

EN

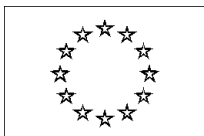
*Case No IV/M.526 -
Sappi / DLJMB / UBS /
Warren*

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 28/11/1994

*Also available in the CELEX database
Document No 394M0526*



COMMISSION OF THE EUROPEAN COMMUNITIES

DIRECTORATE-GENERAL FOR COMPETITION

Merger Task Force

Brussels, 28/11/1994

MERGER PROCEDURE
6 (1) (b) DECISION

PUBLIC VERSION

Registered with advice of delivery

To the notifying parties

Subject: **CASE N° IV/M.526- SAPPI/DLJMB/UBS/WARREN**

Dear Sirs,

1. On 21 October 1994 Sappi, DLJMB and UBS notified to the Commission their intended acquisition of Warren, a wholly owned subsidiary of Scott.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of application of Council Regulation N° 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I. THE PARTIES

3. Sappi, a South-African undertaking, has been active since 1936 in the pulp and paper industry. It is one of the largest forest products groups in Africa, a major coated wood-free paper producer in Europe and one of the world's more significant pulp and paper exporters. Its pulp mills are located in Southern Africa and Germany. It produces a large range of papers at its facilities in South Africa, Germany and UK.

Sappi's exports into Europe are handled by a Belgian based company, Sappi Europe SA and by Speciality Pulp Group, a Hong Kong based company with operations in Switzerland, South Africa and the United States. Sappi Europe is a joint venture between Hannover Papier GmbH and Sappi Europe Ltd.

4. DLJMB is a U.S. investment banking and financial services group, ultimately controlled by "Mutuelles AXA", a group of French mutual insurance companies.
5. UBS is a U.S. based, wholly owned, indirect subsidiary of Union Bank of Switzerland carrying on merchant banking activities.
6. Warren is a Pennsylvanian corporation, wholly owned by Scott. It is organised into three business divisions : coated papers, uncoated papers and speciality papers.

II. THE OPERATION

Joint Control

7. Sappi, DLJMB and UBS will acquire all the issued and outstanding shares of Warren. Immediately following the merger, Warren will be a direct, wholly owned subsidiary of SDW Holdings, and SDW Holdings will be owned by Sappi, DLJMB and UBS, with Sappi holding 87% of the common equity of SDW Holdings, DLJMB 10,8% and UBS 2,2%.
8. The Board of Directors of SDW Holdings will be composed of nine members. Sappi, UBS and DLJMB will have the right to appoint respectively 5, 1 and 2 directors (but see point 10 below). Finally, the Chief Executive Officer will be also a Board Director.
9. The Shareholders Agreement provides that the following decisions, inter alia, will require the approval of at least one director of each of Sappi, UBS and DLJMB (to the extent that they are entitled to at least one director- see point 10 below):
 - approval of annual business plan;
 - approval of budget;
 - any merger involving Holdings or Warren;
 - appointment of the Chief Executive Director and Chief Financial Officer.
10. In the Commission's experience, it is not typical for DLJMB and particularly UBS to be granted such substantial veto rights in relation to their relatively limited shareholdings in the common equity of SDW Holdings. However, the acquisition of Warren is a particularly complex financial operation which is being financed by the issue of a variety of financial securities other than common stock. ⁽¹⁾[...]. Consequently, the grant of these veto rights has to be seen in the light of the overall debt/equity financing of the acquisition.
11. It is not necessary to enter into the details of these financial operations except for the following point. Certain classes of these other financial securities have warrants attached to them which can be exercised to

¹ Deleted business secrets.

purchase new common stock of SDW Holdings. The new common stock amounts to ⁽²⁾[...] on a fully diluted basis. If these warrants are exercised by DLJMB and UBS this will result in an increase in their respective total percentage shareholding in the common stock of SDW Holdings. However, in the event that these warrants are ceded to third parties and these parties exercise their rights under the warrant, there will be a corresponding decrease in their respective total percentage shareholding (as well as that of Sappi). At this stage it is not clear whether these warrants will be placed with third parties or indeed whether the warrants will be exercised. Nevertheless, it appears that in an extreme but possible scenario, UBS' total percentage shareholding in common stock may decrease to such an extent that it would no longer be entitled under the Shareholders Agreement to a board director. In all possible scenarios, DLJMB would remain entitled to at least one board director.

12. Consequently, Sappi and DLJMB will enjoy joint control and in all but an extreme future scenario, UBS also.
13. DLJMB and UBS have both confirmed that their equity investment in SDW Holdings represents a medium to long term investment. They can therefore be expected to exercise their veto powers and, indeed there is an incentive for UBS to exercise the very small number of warrants required to preserve its veto powers.
14. As a result of the above, each of the parties (Sappi, DLJMB and UBS in the expected circumstances and Sappi and DLJMB alone in the extreme future scenario) have the right at least to veto the principal business decisions of Warren. Therefore they will have joint control.

Full Function Economic Entity

15. Warren currently possesses all the assets and resources necessary to enable it to perform all the functions of an autonomous entity and will remain as such after the completion of the proposed operation.

Absence of coordination

16. DLJMB and UBS are not active, either directly or indirectly, in the pulp and papers business. Sappi is mainly active in pulp and other paper products, while Warren only produces release paper and light weight coated paper (LWC). Moreover, it can be expected that Sappi will play a leading role in the management of Warren. The risk of any coordination between the undertakings concerned within the meaning of Article 3 of the Merger Regulation can therefore be excluded.

