II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 February 1997

setting out measures in order to restore effective competition

(Case No IV/M. 784 — Kesko/Tuko)

(Only the English text is authentic)

(Text with EEA relevance)

(97/409/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 (2) (a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 8 (4) and Article 22 thereof,

Having regard to the Commission Decision of 20 November 1996 declaring the concentration by which Kesko Oy acquired sole control over Tuko Oy incompatible with the common market,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations [2],

Whereas:

(1) On 26 June 1996 the Commission received a request from the Finnish Office of Free Competition pursuant to Article 22 of Regulation (EEC) No 4064/89 ('the Merger Regulation') to examine the acquisition of Tuko Oy ('Tuko') by Kesko Oy ('Kesko'). On 20 November 1996 the Commission adopted a Decision pursuant to Article 8 (3) in conjunction with Article 22 of the Merger Regulation ('Decision of 20 November 1996'), declaring the concentration incompatible with the common market.

(2) At the time when the Decision of 20 November 1996 was adopted, the concentration had already been completed, since Kesko acquired control over Tuko on 27 May 1996 by acquisition of shares. The Commission decided not to include in its Decision of 20 November 1996 measures in application of Article 8 (4) of the Merger Regulation. The Commission announced that a separate Decision pursuant to Article 8 (4) would be adopted setting out appropriate measures in order to restore conditions of effective competition.

Basic reasoning for the Decision of 20 November 1996

(3) The Commission reached the conclusion that the concentration would create or strengthen a dominant position for Kesko on the Finnish market for retail of daily consumer goods, where the combined market share of Kesko and Tuko would be at least 55 %, whether assessed at local, regional or

[1] OJ No L 395, 30. 12. 1989, p. 1; corrected version OJ No L 257, 21. 9. 1990, p. 13.
[2] OJ No C 202, 2. 7. 1997, p. 3.

national level. This position would be further strengthened by their position as regards large retail outlets, control of business premises, customer loyalty schemes, private label products, distribution systems and, not least, by the considerable power of their central organs as buyers of daily consumer goods from manufacturers of such goods (referred to in the Decision of 20 November 1996 as the procurement markets).

(4) Further, the Commission reached the conclusion that the concentration would create or strengthen a dominant position for Kesko on the Finnish market for cash-and-carry sales of daily consumer goods. The combined market share would be about 80 % on a national level and between [50 % to 100 %] (1) in all regions. In addition, that position would be strengthened by Kesko's buying power, as described above.

(5) On both markets it was concluded that Kesko would be the clear market leader, with a position far ahead of that of the other players in the market.

(6) Finally the Commission concluded that the dominant positions of Kesko, as described above, would not be negated by potential competition and, indeed, that the concentration would increase barriers to entry in such a way that it is extremely unlikely that any entry would be possible following completion of the acquisition.

(7) Kesko did not, in the course of the procedure which led to the adoption of the Decision of 20 November 1996, offer any undertaking capable of addressing the competitive concerns indentified in that Decision. It is therefore necessary to eliminate the dominant position created by the acquisition of Tuko Oy.

The Commission's statement pursuant to Article 18 of the Merger Regulation

(8) In order to remedy the situation whereby Kesko had already effectively controlled Tuko since May 1996, the Commission issued a statement pursuant to Article 18 of the Merger Regulation ('the statement pursuant to Article 18'), indicating that it considered it appropriate to adopt a decision pursuant to Article 8 (4) obliging Kesko to sell 'en bloc' the daily consumer goods business of Tuko Oy.

(9) Moreover, in explaining the modalities of such a divestiture, the statement pursuant to Article 18 indicated that the divestiture should include all assets relating to the daily consumer goods business, including the shares in Tuko Oy, and that the buyer should be a viable existing or prospective competitor, independent and unrelated to the Kesko group, with sufficient expertise and financial resources. The deadline for completing the divestiture was set at six months. Furthermore, it was indicated that a trustee would have to be appointed to conduct an audit to ascertain full divestiture, to determine the management structure of the assets to be divested pending such divestiture, to act as Kesko's investment banker in selling the business and to report to the Commission on a periodical basis on the operation of the business as well as the state of negotiations with third parties.

