II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 26 June 1997

declaring a concentration to be incompatible with the common market

(Case No IV/M.890 — Blokker/Toys 'R' Us)

(notified under document number C(1997) 1884)

(Only the English text is authentic)

(Text with EEA relevance)

(98/663/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(3) and (4) and Article 22 thereof,

Having regard to the Commission Decision of 21 February 1997 to initiate proceedings in this case,

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) The procedure under consideration concerns a request received by the Commission on 23 January 1997 from the Dutch Government pursuant to Article 22 of Regulation (EEC) No 4064/89 ('the Merger Regulation') to examine the acquisition of the Dutch operations of Toys 'R' Us by Blokker. The agreement (which contains implementation agreements) underlying the operation was signed by the parties in the form of an exchange of letters on 24 December 1996. By letter of 13 January 1997 the transaction was notified to the Dutch authorities.

(2) On 21 February 1997 the Commission adopted a decision under Article 6(1)(c) in conjunction with Article 22 of the Merger Regulation finding that the request was admissible in accordance with Article 22, that the request had been made within the one-month period provided for in

[1] OJ L 395, 30.12.1989, p. 1; corrected version, OJ L 257, 21.9.1990, p. 13.

[2] OJ C 363, 25.11.1998.

Article 22(4) and that the concentration raised serious doubts as to its compatibility with the common market.

I. THE PARTIES

(3) Blokker Holding BV ('Blokker') is a major retail operator in the Netherlands. Its principal activities are retail trade in household articles, toys and other products. Blokker operates several retail chains either as owner of shops or through franchising agreements. Blokker currently operates 147 wholly owned toy shops under the 'Bart Smit' trade mark and 196 toy shops under the 'Intertoys' trade mark, of which [. . .](*) are franchised to individual operators. Blokker also sells a broad assortment of toys in its household articles stores, in particular in the outlets under the 'Blokker', 'Marskramer' and 'Familux' trade marks (431 shops of which [. . .] are franchised). The total turnover of Blokker in 1995 was ECU [. . .] million.

(4) Blokker is also active in other Member States. It operates about 160 Blokker household stores in Belgium, Luxembourg, Germany and France, 15 Bart Smit stores in Belgium and 2 Intertoys stores in Germany.

(5) Toys 'R' Us Inc. (US) is one of the world's biggest toy retailers and is active in most Member States of the European Community. The worldwide turnover of Toys 'R' Us Inc. (US) in 1996 was ECU 7 523 million. Toys 'R' Us (Netherlands) BV is a wholly owned subsidiary of Toys 'R' Us Inc. (US) and achieved in 1996 a total turnover of ECU 27,5 million. The undertakings are hereinafter jointly referred to as 'Toys 'R' Us'.

II. THE OPERATION

(6) The operation as set out in the agreement of 24 December 1996, referred to as the 'Letter Agreement' has been implemented through a set of agreements: the 'Master Sub-lease Agreement', 'Asset Purchase Agreement', 'Franchise Agreement' and the 'Marketing Subsidy Agreement'. Of the nine stores operated by Toys 'R' Us, Blokker takes over the six stores in Alkmaar, Utrecht, Breda, Beek and Muiden and Rotterdam-De Boog. The three stores in Arnhem, Rotterdam-Zuidplein and Eindhoven are operated by Blokker under a temporary operating agreement. The latter will be closed once another tenant has been found for the premises or an agreement has been reached with the respective landlords. The transaction was concluded on 3 February 1997. That is also the date on which Blokker started to operate the Toys 'R' Us stores.

(7) Speelhoorn BV, a wholly owned subsidiary of Blokker, sub-leases from Toys 'R' Us the premises for the five shops in Alkmaar, Utrecht, Breda, Beek and Rotterdam-De Boog which are currently leased by Toys 'R' Us (Netherlands) BV. Speelhoorn leases the shop in Muiden from Toys 'R' Us which is owned by Toys 'R' Us Inc. (US). The respective lease terms will end between the years [. . .] and [. . .], the respective sub-leases, or in the case of Muiden the lease, are valid as long as the franchise agreement is in effect. The floor capacity per store will be reduced from 3 000-4 000 m^2 to approximately [. . .], the remaining space will also be sub-leased per square metre by Toys 'R' Us if possible. The amount of rent Blokker pays to Toys 'R' Us is less than the amount Toys 'R' Us is paying to its respective landlords.

