



EUROPEAN COMMISSION

DG Competition

Case M.8385 - PILLARSTONE / FAMAR

Only the English text is available and authentic.

REGULATION (EC) No 139/2004

MERGER PROCEDURE

Article 7(3)

Date: 27.2.2017



Brussels, 27.2.2017
C(2017) 1463 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying party:

Subject : **Case M.8385 - PILLARSTONE / FAMAR**
Commission decision pursuant to Article 7(3) of Council Regulation
N° 139/2004¹ and Article 57 of the Agreement on the European
Economic Area²
Request for derogation

Dear Sir or Madam,

(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 Merger Regulation") with regard to the proposed acquisition by Pillarstone Europe LLP ("Pillarstone", UK), part of the KKR Group ("KKR", USA), of sole control over Famar SA ("Famar", Luxemburg) submitted pursuant to Article 7(3) of the Merger Regulation on 27 January 2017.

1. THE PARTIES AND THE TRANSACTION

- (2) Pillarstone is a fund which has been established notably as an investment vehicle to provide companies with new capital. It is indirectly controlled by KKR, a global investment fund with interests in a variety of sectors.
- (3) Famar is an international group of companies active in the market for the contract manufacturing of pharmaceutical and cosmetic products on behalf of third parties.

¹ OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). 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 OJ L 1, 3.1.1994, p.3 ("the EEA Agreement").

It operates through eleven manufacturing plants, three development centres and four distribution sites in five European countries (France, Greece, Italy, Spain and the Netherlands). Famar is presently controlled by the Marinopoulos Group.

- (4) According to information provided by the parties, the Transaction concerns the acquisition by Pillarstone of sole control over Famar. The operation will be carried out by virtue of an Equity Advisory Agreement ("EAA") entered into by a subsidiary (to be newly created) of Pillarstone with the following four banks holding loans on which Famar defaulted (the "Greek Banks": Alpha Bank, Eurobank, National Bank of Greece and Piraeus Bank). The Greek banks will convert outstanding loans into equity and provide fresh funds to Famar in the context of its restructuring. Famar's shares will be distributed among the four banks in proportion to their respective contributions, pursuant a new Articles of Association of Famar.
- (5) Pillarstone states that it will not hold shares of Famar's capital. However, Pillarstone claims that it will exercise – through the directors (three members (out of five)) that it will indirectly appoint at the board of Famar – voting rights with a view to determining the strategic commercial behaviour of Famar. In particular, Pillarstone will have the power to decide alone *inter alia* on this company's and its subsidiaries' budget and on investments up to a certain level (Articles 16 and 21.4 of the Articles of Association). The main strategic decisions (including the business plan and the budget) will be taken by simple majority of the Board of Directors. Likewise, pursuant to Article 3.1 and 3.2 of the EAA, Pillarstone will appoint the company's new executive management and assist/supervise it in the elaboration of the company's new business plan.
- (6) Also, Pillarstone states that there is a possibility that, in a second stage, it will acquire the entire share capital of Famar from the Greek banks.
- (7) Pillarstone claims that it will have sole control over Famar on a lasting basis, whether the second stage of the Transaction is implemented or not. Indeed, if the second stage is implemented Pillarstone will acquire Famar's shares and it will have clear sole control over Famar. If the second stage is not implemented then Pillarstone will maintain its role as Equity advisor.

2. EU DIMENSION

- (8) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (KKR [...] EUR and Famar [...] EUR). Each of them has an EU-wide turnover in excess of EUR 250 million (KKR [...] EUR and Famar [...] EUR), but 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.

3. THE APPLICATION FOR DEROGATION

- (9) Pillarstone submits that Famar is facing serious financial and structural difficulties that threaten its viability. Pillarstone explains that since the last quarter of 2015, Famar has been confronted with a steady decline of its industrial and commercial performance.

- (10) As a consequence, on 8 August 2016 Famar opened a conciliation proceeding before the Paris Commercial Court. Famar, Famar's creditors and ultimate shareholders have reached an agreement to the effect that they will provide the necessary financing to ensure the continued existence and the viability of Famar in return for a change of control of the Famar Group, which will take place as with the Transaction.
- (11) Failure to ensure the closing of the Transaction by end of February 2017 will result in the funding being cancelled and Famar becoming insolvent, which would cause serious damage to Famar's reputation, goodwill and viability and put 2951 employees at risk.

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

- (12) 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).
- (13) 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.
- (14) 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 Transaction falls under the suspension obligation pursuant to Article 7(1) of the Merger Regulation

- (15) The Commission considers that the proposed Transaction constitutes, on the basis of the information provided by the parties so far, a concentration within the meaning of Article 3 of the Merger Regulation and would have an EU dimension according to Article 1(2) thereof. Hence the operation falls under the suspension obligation laid down in Article 7(1) of the Merger Regulation. Moreover, at this stage and for the purposes of the present decision, it is not necessary to conclude on whether Pillarstone will acquire sole control over Famar. This issue will be decided after the proposed transaction is notified to the Commission.

