

***Case No COMP/M.3130 -
ARLA FOODS /
EXPRESS DAIRIES (see
M.2579)***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 10/06/2003

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10/06/2003

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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.3130 - Arla Foods/Express Dairies
Notification of 16.04.2003 pursuant to Article 4 of Council Regulation
No 4064/89¹**

1. On 16 April 2003 the Commission received a notification of a concentration whereby Arla Foods ("Arla") proposes acquiring Express Dairies plc ("Express").
2. On 15 May 2003, the United Kingdom ("UK") competition authority made a request under Article 9 of the EC Merger Regulation that this merger be referred to the UK with a view to assessing it under national law.
3. After examining the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation.
4. On the same date as this decision and in reply to the request, the Commission addresses to the UK competition authority a decision to refer the markets for supply of fresh processed milk and fresh non-bulk cream, but not referring the market for the procurement of raw milk.

I. THE PARTIES

5. Arla is a large dairy co-operative with production facilities mainly in Denmark, Sweden and the UK. Further, Arla has sales subsidiaries in most EU countries and a number of third countries.

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).

6. The co-operative is characterised by the owners – farmers – i.e. the members of the co-operative, also being the suppliers of the co-operative's most important raw material, raw milk.
7. Arla is present in all standard dairy product markets, including the purchasing of raw milk, production and sale of fresh liquid milk, UHT milk, cream, fermented milk products and fresh desserts, a wide range of cheeses, yellow fats (butter, blends and margarine), flavoured sterilised milk, juice/nectar, dilutable fruit drinks, dilutable soft drinks, mineral water and ingredients, including milk powder, casein/caseinates, cheese powder, whey products, milk calcium powder and flavoured powders. Arla is present in all the above product markets in Denmark and Sweden and to some extent the UK. Arla is present in the yellow fats, cheese and ingredients markets in most EEA countries and some third countries.
8. Express is a UK public listed company which purchases raw milk, and currently uses it to process and supply fresh liquid milk and cream from 7 processing dairies in Great Britain ("GB"). It also produces and sells a number of ancillary products, namely: sterilised white milk in glass bottles, liquid milkshake bases and limited volumes of both milk powder and orange juice. Express also sells bulk yellow fat (butter) which is contract manufactured on its behalf. Express furthermore makes sale of bulk cream to international traders but is not delivering bulk cream to the UK food industry. Furthermore, Express has a distribution business.
9. Express also owns 75% of Claymore Dairies Limited, which is a producer and supplier of fresh liquid milk in the UK, and 50% in a joint venture with Milk Link relating to the sale of fresh chilled products which are produced by Milk Link.

II. THE OPERATION

10. The proposed concentration has been unanimously recommended to Express' shareholders by the Board of Express and was announced on 27 March 2003. The transaction is an acquisition by Arla (through Arla International A/S, a wholly owned subsidiary of Arla, and its wholly owned subsidiary Arla Foods UK Holding Limited, which has been established for the purpose of this transaction) of sole control over Express. Express will acquire all of the shares of Arla UK from Arla Foods UK Holding Limited, with the consideration for this acquisition being shares in Express representing 51% of Express' issued share capital.

III. CONCENTRATION

11. The proposed transaction is an acquisition by Arla (through Arla International A/S, a wholly owned subsidiary of Arla, and its wholly owned subsidiary Arla Foods UK Holding Limited), of sole control over Express. The proposed transaction is therefore a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

12. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion² (Arla €5,308 million, Express €1,274.3 million). Each of the

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

parties have a Community-wide turnover in excess of EUR 250 million (Arla €4,387 million, Express €1,274.3 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.

V. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

13. This decision covers those aspects of the proposed transaction, which are not referred to the UK pursuant to Article 9 of the Merger Regulation. The proposed transaction concerns a number of markets such as (i) the supply of long-life UHT and sterilised milk, (ii) the supply of long-life cream (non-bulk), (iii) supply of bulk cream, (iv) supply of milk powder. On none of these mentioned markets the proposed transaction will give rise to an affected market. The markets possibly affected by the proposed transaction are:

(a) The market for the procurement of raw milk

Product market

14. Raw milk is collected from farms and delivered to dairies or creameries for processing. According to the Robert Wiseman Dairies plc and Scottish pride Holdings plc Milk Report, in the UK about half of the raw milk produced is processed for consumption as liquid milk and cream, mostly in fresh pasteurised form but a small proportion as UHT or long-life milk and cream. The remainder is manufactured into dairy products such as butter and cheeses or used in the production of other foods such as chocolate. The volume of raw milk produced in the UK is controlled by an EC quota regime under which excess production is subject to a punitive levy. The UK's current quota is equivalent to about 90% of its consumption of milk and dairy products. The shortfall is met by imports of dairy products such as butter, cheese, UHT milk and milk powder. The demand for fresh processed milk is satisfied almost entirely using raw milk from UK farms.
15. From an upstream perspective, the parties submit that a separate product market for the procurement of raw milk can be identified. The Commission's market investigation has confirmed the parties' view, which is in line with the view taken by the UK authorities previously. This is based both on supply and demand criteria, i.e. different level in the supply chain, different suppliers and different buyers, volume and value, no suitable substitutes in terms of product characteristics, price and intended use, etc..

