



EUROPEAN COMMISSION

PUBLIC VERSION

Commission decision
of 29.10.1993
referring case No. IV/M.330
to the competent authorities of the Federal Republic of Germany
pursuant to Article 9 of Council Regulation No. 4064/89
(Case No. IV/M.330 - McCormick/CPC/Rabobank/Ostmann)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No. 4064/89 of 21 December 1989¹ on the control of concentrations between undertakings, and in particular Article 9(3)(b),

Having regard to the notification made by McCormick, CPC and Rabobank pursuant to Article 4 of the said Council Regulation on 14.09.1993,

Having regard to the communication received from the Government of the Federal Republic of Germany dated 7.10.1993,

whereas,

¹ OJ L 257, 21.9.1990, p. 14.

1. The above mentioned operation concerns the creation of a joint venture by McCormick & Company, Incorporated ("McCormick"), CPC International Inc. ("CPC") and Coöperatieve Centrale Raiffeisen-Boerenleenbank BA acting for and on behalf of its wholly owned subsidiary Rabo Merchant Bank NV ("Rabobank") together with the acquisition of Ostmann by the same parties.
2. The Federal Republic of Germany has informed the Commission by letter dated 7.10.1993 that, in its opinion, the notified concentration threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded in the market for supplies of dried herbs and spices to food retailers in Germany.
3. After examination of the notification the Commission considers that the notified concentration falls within the scope of Council Regulation 4064/89 and that, having regard to the market for the products in question and the geographic reference market, there is such a distinct market and such a threat exists.

I THE PARTIES

4. CPC is a US-based diversified food company, active in a range of sectors including dehydrated sauces, soups, bouillons, desserts, bread, pasta, corn and starch products. Herbs and spices do not constitute a central part of its activities.
5. McCormick is a US-based speciality food company engaged in the manufacturing and marketing of herbs and spices, seasonings and flavorings. Herbs and spices constitute the central core of its business both in Europe and worldwide. McCormick is one of the world's leading herb and spice companies.
6. Ostmann is a German company, with a total turnover of [...]², [...]³ of which is achieved in the sale of herbs and spices in Germany.
7. Rabobank is the second largest bank in the Netherlands. It is a prime lender to the Dutch agricultural sector and has developed an expertise in the agro-food sector. Its skills as an analyst of potential take over targets and its financial resources are said to play an important role in the JV activities.

II THE OPERATIONS

8. CPC, McCormick and Rabobank will create a new joint venture which will combine the entirety of CPC's and McCormick's herb and spice business in the EC and EFTA countries, with two de minimis exceptions discussed hereafter, and the assets of Ostmann.

The three notifying parties have entered into a number of interrelated legal contracts (joint venture agreement, Ostmann purchase agreement) the result of which is that three previously independent herb and spice businesses will be run under one single structure of decision and as one single economic unit.

9. The formal arrangements may be summarised as follows: a joint venture agreement (JVA) establishes the creation of NEWCO, the capital contributions of the parents and the decision-making process in NEWCO. The parties agree to charge CPC (designee) to acquire Ostmann, which will unconditionally be transferred to the JV. Maizena Holding, a CPC subsidiary which will not be transferred to the JV but which holds directly CPC's participation in the JV, has signed the acquisition agreement with Ostmann. The transfer of Ostmann to NEWCO is explicitly foreseen in the Ostmann purchase agreement, and

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authorised by the sellers of Ostmann. The creation of the JV and the acquisition of Ostmann are conditional on each other.

10. Comparing the structure of the market before and after the notified agreements are completed, the final result is a concentration between three previously independent suppliers. The parties' declared strategy is to become a large European player, for which they need both to merge their respective activities and enlarge their manufacturing base in the EEC.

This final result is achieved through the creation of a JV and the acquisition of Ostmann. The question arises as to whether the purchase of Ostmann can be viewed as a separate operation of no Community dimension, since Ostmann does not achieve the 250 million Ecu threshold.

11. The purchase of Ostmann is accomplished by the parent companies of the JV for the following reasons:

Maizena Holding GmbH concluded the purchase agreement with Ostmann within the scope of its authority given by the three parent companies. This follows from reading the "Ostmann Purchase Agreement" in conjunction with Article X of the "Joint Venture Agreement" (JVA). Pursuant to the terms of the Purchase Agreement, Maizena is acting for the JV to be established by CPC, McCormick and Rabobank. According to the JVA and the knowledge of the parties, the acquisition of Ostmann forms an indispensable condition for the creation of the JV. Maizena has therefore been authorised by the parent companies to accomplish the acquisition before the first "closing" of the JVA. Up to that "closing", Maizena acts exclusively on behalf of the parent companies. This interpretation also relies on the fact that Maizena could not act on behalf of a JV which itself cannot be legally responsible for preparing an acquisition before its very existence.

