

***Case No COMP/M.6895 -
3G SPECIAL SITUATIONS FUND III/
BERKSHIRE HATHAWAY/
H J HEINZ COMPANY***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION

Date: 31/05/2013

***In electronic form on the EUR-Lex website under
document number 32013M6895***



Brussels, 31.5.2013
C(2013) 3418 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

MERGER PROCEDURE

To the notifying party:

Dear Sirs,

**Subject: Case No COMP/M.6895 – 3G Special Situations Fund III/ Berkshire Hathaway/ H J Heinz Company
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004**

- (1) On 24 April 2013, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004¹ by which the undertakings 3G Capital Inc., via 3G Special Situations Fund III, L.P. ('3G Capital') and Berkshire Hathaway Inc. ('Berkshire') acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of the undertaking H.J. Heinz Company ('Heinz') by way of purchase of shares.
- (2) 3G Capital, Berkshire and Heinz are collectively referred to as 'the Parties' whereas 3G Capital and Berkshire are collectively referred to as 'the Notifying Parties'.

1. THE PARTIES

- (3) 3G Capital is a US-headquartered global investment firm. The company's portfolio includes a controlling shareholding in Burger King Corporation, active in the quick-service restaurant sector.

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.

- (4) Berkshire is a US-headquartered investment firm whose subsidiaries are engaged in a number of business activities including property and casualty insurance, freight rail transportation, utilities and energy, finance, manufacturing, services and retailing.
- (5) Heinz is a US-headquartered global food processing company whose product portfolio includes ketchup, condiments and sauces, frozen food, infant nutrition and other food products.

2. THE OPERATION AND CONCENTRATION

- (6) The proposed transaction consists in the acquisition of joint control by 3G Capital and Berkshire over Heinz. 3G Capital and Berkshire will be able to exercise decisive influence over Heinz [...]:²

- [...].
- (7) Heinz sells food products on the markets globally and thus constitutes a business with a market presence to which a market turnover can be attributed.³
- (8) In view of the above, the proposed transaction constitutes a concentration within the meaning of Article 3(1)(b).

3. EU DIMENSION

- (9) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million⁴ (3G Capital: EUR [...]; Berkshire: EUR [...]; Heinz EUR [...]). Each of them has an EU-wide turnover in excess of EUR 250 million (3G Capital: EUR [...]; Berkshire: EUR [...]; Heinz: EUR [...]), but none of them achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.
- (10) The notified operation therefore has an EU dimension under Article 1(2) of the Merger Regulation.

4. COMPETITIVE ASSESSMENT

- (11) The proposed transaction gives rise to affected markets due to the vertical relationships between Heinz's cold sauces business and Burger King's quick-service restaurant business.⁵

² Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1), paragraphs 64–73.

³ Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1), paragraphs 24 and 91.

⁴ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice.

⁵ 3G Capital currently has no other portfolio investments. Berkshire holds controlling interests in International Dairy Queen Inc., McLane Company and Marmon Holdings Inc. No affected markets arise in the EEA from any horizontal overlaps or vertical relationships between these business activities and Heinz's activities.

- (12) Burger King franchises and operates fast food hamburger restaurants in 21 Member States of the EEA.⁶ Burger King uses Heinz's cold sauces as an ingredient in its hamburgers and offers customers complementary cold sauces to accompany their food either as individual portions or out of a dispenser.

A. Relevant market definitions

1. Cold sauces

Product market definition

- (13) The Notifying Parties submit that the market for cold sauces is to be distinguished from the market for hot sauces. While cold sauces are typically used to add flavour to cooked food, hot sauces are employed during the cooking process. This distinction is in line with Commission precedents.⁷
- (14) The Notifying Parties submit that it may be appropriate to identify a single product market for all cold table sauces due to supply-side considerations. However, the Commission has in the past identified distinct categories for (i) ketchup, (ii) mayonnaise, (iii) mustard, (iv) salad dressings and (v) other cold sauces,⁸ noting the different characteristics and use of the products. The market investigation has broadly confirmed this segmentation.
- (15) The Notifying Parties agree with the Commission's decisional practice which has consistently drawn a distinction between the sale of food products to the retail and the food service sector.⁹ However, the Notifying Parties submit that it can be left open whether, in line with Commission precedents, a further distinction within the food service sector should be drawn between a social segment (including canteens and hospitals) and a commercial segment (including restaurants, fast food chains and hotels).¹⁰ The Notifying Parties also submit that it can be left open whether, as previously considered but left open by the Commission, front-of-the-house and back-of-the-house applications within the food service sector fall into separate product markets.¹¹

⁶ Burger King is active in Austria, Bulgaria, Cyprus, Czech Republic, Denmark, France, Germany, Hungary, Iceland, Ireland, Italy, Malta, the Netherlands, Norway, Poland, Portugal, Slovenia, Slovakia, Spain, Sweden and the United Kingdom.

