

EN

Case No
COMP/M.3709 –
Orkla / Elkem

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 7(3)
Date: 20.1.2005



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.1.2005

SG-Greffe(2004) D/202264

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Dear Sirs,

Subject: Case No COMP/M.3709 – Orkla/Elkem

1. We refer to your application for a derogation from the suspension obligation provided for in Article 7(1) of Council Regulation (EC) No 139/2004 (“the EC Merger Regulation”) with regard to the proposed acquisition by Orkla ASA (“Orkla”) of sole control of Elkem ASA (“Elkem”) submitted pursuant to Article 7(3) of the EC Merger Regulation on 14 January 2005, as well as to your briefing paper of 13 January 2005.

I. THE PARTIES AND THE OPERATION

2. **Orkla** is a Norwegian public company, listed on the Oslo Stock Exchange, engaged in the businesses of branded consumer goods in the Nordic region, Central and Eastern Europe, in chemicals, hydro-electric power generation and financial investments.
3. **Elkem** is a Norwegian public company, listed on the Oslo Stock Exchange and the Frankfurt Stock Exchange, engaged in the business of production and supply of metals and materials to the steel, foundry, chemicals, electronics and aluminium industries and generation of hydro-electric power. Currently 46.5% of the share capital and votes in Elkem are held directly or indirectly by Alcoa Inc. (“Alcoa”), 39.85% by Orkla, 7.9% by Folketrygdfondet, 1.4% by Storebrand Livsforsikring AS and 0.9% by DnB NOR Bank ASA. The remaining 3.5% of the shares and votes are divided amongst more than 6,000 individual shareholders.
4. On 10 January 2005, Orkla entered into individual agreements with each of Folketrygdfondet, Storebrand Livsforsikring AS and DnB NOR Bank ASA for the

acquisition of all of their respective shares and votes in Elkem, bringing Orkla up to 50.03% of the shares and votes in Elkem (“the operation”). Consequently, Orkla will upon completion of the transaction have sole control in Elkem.

II. THE APPLICATION FOR DEROGATION

5. According to the application for derogation, the operation triggers the duty for Orkla to make a mandatory offer for all of the outstanding shares in Elkem under the applicable section 4-1, first paragraph, of the 1997 Norwegian Securities Act. Under that provision, an obligation to make an unconditional offer for the purchase of all shares in a Norwegian company listed on a Norwegian stock exchange is triggered when a person through acquisition becomes the owner of shares representing more than 40% of the voting rights in the company. The mandatory offer is, pursuant to the Oslo Stock Exchange interpretation, most likely triggered when Orkla receives the shares on its own account with the Norwegian Securities Registry (“VPS”). The mandatory offer price is the higher of (i) actual agreed or paid compensation during the preceding 6 month period or (ii) market value of the shares when the mandatory offer is triggered.
6. Should Orkla not be entitled to have the acquired Elkem shares transferred to its VPS account, there is a risk that someone may try to influence or manipulate the market price of the Elkem shares in order to increase the mandatory offer price to be paid by Orkla, as the offer has already been made public. Due to the very limited free float of Elkem shares, it would not be very difficult or costly to push the market price of Elkem to a higher level. [...].
7. The application states that it is made in order to protect Orkla’s business interests and to avoid the risk of facing substantial losses in the accomplishment of the mandatory offer for all the shares in Elkem. The request only covers the right to have the acquired shares transferred to Orkla’s VPS account, and Orkla will neither vote nor exercise any other shareholder rights for the shares until after the Commission has ended its examination of the operation.

III. THE CONDITIONS FOR A DEROGATION PURSUANT TO ARTICLE 7(3) OF THE EC MERGER REGULATION

8. Pursuant to Article 7(1) of the EC Merger Regulation, a concentration falling under that Regulation shall not be implemented either before its notification or until it has been declared compatible with the common market. Pursuant to Article 7(3) of the EC Merger Regulation, the Commission may, on reasoned request, grant a derogation from the obligation imposed in Article 7(1). In deciding on the request, the Commission must take into account *inter alia* the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.
 - A. THE OPERATION FALLS UNDER THE SUSPENSION OBLIGATION PURSUANT TO ARTICLE 7(1) OF THE EC MERGER REGULATION**
9. The operation consists in the acquisition of sole control in Elkem by Orkla.

10. It has a Community dimension. In 2003, Orkla had a world-wide turnover of approximately EUR 3.75 billion and an EU-wide turnover of approximately EUR [...] billion, Elkem had a world-wide turnover of approximately EUR 2.25 billion and an EU-wide turnover of approximately EUR [...] billion, and the undertakings concerned did not achieve more than two thirds of their EU-wide turnover within one and the same Member State.
11. Therefore, the operation appears to fall under the suspension obligation laid down in Art. 7(1) of the EC Merger Regulation.