With regard to the acquisition of Ostmann, CPC, McCormick and Rabobank have, therefore, to be considered as the undertakings concerned within the meaning of the Regulation. Hence it follows that the turnovers of the three acquiring undertakings have to be taken into account for the determination of Community dimension of the concentration.

In any event, the question as to whether the purchase of Ostmann and the creation of the JV can be viewed as one or two separate operations within the meaning of the Regulation can be left open because the identity of the acquiring parties in both transactions determines a Community dimension in any case.

JOINT CONTROL

12. The parties, including Rabobank, exert joint control over the JV through a holding company, through its general shareholders meeting and the Supervisory Board.
13. The holding company ("European Spice Partners BV", subsequently "the Company") incorporated under Dutch law will own, directly or indirectly, operating subsidiaries that will undertake the manufacturing and sale activities of the JV.
14. Voting rights in the Company are attached to common and preferred stock in such a way that voting rights are split as follows: [...] ⁴

Major decisions have to be approved unanimously either through the general meeting of shareholders or through the Supervisory Board. The general shareholders meeting will appoint by unanimous decision the Managing Director of the Company. The Board of the Management company will hold responsibility for the day to day management and general supervision of the JV's operations. The Board shall be appointed by the Company and ratified by the unanimous approval of its shareholders. The President and CEO of the

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management company will be selected by McCormick. For as long as McCormick selects the president of the Management company, the Chairman of the Supervisory Board will be nominated by CPC. Rabobank will nominate the Vice Chairman.

15. The Supervisory Board, which is composed of 5 members (2 CPC, 2 McCormick, 1 Rabobank), will by unanimity approve the business plan and the annual budget, strategic policies and capital investment programmes, acquisitions, divestments, joint ventures with third parties and other important matters (Article 5.2 of the JVA).
16. The above mentioned mechanisms ensure that the agreement of all three parties is required in respect of decisions regarding the management, commercial policy and the competitive strategy of the JV, and which would go beyond the usual rights of minority shareholders.
17. Under the terms of Article 3 of the Regulation and existing case practice, CPC, McCormick and Rabobank therefore have the possibility of exercising decisive influence in the JV. With regard to Rabobank, the question arises as to whether a participation of Rabobank in the essential business decisions of the JV can actually be expected. Rabobank's low capital share and the agreement on fixed return cannot rebut the fact that Rabobank has the legal right to exert a decisive influence on the JV. The mere possibility of exercising decisive influence is sufficient, unless clearly undermined by factual evidence. In this case, the position of Rabobank as a merchant bank with particular interest in the farming and agro-food sectors and the significant investment of DfI 25 Mio lead Rabobank to act as a business partner and not as a mere financial investor. The fact that the Supervisory Board decides by unanimity upon major decisions affecting the market behaviour of the JV may entail potential liabilities for Rabobank. Moreover, a mere financial investor would not be interested in participating in the determination of the market behaviour of the JV. From the JV's point of view, Rabobank may provide an additional source of capital to the JV regarding future acquisition activities.

AUTONOMOUS ECONOMIC ENTITY

18. The JV combines the totality of the European-wide businesses of its industrial parents. The JV has the necessary functional autonomy to engage in its activities on a lasting basis, since, in particular, it will have the necessary assets, employees, trade marks and expertise to carry out research, product development, processing of raw materials, packaging and distribution in the area of herbs and spices.⁵
19. The JV will itself own all the trademarks used by the existing businesses contributed by the parents, and will own all other trade marks developed for its products.

The parents retain ownership of "McCormick", "Knorr" and "Goodalls" trade marks. However these are exclusively and irrevocably licensed to the JV, [...]°. The licence may only be terminated if a parent withdraws from the JV, and then only 15 years after that event. The parents withdraw from the relevant markets and they enter into a non-competition clause with the JV. In this context, retention by the parents of ownership of brands, given the conditions of the licence, does not undermine the functional autonomy of the JV.

Patents and know-how are of limited importance in the sector and are in any case licensed to the JV on an exclusive basis.

ABSENCE OF RISK OF COORDINATION

20. The purchase of Ostmann does not give rise to coordination of the competitive behaviour of the parties among them and Ostmann or among themselves.

