EUROPEAN COMMISSION

DG Competition

Case M.9741 - INES KAINDL / PETER KAINDL / M KAINDL

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(a) INAPPLICABILITY
Date: 24/09/2020

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EUROPEAN COMMISSION

Brussels, 24.9.2020
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PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Ines Kaindl
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Switzerland

Subject: **Case M.9741 – INES KAINDL/PETER KAINDL/M KAINDL**
Commission decision pursuant to Article 6(1)(a) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 20 August 2020, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Ines Kaindl acquires joint control over M. Kaindl OG (hereinafter: 'M. Kaindl' or 'the Target') by way of succession from her deceased father Ernst Kaindl (hereinafter 'the Transaction'). The other controlling party in M. Kaindl is Peter Kaindl. Peter Kaindl and Ines Kaindl are referred to hereinafter as the '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').

1. PROCEDURE

(2) On 6 September 2019, Ines Kaindl sent a letter to the services of the Directorate-General for Competition ("DG COMP"), requesting a confirmation that the acquisition of joint control in M. Kaindl by Ines Kaindl does not constitute a concentration within the meaning of the Merger Regulation.

(3) On 24 September 2019, DG COMP provided Ines Kaindl with a comfort letter (the "First Comfort Letter"). In the First Comfort Letter, DG COMP informed Ines Kaindl that she did not seem to qualify as a person in control of an undertaking within the meaning of Article 3 of Council Regulation (EC) 139/2004 (the "Merger Regulation") and that therefore there is no obligation to notify the Transaction under the Merger Regulation.

(4) On 23 December 2019, the Commission received a Case Team Allocation Request from Peter Kaindl for the Transaction.

(5) By a letter dated 5 February 2020, Peter Kaindl asked DG COMP to confirm that the conclusion reached in the First Comfort Letter was still valid taking into account certain new information.

(6) On 1 April 2020, DG COMP confirmed its conclusion set out in the First Comfort Letter in a further comfort letter by taking into account the submissions by Peter Kaindl, including the submissions dated 13 February 2020, 18 February 2020 and 3 March 2020, various documents annexed to these submissions, and in particular the opinions by the Professors Oberhammer, Graf and Schenker (the "Second Comfort Letter"). The Second Comfort Letter was addressed to Ines Kaindl and a copy sent to Peter Kaindl.

(7) On 25 May 2020, Peter Kaindl informed the Commission that he intended submitting a notification of the Transaction notwithstanding DG COMP's confirmation of its position in the Second Comfort Letter.

(8) On 9 June 2020, Ines Kaindl also informed the Commission that she intended submitting a notification of the Transaction notwithstanding DG COMP's position in the First and Second Comfort Letter.

(9) On 13 July 2020, Ines Kaindl submitted a draft notification of the Transaction for informal consultation with DG COMP.

(10) On 20 August 2020, Ines Kaindl notified the Transaction to the Commission.

2. PETER KAINDL'S SUBMISSION OF 17 SEPTEMBER 2020

(11) On 7 September 2020, Ines Kaindl made the Commission aware of the fact that the German language version of the notice of prior notification of a concentration (the "Notice") in the Official Journal of the European Union ("OJ") incorrectly stated that Ines Kaindl acquires sole control of the Target.[3]

[3] OJ No C 289, 1.09.2020, p. 7.

(12) On 11 September 2020, the Commission published a corrigendum to the German language version of the Notice in the OJ.[4]

(13) On 17 September 2020, Peter Kaindl made a submission[5] in which he asked the Commission to correct the mistake in the (uncorrected) German language version of the Notice. He further asked the Commission to inform him about the effective date of the notification within the meaning of Article 4(3) of the Merger Regulation, by making reference to Article 5(5) second sentence of Commission Regulation (EC) No. 802/2004 implementing the Merger Regulation[6] ("the Implementing Regulation").

2.1. Position of Peter Kaindl

(14) Peter Kaindl submits that the mistake in the (uncorrected) German language version of the Notice in this case may have been caused by misleading information provided by Ines Kaindl. Therefore the notification was incorrect and could only be effective once the mistake had been corrected.

