



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12/08/2004

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 7(3) DECISION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

To the Notifying parties:

Dear Sirs,

Subject: Case NO COMP/M.3522 – Danish Crown/ HK/ Sokołów

1. We refer to the application for a derogation from the suspension obligations provided for in Article 7(1) of Council Regulation (EC) No 139/2004 (the Merger Regulation) submitted pursuant to Article 7(3) of the Regulation on 16/07/2004, and the subsequent memorandum received on 06/08/2004.
2. Under Article 7(3) of the Regulation, the Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 and 2 in order to prevent serious damage to one or more undertakings concerned by a concentration or to a third party.

I. THE FACTS

3. **Danish Crown** is a Danish cooperative slaughterhouse company with farmers as their members, who supply raw materials (pigs and cattle) to the cooperative. Danish Crown is vertically integrated in the slaughtering of pigs, cattle, meat processing and meat trading industries.
4. **HK** is a company controlled by LSO Osuuskunta, which is a Finnish cooperative with farmers as their members. HK is vertically integrated in the slaughtering of pigs, cattle and poultry, meat trading and meat processing.
5. **Sokołów** is a Polish company engaged in slaughtering of pigs, cattle, and in the processing of pig meat, beef and poultry. In addition, Sokołów is also active to a limited degree in the production of pigs for slaughter.

6. The operation concerns the proposed acquisition of Sokołów by Danish Crown and HK. In the course of the first part of the transaction, Danish Crown and HK, by way of private contracts between themselves and the present shareholders in Sokołów will jointly acquire over 50% of the shares, which will be placed in a newly created holding company (Saturn Nordic Holding AB). The shares in Saturn Nordic Holding AB will then be divided in equal parts between Danish Crown and HK, giving them a joint control over Sokołów.
7. However, given the fact that Sokołów is a publicly traded company on the Warsaw Stock Exchange, the parties will have to follow Polish rules on public trading in securities. According to those rules, anyone wishing to acquire a stake in the publicly traded company amounting to 25%, 50% or 75% of the total number of votes at the general meeting of shareholders must notify and obtain permission from the Stock Exchange Commission (“SEC”). Having obtained a clearance from the SEC, the acquirer who has become an owner of more than 50% of the total number of votes at the shareholders’ meeting is obliged to launch a public offer for sale or exchange of the remaining shares in the target company.
8. This public offer must be made immediately after the clearance from the SEC and unconditionally. The parties cannot withdraw their public offer after the call has been made. It follows that the parties, under the Polish securities laws are obliged to implement their transaction straight after the clearance from the SEC.

II. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

9. The proposed transaction will give rise to horizontal overlaps between the parties’ activities. Based on previous Commission’s decisions¹ the following product and geographic markets can be identified.

Sale of fresh meat

Product market

10. The Commission has in the previous cases defined separate product markets for the sale of fresh pork and beef, respectively.² Fresh meat includes both fresh and frozen meat which is not processed in any way. The sale of fresh meat can be sub-segmented into a (i) retail market (supermarkets, butchers, farm sales) and (ii) a catering market, constituting separate product markets. In addition the Commission has identified a separate product market for the sale of fresh meat to (iii) industrial processors. Industrial processors transform the meat into processed meat products, which is then sold to the retail market or the catering market as processed meat. The Commission has previously defined separate product markets for each type of meat used for further processing.³ Both customers and competitors consider pig meat to be distinguished from beef, lamb, poultry etc. Processors of pig meat take

¹ COMP/M.1313 – Danish Crown/Vestjyske Slagterier, COMP/M.2662 – Danish Crown/Steff-Houlberg, COMP/M.3337 – Best Agrifund/Nordfleisch and COMP/M.3401 – Danish Crown/Flagship Foods.

² COMP/M.3337 – Best Agrifund/Nordfleisch.

³ COMP/M.3401 – Danish Crown/Flagship Foods, paragraph 8-9.

into account that consumers clearly distinguish between the various types of protein contained in these products. Customers also have different diet preferences based on health and safety concerns as well as on religious beliefs in some cases. Based on this, the Commission considers each type of meat to constitute a separate product market.

