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*Case No COMP/M.5969-
SC Johnson/ SARA LEE*

Only the English text is available and authentic.

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

Article 22(3)

Date: 07/09/2010



Brussels, 07/09/2010
C(2010) 6282

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

**Czech Office for the Protection of
Competition**

Dear Sir,

Subject: Case No COMP/ M.5969 – SC Johnson / Sara Lee **Request
for referral by the Comisión Nacional de la Competencia to the
Commission pursuant to Article 22(1) of Council Regulation No. 139/2004**

Ref.: Letter of 23 August 2010 by the Czech Office for the Protection of Competition to Mr Alexander Italianer, Director General for Competition.

I. INTRODUCTION

- (1) With the above-mentioned request of 28 July 2010 the Spanish Comisión Nacional de la Competencia (“CNC”) formally requested the Commission to examine, in application of Article 22(3) of Council Regulation No 139/2004¹ (“the Merger Regulation”), the concentration whereby the undertaking SC Johnson & Son, Inc. (“SCJ”) intends to acquire the assets of Sara Lee Corporation’s (“Sara Lee”) household insecticides business (“SLHI”). In your letter of 23 August 2010 you have requested, pursuant to Article 22(2) of the Merger Regulation, to join the initial request by the Spanish Competition Authority.
- (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

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”).

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 7 July 2010, SCJ notified the abovementioned concentration to the CNC. On 29 July 2010, the Commission received a referral request pursuant to Article 22(1) of the Merger Regulation from Spain. Spain 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 3 August 2010 about the Spanish request. On 23 August 2010, thus within the time limit foreseen in Article 22 (2) of the Merger Regulation, the Competition Authority of Czech Republic, Office for the Protection of Competition, has joined the referral request. Four other Member States – France, Belgium, Italy and Greece– have also joined the initial request.
- (5) By letter dated 2 September 2010, SCJ expressed its opposition to the referral request. According to SCJ, the transaction does not meet the conditions of affecting trade between Member States in the sense of Article 22 of the Merger Regulation and the Commission is not better placed than the competent national authorities to handle the case. SCJ also argues that such a referral would undermine the principle of legal certainty.

II. THE PARTIES AND THE OPERATION

- (6) SCJ is a US based corporation specialized in the manufacturing, development and distribution of household cleaning products.
- (7) Sara Lee is a US based corporation specialized in the manufacturing and marketing of a wide range of consumer goods. Sara Lee's household insecticides business is active in the manufacturing and marketing of various types of insecticides for household use.
- (8) With the operation, SCJ acquires sole control over the Sara Lee² insecticides business by way of a cash offer for the assets of the business of EUR [...] million. The transaction is a concentration within the meaning of Article 3 of the Merger Regulation. However, according to the Parties, the transaction does not have a Community dimension within the meaning of Article 1 of the Merger Regulation.
- (9) The markets concerned by the transaction are the markets for household insecticides, which according to the Parties may be sub-segmented into the following product segments: insecticides against crawling insects, insecticides against flying insects, anti-moths products and repellents. This product market definition is in line with the market definition of merger decisions by the Spanish national competition authority.

² Both referred to as the "Parties".

- (10) According to the Parties the relevant geographic market(s) is national. This is in line with the Spanish Competition Commission case N-301 S.C. Johnson/Bayer and with the decision practice of the national competition authorities that have analysed this market.³ The Commission has not specifically addressed the market for household insecticides in its previous decisions, however, a national geographic definition of this market is in line with the Commission's practice for a number of consumer goods sold in retail outlets⁴. The Parties themselves have provided market share information on the basis of a national geographic market definition.

III. ASSESSMENT OF THE REFERRAL REQUEST

- (11) 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 request⁵. 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

- (12) 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.⁶ In that sense, the fact that the markets have been defined as national is not decisive to conclude that a transaction does not affect (or potentially affect) trade between the Member States.⁷
- (13) Several elements militate in favour of the conclusion that in this case trade between Member States is affected. Although certain brands of the Parties are currently present only in certain national markets, the Parties also have brands used in multiple Member States⁸. In addition, the production of insecticides does not usually take place in the same Member State as they are commercialised. It can also be noted that the parties are active in nearly all the segments of the relevant sub-markets in several Member States. These elements clearly indicate

³ See e.g. Decision of the French Ministry of the Economy of 11 March 2003 and decision of the Portuguese Authority of 21 January 2003 in case 56/2002 – JOHNSON / NEGÓCIO FLORA DA BAYER.

