

***Case No COMP/M.2817 -  
BARILLA / BPL /  
KAMPS***

Only the English text is available and authentic.

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

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Article 6(2) NON-OPPOSITION  
Date: 25/06/2002

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25-06-2002

SG (2002) D/230364

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.2817 - Barilla / BPL / Kamps  
Notification of 08.052002 pursuant to Article 4 of Council Regulation  
No 4064/89<sup>1</sup>**

1. On 8 May 2002, the Commission received a notification of a proposed concentration by which the undertakings Fin.Ba S.p.A. ("Fin.BA") belonging to the Barilla Group ("Barilla" - Italy) and Banca Popolare di Lodi S.c.a.r.l. ("BPL" - Italy) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of Kamps AG ("Kamps" - Germany) by way of public bid.
2. After examination of the notification, the Commission has concluded that the proposed operation falls within the scope of Council Regulation (EEC) No 4064/89 and, taking into account undertakings submitted by the parties, does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

## I THE PARTIES

3. **Barilla** is active in the production and sale of pasta and pasta sauce products, bakery products (bread, bread substitutes and cakes) and ice cream products.
4. **BPL** is an Italian bank active in the field of credit business and financial services. BPL has currently no controlling interests in companies active in the bakery sector.
5. **Kamps**, the target company, is active in the production and sale of bakery products (bread, bread substitutes and cakes).

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<sup>1</sup> 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).

## **II. THE OPERATION**

6. Barilla and BPL have launched a public take-over offer for all Kamps' listed shares. The initially hostile offer became friendly after gaining approval by Kamps' board of directors. After the acquisition of Kamps, Barilla and BPL will have joint control over Kamps. Fin.Ba (Barilla) and BPL will also enter into a shareholders' agreement. On the basis of this agreement, BPL has agreed to provide [...] % of the financing necessary for the realisation of the public bid (up to a maximum of € [...] million). BPL will contribute [...] % of such financing through equity while the rest will be financed through a loan. [...]
7. According to the shareholder's agreement, BPL has veto rights, inter alia, over the approval of the business plan of Kamps, any substantive modification or re-drafting of it, and over the approval of the annual budget, in case of significant differences with the business plan. These veto rights will give to BPL joint control, together with Barilla, of Kamps.
8. The operation constitutes, thus, a concentration within the meaning of Article 3 (1)(b) of the Merger Regulation.

## **III. CONCENTRATION OF A COMMUNITY DIMENSION**

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (Barilla EUR 2,232 million, BPL EUR 2,245 million and Kamps EUR 1,709 million)<sup>2</sup>. Each of them have a Community-wide turnover in excess of EUR 250 million (Barilla EUR [...] million, BPL EUR [...] million and Kamps EUR [...] million), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

## **IV. COMPETITIVE ASSESSMENT: THE OPERATION AS NOTIFIED**

### **A. Relevant product markets**

10. Both Barilla and Kamps are active in the production and sale of bakery products. Bakery products are highly differentiated products due to the large variety of existing product characteristics and, particularly in the bread substitutes markets, the presence of strong brands.
11. The parties submit that bakery products can be subdivided into three main groups: (i) bread (including fresh and pre-packaged bread), (ii) bread substitutes (including crisp bread, extruded bread, crisp rolls, bread sticks, crackers and rusks) and (iii) cake products (including two main segments: the segment for cakes, mini cakes and other pastries produced by craft pastries as well as industrial producers and the segment for morning goods which include bagels, croissants, scones and similar products normally eaten for breakfast).

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<sup>2</sup> 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.

12. In the parties' view, the above three groups constitute the relevant product markets. According to a narrower product market definition, however, these groups of products could, according to the parties, be subdivided further into the following markets: (i) fresh bread; (ii) industrial and pre-packaged bread; (iii) bread substitutes (iv) cakes and (v) morning goods.
13. The market for bread substitutes, where the transaction has its most significant competitive impact, contains a variety of differentiated products, including numerous types of extruded bread, crisp rolls, bread sticks, crackers and rusks. Accordingly, this market could conceivably be further subdivided into as many markets as product types belonging to this category.
14. In particular, a separate product market for crisp bread would lead to substantial overlaps and high market shares in Germany. The market test gave indications that a hypothetical monopolist could profitably impose a SSNIP (Small but Significant Non-transitory Increase in Prices, for example 5 to 10%) in this tentative market.
15. However, whether crisp bread constitutes a separate relevant product market or forms part of a wider market for bread substitutes can be left open, because the operation as notified raises serious doubts as to its compatibility with the common market under any possible product market definition.

## **B. Relevant geographic markets**

16. With regard to the geographic market definition, the parties recognise that for bread and cake products the geographic dimension would normally be national.
17. However, with regard to bread substitutes, the parties submit that the geographic dimension should be viewed as European because bread substitutes offered to consumers are very similar across Europe, their taste does not change from one Member State to another, their packaging is often the same all across Europe, they are often manufactured in one production plant which supplies various Member States, and their transport costs are very low.
18. With regard to the bread and cake product groups, an exact geographic market definition can be left open in the present case, because the concentration does not raise concerns with regard to these products under any possible product and geographic market definition.
19. For the bread substitutes market, where brands play a very important role, the Commission's initial market investigation confirmed that the relevant product market appears to be national. It appears from the market investigation that brand reputation in the relevant sector must be built up on a country-by-country basis. Thus, a brand premium created in one Member State has virtually no effect on the brand's market power in any other Member State. In the crisp bread segment, Wasa is the only brand that is known across several countries, that is mainly Germany, Austria and the Scandinavian countries. It is the only such brand with a strong competence for crisp bread. The parties themselves point out in the notification that Barilla/ Wasa faces a different set of principal competitors in virtually every Member State. Exceptions, according to the parties' figures, are Ryvita, which has [80-90%] market share in the United Kingdom and [0-10%] in Finland, and Danone, which has [50-60%] in France, [20-30%] in Belgium and [10-20%] in Germany. The relative market shares of bread substitute manufacturers vary significantly across the EEA.

