO tobacco

12. RYO tobacco is a fine-cut tobacco for cigarettes which consumers roll themselves. The main differences between RYO and FMCs are a lower taxation for RYO and the need and the possibility for the customer to make his cigarettes on his own.

(3) A market for white sticks ?

13. The parties argued the market for FMCs and RYO tobacco constitute one single market of “white sticks”. The market inquiry taken out by the Commission found indications that there are several distinctions between RYO and FMC from the customers’ point of view. The price of a RYO cigarette is usually at the lower end of the price range of FMCs or even below. The smokers of RYO seem to form a distinct type of smokers separated from the mainstream of FMC smokers. A market enquiry taken out by the German Federal Cartel Office (Bundeskartellamt) in 1999³ found out that 83% of all smokers would not consider rolling their own cigarettes. The market enquiry carried out

³ Decision of 31 August 2000 “Imperial Tobacco/ EFKA”

by the Commission among the companies in the affected markets showed that the estimated proportion of customers smoking both styles vary from country to country. The proportion does normally not amount to more than 20 percent.

14. However, for the purpose of the present decision it is not necessary to decide whether there are separate markets for manufactured cigarettes and RYO, since the competitive assessment would be the same for a combined or for separate markets.

(4) Tubes and papers

15. Cigarette tubes are pre-formed paper tubes which are used with RYO tobacco although they are sold separately from tobacco. Cigarette papers are small sheets of paper with adhesive on one edge. The decision of the German Federal Cartel Office quoted above states that *‘A difference between markets for cigarette papers on the one hand and cigarette tubes on the other hand is not factually justified. Both products serve the self-manufacture of cigarettes and are therefore well capable of substitution. As far as their manufacture is concerned, both can be produced on the same machines’*. In this case it is not necessary to decide whether tubes and papers constitute a single market or two separate markets as no competition problems arise under either alternative.

B. Relevant geographic markets

(1) Cigarette markets

16. The parties have submitted information at both national and European level. In the previous merger decisions BAT/Rothmans and Seita/Tabacalera⁴ the Commission considered that the markets for tobacco products (cigarettes, RYO tobacco and cigars/cigarillos) at producers and distributors levels were national, since they have strong national characteristics concerning tax, public health protection, advertising and distribution. The parties broadly agree with this definition, although they outline the volume of trade flows between European countries. Trade flows are generated since cigarettes are produced only in some specific countries and then delivered to the country of their destination. However, by the reasons mentioned in the previous decisions, the relevant geographic markets for tobacco products are national, which was largely confirmed by the market investigation

(2) Tubes and papers

17. The parties argue that there are a number of factors which indicate that the geographic market for cigarette tubes and papers is regional rather than national, the region being the EEA and central and eastern Europe. At least, the Parties claim that it should be recognised that there is a considerable scope for imports into Germany. These factors are that the leading producers manufacture in a limited number of locations and deliver the products across the region, that transport costs are low (less than 3 % of the wholesale price) and the absence of tariffs or quotas to imports.
18. Market investigation has confirmed that, for tubes and papers the barriers to trade are lower than those for tobacco products, as there are fewer regulatory requirements and no significant differences in national taxation. The European scope of the market for

⁴ Decision in case DG IV/M.1415 – BAT/Rothmans and in case COMP/M. 1735 – Seita/Tabacalera

tubes and papers is emphasised by the high trade flows within Europe. Circa 40 % of a typical plant's production is exported⁵, and most of the manufacturers distribute their products in several EEA countries from one single plant. In addition, wholesale prices of the most famous brand in the EEA, *Rizla*, show a degree of convergence across European countries.

19. The market inquiry undertaken by the Commission among producers tended to indicate that the market for tubes and papers is Europe-wide. However, as no competition concern arises whether this market is regarded as European-wide or national, the market definition can be left open for the purpose of this case.

