EN

Case No COMP/M.5828- PROCTER & GAMBLE / SARA LEE AIR CARE

Only the English text is available and authentic.

REGULATION (EC) No 139/2004

MERGER PROCEDURE

Article 22(3)

Date: 31/03/2010

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.

EUROPEAN COMMISSION

Brussels, 31.3.2010
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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 22(3) DECISION

Office of Fair Trading

Dear Sir,

Subject: Case No COMP/ M.5828 – Procter & Gamble / Sara Lee Air Care
Request for referral by the Bundeskartellamt to the Commission pursuant to Article 22(1) of Council Regulation No. 139/2004

Ref.: Letter of 17 March 2010 by Mr. Sheldon Mills, Director of Mergers of the Office of Fair Trading, to Mr Alexander Italianer, Director General for Competition.

I. INTRODUCTION

(1) With the above-mentioned request of 19 February 2010 the German Competition Authority ("the Bundeskartellamt") formally requested the Commission to examine, in application of Article 22(3) of Council Regulation No 139/2004[1] ("the Merger Regulation"), the concentration whereby the undertaking Procter & Gamble ("P&G", USA) acquires sole control of Sara Lee Corporation's Air Care Business ("Sara Lee Air Care", USA). In your letter of 17 March 2010 you have requested, pursuant to Article 22 (2) of the Merger Regulation, to join the initial request by the German Competition Authority.

[1] OJ L 24, 29.1.2004, p 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, 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) Pursuant to Article 22(1) of the Merger Regulation, one or more Member States may request the Commission to examine any concentration, as defined in Article 3 of the Merger Regulation, that does not have a Community dimension within the meaning of Article 1 of the 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. According to Article 22(2) of the 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 5 February 2010, P&G notified the abovementioned concentration to the Bundeskartellamt. On 19 February 2010, the Commission received a referral request pursuant to Article 22(1) of the Merger Regulation from the Bundeskartellamt. The Bundeskartellamt has thus made the referral request within 15 working days of the date of the notification as foreseen in Article 22(1) of the Merger Regulation.

(4) The Commission informed, in accordance with Article 22(2) of the Merger Regulation, the competent authorities of the other Member States on 24 February 2010.

(5) On 17 March 2010, thus within the time limit foreseen in Article 22 (2) of the Merger Regulation, the Competition Authority of the United Kingdom, the Office of Fair Trading ("OFT"), has joined the referral request.

(6) Six other Member States –Belgium, Portugal, Spain, Slovakia, Hungary, and Poland– joined as well the request within the relevant time period. Subsequently, Slovakia and Poland withdrew their respective referral requests.

II. THE PARTIES AND THE OPERATION

(7) P&G is a company specialized in the manufacturing, development, distribution and marketing of household care, beauty care, health care and well being, baby and family care products.

(8) Sara Lee Air Care is active in the manufacturing and marketing of various types of air fresheners. Other businesses of Sara Lee Corporation are not involved in the proposed transaction.

(9) With the operation, P&G acquires sole control over Sara Lee Air Care[2] by way of a cash offer of EUR 320 Million. The transaction is therefore a concentration within the meaning of Article 3 of the Merger Regulation. However, it does not have a Community dimension within the meaning of Article 1 of the Merger Regulation.

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[2] Both referred to as the "Parties".

(10) The markets concerned by the proposed transaction are the markets for air fresheners, which according to the Parties may be sub-segmented into different product segments in accordance to technology used (aerosols, continuous non energized, continuous energized, and among the latter plug-in or battery powered) and/or consumer usage (home fresheners, car fresheners, fabric fresheners, and toilet fresheners). The OFT does not conclude, in its request, to a precise product market definition.

(11) According to the Parties, there are some indications that the relevant geographic market(s) may be wider than national. The OFT considers that the geographic market is likely to be at least national.

III. ASSESSMENT OF THE REFERRAL REQUEST

(12) Pursuant to Article 22(3) of the 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[3]. If these two legal requirements are met, the Commission may exercise discretion with regard to whether or not it is appropriate that the Commission examines the concentration.

Effect on trade between Member States

(13) Regarding the first criterion, the OFT argues that it can be concluded that the transaction affects trade between Member States, in particular since, as the Parties informed the OFT, P&G's plug-in air fresheners are manufactured by a third party in France while Sara Lee's plug-in air fresheners are manufactured in Spain.