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

- (16) The Parties submit that the Transaction will not have a negative effect on third parties. Absent the Transaction, Famar would cease to be a viable business, would likely be unable to reimburse its creditors and may have to be subject to insolvency proceedings. Accordingly, the Transaction, a precondition for Famar's debt restructuring, will avoid the negative impact on Famar's creditors and customers.

- (17) The Commission considers that the suspension obligation imposed by Article 7(1) could lead to serious harm to Famar while no negative effects are likely to arise in relation to third parties from providing a derogation from this obligation.

C. The threat to competition posed by the concentration

- (18) Famar is active in the provision of contract manufacturing services in the pharmaceutical sector. In essence, Famar is a sub-contractor providing its manufacturing services for medicines and molecules, in relation to which it does not own the IP rights. As contract manufacturer, Famar has no access to the downstream market for the supply of medicines to the market.
- (19) Two of KKR's portfolio companies, Gland Pharma and Capsugel, are also active in the pharmaceutical sector. Both companies are in the process of being divested. The Transaction involving Gland Pharma has been cleared by the competition authorities in China and India and the Parties indicate that no other clearances are required; closing is expected to take place in the first quarter of 2017. The Transaction involving Capsugel has not yet received all necessary antitrust clearances (including that from the European Commission).
- (20) Famar, Gland Pharma and Capsugel are active in the following areas.
- (21) Famar provides contract manufacturing of finished dose pharmaceuticals (FDPs) for third parties, in particular it manufactures the following groups of pharmaceutical forms and conditions: solids, sterile liquids and semi-solids, non-sterile liquids and semi-solids, and injectables. To that end Famar explains it only uses standard technologies that are widely available. As regards the manufacturing of capsules, the only type of capsules Famar purchases are hard gelatine capsules. Famar is focussed in the EEA market (which accounted for 84% of sales in 2015).
- (22) Gland Pharma is active in the development and manufacturing of generic medicines injectables, mainly for customers in India and in the USA. Gland Pharma also purchases and sells contract manufacturing of injectables for or from third parties.
- (23) Capsugel is primarily active in the supply of capsules, an input for manufacturing FDPs. Also Capsugel provides some contract manufacturing of FDPs for third parties.
- (24) Accordingly, the Transaction will potentially create horizontal overlaps and vertical links between the parties.

Horizontal overlaps in contract manufacturing

- (25) In previous decisions, the Commission has considered that within the pharmaceutical contract manufacturing market a number of sub-markets may be defined, corresponding in each case to the type of pharmaceutical form (e.g. solids, semi-solids, injectables) which is manufactured and also in some cases to the manufacturing processes (types of active ingredients involved, toxicity, sterile environment, etc.). As regard the geographic scope of these markets, the Commission has considered that they could be worldwide or at least EEA-wide.

- (26) Famar and Gland Pharma overlap in the markets for the contract manufacturing of injectables and of solids.
- (27) As regards the contract manufacturing of injectables, the combined market share in 2015 is [0-5] % (Gland Pharma [0-5] %, Famar [0-5] %) at worldwide level and less than 10% at EEA level (Gland Pharma < 1%, Famar [5-10] %).
- (28) As regards the contract manufacturing of solids, the combined market share in 2015 is [5-10] % (Capsugel [0-5] %, Famar [0-5] %) at worldwide level and less than 15% at EEA level (Capsugel < 5%, Famar [5-10] %).
- (29) In addition the Notifying Party submits that Famar does not hold any patented technology, knowhow, manufacturing technique or dedicated manufacturing site that would allow it to distinguish itself from competitors by being in a position to supply certain types of products and services that other contract manufacturers are not in a position to manufacture.
- (30) On the basis of the information provided by the submitting party, the Commission concludes that the operation is unlikely raise *prima facie* any competition concern as regards horizontal overlaps, in particular in view of the low combined market share of the parties that would be less than 20% in any plausible scenario.

Vertical relationships

a) Gland Pharma and Famar

- (31) The parties state that Gland Pharma does not purchase contract manufacturing services from companies established in the EEA, hence to Famar. On the worldwide level Gland Pharma, purchases contract manufacturing services that represent [0-5] % of the worldwide contract manufacturing market. Therefore, no meaningful vertical relation would take place between Famar and Gland Pharma as a consequence of the Transaction.

b) Capsugel and Famar

- (32) There is another vertical relationship as Famar purchases capsules³ from Capsugel as input for the manufacturing of finish dose pharmaceuticals (FDPs). The Parties submit that the relevant market covers all solid oral dosage delivery mechanisms ('SODDM').⁴
- (33) In 2015 Capsugel has a [10-20] % market share on the worldwide SODDM market and a [10-20] % market share on the same market at the EEA level. Famar's market share on the market for the contract manufacturing of solids in 2015 was [0-5] % at worldwide level and [5-10] % at EEA level.
- (34) However, in previous decisions, the Commission has considered a narrower market definition, segmenting the SODDM market according to the dosage delivery mechanisms and the types of capsules (hard gelatine, soft gelatine, liquid

³ Capsules are one form of oral dosage in which a drug can be delivered.