Kesko's reaction to the statement pursuant to Article 18

(10) After receiving the statement pursuant to Article 18, Kesko argued that the Decision under Article 8 (4) should be made more flexible so as not to impose undue burdens on Kesko. Moreover, Kesko proposed two transactions which in its view might put into effect the divestiture of the Tuko daily consumer goods business.

Arguments as to flexibility

(11) Kesko has submitted that the Commission's powers, when ordering a divestiture within the meaning of Article 8 (4) of the Merger Regulation, are limited by the principle of proportionality to ordering remedial action which does not go beyond what is appropriate and necessary to attain the objective sought. Kesko has therefore submitted that the divestiture order set out in the statement pursuant to Article 18 should be adapted to allow for the highest possible degree of flexibility in order not to impose undue burdens on Kesko.

Taking this argument into account, the Commission has in this Decision allowed for the retention by Kesko of the shares in Tuko Oy, the possibility for Kesko to [. . .] the inclusion of provisions allowing, on the basis of the reasoned opinion of the trustee, for a divestiture not constituting an 'en bloc' solution.

(1) In the published version of this Decision, some information has been omitted or replaced by ranges and certain passages have not been reproduced, pusuant to Article 17 (2) of Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets.

(12) Kesko has also argued that the Commission, in addition to the limitations imposed by the proportionality principle, is subject to an additional restriction imposed by Article 22 (5) of the Merger Regulation, which states that the Commission is to take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State at the request of which it intervenes.

However, Article 22 (5) of the Merger Regulation simply limits the scope of any measures to the territory of the Member State concerned. Article 22 (3) of the Merger Regulation explicitly refers to Article 8 (4). This confirms that the Commission has the same powers within the meaning of Article 8 (4) of the Merger Regulation whether it acts on a request by a Member State or not.

Remedies proposed by Kesko

(13) Kesko has submitted two proposals for divesting the Tuko business. However, the first proposal, which included the sale to [. . .] was withdrawn [. . .]. The second proposal, including the sale to a consortium of companies, was presented at a very late stage of the proceedings when a draft decision pursuant to Article 8 (4) had already been sent to the Member States, and a date fixed for discussion of that draft by the Advisory Committee on Concentrations. Furthermore, the proposal did not contain any explanation why it did not offer an 'en bloc' solution, but entailed the consortium buying different stakes in the total business of Tuko. Nor did it contain sufficient assurances that the buyers would be independent and unrelated to the Kesko group and have the necessary expertise and financial resources to constitute a viable competitor to Kesko. Finally, since no independent trustee has yet been appointed as foreseen in the statement pursuant to Article 18, the proposal included none of the guarantees for an appropriate divestiture as contained in the audit to be made by the trustee of the Tuko business or the reports by the trustee on prospective buyers.

On 11 February 1997 Kesko informed the Commission that it had signed contracts with a view to implementing the abovementioned second proposal. The signature of those contracts does not affect this Decision, in particular since the entry into force of these contracts was explicitly made dependent on the Commission's approval (by 30 April 1997).

Conclusion

(14) For the above reason, and since the concentration has already been implemented, it is necessary to order Kesko, by virtue of Article 8 (4) of the Merger Regulation, to divest itself of the daily consumer goods business of Tuko Oy. In reaching the Decision, the Commission has taken into account Kesko's argument set out above regarding flexibility and the need not to go beyond what is appropriate and necessary to attain the objective sought, namely to restore effective competition on the Finnish markets for retail and cash-and-carry sales of daily consumer goods,

HAS ADOPTED THIS DECISION:

Article 1

Kesko is hereby ordered to divest the daily consumer goods business of Tuko Oy to a purchaser which must be a viable existing or prospective competitor, independent of and unrelated to the Kesko group and possessing the financial resources and proven expertise enabling it to maintain and develop the divested business as an active competitive force in competition with Kesko's daily consumer goods business (the purchaser standards).