⁵ The JV will have to initially rely on CPC's catering distribution network until its own network is developed.

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It is true that for the time until the creation of the JV CPC, McCormick and Ostmann will be present on the same market. The consummation of the Ostmann Purchase Agreement, however, takes place just after the creation of the JV, namely by the actual transfer of assets between Ostmann and Maizena acting on behalf of the JV. A coordination of competitive behaviour seems to be excluded at this stage because CPC and McCormick will retire from the spice market at the moment of creation of the JV.

Moreover, the risk of temporary coordination of behaviour has not to be taken into account under the Regulation. Pursuant to consideration 24 of the Regulation, there is no coordination of competitive behaviour where two or more undertakings agree to acquire joint control of one or more other undertakings with the object and effect of sharing amongst themselves such undertakings or their assets. This consideration may be transmitted to the present case in which three undertakings acquire joint control over another company in order to bring it immediately into a joint venture established by them, if the joint venture is assumed to include the complete activities in the sector concerned.

21. CPC and McCormick permanently withdraw from the markets in which the JV will be active. The permanent withdrawal of the parents from the market of the JV is expressed in the non-competition clause included in the JVA for as long as the parents remain shareholders of the JV and for 5 years thereafter. Rabobank has no activities in the markets of the JV.
22. For the sake of completeness, the parties have identified a number of residual markets where certain overlaps exist. Because of their marginal significance, none of them, either separately or together, could constitute a sufficiently important risk of coordination so as to question the concentrative character of the operation. These are:
 - McCormick retains its industrial ingredients activities. [...] ⁷.
 - CPC is active in the "wet sauces" business. [...] ⁸.
 - As to overlapping activities of the parents outside the JV, CPC and McCormick will both be active in the supply of flavour systems to snack manufacturers. [...] ⁹.
23. McCormick is an important producer and trader of bulk herbs and spices. However, there are no obligations for the JV to buy from its parent company (Art. 2.4a JVA).
24. McCormick remains a leading supplier of herbs and spices in other geographic markets, in particular the US. Certain "spill-over effects", however, cannot be foreseen on retail markets in Europe.

III COMMUNITY DIMENSION

25. The notified transactions, namely the creation of the JV and the acquisition of Ostmann by the parent companies, are of Community dimension, whether they are viewed as one or two concentrations. The acquiring parties achieved an aggregate combined worldwide turnover of [...] ¹⁰ in the last financial year. Both Rabobank and CPC achieved a Community wide turnover exceeding Ecu 250 million. The parties do not achieve two thirds of their Community wide turnover in one and the same Member State.

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IV ASSESSMENT

A. Product market

26. The products concerned by the concentration are herbs and spices and mixtures of herbs and spices used as seasonings and flavourings. There are some 70 individual varieties of herbs and spices, such as pepper, paprika, basil, parsley, oregano, etc. and some 80 mixtures or blends (curry powder, ready mixes for fish, meat and chicken, etc.). All suppliers of packaged herbs and spices offer a range of herbs and spices. Suppliers offer, and food distributors demand, a range of herbs and spices, not individual spices from different suppliers.

A strict view of demand substitution from the perspective of the end consumer could lead to the argument that each individual spice presents different characteristics, prices and end use. Such a narrow approach would not allow a proper analysis of the conditions of competition in this market. In any case, established suppliers would be able immediately to increase their offer of an individual herb or spice if an increase in its margin were to justify such an action. Therefore it is the range of herbs and spices, and not the individual herbs and spices, which constitute the product market.

27. Herbs and spices can be divided into four groups according to processing: fresh, air-dried, freeze-dried and frozen. They are sold to three different categories of customers: food retailers, food manufacturers and caterers (restaurants, schools, hospitals, etc.).

Overall market value estimates for 1992 are provided in the following table in million ECU. [...] ¹¹.

28. The parties submit in their notification that the relevant product market comprises all herbs and spices, including fresh, frozen, freeze-dried and air-dried herbs and spices sold to all three categories of customers.

Different categories of customers

29. The bulk of CPC, McCormick and Ostmann sales are to food retailers. Food retailers represent [...] ¹² of their respective turnover in herbs and spices in the EEC. CPC has some sales in the catering sector, often to restaurants of food retailers. Its share of the EEC catering sales is estimated at [...] ¹³. McCormick has some sales to industrial clients. Its share of EEC sales to industrial clients is estimated at [...] ¹⁴. The bulk of the parties' sales, the main overlap between the parties' activities and significant market shares are only to be found in the retail sector.