V. COMPETITIVE ASSESSMENT

(1) The cigarette market in Germany

20. According to the Parties, as far as FMC in Germany are concerned, Reemtsma has a market share of [20-30]% and Imperial Tobacco [0 – 5] %, of which [0 – 5]% are for own label brands. There is a clear market leader, Philip Morris, with 36.8 % market share and BAT with 20.2 % is of a similar size to Reemtsma.
21. According to the Parties, as far as RYO in Germany are concerned, Imperial Tobacco has [15 – 25]% market share and Reemtsma [5 – 10]%. The market is led by BAT with 30 %, and, with 13 %, Pöschl, a German manufacturer, is the only other manufacturer with more than 3 % market share.
22. If FMC and RYO are aggregated in one single market, then Reemtsma has a [15 – 25]% market share and Imperial Tobacco has a [0 – 5]% market share. Philip Morris is the clear market leader with 33.7 % market share, while BAT has 20 % market share.
23. A common characteristic of the German cigarette market is that own-label represent a large part of the sales, namely 15 % for FMC and 40 % for RYO, and several manufacturers compete for obtaining the supply of these products. This confers a significant bargaining power to the distributors, in relation to the supply of own-label cigarettes.
24. Finally, it should to be noted that restrictions on advertisement and promotion in Germany are not as stringent as in other EU countries, which allows for brand development and facilitates market entry.
25. In the German FMC, RYO or white stick markets, the combination of the Parties' businesses would form the second largest manufacturer. In each of these markets, the new entity will face the competition of the market leader and at least another established competitor. These elements, combined to the bargaining power of the distributors and the possibility of market entry, indicate that the envisaged concentration does not raise competition concerns for the German cigarettes market.

(2) Cigarettes in Italy

26. According to the Parties, Reemtsma has [less than 1]% of the Italian FMC market and Imperial Tobacco [less than 1]%. Therefore it is not an affected market. On the overall 'white stick' market, the Parties have respectively [less than 1]% and [less than 1]%. This market is also unaffected.
27. The Italian RYO market represents less than 0.5 % of the cigarettes market. However, Imperial Tobacco has a [40 – 50]% market share and Reemtsma [5 – 15]%. If this market is considered on a stand alone basis, it is then affected by the concentration.
28. The Parties face competition of international manufacturers, BAT having a 25.7 % market share, and Gallaher 12.4 %. In addition, barriers to entry in the Italian market appear to be low, thanks to the minimal investment required in distribution, as the distribution system is fully operated by the *de facto* national monopoly, Etinera. Last there is a high volatility in brands' market share, as Golden Virginia of Imperial Tobacco went from [0 – 10]% in 1997 to [10 – 20]% in 2001, and as Reemtsma increased its market share from [0 – 5]% in 1998 to [5 – 10]% in 2001.
29. Considering in addition the competitive pressure exerted by the cheapest FMC brands, no competition concern arises on the Italian RYO market, if such a market could be defined.

(3) Tubes and papers

30. Reemtsma activities are limited to the supply of tubes to the German market. According to the Parties, Imperial Tobacco's share of the German market for branded tubes in Germany is [5 – 15] % and Reemtsma is [10 – 20]%. Own brands account for nearly 50% of the overall market. Imperial supplies a large proportion of the own label tubes sold in Germany. However given the buying power of the distributors selling own label tubes and their ability to easily and quickly change of supplier, as well as the possibility of market entry or capacity expansion (Imperial Tobacco estimates the investment cost at about €[0-5] million) the Commission considers that the own brand tubes market shares should be allocated to the distributors and not the manufacturer.
31. On the European market for tubes, the parties combined market share for branded tubes would be [20 – 30]% : Imperial Tobacco accounts for [10 – 20]% and Reemtsma [5 – 15]%. At the European level Imperial also has substantial sales of own label tubes and the Commission considers that these sales should be allocated to the distributors for the same reasons as outlined above.
32. The proposed operation will not therefore give rise to competition problems on the narrowest market, tubes in Germany where the parties sales of branded tubes will account for [20 – 30]% of the market and where they will face competition from own brands which have over half of the market. As Reemtsma only produces and sells tubes in Germany the operation does not affect the markets for papers nor will it have adverse effects on any wider European market.