Geographic market

16. In relation to the geographic scope of the market, the parties submit that it is Great Britain ("GB") given that there is considerable trade in raw milk between the various regions of GB but there are no imports or exports of raw milk between GB and the Island of Ireland or between GB and continental Europe. The Commission investigation largely supports the view of the parties and the UK authorities, which states a GB wide market. This is because of the perishable nature of the product and due to the fact that raw milk has a relatively high volume and weight in relation to its

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.

value and transport costs are therefore a significant factor influencing its distribution geographically. Therefore, it can be concluded that the geographic scope of the market for the procurement of raw milk is GB-wide.

(b) Supply of long-life (UHT and sterilised) flavoured milk and fresh flavoured milk

Product market

17. The parties are active in the processing and supply of milk, including fresh and long-life (UHT and sterilised) flavoured milks.
18. Flavoured milk is a product mix of milk and another beverage; e.g. fruit juice and is designated according to the added flavour. Fresh flavoured milk differs from long-life flavoured milk both on demand and supply characteristics.
19. From a demand perspective, fresh and long-life flavoured milks have very different characteristics. In particular, fresh flavoured milks have a different flavour from long-life flavoured milks, reflecting the different flavours of the main ingredients. The majority of flavoured milks sold in the UK are long-life with fresh flavoured milks being regarded as a more premium product. Price differentials also exist between long-life and fresh flavoured milk, long-life flavoured milk being cheaper than fresh flavoured milk.
20. There are also differences in the handling/display of fresh and long-life flavoured milks. Fresh flavoured milk has a short shelf life code, whereas long-life flavoured milk has a longer shelf life code. Given that long-life flavoured milks are ambient (non-refrigerated), they tend to be displayed in a different supermarket aisle from fresh flavoured drinks. Also the distribution of fresh and long-life flavoured milks is different, in that long-life flavoured milks can be distributed on ambient lorries and through ambient depots/warehouses, whilst fresh flavoured milks must be refrigerated at all times, with distribution being more time critical.
21. Fresh and long-life flavoured milks can also be distinguished on the supply side. This is because the production methods for the main consistent ingredients of flavoured milks (i.e. either fresh processed milk or long-life (UHT and sterilised) milk) are very different, requiring different processes and plant. Accordingly, a processor of fresh flavoured milks could not readily switch to producing long-life flavoured milks since they would require additional machinery. For a processor of long-life (UHT and sterilised) milk the switch to producing fresh flavoured milk would be relatively easy.
22. Given the above, the parties consider that there is a distinct product market for fresh flavoured milks as opposed to long-life (UHT or sterilised) flavoured milks. This view has also been widely supported by the Commission's market investigation. However, for the purpose of the current decision it is not necessary to conclude on the relevant product market definition since irrespective of the product market definition adopted the proposed transaction does not raise any competition concerns on any such markets.

Geographic market

23. As regards the geographic definition, the parties cannot estimate the total volume of imports into the UK separately for fresh and long-life flavoured drinks.

24. In their view however and in relation to long-life flavoured milk, according to AC Nielsen data provided by the parties, Yazoo (a long-life product imported from Belgium which is the most popular brand of flavoured milk in the UK) represented around 20% of whole UK sales of all flavoured milks in 2001. Accordingly, Yazoo will represent an even higher share of UK sales with regard to long-life flavoured milk, suggesting that the relevant market for long-life flavoured milks may well be wider than the UK.
25. As far as the fresh flavoured milk is concerned, the parties are unable to provide evidence of the fresh flavoured milk market being wider than the UK. From the market investigation however, it can be concluded, that the market for fresh flavoured milks is likely to be national due to the perishable nature of the product, which does not allow it to be transported over a long distance.
26. For the purpose of this decision, the geographic market definition of both long-life (UHT and sterilised) and fresh flavoured milks can be left open, since the transaction will not create competition concerns in either case.