30. Retailers constitute a distinct group of clients to which different prices may be charged. Discounts, rebates and refunds are negotiated with each individual retailer and the way price negotiations take place allow to apply different prices between retailers and other types of clients. [...] ¹⁵.

31. Due to the specific circumstances of this market, arbitrage by retailers does not seem possible. Supplies of herbs and spices to retailers require retail glass or plastic packaging, as opposed to the larger drums used to supply industrial and catering customers. In addition, a retailer requires a full range of herbs and spices, whereas industrial and catering customers

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require a more limited range of products, and these are often mixes tailored for each individual client. The products in each segment present therefore differences that hinder any possible arbitrage between the different segments.

32. From a demand point of view, sales of herbs and spices to food retailers constitute a distinct product market.
33. The parties have argued that considerations of supply-side substitutability should extend the relevant product market to encompass suppliers to industrial and catering clients. In general, though, companies supplying each segment are specialised, as are the parties themselves. Even if industrial and catering suppliers could be considered as potential entrants into the retail market, supply-side substitution is in general to be considered only in market definition when it can take place in the very short term and without entailing significant costs. Moreover, the enquiry of the Commission shows that suppliers to industrial and catering clients would need to enlarge their product range, invest in new packaging capacity, set up a distribution network and merchandising logistics and perhaps develop a brand before being able to supply to retailers. As a result, industrial and catering suppliers would incur significant costs and time lags to sell to retailers.

In fact, the responses of retailers and industrial suppliers to the Commission's enquiries tend to show that suppliers to clients other than food retailers cannot probably be considered as realistic entrants on the food retail market (see below under barriers to entry).

Fresh, frozen freeze-dried and air-dried herbs and spices

34. Overall sales of herbs and spices to retailers in the EEC are broken down as follows (Ecu million 1992): [...] ¹⁶.
35. The parties only sell air-dried herbs and spices to retailers. The question of whether all four forms of herbs and spices belong to the product market has only a small impact on the parties' market share, since air-dried accounts for around [...] ¹⁷ of total market sales.
36. The inquiry of the Commission, though, tends to indicate that at least fresh and frozen herbs and spices could be excluded from the relevant product market. Consumers demand dried herbs and spices because of convenience, shelf stability (ability to store), availability all year round and the wide range of choice. Fresh and frozen are perceived as high quality products, are offered in much more limited ranges, and are not so widely available in retail stores. Retailers in various Member States have indicated to the Commission that individual customers have a market preference for and purchase one form or the other. In any case they purchase one form or the other for different purposes and at different occasions. The various forms seem to be demanded for different reasons.
37. Fresh, freeze-dried and frozen forms are generally limited to herbs (parsley, tarragon, etc.). In terms of range, they are not comparable to the full range of air-dried herbs and spices offered by the parties.
38. In addition, retailers do not perceive that prices of one group influence prices in another. Suppliers of dried herbs and spices do take into account offers and prices of other suppliers of dried herbs and spices but not those of fresh and frozen. Prices of fresh herbs tend to vary more frequently (i.e. weekly) whereas prices of dried herbs and spices are set when new crops are available and thus price remains static.

All retailers consulted by the Commission have indicated that there is no price competition between the different forms. Differences in product ranges, presentation and packaging

¹⁶ Deleted business secrets.

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make price comparisons difficult, but in any case there seem to be significant price differences [...] ¹⁸.

39. From a supply point of view, manufacturing of the various forms obviously involves different processes. Fresh herbs do not involve an industrial activity as such. Freeze-dried and frozen require specific manufacturing and distribution without breaking the cold chain. Air-dried herbs and spices are industrially treated and blended. Suppliers of each form tend to specialise. The parties supply only air-dried herbs and spices. The markets for frozen and freeze-dried herbs are small, and tend to be regarded as niche markets. Club Feinkost and Iglo, for instance, market these products in Germany.

In addition, the supply of the larger full range of air-dried herbs and spices require a specific distribution, including full service at the sales point (merchandising and rack-jobbing).

Conclusion

40. The Commission concludes that the relevant product market is that of the supply of a range of dried herbs and spices to food retailers for eventual household consumption.

This conclusion is based on the indications given by food retailers as to the preferences of consumers and as to the non-existence of price competition among fresh, frozen, freeze-dried and air-dried, the different product ranges involved which imply totally different distribution systems, the marked specialisation of suppliers in the different areas and the very different order of magnitude of market volumes.

