

EN

Case No
COMP/M.5969 – SC
Johnson / Sara Lee

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 7(3)
Date: 11.2.2011



EUROPEAN COMMISSION

Brussels, 11.2.2011
C(2011) 1001 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.5969 – SC Johnson / Sara Lee

Request for a derogation pursuant to Article 7(3) of Council Regulation No 139/2004¹

1. We refer to the application for a partial derogation from the suspension obligations provided for in Article 7(1) of Council Regulation (EC) No 139/2004 (the "Merger Regulation") with regard to the proposed acquisition by SC Johnson & Son, Inc. ("SCJ" or "the Applicant", USA) over Sara Lee corporation's ("Sara Lee", USA) worldwide household insect control business submitted pursuant to Article 7(3) of the Merger Regulation on 17 December 2010 ("the Application").
2. Reference is further made to subsequent correspondence exchanged with the SCJ and Sara Lee.²

¹ OJ L 24, 29.1.2004, p. 1. 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 While SCJ will be referred to as "the Applicant", SCJ and Sara Lee are commonly referred to as "the Parties".

I. THE PARTIES AND THE OPERATION

3. SCJ is a family-owned US-based company. The main business areas where SCJ is present are cleaning products, home fragrance (air care) products, insect control products, storage products and car cleaning products.
4. Sara Lee Corp. is a worldwide supplier of branded consumer goods, operating in the meats, bakery, beverage and household and body care sectors with its headquarters in the US and listed on the New York and Chicago Stock Exchanges. Sara Lee recently decided to divest itself of a number of activities that it does not any more consider its core business, including its body care and air care, shoe care businesses³, as well as its household insect control business. The acquired business in the present case is Sara Lee's worldwide household insect control business ("the Target").
5. The transaction consists of the acquisition by SCJ of sole control over Sara Lee's household insect control business. It has been concluded through an exchange of offer and acceptance letters, including a Sale and Purchase Agreement ("the Agreement"), signed by SCJ and Sara Lee on 14 June 2010.
6. SCJ will directly or indirectly acquire a series of shares, businesses and assets in Europe and worldwide, which constitute the business related to household insect control products detained by Sara Lee. The Target will consist of properties, plants and equipment, stock, regulatory consents and registrations, contracts, claims, business information, assets associated with relevant pension schemes, industrial and intellectual property rights, IT systems and goodwill.⁴ The turnover of the Target areas achieved through sales to customers outside the EEA amounts to approximately [...] of its global sales, the part relative to the activities in Malaysia being particularly relevant and accounting for approximately [...] of total global sales according to the Applicant. The Target sources all of its products for the EEA markets from third-party manufacturer. However, it owns production facilities manufacturing household insect control products in Malaysia; according to the Parties, the products manufactured by these facilities are sold exclusively outside the EEA.
7. The proposed transaction comprising the acquisition of Sara Lee's worldwide household insect control business therefore constitutes a single concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

³ The sale of Sara Lee's body care business was cleared with remedies by the Commission by decision of 11.10.2010 in case M.5658 Unilever/Sara Lee Body Care. The sale of Sara Lee's air care business was cleared by the Commission by decision of 17.6.2010 in case M.5828 Procter&Gamble / Sara Lee Air Care. On 31.12.2010 SCJ concluded an agreement with Sara Lee to acquire the shoe care business of Sara Lee.

⁴ Para. 45 Form CO.

II. UNION DIMENSION

8. The proposed transaction meets neither the thresholds of Article 1(2) nor those of Article 1(3) of the Merger Regulation. However, the Commission decided to examine the proposed transaction on 7 September 2010 following a referral request made by Spain pursuant to Article 22(1) of the Merger Regulation on 28 July 2010 and later joined by Belgium, France, Czech Republic, Greece and Italy (together with Spain "the affected Member States") pursuant to Article 22(2) of the Merger Regulation.⁵

III. THE PROCEDURE

9. The proposed transaction was notified to the Commission on 3 November 2010 pursuant to Article 4 of the Merger Regulation. After examination of the notification, the Commission concluded that the operation falls within the scope of the Merger Regulation and raises serious doubts as to its compatibility with the internal market and with the EEA Agreement. On the 22 December, the Commission therefore decided to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