20. Furthermore, although the physical product characteristics of bread substitutes do not vary much between Member States, the products' market positioning as perceived by the consumer does differ. For example, bread substitutes are considered a healthy or dietary alternative to regular bread (with varying emphasis) in some (mainly central and northern European) markets. As such, it is used as a "carrier" for butter and other toppings. In other (mainly southern European) countries it is more often eaten as an accompaniment to drinks or meals. The perception of crisp bread and other bread substitutes as "light and healthy" products as opposed to dietary food that is eaten for medical reasons also varies somewhat between geographic markets and significantly affects the competitive constraints (substitutes) that the various bread substitutes are exposed to. The packaging design, especially the languages on the label, provide a further instrument for manufacturers to price discriminate between national markets.
21. Hence, it appears from the initial market investigation that the conditions of supply and demand for bread substitutes differ significantly between Member States. A hypothetical monopolist who owns a strong bread substitute brand in one Member State would seem to be not significantly restrained in his competitive behaviour by competitors established in other national markets because these competitors would face significant barriers-to-entry (inter alia through sunk investment in advertising) to the incumbent's market.

### **C. Assessment**

22. According to the narrowest possible product market definition, and assuming that the geographic market is Europe-wide, the activities of the parties would overlap in the six following markets: (i) pre-packaged bread, (ii) pre-packaged cakes (iii) pre-packaged morning goods (iv) crisp bread, (v) extruded bread, and (vi) crisp rolls. Assuming that the geographic dimension of these markets is national, the activities of the parties would overlap only in Italy for the markets (i) and (ii), and only in Germany, for markets from (iv) to (vi).

#### *Bread: Pre-packaged bread*

23. Assuming that the geographic market is Europe-wide, the parties estimate to hold a combined market share by value of about [10-20%] (Barilla: [0-10%], achieved through sales only in Italy; Kamps: [10-20%], achieved through sales only in Austria, Belgium, France, Germany, Italy and the Netherlands).
24. Alternatively, assuming that the geographic market has national dimension, the only country of overlap would be Italy, where the parties estimate to hold a combined market share by value of about [10-20%] (Barilla: [10-20%]; Kamps: [0-10%]).
25. In both cases, after the concentration, the combined entity would still face competition from well established competitors such as Allied Bakeries, British Bakeries, Harry Brot, at European level and San Carlo, Parmalat, Interpan, and Roberto Industria in Italy. As the horizontal overlap is de minimis, the concentration does not raise concerns in the pre-packaged bread segment.

#### *Cakes: Pre-packaged cakes and morning goods*

26. Assuming that the geographic market is Europe-wide, the parties estimate to hold a combined market share by value of about [0-10%] (Barilla: [0-10%], achieved through sales only in Italy; Kamps: [0-10%], achieved through sales only in Denmark, Finland, Germany, and Italy). Conversely, assuming that the market is national, the only country of

overlap would be Italy, where Barilla has [10-20%] market share, but Kamps only a market share of about [0-10%].

27. With regard to pre-packaged morning goods, there would be horizontal overlap only assuming the market is European wide. In such a case the parties estimate to hold a combined market share by value of about [10-20%] (Barilla: [0-10%], achieved through sales only in Italy; Kamps: [0-10%], achieved through sales only in France, Germany, the Netherlands and Spain).
28. Given the very limited overlaps, the concentration does not raise serious doubts under any possible market definition concerning pre-packaged cakes or pre-packaged morning goods.

*Bread Substitutes: crisp bread, crisp rolls, extruded bread*

29. In bread substitutes, the parties' activities overlap to a significant extent only in Germany. Barilla/ Kamps have submitted market share data based on two separate sources, Euromonitor and a combination of the parties' own sales data and Nielsen market data, which differ significantly:

**Germany**

<b>Bread Substitutes (Value)</b>	<b>Euromonitor (2000)</b>	<b>Parties/ Nielsen (2001)</b>
Barilla	[60-70%]	[30-40%]
Kamps	[0-10%]	[0-10%]
<b>Combined</b>	<b>[60-80%]</b>	<b>[30-50%]</b>
Brandt/ Burger	[10-20%]	[20-30%]
Leicht&Cross	[10-20%]	[0-10%]
Private-labels (including Kamps)	[0-10%]	[0-10%]
"Others" (incl. Uncle Ben's [0-10%])		[20-30%]

30. The Euromonitor data was used by the Bundeskartellamt in its 1999 decision in Barilla/ Wasa and by Barilla during pre-notification before the company had access to market data owned by Kamps (as the bid was initially hostile and became friendly after Kamps' management agreed to an increased offer by Barilla). Kamps claims that the Euromonitor data is inaccurate. However, there is a significant residual ("others") in the parties' calculations based on Nielsen market data. The only significant additional competitor the parties have been able to identify is Uncle Ben's, who produces rice waffles. Market share estimates submitted by respondents to the Commission's market investigation were generally higher than the Parties'/ Nielsen figures, although they also varied significantly. It therefore appears likely that the parties' combined bread substitutes market share significantly exceeds 40%.
31. The overlap in the parties' activities occurs in the crisp bread segment, where Barilla owns the leading "Wasa" brand and Kamps is active with its "LiekenUrkorn" brand. Both brands are priced at a significant premium ([>>100%]) to private labels of comparable quality.
32. If crisp bread were defined as a separate relevant product market, the parties' combined market share would be [80-90%] (Barilla [70-80%], Kamps [0-10%]), according to parties' calculations/ Nielsen (no Euromonitor data available). The only significant competitor with branded products is Brandt's "Burger" division, a leading former East German crisp bread brand that is, however, virtually unknown in western Germany. Burger's national market share, according to the parties, is [0-10%]. Private labels account

for the remaining market share, but Kamps and Burger are also the main players in this segment (in addition to imports by the UK supplier Ryvita).

