

Final Report of the Hearing Officer ⁽¹⁾**Südzucker/ED&F Man****(M.6286)**

(2014/C 160/07)

1. BACKGROUND

1. On 19 September 2011, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ⁽²⁾ (the 'Merger Regulation') by which Südzucker Holding GmbH, controlled by Südzucker Mannheim/Ochsenfurt (the 'Notifying Party') acquires control, within the meaning of Article 3(1)(b) of the Merger Regulation, of ED&F Man Holding Limited ('EDFM'), by way of purchase of shares. (The Notifying Party and EDFM are referred to as 'the parties').

2. WRITTEN PROCEDURE

2. During the first phase, the Commission raised serious doubts as to the compatibility of the operation with the internal market. Accordingly, on 9 November 2011, the Commission decided to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

3. On 24 January 2012, the parties submitted formal commitments to divest all the shares held by EDFM in a refinery in Brindisi, Italy ('SRB'), which is a 50/50 joint venture with Società Fondiaria Industriale Romagnola S.p.A. ('SFIR'), and to transfer to SRB three existing contracts for the supply of raw cane sugar. The parties also committed, in case of a failure to transfer the contracts, to supply or procure to supply SRB with the contract volumes of raw cane sugar at reasonable prevailing market rates, in line with industry wide practices. Further to the market test, the Commission took the view that the proposed commitments would not entirely eliminate the competition concerns identified, and proceeded to the adoption of a Statement of Objections ('SO').

4. The SO was sent to the Notifying Party on 14 February 2012. The deadline to reply was 28 February 2012.

5. In the SO, the Commission's preliminary findings indicated that the notified concentration would result in the creation of a dominant position on the market for the supply of white sugar to industrial processors in Italy. On the remedies, the SO found that there was a significant risk of failure in the transfer of the raw sugar cane contracts, and that the alternative remedy proposed by EDFM was insufficient to guarantee the viability of SRB.

6. On 28 February 2012, the parties submitted joint written comments on the SO and requested a formal oral hearing. In addition, EDFM submitted separate comments on certain documents in the Commission's file concerning SRB, to which EDFM was granted access ⁽³⁾ and which were confidential vis-à-vis the Notifying Party.

Access to file

7. The Notifying Party was given access to the file on 15 February 2012. Requests for additional access to the file were submitted by the parties on 20, 21 and 23 February 2012.

8. All the parties' requests for additional access to the file have been dealt with by the Directorate-General for Competition. As I did not receive any complaint from the parties, I consider that their procedural rights in respect of access to the file have been observed.

⁽¹⁾ Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29) ('Decision 2011/695/EU').

⁽²⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

⁽³⁾ See Article 18(3) of the Merger Regulation and Article 17(2) of the Merger Implementing Regulation.

Interested third persons

9. On 21 February 2012, I accepted a request from SFIR to be heard as interested third person pursuant to Article 18(4) of the Merger Regulation. SFIR demonstrated sufficient interest in the proceedings given that the remedies proposed by EDFM are likely to affect its competitive position on the relevant market and that SFIR has made a number of written submissions in the course of the procedure. On 29 February 2012, following the parties' request for a formal oral hearing, I communicated to SFIR my decision to allow it to express its views at the formal oral hearing.

3. ORAL PROCEDURE

Request for closed session

10. On 1 March 2012, the parties requested a closed session regarding certain parts of their presentations dealing with the impact of the transaction on the Italian market and the remedies, on the ground that market participants would have access to sensitive information.

11. I rejected this request for the following reasons. First, I informed the parties that the only interested third person attending the formal oral hearing was SFIR. Second, the parties' argument that competitors should not have access to the information on the parties' respective positions on the relevant market, is an argument which could equally be made for any formal oral hearing in any merger case. If accepted, it would thus deprive Article 13 of Decision 2011/695/EU of its meaning. Third, as EDFM's joint venture partner in SRB, SFIR was party to EDFM's commercial information regarding the supply of sugar in Italy. Thus, I found no reason why SFIR should not have access to any of the Notifying Party's information which could be discussed in the presence of EDFM. Moreover, regarding the remedies proposal, SFIR was aware of the content, having been granted access to a nearly un-redacted version. Finally, both SFIR and EDFM are parties to the main contract covered by the remedies (the 'Mitra' contract).

The formal oral hearing

12. The formal oral hearing was held on 5 March 2012 in Brussels and was attended by: the Notifying Party and its legal advisors; EDFM and its legal and economic advisors; the interested third party and its legal advisors; the relevant Commission services and the representatives of six national competition authorities, i.e. the Belgian, German, Spanish, Italian, Finnish and Swedish competition authorities.

13. No incident occurred during the formal oral hearing.

4. PROCEDURE AFTER THE FORMAL ORAL HEARING

Additional submissions of the parties

14. On 12 March 2012 the parties submitted further comments following the discussions at the formal oral hearing.

Letter of facts

15. On 14 March 2012, the Commission sent to the parties a letter of facts setting out additional elements in support of the Commission's objections in the final decision. The parties were given until 16 March 2012 to provide their written comments. The parties responded on 19 March 2012.

Commitments

16. On 16 March 2012, the parties submitted a set of improved commitments to address the concerns that were highlighted in the SO. These consist in the divestment of all the shares held by EDFM in SRB and the transfer of the economic benefit of the three existing contracts for the supply of raw cane sugar. The parties also committed that, should EDFM fail to transfer the economic benefit of the Mitra contract, it will supply or procure to supply SRB with volumes of preferential raw cane sugar on the same terms and conditions of this contract; whereas concerning the two remaining contracts, EDFM will supply or procure to supply SRB with the respective volumes of preferential raw cane sugar at reasonable prevailing market rates in line with industry wide practices. The remedy package includes additional measures, such as the specification of certain purchaser requirements and the introduction of a fast-track arbitration clause.

17. The market test for these improved remedies was launched on 20 March 2012. The Commission concluded that the commitments proposed by the parties on 16 March 2012 sufficiently addressed all the remaining concerns regarding the compatibility of the proposed transaction with the internal market.

5. THE DRAFT DECISION

18. Pursuant to Article 16(1) of Decision 2011/695/EU, the Final Report shall consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views.

19. Upon review of the draft decision, I conclude that it does not deal with any objection in respect of which the Notifying Parties have not been afforded the opportunity of making known their views.

6. CONCLUDING REMARKS

20. I conclude that that all participants in the proceedings have been able to effectively exercise their procedural rights in this case.

Brussels, 2 May 2012.

Wouter WILS