IV. THE APPLICATION FOR DEROGATION

10. On 17 December 2010, SCJ applied for a partial derogation pursuant to Article 7(3) of the Merger Regulation from the suspension obligation provided for in Article 7(1) of the Merger Regulation, in order to be allowed to "execute the Concentration exclusively in the countries and territories where the Business is present outside the European Economic Area". SCJ does not further specify which tangible and intangible assets would be concerned by the partial execution.
11. SCJ argues that such a partial derogation would be justified because SCJ and Sara Lee Insecticide business outside of the EEA would suffer due to the uncertainty caused by the standstill obligation.
12. In addition, the duration of the suspension would be disproportionate due to the Article 22 referral procedure. From the first notification to a national competition authority in July 2010 to a final Commission's decision in May/June 2011, SCJ argues that a period of nine to twelve months would have elapsed during which the transaction cannot be closed.
13. Furthermore, according to the parties, the closing of the proposed transaction outside of the EEA would not pose any direct threat to competition in the European markets, because the household insect business outside of the EEA is completely separate from the business in the EEA.
14. Finally, SCJ argues that refusing a partial derogation would be an inappropriate assertion of extra-territorial jurisdiction, as the Russian competition authority has

⁵ The Portuguese Competition Authority decided not to join the referral request and has cleared the transaction under the condition of the divestment of Sara Lee's national brand Dum Dum.

cleared the transaction and the Malaysian government consciously decided not to install a merger review regime, so the transaction does not need to be notified there.

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

15. 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 the basis of a reasoned request, grant a derogation from the obligation imposed by Article 7(1) of the Merger Regulation.
16. Article 7(3) provides that, in deciding upon 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.
17. Given that it is a derogation from the general obligation not to implement concentrations, it should be granted only exceptional and justified, circumstances where the suspension would cause serious damage to the undertakings concerned by the concentration or to a third party (for instance when the target is under an imminent danger of bankruptcy).

A. The operation falls under the standstill obligation pursuant to Article 7(1) of the EC Merger Regulation

18. The operation consisting in the acquisition by SCJ of sole control of Sara Lee's household insecticide business falls under the Merger Regulation by virtue of the Commission decision to examine the case referred to it by the Spanish, Belgian, French, Italian, Czech and Greek competition authorities, pursuant to Article 22 of the Merger Regulation. In accordance with Article 22(4) of the Merger Regulation, the operation falls under the standstill obligation pursuant to Article 7(1) of the Merger Regulation to the extent that it had not been implemented on the date on which the Commission informed the parties that the referral request had been made.
19. The Commission informed the Parties about the referral request on 4 August 2010. The Parties informed the Commission on the same day that the proposed transaction had not been implemented. It follows that the operation falls under the standstill obligation pursuant to Article 7(1) of the Merger Regulation.

B. The effects of the suspension on the undertakings concerned and third parties

a. Effects on SCJ, Sara Lee's household insect control business and on third parties

SCJ's submission

20. The notifying party claims that the standstill obligation would cause negative consequences for the notifying party, the target and third parties going beyond those normally imposed by the standstill obligation. It asserts negative effects specifically for the Russian and Malaysian parts of the business.
21. First, concerning the Russian part of the business, due to seasonality of the insect control business in Russia, the negotiations with the customers would start normally in January or February. If SCJ were to take over the Target at a later stage, the Target's business would run under commercial conditions already agreed by Sara Lee and which could be incompatible with SCJ's business policy. Likewise, suppliers would have to deal with a different company during the implementation phase of the agreements.
22. In addition, SCJ claims that Sara Lee's distribution system in Russia needs to be improved and SCJ would be able to do that. According to SCJ, the Russian business would suffer irreparable harm due to significant challenges ahead with Russian distributors if SCJ does not take over the distribution prior to the coming season.
23. In respect of the Malaysian business, SCJ's claims that there is the risk that the Malaysian part of the business would lose its best, most experienced and brightest managers and workers because of the uncertainty and delay caused by the suspension. This risk would be intensified by the low unemployment rate in Malaysia.
24. Also SCJ's current insect control business in Malaysia is rather small. SCJ fears that it would not be able to obtain the necessary transitional services from Sara Lee in Malaysia as they would only be available until 31 March 2011.
25. The Malaysian government is currently initiating a vaccine testing against dengue fever and local household insect control companies are adjusting their marketing and public relation campaigns. SCJ is expressing its suspicions that the current Sara Lee Management might not be able to also adjust their marketing to this situation.