⁴ SODDM includes empty hard gelatine capsule shells, empty alternative polymer capsule shells, soft gelatine capsules, tablets, liquid-filled capsules, etc.

and alternative polymer capsules)⁵. Capsugel's market share in 2015 for hard gelatine capsules is [50-60] % at the worldwide level and [70-80] % at EEA level; for soft gelatine capsules it is [5-10] % at the worldwide level and [5-10] % at EEA level; and for alternative polymers capsules it is [50-60] % at the worldwide level and [50-60] % at EEA level.

- (35) Famar only purchases hard gelatine capsules for its operations⁶. In 2016 these purchases amounted to EUR [...] which is [0-5] % of the total sales of hard gelatine capsules at the worldwide level. Capsugel makes up an important part of Famar's purchases of hard gelatine capsules; in 2015 it represented [...] % of its purchases and [...] % in 2016.
- (36) Considering hard gelatines capsules as a separate relevant market, one vertically affected market upstream arises at the worldwide and EEA levels.
- (37) For the reasons set out below, it is unlikely that the vertical relationship between Famar and Capsugel would raise any competition concerns.
- (38) First, input foreclosure (*i.e.* Capsugel restricting its supply of capsules to Famar's competitors post-merger) is unlikely as:
- (a) input foreclosure would not be profitable, and therefore there would be no incentive to do so. To foreclose Famar's competitors, Capsugel would have to reduce its production by more than [90-100] %, given that the potential additional demand by Famar is a small fraction of what Capsugel supplies to other clients. Additionally, given that Famar is a small player in the market and uses standard technologies that are widely available (so none of Famar's customers are locked in with regard to any product manufactured by Famar under contract), it would not be able to raise prices to downstream customers.
 - (b) there are alternative capsule suppliers in the market including ACG, Qualicaps, Suheung and Farmacapsulas, that would be in the position to supply at least in part the customers that Capsugel would refuse to supply.
 - (c) most of Capsugel's customers (pharmaceutical companies) are also Famar's customers for contract manufacturing services. In this context, a strategy of denying access to capsules would also be detrimental to Famar's interests.
- (39) Second, customer foreclosure (*i.e.* Famar only supplying itself at Capsugel, in order to deprive other capsule manufacturers of a sufficient customer base) would also be unlikely to cause any competitive harm because the Famar's demand of hard gelatine capsules is very limited compared to the demand of third parties. The volumes Famar buys from other parties than Capsugel are very small (less than [0-5] % for the EEA and less than [0-5] % worldwide in 2015). Where

⁵ See case M.6231 - KKR/ Capsugel, paragraphs 10 to 15; case M. 5476 – Pfizer/ Wyeth, paragraphs 101 to 107.

⁶ In 2015 Famar derived [...] % of its sales of solids from pharmaceutical products in hard gelatine capsules.

Famar to divert this demand towards Capsugel, there would be no impact to other capsules suppliers.

- (40) In conclusion, on the basis of the information provided by the Notifying Party, the likelihood that the Transaction would raise serious doubts is very limited, both regarding horizontal overlaps and vertical relationships or with regard to negative effects on a third party and to competition.

Conclusion

- (41) Therefore, on the basis of the information provided by the parties, it appears *prima facie* that the Transaction is not likely to pose a threat to competition within the EEA.

D. Balance of interests

- (42) Based on the above, it appears that whilst the suspension obligation could seriously affect financial situation of the 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.

5. TERMS AND CONDITIONS

- (43) According to Article 7 (3), 4th sentence, of the Merger Regulation, a derogation from the suspension obligation laid down by Article 7 (1) thereof may be made subject to conditions and obligations in order to ensure effective competition.
- (44) On 16 February 2017 Pillarstone committed itself to submit a complete notification of the Transaction to the Commission without delay and, in any case, within one month from the adoption of this Article 7(3) decision.
- (45) Based on the preceding considerations, the Commission has decided to grant a derogation from the suspension obligation with regard to the proposed concentration subject to the following conditions:
- Pillarstone shall submit a complete notification of the Transaction to the Commission without delay and, in any case, within one month from the adoption of the Article 7(3) decision in order to allow the assessment of the compatibility of the proposed concentration with the internal market and the EEA agreement.
 - Until the Commission has adopted its decision on the compatibility of the Transaction, this derogation would allow Pillarstone and the Greek banks to take only actions which are necessary to restore Famar's viability.

6. CONCLUSION

- (46) The Commission considers that the reasons given by the notifying parties for derogation from the suspension obligations meet the requirements set out in Article 7(3) of the Merger Regulation.
- (47) On the basis of the above considerations, and in accordance with Article 7(3) of the Merger Regulation and Article 57 of the EEA Agreement, Pillarstone 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 and the EEA Agreement by means of a decision pursuant to Article 6(1)b or 8(2) or a presumption pursuant to Article 10(6).

For the Commission

(Signed)

*Margrethe VESTAGER
Member of the Commission*