(4) The cigarettes market in the United Kingdom

The cigarette market structure

33. According to the Parties, as far as the FMC market is concerned, Imperial Tobacco has a [35 – 45]% market share and Reemtsma [0 – 10]%⁶. Their competitors are Gallaher, which holds 39.5 % of the market, Philip Morris, whose brands are distributed by Imperial Tobacco, 7.3 %, and BAT, 7.3%.
34. Imperial Tobacco is the market leader for RYO in the UK, with, according to the Parties, a market share of [50 – 70]%. Its two competitors are Gallaher and BAT with respectively 32 % and 8 % of the market. Reemtsma does not sell RYO products in the UK.
35. If the ‘white stick’ were considered, Imperial Tobacco would have [35 – 45]% and Reemtsma [0 – 10]%⁶. In this market, Gallaher has 38.9 %, Philip Morris 7.2 % and BAT 7.3 %.
36. As mentioned in point 13, there is no need to decide whether or not FMC and RYO are part of the same product market, as it leaves unchanged the competitive assessment of the envisaged transaction. As far as the UK market for cigarettes is concerned, all the figures in the analysis below are based on FMC sales only : market shares are almost the same for the FMC market and the ‘white stick’ market, and RYO is not affected by the concentration.
37. The mere indication of market shares in point 20 is not sufficient to depict the UK FMC market structure: prices of cigarettes vary from £ 3.37 a packet to £ 4.63, which indicates significant differences in brand positioning and implies that the product market is not fully homogeneous. Some distributors acknowledge that brands positioned at the two extremes of this spectrum are not close competitors, if they compete at all. In fact, most of the manufacturers and distributors segment the FMC market in up to four categories based on prices. These categories differ not only in terms of prices, as brand recognition, brand loyalty and advertisement and promotion expenditures decrease with price.
38. Considering the spectrum of cigarette packets prices in the UK, it appears that half of the sales have been recorded by brands sold at more than £ 4.1, the other half being priced at less than £ 3.9. This gap in prices establishes the distinction between the so-called “premium brands” that usually have a recognition larger than the UK and the “low price” brands, whose distribution is limited to the UK. If competitive positions are considered across these two segments, the following picture emerges:
 - (i) in the premium segment, Imperial Tobacco has [30 – 40]% market share, Gallaher 48 %, BAT 3%, Philip Morris 14 % and Reemtsma no sales ;
 - (ii) in the low prices segment, Imperial Tobacco has [40 – 50]% market share, Gallaher 32 %, BAT 12 %, Philip Morris no sales and Reemtsma [5 – 15]%⁶.

⁶ Reemtsma market share should be considered with caution as it includes Reemtsma’s brands and own-label sales.

39. There is actual competition between brands positioned in the two segments, so that it cannot be considered that they are two distinct product markets. However, it should be noted that Imperial Tobacco is the strongest manufacturer in the low price segment. This strength of Imperial Tobacco in the low price segment is reinforced if RYO are taken into account, as both manufacturers and distributors recognise that there is a degree of competition between low priced cigarettes and RYO, and as Imperial Tobacco has recorded [50 – 70]% of the sales of RYO in the UK last year.

The parties' activities in the UK and their combination

40. Philip Morris brands are distributed in the UK by Imperial Tobacco. The two companies have entered a co-marketing, co-promotion and logistics agreement, by which Imperial Tobacco is granted the exclusivity of the distribution of Philip Morris brands in the UK. As a consequence, Imperial Tobacco, in its commercial relations with distributors, represents [40 – 50]% of the cigarettes sold in the UK. This reinforces its bargaining position with wholesalers and retailers.
41. Reemtsma's activities in the UK are pursued from Germany and are mostly focused on the supply of own-label cigarettes to supermarket and cash-and-carry chains : [over 80]% of its sales are recorded by own-label sales. Reemtsma is virtually the only supplier of own-label cigarettes in the UK. In addition to this own-label supply activity, Reemtsma distributes three brands in the UK, Maxim, Kings/Superkings and Ronson, which represented respectively [less than 1]%, [less than 1]% and [less than 1]% of the market in 2001.
42. The parties argue that adding the Reemtsma's own-labels sales to Imperial Tobacco sales is not meaningful, as these products are wholly controlled by the retailers, whose contracts are typically for one year. In addition, the parties claim that own-label cigarettes benefit from virtually no promotion and that they have a limited distribution, most of the own sales being made to retailers which supply these products in their outlets only.
43. However, unlike other fast moving consumer goods, where 'own-label products' are often unbranded or branded with the retailer's shop brand, own label cigarettes are branded in the same way as other branded cigarettes, without reference to the retailer.
44. The Commission's investigation has further revealed that Reemtsma has acquired the trade marks for a very large proportion of own-label cigarettes sold in the UK. Some distributors do not wish to own the trade marks so as to mitigate their risk of legal liabilities. According to the Parties, in 2001, trademarks representing [50-70]% of the own-labels sales, or [0-5]% of the UK market, were sold to Reemtsma. Promotion expenditures have been incurred by Reemtsma in 2001 for some of these trademarks. According to the Parties, for the [...] brands, [...] have been budgeted in 2001 for the marketing of own-labels representing revenues of [...]. The average promotion ratio of these own-labels is [...], which is in line with that for several Parties' brands. Under the current supply contracts, Reemtsma has granted exclusivity to their customers. However, no clause of these contracts determines the future of these trademarks, which are property of Reemtsma.
45. Reemtsma owns and promotes trademarks for own-labels representing [0 – 5]% of the FMC market in the UK. Even if the distribution of these products is currently limited to the supermarket and cash-and-carry chains that formerly owned these trademarks, nothing prevents Reemtsma from extending the scope of their distribution at the end of