(15) Peter Kaindl further claims that even if the information from Ines Kaindl had not caused the mistake in the German language version of the Notice, third parties would be deprived of their rights to comment on the notified concentration, if the Commission were to consider that the initial notification date was valid.

2.2. Commission's assessment

(16) The Commission finds that Ines Kaindl provided sufficient information for the Commission to be able to conclude that it does not have jurisdiction over the Transaction.

(17) The Commission notes that the error in the German language version of the Notice of Publication was due to a translation error. Ines Kaindl notified an acquisition of joint control over M. Kaindl, not of sole control.

(18) Further, it can be left open whether in the present case the Commission was under duty to publish the Notice under Article 4(3) of the Merger Regulation, which requires a publication only when "*a notified concentration falls within the scope of this Regulation*". In any event, the translation error was corrected in the OJ as soon as it was noticed and sufficiently early to allow third parties to adapt their initial observations or to submit new adapted observations. In this regard, the initial 10 calendar day deadline referred to by the Notices of Publication, in this case in the OJ of 1 September 2020, was not affected by the corrigendum, which only changed the description of the nature of control. In any event, even after the publication of the corrigendum on 11 September 2020, third parties still had 10 calendar days to make their views known before the adoption of the decision on 25 September 2020.

(19) In conclusion, the Commission finds that third parties' rights were not infringed by the publication of the incorrect German language version of the Notice of Publication in this case on 1 September 2020.

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4 OJ No C 301, 11.09.2020, p. 22.

5 Peter Kaindl's response to RFI 5 dated 17 September 2020.

6 OJ No., L 133, 30.04.2004, p. 1.

3. THE PARTIES TO THE TRANSACTION AND OTHER PARTIES

(20) The Transaction involves several members of the Kaindl family and three wood processing undertakings controlled by different members of the family.

(21) The main family members involved are **Ernst Kaindl** (deceased on 11 April 2017) and his daughter **Ines Kaindl** as well as the brother of Ernst Kaindl **Martin Matthias Kaindl** (deceased on 21 August 2019) and his son **Peter Kaindl**.

(22) **M. Kaindl** is an Austrian company and a wood processing and manufacturing undertaking. **M. Kaindl** produces wood-based materials such as raw and coated particle board, medium density board and high-density board, laminate flooring, and decorative laminate.[7]

(23) M. Kaindl was in the past jointly controlled by its two general partners, the brothers Ernst Kaindl and Martin Matthias Kaindl. In 1984, the shares in M. Kaindl were redistributed among the two general partners and continued to be jointly controlled by them. The brothers each held 40% of the shares and each 50% of the voting rights. The remaining 20% of the shares were held by Peter Kaindl**.**

(24) In 2018, Martin Matthias Kaindl, who died on 21 August 2019, gifted his shares in M. Kaindl to Peter Kaindl. According to Peter Kaindl, he became an unlimited partner as a result of this donation. Ines Kaindl submits that, however, to this day, Peter Kaindl is still registered as a limited partner of M. Kaindl. Martin Matthias Kaindl's death has not been recorded in the commercial register yet. The dispute concerning the approval to change the entry in the commercial register is currently subject to litigation at the Salzburg Regional Court (Case 8 Cg 64/19h) due to doubts concerning the effective transfer of the shares to Peter Kaindl.

(25) In parallel with their respective shareholding in M. Kaindl, Ernst Kaindl controlled **SWISS KRONO Group** and Martin Matthias Kaindl controlled **Kronospan Group ('Kronospan')**.

(26) **SWISS KRONO Group** is active in wood processing and manufacturing with a turnover of approximately EUR […] worldwide in the last completed business year. It is active in the same markets for wood-based materials as M. Kaindl and, in addition, produces oriented strand board.

(27) Ines Kaindl became a member of the board of directors of SWISS KRONO Holding AG ('SWISS KRONO'), the Swiss-based ultimate parent company of the SWISS KRONO Group in 2006. Since 2009 until today, Ines Kaindl holds the position of the chairperson of this board. Until his death, it was however Ernst Kaindl who held […]% of the shares in SWISS KRONO.