Geographic market

11. The Commission has considered the geographic scope of the market for fresh pig meat to the retail market to be national in scope whereas the market for the supply of fresh pig meat to caterers and industrial processors possibly could be wider based on large imports and exports. In addition and in relation to industrial processors the origin of the meat plays a less important role indicating a wider market than national. However, for the purpose of this decision the precise scope of the market for fresh pig meat, beef and poultry can be left open as even on the basis of all alternative market definitions considered the proposed transaction will not significantly impeded effective competition in the common market or a substantial part of it.

Competitive assessment

Retail market – fresh pig meat/fresh beef

12. The parties' combined market share on an EU wide basis on the sale of **fresh pig meat** for direct human consumption would be [0-5]% in 2003. On the retail market for the sale of fresh pig meat the proposed transaction will give rise to a horizontal overlap in Finland. Danish Crown is only active on the retail market and has no sales on the catering market in Finland. HK holds a market share of [30-40]% in Finland and Danish Crown sells small volumes of pig meat to retailers. Danish Crown's market share is [0-5]% resulting in a combined market share of [30-40]%. Sokołów has no sales in Finland of fresh pig meat.
13. On an EU wide basis the parties' combined market share for **fresh beef** for direct human consumption would be [0-5]%. On the market for the sale of fresh beef in Finland Danish Crown conducts small sales amounting to a market share of around [0-5]% and HK holds a market share of [10-20]%. Sokołów is not active in Finland.
14. From the above it can be seen that the proposed transaction will not significantly impede effective competition in the EU, in particular as a result of the creation or strengthening of a dominant position on the markets for the sale of fresh pig meat or fresh beef.
15. As it can be seen from the above the proposed transaction will only on the retail market for the sale of fresh pig meat and fresh beef give rise to small horizontal overlaps in Finland. As the Danish Crown and HK combined market share will remain at [30-40]% and the increment to the total market share is small, no coordination concerns between Danish Crown and HK can be identified under Article 2(4) of the Merger Regulation.

Sale of fresh meat for further processing/industrial processors

16. The parties have overlapping activities on the market for the sale of fresh beef, pig meat and poultry for further processing. The parties' activities overlap to a certain extent in Poland, Denmark and Finland.

Beef

17. On the market for fresh beef for further processing the proposed transaction will on an EU wide basis result in a combined market share of Danish Crown, HK and Sokolów of [5-10]% in 2003. Considering national market, which might be a too narrow market definition, Danish Crown and HK's activities will horizontally overlap in Denmark and Finland. Danish Crown is by far the most important supplier of fresh beef for further processing in Denmark and holds a market share of [90-100]%. HK only has sporadic sales in Denmark and does not have regular customers in Denmark. HK's market share amount to [0-5]% in 2003. On Finnish market HK holds a market share of [10-20]% and Danish Crown had in 2003 sales not increasing a market share of [0-5]%.
18. From the above it can be concluded that the combined market shares of Danish Crown, HK and Sokolów on an EU wide market for the sale of fresh beef for further processing will not significantly impede effective competition, in particular as a result of the creation of strengthening of a dominant position.
19. Considering the limited sales of HK in Denmark and Danish Crown's limited sales in Finland the proposed transaction will not create competition concerns under Article 2(4) of the Merger Regulation in respect of coordination between the parent companies.

Pig meat

20. Danish Crown, HK and Sokolów are active in the supply of pig meat for further processing. On an EU wide market Danish Crown, HK and Sokolów combined market shares would be [10-20]% in 2003. On a national basis Sokolów's and Danish Crown's activities overlap in Poland. However, the parties' combined market share will only be [0-5]% in Poland and therefore not lead to competition concerns. Based on this it can be concluded that the proposed transaction will not significantly impede effective competition in the EU or in Poland on the market for the supply of pig meat for further processing.
21. Danish Crown and HK activities in the supply of pig meat for further processing will on a national basis overlap in Denmark and Finland. In Denmark Danish Crown holds a very strong position as its home market. Danish Crown's market share is [60-70]% in Denmark. However, HK's activities on the Danish market are very limited and only accounts for a market share of [0-5]%. Based on such a small overlap the proposed transaction is not likely to create coordination concerns on the Danish market. In Finland HK holds a market share of [30-40]% on the market for fresh pig meat for further processing. Sokolów is not active on the Finnish market and Danish Crown holds a market share of [0-5]% in 2003. Considering the combined market share of the parties of [30-40]% the proposed transaction is not likely to create coordination concerns. In view of the above it can be concluded, that the proposed transaction is not likely to create concerns under Article 2(4) of the Merger Regulation.