B. Geographic market

41. In its request for referral, the German Government considers that there is a distinct market for dried herbs and spices in Germany. In that respect, the Commission has taken into account the elements contained in this request as well as the following elements resulting from its own enquiry.

42. The leading suppliers of herbs and spices to the retail trade tend to be different across countries.

Belgium:	Ferruzzi, BSN
France:	Ferruzzi, BSN
Spain:	Ferruzzi
Portugal:	Ferruzzi
Italy:	Ferruzzi, Cannamela
Germany:	Ostmann, CPC
UK: McCormick, Lion Foods	
Ireland:	McCormick, CPC
Netherlands:	Van Sillevoldt, Burns Philp.

43. In particular in Germany, suppliers are basically German companies. The fact that Ubena was acquired by CPC does not alter this conclusion since Ubena was developed as a German company.

Supply characteristics

44. According to the notification, several suppliers tend to centralize processing and manufacturing in few plants, and therefore supply from one different plant to various countries. [...] ¹⁹. Ducros (Ferruzzi) would serve from one single plant its operations throughout the South of Europe. Burns Philp is present in both the UK and the Netherlands,

¹⁸ Deleted business secret.

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although this is due to past acquisitions (British Pepper and Spice in the UK and Euroma in the Netherlands).

The parties therefore submit that supply is transnational, although it is not clear that this would prevent markets from being basically national at present.

Prices

45. The parties recognize that price levels are different among Member States, although they submit that the traditional price differences are eroding. McCormick and CPC apply significantly different prices in the various countries where they are active. Although in their notification the parties stress the trend towards the development of cross-border retailing groups and the creation of international purchasing groups, the Commission's enquiry indicates at present that price negotiations for these products are still carried out largely on a national basis. All competitors and clients of the parties, as well as large suppliers in other Member States, have indicated that price negotiations for these products are carried out at national level and will continue to be so in the foreseeable future.

Trade flows

46. Trade in finished herbs and spices is not hindered by tariff barriers. However, trade in finished herbs and spices seems to be limited in volume and generally a matter of intra-company trade. The parties estimate imports of finished herbs and spices into Germany, for instance, at a value representing less than roughly [...] ²⁰ of the domestic market value. [...] ²¹.

Access to retailers

47. Access to retailers, generally and foremost in Germany, by a supplier of herbs and spices with no previous sales in that country is hindered by the following obstacles, at least:
- need for a local distribution network in order to be able to supply the retailer's outlets throughout the country.
 - need to provide a "full service" at each sales point of the food retailer, which is a very specific feature of the herbs and spices market as opposed to other food products;
 - need to substitute an established national brand by another;
 - saturation of retailers shelves with established national suppliers, which would require important financial investments to displace an established national supplier from a retail chain;
 - volume and performance discounts and refunds would hinder the price competitiveness of a new entrant.

Distribution and merchandising

48. Competitors, clients and potential entrants have mentioned this aspect as a significant barrier to entry into the market of herbs and spices in Germany. Food retailing in most Member States is a concentrated market, where all large players have attained at least a national dimension. They require therefore that suppliers serve their outlets throughout the country.
49. The distribution of herbs and spices cannot be compared with the distribution of other food products. Herbs and spices imply the supply of a large number of individual references or products (up to 200-300), each with a very low turnover and, hence, low volumes.

²⁰ Less than 5%.

²¹ Deleted business secrets.

Food distribution channels are not suited to manage such a large number of low-turnover, low-volume stocks. In addition, each jar of herbs and spices that has been sold needs to be replaced in the rack (called "rack-jobbing")

In contrast with other food products, suppliers of herbs and spices have to carry out distribution and merchandising themselves, that is, provide a full service at each point of sale. The provision and quality of this full service is an important requirement of food retailers in Germany when choosing a supplier of herbs and spices.

50. The investments needed to set up such a distribution and merchandising network for a large Member State do not seem to be prohibitive on their own. [...] ²².
51. The parties argue that distribution and merchandising can be entrusted to third parties, therefore avoiding the need to set up an owned network. For example, CPC delivers its herbs and spices in Germany through independent delivery companies, and merchandising is assured by people hired by CPC on a contract basis. McCormick does not own any transport or storage space relating to distribution of its products in the UK, which is all contracted out to third parties. Distribution in Ireland is ensured by a third party as well. The use of third parties to distribute herbs and spices in the UK and Ireland has not impeded McCormick from achieving a significant market share in those countries. However, this does not seem to be the case in Germany.
52. German retailers consider that distribution and merchandising constitute important barriers. The fact is that German retailers regard geographic coverage as one of the main criteria to select a supplier of herbs and spices, together with the quality of its service. Moreover, distribution through third parties constitutes a significant cost disadvantage for a new entrant in relation to the main German suppliers, Ostmann and Fuchs.