(28) At the time of Ernst Kaindl's death, Ines Kaindl held a […] % share in SWISS KRONO In addition, she holds 11 % of the shares in a startup firm. There are no veto or other controlling rights attached to this participation. Ines Kaindl also holds the majority of shares in the asset management company […]. The purpose of this asset management company is to hold one apartment property in […]. It does not offer goods or services on any product or service market.

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7 M. Kaindl does not produce oriented strand board.

(29) **Kronospan** is headquartered in Czechia. It is also active in the same markets for wood-based materials. In addition, Kronospan produces oriented strand board. Peter Kaindl has shares in Kronospan.[8]

4. THE OPERATION

(30) According to the testament of Ernst Kaindl, Ines Kaindl inherits […]% of Ernst Kaindl's possessions and the remaining […]% are inherited by his wife Christiana Kaindl. In relation to SWISS KRONO, Ernst Kaindl left […]% of the voting shares to Ines Kaindl and […]% of the voting shares to Christiana Kaindl as a legacy (*Legat*). Furthermore, Ernst Kaindl left his shares in M. Kaindl (40 % of the total shares and 50 % of the voting rights) to his daughter Ines Kaindl as a legacy.

(31) Since Ernst Kaindl's death, the shares in the two undertakings were under estate administration by Dr. Urs Mühlebach. The ultimate purpose of the estate administration by Dr. Urs Mühlebach was the execution of Ernst Kaindl's testament. The transfer of the M. Kaindl shares from the estate administrator Dr. Urs Mühlebach to the legatee Ines Kaindl took place on 1 November 2019.[9]

5. THE CONCENTRATION

(32) Article 3(1) EUMR states that a concentration arises where a change of control on a lasting basis results from the merger of at least two undertakings or an acquisition of control by one or more persons already controlling at least one undertaking or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

5.1. Acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings

(33) It has to be determined whether Ines Kaindl on the relevant date for establishing the Commission's jurisdiction was a person already controlling at least one undertaking with economic activity or a natural person carrying out economic activities in her own account.

5.1.1. Views of the Parties

5.1.1.1. Position of Ines Kaindl

(34) According to Ines Kaindl, she acquired the late Ernst Kaindl's shares in M. Kaindl as well as his shares in SWISS KRONO by legacy (*Legat*) based on the testamentary disposition of Ernst Kaindl. Under Austrian law, the testator can bequeath (*vermachen* or *Vermächtnis*) parts of the inheritance to a legatee (*Legatar*). The legatee acquires the legacy (*Legatsausfolgung*) by way of singular succession (*Einzelrechtsnachfolg*e) and the legacy is then not part of the estate anymore. The transfer from the trustee of

8 Submission of Peter Kaindl in response to RFI 1 dated 7 September 2020.

9 See Form CO, Annex 7. Ines Kaindl has explained this delay to the Commission by reference to litigation in Austrian courts.

the estate to the legatee (in this case from Dr. Urs Mühlebach to Ines Kaindl) took place by declaration of transfer (*Übertragungserklärung*) on 1 November 2019.

(35) Ines Kaindl is therefore of the view that in this case she acquired the shares of and, therefore, joint control in M. Kaindl by way of a declaration of transfer from the trustee Dr. Urs Mühlebach on 1 November 2019. According to her, she also acquired sole control over SWISS KRONO on 1 November 2019 by way of a declaration of transfer from Dr. Urs Mühlebach to Ines Kaindl of 1 November 2019, in conjunction with the circular resolution of the board of directors of SWISS KRONO of the same day. At that moment she was according to her not an undertaking or a person controlling at least one undertaking within the meaning of Article 3(1)(b) of the Merger Regulation. Ultimately Ines Kaindl emphasises that there was therefore no notifiable concentration.