(8) Blokker purchases from Toys 'R' Us (Netherlands) BV the assets and inventory of all nine stores except for the cash register and the computer system. Blokker pays Toys 'R' Us NLG [. . .] for the inventory and an amount of NLG [. . .] for so-called assets (fixtures and furniture). Blokker also takes over the employment contracts of the personnel of all stores [. . .].

(9) The Franchise Agreement provides that Blokker has the exclusive right to use the trade mark and the Toys 'R' Us system in the Netherlands. Toys 'R' Us has developed requirements for type, quality and category mix of the items to be carried Blokker has the right to add other product categories which are usually not sold in Toys 'R' Us stores and is free to determine the individual products in each category and the respective prices. The term of the franchise is 12 years, the franchisee has the right to renew the agreement for terms of 10 years provided the franchisee has not committed material breaches of the agreement. The franchise fee is [. . .] of net sales, the franchisee has to pay a service fee of [. . .] on merchandise procured in connection with coordinated purchases [. . .].

(*) This version of the Decision has been edited to ensure that confidential information is not disclosed.

(10) The Franchise Agreement gives Blokker the right to purchase toys through the Toys 'R' Us central buying operation. According to the Agreement, this merchandise can be offered for sale by the franchisee or in any 'franchised store'.

(11) [. . .].

III. CONCENTRATION

(12) The parties argue that this operation is not a concentration within the meaning of the Merger Regulation. They state that the Franchise Agreement is the nucleus of the transaction and that the other agreements are merely ancillary agreements facilitating the execution of the Franchise Agreement. They further that Blokker does not obtain control within the meaning of the Merger Regulation and that Blokker does not gain any more security of tenure than a franchisee in any typical franchise agreement. They also argue that a franchise agreement needs to be assessed under Article 85 of the EC Treaty and Commission Regulation (EEC) No 4087/88, the Franchise Block Exemption Regulation [3], and cannot therefore be an element of a concentration.

(13) According to Article 3(1)(b) of the Merger Regulation, a concentration arises when one undertaking acquires direct or indirect control of the whole or parts of another undertaking. Article 3(3) defines the element of control as constitued by rights, contracts or any other means which confer the possibility of exercising decisive influence on an undertaking, in particular by ownership or the right to use all or part of the assets of an undertaking. Control for the purposes of the Merger Regulation means the possibility of exercising decisive influence on an undertaking. Therefore, acquisition of control is not limited to cases where a legal entity is taken over but can also happen through the acquisition of assets. In this situation the assets in question must constitute a business to which a market turnover can be clearly attributed [4].

(14) The mere fact that a franchise agreement is a part of the operation cannot exclude the whole operation from the application of the Merger Regulation. The decisive question is whether the whole set of agreements concluded between Toys 'R' Us and Blokker will give Blokker control of the Toys 'R' Us business which remains on the Dutch market. The three shops which are to be closed and are only temporarily in operation are not part of the concentration, since Blokker does not acquire control on a lasting basis.

(15) In this operation Blokker takes over all the assets (leases, fixtures and inventory, personnel, use of brand name) which make up the business of Toys 'R' Us in the Netherlands. To this business, a turnover can clearly be attributed. The operation leads to a lasting change in the structure of the undertakings concerned since the agreements underlying the operation are of a long-lasting nature. Toys 'R' Us has repeatedly stated that it has definitely decided to leave the Dutch market and that it will not choose any other buyer for its business. The fact that Blokker operates the stores as a franchisee is not a factor militating against the exercise of control by Blokker. The particular Franchise Agreement does not confer upon Toys 'R' Us rights which could lead to the assessment that Toys 'R' Us retains control of the business. It is the franchisee who selects the products within the given categories and who determines the prices at which they will be sold. Blokker has confirmed in its letter of 7 February 1997 that its particular agreement with Toys 'R' Us allows it to add other product categories which are usually not sold in Toys 'R' Us stores, such as garden furniture or Christmas items. Blokker has also stated that it wants to create a new shopping formula which differs essentially from the existing Toys 'R' Us concept. This confirms that Blokker not only gains control over the day-to-day operations but that Blokker determines the concept of the shops. Therefore, Toys 'R' Us will no longer determine the course of the business but cedes its influence to Blokker.

(16) Therefore, Blokker acquires control of parts of an undertaking within the meaning of Article 3(1) and the operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

(17) The combined worldwide turnover of the parties does not exceed ECU 5 000 million. The worldwide turnover of Blokker is ECU [. . .] million. The turnover of Toys 'R' Us (Netherlands) BV that can be attributed to the shops taken over by Blokker is estimated by Toys

[3] OJ L 359, 28.12.1988, p. 46.
[4] Commission notice on the notion of a concentration under Council Regulation (EEC) No 4064/89, paragraph 11 (OJ C 385, 31.12.1994, p. 5).