Brands

53. Consumers' brand loyalty in the herb and spice market is less important than in other food sectors. Herbs and spices are only bought infrequently and marketing studies submitted by the parties show that generally consumers show little attachment to particular brands. Consumers seem to show little attachment to brands, and any possible attachment would be weakened by the frequent practice of refilling branded jars with spices bought in plastic bags from other manufacturers. Retailers in Germany and the UK have largely confirmed this view, although some have pointed out that certain well established brands do enjoy some brand recognition.
54. Expenditure on advertising by the parties is very low in terms of turnover [...] ²³. However, discounts for promotion on sales point seems to play a more important role. It is difficult to ascertain precisely which discounts are linked to promotion and advertisement, [...] ²⁴.
55. The fact remains that certain brands are able to charge premium prices, and retailers and some competitors of the parties have identified a low price and a high price market segment. Private labels or store brands are used by retailers in some cases, in particular "hard discounters" such as Aldi, a fact that further points to brands playing a certain role in this market.

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Saturation of retailers' shelves

56. The bulk of supply of herbs and spices in Germany has traditionally been assured by German-based companies by long-standing brands (Fuchs, Ostmann, Ubena). A newcomer would face high costs ("key payments") in order to be listed by a major retailer. These costs depend on the size and number of outlets of each retailer, but are of the order of several million DM.

Moreover, to list an additional supplier of herbs and spices implies losing a significant amount of shelf space. Racks for herbs and spices usually take up to 1.3 m shelf width at the sales point, whereas for other food products requirements might be much less (30-40 cm). Therefore key payments are different.

In herbs and spices, therefore, a newcomer would probably have to displace an existing supplier, with all the risks and uncertainty associated with changing from a well-known, long-established supplier to an unknown one, from the point of view of the retailer.

Conclusion

Several factors indicate that the herb and spice market remains national, in particular in Germany. Given that prices seem to be largely dependent on national conditions, the market could be regarded as national. The stability of demand and saturation of the market, particularly in Germany, together with the specificity of distribution and merchandising, the relatively high costs of entering the market in relation to the risks involved and the turnover that can be achieved, form a conglomeration of factors creating an important barrier to entry into the German market. It has been confirmed as such almost unanimously by the German retailers and industrial suppliers consulted by the Commission.

These facts are regarded as important by the German market operators. However, retailers in the UK, for instance, the other large Member State where the joint venture will be active, take into account the possibility of using suppliers from other Member States and do not give such a strong weight to these barriers. The parties have argued that the barriers are not insurmountable (for instance, for large companies selling herbs and spices in other Member States). They have further submitted that the herbs and spice market is undergoing substantial changes. In particular, they argue that food retailing is in the process of becoming transnational and that the use of private labels by German retailers will strongly develop in the short term, rendering access to the market easier. However, the enquiry of the Commission in Germany has not revealed any clear signs of such a market evolution in the foreseeable future.

The Commission considers that under these conditions, the market for herbs and spices in Germany presents all the characteristics of a distinct market in the sense of Article 9.

C. Threat to competition

57. The merged entity will be active throughout Europe. McCormick currently sells herbs and spices to retailers in all Member States, excepting Belgium, Denmark, Italy and Portugal. It is also present in Sweden, Finland with marginal market shares, and Switzerland. CPC is active in Germany, Greece, Ireland and Spain. Ostmann is basically active in Germany, although it has marginal sales in all Member States (excepting Ireland and Luxembourg), and in Norway and Austria. The merged entity will be active throughout Europe, [...] ²⁵.
58. The main impact of the proposed merger is in Germany and Ireland, since in the UK only McCormick has significant sales and the proposed concentration does not reinforce its position there. Retailers in the UK have confirmed that they do not expect any major impact of the proposed operation on the British market.

²⁵ Market share above 50%.

