



EUROPEAN COMMISSION

DG Competition

*Case M.8562 - Cargill /
Faccenda Investments*

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 4(4)

Date: 18.10.2017



EUROPEAN COMMISSION

Brussels, 18.10.2017
C(2017)7106 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 parties

To the UK Competition Authority

**Subject: Case M. 8562 –Cargill / Faccenda Investments
Commission decision following a reasoned submission pursuant to Article 4(4) of Regulation No 139/2004¹ for referral of the case to the United Kingdom and Article 57 of the Agreement on the European Economic Area²**

Date of filing: 25 September 2017

Legal deadline for response of Member States: 17 October 2017

Legal deadline for the Commission decision under Article 4(4): 30 October 2017

Dear Sir or Madam,

1. INTRODUCTION

- (1) On 25 September 2017, the Commission received by means of a Reasoned Submission a partial referral request pursuant to Article 4(4) of the Merger Regulation with respect to the transaction cited above. Cargill, Incorporated and Faccenda Investments Ltd. request the operation to be examined partially by the

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').

competent authorities of the United Kingdom as regards its effects on the relevant markets in the United Kingdom.

- (2) According to Article 4(4) of the Merger Regulation, before a formal notification has been made to the Commission, the parties to the transaction may request that their transaction be referred in whole or in part from the Commission to the Member State where the concentration may significantly affect competition in one or more markets within that Member State which present all the characteristics of a distinct market.
- (3) A copy of this Reasoned Submission was transmitted to all Member States on 26 September 2017.
- (4) By letter of 29 September 2017, the Competition and Markets Authority ('CMA'), as the competent authority of the United Kingdom, informed the Commission that the United Kingdom agrees with the proposed partial referral.

2. THE PARTIES

- (5) **Cargill, Incorporated** ('Cargill'), the ultimate parent company of the Cargill Group, is a privately held company active in the international production and marketing of food, and agricultural and risk management products and services. Cargill's businesses include grain and commodity merchandising, oilseed and grain processing and refining, flour milling, meat processing (including chicken) and financial services.
- (6) **Faccenda Investments Ltd.** and its affiliates ('Faccenda') operate as a holding company. The company, through its subsidiaries, supplies chicken, duck and turkey products in the United Kingdom and abroad. Faccenda achieves [...] % of its Union-wide turnover in the UK.
- (7) Cargill and Faccenda will be jointly referred to as 'the Parties'.

3. THE OPERATION AND CONCENTRATION

- (8) The Parties will combine their UK-based chicken production activities in a full-function joint venture (JV). The JV will be a newly created company to which the Parties will contribute their integrated UK chicken breeding, rearing, fattening, slaughtering and packaging operations, including related activities such as chicken feed production and road transport delivery assets. Faccenda will also contribute to the JV equivalent assets in relation to turkey and duck production.³
- (9) The operation consists in the acquisition by Cargill and Faccenda of joint control of the JV by means of purchase of shares. Each of Cargill and Faccenda will acquire 50% of the shares in the JV in return for the transfer of its business ('the Transaction') and both Parties' agreement will be required for the JV to adopt any strategic decisions.

³ In general, the JV's scope of activity is confined to raw/fresh/chilled (i.e. unfrozen) poultry products and raw/fresh/chilled "ready-to-cook" added value poultry products; the activities left out of the JV almost entirely concern cooked "ready-to-eat" poultry products (which are delivered frozen within the UK and via imports), see para 72 Form RS.

- (10) The JV meets all of the criteria set out in the Commission's Consolidated Jurisdictional Notice⁴ to be considered a full-function undertaking since: i) it will operate on a lasting basis, as its duration is indefinite; ii) it will have sufficient resources to operate independently on the market, as it will have access to all of the assets which the Parties were employing in their respective independent pre-JV businesses in the fresh chicken markets; iii) it will undertake all of the activities of the former businesses of the Parties save only certain retained activities (essentially in relation to cooked poultry); iv) while the JV will have some sale relations with the parents [...], this supply will account for less than 10% of the JV's total estimated annual turnover. Moreover, these supply agreements will be upon arms' length terms.
- (11) The Transaction therefore constitutes a concentration within the meaning of Articles 3(1)(b) and 3(4) of the Merger Regulation.