'R' Us at ECU [. . .] million. It follows that the concentration has no Community dimension within the meaning of Article 1 of the Merger Regulation.

V. EFFECT ON TRADE BETWEEN MEMBER STATES

(18) Article 22(3) of the Merger Regulation requires that the concentration affects trade between Member States. A [. . .] proportion of the toys ([. . .] %) sold by the Blokker group and in general on the Dutch market is imported into the Netherlands from other Member States. In addition, before the operation the majority of the products sold by Toys 'R' Us were provided from their German organisation. Following the operation, that is no longer the case. Blokker obtains its products from a variety of sources, including direct imports from manufacturers in the Far East and from Dutch importers or sales offices.

(19) In addition, the acquisition of the Toys 'R' Us stores by Blokker can increase barriers to entry for new entrants to the Dutch market for toys, including entrants from other Member States.

(20) Thus, the change in structure of the Dutch specialised toy retail market as set out below will have an appreciable influence, directly or indirectly, actually or potentially, on the pattern of trade between Member States [5].

VI. COMPATIBILITY WITH THE COMMON MARKET

A. Toy retaling in the Netherlands

Market information on retail of toys

(21) The range of products generally sold in toy retail outlets includes principally the following product categories: baby and toddlers' toys, puppets, cuddly toys, play animals, construction toys, board games, puzzles, assembly kits, outdoor play items, look and listen toys and hobby articles (the so-called classic toys) and electronic toys such as computer games and video games. The abovementioned categorisation of toys usually sold in retail outlets is used in the available market studies [6] and is generally accepted in the toy industry, and is confirmed by the Commission investigation with retailers and suppliers of toys.

(22) There are only two publicly available studies providing information on the total value of sales of toys in the Netherlands. These are published by the EIM/Centre for Retail Research [7], and the Gfk Interact [8] respectively. Both studies give estimates of the total retail sales of toys in the Netherlands and estimates of the importance of the various retail channels through which toys are sold to the final consumer. Both studies indicate a decline in the value of total sales of toys in recent years. According to the Gfk study the number of toys sold in the Netherlands shows a slight increase over the last three years but the average price per toy item has decreased which leads to a decrease in total value.

(23) A specific feature of toy retailing is its highly seasonal character. About 50 % of the yearly sales are realised in the period between 1 October and 31 December. A characteristic feature of the Dutch market in this respect is the Saint Nicholas period which starts in November and has its high point on the evening of 5 December. Thus the annual peak in sales occurs earlier in the Netherlands than in neighbouring countries. A specific feature of the Dutch market is also that the amount of money spent on toys per child in the Netherlands is approximately 20 % lower than the average in Western Europe.

Total value of sales

(24) The EIM/Centre for Retail Research has estimated the total value of toy sales in the Netherlands at NLG 870 million (ECU 410 million) in 1996. According to the EIM definition, this figure covers classic and other toys, electronic and computer games, but does not cover CD-ROMs and children's videos. The EIM bases its findings on the production statistics of the Dutch Centraal Bureau voor de Statistiek together with its own estimations.

(25) The Gfk market study estimates the total sales value of toys in the Netherlands at around NLG 734 million (ECU 343 million) in 1996. The Gfk

[5] Judgment of the Court of Justice of the European Communities in Case 56/65 *Société Technique Minière v. Maschinenbau Ulm* [1966] ECR, p. 235.

[6] These studies will be discussed below (paragraphs 24 to 25).

[7] EIM/Centrum voor Retail Research, Brancheschets Speelgoeddetailhandel, 1996 and 1997.

[8] Gfk Interact Consumer Panel 1996.

study covers all categories of toys, including electronic and video games, but does not cover children's videos and CD-ROMs. This market study is based on a consumer panel of 5 000 people, questioned regularly about their expenditure on toys. The study covers only purchases with a value of more than NLG 10 (ECU 4,7) by persons older than 12 years. Two major suppliers (Lego and Mattel) have stated that the Gfk figures cover only about 75-80 % of the total sales. Based on this assumption the total sales value can be estimated at NLG 980 million (ECU 457 million) in 1996.

(26) The Commission received one market study from Lego which stated that the size of the total sales amount to NLG 1 053 million. This market study does not cover children's videos and CD-ROMs.

