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Case No COMP/M.2940 - TPG ADVISORS III / GOLDMAN SACHS / BAIN CAPITAL INVESTORS / BURGER KING

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 11/10/2002

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11/10/2002

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sir/Madam,

Subject: **Case No COMP/M.2940 – TPG Advisors III/Goldman Sachs/Bain Capital Investors/Burger King**
Notification of 12.09.2002 pursuant to Article 4 of Council Regulation No 4064/89[1]

1. On 12.09.2002, the Commission received a notification of a proposed concentration by which the US-based undertakings TPG Advisors III., Inc. ("TPG Advisors III"), The Goldman Sachs Group, Inc. ("Goldman Sachs") and Bain Capital Fund VII, L.P., controlled by Bain Capital Investors, L.L.C. ("Bain Capital Investors"), intend to acquire within the meaning of Article 3(1)(b) of the Council Regulation (EEC) No 4064/89 ("the Merger Regulation") joint control of the undertaking Burger King Corporation ("Burger King") by way of purchase of shares.

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

I. THE PARTIES

3. TPG Advisors III is the manager for several investment funds whose primary activities are to make investments in a variety of operating companies through acquisitions and corporate restructuring.

[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).

4. Goldman Sachs is a global investment banking and securities firm. Goldman Sachs participates in the acquisition through several equity funds for which it is acting as investment manager.

5. Bain Capital Investors is the ultimate general partner of several investment funds and its main activity is to make investments in a variety of operating companies. It has to be noted that Bain Capital Investors acts as the ultimate general partner of a private equity fund ("Bain VI") that does not participate in the transaction but that retains what could be deemed to be a controlling interest in Domino's, a US company active world wide in the supply of pizza home-delivery services.

6. Burger King, the acquired undertaking, is active world-wide in the quick service restaurant industry through 1,014 company-owned and 10,441 franchised restaurants and outlets. Burger King is a wholly owned indirect subsidiary of United Kingdom based Diageo plc, whose core businesses are spirits, wine and beer.

II. THE OPERATION

7. The transaction relates to 100% of the shares of Burger King. To this end, the acquiring parties and Diageo signed a Stock Purchase Agreement on July 25, 2002. The three investors were the winning bidders in an auction process held in the first half of 2002.[2]

III. CONCENTRATION

8. The operation will be effected through a special-purpose acquisition vehicle, Delaware Champion Acquisition Corporation ("DCAC") which will own 100% of the shares of Burger King. The sole shareholder in DCAC is Delaware Champion Holdings LLC ("DCH"), in which the three groups of investment funds managed by TPG Advisors III, Goldman Sachs and Bain Capital Investors hold equity interests of approximately […]%, […]% and […]% respectively. Pursuant to an Operating Agreement signed on 8 August 2002, DCH is managed jointly by TPG Advisors III, Goldman Sachs and Bain Capital Investors. Unanimity by TPG Advisors III, Goldman Sachs and Bain Capital is required for all management decisions in DCH. Burger King has sufficient access to management and resources for it to be considered full-function.

9. The notified transaction will therefore result in joint control by TPG Advisors III, Goldman Sachs and Bain Capital Investors over Burger King in the meaning of Article 3(1)(b) of the Merger Regulation.

10. It follows that the notified transaction constitutes a concentration pursuant to Article 3(1) (b) of the Merger Regulation

IV. COMMUNITY DIMENSION

11. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion[3] (TPG III EUR […]million, Goldman Sachs EUR 14,156.8 million,

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[2] On 19 August 2002, the United States antitrust regulators granted early termination of the waiting period applicable under U.S. merger control rules, thereby clearing the transaction in the United States.

[3] 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

Bain Capital Investors EUR […]million and Burger King EUR 1,680 million in 2001). Each of at least two of them have a Community-wide turnover in excess of EUR 250 million (TPG III EUR […]million, Goldman Sachs EUR […]million, Bain Capital Investors EUR […] and Burger King EUR […]million in 2001), 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.

V. COMPETITIVE ASSESSMENT

The relevant product market

12. The notifying parties submit that the relevant product market is the market for "quick-service restaurants". The distinguishing characteristics of quick-service restaurants are generally that the emphasis on speed of service and relatively low prices. The "quick-service restaurant" product market, as proposed by the parties, would include fast-food restaurants (hamburger and non-hamburger), self-service restaurants, and home-delivery/take-away outlets.

13. Possible alternative product market definitions put forward by the notifying parties include "informal eating-out" restaurants; so-called "chained" quick-service restaurants; or separate markets for fast-food and take-away/home delivery. For the purposes of the assessment of this transaction, there is no need to consider separate markets for hamburger and non-hamburger quick service restaurants since there would be no overlap between the parties' activities, if this market definition were adopted.

14. "Informal eating-out" restaurants would include all quick-service restaurants plus a wide selection of chained and independent informal restaurants, pizzerias, cafes, coffee shops, sandwich bars, etc. This definition would broaden substantially the scope of the relevant product market proposed by the parties.

15. "Chained" quick-service restaurants may be considered to comprise those quick-service restaurants belonging to an international chain or to a local chain with a minimum number of outlets that the parties estimate in around ten.