4. UNION DIMENSION

- (12) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million.⁵ (Cargill: EUR 96.8 billion; Faccenda: EUR 741.3 million). Each of them has a Union wide turnover in excess of EUR 250 million (Cargill: EUR [...]; Faccenda: EUR [...]). Faccenda achieves more than two thirds of its Union-wide turnover in the United Kingdom but Cargill does not.
- (13) The concentration therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

5. ASSESSMENT

- (14) The Transaction leads to horizontal overlaps between the Parties' activities in the market for the supply of fresh chicken products and to vertical relationships with regard to the upstream animal feed market, where Cargill is present, and the downstream market for the supply of chicken products.

A. Relevant product markets

Supply of fresh chicken

- (15) The Commission has assessed poultry and other meats as distinct product markets.⁶ Moreover, the Commission (and the CMA) has envisaged examining each of the markets for chicken, duck and turkey separately.⁷ Since Cargill sells neither duck nor turkey in the UK or the EEA and will therefore not contribute any duck or turkey-related activities to the JV, the remainder of this decision is focused on the market for the supply of chicken.

⁴ Commission Consolidated Jurisdictional Notice (OJ C95, 16.4.2008, p.1).

⁵ Turnover calculated in accordance with Article 5 of the Merger Regulation.

⁶ See Commission decision in case M.5705-Marfrig Alimentos/Seara, para 10

⁷ See, for instance, paras 42-43 of CMA decision in case Boparan/Bernard Mathhews and para 39 of Commission decision in case M. 6383-Cargill/KoroFrance. The Commission has ultimately left this question open.

- (16) In previous decisions, the Commission has made a distinction between primary chicken, i.e. meat that has not been processed in any way (in some decisions called fresh chicken)⁸ and processed chicken.⁹ In relation to processed chicken, the CMA has drawn a distinction between uncooked processed products and cooked processed products.¹⁰ Uncooked processed chicken are added value "ready-to-cook" chicken products, such as spiced, seasoned, marinated or stuffed chicken. The Parties submit that, within added value "ready to cook" chicken products, some distinctions could be made, such as a separate category of chickens for roasting in a store, that is, so-called rotisserie chickens. Both parties will contribute their activities in the market for ready-to-cook chicken products, including rotisserie products, to the JV. By contrast, the JV will not sell any cooked chicken products.
- (17) Regarding primary chicken meat, that is, chicken meat that has not been processed, there may be a distinction between primary fresh chicken (that is, chicken meat that is unprocessed and has never been frozen) and primary frozen chicken, as well as by customer channel, that is, sales to retailers (mostly supermarkets), caterers and food manufacturers. In recent decisions, the Commission left open whether such distinctions should be made.¹¹

Animal feed

- (18) The Commission (and the CMA) have considered that there are separate product markets for i) single feed and ii) compound feed.¹²
- (19) Regarding single feed, the Commission envisaged a distinction between i) the supply of raw materials to compound feed manufacturers and ii) the supply of roughage and moisture rich single feed to farmers but left the market definition open.¹³ The Commission also considered a further distinction of the single feed market between the supply of non-grain feed ingredients (NGFI), such as oilseed meals (e.g. soybean and rapeseed meals), and feed grains but left the market definition open.¹⁴ The Commission also considered a possible sub-segmentation of the NGFI market

⁸ In previous Commission decisions, (see for instance Commission decisions in cases M. 5322 Marfrig/OSI Group Companies, para 10; M.5705-Marfrig Alimentos/Seara, para. 8) the term "fresh" is used to denote unprocessed meat – both frozen and unfrozen - and is distinguished from processed meat. The Parties point out that, according to regulatory requirements, chicken cannot be labelled as "fresh" if it has previously been frozen. They therefore use the term "primary chicken" to denote unprocessed chicken, which can be both fresh and frozen.

⁹ See Commission decision in cases M.6383 Cargill/KoroFrance, para. 38; M. 5322-Marfrig/OSI Group Companies, paras. 10-19 and 35; M.5705- Marfrig Alimentos/Seara, para. 10.

¹⁰ See CMA decisions in cases Boparan/Bernard Matthews, para 30 and Boparan/Vion, para 48.

¹¹ See Commission decision in cases M.6383 Cargill/KoroFrance, paras 39 and 41; M.5705- Marfrig Alimentos/Seara, paras 9-12.

¹² See, for instance, Commission decision in case M 6573- Forfarmers/Agricola, para 10 and CMA decision in case ME/6507/14- ForFarmers/CountryWide Farmers, para 29.

¹³ See Commission decision in cases M. 6573- Forfarmers/Agricola, para 10; M. 6468-Forfarmers/Hendrix, para 14.