5.1.1.2. Position of Peter Kaindl

(36) Relying on the legal opinions of three university professors, Peter Kaindl takes the view that Ines Kaindl acquired ownership over the […]% shareholding in SWISS KRONO and, therefore, *de jure* control over this undertaking already before the transfer of the shares in M. Kaindl. According to the legal opinions, this reflects certain differences between the national laws governing the succession in Austria and Switzerland, where the two undertakings' parent companies are registered.[10]

(37) According to the submission by Peter Kaindl, all material elements of the succession would be governed by Austrian law (the so-called *Erbstatut*). This would follow from the explicit choice in the last will of Ernst Kaindl. Generally, the rules governing the procedural questions of the actual asset transfer (the so-called *Eröffnungsstatut*) would, in such case, according to Austrian International private law, also be governed by Austrian law.[11]

(38) However, according to one of the legal opinions annexed to the submission by Peter Kaindl, Austrian courts would not have jurisdiction to take a decision about the transfer of shares in a company that is listed in Switzerland. The legal opinion by Prof. Paul Oberhammer discusses possible solutions to this problems in several pages before co0ncluding that the most convincing approach would be to adopt an "assets before heritage" (*Einzelstatut geht vor Gesamtstatut*) principle and apply Swiss law for the actual transfer of the shares in SWISS KRONO to Ines Kaindl.[12]

(39) A difference between Austrian and Swiss law would be that under Austrian law, an heir or legatee would only acquire ownership over assets of the deceased by way of a formal act, the devolution (*Einantwortung*). In Switzerland, to the contrary, there would be no such act and ownership would transfer immediately following the death of the deceased.[13]

(40) The legal opinions of Prof. Paul Oberhammer and Prof. Georg Graf both conclude that a Swiss authority cannot be expected to perform a formal act that is unknown in their

[10] Peter Kaindl's response to RFI 1, question 6 dated 7 September 2020, and three legal opinions submitted by Peter Kaindl on 13 February 2020.

[11] Case team allocation request in M.9741 by Peter Kaindl dated 23 December 2019.

[12] Legal opinion of Professor Oberhammer, submitted by Peter Kaindl on 13 February 2020.

[13] Legal opinion of Professor Oberhammer, submitted by Peter Kaindl on 13 February 2020.

own legal system.[14] According to Prof. Paul Oberhammer, a letter sent to Ines Kaindl by the Swiss authority would show that the authority did not intend to transfer the shares of SWISS KRONO by way of a devolution.[15]

(41) Both opinions conclude that, despite different views in the legal literature on the application of the inheritance statute under international private law, Ines Kaindl already acquired joint ownership, together with Christiana Kaindl, over all the shares in SWISS KRONO at the time of Ernst Kaindl's death. The transfer of shares by Dr. Mühlebach on 1 November 2019 would have only terminated the joint ownership and resulted in sole ownership of Ines Kaindl over […]% of the shares in SWISS KRONO.

(42) Further, Peter Kaindl claims that Ines Kaindl already acquired *de facto* control over SWISS KRONO before the death of Ernst Kaindl by means of her appointment as a chairwoman (in 2009) and as heir/ legatee (in 2012).[16]

(43) Another point in time for which Peter Kaindl claims that Ines Kaindl acquired *de facto* control over SWISS KRONO is 2013 when Ernst Kaindl suffered from a stroke and a subsequent deterioration of his health. Peter Kaindl asserts that as of that event, Ernst Kaindl would have had no more contacts with any employees of SWISS KRONO Group, while the management only reported to Ines Kaindl. Peter Kaindl submitted a statement from a former manager of SWISS KRONO Group according to which Ines Kaindl acted as if she was the owner of SWISS KRONO and took all significant decisions by herself as of early 2014, at the very latest.[17]

(44) Peter Kaindl therefore considers that Ines Kaindl acquired joint control in M. Kaindl at a moment in time when she already controlled another undertaking. He considers therefore that the acquisition of joint control in M. Kaindl is a notifiable concentration.

5.1.2. The Commission's assessment

(45) The Commission finds that the Transaction does not constitute a notifiable concentration within the meaning of Article 3(1)(b) of the Merger Regulation because, on the relevant date for assessing jurisdiction in situations of acquisition of control by succession, i.e. the moment of the death of the testator, Ines Kaindl did not control an undertaking.[18]

(46) Firstly, the Commission finds that as a matter of law the relevant date for assessing its jurisdiction in a case of an acquisition by means of succession for the purposes of Article 3(1)(b) of the Merger Regulation is the moment of the death of the testator (see below Section 5.1.2.1.). Secondly, it finds as a matter of fact that Ines Kaindl did not already control at least one undertaking on the relevant date, i.e. that of the death of her father Ernst Kaindl (see Section 5.1.2.2). Thirdly and in any event, irrespective of the relevant date for establishing the Commission's jurisdiction, the acquisitions of