Assessment

26. Concerning the Russian part of the business, SCJ only asserts that Sara Lee's business might be suffering but does not provide any evidence of it. There is no proof that Sara Lee would mismanage the business intentionally or unintentionally, in particular given Sara Lee's contractual obligation to use its reasonable efforts to maintain the business until transfer (as confirmed by Sara Lee in reply to a request for information). The turnover figures submitted by SCJ for 2009 and 2010 even show that the business has been growing significantly at a time when the standstill clause was already applicable.

27. As regards third parties, SCJ does not explain how the fact that suppliers would have to deal with a new owner of the Target that has not negotiated the contracts would adversely impact them.
28. Also in respect of the Malaysian part of the business, SCJ has not shown evidence that the Target business would suffer due to the standstill obligation. In particular, SCJ did not provide any evidence that the personnel would abandon Sara Lee's business due to any uncertainty caused by the standstill obligation.
29. Furthermore, it is not further substantiated why the current management would not be capable to continue to manage the business properly. In respect of the transitional agreements, the Parties have already agreed on a solution to extend the transitory periods by the Amendment Agreement concluded on 31 December 2010.
30. In reply to a request for information, Sara Lee does not provide any detailed and substantiated evidence that the businesses in any of the non-EEA countries would be under extraordinary financial or other distress. Moreover, it confirmed that Sara Lee is under a contractual obligation to use its reasonable efforts to maintain the businesses until it is transferred to SCJ.
31. As SCJ does not provide any evidence for its claims, the Commission takes the preliminary view that the applicant has not shown that the standstill obligation may pose a real threat to the business, and not merely a hypothetical one, not only in respect of the Malaysian business but also in respect of other non-EEA countries where the acquired business is active.
32. In addition, there is no clear evidence that the claimed negative effects are effectively caused by the delay in the transfer of the Target to SCJ. Indeed, challenges caused by uncertainties of customers, suppliers or employees of a business transferred to a new owner as to the future of that business can often be observed in cases of major corporate restructuring. In the present case, the divestiture by Sara Lee of the Target is only one of several transactions consisting in the divestiture of non-core business activities to various acquirers.
33. Finally, the Parties do not substantiate in any detail how the standstill obligation affects the business activities in other non-EEA countries besides Russia and Malaysia, to which the request for derogation also applies.
34. Ultimately, the effects claimed by the Applicant due to uncertainty as to when the proposed transaction can be consummated do not appear to differ from those that may be expected in any other concentration subject to the standstill obligation. In particular, the principle of *ex ante* merger control as laid down in the Merger Regulation has as a consequence that the financial loss caused by the simple delay of implementation of the transaction, such as lost profits or synergy gains or administrative costs related to the transaction, cannot be regarded as exceptional circumstance as such.

b. Other elements raised by the applicant

SCJ's submission

35. SCJ claims that the duration of the suspension would be in itself disproportionate. From the first notification to a national competition authority in July 2010 to a final Phase II Commission decision in May/June 2011, SCJ argues that closing cannot take place during nine to twelve months after the first notification.
36. Although SCJ does not contest the European Commission's jurisdiction to review the present transaction, the notifying party also submits that the Article 22 referral procedure put an exceptional burden on the parties as the proposed transaction did initially only trigger merger review in two Member States. The five Member States joining the Spanish request did not have any jurisdiction, as the respective national turnover thresholds were not met.
37. SCJ further submits that the Parties could have structured the acquisition by SCJ of the Target in the form of a series of independent transactions such that the acquisition of the Target's activities outside the EEA would not have fallen under the Merger Regulation.
38. Finally, SCJ claims that by refusing to grant the derogation request, the Commission would unjustifiably and excessively assert jurisdiction. It asserts that this would be true in particular for Malaysia where there is no Merger Review System. The suspension of the execution of the concentration in Malaysia would according to the notifying party "contravene Malaysia's *stated approach to merger control policies at the time of improving relations between the EEA and Malaysia.*"

Assessment

39. As far as SCJ refers to the fact that the proposed transaction falls under the standstill obligation due to the referral under Article 22 of the Merger Regulation, this cannot as such be considered an exceptional circumstance. The referral procedure laid down in that Article is part of the general system of merger control established under the Merger Regulation which is based on the principle of *ex ante* control.
40. It is an inherent feature of the EU merger review system that the standstill obligation affects the whole concentration, as envisaged by the parties concerned and notified to the Commission and not only the part of that transaction which concerns the EEA markets. This is in conformity with the basis on which the Commission can claim jurisdiction under international law⁶, and other major jurisdictions with similar systems apply it in a comparable way. Therefore, the application of the standstill obligation to the whole transaction cannot be seen as an inappropriate assertion of extra-territorial jurisdiction.
41. As to the argument of the claimed exceptionally long duration of the standstill obligation, it should be pointed out that the Commission opened Phase II

