

EN

***Case No COMP/M.5109
– DANISCO / ABITEC***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 22 (3)
Date: 17/04/2008



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17-IV-2008

SG-Greffe(2008) D/201827

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 22(3) DECISION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

To the Office of Fair Trading

Dear Sir,

Subject: No COMP/M.5109 - Danisco/ Abitec

Request for referral of 4 March 2008 by the German Bundeskartellamt to the Commission pursuant to Article 22(1) of the EC Merger Regulation

Ref: Letter of 1 April 2008 (received on that same day) by Mr Alastair Mordaunt, Director, Mergers of the Office of Fair Trading, the competent Competition Authority of the United Kingdom, to Ms Neelie Kroes, Commissioner of the European Commission

I. INTRODUCTION

- (1) With the above-mentioned request of 4 March 2008 the German Competition Authority – the Bundeskartellamt (“the BKartA”) requested the Commission to examine, in application of Article 22(1) of Council Regulation (EC) No 139/2004 (“the EC Merger Regulation”), the concentration whereby the undertaking Danisco A/S (“Danisco”, Denmark) acquires sole control of Abitec Ltd. (“Abitec”, United Kingdom) from Associated British Foods PLC. In your letter of 1 April 2008 you have expressed your wish, pursuant to Article 22 (2) of the EC Merger Regulation, to join the initial request by the German Competition Authority.
- (2) Pursuant to Article 22(1) of the EC Merger Regulation, one or more Member States may request the Commission to examine any concentration, as defined in Article 3 of the EC Merger Regulation, that does not have a Community dimension within the meaning of Article 1 of the EC Merger Regulation but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. Such a request must be made within 15 working

days of the date of the notification of the concentration. Pursuant to Article 22(2) of the EC Merger Regulation, any other Member State may join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

- (3) On 12 February 2008, Danisco notified the above mentioned concentration to the BKartA. On 4 March 2008, the Commission received a referral request pursuant to Article 22(1) of the EC Merger Regulation from the BKartA. The BKartA has thus made the referral request within 15 working days of the date of the notification as required in Article 22(1) of the EC Merger Regulation.
- (4) On 6 March 2008, the Commission informed all the competent authorities of the other Member States with the exception of one in accordance with Article 22 (2) of the EC Merger Regulation. The Member State which for technical reasons could not be informed on 6 March 2008 was informed on 10 March 2008. The Commission also informed the undertakings concerned pursuant to Article 22 (2) of the EC Merger Regulation.
- (5) On 1 April 2008, thus within the time limit foreseen in Article 22 (2) of the EC Merger Regulation, the competent authority of the United Kingdom, the Office of Fair Trading ("the OFT"), joined the referral request.
- (6) The parties of the transaction disagree with the referral. They sent the Commission a written submission in which they expressed their disagreement and explained their position further in a meeting with the case team on 3 April 2004.

(1) **II. THE PARTIES AND THE OPERATION**

- (7) **Danisco** manufactures and markets food ingredients, ingredients for feed, sweeteners and sugar. It produces a broad range of emulsifiers, in particular the emulsifiers DISMO, MONO-DI, DATEM, ACETEM, CITREM, LACTEM, SSL/CSL, PGMS, PGE, PGPR, and Sorbitan Esters, and offers value added services in this respect. Emulsifiers can be used for a range of food and non-food applications, however the parties sell little for non-food use. Within food use, the emulsifiers are used for a variety of purposes helping to control the texture, oil stabilisation, aeration and freshness.
- (8) **Abitec** is active in the manufacture and marketing of emulsifiers used in food and to a much lesser extent used in other areas such as cosmetics. Like Danisco, Abitec produces DISMO, MONO-DI, DATEM, LACTEM, SSL/CSL, and PGPR.
- (9) Pursuant to the share and purchase agreement concluded on 22 January 2008, Danisco will acquire the whole of the shares of Abitec.
- (10) With the operation, Danisco will acquire sole control by way of acquisition of shares and assets of Abitec. The transaction is therefore a concentration within the meaning of Article 3 of the EC Merger Regulation. However, it does not have a Community dimension (the target had a world-wide turnover of EUR 28.6 million in 2007).

III. ASSESSMENT OF THE REFERRAL REQUEST

(11) The request was submitted within the relevant deadlines and concerns a concentration within the meaning of the EC Merger Regulation. Pursuant to Article 22(3) of the EC Merger Regulation, the Commission may decide to examine the concentration if it considers that (i) it affects trade between Member States and (ii) it threatens to significantly affect competition within the territory of the Member State or States making the request. It follows that if these two legal requirements are met, the Commission may exercise discretion with regard to whether or not it is appropriate that the concentration is examined by the Commission. The Commission has, in its relevant Notice on Case Referral in respect of concentrations (“the Referral Notice”)¹, set out in a general manner its understanding regarding the appropriateness of particular cases or categories of cases for referral.