¹⁴ See, for instance, Commission decision in cases M. 6573 ForFarmers/Agricola, para 15 and 18; M. 1362-BAY WA/RWA.

according to different types of NGFI but left the market definition open.¹⁵ The Commission has also examined separately the markets for crude seed oils (e.g. rapeseed oils and soybean oils), leaving open a possible further sub-segmentation according to the type of oilseed.¹⁶

- (20) Regarding blended feed/compound feed, the Commission has considered but ultimately left open whether compound feed should be sub-segmented into concentrates, starter nutrition, milk replacers and complete feed.¹⁷ Finally, regarding feed mixes, the Commission left open whether they could be divided into premixes and base-mixes.¹⁸

B. Relevant geographic market

Supply of fresh chicken

- (21) As regards the geographic scope of the market for the supply of primary fresh chicken to retailers, the Commission has left open the question whether the market is national in scope or possibly EEA-wide.¹⁹ The CMA has, on a conservative basis, examined this market on a UK national level, noting in particular a preference of retailers for British-reared fresh chicken products following health scares involving red meat.²⁰ Regarding primary fresh chicken supplies to caterers and food manufacturers, the Commission has left open the question whether the market is national or wider.²¹
- (22) Regarding primary added-value "ready to cook" chicken products the Commission has left open whether the markets are national or wider.²²

Animal feed

- (23) The Commission has left open the geographic market definition with regard to single feed (although it considered there are indications the market is EEA-wide).²³ As regards compound/blended feed, the Commission found that the market is at most

¹⁵ See, for instance, Commission decision in cases M. 7854-Agravis/Wilmar International/H Bogel, para 19; M.6383 Cargill/KoroFrance, para 35.

¹⁶ See, for instance, Commission decision in case M.8199-Bunge/European oilseed Processing Facilities, para 24.

¹⁷ See paras 9 and 11 of Commission decision in case M. 6383-Cargill/KoroFrance.

¹⁸ See Commission decision in cases M.6626 – DLG/Danish Agro/DanHatchof, para 23; M. 6573-Forfarmers/Agricola, para 28; M. 5558- Nutreco/Cargill, para 12.

¹⁹ See cases M.6383 Cargill/KoroFrance, para 40; M. 5705-Marfrig Alimentos/Seara, para 16.

²⁰ See CMA Cases Boparan/Vion, para 42; Boparan/Bernard Matthews, para 51.

²¹ See Commission decision in case M. 5322 Marfrig/OSI Group Companies, para 21.

²² See, for instance, para 22 of Commission decision in case M. 5322 Marfrig/OSI Group Companies.

²³ See, for instance, Commission decision in cases M. 7854 Agravis/Wilmar International/H Bögel, paras 26-27; M.6468- Forfarmers/Hendrix, para 16; M. 5410- Forfarmers/Cefetra, para 15.

national in scope.²⁴ Regarding feed mixes, the Commission found that the market could be national but left the exact market definition open.²⁵

C. Assessment

- (24) Pursuant to Article 4(4) of the Merger Regulation, and to the Commission notice on case referral in respect of concentrations ("the Referral Notice")²⁶, the assessment of a concentration may be referred to a Member State provided that two legal requirements are fulfilled:
- (a) there must be indications that the concentration may significantly affect competition in a market or markets, and
 - (b) the market(s) in question must be within a Member State and present all the characteristics of a distinct market.
- (25) On the basis of the information provided by the Parties, the Transaction leads to horizontally affected markets in the following markets and/or segments:
- the supply of primary fresh chicken in the UK, where the Parties' combined market share would amount to [20-30]%;
 - the supply of primary fresh chicken to UK retailers, where the combined market share would amount to [20-30]%;
 - the supply of rotisserie chicken to UK retailers, where the combined market share would amount to [30-40]%.
- (26) Furthermore, the Transaction leads to vertically affected markets in the following markets and/or segments:
- the supply of rapeseed meal and soybean meal in the UK upstream, where Cargill's market share is [30-40]% and [30-40]% respectively, and the supply of different chicken products in the UK downstream;
 - the supply of crude rapeseed oil and soybean oil in the UK upstream, where Cargill's market share is [40-50]% and [40-50]% respectively, and the supply of different chicken products in the UK downstream
- (27) All affected markets are geographically confined to the United Kingdom, mainly because Faccenda achieves the vast majority ([...])% of its Union-wide turnover in the UK. There are no affected markets at EEA level. On the basis of the information submitted in the Reasoned Submission, the only possible overlap between the Parties' activities outside of the United Kingdom is in the Netherlands, on an overall market for the supply of primary fresh and frozen chicken. On that market, the Parties have a very small combined market share (below [0-5]%).