Poultry

22. Only Danish Crown and HK are active in the supply of poultry for further processing. In the EU Danish Crown and HK will hold a combined market share on the [0-5]% on the market for the supply of poultry for further processing. Both Danish Crown and HK conducts sale of fresh poultry for further processing in Poland. However, their combined market share will only be [0-5]% in Poland. Likewise in Denmark Danish Crown and HK's activities will overlap resulting in a combined market share of [0-5]%. In Finland HK holds a strong position on the market for the sale of fresh poultry for further processing with a market share of [40-50]%. Danish Crown has small sales of poultry for further processing in Finland with a market share of around [0-5]% in 2003.
23. Based on the above it can be concluded that the proposed transaction does not raise competition concerns under Article 2(4) of the Merger Regulation, neither on an EU wide basis nor on national markets in Denmark, Finland or Poland.

The supply of processed meat

Product market

24. The Commission has defined a separate product market for processed meat products as comprising meat from mammals or birds, containing external ingredients such as salt or spices, being raw, dried smoked or cooked. Processed meat products can vary in the raw material used (pork, beef, poultry), ingredients (spices), water content, heat treatment (smoked or boiled), portion, packaging, temperature (chilled or canned). All processed meat products constitute a combination of this 7-dimension scheme.
25. The Commission considers that there are separate product markets for a) processed pork products, b) processed beef products and c) processed poultry products. In addition the Commission has considered whether the processed meat products should be separated into (a) raw cured products, (b) processed meat for cold consumption, (c) canned meat, (d) cooked sausages, (e) pâtés and pies and (f) ready prepared dishes and components for such (convenience products).
26. As for customer groups the sale of processed meat can be separated into a retail segment and a catering segment.⁴ However, for the purpose of this decision the precise delineation of the product market can be left open since on the basis of all alternative market definitions considered the proposed transaction will not significantly impede effective competition in Finland or in the EU in particular as a result of the creation or strengthening of a dominant position on these markets.

Geographic market

⁴ COMP/M.3401 – Danish Crown/Flagship Foods, paragraph 17.

27. The Commission has considered the geographic market to be wider than national⁵, but decided later that due to suppliers ability to price discriminate between different Member States the national geographic market delimitation was justified.⁶ However, it was not ruled out that there were some markets for individual product groups of processed meat which were more wide ranging than others.
28. However, for the purpose of this decision the precise scope of the geographic market can be left even on the basis of all alternative market definitions considered the proposed transaction will not significantly impede effective competition in Finland or in the EU in particular as a result of the creation or strengthening of a dominant position on that market.

Competitive assessment

29. Considering a market for all processed pig meat products the parties combined market share in the EU would be [0-5]% in 2003. On the retail segment in the EU the parties combined market share would be around [0-5]% and on the catering segment [0-5]%. Considering an overall market for all processed meat in the EU the parties would hold an EU wide market share of [0-5]% (retail segment [0-5]% and catering segment [0-5]%). Based on the above it can be concluded that the proposed transaction will not significantly impede effective competition in the EU on the market for processed meat, in particular as a result of the creation or strengthening of a dominant position.
30. Considering the risk of coordination between Danish Crown and HK, this could be a possibility in Finland where Danish Crown and HK's combined market share exceeds [10-20]%. On an overall market for processed pig meat in Finland the Danish Crown and HK's combined market share would be [20-30]% (retail [40-50]% and catering [0-5]%). Danish Crown only has limited activities in processed meat in Finland. Even considering a separation of processed pig meat into the subgroups identified above under a-f Danish Crown's market share on the subgroups separated into retail and catering would at most be [0-5]% in one subgroup. Based on this the proposed transaction will not result in coordination concerns under Article 2(4) of the Merger Regulation based on the insignificant overlaps between Danish Crown and HK on the market for the sale of processed pig meat in Finland.

