

EN

Case No
COMP/M.5267 – Sun
Capital / SCS Group

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 7(3)
Date: 02.7.2008



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 02.7.2008

SG-Greffe(2008) 204311

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Subject: Case No COMP/M.5267 – Sun Capital / SCS Group

Request of derogation pursuant to Article 7 (3) of Council Regulation No. 139/2004

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 the Sun Capital Partners, Inc. ("Sun Capital", USA), of sole control over the trading business of SCS Upholstery plc, ("SCS Group" or the "Target", UK) submitted pursuant to Article 7(3) of the EC Merger Regulation on 30 June 2008.

I. THE PARTIES AND THE OPERATION

2. **Sun Capital** manages a group of private equity investment funds investing worldwide.
3. **SCS Group** is a UK based retailer of upholstered furniture, lounge room sofas and chairs and has no sales outside of the UK. The company is owned by the SCS Upholstery plc.
4. Sun Capital wishes to acquire sole control over the Target by a purchase of the entire share capital, therefore the proposed transaction qualifies to a concentration within the meaning of Article 3 of the EC Merger Regulation.

II. THE COMMUNITY DIMENSION

5. In the year ending on 31 December 2007, Sun Capital's worldwide turnover was EUR [...], its EEA-wide turnover was EUR [...]. In the financial year ending on 30 September 2007, The Targets' turnover was EUR [...] both worldwide and EEA-

wide which it exclusively achieved in the UK. Therefore the proposed transaction is of Community dimension within the meaning of Article 1(2) of the EC Merger Regulation.

III. THE APPLICATION FOR DEROGATION

6. Sun Capital submits that the Target is in serious financial distress. According to Sun Capital, the Target requires an immediate capital injection in the range of GBP [...] in order to be able to meet its liabilities as they fall due. As a result of not meeting its rent liabilities the company is facing increasing risks of debtors taking action to secure their credits. Under UK insolvency law the company will be obliged to file for administration immanently. In this respect, the company has provided information as to its state of insolvency as well as to the fact that some creditors (namely, landlords of outlets rented by the Target) are already acting for the satisfaction of their credits.
7. According to the application for derogation filing for administration is likely to lead to the winding up of the company should a sale of the company as a going concern not be successful immediately at this stage. Due to the administration, the Target is likely to suffer very serious reputational damage which would be likely to cause customers to cancel their existing orders, suppliers to cease delivery or to file for insolvency themselves and landlords (shop premise owners) to attempt to seize and sell stock on premises. By way of example, in relation to a number of stores landlords are about to exercise their rights of distraint. These and similar actions would have an immediate negative effect on the financial situation of the company that the company could not survive.
8. According to Sun Capital, derogation from the standstill obligation would enable Sun Capital to immediately take the measures necessary: implement a rescue plan and inject fresh funds into the Target. This is necessary in order to minimise further damage to the Target and to its dealings with customers, suppliers and employees which will likely flow from the appointment of an administrator and to repair the consequences of a continued uncertainty about the prospects for the Target. Without the proposed sale and cash injection the Target would not be able to meet its liabilities as they fall due. Therefore granting a derogation would avoid causing irreversible deterioration of the Target.

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

9. Pursuant to Article 7(1) of the 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 Merger Regulation, the Commission may, on reasoned request, grant derogation from the obligation imposed in Article 7(1). Derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where suspension provided for in the EC Merger Regulation would cause serious damage to the undertakings concerned by a concentration or to a third party. 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 TRANSACTION FALLS UNDER THE SUSPENSION OBLIGATION PURSUANT TO ARTICLE 7(1) OF THE EC MERGER REGULATION

10. Given that the proposed transaction qualifies as a concentration with Community dimension within the meaning of the EC Merger Regulation, it falls 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 THIRD PARTIES