B. Relevant product market

(27) The parties concerned in the operation are active in the retail of a broad assortment of toys in specialised toy shops or shops with a specialised toy department. In the Netherlands toys are sold for the most part by specialised toy shops which carry a broad assortment of toy products throughout the whole year. In addition, toys are also sold through other retail channels such as certain drugstores, petrol stations, supermarkets, electronic or computer shops, a cash and carry wholesaler and mail order companies.

(28) It is the view of the Commission that the relevant market is the market for retail outlets which sell a broad assortment of toys the final consumer throughout the year. In the Netherlands these outlets include specialised toy shops and shops with a specialised toy department such as department stores and household articles stores. These outlets are referred to as specialised toy outlets. By contrast, the parties argue that the relevant market should be defined more broadly including all the distribution channels through which toys are sold to the final consumer.

(29) The parties submit that the exclusion of other outlets is arbitrary. Furthermore, the parties argue that all sales of products such as CDs, audio appliances, computers, children's videotapes and sports articles should also be included in the definition of the relevant market, since these products are sold in specialised toy shops as well as in other outlets. The parties also refer to a study prepared by Lego. According to this study the relevant market should be defined according to products and services requested by children for their leisure time. This approach is referred to as the concept of the children's wish-list. The parties state that the appropriate criterion for the market definition should be the children's entertainment character of a product. The parties cite as examples the facts that sports shoes, CD-ROMs or computer games or hi-fi equipment are perceived by children as perfect substitutes for 'traditional' toys.

(30) The concept of defining the relevant market according to the children's wish-list is not accepted by the Commission. In so far as services are included it would already go beyond retailing. Under the Merger Regulation, a relevant product market comprises those products or services which are substitutable by the consumer by reason of their characteristics, their price and their intended use. Even if the market definition were restricted to the retail of products with an entertainment character, that would include the retail of products for which competition takes place on other markets. The relevant market in a retail context cannot be defined by all possible options of consumer spending.

(31) The specialised toy outlets can be distinguished from other retail channels because they carry throughout the whole year a broad assortment of toy products specifically aimed at children. These specialised outlets enable consumers to make a choice from a broad assortment. Toys 'R' Us stated at the hearing that specialised toy retailers carry a range of toy products selected with the aim of attracting as many consumers to the store as possible. A broad assortment normally includes products from the following categories: baby and toddlers' toys, puppets, cuddly toys, play animals, construction toys, board games, puzzles, assembly kits, outdoor play items, look and listen toys and hobby articles (the so-called classic toys) and electronic toys such as computer games and video games. The abovementioned categorisation of toys is used in the available market studies and is generally accepted in the toy industry, and is confirmed by the Commission's investigation with retailers and suppliers of toys.

(32) Specialised toy retail outlets have the distinctive feature that they all publish special toy catalogues for the Saint Nicholas sales period, which in the Netherlands is the annual peak in sales. Other catalogues such as the catalogue published by the drugstore Kruidvat, are not toy catalogues since they use toys only as an eye-catcher and toy products make up only a small percentage of the overall number of products advertised.

(33) The composition of the assortment of toy products may vary between the different specialised toy retail outlets as some put more emphasis on certain categories or select other products within the categories. Furthermore due to the dynamics of the market and the indroduction of new toys, the relative weight of product categories themselves can change over time. For example products such as electronic games and video games have entered the range as a mainstream product category in recent years. In this respect the most recent development is CD-ROMs for children which are now being introduced in certain toy shops.

(34) A specific feature of toy retailing in the Netherlands is that the majority of sales of toys (at least 80 %) is concentrated in specialised outlets. Outlets such as computer shops and electronics shops normally carry only video games and computer games which is only one category out of the assortment of specialised toy retail outlets. Other distribution channels such as supermarkets and drugstores only carry a limited number of products as part of another range of consumer goods. Those supermarkets which carry toys have a small selection of usually small items below a certain price level. Similarly drugstores offer a limited selection usually from one to three branded suppliers. Even the drugstore chain Kruidvat which has the highest turnover among the drugstores only carries up to 100 items of the three brands Lego, Fisher Price and Barbie on a permanent basis. All other items are only sold on a temporary basis. This is considerably less than the toy department of the Blokker household shops which carry up to [. . .] toy items. Some petrol stations, in particular Shell, carry a very limited number of branded products (for instance Lego), often on a temporary basis. The products are usually packaged specifically for the outlet in question and differ slightly from the products available in the specialised toy outlets.