33. The parties' very high combined market share and significant overlap in a tentative market for crisp bread would by itself raise serious doubts as to its compatibility with the Common Market with respect to the creation or strengthening of a position of single dominance. However, serious doubts also arise in a wider market for bread substitutes in Germany.
34. The market investigation indicates that Wasa is by far the largest supplier of bread substitutes. In addition, LiekenUrkorn is the closest substitute to Wasa, and vice versa, both in a tentative crisp bread market and also in a wider bread substitutes market. The parties' market shares do therefore not fully reflect Barilla/ Kamps' combined market power. According to estimates submitted by retail chains and competitors, consumers are significantly more likely to switch from Wasa to LiekenUrkorn, and vice versa, in response to a price increase than to any other bread substitute product. As a result, Wasa's pricing power is to a significant degree restrained by the fact that consumers would switch to LiekenUrkorn in response to a price increase, whereas LiekenUrkorn would lose a significant number of customers to Wasa (but to a much lesser degree to other bread substitutes) if it attempted to raise prices above current levels.
35. The remaining competition in crisp bread at the retail level primarily consists of private-label products. [40-50%] of Kamps' crisp bread production by volume and [30-40%] by value accounts for such private-labels (parties' data). Barilla/ Wasa, by contrast, only sells [0-10%]/ [0-10%] of its production by volume/ value under private-labels [...].
36. Wasa and LiekenUrkorn are the only significant crisp bread brands active in the German bread substitutes market, the Burger brand (owned by Brandt) being known only in former East Germany. Market participants consider it unlikely that an entirely new brand could effectively and profitably compete with Wasa in the short to medium term. Rather, competition post-merger would be more likely to arise from the repositioning or reformulation of brands in currently less close substitutes, such as extruded bread. However, there is only one brand, "Leicht & Cross" that would seem to be positioned in sufficient proximity to Wasa/ LiekenUrkorn to be considered a close competitor in terms of brand positioning. In terms of product characteristics, however, extruded bread involves a fundamentally different production process from crisp bread and Leicht & Cross would have to set up a new production line in order to replace LiekenUrkorn as an equally close substitute to Wasa.
37. Another strong bread substitute brand, "Brandt", is mainly associated with rusks (Zwieback). With its image as a temporary bread substitute for consumers with stomach problems and for infants, Brandt appears to be an unlikely entrant into the "light and healthy" segment occupied by Wasa and LiekenUrkorn. Hence, there appears to be no product that could in the short term replace LiekenUrkorn as a close, albeit significantly smaller, competitor to the leading Wasa brand. Despite its relatively small market share, LiekenUrkorn enjoys significant retail distribution power from its integration into Kamps' large product portfolio and in-house logistics network, which would be difficult to replicate for smaller competitors.
38. Hence, the removal of the closest substitute (LiekenUrkorn) to the leading Wasa brand resulting from the combination of Barilla and Kamps would lead to serious doubts regardless of whether crisp bread is defined as a separate market or as part of an overall bread substitutes market.

39. No competition problems arise in any separate markets for crisp rolls or extruded bread as the parties' activities do not overlap in these segments.

*Conclusion concerning the operation as notified*

40. In conclusion, the operation as notified raises serious doubts as to its compatibility with the common market, in that it would create or strengthen a (single) dominant position in a German market for bread substitutes or for crisp bread.

**V. MODIFICATION TO THE ORIGINAL CONCENTRATION**

41. In order to remove the competition concerns raised by the operation in relation to the market for bread substitutes or crisp bread, Barilla has submitted undertakings to the Commission that will remove the serious doubts raised by the original transaction regarding its compatibility with the common market.
42. Barilla on 4 June 2002 submitted a package of undertakings to transfer to a viable competitor Kamps' crisp bread business, including the physical transfer to the purchaser of two production and packaging lines, a license to use the LiekenUrkorn brand for crisp bread for a period of two years, an indefinite license to use the distinctive packaging design used by LiekenUrkorn for its crisp bread products and the transfer of all existing private-label supply contracts. Following the result of the Commission's market test of these undertakings, Barilla on 21 June 2002 submitted a number of limited modifications to the undertaking with a view to improving its effectiveness. [...] The text of the undertaking is annexed and forms an integral part of this decision.
43. The undertakings will thus eliminate the overlap of Barilla's and Kamps' activities in the field of bread substitutes in Germany (market for bread substitutes or for crisp bread). It enables a viable new competitor to be created in order to remedy the removal of Kamps as an independent supplier in the field of bread substitutes. The Commission, hence, concludes that the undertakings submitted by Barilla are sufficient to remove the serious doubts raised by the original concentration in this field.
44. In order to ensure that Barilla complies with these undertakings, the Commission attaches conditions and obligations to this decision. The undertakings set out in sections B, D (paragraph 13,14 and 15 only), E and F (paragraph 29(ii)(e) only) of the commitments annexed to the present decision constitute conditions, since only by fulfilling them the structural change on the relevant markets may be achieved. The other undertakings constitute obligations, since they concern the implementing steps necessary to achieve the structural change intended.