11. The parties submit that the derogation is required to avoid significant negative financial effects to the undertakings concerned.
12. According to the parties, once the Target is placed into insolvency administration, several adverse consequences will occur as indicated above. They would be particularly serious as a result of the specificities of the Target's activities in the furniture retail sector. [...]. Therefore suppliers would immediately discontinue supplies and seize stock [...] According to the applicant, in such situation, the Target will not have the possibility to continue its trading and its financial situation is likely to rapidly deteriorate, making very difficult to preserve the company as a going concern. The applicant refers to experience from previous insolvencies in the furniture retail sector.
13. Therefore, as noted above, the appointment of an administrator to the Target is likely to result in the immediate closure of all outlets, cessation of business, dismissal of employees for redundancy, followed by a piece meal break-up of the principal assets of the Target, leading to significant losses for all unsecured creditors.
14. According to the information received in the application and further information provided upon the Commission's request, derogation from the suspension obligation would not have adverse effects on any third party. The parties have provided information about the process undertaken to identify a potential purchaser for the business of the Target. Other potential buyers have been contacted by the Target, but none of them was in the position to grant the Target the necessary financial resources in the very tight timeframe necessary in order to avoid the administration procedure.
15. Therefore, granting the derogation to Sun Capital is unlikely to give it an undue advantage over other potential buyers interested in the Target. If, on the other hand, derogation is not granted, Sun Capital will not be in the position to purchase the Target and it will be very unlikely that alternative purchasers can be found which are interested in taking over the Target as a going concern.
16. The Commission considers that the reasons given for a derogation from the suspension obligations can be regarded as exceptional. The Target is in serious financial distress and will be placed under administration procedure immanently, which is likely to resulting severe deterioration of the value of the Target. The delay in the implementation of the transaction due to the standstill obligation imposed by the EC Merger Regulation may cause this disruption to magnify.

C. THE THREAT TO COMPETITION POSED BY THE CONCENTRATION

17. The Target is a retailer of upholstered furniture, lounge room sofas and chairs only in the UK. In a potential UK market for furniture retailing it would hold a market share of only [0-2]per cent. It would have a market share of less than 5% even in the narrowest possible market, the market for upholstered products. Sun Capital has no portfolio companies directly competing with the Target. It has two companies active in the furniture sector in the UK: HomeForm, a UK retailer of fully installed kitchens, bedrooms and bathrooms with no sales of sofas and Lexington Home, a US company with *de minimis* sales in the UK.
18. Therefore, on the basis of the information provided by the parties *prima facie* the transaction is not likely pose a threat to competition within the EEA.

D. BALANCE OF INTERESTS

19. Based on the above, it appears that whilst the suspension obligation could seriously affect the financial interests of the parties and could result in discontinuation of supplies, no threat to competition caused by the operation can currently be identified, and the derogation does not appear to have adverse effects on one or more of the parties or on any third party. Therefore the Commission finds that the derogation can be granted in accordance with the application and to the extent specified below.

V. TERMS AND CONDITIONS

20. According to Article 7(3), 3rd sentence, of the EC Merger Regulation, the derogation may be made subject to conditions and obligations.
21. Until the Commission has adopted a decision on the compatibility of the operation, this derogation is granted solely insofar as it allows the acquirer to take all actions that are strictly necessary to restore the viability of the Target as a going concern following signing of the share purchase agreement.
22. The necessary actions include the following:
 - Appointing to the board of the Target a Sun Capital Representative who shall liaise with incumbent management. The Sun Capital Representative shall not form the majority of the board of the Target and shall not have any directorship in relation to any other portfolio entity controlled by Sun Capital or any affiliate of Sun Capital with activities in the UK furniture retail sector; The Sun Capital Representative shall not have any veto right except standard minority protection rights such as those relating to winding up of the company, changes in the statutes, any reduction in share capital or variation of rights attached to shares, disposal of assets etc."
 - Providing funding to the Target for specifically determined purposes;
 - Communicating and negotiating with all suppliers, landlords and other property counterparties, creditors, finance providers, credit intermediaries and other stakeholders of the Target to seek to restore the viability of the Target as a going concern.

23. The day to day operation of the Target is the responsibility of its management. Any actions by Sun Capital apart from those outlined above must be approved by the Commission after a reasoned request.
24. It is a condition of the present derogation that Sun Capital appoints, subject to the Commission's approval, an independent observer, responsible for ensuring that the businesses of the Target are operated independently from Sun Capital and that the terms and conditions of the derogation are observed. He will report to the Commission any breaches of the terms and conditions and any other matters he considers relevant to his task. The observer shall be independent of and unconnected with the merging parties. Sun Capital will ensure that the independent observer is granted all the facilities necessary to carry out his task.
25. The derogation is subject to the condition that Sun Capital does not exercise any voting or other shareholder rights for any purpose other than those mentioned above until the operation has been declared compatible with the common market.

VI. CONCLUSION

26. Based on the above considerations and in accordance with Article 7(3) of the Merger Regulation, Sun Capital is granted a derogation from the obligations imposed by Article 7(1) of the Merger 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 Article 8(1) or Article 8(2) or a presumption pursuant to Article 10(6).

For the Commission

(signed)
Margot WALLSTRÖM
Member of the Commission