III. ASSESTMENT OF THE REQUEST

31. The derogation from suspension obligation imposed under Article 7(1) ECMR is requested so as to enable Danish Crown and HK to put an unconditional bid offer for the remaining shares of Sokołów. The ability to put an unconditional offer after the clearance from the Polish SEC would enable the parties to comply with the necessary rules on public securities in Poland. In addition, the launching of such an offer would limit any detrimental effects caused by the parties delay in putting a bid offer as a delay could lead to an uncertainty and disturbance in the stock market.

Effects of suspension of third parties

⁵ COMP/M.1313 – Danish Crown/Vestjyske Slagterier.

⁶ COMP/M.2662 – Danish Crown/Steff-Houlberg.

32. The parties claim that the granting of a derogation would not have a negative effect on any third party. On the contrary, as stated above, it would avoid the risk of disruption on the stock market.

Threat to competition

33. The parties do not consider that the proposed transaction will have any negative actual or potential effect on the competition in the EEA. As explained above, on the basis of the information available it is unlikely that the merger will give rise to competition concerns.

Assessment

34. 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.
35. Nor would the derogation, on the basis of the information provided by the parties, be likely to adversely affect the interest of any other undertaking concerned by the concentration or a third party.
36. Furthermore, while it seems unlikely, on the basis of the information provided by the parties, that the proposed concentration poses a threat to competition, and any possible threat is minimised by the terms and conditions attached to the granting of the derogation as outlined below and is, therefore, outweighed by the other factors taken into account by the Commission in this assessment.
37. Accordingly, the Commission has examined the request for a derogation made by the parties and finds it to be adequately reasoned. It further finds that having the request, and in particular the effect on the parties of failing to grant a suspension, as well as the absence of a threat to competition posed by the proposed transaction, that a derogation can be granted. However, it considers that the derogation should not be wider than is necessary to ensure equality of treatment for all parties. To this end, the derogation is granted subject to the terms and conditions set out in section IV below

IV. TERMS AND CONDITIONS OF THE DEROGATION

38. Until the Commission has adopted a decision on the compatibility of the operation, this derogation is granted solely in so far as it is necessary to acquire the shares of the parties with whom they have concluded share purchase agreements and shareholders agreement and to place a public bid for the remaining shares in Sokółów. Therefore, the parties are authorised to take the following actions:
- a) Through Saturn Nordic Holding AB to establish a majority ownership of the share capital of Sokółów by means of acquiring additional 8,000,000 shares from LEAB and further by means of acquiring the entire shareholding of HK in Sokółów (equalling 30,157,434 shares) against newly issued shares.
- b) To contract a broker as required by the Polish Securities law to organise a public bid for the remaining shares in Sokółów.

- c) To issue an offer for the remaining shares of Sokołów to the shareholders of Sokołów.
 - d) To purchase the number of shares of Sokołów from the minority shareholders which are offered to the parties during the public bid.
 - e) To take any other actions which are necessary or required in order to consummate and complete the transaction set out above, however always subject to the conditions of agreement of the Commission.
39. It is a condition of the present derogation that the parties shall not take any of the additional actions referred to in point 38(e) above without the agreement of the Commission.
40. The parties undertake until competition clearance has been granted not to vote in concert on their shares, hereunder in concert to make changes to the board of Sokołów or in concert to call for a general meeting of the shareholders. In such respect it should be noted that Danish Crown as a consequence of the shareholding acquired from LEAB and thus not as a consequence of the Shareholders Agreement entered into with HK on 24 August 2004 will appoint two new board members as a replacement of the board members who have previously been appointed by LEAB. Such replacement will take place without any general meeting of shareholders is required. Thus the change of the board of directors is a consequence of Danish Crown being a shareholder of Sokołów with a shareholding of [...] and not a consequence of the contemplated concentration.
41. The foregoing terms and conditions are necessary in order to ensure that any possible threat to competition arising from granting the derogation is neutralised until the Commission has had the opportunity to pronounce upon the compatibility of the merger with the common market in accordance with the Merger Regulation.

V. CONCLUSIONS

42. Based on the above consideration and in accordance with Article 7(3) of the Merger Regulation, Danish Crown and HK are hereby granted a derogation from the obligation imposed by Article 7(1) of the Regulation in accordance with the foregoing terms and conditions 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 Danish Crown, HK.

*For the Commission
(Signed)
Poul NIELSON
Member of the Commission*