14 Legal opinions of Professor Graf and Professor Oberhammer, submitted by Peter Kaindl on 13 February 2020.

15 Legal opinion of Professor Oberhammer, submitted by Peter Kaindl on 13 February 2020

16 Peter Kaindl's response to RFI 1, question 6, dated 7 September 2020.

17 Peter Kaindl's response to RFI 1, question 6, dated 7 September 2020.

18 The Commission notes that in its substantive assessment for the purposes of this decision, it does not find it necessary to distinguish between the concepts of testament and legacy, as both the testament as a whole as well as the two legacies pursue the same economic aim of transferring the two undertakings to Ines Kaindl.

control over M. Kaindl and SWISS KRONO should be qualified as forming part of a single concentration under Article 3 of the Merger Regulation because of their unitary nature (see Section 5.1.2.3).

5.1.2.1. The relevant date for establishing the Commission's jurisdiction in case of an acquisition by means of succession is the moment of the death of the testator

(47) The Transaction concerns an acquisition of control by way of succession and thus, by "*other means*" within the meaning of Article 3(1)(b) of the Merger Regulation.

(48) Article 3(1)(b) of the Merger Regulation applies to acquisitions of control by an undertaking or by a person controlling at least one undertaking on the relevant date for establishing the Commission's jurisdiction.

(49) The Commission has in its decisional practice not yet considered or established the relevant date for determining whether an acquirer already controls "*at least one undertaking*" or is an "*undertaking*" in case of an acquisition of control through succession.

(50) Neither the Merger Regulation nor the Commission Consolidated Jurisdictional Notice on the control of concentrations between undertakings ("Jurisdictional Notice")[19] provide explicit guidance as to the relevant date for determining whether an acquirer already controls "at least one undertaking" or is itself an "undertaking" in the situation of an acquisition of control by succession. The Commission notes that the Jurisdictional Notice, in Paragraphs 154 to 156 establishes the relevant date for determining the Commission's jurisdiction for several types of acquisition of control (e.g. conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first notification, whichever date is earlier). It does not explicitly address the situation of acquisition of control by means of succession. However, the list at Paragraph 156 of the Jurisdictional Notice is not exhaustive.

(51) In this regard, the Commission notes that Paragraphs 154-156 of the Jurisdictional Notice refer to the concept of "*triggering event*", which materialises when the undertakings concerned demonstrate a sufficiently concrete plan for the proposed concentration.[20] In the context of an acquisition by means of succession, the Commission finds that it is necessary to establish the triggering event by reference to the date of the testator's death, which cannot be known in advance. Indeed, the death of the testator is the natural "triggering event" in cases of succession.

(52) The Commission considers that it is essential in light of the principle of legal certainty, the functioning and coherence of merger control and in order to ensure the uniform application of the Merger Regulation in cases of acquisition by means of succession that economic actors such as the Parties can easily and with legal certainty at the moment of the notification assess the relevant date for establishing the Commission's jurisdiction. This is the case if the date of the testator's death is taken as the relevant date.

19 OJ No. C 95, 16.4.2008, p. 1.

20 Recital 34 of the Merger Regulation.

(53) Moreover, this date can be established independently from different applicable laws.[21] Compared to dates after the death of the testator when the heir(s) effectively receive the shares in a corporate entity under the different applicable national laws, the Commission finds that only the date of the death of the testator can be assessed with sufficient ease and certainty, which is essential in light of the principle of legal certainty, the functioning and coherence of merger control and in order to ensure the uniform application of the Merger Regulation, at least in cases in which the testator did not attach any suspensive conditions to his legacy.