the current supply contracts, all of which end in 2004 at the latest. Therefore, these [0 – 5]% market shares should be fully attributed to Reemtsma. The result of this is that the acquisition of Reemtsma by Imperial Tobacco will bring an additional market share of [0 – 5]⁷ to the [35 – 45]% currently recorded, and proportionally more in the low price segment.

Contestability of Reemtsma market shares

46. The parties argue that, irrespective of whether or not these own-label sales are fully attributed to Reemtsma, Reemtsma's entire UK market share is wholly contestable because (i) there are no barriers to entry at the distribution level ; (ii) retailers can readily replace Reemtsma's own-label products with the own-label produced by other manufacturers and (iii) manufacturers can easily de-list "own-label" brands in favour of non-exclusive, comparably low priced manufacturer brands which are available to a number of manufacturers. According to the parties, these three elements combined together show that the market overall would be wholly unaffected by the proposed merger.
47. It appears that distribution to supermarket and cash-and-carry chains can be handled easily and at low cost, as there are few delivery points to be supplied. Nevertheless, market investigation has revealed that the distributors of own-label cigarettes that do not own their trademarks cannot change their cigarette manufacturer easily, unless they are allowed to transfer their trademark to their new manufacturer: there is a generally acknowledged brand recognition and brand loyalty to own-label products which imply that replacing a trademark name would adversely impact sales for a several years time. Indeed, some of the own-labels, like *Red Band* that represented [0 – 5]% of the market in 2001, has been sold widely in UK pubs and restaurants for more than 15 years and has benefited from a continued support in terms of advertisement and promotions.
48. The argument put forward by the parties that "manufacturers can easily de-list "own-label" brands in favour of non-exclusive, comparably low priced manufacturer brands which are available to a number of manufacturers" is not in favour of a continuing competition in the low-price segment of the UK FMC market, as it means that the incumbent manufacturers can easily displace the own-labels out of the market and consequently force these competing brands to exit the market.

Impact of the concentration

49. It can be concluded from above that own-label distributors that do not own their trademarks can not easily substitute Reemtsma as a supplier except if they are allowed to transfer their trademark, which is not a provision of their current supply contracts.
50. Firstly, the acquisition of Reemtsma by Imperial Tobacco will confer to the latter a stronger position in the UK cigarette market, with a [40 – 50]% market share if all own-label sales are included, and [40 – 50]% if the own-label sales for trademarks which are still owned by the distributors are excluded. In terms of distribution, Imperial Tobacco will represent [50 – 60]% of the sales in the UK.

⁷ This figure is the addition of [0 – 5]% and the [less than 1]% recorded by Reemtsma's own brand in the UK (*Maxim, Kings/Superkings and Ronson*).