⁴ See e.g. Case COMP/M.5828 Procter & Gamble / Sara Lee Air Care; COMP/ M.5644 Kraft / Cadbury; COMP/M.5658 Unilever / Sara Lee Body Care.

⁵ See also Commission Notice on Case Referral in respect of Concentrations, paragraphs 42-44. OJ C 56, 05.03.2005, p.2.

⁶ Paragraph 43 of the Referral Notice.

⁷ See, by analogy, Commission Notice – Guidelines on the effect on trade concept contained in Art. 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004), points 19 to 43.

⁸ See e.g. *Catch* of Sara Lee insecticide business which is used in France, Czech Republic, Poland, Slovakia or *Raid* from SCJ in Spain, Slovenia, Slovakia, Portugal, Poland, Greece, Germany etc.

that the transaction affects trade between Member States to the effect of article 22 of the Merger Regulation.

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

- (14) 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 deserves close scrutiny, without prejudice to the outcome of a full investigation.
- (15) In the Czech Republic, the relevant product markets for home insecticides are already very concentrated. As shown in the table below, the transaction would lead to a combined market share of [50-60]% in the potential anti-moth product market with an increment of [10-20]% and of [50-60]% in the likely flying insect killers market with an increment of [0-5]%. The market shares in the potential crawling insect killers market are around [20-30]%.

FIK	
MARKET SHARES <u>IN VALUE</u> - CZECH REPUBLIC	
Company	2009
	%
SCJ	[40-50]
Sara Lee	[0-5]
Total SCJ+SL	[50-60]
Lybar/Spolchemie	[40-50]
Unichem	[0-5]
Marca	[0-5]
Papirny Moudry	[0-5]
Other	[0-5]
TOTAL	100,0

CIK	
MARKET SHARES <u>IN VALUE</u> - CZECH REPUBLIC	
Company	2009
	%
SCJ	[20-30]
Sara Lee	[0-5]
Total SCJ+SL	[20-30]
Lybar/Spolchemie	[50-60]
Unichem	[5-10]
Marca	[0-5]
Other	[10-20]
TOTAL	100,0

ANTI-MOTH	
MARKET SHARES <u>IN VALUE</u> - CZECH REPUBLIC	
Company	2009
	%
SCJ	[40-50]
Sara Lee	[10-20]
Total SCJ+SL	[50-60]
Lybar/Spolchemie	[20-30]
Marca	[5-10]
Papirny Moudry	[0-5]
Other	[5-10]
TOTAL	100,0

- (16) On the basis of the *prima facie* analysis submitted by Czech Republic, the Commission considers, without prejudice to the outcome of its investigation that there is a risk that the concentration threatens to significantly affect competition within the territory of Czech Republic which deserves closer scrutiny.

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

- (17) Pursuant to paragraph 45 of the Referral Notice, referrals of concentrations already notified should normally be limited to those cases where it appears that the potential negative effects would be best addressed at the Community level.
- (18) In the present case, the proposed transaction may give rise to competition concerns in a series of national markets located in a number of Member States, namely France, Belgium, Italy, Greece, Spain and the Czech Republic 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 desirable. Given the characteristics of the present transaction (inter alia the probable importance for the Italian market of SLHI as potential competitor) and the proximity of some of the national markets concerned, the main economic impact of the concentration is connected to such markets. Consequently, the present concentration falls under one of the categories of cases referred to in paragraph 45 of the Referral Notice.

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

IV. CONCLUSION

- (20) After examination of the above-mentioned, the Commission has concluded that the transaction the Czech Office for the Protection of Competition 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 Czech Republic to join the initial referral request made by Spain 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.
- (21) 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 23 August 2010.

For the Commission

(signed)

Algirdas SEMETAS
Member of the Commission