⁷ Cases COMP/M.1802 – *Unilever/Amora-Maille*, paragraph 10; COMP/M.1999 – *Unilever/Bestfoods*, paragraphs 22–32; COMP/M.6753 – *Orkla/Rieber&Son*, paragraphs 31–7.

⁸ Cases COMP/M.1802 – *Unilever/Amora Maille*, paragraph 10; COMP/M.1990 – *Unilever/Bestfoods*, paragraph 22; COMP/M.6753 – *Orkla/Rieber & Son*, paragraphs 13, 17 and 33.

⁹ Cases COMP/M.1802 – *Unilever/Amora Maille*, paragraph 19; COMP/M.1990 – *Unilever/Bestfoods*, paragraphs 8–11; COMP/M.2302 – *Heinz/CSM*, paragraphs 8–11; COMP/M.3658 – *Orkla/Chips*; COMP/M.4216 – *CVC/Bocchi/De Weide Blik*, paragraph 21; COMP/M.6321 – *Buitenfood/Ad van Geloven Holding/JV*, paragraphs 16–9; COMP/M.6753 – *Orkla/Rieber & Son*, paragraph 10.

¹⁰ Cases COMP/M.1990 – *Unilever/Bestfoods*, paragraph 42; COMP/M.4216 – *CVC/Bocchi/De Weide Blik*, paragraph 21; COMP/M.5199 – *De Weide Blik/Atlanta*, paragraph 17; COMP/M.6753 – *Orkla/Rieber & Son*, paragraphs 28 and 30.

¹¹ 'Front-of-the-house' refers to products that are used, for example, in office buildings and canteens and that are visible to the consumer. 'Back-of-the-house' refers to products that are used in, for example, restaurant kitchens and that are not visible to the consumer. Cases COMP/M.1990 –

- (16) The market investigation was inconclusive as to whether a distinction should be made between a social segment and a commercial segment; however, the results of the market investigation seem to indicate that a distinction between front-of-the-house and back-of-the-house applications might be warranted because of, for example, branding being more important for customer choice in front-of-the-house applications. Nevertheless, as no competition concerns have been identified under even the narrowest market definitions, it can be left open whether a distinction should be made between social and commercial segments or between back- and front-of-the-house applications.
- (17) The Notifying Parties further submit that it is not appropriate to define separate markets for branded and private label products in the food service sector. According to the Notifying Parties, food service operators do not attach any importance to the brand of the product resulting in a high degree of demand-side substitutability. Furthermore, the Notifying Parties argue that branded and private label products are manufactured using the same processes resulting in a high degree of supply-side substitutability. The market investigation seems to indicate that branded and private label products compete with each other at least in some applications. However, as no competition concerns have been identified even under the narrower market definition, the question can be left open.
- (18) In summary, the Commission considers that the relevant product market consists of separate markets for the supply of (i) ketchup, (ii) mayonnaise, (iii) mustard, (iv) salad dressings and (v) other cold sauces to the food service sector. For the purposes of this decision, it can however be left open whether further segmentation between social and commercial segments, front- and back-of-the-house applications or branded and private label products should be made.

Geographic market definition

- (19) The Notifying Parties submit that, in line with previous Commission decisions, the markets in the food service sector are national in scope.¹² This is due to diverging market shares of suppliers across Member States, differing consumer tastes and the fact that negotiations are conducted on a national basis.
- (20) However, as no competition concerns have been identified under even the narrowest reasonable, national, market definitions, geographic market definitions can be left open for the purposes of this decision.

2. Quick-service restaurants

Product market definition

- (21) The Notifying Parties submit that the relevant product market is the market for informal restaurants, including chained and independent quick-service restaurants, pizzerias, cafes, sandwich shops as well as take-away and home delivery outlets.

Unilever/Bestfoods, paragraphs 43–4; COMP/M.6753 – *Orkla/Rieber & Son*, paragraphs 29 and 30.