Market shares

59. The market shares notified by the parties correspond to estimates calculated on the basis of adjusted figures for overall market consumption at retail prices (Nielsen) and a corresponding adjustment of their net turnover in herbs and spices to express it in retail prices.
60. On the basis of the parties' estimates, the merged entity will enjoy a [...]²⁶ share of the sales of air-dried herbs and spices to food retailers in Germany. The next competitor, Fuchs, has a market share of roughly half that of the parties and the remaining competitors are small, with market shares below [...]²⁷. The parties' market shares have been increasing moderately between 1990 and 1992, basically with the brands Ubena and Ostmann. Fuchs has lost [...]²⁸ in the same period..
61. Nielsen estimates the parties' market share at [...]²⁹ and that of Fuchs at [...]³⁰, giving a two-firm concentration ratio of [...]³¹.
62. In Ireland, the combined market shares of the parties in the relevant product market would attain [...]³². CPC and McCormick have lost [...]³³ of the market between 1990 and 1992. The next competitor, RHM Foods, has a share of [...]³⁴.
63. After the merger, there will remain basically two significant suppliers in Germany and just one in Ireland.
64. As a result of the concentration, the combined market share of two leading suppliers of herbs and spices to food retailers in Germany would amount to roughly [...]³⁵ ([...] ³⁶ by Nielsen's estimates). Since the remaining competitors are in many cases of regional dimension and, in any event, none of them has a market share exceeding [...] ³⁷, the finding of a sole dominant position by the merged entity or of a joint dominant position between the merged entity and Fuchs in Germany cannot be excluded.

Remaining competitors in Germany

65. The question arises whether Fuchs will be able to compete with the new group with regard to its technological know-how, its wide range of products and its fully developed distribution and service network, although its market share hardly amounts to half of the JV's market share.

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²⁷ Deleted business secret.

²⁸ Deleted business secret.

²⁹ Above 50%.

³⁰ Above 25%.

³¹ Above 75%.

³² Above 50%.

³³ Deleted business secret.

³⁴ Below 25%.

³⁵ Above 50%.

³⁶ Above 50%.

³⁷ Less than 10%.

66. It seems that the remaining competitors in the German market, which are small and medium-sized companies, would not be able to compete against the two large suppliers. Their distribution networks are either regionally limited or characterised by relations with new nationwide retailers. As regional suppliers, they have not developed a national distribution network and they experience difficulties in maintaining and defending their current positions. As the supply of herbs and spices further increases its concentration ratios, and as retailers progressively concentrate, the scope of action of the smaller regional suppliers seems to be further restricted. As stated above, distribution and merchandising is the most important criterion for retailers in the selection of suppliers. Together with the lack of a national brand, they suffer from a strong competitive disadvantage.

Brands

67. Although brands may play a lesser role, it is worth noting that in Germany, the merged entity and Fuchs would constitute the only two suppliers of manufacturers' brands that, according to German retailers, can be sold at premium prices. The merged entity would supply the Ostmann, McCormick and Ubena brands, which together with the Fuchs brand constitute the premium price segment. The merged entity, with three out of the four brands, would be in a strong bargaining position towards retailers. Retailers' spectrum of choice will be drastically reduced by the proposed acquisition, and if they wanted to pursue their current practice of listing two or three premium brands, both the merged entity and Fuchs could probably become unavoidable partners.

68. The role of private label and store brands as facilitating entry into the market has not been confirmed by the enquiry of the Commission in Germany. It has to be noted that CPC supplies its herbs and spices for three private label or store brands (Oro, Nio and Tip, this last one together with Fuchs). McCormick is a supplier of herbs and spices for private labels in the UK (Sainsbury and Tesco). Fuchs follows a multiple brand strategy, by which it supplies to retailers a private label or store brand under exclusive arrangements (examples are Tengelmann, Rewe, Edeka). It seems that the manufacturers with premium brands themselves supply the private labels and store brands to a large extent in Germany, which might explain the relatively very low market share of private labels in this country.

Purchasing power by food retailers

69. Herbs and spices represent a relatively unimportant part of the retailers' range of products. They are bought infrequently by consumers, and probably cannot be regarded as leading products attracting customers to the retail outlets. In all probability, they do not play any major role in a supermarket either in quantitative or qualitative terms, although margins are said to be exceptionally high for retailers.

70. The parties have argued that private labels and store brands reinforce the bargaining position of retailers towards their suppliers. However, private labels in herbs and spices in Germany account for only [...] ³⁸ of the market. Moreover, as stated above, there are indications that supplies for private labels and store brands are controlled by the established suppliers and, in particular, the parties themselves.

71. The parties depend to a large extent on sales to the leading retailers. CPC and Ostmann concentrate over half of their respective turnover in the relevant market on the first three clients. On the other hand, the parties often represent a larger share of the retailers' purchases of herbs and spices but a minimal part of the retailers' total purchases.

