EN

Case No COMP/M.6137 - CITIGROUP / MALTBY ACQUISITIONS LIMITED

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 7(3)
Date: 01.02.2011

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 01.02.2011
C(2011) 699 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 parties

Dear Sirs,

Subject: **Case No COMP/M.6137 - CITIGROUP / MALTBY ACQUISITIONS LIMITED**
Request for derogation pursuant to Article 7(3) of Council Regulation Nº 139/2004

1. We refer to your application of 1 February 2011 for a derogation from the suspension obligation provided for in Article 7(1) of Council Regulation (EC) No 139/2004 ("the Merger Regulation") with regard to the proposed acquisition by Citigroup Inc, via its subsidiary Citibank N.A., acting through a London Branch ('Citi'), of Maltby Acquisitions Limited ('MAL', UK) which holds all the share capital in EMI Group Ltd, and its subsidiaries (hereafter referred to as the 'EMI group') submitted pursuant to Article 7(3) of the Merger Regulation.

I. THE PARTIES AND THE TRANSACTION

2. Citi is a subsidiary company of Citigroup Inc, a diversified global financial services holding company listed in the USA.

3. EMI is a music recording and music publishing company. EMI's music recording division, EMI Music, signs and develops artists, markets and promotes them and distributes their music to retailers. EMI's music publishing division, EMI Music Publishing, is involved in discovering, signing and providing creative and financial support to authors/composers, promoting the use of their music, licensing the authors' work to those who wish to use the works, and collecting revenues from those users.

4. All the share capital of EMI is held by the holding company MAL (which has no business activities outside of EMI). All of the share capital of MAL is in turn held by the holding company MIL.

5. All of the share capital of MIL is held by MHL, a holding company ultimately controlled by Maltby Capital Limited ('MCL', UK). MCL is an investment vehicle controlled by investments funds managed by Terra Firma Investments (GP)2 Limited and Terra Firma Investments (GP)3 Limited which form part of the Terra Firma Group.

6. Terra Firma acquired control over EMI in 2007.[1] Citi financed all of the initial debt (approximately GBP 2.64 billion) whilst Terra Firma provided approximately GBP 1.5 billion in equity (subsequently increased by a further GBP 250 million).

7. The group of companies below the holding company MHL holds a number of loan facilities with Citi ('Facilities Agreements'). As of 31 December 2010, the total outstanding debt currently owed to Citi under the Facilities Agreements (as well as certain hedge agreements) is in the vicinity of GBP […].

8. The annual statements for MIL dated 31 March 2010 indicated negative equity of GBP 1.315 billion (approximately EUR 1.53 billion). Similarly, MIL's unaudited balance sheet, dated 30 September 2010, reported negative equity of GBP 1.216 billion. According to a third party valuation,[2] EMI's enterprise value as at 10 January 2011 was approximately GBP […].

9. MIL, MAL, EMI Group Ltd and around 270 EMI group subsidiaries worldwide are borrowers and/or guarantors of the Citi Debt. As part of an extensive security package, in 2007 MAL entered into a share pledge granting security in favour of Citi over all of MAL's shares owned by MIL.

10. On 1 February 2011 the directors of MIL declared an event of default under the Facilities Agreements as a result of balance sheet insolvency.

11. Following this declaration, Citi called on its right to accelerate the debt owed under the Senior Facilities Agreement and secured by MIL's assets and demanded repayment. MIL was unable to repay and was placed in administration. Administrators were appointed.[3]

12. The proposed transaction contemplates a sale by the administrators of MIL's shares in MAL to Citi. The share and purchase agreement in relation to this proposed transaction was signed between MIL, the administrators and Citi on 1 February 2011. Closing of the transaction was made conditional upon receipt of a favourable decision regarding a derogation pursuant to Article 7(3) of the Merger Regulation.

13. As a result of the proposed transaction, MIL will be 'left behind' with no assets and will remain in administration until it is liquidated/dissolved. Simultaneously with the transfer of the EMI business to Citi, Citi will release the EMI group from a proportion of its bank debt down to an agreed appropriate amount in exchange for MAL issuing new shares (known as a 'debt for equity' swap) to Citi. Through this debt restructuring, the EMI group companies will have a solvent balance sheet and can continue operating as a going concern.