(14) According to the Commission Notice on Case Referrals in respect of concentrations (the "Referral Notice"), a concentration fulfils the first substantive condition where it is liable to have some discernible influence on the pattern of trade between Member States.[4]

(15) Although the markets concerned are likely to be national in scope, in line with the past practise of the Commission concerning fast-moving consumer goods[5], the fact that the proposed transaction had to be notified in ten member states gives clearly a *prima facie* indication that the transaction does affect the trade between Member States. In addition, it should be noted that the Parties' use the same brands throughout the EEA and manufacture some of the products concerned in single locations from which they ship the products in the various EEA countries.

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3 See also Commission Notice on Case Referral in respect of Concentrations, paragraphs 42-44. OJ C 56, 05.03.2005, p.2.

4 Paragraph 43 of the Referral Notice.

5 See for instance COMP/M.3732 – *Procter & Gamble / Gillette*, recital 17 of the decision of 15 July 2007

Threat to significantly affect competition within the territory of the Member State(s) making the request

(16) Regarding the second criterion, paragraph 44 of the Referral Notice[6] 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 deserves close scrutiny, without prejudice to the outcome of a full investigation. The request of the United Kingdom demonstrates that there are sufficient *prima facie* elements to indicate that the concentration may significantly lessen competition in some segments of the market for air fresheners when delineated by technology used (aerosols, continuous non energized, continuous energized, and among the latter plug-in or battery powered) and/or consumer usage (home fresheners, car fresheners, fabric fresheners, and toilet fresheners).

(17) Indeed, in the United Kingdom, according to the Parties, the transaction would lead to a combined market share of [20-30]% (with an increment of [10-20]%) in the overall air market and as high as [40-50]% (with an increment of [5-10]%) in the "continuous energized plug-in air fresheners" segment. The OFT has put forward that unilateral effects cannot *prima facie* be excluded in this latter segment or in the continuous energized air care segment in general (which also includes battery operated products) and thus threatens to significantly affect competition in the market for air fresheners and its potential sub-segments.

(18) Moreover, P&G holds a very significant share of the fabric fresheners segment ([80-90]% including private label products, [90-100]% excluding private label products) where Sara Lee is not present and can be seen as a potential competitor due to its overall activities in air fresheners. In this regard the Parties themselves submit that there is supply-side substitutability between the different segments of the air fresheners market. The air freshener sector is already now highly concentrated with basically four market players, two of them being the Parties.

(19) On the basis of the *prima facie* analysis submitted by the United Kingdom, the Commission considers, without prejudice to the outcome of its investigation, that the concentration threatens to significantly affect competition within the territory of the United Kingdom.

On the appropriateness of a referral of the present case to the Commission

(20) Pursuant to paragraph 45 of the Referral Notice, referrals of concentrations already notified 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.

(21) In the present case, the proposed transaction may give raise to competition concerns in a series of national markets located in a number of Member States, namely Germany, Belgium, the UK, Spain and Portugal, which have all requested a referral of the case to the Commission. The coherent treatment of the case, regarding both the investigative efforts and eventually possible remedies, is thus

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6 OJ C 56, 05.03.2005, p. 2.

considered desirable. Consequently, the present concentration falls under one of the categories of cases referred to in paragraph 45 of the Referral Notice.

(22) Therefore the Commission has concluded that it is, in the present circumstances, be the best placed authority to assess this concentration.

IV. CONCLUSION

(23) After examination of the above-mentioned, the Commission has concluded that the transaction the OFT refers to in its request for referral is a concentration within the meaning of Article 3 of the Merger Regulation. The Commission considers that the request by the Competition Authority of the United Kingdom to join the initial referral request made by the German Competition Authority for the application of Article 22(3) is admissible as it meets the requirements laid down in Article 22(2) and 22(3) of the Merger Regulation and paragraphs 42-45 of the Referral Notice. The Commission therefore has decided to examine the proposed concentration under the Merger Regulation.

(24) In the light of the above, I would like to inform your Authority that the Commission will initiate proceedings pursuant to Article 10(1) of the Merger Regulation when it has the necessary information for its investigation. In the context of Article 22(3), it is considered that this information should also include the information at the disposal of the national competition authority (initial notification and/or any additional information obtained through preliminary investigation). May I therefore invite you to communicate this information to the Commission as far as such was not yet joined to your letter of 17 March 2010.

For the Commission

(*signed*)
Joaquin ALMUNIA
Vice-President of the Commission