(35) Moreover, in these other distribution channels, toys are often used as a means to attract consumer traffic for the sale of other products or as impulse purchases. By contrast, consumers go to specialised toy outlets with the expectation of having a choice from a broad assortment of toys or finding the item or product category there. Although the sales of a small selection of branded products in non-toy outlets may have some influence on prices of similar products in specialised toy retail outlets, they cannot be regarded as fully-fledged competitors with these outlets. This view has been confirmed by other toy retailers.

(36) The parties argue that the hypermarket Maxis and the cash and carry wholesaler Makro should be included in the relevant market. Maxis carries a broad assortment comparable with a Blokker store and is considered to be part of the relevant market. Makro as such, is a wholesaler which is in principle not open to the general public. Sales of mail order companies are negligible.

(37) The assortment of products in specialised toy retail outlets may include products such as books, sports articles, watches and in some outlets even computers, which are more commonly found in other outlets. Competition for these items largely takes place on neighbouring retail markets. The fact that a small number of these items may be sold in specialised toy retail outlets does not affect this conclusion. For this reason it is not appropriate to include all these products in the assessment of competition between specialised toy retail outlets. In any event, this does not make a substantive difference to the assessment of the case [9]. Children's videotapes are sold in a variety of outlets including specialised toy retail outlets. Since the question whether these have to be considered as a toy is not decisive for the case, the product category can be left open.

C. The relevant geographic market

(38) In earlier decisions concerning retail operations, the Commission has generally taken the view that retail markets can be defined as national under certain circumstances [10]. Although the catchment area of a retail outlet, which can be based on the distance a consumer is willing to travel to reach it, is of a local or regional scale, the catchment area does not necessarily determine the geographic market. In a situation where several retail chains operate networks of stores on a national scale, the important parameters of competition are determined on a national scale. Therefore, from the viewpoint of the catchment area, what may be a local or regional market has to be aggregated to a national market in these circumstances.

[9] Since the proportion of these products in Blokker's turnover seems to be higher than that of its competitors, the inclusion of these products would only increase Blokker's market share among the specialised toy retailers.

[10] Commission Decision 97/277/EC in Case IV/M.784 — Kesko-Tuko (OJ L 110, 26.4.1997, p. 53, paragraph 21).

(39) The specialised toy retail market in the Netherlands is characterised by chains which operate on a country-wide basis. Both Blokker and Toys 'R' Us operate their retail outlets according to a national, and in the case of Toys 'R' Us, even international, store concept. In these concepts important parameters of competition are determined at the central level of the chain.

(40) Pricing decisions for toys sold in stores belonging to the Blokker group are determined at the central level of each chain. Even the Blokker and Intertoys shops, which are operated under franchise agreements, are bound by the prices determined at the central level. Franchisees of Blokker and Intertoys are obliged to inform the management of the chain about local competition but it is the central management which decides whether or not to react to local competition. Although the members of Otto Simon are not bound by the centrally recommended prices, most of them follow those prices.

(41) Advertising by retailers is mainly carried out on a national scale as catalogues and flyers have the same appearance and are distributed throughout the country. Furthermore, the product ranges of the chains, especially the retail outlets belonging to the Blokker group, are determined at the central level of the chains.

(42) Although the chains operated by Blokker are active in other Member States (Bart Smit and Blokker in Belgium, Intertoys in Germany) and the Toys 'R' Us formula is operated in large parts of Europe, the geographic market cannot be defined on a basis wider than a national market. Consumer preferences and habits differ from one Member State to another. The catalogues of retailers are published and distributed only on a national scale. The poor performance of Toys 'R' Us in the Netherlands which introduced on the Dutch market the German Toys 'R' Us concept and the product range selected for the German market is a good example to show that the Dutch specialised toy retail market is national.

D. **Effects of the concentration**

(i) Structure of supply in the relevant market

The Blokker group

(43) The Blokker group operates two chains of specialised toy shops: 'Bart Smit' and 'Intertoys'. The 147 Bart Smit shops are all owned by Blokker. The Intertoys chain comprises 196 shops, of which [. . .] are operated through franchise agreements and [. . .] are wholly owned.

(44) Blokker also sells an assortment of toys in its chains for household articles: 'Blokker', 'Marskramer' and 'Familux'. In total, toys are sold in 288 Blokker shops. Of these shops [. . .] are owned by Blokker while [. . .] are operated through franchise agreements. Under the Marskramer and Familux formulas, Blokker operates 143, shops of which [. . .] are operated through franchise and [. . .] owned.

(45) The position of Blokker in toy retailing is for a large part the result of acquisitions. In 1985 the Blokker group acquired Bart Smit. In 1994 the Blokker group acquired Intertoys, Marskramer and Familux in which it earlier had a minority interest.