⁶ See Case T-102/96 *Gencor / Commission* [1999] ECR II-753, point 90.

proceedings in this case pursuant to Article 6(1)(c) of the Merger Regulation, after the commitments offered by the Parties during the Phase I investigation were not sufficient to remove the serious doubts identified by the Commission. Had further reaching commitments being offered in Phase I, the merger review process and, hence, the standstill obligation might have already been concluded at the present point in time.

42. As to the argument that the Parties could have structured the operation in such a way that SCJ could have acquired certain business activities outside the EEA without being subject to EU merger control and the standstill obligation, it is up to the undertakings concerned to decide which transactions to carry out. However, according to the case law of the General Court, even several formally distinct legal transactions may be considered a single concentration, provided that those transactions are interdependent in such a way that none of them would be carried out without the others and that the result consists in conferring on one or more undertakings direct or indirect control over the activities of one or more other undertakings⁷. In such a case, those transaction would as a whole be considered a concentration and will be subject to the standstill obligation laid down in Article 7(1) of the Merger Regulation.
43. As to the argument that assuming jurisdiction over the notified operation including the transfer of the Target business in Malaysia would go against the policy choice of that country not to have a system of merger review, it is sufficient to note that by applying the Merger Regulation, including its standstill obligation, to the notified concentration as a whole, the Commission pursues the objective of the Merger Regulation to safeguard competition within the internal market and not to protect competition in any third country.

C. The threat to competition posed by the concentration

44. The sector affected by the transaction is the manufacture and sale of household insect control (or household insecticides) products. These are ready-to-use products for killing and repelling insects inside or around the home.
45. SCJ is active basically all across the EU with its brands Raid and Baygon. In smaller markets such as Belgium and Czech Republic it is active only with one of the brands. In Anti-moths, SCJ also markets Autan in Belgium, Spain and Italy.
46. Sara Lee Insecticide is active in all the Member States concerned by this decision with the exception of Italy. Contrary to SCJ, Sara Lee is active in the EU with different national and/or regional brands. Only Vapona and Catch are present in several Member States.
47. Within household insecticides, a distinction can be made based on the type of insect that the product is intended to kill. It is possible to distinguish between the following categories (i) products that kill flying insects (primarily flies and mosquitoes), typically known as “Flying Insect Killers” or “FIK”, (ii) products that kill crawling

⁷ See Case T-282/02 *Cementbouw v Commission* [2006] ECR II-319, point 109.

insects (ants, spiders and cockroaches), which are known as “Crawling Insects Killers” or “CIK”, and (iii) products designed to kill moths (“Anti-moths”).

48. In its Article 6 (1)(c) decision, the Commission decided after a first phase market investigation that the proposed transaction raised serious doubts as to its compatibility with the internal market in respect of the FIK, CIK and Anti-moths markets in France, Spain, Belgium and Greece as well as the FIK and Anti-moths markets in the Czech Republic.

SCJ's Submission

49. According to SCJ, the partial derogation requested would not pose any threat to competition in the EEA. The household insect control markets are national in scope. Sara Lee's household insect control business in the EEA is completely supplied by contract manufacturers. Any transfer of assets outside of the EEA would therefore not have any effect on the business within the EEA.
50. SCJ also states that the supply contracts for products and ingredients are different for the business within the EEA and outside of the EEA.

Assessment

51. At the current stage of the procedure, following the opening of proceedings pursuant to Article 6(1)(c) of the Merger Regulation, the proposed transaction raises serious competition issues with respect to the supply of household insecticide products in Spain, France, the Czech Republic, Belgium and Greece, where the parties' activities show significant overlaps.
52. The market investigation in First Phase has confirmed SCJ's claim that the markets are most likely national in scope.
53. However, at the present stage the Commission does not possess sufficient information in order to assess to what extent the Target's activities within and outside the EEA are integrated, in particular in terms of management, procurement of insect control products from third-party manufacturers, brands and sales. This is in particular true given the very broad and unspecific scope of the derogation request, which does not permit the Commission to precisely identify which business units, tangible and intangible assets would be subject to the requested derogation.
54. Furthermore, Sara Lee has explained that there are currently some countries outside of the EEA supplied by the France export division, namely: French Polynesia; New Caledonia; Algeria; Benin; Burkina Faso; Cameroon; Cape Verde; Gabon; Equatorial Guinea; Madagascar; Mali; Mauritania; Mauritius; Mayotte; Morocco; Niger; Senegal; and Tunisia. According to Sara Lee, these sales by the France Export division account for only a small part of Sara Lee's overall non-EEA sales. The France Export division is also supplying the French Départements d'outre-mer (DOM), which are a part of the EEA territory. Since the Parties did not provide any information with regard to the affected markets in the DOM, the Commission is currently not in a position to assess to what extent implementation of the concentration outside the EEA could affect competition in the DOM markets.