²⁴ See Commission decision in cases M. 6573 Forfarmers/Agricola, para 25, M.6468- Forfarmers/Hendrix, para 33.

²⁵ See Commission decision in cases M.6626 – DLG/Danish Agro/DanHatch, para 23; M. 6383-Cargill/KoroFrance, para 15.

²⁶ OJ C 56, 5.3.2005, p. 2.

D. Conclusion

- (28) The Transaction would lead to horizontally affected markets with regard to the market for the supply of fresh chicken in the UK (with a combined market share of [20-30]%), a possible market for the supply of fresh chicken to UK retailers (with a combined market share of [20-30]%) and a possible market for the supply of rotisserie chicken to UK retailers (with a combined market share of [30-40]%). The Transaction would also lead to vertically affected markets with regard to the possible upstream markets for the supply of rapeseed meal, soybean meal, crude rapeseed oil and soybean oil in the UK (where Cargill's market share would be [30-40]%, [30-40]%, [40-50]% and [40-50]% respectively) and the supply of different chicken products in the UK downstream.
- (29) In view of the foregoing, the assessment suggests that the Transaction may significantly affect competition in a number of markets in the United Kingdom, which present all the characteristics of distinct markets. Therefore, the two legal requirements set forth by Article 4(4) of the Merger Regulation appear to be fulfilled in the present case.

6. REFERRAL

- (30) The Referral Notice (point 17) indicates that, in seeking a referral under Article 4(4), *"the requesting parties are ... required to demonstrate that the transaction is liable to have a potential impact on competition on a distinct market within a Member State, which may prove to be significant, thus deserving close scrutiny"*, and that *"such indications may be no more than preliminary in nature [...]"*. Point 18 of the Referral Notice also indicates that *"the requesting parties are required to show that a geographic market in which competition is affected by the transaction in the manner just described (paragraph 17) is national, or narrower than national in scope"*. Furthermore, pursuant to point 20 of the Referral Notice, concentrations whose effects are likely to be confined to, or have their main economic impact in a single Member State, are the most appropriate candidate cases for referral to that Member State.
- (31) On the basis of the information provided by the Parties in the Reasoned Submission, the Commission considers that the Transaction is an appropriate candidate for pre-filing referral from the Commission to the United Kingdom as regards the effects of the Transaction on the relevant markets in the United Kingdom in accordance with Article 4(4) of the Merger Regulation. The Transaction is a concentration within the meaning of Article 3 of the Merger Regulation, it has an EU dimension and it may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market.
- (32) The Commission considers, on the basis of the information submitted in the Reasoned Submission, that the principal impact on competition of the concentration is liable to take place on distinct markets in the United Kingdom, and that the requested referral would be consistent with points 17, 18 and 20 of the Referral Notice.
- (33) The Commission has considered as an additional factor supporting the referral the fact that the CMA would be best placed to examine the effects of the Transaction, as the CMA has extensive and specific expertise in examining the markets at hand and

assessing agricultural mergers in the poultry sector in the United Kingdom (see point 23 of the Referral Notice).²⁷

- (34) Furthermore, in accordance with point 22 of the Referral Notice, there are no prospects that a significant number of national markets outside the United Kingdom will be affected or that a partial referral of the case could lead to conflicting investigations or remedies in this case. The affected markets are exclusively located in the United Kingdom with very limited additional overlaps in the Netherlands.²⁸

7. CONCLUSION

- (35) For the above reasons, and given that the United Kingdom has expressed its agreement, the Commission has decided to refer the assessment of the effects of the Transaction on the relevant markets in the United Kingdom to be examined by the CMA. This decision is adopted in application of Article 4(4) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)

Johannes LAITENBERGER

Director-General

²⁷ See the Completed acquisition by Boparan Private Office of the business formerly carried on by Bernard Matthews Limited” of 12 January 2017; Completed acquisition by Boparan Holdings Limited of Vion Poultry Limited” of 19 July 2013; and Acquisition by 2 Sisters Property BV of Storteboom Group BV, of 28 June 2010.

²⁸ The overlap between the Parties in relation to the sale of fresh and frozen chicken in the Netherlands is *de minimis* and will not in any case exceed 20% in any plausible market/segment. In addition, any vertical links between Cargill's feed activities in the EEA and the Parties' minor sales of chicken in the Netherlands do not give rise to market shares exceeding 30%.