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1 The transaction was reviewed by the Commission (case COMP/M.4732 - Terra Firma/EMI, Commission decision of 11 July 2007). Through that transaction, the undertakings Terra Firma Investments (GP)2 Limited and Terra Firma Investments (GP)3 Limited acquired control of the whole of EMI via a newly founded vehicle company Maltby.

2 Valuation carried out by American Appraisal and dated 10 January 2011.

3 Administrators are independent officers of the Court and licensed insolvency practitioners. Under English insolvency law, the administrators of MIL have the power to sell the assets of MIL.

14. The proposed transaction is meant to preserve the maximum value possible for the EMI group and Citi by avoiding the negative consequences which an insolvency of the holding company MIL might trigger for the EMI business.[4]

15. The proposed sale of the EMI business takes place in the context of a pre-packaged administration ('pre-pack'), that is, a pre-arranged sale by a company in administration of its business and assets that completes almost immediately following the appointment of the administrator. According to Citi, a pre-pack arrangement is used under English Law notably where the value of the company is so clearly below the value of the debt or the administrator is concerned by the impact of a delay on the value of the business. Indeed, according to the notifying party, a main objective of a pre-pack arrangement is to rescue a company as a going concern.

II. THE EU DIMENSION

16. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million. Each of them has an EU-wide turnover in excess of EUR 250 million, and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The proposed transaction therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

III. THE APPLICATION FOR DEROGATION

17. As mentioned under paragraph 11, on 1 February 2011, MIL was placed in administration following a declaration by MIL directors that the company was balance sheet insolvent.

18. Citi submits that, if the EMI group were to sit under MIL while in administration for a prolonged period of time, such as the 25 working day period of review of the proposed transaction under the Merger Regulation, this would lead to further financial difficulties and to the decline of EMI's business in terms of business value and reputation.

19. Citi submits that a derogation from the suspension obligation imposed by Article 7(1) would allow it to preserve the maximum value possible for the EMI group as it would allow it to immediately implement the purchase of the EMI business and the restructuring of the debt.

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

20. 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).

21. Article 7(3) of the Merger Regulation provides that, 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.

4 Please see paragraphs 25 and following below.

22. Derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where suspension provided for in the Merger Regulation would cause serious damage to the undertakings concerned by a concentration, or to a third party.

A. THE OPERATION FALLS UNDER THE SUSPENSION OBLIGATION PURSUANT TO ARTICLE 7(1) OF THE EC MERGER REGULATION

23. As explained above, the request for derogation has been submitted in relation to the proposed acquisition of sole control of MAL by Citi. The share and purchase agreement in relation to this proposed transaction was signed between MIL, the administrators and Citi on 1 February 2011.

24. According to a draft short Form CO submitted by Citi, the transaction meets the turnover thresholds of Article 1(2) of the Merger Regulation.

25. Therefore, the operation falls under the suspension obligation laid down in Article 7(1) of the Merger Regulation.

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

26. The parties submit that a suspension would have significant negative financial effects on the business of the EMI group.

27. The Commission has granted a derogation in previous cases (which did not present competition concerns) with the purpose of preserving the financial or competitive viability of the target business. In particular, if the target is on the brink of bankruptcy and only immediate implementation of the deal would avoid a further grave deterioration of the situation or would prevent a significant deterioration of the assets to be acquired, a derogation may be granted.

28. In this case, the parties submit that the proposed operation, and in particular the immediate implementation of the "pre-pack" arrangement, would avoid a number of effects that could seriously damage the viability of the EMI group business.

Risk of administration for EMI operating companies

29. The administration of MIL does not automatically make all the 270 operating companies of the group enter the administration procedure, but risks having a knock-on effect based on the fact that the companies are guarantors of the Citi Debt. MIL's default and administration would expose the guarantors to the request for the full payment of Citi's credit.[5] According to the notifying party, this would create strong uncertainties upon the directors of the various companies around the world who would seek their own legal advice as regards their potential personal liability, and increase the risk of a significant number of directors of EMI companies of the group filing for bankruptcy.