(c) Supply of packet yellow fats

Product market

27. Both of the parties supply only packet butter and no other yellow fats. Arla manufactures and distributes the product whereas Express acts merely as a distributor of packet butter manufactured and branded by third parties as part of its foodservice and doorstep milk delivery business, Nevertheless, the parties submit that consumers view packet yellow fats as one market. This comprises of packet butter, blends/spreads and margarine. The parties believe that consumers can switch from one type of product to another and merely look at price, taste, convenience and health considerations.
28. On the supply side, the principal technologies available on the market can be used to produce a range of yellow fats, which overlap with one another. In addition, the investment that a butter manufacturer would need to make in order to expand production to products, which are legally defined as margarine, would not be significant. Switching from margarine production to butter or spreads would even be cheaper.
29. The parties support that on the demand side, the national multiples also approach the market as a yellow fats market, comprising different product categories. This approach is reflected in the way in which yellow fat products are promoted and displayed to consumers in supermarket stores.
30. Contrary to the view of the parties the market investigation has indicated that there are distinct demands and supply considerations between packed butter, blends/spreads and margarine, which could further subdivide the markets.
31. The final usage of each product is different and they are bought for different usage occasions. In addition, there is a big price differential between packet butter and spreads and margarine and overall the products are not considered as direct substitutes to each other.
32. On the supply substitutability side the market investigation has shown that the manufacturing process for the products is completely different. Depending on the raw

materials used in the production of the products, the price of margarine and spreads is driven by the oil price whereas the price of butter is driven by the intervention price of milk

33. A further sub-division of the market could be the division between branded and non-branded packet butter. The market investigation carried out by the Commission suggests that some consumers are brand loyal whereas others base their decision on price. As regards the volumes of packet butter supplied by Arla in GB, approximately [...] % of this volume ([...] tonnes) are supplied under branded labels, whereas the remainder is supplied under own label. Considering the segment of packet butter as a whole, the parties estimate that approximately 66% are supplied under branded labels, whereas the remainder is supplied under own label. Nevertheless, it should be noted that Express does not manufacture any packet butter but only sells small volumes of packet butter manufactured by others.
34. However, the precise product market definition can be left open in this case since there are no competition concerns even on the narrowest definition of the market.

Geographic market

35. It is submitted by the parties that the market for packet yellow fats is EEA wide due to the extensive trade amongst EEA Member States. It's the same situation if the product market is sub-divided into butter, spreads and margarine separately. The results from the market investigation confirm this approach and some respondents even suggested that the geographic definition should be world-wide as butter is a high value product compared to volume which makes its transport costs lower and thus imports are possible, e.g. from New Zealand. Nevertheless, it must be noted that the geographic market definition could be as narrow as national if the product is segmented into branded and non-branded products.
36. For the purpose of this case the geographic market definition is left open since it does not create any competition concerns even on the narrowest geographic market definition.

(d) Supply of bulk yellow fats

Product market

37. The parties contend that the market for bulk yellow fats encompasses butter, margarine and liquid vegetable oil. It is a highly fragmented market with several suppliers all over the EEA. However, the market has a significant size, the buyers typically being the food processing industry. In view of the Commission, it is possible to define a more narrow market for the supply of bulk butter.
38. The Commission based on the findings of the market investigation questions whether bulk yellow fat should be considered as one product market. However, for the purpose of this decision, it can be left open whether bulk yellow fat or bulk butter constitutes separate markets.

Geographic market

39. The parties submit that since it is a very price sensitive market it is EEA wide as it is not possible to obtain any price premiums considering that the market is very

transparent. Concerning bulk yellow fat it could be argued that such a market could be national in scope.

40. However, the geographic market can be left open for the supply of yellow fats or for the supply of bulk butter since it does not raise any competition concerns, neither on a national or on an EEA-wide market.