**VI. CONCLUSION**

45. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement, subject to the condition of full compliance with sections B, D (paragraph 13,14 and 15 only), E and F (paragraph 29(ii)(e) only) of the commitments annexed to the present decision and to the obligation of full compliance with the other sections of the said commitments. This decision is adopted in application of Article 6.2 of Council Regulation (EEC) No 4064/89 and of Article 57 of the EEA Agreement.



For the Commission

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Member of the Commission

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Brussels, 21<sup>st</sup> June 2002

**Delivered by hand**

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**Case M. 2817 – Barilla / BPL / Kamps**

**COMMITMENTS TO THE EUROPEAN COMMISSION**

Pursuant to Article 6(2), of Council Regulation (EEC) No. 4064/89 as amended (the “Merger Regulation”), Fin.Ba S.p.A. and Banca Popolare di Lodi s.c.a.r.l. (hereinafter “the Parties”) hereby provide the following commitments (hereinafter “the Commitments”) in order to enable the European Commission (hereinafter “the Commission”) to declare the acquisition by the Parties of joint control over Kamps AG compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (hereinafter “the Decision”).

These Commitments shall take effect upon the date of adoption of the Decision (hereinafter “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 447/98<sup>1</sup>.

## **Section A. Definitions**

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

**The Closing Date:** the date of the execute of the license described at point 2 a) below of these Commitments.

**The Commission Standard Trustee Mandate:** the Commission’s recommended model trustee mandate dated 4<sup>th</sup> June 2002 in the case of commitments accepted under Council Regulation (EEC) No 4064/89.

**The Customer List:** the list of customers of the Divested Business as defined in Section B.

**The Divested Business:** the business or businesses as defined in Section B that the Parties shall procure Kamps to divest [...].

**The Divestment Trustee:** one or several natural or legal person, independent from the Parties, which is approved by the Commission and appointed by the Parties and, which has received from them the irrevocable and exclusive mandate to sell the Divested Business to a Purchaser [...].

**The Extended Divestment Period:** the period from the date of expiration of the First Divestment Period within which the Divestment Trustee shall have an irrevocable and exclusive mandate from the Parties to sell the Divested Business [...].

**The First Divestment Period:** the period within which the Parties can propose a Purchaser for the Divested Business.

**The Hold Separate Manager:** the person employed by the Divested Business, who will be in charge of running the day-to-day business under the authority of the Monitoring Trustee.

**The Intellectual Property Rights:** intellectual property rights comprise, but are not limited to, patents, licenses and sublicenses, copyrights, technical information, trademarks, trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, manuals and technical information, and all research data concerning historic and current R&D efforts relating to the Divested Business, including, but not limited to, designs of experiments and the results of successful and unsuccessful designs and experiments.

**The Key Personnel:** all personnel necessary to maintain the viability and competitiveness of the Divested Business, which is listed by the Monitoring Trustee in its first report and is subject to the prior approval of the Commission.

**The Monitoring Trustee:** one or several natural or legal person, independent from the Parties, which are approved by the Commission and appointed by the Parties, which has the duty to monitor and to ensure that the Parties comply with the conditions and obligations under these Commitments.

**The Personnel:** the personnel who is currently operating the crisp bread production lines located [...] including the personnel who is currently operating the packaging machines.

**The Purchaser:** the entity approved by the Commission as acquirer of the Divested Business in accordance with the criteria set out in Section E.

**The Trustee(s):** the Monitoring Trustee and/or the Divestment Trustee.

**BPL:** Banca Popolare di Lodi s.c.a.r.l., a company incorporated under the laws of Italy, and includes all of its successors and assigns, its subsidiaries, and the directors, officers, managers, agents and employees.

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<sup>1</sup> Official Journal C 68, 02.03.2001, pages 3-11.

**Fin.Ba:** Fin.Ba S.p.A., a company, incorporated under the laws of Italy, and includes all of its successors and assigns, its subsidiaries, and the directors, officers, managers, agents and employees.

**Kamps:** Kamps AG a company, incorporated under the laws of Germany, and includes all of its successors and assigns, its subsidiaries, and the directors, officers, managers, agents and employees.

## **Section B. The Divested Business**

### Commitment to divest

1. The Parties commit to procure the divestment by Kamps of its crisp bread business under the modalities defined below to the Purchaser according to the procedure described in Section D.

### Definition of the Divested Business

2. The Divested Business consists of and is limited to:
  - (a) A non renewable [...] license for the use of the Lieken Urkorn trade mark exclusively in relation to the production, marketing, sale and distribution of crisp bread products. After the expiry of the license, the Purchaser will not be entitled to use the Lieken Urkorn trade mark and, in particular, any graphical representation directly or indirectly related to the logo of Lieken Urkorn trade mark. The Purchaser will be entitled however for [...] to mention in a succinct manner and for information purposes only the name "Lieken Urkorn" on the packages of those crisp bread previously sold under the Lieken Urkorn trade mark. In addition, the Purchaser will have the right, after the expiry of the license, to continue to use for its crisp bread products the same packaging solutions as those currently used for crisp bread products currently sold under the Lieken Urkorn trade mark (including the same combination of colours, design etc);

Until such time the Purchaser shall be entitled to use the Lieken Urkorn trade mark for the production, distribution and sale of crisp bread products, the Purchaser shall abide to the highest standard of quality (i.e. at least equivalent to the standard currently used by Kamps for its crisp bread products) in the

production, distribution and sale of those products sold under the Lieken Urkorn trade mark so as to protect the Lieken Urkorn trade mark at all time from any harm in whatever form it might occur (being it understood that such obligation should not limit the ability of the Purchaser to determine his own distribution and pricing strategy). In addition, the Purchaser shall have to submit itself to such quality control procedures as the Parties consider necessary in order to ensure that the Purchaser respects its obligations with regard to such issue.