1. Effect on trade between Member States

(12) Pursuant to paragraph 43 of the Referral Notice, a concentration fulfils the criterion of effect on trade between Member States laid down in Article 22 EC Merger Regulation if it is *"liable to have some discernible influence on the pattern of trade between Member States"*.

(13) Regarding the first substantive criterion, the BKartA and the OFT argue that the relevant geographic markets are at least EEA-wide if not worldwide. Moreover, independently of the exact geographic market definition, there are important trade flows in emulsifiers and other food additives between Member States and between Member States and third countries. Typically, companies have a limited number of production sites and supply their products worldwide.² Both the acquirer and the target have widespread sales of emulsifiers throughout the EEA as can be seen in table 1.

(2) **Table 1**

Danisco		Abitec	
Country	Share of total European sales	Country	Share of total European sales
Germany	[10-20]%	France	[15-25]%
France	[10-20]%	Germany	[10-20]%
UK	[10-20]%	Spain	[10-20]%
Netherlands	[5-15]%	Italy	[5-15]%
Italy	[0-10]%	UK	[5-15]%

(3) *Source: OFT's submission*

(14) Against this background, it can be concluded that trade between Member States would be affected within the meaning of Article 22 of the EC Merger Regulation.

¹ OJ C 56, 5.3.2005, p. 2.

² Danisco's production sites are located in Brazil, China, Denmark, Malaysia, and the USA, Abitec has only one production site in the United Kingdom. Both companies supply their products worldwide to customers.

2. Concentration threatens to significantly affect competition

- (15) Regarding the second criterion, paragraph 44 of the Referral Notice provides that a referring Member State should demonstrate that, *"based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse effect on competition and thus it deserves close scrutiny. Such preliminary indications may be in the nature of prima facie evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation."*
- (16) Regarding the second substantive criterion, the BKartA and the OFT submit that the transaction threatens to significantly affect competition within Germany and the United Kingdom.

i. Product markets

- (17) The parties base their assessment from a demand side perspective on a broad product market definition. They submit that emulsifiers are generally substitutable with each other, and should be treated as a single market. Further, the parties consider that lecithin, an organic product, should be considered a substitute as it is able to perform many of the same functions as synthetic emulsifiers. The OFT, which already started its market investigation under national law, found some evidence that the relevant product markets are not limited to specific emulsifiers. However, a number of competitors and customers submitted in its investigation that it was difficult to switch from one specific emulsifier to another, because emulsifiers and products in which they are used are specifically formulated around each other. Furthermore, the ability to switch is often limited by the necessary function and application of the emulsifier.
- (18) The parties submit that supply side substitution is viable and refer to adequate spare capacity in the market. From answers the OFT received in its investigation it appears as if spare capacities are potentially lower than submitted by the parties, in particular for those specific emulsifiers for which the parties have a high market share.
- (19) Without prejudice to the outcome of a possible future market investigation it can be concluded that one or several product markets for specific emulsifiers, where the parties have relatively high market shares, must be defined.

ii. Geographic markets

- (20) As regards the relevant geographic market, the BKartA and the OFT submit that the markets are at least EEA-wide. The notifying party has pointed out that transportation costs are not a limiting factor for worldwide supply relationships. Companies active in the production of emulsifiers have generally only a few production sites from which they supply worldwide.³
- (21) It must be stressed that these preliminary conclusions on the relevant markets may change in the course of the Commission's further analysis and investigation.

³ Compare table 1.

iii. Assessment

- (22) The parties' combined *market shares* are particularly high if a narrow market definition is chosen. Their highest market shares are in the supply of DISMO ([40-50]%) and DATEM ([35-45]%). The OFT suggests that the parties may have underestimated their market share for DATEM, because they did not include in-house sales to Cereform, although sales to Cereform, an ABF company like Abitec at present, will become part of the merchant market post merger with the market share at [40-50]%. Relating to DISMO and DATEM the *increment* is at [5-15]% and [0-10]% ([5-15]% if sales to Cereform are taken into account).
- (23) *Comments by customers* to the OFT indicate that the acquisition of Abitec might indeed have adverse effects on competition. They submitted that the relevant markets are already oligopolistic in nature with Danisco as the price leader. Others considered further that Abitec was the cheapest provider and was used by them as a price benchmark. However, the parties submitted that Danisco and Abitec were not close competitors. The OFT could not draw a final conclusion in that respect, in particular because it had a poor response to questions sent to Abitec customers.
- (24) In table 2 the parties' market shares for (i) all emulsifiers (including lecithin), (ii) all emulsifiers (excluding lecithin), (iii) DISMO and DATEM and the increment after the acquisition of Abitec are shown:

(4)