72. On the other hand, food retailers would be facing only two alternative sources of nationwide supplies in Germany (the merged entity and Fuchs) and an extremely concentrated supply in Ireland.

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Moreover, food retailers' primary level of competition is at local level. Their main concern in respect of price competition is to obtain better conditions than their nearer competitors, rather than the absolute level of prices. This is confirmed by the indication that negotiations with retailers focus on discounts, rebates and refunds, rather than on list prices, for instance. Even if the largest retailers were to have some countervailing purchasing power, it is not clear that they would have an interest or that they would be able to constrain price increases which, after all, they may easily pass on to the end consumer.

Entry - Potential Competitors

73. The parties submit that entry into this market is not costly. They estimate the costs of a green field operation which purchases its own milling, blending and packaging equipment at some [...] ³⁹. Technology or availability of raw materials do not seem to constitute a barrier in this market. As already discussed above, access to food retailing, in particular distribution and merchandising, constitute the main barrier to entering the German retail market.
74. Industrial suppliers of herbs and spices, large groups marketing herbs and spices in other Member States (basically Ferruzzi/Ducros, BSN with Amora and Liebig, and Burns Philp with British Pepper and Euroma), and multinational food companies have been identified as possible potential entrants, since they either have the manufacturing facilities or the know-how and expertise related to marketing food products.
75. Industrial suppliers have the manufacturing facilities to process herbs and spices. To enter the retail market, they would incur costs in investments in packaging lines. These have been estimated within the range [...] ⁴⁰ by different market operators. Payments to retailers to obtain listing have been mentioned as a significant cost, together with those associated with development of a brand and initial promotion. Besides a significant initial expense, the main barrier faced by industrial suppliers is the lack of distribution, as mentioned above, together with the lack of established brands and the need to displace established suppliers. Failed attempts to enter the retail market in Germany have been reported to the Commission.
76. On a preliminary basis, none of the large groups marketing herbs and spices in other Member States, nor the large multinational food companies consulted by the Commission have indicated having concrete plans to enter the retail herbs and spice markets. [...] ⁴¹. The enquiry of the Commission shows that there are no concrete indications that the threat of entry would be credible enough to constrain the competitive behaviour of the merged entity in Germany, where barriers to entry seem an important obstacle.

Therefore, certain structural features in the market, together with the fact that possible purchasing power and the threat of entry might not constitute sufficient disruptive factors, indicate that the concentration threatens to create or to strengthen a dominant position, as a result of which effective competition would be significantly impeded on the German market.

V CONCLUSION

77. In the light of the above considerations the Commission concludes that the concentration threatens to create a dominant position as a result of which competition would be significantly impeded on a distinct German market. By contrast, such a threat to competition on the Irish market has not been identified for the following reasons:

³⁹ Deleted business secrets.

⁴⁰ Deleted business secrets.

⁴¹ Deleted business secrets.

- the parties have lost a combined [...] ⁴² market share between 1990 and 1992;
- barriers to entry in the herbs and spice market are related to distribution, and hence to the extension of the country;
- unlike in Germany, distribution by third parties does not seem to hinder the development of a high market share.

These characteristics are in strong contrast with the findings of the enquiry of the Commission in Germany and the information provided by the German authorities in their Article 9 request.

78. It follows from the above that the conditions for a referral under article 9(3) are fulfilled with regard to the German market of herbs and spices.

VI. REFERRAL

79. When the substantive conditions under Article 9 are met, the Commission may either deal with the case itself or refer it to the competent authorities of the Member State concerned, taking into account the public interest of ensuring that competition in the common market is not distorted.

The Commission had the intention of dealing with the case itself, taking into account both the threat to the distinct market in Germany and any foreseeable effects of the concentration on other markets within the Community. This option has been foreclosed as a result of an error in the calculation of the legal deadlines provided for in Article 10(1), second sentence. However, the possibility of referral under Article 9 is still open pursuant to Article 10(6) read in conjunction with Article 9(4)(a). It follows from the above that it is appropriate to refer this case to the competent authorities of the Federal Republic of Germany for the purposes of carrying out a proper competition assessment.

HAS ADOPTED THIS DECISION :

Article 1

The notified concentration between McCormick, CPC, Rabobank and Ostmann is hereby referred to the competent authorities of the Federal German Republic pursuant to Article 9 of Council Regulation (EEC) No. 4064/89 with regard to the German market of herbs and spices.

Article 2

This decision is addressed to the Federal Republic of Germany.

For the Commission

⁴² Deleted business secret.