¹² Cases COMP/M.1802 – *Unilever/Amora Maille*, paragraph 25; COMP/M.1990 – *Unilever/Bestfoods*, paragraphs 58–9; COMP/M.6753 – *Orkla/Rieber & Son*, paragraphs 40–1.

- (22) The Commission has in the past left open the question whether the relevant product market is the market for all types of informal restaurants or whether (i) quick-service restaurants, (ii) eat-in quick-service restaurants (thus excluding take-away and home delivery restaurants), or (iii) chained informal restaurants (thus excluding independent quick-service restaurants) each constitute separate product markets.¹³
- (23) The majority of respondents indicated in the market investigation that the relevant product market might include all types of informal restaurants. However, some respondents did indicate that quick-service restaurants would differ from other types of informal restaurants in terms of, for example, pricing. Nonetheless, as no competition concerns have been identified even under the narrowest market definition, the exact product market definition can be left open for the purposes of this decision as well.

Geographic market definition

- (24) The Notifying Parties submit that the markets are national in scope due to differences in price, food culture and consumer preferences between different Member States. The Commission has in the past confirmed this position, while in one decision leaving open the question whether the market could possibly have a local scope.¹⁴
- (25) The market investigation suggested that, in the present case, the relevant geographic markets are at least national in scope, some respondents considering them to be even wider. However, as no competition concerns have been identified even under any plausible alternative market definition, the exact geographic market definition can be left open for the purposes of this decision.

B. Competitive assessment

- (26) The vertical relationships between Heinz's and Burger King's businesses lead to vertically affected markets in Cyprus, Malta and Spain.¹⁵

1. Spain

- (27) Heinz has a market share of [20-30]% by value and [30-40]% by volume in the Spanish market for the supply of ketchup to the food service sector. The Notifying Parties estimate that Heinz's market shares are uniform across the possible sub-segments of this market (i.e. the commercial segment, the front-of-the-house segment and the back-of-the-house segment). Furthermore, Heinz has a

¹³ Cases COMP/M.2940 – *TPG Advisors III/Goldman Sachs/Bain Capital Investors/Burger King*, paragraphs 12–23; COMP/M.4220 – *Food Service Project/Tele Pizza*, paragraphs 7–13.

¹⁴ Cases COMP/M.2940 – *TPG Advisors III/Goldman Sachs/Bain Capital Investors/Burger King*, paragraphs 24–5; COMP/M.4220 – *Food Service Project/Tele Pizza*, paragraphs 14–7.

¹⁵ The Notifying Parties have submitted market share estimates for all of the national market sub-segments previously considered by the Commission. However, due to a lack of available third party data, the Notifying Parties submitted broad market share estimates, in particular as regards the narrow segmentations of front-of-the-house/back-of-the-house applications or sales of branded products.

market share of [30-40]% by value and [50-60]%¹⁶ by volume of sales of branded ketchup to the food service sector.

- (28) Burger King has a downstream share of [10-20]% by value and [10-20]% by volume in the national market for quick-service restaurants in Spain ([20-30]% by value and [10-20]% by volume in eat-in quick-service restaurants and [20-30]% by value and [10-20]% by volume in chained quick-service restaurants).

2. Cyprus

- (29) Heinz has a market share of [30-40]% by value and [30-40]% by volume in the Cypriot market for the supply of other cold sauces (i.e. all cold sauces excluding ketchup, mustard, mayonnaise and salad dressing) to the food service sector. The Notifying Parties estimate that Heinz's market shares are uniform across the possible sub-segments of this market (i.e. the commercial segment, the front-of-the-house segment and the back-of-the-house segment). According to the Notifying Parties, the market for other cold sauces in Cyprus is entirely comprised of branded products.
- (30) Burger King has a downstream share of [10-20]% by value and volume in the national market for quick-service restaurants in Cyprus ([10-20]% by value and [10-20]% by volume in eat-in quick-service restaurants and [20-30]% by value and [30-40]% by volume in chained quick-service restaurants).

3. Malta

- (31) Burger King has a market share of [10-20]% by value and volume in the national market for quick-service restaurants ([20-30]% by value and [10-20]% by volume in eat-in quick-service restaurants). However, if only chained quick-service restaurants are considered, Burger King has a market share of [20-30]% by value and [30-40]% by volume in Malta.
- (32) Heinz's market shares for the supply of cold sauces to the food service sector in Malta remain below 20% for the different cold sauces and the possible different sub-segments (maximum of [10-20]% in ketchup and [10-20]% in mayonnaise with no activities in mustard, salad dressings and other cold sauces).