Toys 'R' Us

(46) Toys 'R' Us entered the Dutch market in 1993, introducing a new concept of toy retailing: that of so-called megastores in out-of-town locations. Toys 'R' Us operated nine megastores in the Netherlands in 1996. Because of their extensive floor size the stores can carry the largest possible range of toy products. The product range of Toys 'R' Us also contains other products including bicycles, nappies and baby food.

The Otto Simon group

(47) Otto Simon BV[11] is a wholly owned subsidiary of Otto Simon Beheer BV which belongs to the German Vedes group. The members of the Otto Simon system are all independent retailers. Otto Simon offers its members joint purchasing, accepts the *del credere* risk and provides marketing and other support services.

(48) Otto Simon operates four different formulas of specialised toy shops. 'De Speelboom' is a specialised toy shop carrying a broad product range (100 shops). 'Wigwam' is a 'shop in a shop' concept which is mainly operated in combination with other outlets such as household shops, book shops, drugstores and carries a smaller range of

[11] Otto Simon BV was formerly operating under the name Toypartners BV.

toys (241 shops). 'Techno Hobby' is a chain specialising in model trains, radio-controlled toys, miniature cars and model construction sets (45 shops) [12]. From 1 May 1997 Otto Simon took over the operation of the five specialised toy shops of 'Early Learning Centre' through a master franchise agreement. These shops carry a broad range of toys with educational value for children aged between 0 and 8 years.

In Den Olifant

(49) In Den Olifant is a franchise chain of small specialised toy shops. It operates seven stores in the Netherlands.

Department stores and hypermarkets

(50) In the Netherlands there are three important chains of department stores which have specialised toy departments: Vroom & Dreesmann (63 stores, of which 46 sell toys), which is owned by Vendex International, and De Bijenkorf (6 stores) and Hema (236 stores), which are both owned by Koninklijke Bijenkorf Beheer (KBB). The only hypermarket in the Netherlands is Maxis, which operates 5 stores.

Other independent specialised toy outlets

(51) There are also a number of small independent specialised toy shops and independent household articles shops. Their operations are not substantial and they are declining. In addition, there are a number of smaller independent department stores which sell toys.

(ii) Market shares in the relevant market

(52) As described above, the Commission has defined the relevant product market as the retail of toys through specialised toy retail outlets.

(53) In order to determine the market shares of the parties active in the relevant market the Commission has sent questionnaires to supplies/ and retailers regarding the size of the total market, the relative importance of various distribution channels and the actual turnover figures of parties active in the relevant market. In this way the Commission has determined the market shares of all main players in the market [13]. The combined market share of the remaining independent specialised toy shops, the independent household articles stores and independent department stores is estimated at 10 % of sales in the relevant market since it would be nearly impossible to obtain turnover figures for these outlets. (This figure is based on the Gfk market study.)

(54) Based on the aggregation of actual turnover figures of the parties active in the relevant market and the estimation of the combined market share of the independent operators, the sales value in the relevant market is estimated at around NLG 785 million (ECU 366 million) in 1996.

(55) The market shares of the parties in the relevant market, calculated on the basis of their actual turnover figures, are set out in the table. These figures have not changed substantially over the last three years.

[12] Techno Hobby does not carry a broad assortment as defined above. The question whether it should be part of the relevant market can be left open since it would make a substantive difference to the assessment. For the purpose of this case, it is incorporated in the market share of Otto Simon.

[13] For the purpose of calculating market shares, other products such as books, sports articles, watches and children's videotapes are not taken into account. Since not all Blokker's competitors sell CD-ROMs in their toy department (department stores), CD-ROMs are not taken into account in calculating Blokker's market share. For these reasons, the Commission has based the calculation of Blokker's market share on a turnover figure of which 20 % has been deducted as indicated by Blokker.

Market shares in the relevant market in 1996

Bart Smit	[. . .]	[20-30 %]
Intertoys	[. . .]	[20-30 %]
Marskramer/Familux	[. . .]	[< 5 %]
Blokker	[. . .]	[5-15 %]
Total Blokker group	[. . .]	[55-65 %]
Toys 'R' Us	[. . .]	[3-10 %]
Blokker + Toys 'R' Us	[. . .]	[. . .]
Otto Simon	[. . .]	[10-20 %]
Vroom & Dreesmann	[. . .]	[3-10 %]
Bijenkorf	[< 5 %]	
Hema	[< 5 %]	
In den Olifant	[< 5 %]	
Other (including Maxis)	[10 %]	Combined market share (estimate)
Total relevant market	100 %	

(56) In the calculation of Blokker's market share, all chains are taken together. According to Blokker, the Bart Smit, Intertoys and Blokker chains all have their own commercial policies with regard to purchasing, determination of product ranges and retail prices. [. . .]. However, this cannot lead to the conclusion that Blokker, Bart Smit and Intertoys are independent undertakings. What is decisive is that the chains all operate within the control over the competitive behaviour of all three chains. [. . .].