- (b) In relation to the supply contracts for crisp bread products that Kamps has entered into with private label owners and that are in force at the Effective Date, the Parties will use their best efforts (and procure Kamps to use its best efforts) – within the limits of the applicable laws and to any possible extent - in order to transfer the aforementioned supply contracts but being understood that the Parties cannot guarantee that the private label owners will agree to the transfer of their contracts to the Purchaser;
- (c) One or more production line(s), at the option of the Parties, having at least equivalent technical characteristics as the line(s) currently used by Kamps to produce crisp bread [...]. The name plate production capacity of the line(s) in question shall under no condition exceed the current production capacity of those lines currently used [...]. The Purchaser will have the right to decide when and where the production line(s) will have to be made available being it agreed that the Purchaser shall make the request at least [...] before the expiry date of the license *sub a)* above. The Parties shall make their best efforts to deliver the production line(s) within [...] following the receipt of the Purchaser's request. It is understood that the production lines shall include the packaging equipment;
- (d) If the Parties shall decide to transfer to the Purchaser the crisp bread production line [...], then the Parties shall integrate such line [...];
- (e) in order to ensure the continuous supply of Lieken Urkorn crisp bread products to the Purchaser [...], it is provided that until such time the production lines sub c) are not transferred, installed, tested and fully operational but nevertheless not after the license *sub a)* above expires, the Parties shall supply the Purchaser, at the Purchaser's request, with crisp bread products, being it agreed that:
  - (i) the crisp bread will be sold to the Purchaser [...];

- (ii) the Purchaser shall be entitled to obtain from the Parties and/or Kamps the types of crisp bread currently sold by Kamps but shall not be entitled to obtain other types of crisp bread currently not sold by Kamps;
  - (iii) the Purchaser will not be entitled to request to be supplied with more than [...].
- (f) Those further intangible assets, which contribute to the current operation of the Divested Business or may be necessary to ensure the viability and competitiveness of the Divested Business. The intangible assets include, but are not limited to, (i) the recipes used in conducting the Divested Bus; (ii) all other Intellectual Property Rights, if any, used in conducting the Divested Business;
- (g) All licences, permits and authorisations issued by any governmental organisation for the benefit of the Divested Business to the extent they are transferable; and
- (h) All contracts, teaming arrangements, agreements, leases, commitments and understandings of the Divested Business; all customer lists and credit records; and all other product and production related records of the Divested Business.

#### Personnel

3. The Parties commit to procure Kamps to use its best efforts in order to transfer to the Purchaser upon the Purchaser's request the Personnel.
4. This transfer will be achieved in the following manner:
  - (a) The Hold Separate Manager will, in co-operation with the Monitoring Trustee, identify the Personnel;

(b) Ensuring the compliance with all applicable labour and employment laws, in particular (where relevant) with the Council Directives on collective redundancies<sup>2</sup>, on safeguarding employees rights in the event of transfers of undertakings<sup>3</sup> and on informing and consulting employees<sup>4</sup> as well as with national provisions implementing these Directives;

(c) The Hold Separate Manager will, in co-operation with the Monitoring Trustee, establish objective criteria to complete the matrix of functions and specific skills of the Personnel;

(d) The Parties shall, subject to customary confidentiality assurances, permit prospective purchasers of the Divested Business to have reasonable access to the Hold Separate Manager to discuss the transfer of the Personnel on the basis of the result of the work described under (a), (b) and (c) above. The Hold Separate Manager shall, subject to review by the Monitoring Trustee, decide upon the requests of prospective purchasers to have access to the Personnel of the Divested Business;

(e) The Parties and/or the Hold Separate Manager shall provide to the Purchaser information relating to the Personnel to enable the Purchaser to make offers of employment taking into account all applicable labour and employment laws;

(f) The Parties shall waive all contractual rights concerning the Personnel of the Divested Business in order to facilitate the immediate transfer of the Personnel;

(g) The Parties shall take all reasonable steps, including appropriate incentive schemes, to cause all Key Personnel as currently employed by the Divestment Business to remain with the Divested Business. The incentives shall be approved by the Commission upon recommendation of the Monitoring Trustee and after having heard the Hold Separate Manager. The incentives shall be determined on the basis of industry practice.

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<sup>2</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

<sup>3</sup> Council Directive 77/187/EC of 14 February 1977 1998 on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of a business as amended by Council Directive 98/50/EC.

<sup>4</sup> Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, as amended by Directive 97/74/EC.



5. If the Purchaser wishes that all or any of the Personnel shall not be transferred, the Parties shall ensure that the Trustee indicates to the Commission why the Purchaser considers not necessary to have access to the Personnel.

#### Customer list

6. The Customer List as referred to in these Commitments shall comprise all the customers in Germany to which:
- (a) Kamps sold crisp bread products during the year 2001,
  - (b) Kamps sold crisp bread products during the year 2002 up to the Closing Date.

#### Non-divested businesses

7. The Divested Business shall not include:
- (a) a license to produce and sell crisp bread under any other trade mark than Lieken Urkorn ;
  - (b) a license to produce any other kind of products other than crisp bread products currently manufactured by Kamps under the trade mark Lieken Urkorn or any other trade mark of Kamps and/or of the Parties;
  - (c) any real estate property;
  - (d) any assets not part of the Divested Business as defined under Section 2 and which is used in relation to a business of Kamp's and/or of the Parties' other than the Divested Business.