4. Overall assessment

- (33) The Parties' market shares exceed 30% only in certain potential sub-segments of either the upstream or the downstream markets.¹⁷ In addition, the Notifying Parties have identified a number of competitors active in each of the affected markets and possible sub-markets, and the respondents in the market investigation have not raised substantiated concerns regarding the proposed transaction.

¹⁶ According to Heinz, this pronounced difference between Heinz's volume and value market shares is due to the fact that [...].

¹⁷ See paragraph 25 of the Commission Guidelines on the assessment of non-horizontal merges under the Council Regulation on the control of concentrations between undertakings (OJ C265, 18.10.2008, p.1).

4.1. Input foreclosure

- (34) As regards potential input foreclosure concerns, the Notifying Parties submit that a number of alternative sauce suppliers are active in the affected upstream markets. In Spain, the competitors in the supply of ketchup to the food service sector include Bolton ([10-20]% market share), Choví ([5-10]%) and Helios Dulces y Conservas ([5-10]%). In Cyprus, competitors in the supply of other cold sauces to the food service sector include Mitsios Trading, Andreas Sophocieous and Delicacy Foods with equal shares of approximately [20-30]% each. In Malta, Heinz's most important competitors for the supply of various cold sauces are Alf Mizzi & Sons, Bartoli Brothers, Borg & Aquilina, F. Busuttil and Impex Limited.
- (35) The competitors on the upstream markets responding to the market investigation unanimously indicated that they would be able to increase their production of cold sauces in the next three years if there was increased demand for their products.
- (36) The respondents to the market investigation on the downstream markets unanimously indicated that there will be alternative suppliers of cold sauces to their business after the proposed transaction if Heinz were not willing or able to supply them with cold sauces or were to increase its prices or deteriorate other sales conditions. Accordingly, the vast majority of respondents did not expect the proposed transaction to have an effect on their business and none of the respondents expected the proposed transaction to have an effect on the markets for the supply of cold sauces or for quick-service restaurants.
- (37) In light of the presence of alternative cold sauces suppliers not facing significant capacity constraints and in the light of the results of the market investigation, the Commission thus concludes that no input foreclosure concerns arise from the proposed transaction.

4.2. Customer foreclosure

- (38) As regards potential customer foreclosure concerns, the Notifying Parties submit that there are a large number of quick-service restaurants competing with Burger King in the affected downstream markets. In Spain, the most important competitors in quick-service restaurants include McDonald's ([20-30]% market share), Pans & Co ([0-5]%), Rodilla ([0-5]%) and KFC ([0-5]%). In Cyprus, Burger King's most important quick-service restaurant competitors are franchisees of McDonald's, KFC and Goody's and in Malta Burger King primarily competes with Food Chain Holdings, Subway and franchisees of McDonald's.
- (39) Heinz is already an approved supplier to Burger King and the Notifying Parties do not expect the proposed transaction to have any effect on Burger King's supply patterns in the future. For example, Burger King already purchases [...] of its ketchup requirements in Spain and [...] of its requirements of other cold sauces in Cyprus from Heinz.
- (40) A minority of respondents in the upstream market raised general concerns about potential customer foreclosure and adverse effects of the transaction. However, none of those respondents currently sells cold sauces to Burger King in the EEA. Moreover, all of the cold sauce suppliers – including those mentioning potential customer foreclosure – indicated that there would be alternative customers of cold

sauces in the food service segment in case they were not able to sell to Burger King or only able to sell to Burger King at inferior sales conditions.

- (41) Furthermore, the majority of respondents on the upstream markets did not expect the proposed transaction to have an effect on their business or the quick-service restaurant markets. In addition, none of the respondents expected the proposed transaction to have a negative effect on the markets for the supply of cold sauces. One cold sauce supplier expected the proposed transaction to have a positive effect on the markets for cold sauces because of efficiencies and synergies brought about by the transaction.
- (42) The Commission thus concludes in light of the presence of alternative cold sauce customers and the results of the market investigation that no customer foreclosure concerns arise from the proposed transaction.

4.3. Overall conclusion

- (43) In the light of the presence of strong competitors on both the upstream and the downstream markets, the existing commercial relationships between Heinz and Burger King and the results of the market investigation on the impact of the transaction, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market and with the EEA Agreement.

5. CONCLUSION

- (44) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

*For the Commission
(signed)
Joaquín ALMUNIA
Vice-President*