Kesko shall, prior to the divestiture, ensure that the assets to be divested include the total business of Tuko Oy relating to sales of daily consumer goods. Moreover, that business shall be restored to the same competitive condition it was in before the acquisition of control by Kesko. This may require, *inter alia*, that any assets, tangible and intangible, relating to sales of daily consumer goods, which were held by Tuko Oy at the time of the concentration and are no longer held by it, be restored to Tuko Oy or, if necessary, be replaced at Kesko's expense. Moreover, all contracts entered into by or on behalf of Tuko Oy or any other organ of the Tuko group, in relation to its activities in the sales of daily consumer goods shall, to the extent that they are assignable, be transferred. To the extent that such contracts are not assignable, Kesko shall use its best efforts to have them transferred on a voluntary basis.

Article 2

1. Kesko shall, within 30 days of notification of this Decision, appoint an independent trustee, to be approved by the Commission, for monitoring the operation and management of the assets to be divested in accordance with Article 1.

2. Kesko shall ensure that the irrevocable mandate of the trustee includes the following rights and obligations:

(a) to conduct an appropriate audit to identify all assets and contracts to be included in the divestiture in accordance with Article 1, for which purpose the trustee shall have access to all documents, books and records of the Tuko group and, to the extent that any assets held by the Tuko group at the time of the concentration are no longer held by it at the time of the audit, to all documents, books and records of the Kesko group;

(b) to determine, on an on-going basis until final divestiture is completed, the best management structure of the divestiture package to ensure its viability, marketability and competitiveness;

(c) to act as Kesko's investment banker in conducting good-faith negotiations with interested third parties with a view to selling the divestiture package 'en bloc' within the time limit set in Article 4;

(d) to provide to the Commission a written report (with a copy to Kesko) on the result of the audit referred to at point (a) and, moreover, to provide to the Commission, on a monthly basis, written reports concerning the operations and management of the divestiture package, as well as on relevant developments in its negotiations with third parties interested in purchasing the divestiture package, including the timeframe within which an agreement with interested third parties would be implemented, and, in particular, sufficient information to enable the Commission to assess whether each bidder satisfies the purchaser standards.

If, in the trustee's opinion, an offer which does not meet the criteria set out in Article 1 would achieve the same result as the 'en bloc' solution, the trustee should set out the reasons for this in his report to the Commission. If the Commission, in accordance with point (e) does not indicate its disagreement, such an offer shall, for the purposes of this Decision, be considered valid;

(e) to continue negotiations with an interested third party only if the Commission does not, within two weeks of receipt of the trustee's report, formally indicate that it does not agree that the third party satisfies the purchaser standards;

(f) to receive remuneration from Kesko on a basis which will provide incentives for a prompt divestiture.

3. Kesko shall provide the trustee with all reasonable assistance required by him in carrying out his mandate, including, if appropriate, the appointment of independent personnel with adequate commercial and/or financial expertise.

Article 3

[...]

Article 4

1. The divestiture in accordance with Article 1 shall be completed within [...] of notification of this Decision. Kesko shall be deemed to have complied with this Decision if, within that time limit, a binding agreement for the sale of the divestiture package has been signed, provided that completion of the divestiture takes place within [...] from the date of such signature.

2. If more than one prospective purchaser unopposed by the Commission is available, Kesko shall be free to select the offer of its choice.

3. In the event that it should prove impossible to sign a binding agreement within the [...] period referred to in paragraph 1, the Commission may, on request from Kesko and on the trustee showing good cause, extend that period. In such case, Kesko shall give the trustee an irrevocable mandate to sell the divestiture package on the best possible terms and conditions, [...]. In any event, the divestiture must be fully completed by [...].

Article 5

This Decision is addressed to:

Kesko Oy
Satamakatu 3
FIN-00160 Helsinki.

Done at Brussels, 19 February 1997.

For the Commission
Karel VAN MIERT
Member of the Commission