30. Furthermore, there are hundreds of millions of pounds of intercompany debts between the EMI group companies. For the 270 EMI companies referred to in paragraph 9 above, these intercompany debts are subordinated to the Citi Debt. The default resulting from MIL's balance sheet insolvency and acceleration and demand of the Citi

5 In this regard, Citi has indicated that, shortly before the appointment of the administrators to MIL and the signing of the SPA, it has provided a forbearance letter for the benefit of the EMI group members, other than MIL.

Debt resulted in the freezing of this intercompany financing, effectively blocking the repayment of the intercompany debts between nearly 300 subsidiaries. According to Citi, this might result in companies within the EMI group filing for insolvency or pre-insolvency during the 25 working day period of review of the proposed transaction.

31. The default resulting from MIL's balance sheet insolvency and acceleration and demand of the Citi Debt resulted in the blocking of cash pooling arrangements between EMI companies[6] (and resulting payments from companies with available cash to companies which would have an overdraft). This might also result in companies within the EMI group filing for insolvency or pre-insolvency during the 25 working day period of review of the proposed transaction.

32. The purpose of the 'pre-pack' arrangement adopted in the case at hand (and in particular the swift closing of the proposed transaction) is precisely to avoid these uncertainties and risk of cascade of bankruptcies of the 270 EMI group operating companies all over the world.

Risk of deterioration of the EMI business

33. The parties submit that if MAL (and therefore the EMI group) were to sit under a company in administration for a prolonged period of time, including the 25 days required for merger review, the directors of EMI group companies (in the perspective of avoiding liability in relation to the *par condicio creditorum*) would be likely to […]. Even if the default could – pursuant to the contracts – normally be cured within a certain "grace period", this period is often shorter than the 25 working days suspension period.[7]

34. Moreover, the suspension period could have a detrimental effect on the possibility for the EMI group to retain its most valuable artists, who guarantee the highest revenues in terms of royalties and album launches. The notifying party submitted that EMI is (i) […].

35. According to EMI's CEO, a public knowledge that EMI sits in administration without a clear and immediate solution would "tip the balance" such that EMI's ability to hold the existing talent would be severely undermined. Given that the business of EMI is based on goodwill, image and personal relationships at all level of the business, a termination of the relationships due to a deteriorated image of EMI caused by perceived financial instability could not be easily re-established.

36. EMI has submitted projections for its recorded music business (which represents […]% of EMI's revenues) showing that the long-term, ongoing effects of […] would lead to a loss of market share of […]%. A loss of even […]% market share in […]. As regards the overall business, the projected EBITDA impact of revenue loss ranges from GBP […].

C. THE THREAT TO COMPETITION POSED BY THE CONCENTRATION

37. The notifying party submitted a draft short Form CO.

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6 That is, a common bank facility allowing for available cash to be netted off/pooled with liabilities across different companies within the cash pool.

7 As a way of example, the copyright agreements with important songwriters such as Alicia Keys, Usher, Beyonce, Aerosmith and Norah Jones all contain termination provisions (applicable *inter alia* in the event of a default on payment) with "grace periods" to cure the default that vary between 15 and 30 *calendar* days.

38. MAL, through its subsidiary EMI, is active in the markets for recorded music, music publishing and online distribution of music. Citi is active in the financial services sector and does not have any portfolio company in which it has a controlling interest that are active in the markets where MAL, through its subsidiary EMI, is active.

39. Given the lack of any type of horizontal or vertical overlap, the transaction would not give rise to any competition concern.

D. CONCLUSION

40. The Commission concludes that the requirements set out in Article 7(3) for granting the requested derogations from the suspension obligation are met, for the reasons expounded above.

E. BALANCE OF INTERESTS

41. Based on the above, it appears that whilst the suspension obligation could seriously affect the financial situation of target, no threat to competition caused by the operation can currently be identified, and 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 derogation can be granted in accordance with the application and to the extent specified below.

V. CONCLUSION

42. The Commission considers that the reasons given for derogation from the suspension obligations meet the requirements set out in Article 7(3) of the Merger Regulation.

43. On the basis of the above considerations, and in accordance with Article 7(3) of the Merger Regulation, Citi is granted a derogation from the obligations imposed by Article 7 (1) of the Merger Regulation in accordance with its application and until the Commission takes a final decision under the relevant provisions of the Merger Regulation.

For the Commission

signed
Joaquín ALMUNIA
Vice-President