### **Section C. Related commitments**

#### Preservation of Viability, Marketability and Competitiveness

8. The Parties undertake to procure that Kamps shall endeavour to preserve from the Effective Date the full economic viability, marketability and competitiveness of the Divested Business until the Closing Date, in accordance with past commercial practice and in the ordinary course of business, as shall be monitored by the Monitoring Trustee in accordance with the following paragraphs. In this regard the Parties undertake to procure that Kamps shall endeavour to reduce to the minimum any possible risk of loss of competitive potential of the Divested Business resulting from the uncertainties inherent to the transfer of a business. Pending divestiture, the Parties shall enable the Hold Separate Manager to manage the Divested Business in the best interest of the business. In particular, the Parties undertake to procure that Kamps shall not carry out any act upon its own authority which may have a

significant negative impact on the economic value, the management or the competitiveness of the Divested Business until the Closing Date. The Parties undertake to procure that Kamps shall not carry out upon its own authority any act which may be likely to alter the nature and scope of activity of the Divested Business, or the industrial or commercial strategy or the investment policy of the Divested Business. Sufficient resources shall be made available for the business to develop until the Closing Date, based on the approved strategic business plans.

#### Ring-fencing

9. The Parties undertake to procure that Barilla and Kamps shall implement all necessary measures to ensure that in relation to the supply contract described at paragraph 2 sub c) any sensitive commercial information shall be kept confidential, with the exception of information reasonably necessary for the divestiture of the Divested Business or otherwise required by law. The Monitoring Trustee, after having heard the Parties and the Hold Separate Manager, shall decide on the exercise of this exception.

#### Non-compete clause concerning the Divested Business

10. The Parties undertake to procure that Kamps shall commit to abstain, and to procure that companies under its control<sup>5</sup> shall abstain absolutely, pending divestiture and for a period equal to the duration of the license sub a) (i.e. [...]), from carrying on or actively seeking any crisp bread business competing with the Divested Business, with any of the customers of the Divested Business on the Customer List, being it agreed that :

- Kamps will have the right to continue to supply crisp bread to those private label owners that on the basis of their current contract with Kamps have refused the transfer of their contract to the Purchaser and have the right to require Kamps to continue supplying them with crisp bread products;
- Barilla will have the right to continue to produce, market, sell and distribute crisp bread products under all trade marks Barilla owns and/or uses at the Effective Date or will own and/or use at any future date without any restriction except for what is provided here below at point 11, being it agreed that Barilla, until the Closing date and, thereafter, for a

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<sup>5</sup> *The notion of control shall be interpreted in the light of the Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89, OJ C 66, 2.3.1998, p. 5.*

period of two years, will not solicit private label owners currently supplied by Kamps with private label crisp bread products.

#### Use of Kamps' brands

11. In order to further facilitate the development of the Divested Business, the Parties undertake within three months after the Closing Date at the latest and exclusively in relation to crisp bread products sold in Germany:

- (a) for the duration of the license sub point a) (i.e. [...]) not to use and to procure Kamps not to use any existing Kamps trade mark in relation to crisp bread products, or introduce any new Kamps brands to market and sell crisp bread products;
- (b) for a period of 10 years following the Closing Date not to use and to procure Kamps not to use the Lieken Urkorn trade mark to market and sell crisp bread ;
- (c) for the duration of the license sub point a) (i.e. [...]) not to link the Wasa brand and the Kamps brands in any trading terms and promotional activities with specialist wholesale or retail customers or in consumer promotions.

#### Non-solicitation clause

12. The Parties undertake that the Parties will not hire or solicit and that the Parties will procure Kamps not to hire or solicit, the Key Personnel and Personnel transferred with the Divested Business for a period of [...] after the Closing Date.

### **Section D. The Divestment Procedure**

#### The First Divestment Period

13. The Parties undertake to find a Purchaser for the Divested Business and to enter into a final binding sale and purchase agreement with such a Purchaser for the sale of the Divested Business within [...] from the Effective Date. The final binding sale and purchase agreement shall be conditional upon the Commission's approval and the obtaining of the required regulatory clearances.



#### The Extended Divestment Period

14. If the Parties are not able to enter into a binding agreement for the sale of the Divested Business in accordance with paragraph 13 above, the First Divestment Period shall be extended by another [...] from the date of the expiration of the First Divestment Period. The Parties undertake/s to give the Divestment Trustee (to be appointed pursuant to Section F of these Commitments) an irrevocable and exclusive mandate to sell the Divested Business within the Extended Divestment Period [...].

#### Closing

15. The Parties shall be deemed to have complied with this undertaking if, within a period not exceeding [...] from the Effective Date, they have entered into a binding agreement for the sale of the divested Business in accordance with paragraphs 22, 23, and 24 below, provided that the closing of the sale takes place within [...] after the conclusion of the sale and purchase agreement, subject to the relevant regulatory approvals.

#### Reporting

16. The Parties and/or Kamps shall report in full in writing in English to the Commission and the Trustee on developments in the negotiations with potential purchasers of the Divested Business within 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).
17. The Parties shall inform the Commission and the Trustee on the preparation of the data room documentation, on the preparation of the information memorandum and on the due diligence procedure. The Parties shall submit to the Commission for prior approval a copy of the draft information memorandum prepared for the sale of the Divested Business to allow the Commission to verify the information memorandum's consistency with the terms of these Commitments.
18. The Parties shall also inform the Commission and the Trustee/s on the identification of possible purchaser and submit to the Commission a list of potential buyer, which have expressed a clear interest for the Divested Business.