² Deleted business secrets.

III. CONCENTRATION OF COMMUNITY DIMENSION

17. The undertakings concerned have a combined aggregate worldwide turnover in excess of 5 000 million ECU. Sappi, Mutuelles AXA and UBS each have a Community turnover in excess of 250 million ECU, but do not achieve more than two-thirds of their aggregate Community turnover within one and the same Member State. The notified operation therefore has a Community dimension.

IV. COMPATIBILITY WITH THE COMMON MARKET

18. Although both Sappi and Warren are important producers of pulp and paper, the sales of Warren within the EEA are relatively limited. Out of total sales of ⁽³⁾[...] ECU in 1993, Warren had corresponding sales in the EEA of less than ⁽⁴⁾[...] ECU, the vast bulk of which occurred in the Community. Consequently the major impact of the concentration is outside of the EEA.
19. Nevertheless, Sappi and Warren are active in the EEA on several relevant product markets relating to the pulp and paper industry.
20. In the EEA, Sappi is active on the following markets : pulp (dissolving pulp, unbleached kraft pulp, bleached chemical pulp), fine papers (coated woodfree, uncoated woodfree), flexible packaging , tissue paper, self adhesive paper, carbonless paper, cast coated papers, newsprint, corrugated case materials, and medium density fibreboard and particleboard.
21. In the EEA, Warren has activities on the following markets : LWC and release paper.

a) Relevant product and geographical reference markets

LWC

22. LWC paper is recognised by the European paper industry as a coated woodfree paper with a weight of less than 80 grams per square meter. This product constitutes a separate, distinct market to coated woodfree fine paper. This approach is consistent with the decision of the Commission in the Torras/Sarrio case.⁽⁵⁾

Release Paper

23. The two principal end-uses of release paper are the manufacture of coated fabrics, such as vinyl and other man-made leathers used for specific end-

³ Deleted business secrets - less than 1 000 million ECU.

⁴ Deleted business secrets - less than 50 million ECU.

⁵ Case No IV/M. 166 TORRAS/SARRIO OJ C 58, 3.3.92

uses (to bind books and diaries, and to make upholstery, small leather goods) and decorative laminates.

24. The geographical reference market for LWC and release paper can be considered to be at least EEA-wide, mainly because of the high density and thus easy transportability.

b) Competitive assessment

25. Sappi does not manufacture or sell any direct inputs which are used in the manufacture of release paper or LWC.

However Sappi does produce minor volumes of bleached kraft pulp (which can be used to produce the specialised base paper for the manufacture of release paper). All of this pulp is manufactured in South Africa and is not sold to Warren. Moreover, from the economic point of view, it is highly unlikely that Sappi would be able to supply, at a competitive price, bleached kraft pulp to Warren, since Warren manufactures its release paper at a production unit based in the USA.

LWC and RELEASE PAPER

26. Sappi and Warren are active on different and separate paper product markets. Thus there is no overlap within the specific paper product markets defined above.
27. Even though Warren holds ⁽⁶⁾[...] of the EEA release paper market, the operation will not raise serious doubts because Sappi is not active in this product market and is not involved in any neighbouring market to release paper. Sappi is not active in markets such as books, diaries or small leather goods, the covers of which are usually made in part with release paper.
28. As regards LWC paper, Warren has de minimis market share (less than ⁽⁷⁾[...] in EEA for 1993).
29. Therefore the operation will not lead to any horizontal overlap, within the EEA, for paper products. The operation will not lead to any vertical integration, since pulp produced by Sappi is not used by Warren for the specific papers it sells in EEA.
30. Consequently the concentration does not create or strengthen a dominant position.
For the reasons above, the proposed concentration does not raise serious doubts as to its compatibility with the common market.

⁶ Deleted business secrets - between 25% and 50%.

⁷ Deleted business secrets - less than 1%.

V. ANCILLARY RESTRAINTS

31. The parties have asked that certain restrictions be considered as ancillary to the concentration.
32. Under Clause 5.8 of the Stock Purchase Agreement Scott covenants not to disclose non-public, confidential information relating to Warren for a period of ⁽⁸⁾[...] from the date of completion. The Commission does not consider such agreements in normal circumstances to be restrictive of competition, but to the extent that any residual element of this clause might be restrictive of competition, it can be considered as an ancillary restriction necessary to enable the purchaser take over the full value of the business purchased.
33. Clause 6.6 of the same agreement contains a number of restrictions on Scott. Essentially, Scott agrees not to compete with Warren on a world-wide basis for a period of ⁽⁸⁾[...] in relation to the manufacture and sale of⁽⁹⁾[...]. Scott also agrees not to hire certain senior employees of Warren for a period of ⁽⁸⁾[...] and not to seek their recruitment except by general media efforts for a period of ⁽⁸⁾[...]. Lastly, Scott agrees not to acquire a shareholding exceeding 5 percent in a publicly listed company engaged in any of the activities described immediately above.

These restrictions as described in Clause 6.6 are directly related and necessary for the purchasers to take over the full value of the acquired business and are covered by this decision.

*

*

*

For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation N°. 4064/89.

For the Commission

⁸ Deleted business secrets - not exceeding 5 years.

⁹ Deleted business secrets. Products manufactured and sold by Warren.