55. According to the Parties, all products supplied to the France Export division are manufactured for Sara Lee by contract manufacturers. These products are sent to France, from where they are shipped by France Export to the various territories listed above.
56. This example shows that the business activities within the EEA and outside of the EEA are not completely separated. It also shows that the Application is unclear as to which tangible and intangible assets would be covered by the partial derogation request.
57. In addition, the proposed transaction, as structured by SCJ, constitutes a single concentration and the concerns refer to the concentration as such. The Commission may conclude at the end of the in-depth investigation that the concentration is incompatible with the internal market. If the partial derogation was granted and the non EEA part of the transaction allowed to proceed, the Commission would then, pursuant to Article 8(4) of the Merger Regulation, have to require the parties to dissolve the part of the already implemented concentration so as to restore the situation prevailing prior to the partial implementation or take any measure to achieve such restoration if a dissolution is not feasible. Even in the case of final clearance decision with remedies, part of the assets which are currently also involved in businesses outside of the EEA might be necessary for the viability of the divestment business.

D. Balance of interests

58. Under the Merger Regulation the Commission enjoys certain discretion in its decision to grant a derogation to the standstill obligation provided that the *ex ante* nature of EU merger control is preserved.
59. Indeed, although formal decisions refusing to grant a derogation are rare⁸, positive decisions suspending the standstill obligation are in nearly all cases based on the absence of *prima facie* concerns.⁹
60. Based on the above, it appears that the first condition for granting a derogation that the proposed transaction should not be a threat to competition is not met as an in-depth investigation is currently ongoing on markets in the EEA. In case the Commission were to declare this single concentration incompatible with the internal market at the end of the in-depth investigation, the Commission would have to order the parties to dissolve the already implemented part of the concentration pursuant to Article 8(4) of the Merger Regulation.

⁸ This is explained by the fact that undertakings will usually informally consult the Commission on the potential outcome before making such request and will normally not formally submit or withdraw a formal request before a negative decision is adopted. Indeed, before adopting a final negative decision, a provisional decision or a statement of objections is addressed to the notifying party pursuant to Article 18 of the Merger Regulation and Article 12(1) of the Implementing Regulation. In few cases, the notifying parties dropped their request at this stage.

⁹ In one case, although some potential competition concerns were identified, a partial derogation regarding certain specific tangible and intangible assets outside the EEA was granted subject to conditions in view of specific and exceptional harmful effects on the target and third parties.

61. Moreover, SCJ did not substantiate the exceptional harm which SCJ, the target company or third parties would suffer due to the standstill obligation. Indeed, the reasons given for the alleged need for a derogation cannot be regarded as extraordinary or circumstantial, compared with the normal uncertainty that affects all merger transactions that fall within the Merger Regulation and hence subject to the principle of suspension. Such uncertainty is part of any preventive merger control system.
62. For these reasons, the Commission concludes that the benefits for SCJ that could eventually follow from a partial implementation of the concentration do not outweigh the potential competition concerns raised by the operation.

VI. CONCLUSIONS

63. For these reasons, the Commission concludes that the conditions have not been met for granting a derogation from the standstill obligation laid down in Article 7(1) of the Merger Regulation, pursuant to Article 7(3) of that Regulation.
64. Under the terms of Article 18(2) of the Merger Regulation, a decision pursuant to Article 7(3) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.
65. Within one week from notification of this Decision, SCJ may make known its views on this provisional decision, pursuant to Article 12(2) of the Commission Regulation No 802/2004. In accordance with the same provision, in such a case the Commission shall take a final decision annulling, amending or confirming this Decision. If SCJ does not make known its views within the time limit set, this Decision shall become final at the expiry of the that period.

For the Commission

(signed)
Joaquín ALMUNIA
Vice-President