(54) The Commission notes that the Commission's jurisdiction would be dependent on varying national laws, and events potentially taking place after notification, if the relevant date depended on an event after the death such as for example the acquisition of shares as defined by national law. This would jeopardise the uniform application of the Merger Regulation

(55) In this regard, the two legal opinions submitted by Peter Kaindl and dealing with the determination of the appropriate regime for the transfer of the shares in SWISS KRONO explicitly acknowledge that the question of the applicable national law is disputed in the legal literature. The legal literature cited in the opinions seem to discuss different solutions to address the fact that Swiss law (same as German law) would not know a legal act that is central to acquiring ownership as an heir/ legatee under Austrian law.

(56) These findings are also supported by the rationale for the established choice of the relevant date for the acquisition of control by contract or public bid as laid down in Paragraph 154 et seq. of the Jurisdictional Notice (i.e. the conclusion of the binding legal agreement in case of acquisition by means of purchase of shares or the announcement of the public bid in case of acquisition through public bid). In both situations the relevant date can be determined with legal certainty, can easily be ascertained at the moment of the notification and in line with the *ex ante* control logic of the Merger Regulation, occurs before the actual acquisition of control.

(57) The relevant date laid down in the Jurisdictional Notice further show that the relevant date for establishing the Commission's jurisdiction over a concentration can be before the actual acquisition of the shares in a company, such as in cases of the conclusion of the purchase agreement or the announcement of the public bid.

(58) For these reasons, the Commission finds that for acquisitions of control by succession, the relevant date under Article 3(1)(b) for assessing whether the acquisition of control is by an undertaking or a person already controlling an undertaking is the moment of the death of the testator.

(59) Thus, in the present case, the relevant date for assessing the Commission's jurisdiction in relation to the inheritance is the date of the death of Ernst Kaindl on 11 April 2017.

5.1.2.2. Ines Kaindl was not an undertaking or a person controlling an undertaking on the relevant date of the death of her father Ernst Kaindl

(60) Having established that the relevant date for determining the Commission's jurisdiction is that of the death of the testator, and thus, in the present case the date of

[21] The national law may also allow for the retroactive transfer of the shares.

the death of Ernst Kaindl, namely 11 April 2017, it has to further be determined whether, as a matter of fact, Ines Kaindl already controlled at least one undertaking on 11 April 2017. Ines Kaindl is a natural person and not an undertaking herself, nor does she carry out economic activities in her own account.

(61) The Commission finds that Ines Kaindl did neither have *de jure* (see below Section (A)) nor *de facto* control (see below Section (B)) over at least one undertaking on the relevant date of the death of her father on 11 April 2017.

(A) Ines Kaindl did not have *de jure* control over any other undertaking with economic activity before the death of Ernst Kaindl

(62) According to established case law, an undertaking within the meaning of EU Competition Law is "*any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed*."[22] Economic activity means "*offering goods or services on the market which, at least in principle, could be carried on by a private undertaking in order to make profits*."[23]

(63) Both M. Kaindl and SWISS KRONO were under the *de jure* joint and sole control respectively of Ernst Kaindl until his death. Only following his death, control over both companies would, according to Ernst Kaindl's last will, be transferred to Ines Kaindl.

(64) On the date of the death of Ernst Kaindl, the only entity over which Ines Kaindl had *de jure* control was the asset management company […]. Since 2007, Ines Kaindl holds all shares in […]. She is the sole shareholder and therefore has sole control of […]. […]'s sole purpose is to hold a 3 ½ room apartment in a condominium property in […], which is used exclusively by Ines Kaindl and her family for private purposes. […] is therefore not an undertaking that is engaged in an economic activity, offering goods and services on the market.

(65) Therefore, on the date of the death of Ernst Kaindl, Ines Kaindl did not have *de jure* control over any undertaking within the meaning of the Merger Regulation.

(B) Ines Kaindl did not have *de facto* control over SWISS KRONO before the death of Ernst Kaindl

(66) Further, the Commission finds that Ines Kaindl did not exercise *de jure* control over an undertaking on the relevant date of the death of her father Ernst Kaindl.

(67) The Commission finds that Ines Kaindl did not acquire *de facto* control over the company SWISS KRONO prior to 11 April 2017 on the dates brought forwared by Peter Kaindl (see above Section 4.1.2), namely in 2009 following her appointment as chairwomen of SWISS KRONO (see Section (B.i.) below), in 2012 following her naming as the heir and legatee (see Section (B.ii) below), and in 2013 following the deterioration of Ernst Kaindl's health (see Section (B.iii) below).