## **Section E. The Purchaser**

19. The Purchaser shall be independent of and unconnected to the Parties and/or Kamps, possessing the financial resources, proven expertise and having the incentive to maintain and develop the Divested Business as a viable and active competitive force in competition with the Parties and/or Kamps and other competitors. In addition, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant competition and other regulatory authorities for the acquisition of the Divested Business. Finally, the Purchaser shall be reasonably involved in the food sector and in the sector for branded products. The Parties must be able to demonstrate to the Commission that the purchaser meets the requirements of these Commitments and that the Divested Business is sold in a manner consistent with these Commitments. In order to maintain the structural effect of these Commitments, the Parties will not subsequently directly or indirectly acquire influence over the whole or part of the Divested Business, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divested Business is no longer necessary to render the proposed concentration compatible with the common market.
20. When the Parties and/or Kamps have or are about to reach an agreement with the Purchaser referred to in the paragraph above, they will submit a fully documented and reasoned proposal enabling the Commission to verify that the above requirements with regard to the identity of the Purchaser are fulfilled and that the Divested Business is sold in a manner consistent with these Commitments. The Parties shall send simultaneously to the Monitoring Trustee a copy of the sale and purchase agreement in order to enable it to perform its duties in accordance with paragraph 37 (iii).
21. The verification that the Divested Business is sold in a manner consistent with the commitment shall include an approval by the Commission of the Purchaser and of the final binding sale and purchase agreement.

## **Section F. Trustee<sup>6</sup>**

### **I. Appointment Procedure**

22. The Parties shall appoint one or more Trustees, such as an investment bank or consultant or auditor, subject to the prior approval of the Commission. The Trustee shall be independent of the Parties and Kamps, possess the necessary qualifications to carry out its mandate and shall not be, or become, exposed to a conflict of interest. The Trustee shall be remunerated by the Parties in such a way as not to impede its independence and effectiveness in fulfilling its mandate. In particular, the remuneration package of the Divestment Trustee may not provide for a success premium that is linked to the final sale value of the Divested Business.

#### *Proposal by the Parties*

23. The Parties shall propose a list of proposed Trustees and the terms of the mandate for approval to the Commission with adequate information for the Commission to verify that the Trustee fulfils these requirements. The Parties shall indicate to the Commission whether the proposed Trustees will act as Monitoring Trustee as well as Divestment Trustee or whether different trustees are proposed for the two functions. The mandate submitted for approval shall be drawn up taking due account of the Commission Standard Trustee Mandate and shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments. The Parties shall also procure that the proposed Trustee shall submit to the Commission a detailed work plan in which it is described how the Trustee intends to carry out its duties under these Commitments. This proposal shall be made within one week after the Effective Date unless otherwise specified in the Trustee mandate.

#### *Approval or rejection by the Commission*

24. The Commission shall have the discretion to approve or reject the proposed Trustee or Trustees, and to approve the proposed mandate subject to modifications, that the Commission deems necessary for the Trustee to fulfil its obligations. If only one name is approved, the Parties shall appoint or cause the individual or institution concerned to be appointed as Trustee, in accordance with the mandate approved by the Commission. If more

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<sup>6</sup> For the purposes of the present Commitments, Trustee shall be interpreted as “Fiduciario” under Italian law.



than one name is approved, the Parties shall be free to choose the Trustee to be appointed from among the names approved.

*New proposal by the Parties*

25. If all the proposed Trustees are rejected, the Parties will submit the names of at least two further such individuals or institutions within one week of being informed of the rejection, together with the full terms of the proposed mandate as agreed with the proposed Trustees as well as all information necessary for the Commission to verify that the proposed Trustees possess the necessary qualifications to carry out the task and shall not be, or become, exposed to a conflict of interest. If only one name is approved, the Parties shall appoint or cause the individual or institution concerned to be appointed as Trustee, in accordance with the mandate approved by the Commission. If more than one further name is approved, the Parties shall be free to choose the Trustee to be appointed from among the names approved.

*Trustee nominated by the Commission*

26. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee reasonable acceptable to the Parties which the Parties will appoint or cause to be appointed in accordance with a Trustee mandate approved by the Commission.

*Appointment by the Parties*

27. As soon as the Commission has given approval to one or more proposed Trustees, the Parties shall appoint or cause the Trustee concerned to be appointed within one week thereafter, in accordance with the mandate approved by the Commission.

II. Functions of the Trustee

*Duties and obligations of the Monitoring Trustee*

28. The Monitoring Trustee shall assume its specified duties in order to ensure compliance in good faith with the Commitments on behalf of the Commission and taking into account the legitimate interest of the Parties and Kamps.
29. The Monitoring Trustee shall, following its appointment:

- (i) propose to the Commission a detailed work plan in which it is described how the Trustee intends to monitor the full respect of the proposed Commitments.
- (ii) oversee the on-going management of the Divested Business with a view to ensuring its continued viability, marketability and competitiveness and monitor the compliance by the Parties and/or Kamps with the conditions and obligations under these Commitments. Therefore the Monitoring Trustee shall:
  - (a) in consultation with the Parties, determine the best management structure to ensure that the obligation of non-disclosure of competitively sensitive information is observed by the Parties;
  - (b) monitor that the Parties and/or Kamps maintain the viability, marketability and competitiveness of the Divested Business, in accordance with paragraph 8 of the Commitments, and the management and operation of the Divested Business in the normal course of business, in accordance with past practice, until divestiture;
  - (c) monitor, where applicable, that no competitively sensitive information concerning the Divested Business is disclosed to the Parties (except in so far as necessary to allow the Parties to carry out the divestiture or as otherwise required by law);
  - (d) propose to the Parties and/or Kamps such measures as the Monitoring Trustee considers necessary to ensure compliance with the conditions and obligations under these Commitments, in particular the maintenance of the viability, marketability or competitiveness of the Divested Business and the non-disclosure of competitively sensitive information by the Parties and/or Kamps;
  - (e) be entitled to impose the measures described in the sub-paragraph (d) (with the approval of the Commission) in the event that the Parties and/or Kamps do not comply with the Monitoring Trustee's proposals within the timeframe set by the Monitoring Trustee;
- (iii) provide to the Commission, with a simultaneous non-confidential copy to the Parties and Kamps, a written report within 10 days after the end of every month concerning