Table 2

Potential Market	Europe Value	Europe Volume	German Value	German Volume	UK Value	UK Volume	Europe Market Size (Mio €)
All emulsifiers (including lecithin)	[20-30]%(+[0-10])	[20-30]%(+[0-10])	[10-20]%(+[0-10])	[15-25]%(+[0-10])	[10-20]%(+[0-10])	[15-25]%(+[0-10])	[390-410]
All emulsifiers (excluding lecithin)	[30-40]%(+[0-10])	[30-40]%(+[0-10])	[20-30]%(+[0-10])	[20-30]%(+[0-10])	[20-30]%(+[0-10])	[20-30]%(+[0-10])	[260-280]
DISMO	[40-50]%(+[5-15])	[40-50]%(+[5-15])	[30-40]%(+[0-10])	[35-45]%(+[5-15])	[20-30]%(+[0-10])	[20-30]%(+[0-10])	[80-100]
DATEM (excluding in-house sales to Cereform)	[35-45]%(+[0-10])	[35-45]%(+[0-10])	[10-20]%(+[0-10])	[10-20]%(+[0-10])	[45-55]%(+[0-10])	[45-55]%(+[0-10])	[40-60]
DATEM (including in-house sales to Cereform)	[40-50]%(+[10-20])	--	--	--	[70-80]%(+[20-30])	--	[40-60]

(5)

Source: Parties' Submissions to the BKartA, the OFT, and the Commission

- (25) The nearest EEA-wide competitors for DISMO are Kerry ([5-15]%), Uniqema ([0-10]%), and Palsgaard ([0-10]%) by value. The situation is different for DATEM with stronger alternative suppliers: Cognis ([25-35]%), Kerry ([20-30]%), and Beldem ([0-10]%). Nevertheless, the parties' combined share of supply of DATEM in the UK is with [45-55]% significant.
- (26) It must be stressed that these preliminary conclusions may change in the course of the Commission's further analysis and investigation. However, on a *prima facie* basis, it can be concluded that the transaction threatens to significantly affect competition in Germany and the in UK.
- (6) **3. Appropriateness of a referral of the present case to the Commission**
- (27) According to point 45 of the Referral Notice, as post-notification referrals to the Commission may entail additional cost and time delay for the merging parties, they should normally be limited to those cases "*which appear to present a real risk of negative effects on competition and trade between Member States, and where it appears that these would be best addressed at the Community level.*" The Referral Notice then exemplifies two categories of cases which normally are most appropriate for referral to the Commission pursuant to Article 22: "*(i) cases which give rise to serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets; (ii) cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of Member States, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the concentration is connected to such markets.*"
- (28) Both Germany and the OFT consider that the Commission is better placed to assess the transaction. The BKartA puts forward that National Competition Authorities have limited possibilities to enforce remedies. The OFT highlights that in a case where a Member State has initiated a referral request to the Commission and where the OFT considers it likely that the Commission will accept such request then it is preferable to join the request, thereby upholding the principle of the 'one-stop-shop' and avoiding any parallel OFT investigation with that of the Commission. The OFT is prepared to share the information it has already gathered during its investigation with the Commission and will to this end ask respondents to grant a waiver so that confidential information contained in the answers can be given to the Commission.
- (29) The parties oppose the view of the National Competition Authorities. They argue that the BKartA has in the past investigated international markets and is therefore in the position to handle the present case too. They in particular reject Germany's view that it would be difficult for the BKartA to enforce remedies although none of the parties has production sites located in Germany. They argue in conclusion that the Commission is not the best placed authority to investigate this case.

- (30) The Commission considered that, on balance the requirements for a referral are met and the case should be best assessed at a Community level. The relevant markets are very likely to be wider than national in geographic scope. The case may give rise to competition concerns under the assumption that specific emulsifiers, in particular DISMO and DATEM, are to be considered as separate markets. The parties' market shares would be important and from the comments the OFT received in its procedure, at this stage, it cannot be excluded that competitors may have difficulties to effectively compete with the parties post merger.
- (31) Furthermore, it cannot be excluded that parallel investigations by the BKartA and the OFT would lead to divergent results which in the presence of EEA-wide markets should be avoided. The referral enables the Commission to ensure a coherent treatment of the case.
- (32) Therefore, given the EEA impact of the transaction and to ensure consistency of the investigation and analysis of its impact on competition, the Commission considers to be the best placed authority to assess this concentration, and that the present case is appropriate for a referral to the Commission pursuant to Article 22 of the EC Merger Regulation.

IV. CONCLUSION

The case is eligible for referral under Article 22 of the EC Merger Regulation, since the proposed concentration affects trade between Member States and threatens to significantly affect competition in the UK as part of the relevant EEA-wide markets. Moreover, it appears that the real risk of negative effects on competition and trade between Member States would be best addressed at the Community level. Therefore, the Commission has decided to examine the concentration pursuant to Article 22(3) of the EC Merger Regulation.

For the Commission
(signed)
Neelie KROES
Member of the Commission