51. Second, this reinforcement of Imperial Tobacco position will be greater in the low price segment of the market, where it will hold [50 – 60]% of the market⁸. This figure must be compared with the 32 % held by Gallaher and 12 % held by BAT.
52. Third, by acquiring Reemtsma, Imperial Tobacco obtains control over a company that fully occupies the segment of the market in which market entry is most likely. Indeed, selling a brand made available to all the retailers and wholesalers would require to have a sales force and a distribution network which are expensive to set up. In contrast, own-label cigarettes must be supplied to only a few warehouses in the UK and supply is limited to a short list of customers.
53. [Description of a clause in the distribution agreement signed by Philip Morris and Imperial Tobacco].
54. In addition, restrictions in advertisements and promotions of tobacco products in the UK make it very difficult for manufacturers to develop recognition of new brands. In this respect, BAT, an established competitor, has been unsuccessful in introducing its internationally known brand 555 into the United Kingdom, despite significant efforts. The combination of these two elements indicates that supplying own-label cigarettes is the only way to get a foothold in the UK FMC market, which shows that post merger Imperial Tobacco, by controlling the own-label supply, will be in a position to prevent entry in the UK FMC market.
55. Last, by acquiring the supplier of the own-label cigarettes, Imperial Tobacco gets control over the competing brands that appear to discipline the market. Indeed, the market investigation has shown the main interest that supermarket and cash-and-carry chains bear in having own-label on their shelves : having a product that fixes the bottom price for cigarettes and thus constraining pricing of the manufacturers brands. For instance, two distributors selling own-label cigarettes have complained that by getting control over Reemtsma, Imperial Tobacco will be in a position to erode distributors margins and to increase prices of own-label cigarettes.
56. It results from these elements that, post merger, Imperial Tobacco will be in a position to increase prices of own-label cigarettes, which will probably have the effect of increasing the prices of all the brands, as own-label cigarettes act as a benchmark price for the market. Alternatively, Imperial Tobacco will be in a position to restrict supply volumes or delivery conditions of own-label products in the UK. This would force the supermarkets and cash-and-carry chains to seek the introduction of new own-label trademarks in the market, which cannot be achieved within reasonable time periods and during which the UK cigarette market could undergo significant change.
57. As a consequence, there are serious doubts about the compatibility of the concentration with the common market.

VI. Remedies

58. In order to remedy to the competition concerns identified in the UK cigarette market, the Parties have offered on 15.04.2002 the undertakings summarised hereafter in relation to any UK trade mark which Reemtsma owns and that is currently distributed exclusively

⁸ if the own-label sales for trademarks which are still owned by the distributors are excluded.

as own-label by a distributor. The proposed commitments were refined and finalised on 26.04.2002. The full text of the final commitments is annexed and forms an integral part of this Decision. The main points of the undertaking are summarised below :

Within one month of the decision, Imperial Tobacco undertakes to give notice to the distributors of the terms of the following commitment :

(i) Imperial Tobacco will not apply, use or exploit a Trade Mark in the UK except for the purposes of discharging its obligations during the current and any subsequent own label supply arrangement that it has in place with the distributor ; and

(ii) upon written request by a distributor to procure at any time within a period of twenty years commencing on the decision date the assignment of Reemtsma's trade mark in perpetuity for the sum of [...] to the distributor or to procure such assignment to any other party that the relevant distributor may direct.

In the event that a distributor does not acquire any cigarettes bearing the relevant trade mark from Imperial Tobacco for a continuous period of [...], then Imperial Tobacco will give such distributor notice informing him that it has a period of three months in which to exercise its rights. If a distributor does not exercise its right, then Imperial Tobacco will be entitled to retain title to the trade mark, provided that it will not exercise or apply in the UK the rights in relation to the trade mark for a period of [...] commencing upon the day after the last day when the distributor had the right to exercise its rights.

Imperial Tobacco undertakes to effect the assignment of the trade mark within [...] from the date of receipt of a written request from a Customer.

This commitment also include a reporting by which Imperial Tobacco must inform the Commission of any of the events than can occur with respect to the undertakings of Imperial Tobacco (sending of the notice, written request of a distributor, assignment of a trade mark, giving up of a trade mark by a distributor). In addition, Imperial Tobacco must provide the Commission with a yearly report on the implementation of the commitments.

