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Case No COMP/M.3471 – Apax/Candover/The Telegraph Group

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 7(3)
Date: 19.5.2004

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.05.2004
C(2004) 202132

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 7(3) DECISION

To the notifying parties

Dear Sirs,

Subject : **Case No COMP/M.3471 – Apax/Candover/The Telegraph Group**
Request of derogation pursuant to Article 7 (3) of Council Regulation No. 139/2004[1]

1. I refer to your letter of 17 May 2004, requesting, on behalf of Apax Europe V ("Apax") and Candover Investments plc ("Candover"), and in advance of notification of a possible future concentration, a derogation from the obligation imposed by Article 7(1) of Council Regulation No. 139/2004 ("the Merger Regulation")[2] to suspend the implementation of that concentration until it has been declared compatible with the common market pursuant to a decision under Article 6(1)(b) or Article 8(2) or on the basis of a presumption according to Article 10(6).

2. The Commission may, upon request, pursuant to Article 7(3) of the Merger Regulation, grant a derogation from the above-mentioned obligation. In taking its decision, the Commission takes into account, *inter alia*, the effects of the suspension on one or more of the undertakings concerned by the concentration or on a third party, and the threat to competition posed by the concentration.

I THE FACTS

The Parties

3. Apax Europe V ("Apax") is a pan-European investment fund making investments in a range of industry sectors. Apax Europe V is comprised of nine investor partnerships

1 OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

2 OJ L 24, 29.01.2004, p. 1.

which are limited partnerships constituted in various jurisdictions. The general partner of each of the partnerships is Apax Europe V GP LP, the general partner of which is Apax Europe V GP Co Limited, a Guernsey limited company which is wholly owned by the Hirzell trust. Apax' worldwide turnover (including Apax Europe IV, which is deemed to be a single undertaking together with Apax Europe IV) amounts to approximately […] EUR.

4. Candover is a leading European arranger and provider of private equity for large European buy-outs. Candover provides fund management services, including the provision of investment management advice and services to third investment funds. Its world-wide turnover amounts to EUR […].

5. The Telegraph is a major UK newspaper publisher. It is the publisher of the largest quality daily newspaper in the UK, "The Daily Telegraph" and the second-largest Sunday newspaper in the UK, "The Sunday Telegraph". The Telegraph group achieved a turnover of around EUR […], almost exclusively in the UK.

The proposed transaction

6. The proposed transaction consists in the acquisition of all shares in The Telegraph group by a newly formed company jointly controlled by Apax and Candover. This would result in the acquisition of sole control over the target company by Apax and Candover.

7. The proposed transaction would constitute a concentration with Community dimension. The parties' world-wide turnover exceeds EUR […], and Apax, Candover and The Telegraph achieve each a turnover of more than EUR […] in the EU. The two-thirds test is not satisfied.

The reasons for the request

8. Derogation from the suspension obligation imposed under Article 7(1) ECMR is requested so as to enable Apax and Candover to submit a second round bid by 12 February 2004, as requested by the seller. Potential bidders have been informed that the offer should contain, *inter alia*, the bidder's "assessment of any competition, anti-trust or other regulatory issues that may be applicable to [the bidder's] acquisition of the Telegraph Group … together with the statement that [they] are able to execute a binding agreement without conditionality in this regard …" Apax and Candover points out that they would be effectively barred from bidding if a derogation was not granted. Other potential bidders would not be subject to the ECMR as turnover thresholds would not be met and could give unconditional offers given the voluntary nature of the UK merger control regime.

II ASSESSMENT OF THE REQUEST

9. In considering whether to grant a derogation of suspension pursuant to Article 7(3) of the Merger Regulation the Commission is required to take into account the likely effects of the suspension on one or more of the undertakings concerned by the concentration or on a third party and of the threat to competition posed by the concentration. A derogation can be granted before a notification has been filed.