16. "Take-away/home delivery" might also be considered as separate product market opposed to fast food quick service restaurants. Take-away/home delivery outlets may be distinguished from fast-food restaurants mainly in that location is not important as delivery is made to the consumer's residence and that products in this sector are generally more expensive than fast food but less expensive than full-service restaurant meals.

17. The majority of responses provided during the Commission's market investigation indicate that, as proposed by the parties, restaurants with quick service format, even if they are focused on different types of meals, are regarded as belonging to the same product market. The main features that are consistently identified as particular characteristics of this field are convenience, speed of service and inexpensive prices. Competitors tend to consider that restaurants offering these standards target the same group of clients. This configuration of the market would exclude other segments within the field of restaurants, not offering analogous meal services (e.g. more sophisticated or more expensive restaurants).

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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.

18. Respondents to the Commission's market investigation unanimously point out that customers do switch to other quick-service restaurants offering alternative meal menus in case of substantial variations in service quality, food quality or price. It is particularly mentioned that hamburger and non hamburger quick-service restaurants compete.

19. Chained and not chained restaurants are generally considered to belong to the same product market although there exist obvious differences that are mentioned by respondents in terms of strengths and weaknesses of the two formats. Chained restaurants offer the guarantee of well known brands specially in terms of quality of service and consistency of the menu across different locations. They often offer additional entertainment that makes them attractive to families as a target group. Non-chained restaurants, in contrast, do not enjoy the benefits of an established brand, though some respondents indicate that non-chained restaurants also build customer loyalty through more personalised service and more flexibility in the menus.

20. A number of respondents indicate that, in general, prices are slightly higher in chained restaurants than in non-chained ones and this reflects the premium the customer is willing to pay for the guarantee provided by the brand. In any case, the respondents agree that customers are willing to switch between the two formats in case of substantial price increases or decreases in the quality of food or service.

21. It seems likely that home delivery/take away outlets should be considered part of the quick service restaurant product market. However, some respondents questioned this view on the basis that there are different times for peak demand (evening for home delivery/take away services and lunch time as well as weekends for eat-in quick service restaurants.

22. In the supply side, it is indicated that with some exceptions (e.g. Domino's), many actors in the market offer both eat-in and take away/home delivery services. The main fast food operators offer currently take away services and are able to develop strategies to capture new clients by establishing home delivery services with their products. On the contrary, some home delivery/take away business have entered the eat-in segment.

23. However, for the purposes of this decision, the product market definition can be left open since on the basis of all alternative market definitions considered, the transaction will not lead to the creation or strengthening of a dominant position.

<u>The relevant geographic market</u>

24. The notifying parties submit that the most appropriate definition of the relevant geographic market is national in scope given that food cultures and consumer preferences can differ considerably from country to country, but are generally relatively consistent across a country. The parties also argue that prices charged are essentially similar across national jurisdictions and that the range of products offered does not differ between local areas.

25. A large majority of the respondents to the Commission's market investigation have confirmed the geographic market definition as proposed by the parties. However, for the purposes of this decision, the exact definition of the relevant market can be left open since on the basis of all alternative market definitions considered, effective competition would not be significantly impeded in the EEA or in a substantial part of it.

Assessment

26. It is to be noted that if Bain Capital Investors' substantial indirect interest in Domino's is taken into account, there is a horizontal overlap of activities between Burger King and TPG Advisors III, Goldman Sachs and Bain Capital Investors on the so-called "chained quick-service restaurant" segment. On this segment the parties have overlapping activities in Denmark, Germany, Ireland, The Netherlands, Spain and the United Kingdom. In all cases, the parties' combined share of sales remains below [< 15 %] and reaches a maximum of [< 15 %] in the United Kingdom, reflecting a [0 - 5%] increment.

27. If separate product markets are defined for quick service restaurants and take away/home delivery, there is no horizontal overlap between the parties, since Domino's is only active in the supply of pizza home-delivery services.

28. The parties further point out that, following the transaction, Burger King and Domino's will remain separately managed. While Bain Capital Investors might be deemed to control both Burger King (through Bain VII, together with the other investors) and Domino's (through Bain VI), any attempt to co-ordinate among companies controlled by different investment funds could be in breach of Bain Capital Investors' separate obligations owed to the distinct private investors in each fund.

29. After the merger, well known competitors on the chained quick-service restaurant segment, for example, Mc Donald's, Yum! Brands owned chains (KFC and Pizza Hut) remain present across the EEA in addition to various national quick-service restaurants.

30. No vertical affected markets have been identified. While Domino's owns some of its suppliers in France and the Netherlands but it does not own any supplier in any other EEA country, Burger King is not vertically integrated.

31. Only one of the parent companies, namely Bain Capital Investors, is active in the quick service restaurant sector and therefore no co-ordination between the parent companies is possible in this sector. Nor would it be possible to co-ordinate any of the parent companies' other activities through Burger King given the specialised nature of its business. Consequently, no issue is raised under Article 2(4) of the Merger Regulation.

VI. CONCLUSION

32. 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. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission

(signed)
Mario MONTI
Member of the Commission