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22 See European Court of Justice, Case C-41/90, *Höfner and Elser*, ECLI:EU:C:1991:161, para. 21.

23 See European Court of Justice, Case C-475/99, Ambulanz Glöckner, ECLI: EU:C:2001:577, para. 19; Case C- 49/07, MOTOE, ECLI:EU:C:2008:376, paras. 21 et seq. and Advocate General Jacobs, Opinion in Case C-67/96, Albany, ECLI: EU:C:1999:28, para. 311.

(68) The Commission notes in this regard that in the present case, as well as in any cases involving a succession, all transfers should only take place once the testator died. By including the assets in his last will, Ernst Kaindl has made clear that he did not want to transfer the shares in either company, including SWISS KRONO during his lifetime.

(B.i) 2009 following the appointment as chairwomen of SWISS KRONO

(69) In 2009, Ines Kaindl was appointed chairwomen of SWISS KRONO.

(70) According to Article 3(2) Merger Regulation, control is constituted by "*rights, contracts or any other means which, either separately or in combination […] confer the possibility of exercising decisive influence on an undertaking*". Examples mentioned are ownership or decisive influence on the composition, voting or decisions of the organs of an undertaking.

(71) The Commission notes that a chairperson of a board of directors can have significant influence on an undertaking. However, irrespective of the exact composition of such board and the statutes of the undertaking, the position as a chairperson of the board of directors can be terminated. Furthermore, the chairperson does not decide on their own but rather as a member of the board (even taking potential rights as chair into account). Most importantly, any organ of an undertaking is to be considered as part of such undertaking. Even if an undertaking has only one managing director, such director would not exercise control despite being able to take all decisions within the undertaking by himself because as a managing director he is part of the undertaking (obviously, the same person could nonetheless control the undertaking if he holds other rights that confer control on him).

(72) Specifically looking at SWISS KRONO, the corporate governance structure of the company implements a unitary board structure. The General Meeting of the shareholders is the supreme organ and appoints the Board of Directors. According to the articles of association, the Board of Directors names a chairperson. This person presides over the General Meetings but has no particular voting rights (e.g., no casting vote). In meetings of the Board of Directors, the chairperson has a casting vote. Until the death of Ernst Kaindl, the Board of Directors had four members. Among these members were Ernst Kaindl and Ines Kaindl. Following his death, the Board of Directors consisted of three members.

(73) In a structure such as SWISS KRONO, control is exercised in the General Meeting. A majority in the General Meeting can appoint the members of the Board of Directors. Neither the Board of Directors nor the chairperson of the board exercise control of SWISS KRONO. This holds true regardless of the level of scrutiny a controlling shareholder exercises over the company.

(74) The situation in this case is different from a situation in which a person exercises *de facto* control because of their decisive influence on the company. As chairwoman of SWISS KRONO, Ines Kaindl was naturally in charge of all affairs of the company. However, this was based on her role as chairwoman, not as shareholder. Any other conclusion would mean that managing directors or chairpersons could potentially

control the respective undertaking if the shareholders trust in them and do not actively exercise their control rights.[24]

(75) For these reasons, the Commission finds that Ines Kaindl did not acquire *de facto* control over SWISS KRONO in 2009 when she was appointed as chairwoman.

(B.ii) 2012 following the drafting of Ernst Kaindl's will

(76) On 29 August 2012, Ernst Kaindl drafted the first version of his will and amended it at multiple points thereafter (last known amendment 5 October 2016). Ines Kaindl was ultimately designated to inherit […]% of the voting shares in SWISS KRONO, however it is unknown when this was first included in Ernst Kaindl's will.

(77) The Commission considers that from a legal perspective, naming Ines Kaindl as heir/legatee for the shares in SWISS KRONO does not change its above assessment in relation to her appointment as chairwoman (see Section (B.i) above). The position as heir/legatee does not confer any rights in itself during the lifetime of the testator.

(78) Therefore, the Commission finds that Ines Kaindl did not acquire *de facto* control over SWISS KRONO when she was named as heir/legatee in a testament by Ernst Kaindl in or after 2012.