(57) Moreover, although Blokker argues that there is no coordination on purchasing between the chains, it appears from the Commission's investigation that a degree of coordination between the three chains with respect to purchasing conditions does exist. A number of supplies have stated that, although the Blokker chains make their purchases separately, the prices and conditions fixed are the same. In addition, a number of suppliers have stated that they operate a bonus system in which bonuses are based on the aggregated purchasing volume of the Blokker chains taken together. Furthermore, the Blokker Group does make certain purchases as a group, as is confirmed by Blokker itself.

(58) [. . .].

(iii) Position of Blokker prior to the operation

Market share

(59) On the basis of the Commission's investigation, prior to the operation the Blokker group held a market share of around [55–65 %] on the specialised toy retail market. This high market share in itself creates a presumption of dominance [14], especially when compared to the fragmented structure of the rest of the market. The nearest competitor, Otto Simon, is more than three times smaller than Blokker with [10-20 %]. Vroom and Dreesmann has between [< 3 %] and [< 10 %] and Toys 'R' Us is in a similar position, while all the other market players have market shares significantly below 5 %.

Formula diversity

(60) Prior to the operation, Blokker already operated three different formulas of specialised toy retail

[14] Commission Decision 97/277/EC in Case IV/M.784— Kesko/Tuko (OJ L 110, 26.4.1997, p. 53, paragraph 106).

outlets all of which were located in city-centre shopping streets and urban shopping centres. Bart Smit is more often found in larger and medium-sized supply areas while Intertoys is more often found in smaller cities and communities. The average size of the stores does not exceed [. . .] m^2.

(61) Both Bart Smit and Intertoys offer a large but not complete product range. This is due to the high lease costs of retail space in the city centre and in shopping centres resulting in relatively small stores. Both chains focus on the articles which are most popular at the time. The toy departments of the Blokker stores carry a smaller product range than the Bart Smit and Intertoys stores (for example, Blokker stores do not sell video games or PC software). The product assortment of the Bart Smit, Intertoys and Blokker formulas differ to a certain extent, as confirmed by Blokker and the Commission's investigation of the catalogues of the chains. Nevertheless, the chains together carry an extensive range of toy products.

(62) The fact that Blokker operates three distinct formulas, particularly with varying product assortments, is a competitive advantage. The difference in product range reduces the overall transparency of prices *vis-à-vis* competitors and consumers. Moreover, it enables Blokker either to initiate or react to product or price changes on the level of the chain rather than the group as a whole which increases its flexibility *vis-à-vis* its competitors on the market.

Scale economies in unbranded and own-branded products

(63) On the Dutch toy retail market, the proportion of unbranded and own-branded products directly purchased from the Far East is higher than in neighbouring countries. According to several competitors the Blokker chains have a reputation for carrying a large proportion of unbranded and own-branded products. Blokker itself states that its direct purchases in the Far East include branded products.

(64) The higher proportion of unbranded and own-branded products on the Dutch market is explained by the parties by the relatively high costs of retailing due to expensive high street locations. As a result of this, parties state, retailers tend to compensate the lower margins on branded products, of which prices are usually harmonised by suppliers at a European level, with higher margins on unbranded and own-branded products.

(65) The fact that Blokker carries a large proportion of unbranded, own-branded and directly purchased branded products in combination with its high market share enables it to realise economies of scale in purchasing which cannot be achieved by its competitors. These economies of scale confer upon Blokker a significant competitive advantage. Furthermore the high volume of unbranded and own-branded products also enables Blokker to behave more independently on the market in relation to pricing strategies, since it is not subject to direct price comparisons by competitors and customers in the same way as with branded products.

(66) The parties argue that the prices of unbranded products are determined by prices of similar competing branded products and as a result of this, Blokker is restricted in its pricing strategies on unbranded products. Although unbranded and own-branded products will generally not be sold at prices higher than those of competing products, this still leaves Blokker considerable scope for independent pricing behaviour.