Assessment

59. These remedies have been market tested. All of the affected distributors that replied confirmed that this undertaking will allow them to change their supplier of own-label cigarettes and to transfer the trademark to the new supplier in order to keep their exclusivity. Furthermore, such an undertaking does not conflict with any of the supply arrangements currently in force.
60. Cigarette manufacturers that are considered by the distributors to be a potential alternative to Reemtsma have also been approached in order to verify they would have an interest in supplying own-label cigarettes to the UK and that they have the actual capacity to supply this market under conditions equivalent to the ones currently offered by Reemtsma. At least seven European manufacturers have expressed their interest to supply these distributors. Their total spare capacity is several fold the current size of the own-label market in the UK. Indeed, nearly all of the respondents could supply all this volume alone. None of them identified difficulties in securing a proper delivery of these products to the UK distributors.

Conclusion

61. The proposed remedies offer to the distributors of cigarettes for which the trademark is currently owned by Reemtsma the possibility to freely reassign the trademark whenever they decide to replace Reemtsma as a supplier. These distributors will also be protected against the application, use or exploitation of these trademarks by Imperial Tobacco outside of the exclusivity currently granted in the supply arrangements. These combined two possibilities free these distributors from Imperial Tobacco / Reemtsma and enable them to compete independently.
62. Therefore, these remedies, by giving to the distributors independence from Reemtsma, grant to their own-labels the necessary exclusivity in distribution and flexibility in terms of supplier and consequently restore their original functionality which is to be a bargaining instrument for the distributors against manufacturers, as well as a mean to discipline prices on the market.
63. Finally, were a distributor to stop selling a trade mark, Imperial Tobacco could not make any commercial use of it for a total period of [...]years, which appears to be sufficient to grant, that, were Imperial Tobacco to resume the use of the trade mark, it would be equivalent to launching a new brand.

VII. CONDITIONS AND OBLIGATIONS

64. Pursuant to the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
65. The requirement for achievement of each measure that gives rise to the structural change of the market is a condition, whereas the implementing steps, which are necessary to achieve this result, are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands; where the undertakings concerned commit a breach of an obligation, the Commission may revoke its clearance decision, acting pursuant to Article 6(3)(b) of the Merger Regulation⁹.
66. In the light of the above, the Commission concludes that the commitments submitted by the Parties are sufficient to remove the competition concerns identified by the Commission during its investigation of the proposed transaction, on condition that the Parties comply with the following commitments : sending the notice to the affected distributors and assignment of the trade mark if requested by these distributors.
67. The above mentioned commitments constitute conditions, as only by fulfilling them (subject to any change pursuant to the review clause of the Annex) the structural change on the relevant market can be achieved.
68. All the other commitments are obligations to the Parties.

⁹ cf. the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98.

VI. CONCLUSION

69. The Commission concludes that the commitments submitted by the Parties during the course of the proceedings are sufficient to address the competition concerns raised by this concentration. Accordingly, subject to full compliance with these undertakings, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) and 6(2) of Council Regulation (EEC) No 4064/89.

For the Commission

ANNEX

26 April 2002

By hand and by fax: 00 32 2 296 4301

European Commission – Merger Task Force

DG Competition

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**Case No. COMP/M.2779 – Imperial Tobacco/Reemtsma
Cigarettenfabriken**

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EEC) No. 4064/89 as amended (the “Merger Regulation”), Imperial Tobacco Group PLC (hereafter “Imperial”) hereby provides the following commitments (hereafter “the Commitments”) in order to enable the European Commission (hereafter “the Commission”) to declare Imperial’s proposed acquisition of Reemtsma Cigarettenfabriken GmbH (hereafter “Reemtsma”) compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (hereafter “the Decision”).

These Commitments shall take effect upon the date of adoption of the Decision (hereafter “the Effective Date”).

Any term used in this text shall be interpreted in the light of the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98¹⁰.

¹⁰ *Official Journal C 68, 02.03.2001, pages 3-11.*

Section A. Definitions

In these Commitments, the following expressions shall have the following meanings:

The Customers: the customers specified in Annex 1 hereto. References to a “Customer” are to the individual customers specified in Annex 1.

The Divestment Period: the period within which Imperial is required to effect the assignment of any Trade Mark pursuant to these Commitments following receipt of a written request from a Customer.

The Trade Marks: the UK trade marks which Reemtsma owns and which are specified in Annex 1 hereto. References to a “Trade Mark” are to the individual UK trade marks specified in Annex 1.