(B.iii) 2013 following a deterioration of Ernst Kaindl's health

(79) According to the submissions of Peter Kaindl, Ernst Kaindl had health issues from 2013 onwards which lead to Ines Kaindl representing Ernst Kaindl as owner in all practical aspects vis-à-vis the company (such as decisions on investments, important discussions with customers and suppliers, opening of new factories and hiring/firing of senior staff), in addition to her position as chairwoman.

(80) The Commission considers that even if Ines Kaindl represented Ernst Kaindl in all practical aspects, this position would still be derived from the legal position of Ernst Kaindl as owner of SWISS KRONO. As set out in Paragraph 13 of the Commission's Jurisdictional Notice, control is normally acquired by the persons or undertakings, which are the holders of the respective rights. In case of ownership, that means the owner. Despite the submissions made by Peter Kaindl on the subject of Ernst Kaindl's deteriorating health and Ines Kaindl's consequent role, Ines Kaindl did in any case not have control over SWISS KRONO at this stage.

(81) Therefore, the Commission finds that Ernst Kaindl still had sole control over SWISS KRONO despite the described deterioration of his health until the moment of his death on 11 April 2017. Ines Kaindl did not have de facto control over SWISS KRONO prior to his death and thus on the relevant date for establishing whether she had control over an undertaking for the purposes of the Merger Regulation.

[24] This reasoning is consistent with the Commission decisional practice on management buy-outs: managers can only be notifying parties if they already control another undertaking.

(B.iv) Conclusion in relation to de facto control over SWISS KRONO prior to Ernst Kaindl's death

(82) In conclusion, the Commission finds that Ines Kaindl did not have *de facto* control over SWISS KRONO or any other undertaking within the meaning of the Merger Regulation on the relevant date of the death of her father Ernst Kaindl.

5.1.2.3. The acquisitions of control over M. Kaindl and SWISS KRONO form part of a single concentration under Article 3 of the Merger Regulation because of their unitary nature

(83) In any case, even if the relevant date for establishing the Commission's jurisdiction was not the moment of the death of the testator, the acquisitions of control over the two undertakings M. Kaindl and SWISS KRONO are unitary in nature and, therefore form part of a single concentration under Article 3 of the Merger Regulation. Therefore, their acquisition has to be assessed together.

(84) The two acquisitions are unitary in nature according to the "economic plan" of Ernst Kaindl. In the specific situation of acquisition of control by succession, in the absence of a contract between the testator and the heir or legatee, the plan envisaged by the testator, evidenced by the terms of his will, is the relevant factor. Ernst Kaindl's will envisaged that Ines Kaindl obtains control of the two undertakings without any indications of Ernst Kaindl planning that Ines Kaindl should acquire control at different points in time. This is consistent with the fact that Ernst Kaindl's will was that Ines Kaindl, as his daughter, fully replaces him as the person having joint control (M. Kaindl) and sole control (SWISS KRONO) in both undertakings. Conversely, Ernst Kaindl did not foresee that Ines Kaindl would obtain control in only one of the undertakings. [25]

(85) The economic reality of the Transaction is therefore that Ines Kaindl succeeds her father in his position, in accordance with the terms of her father's will. It would be artificial to look at the inheritance of the shares conferring sole control over SWISS KRONO and those conferring joint control over M. Kaindl separately.

5.2. Conclusion with regard to a concentration within the meaning of Article 3(1)(b) of the EUMR

(86) In conclusion, the Commission finds that on the date of the death of Ernst Kaindl on 11 April 2017, Ines Kaindl did in fact not have control over any other undertaking with economic activity, nor was she a natural person carrying out further economic activities in her own account.

(87) Therefore, the Transaction does not constitute a concentration within the meaning of Article 3(1) of the Merger Regulation.

[25] There was no indication that Ines Kaindl would not accept the testament or legacy.

6. CONCLUSION

(88) For the above reasons, the European Commission has concluded that the notified operation does not constitute a concentration within the meaning of Article 3 of the Merger Regulation and consequently does not fall within the scope of that Regulation. This decision is adopted in application of Article 6(1)(a) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President