Purported effects of a failure to grant the suspension

10. If a derogation from the suspension obligation imposed under Article 7(1) ECMR were not granted, Apax and Candover would effectively lose the opportunity to acquire the target on the sole basis of the acquisition by it being subject to ECMR approval and the consequent inability to submit an unconditional second round bid for The Telegraph on or before 20 May 2004.

11. The reason for this is that the seller insists on a statement that the bidder is able to execute a binding agreement without conditionality in regard to any competition issues. Other potential bidders which are reported to be interested in The Telegraph, including Daily Mail and General Trust (the publisher of the Daily Mail) would not be bound by Art. 7(1) ECMR, since an acquisition of the target by them would not constitute a concentration with Community dimension. A derogation would thus contribute to create a level playing field between the different bidders.

12. The seller is Hollinger International Inc. Lord Black, who owns 30% of the shares in Hollinger International (carrying 73% of the voting rights) had agreed to sell his interests in Hollinger International to Press Holdings, a company controlled by the Barclay Brothers (which publishes several other newspapers in the UK). The legality of this sale and other issues surrounding governance matters relating to Hollinger International have been, or are in the process of being, considered by courts in the US. As a court in the US prevented the previously proposed sale of Lord Black's interest in Hollinger International to Press Holdings, Hollinger International is now continuing with the sale of The Telegraph (and other Hollinger International assets). As other lawsuits are still pending, there is still some uncertainty surrounding the activities and/or conduct of the companies that control The Telegraph which could impact on the sales process. As such, it has been submitted that is important for Hollinger International to ensure that a sale is completed as quickly as possible.

Purported effects of a suspension on third parties

13. Granting of a derogation would put the seller in a position to negotiate with one more potential bidder.

Threat to Competition

14. The Telegraph is active on the UK market for the publishing of quality newspapers. With an average circulation of 920 000 copies a day (Monday to Saturday), the requesting party estimates its market share is around 41%, being followed by The Times (28%), and The Guardian (16%). For Sunday quality newspapers, The Sunday Telegraph ranks second with an average circulation of 710 000 copies. Its market share is estimated at 26%, after The Sunday Times (46%).

15. So far as the Commission can ascertain at this stage, the proposed concentration appears not to cause any harm to competition. Even if the existence of a single or collective dominance cannot be excluded from the outset, the concentration will neither lead to overlaps nor have vertical effects, as other companies controlled by Candover are not active in the same market as the target, in neighbouring markets or in upstream or downstream markets. It is correct that several companies controlled by Candover are, broadly speaking, active in the media sector. However, these companies are active on

other markets, either in the organisation of exhibitions (ECO, Evenser, or in the publication of trade magazines and journals (Centaur) or academic and scientific publishing (Springer). There is no overlap between these publishing activities and the newspaper publishing of The Telegraph. To the extent that there are any links between Candover and The Telegraph in advertising markets, these are, according to the requesting party, immaterial. The same is true for companies controlled by Apax. Apax has no UK newspaper interest whatsoever. Its UK publishing interests are confined to its shareholding in *The Stationery Office*, which provides contract publishing and related services to public and corporate clients. Apax is currently negotiating the acquisition of *PCM Uitgevers*, which is only active in the publication

Assessment

16. The Controlling Purchasers would suffer a serious disadvantage relative to other potential bidders for the assets if a derogation were not granted. They would be effectively excluded from the bidding process. On the other hand, prior completion of the transaction will not lead to any harm for competition. Taking into consideration the special circumstances of the case (above par. 11, 12), a derogation can be granted in the present case

III CONCLUSION

17. Based on the above considerations and in accordance with Article 7(3) of the Merger Regulation, Apax and Candover are hereby granted a derogation from the obligations imposed by Article 7(1) of the Regulation until the acquisition has been declared compatible with the common market by means of a decision pursuant to Article 6(1)(b) or 8(2) or a presumption pursuant to Article 10(6). The present decision is addressed to Apax Europe V and Candover.

For the Commission

Signed
Mrs M. Schreyer
Member of the Commission