VI. COMPETITIVE ASSESSMENT

(a) The market for the procurement of raw milk

41. Around half of all milk supplied to dairy processors goes through farmer co-operative groups of which there are now three major British players: First Milk, Dairy Farmers of Britain and Milk Link. The remaining 50% of raw milk is supplied to processors through direct supply contracts. The parties' estimate the major raw milk suppliers market shares to be Dairy Farmers of Britain (18%), First Milk (21%), Milk Link (12%) and the remaining 51% are supplied by a number of smaller raw milk suppliers.
42. Arla has a milk intake in the UK of approximately [...] million litres of raw milk. Approximately [...] million litres per annum (mlpa) is bought from the successor coops to Milk Marque, including [...] mlpa from Dairy Framers of Britain, [...] mlpa from Milk Link and [...] mlpa from First Milk. The remainder is bought from four milk groups the members of which are all farmers. In addition to supplies from these groups, Arla also contracts directly with a small number of individual farmers.
43. Based on the above, the largest suppliers of raw milk to Arla can be identified as: Dairy Farmers of Britain ([35-45]%), Milk Link Ltd ([15-25]%), Premier Milk Producers ([10-20]%), First Milk ([5-15]%) and Norfolk & Waveney Group ([0-10]%).
44. Express current requirements for raw milk amount to approximately [...] million litres per annum (mlpa), taking into account all recent disposals. Express Milk Partnership, a joint venture between Express and its farmer suppliers would supply approximately [40-50]% of these requirements, with the remainder being provided by the various successor companies to Milk Marketing Boards (MMBs).
45. The largest suppliers of raw milk to Express can be identified as: Express Milk Partnership ([40-50]%), Dairy Farmers of Britain ([30-40]%), Milk Link Ltd ([15-25]%), Southern Milk Producers ([0-10]%) and Nestle ([0-10]%).
46. On the market for the procurement of raw milk, the largest buyers will be the parties ([15-25]%), Dairy Crest ([15-25]%), Wiseman ([5-15]%), ACC ([5-15]%) and a number of smaller dairies ([35-45]%). The market share of [15-25]% on the buyer side is unlikely to raise any concerns of single dominance.
47. One supplier of raw milk has raised concerns to the UK authorities as to whether the transaction is likely to create a situation of collective dominance on the buyer side. Collective dominance on the buyer side in a market would in itself be an unusual situation. A concern of collective dominance in such a situation would be one where the big purchasers jointly reduced demand in order to generate oversupply and trigger price decreases.
48. The purchase of raw milk is fragmented. Furthermore, it should be noted that a large part of raw milk is not used for processing fresh milk and cream but for flavoured milk

drinks and yellow fats. Buyers are thus very heterogeneous in their needs due to their different usage of the raw milk. In addition the large operators differ with respect to their vertical integration into the supply of raw milk. It is thus unlikely that the purchasers would be able to reach the terms of co-ordination. Furthermore, even if the large purchasers were to co-ordinate a decrease in their demand, it is unlikely that this would lead to a sustainable decrease in the price for raw milk. It is more likely that the other types of the demand would pick up due to the lower prices or the supply-capacity would reduce, thereby cancelling the oversupply that could generate the price decrease. The Commission's assessment is thus that these concerns in the present case are unfounded.

(b) The market for the supply of long-life (UHT and sterilised flavoured) and fresh flavoured milk

49. If the product market is considered to include both fresh and long-life flavoured milk, the overlap in the EEA is small (Arla [5-10]%, Express [0-5]%) constituting a combined EEA-wide market share of [5-10]%. In the UK, considering both fresh flavoured and long-life flavoured milk as one product market the combined market share will be around [25-35]% (Arla [15-25]%, Express [5-15]%).
50. In the case of a sub-divided product market into (i) long-life flavoured milk and (ii) fresh flavoured milk, Arla UK is only present on the market for long-life flavoured milks with a market share of [20-30]%, whereas Express' joint venture with Milk Link sells only fresh flavoured drinks with a market share of [25-35]%. In this situation, the proposed transaction does not lead to any overlaps as regards the supply of flavoured milks.
51. Based on the above, it can be concluded that the transaction does not threaten to create or strengthen a dominant position.

(c) The market for the supply of packet yellow fats

52. The combined market share of the parties for the year 2001/2002 for packet yellow fats in the EEA was less than [0-5]%. As far as packet butter is concerned, the combined market share for the same year was less than [10-15]% in EEA.
53. Regardless of the precise product market definition there would only be an affected market if the relevant market was packet butter in GB. Even if this is the case, the increment in market share would be an increase of [0-5]% from [35-45]% to [35-45]%, since Express does not manufacture any packet butter and only sells insignificant volumes of packet butter as part of its foodservice and doorstep deliveries.
54. The Commission therefore concludes that even in the narrowest definition a dominant position would not be created in the supply of yellow fats or any segment of the market.

(d) The market for the supply of bulk yellow fats

55. The parties have a combined market share of less than 15% of the total market for the supply of bulk yellow fats in EEA and in UK and thus this is not an effected market. Furthermore, Express' interest in the supply of bulk yellow fats is limited to the sale of some volumes of bulk butter which are contract-manufactured on its behalf. Likewise, the volume figures for Arla only concern bulk butter. Within the product segment of

bulk butter in EEA, the parties would have a combined market share of [5-10]%. In the UK, the parties' combined market share within the product segment of bulk butter was [10-20]% in 2001/2002.

56. In view of the above, even if the relevant market is on the narrowest market segment for the supply of bulk butter in UK, the market would only just qualify as an affected market and would give rise to no competition concerns.

VII. CONCLUSION

57. For the above reasons, the Commission has decided not to oppose the notified operations, in so far as it concerns those aspects which are not being referred to the United Kingdom pursuant to Article 9, 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