B. THE EFFECTS OF THE SUSPENSION ON THE UNDERTAKINGS CONCERNED AND ON THIRD PARTIES

12. It appears from the application that the suspension of the operation may have the effect on Orkla that, when complying to the applicable Norwegian securities legislation, Orkla would incur a considerable risk to have to make an offer for the outstanding shares in Elkem for a considerably higher price after the operation has been declared compatible with the common market than the price applicable if it were able to transfer the shares acquired through the operation to its VPS account and, thus, trigger the mandatory offer immediately.
13. According to the application, a derogation from the suspension obligation would not have any effect on any legitimate right of any third party.

C. THE THREAT TO COMPETITION POSED BY THE CONCENTRATION

14. According to Orkla, the only horizontal or vertical relationship between the parties' activities are in the Nordic electricity market and in the Nordic market for financial trading of power. In addition, Orkla and Elkem are active in neighbouring markets for concrete additives. However, in none of the above mentioned markets do the parties achieve market shares that would give rise to possible competition concerns.
15. Both Orkla and Elkem have a limited activity in the production of electricity for the Nordic market via hydro-electric generation facilities located in Norway. As electricity in the Nordic countries is mainly traded through the Nordic Power Exchange ("Nord Pool"), Orkla considers the geographic scope of the electricity market to be Nordic. However, even under the assumption of a national Norwegian market the parties' combined market share would be below [0-5]%. Therefore, the parties' position in this market does not give rise to competition concerns of either a horizontal or (in view of the parties' downstream activities in power-consuming industries) a vertical nature.
16. Both parties are involved in financial trading of power through the Nord Pool exchange as well as through bilateral ("over-the-counter, OTC") agreements. Orkla estimates the parties' combined share of this market as approximately [10-20]%, thus excluding possible competition concerns.
17. Orkla produces and markets lignin, a by-product of the pulp and paper industry. Lignin is used as binder, dispersant and emulsifier in various applications. Elkem produces and markets microsilica, a side stream of ferrosilicium production. Even though both additives are used in concrete, oil well drilling and ceramics, Orkla argues that they are not interchangeable, because they fulfil different purposes in

each of the above mentioned applications. However, there is not a distinct relevant product market for lignin and microsilica respectively, as each of these products has a number of substitutes. In relation to the utilisation of lignin as a concrete additive, Orkla submits that the narrowest possible definition of the relevant product market is “water reducing agents for concrete”. In this market Orkla estimates to have a world-wide market share of roughly [5-10]%. When it comes to microsilica used as a concrete additive, Orkla submits that the narrowest possible market definition of the relevant product market is “hydraulic additives for concrete”, in which according to Orkla Elkem has an estimated global market share of [5-20]%. In an overall world-wide market for concrete additives, the parties combined estimated market share would according to Orkla be below [5-10]%. Therefore, it appears that under any possible definition of the relevant markets no competition problems would arise.

18. According to the available information, the operation does therefore not seem to pose any possible threat to competition.

D. BALANCE OF INTERESTS

19. Based on the above, it appears that, whilst the suspension obligation could seriously affect the financial interests of Orkla, no possible threat to competition caused by the operation can be identified, and a derogation does not affect any legitimate right of any third party. In addition, the application for derogation is limited to the transfer of the shares to Orkla’s VPS account, preventing Orkla from exercising any shareholders rights, thus preventing any possible irreversible effects of the requested derogation on competition or third parties. Therefore the Commission finds that a derogation can be granted in accordance with the application and to the extent requested.

IV. CONDITIONS AND OBLIGATIONS

20. According to Article 7(3), 3rd sentence, of the EC Merger Regulation, the derogation may be made subject to conditions and obligations.
21. In order to ensure that the exercise of the derogation, in accordance with the application, is limited to the transfer of the shares to Orkla’s VPS account, the derogation is made subject to the condition that Orkla does not exercise any voting or other shareholder rights attached to the shares acquired prior to the operation being declared compatible with the common market by the Commission.

V. CONCLUSION

22. Based on the above considerations, the Commission has decided, by way of a derogation from the obligation imposed by Article 7(1) of the EC Merger Regulation, to authorise Orkla to transfer the shares in Elkem that it has acquired under the share purchase agreements signed with Folketrygdfondet, Storebrand Livsforsikring AS and DnB NOR Bank ASA to Orkla’s VPS account.
23. The derogation is subject to the condition that Orkla does not exercise any voting or other shareholder rights until the operation has been declared compatible with the common market.

24. This decision is adopted in application of Article 7(3) of the EC Merger Regulation.

For the Commission

(signed)
Neelie KROES
Member of the Commission