Section B. Commitment relating to the UK own label supply of cigarettes

1. Within one month of the Effective Date, Imperial undertakes to give notice to the Customers of the terms of the following commitment, namely that:-
 - (a) Imperial undertakes, for itself and on behalf of Reemtsma, in relation to the Trade Marks:
 - (i) not to apply, use or exploit a Trade Mark in the UK except for the purposes of discharging its obligations during the current and any subsequent own label supply arrangement that it has in place with the Customer set opposite the Trade Mark in Annex 1; and
 - (ii) upon written request by a Customer and in relation to any Trade Mark set opposite that Customer's name in Annex 1 to procure at any time within a period of twenty (20) years commencing on the Effective Date the assignment of Reemtsma's legal and equitable title in and to the Trade Mark in perpetuity for the sum of [...] to the Customer or to procure such assignment to any other party that the relevant Customer may direct.
 - (b) In the event that a Customer in relation to a Trade Mark set opposite its name in Annex 1 does not acquire any cigarettes bearing the relevant Trade Mark from Imperial for a continuous period of [...] from the last date of acquisition, then Imperial will give such Customer notice informing the Customer that it has a period of three months in which to elect to exercise its rights described in paragraph 1(a)(ii) above.
 - (c) If a Customer does not exercise its right under paragraph 1(b) above, then Imperial will be entitled to retain title to the relevant Trade Mark provided that neither Imperial nor any member of its corporate group (including any affiliates jointly controlled by Imperial) will exercise or apply in the UK the rights in relation to the said Trade Mark for a continuous period of [...] commencing upon the day after the last day when the Customer had the right to exercise its rights under paragraph 1(b) above.
2. All notices to be given by Imperial to a Customer pursuant to the terms of the commitment set out in paragraph 1 above shall be made in writing to the registered address of the Customer by fax and registered post. No notice will be considered duly given unless Imperial can produce either a fax work report confirming receipt, a registered mail receipt or a written acknowledgement of receipt from the Customer.

Section C. The Divestment Procedure

3. Imperial undertakes, for itself and on behalf of Reemtsma, to effect pursuant to these Commitments the assignment of all its right, title and interest in any Trade Mark, together with goodwill relating thereto owned by Imperial and/or Reemtsma, within [...] from the date of receipt of a written request from a Customer. Any assignment contract entered into pursuant to this paragraph shall be made conditional upon the prior express approval by the Commission of the contract as provided for in paragraph 4 below.

Section D. Approval of assignment contracts

4. When Imperial has or is about to reach an agreement in relation to the assignment of any Trade Mark pursuant to these Commitments it shall submit a copy of the assignment contract to the Commission together with an explanatory document enabling the Commission to verify that the requirements of these Commitments have been fulfilled.

Section E. Reporting by Imperial

5. Imperial shall provide written reports in English to the Commission as follows:
 - (i) a report within 10 days of the notices referred to in the first paragraph of paragraph 1 being given confirming that such notices have been given and attaching copies of the notices and proof that the notices have been duly given; and
 - (ii) an annual report within 10 days of each annual anniversary of the Effective Date confirming Imperials's compliance with these Commitments and setting out the basis on which this confirmation is made. Such reports to continue only so long as any Trade Marks are subject to these commitments; and
 - (iii) a report within 10 days of receipt of a written request from a Customer referred to in paragraph 1(a)(ii) above indicating that such a request has been made and attaching a copy of the request; and
 - (iv) a report within 10 days of a notice being given pursuant to paragraph 1(b) above confirming that such a notice has been given and attaching a copy of the notice and proof that the notice has been duly given; and
 - (v) a report within 10 days of the date on which paragraph 1(c) above applies in relation to any Trade Mark indicating that it now applies; and
 - (vi) a report within 10 days of an assignment of a Trade Mark being made pursuant to paragraph 3 above and attaching a copy of the assignment contract.

Section F. The review clause

6. The Commission may, upon request from Imperial showing good cause, and where relevant:
- (i) allow for an extension of the Divestment Period in relation to any Trade Mark;
 - (ii) waive or modify, in exceptional circumstances, one or more of the conditions and obligations in these Commitments.

Imperial shall address any request for an extension of time to the Commission no later than one month prior to the expiry of the time period, showing good cause. Only in exceptional circumstances shall Imperial be entitled to request an extension within the last month of the period.

Annex 1

[...]