the monitoring of the operation and management of the Divested Business in order to assess whether the business is held in a manner consistent with these Commitments. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission if the Monitoring Trustee concludes on reasonable grounds that the Parties and/or Kamps are failing to comply with any of the conditions or obligations under these Commitments. the Parties and Kamps shall receive a simultaneous non-confidential copy of any such additional reports;

- (iv) assess the suitability of the proposed purchaser and the viability of the Divested Business after the sale to the purchaser and give its opinion to the Commission on whether the proposed divestment complies with the conditions and obligations under these Commitments;

*Duties and obligations of the Divestment Trustee*

- 30. Within the Extended Divestment Period, the Divestment Trustee shall sell [...] the Divested Business to a Purchaser independent of the Parties, provided that the Commission has approved both such a Purchaser and the final binding sale and purchase agreement in accordance with procedures laid down in paragraphs 19, 20 and 21.
- 31. The Divestment Trustee shall report in full in writing in English to the Commission on developments in the negotiations with potential purchasers of the Divested Business within 10 days after the end of every month following the expiration of the First Divestment Period (or otherwise at the Commission's request). A simultaneous non-confidential copy of these reports shall be provided to the Monitoring Trustee and the Parties.
- 32. The Parties and/or Kamps shall grant a comprehensive power of attorney to the Divestment Trustee for the Sale of the Divested Business, the closing of the Sale and all actions and declarations which the Trustee considers necessary or appropriate for achieving the Sale of the Divested Business or the closing of the Sale, including the appointment of advisors to assist with the Sale process. The power of attorney includes the authority to grant sub-powers of attorney to members of the Trustee's Team.
- 33. If necessary to accomplish the sale, the Parties and/or Kamps shall grant the Divestment Trustee further powers of attorney, duly executed, or cause the documents required for the effecting of the sale and the closing of the sale to be duly executed.

III. Duties and obligations of the Parties

34. The Parties and/or Kamps shall provide the Monitoring Trustee with all such assistance and information, including copies of all relevant documents, as the Monitoring Trustee may reasonably require to monitor compliance with the conditions and obligations under these Commitments. The Parties and/or Kamps shall make available to the Monitoring Trustee one or several offices on their premises. The Parties and/or Kamps shall be available for regular meetings with the Monitoring Trustee, according to a timetable agreed between them, in order to provide the Monitoring Trustee, either orally or in document form, with all information necessary for the completion of his task. At the request of the Monitoring Trustee, the Parties and/or Kamps shall provide the Monitoring Trustee with access to sites to the extent necessary for the fulfilment of its duties under these Commitments. The Parties and/or Kamps shall provide all managerial and administrative support which may reasonably be requested by the Monitoring Trustee on behalf of the management of the divested Business. This shall include all administrative support functions relating to the divested Business which are currently carried out at headquarters level.
35. At the expense the Parties, the Trustee may appoint advisors (e.g. for corporate finance or legal advice), subject to the Parties approval (this approval not to be unreasonably withheld) if the Trustee considers the advisors necessary or appropriate for the performance of its duties and obligations under the Mandate. In the case that the Parties refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead. Only the Trustee shall be entitled to issue instructions to the advisors. The advisors shall not be liable to the Parties for and shall be held harmless by the Parties from any consequences of following the Trustee's instructions. In the Extended Divestment Period, the Divestment Trustee may use the Parties' advisors who served during the First Divestment Period if the Divestment Trustee considers this in the best interest of an expedient Sale.

IV. Replacement, discharge and reappointment of the Trustee

36. The Commission may, after hearing the Trustee, order the Parties to remove the Trustee in the event that the Trustee has not acted in accordance with the provisions of these Commitments or for any other good cause.
37. The Trustee may also be removed by the Parties with the prior approval of the Commission and after the Commission has heard the Trustee in the event that the Trustee has not acted in accordance with the provisions of these Commitments or for any other good cause.

38. The Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. Regarding the appointment of a new Trustee the same procedure applies as described in this section.

39. The Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties, following a request from the Trustee made after all the Commitments with which it has been entrusted have all been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

**Section G. The review clause**

40. The Commission may, upon request from the Parties showing good cause and after hearing the Trustee, and where relevant allow for:

- (i) an extension of the Divestment Period, or
- (ii) the sale of the Divested Business, at the request of the proposed Purchaser showing good cause, without one or more assets, facilities, contracts or other rights or obligations that are part of the Divested Business as described above, or
- (iii) waive or modify, in exceptional circumstances, one or more of the conditions and obligations in these Commitments.

The Parties shall address any request for an extension of time periods no later than one month prior to the expire of such time period, showing good cause. Only in exceptional circumstances shall the Parties be entitled to request an extension within the last month of any period.

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duly authorised for and on behalf of Fin.Ba S.p.A. and Banca Popolare di Lodi s.c.a.r.l.