Gatekeeper function of Blokker

(67) With regard to the position of Blokker, some suppliers have confirmed that, as a result of its high market share, Blokker has a 'gatekeeper' function as concerns access to the toy retail market. To introduce a new toy product on the market a supplier needs to have access to the important distribution channels in order to realise the necessary critical sales volume to recover its investments in radio and television commercials. One of the largest suppliers stated that it would need access to and the support of a minimum of two of the current three Blokker formulas for a successful strategic new product launch with media support, in order to recover the cost of introduction of the new product on the market. Furthermore, two other large suppliers stated that they would not consider introducing a new product on the Dutch market without it being in the Blokker outlets. It follows from the above that Blokker can influence the range of products introduced on the Dutch market. This was also stated by a number of competitors who complained that they were uanble to make purchasing decisions on product lines independently of Blokker.

The parties' argument on prices

(68) The parties argue that prices are low in the Netherlands and that the Dutch consumers are

very price conscious and they state that is an indication that Blokker does not hold a dominant position. The Commission acknowledges that the average value per toy item sold on the Dutch market may be lower than in neighbouring markets. However, as the parties themselves state that 'pricing levels of branded products are usually harmonised at the European level', the supposed low average price per toy item therefore mainly concerns unbranded or own-branded products, which make up a large proportion of toy sales in the Netherlands and for which price comparison parameters do not exist or are not available. Furthermore, one of the largest suppliers mentioned as an additional explanation the Dutch habit of giving many small presents at Saint Nicolas instead of one big present.

(iv) The position of competitors

Otto Simon

(69) As stated above, the aggregate market share of the three Otto Simon formulas is less than one third of that of the Blokker group. In addition, the structure of the Otto Simon group is relatively loose. Since the shops may differ in appearance, the members of the Speelboom formula do not necessarily give the impression of belonging to a chain. The central organisation of Otto Simon operates a common purchasing system, advises on product ranges and offers certain support services. However, members are free to determine their product range. Although this flexibility might be an advantage in so far as it enables members to adopt individual marketing strategies, the loose organisation in combination with the relatively small market share limits the possibility for Otto Simon as a group to carry out a sustained competitive strategy against the Blokker Group.

(70) According to Otto Simon, between 1992 and 1997 more than 30 Otto Simon members have left one of the Otto Simon formulas to join the Intertoys formula of the Blokker group. Blokker has pointed out that the acquisition of Intertoys was made in 1994 and not in 1992. However, in 1992 Blokker had a significant minority stake in Intertoys. How Blokker views the strengh of competition from the Otto Simon group is illustrated by the remark from Mr Blokker, Chairman of the Board of Blokker, in an interview published in the business magazine *Quote* in December 1994 in which he states: 'For some time we have been busy converting a number of these shops (Otto Simon members) to the right belief' and 'If they don't opt for Intertoys, they face the risk of getting one of our shops next door'. It should be noted in this context that Blokker does not sell toys in all its household articles shops. It therefore has flexibility to open toy departments in its stores where and when it considers appropriate.

Toys 'R' Us

(71) Toys 'R' Us entered the Dutch market in 1993 and operated nine stores in the Netherlands in 1996. [. . .].

(72) The Toys 'R' Us concept is based on a merchandise and logistics system which ensures that the broad product range is always in stock. This concept needs a certain critical mass of sales in order to be economically viable. According to Toys 'R' Us, the critical mass of sales and number of stores needed to achieve an acceptable return could not be achieved in the smaller European markets (such as the Netherlands). Therefore the strategy of Toys 'R' Us operating in these smaller markets was to expand into them from neighbouring bigger markets using the existing infrastructure in these bigger markets.

(73) The Toys 'R' Us operations were managed and supplied through the German Toys 'R' Us subsidiary. However, in copying the German Toys 'R' Us concept in the Netherlands without changing the product range, Toys 'R' Us underestimated the significant differences in preferences between Dutch and German consumers, which had an adverse effect on sales in the Netherlands.

(74) In addition, it is common knowledge that in its first year of operations Toys 'R' Us was not fully aware of the specificity of the Dutch Saint Nicholas Day, the peak of toy sales in the Netherlands. Store appearances emphasised Christmas instead of Saint Nicholas.

(75) [. . .].

(76) It can be seen, therefore, that Toys 'R' Us suffered from structural weaknesses and made marketing errors which severely limited its ability to compete strongly on the Dutch market. These weaknesses are recognised by Blokker, the market in general and Toys 'R' Us itself. In the light of the above, Toys 'R' Us did not develop into a significant competitive force on the Dutch market.

Department stores and other specialised outlets

(77) The departments stores have a combined market share of between 5 % and 10 %. Although they

are all part of major retail operators, their market shares in the relevant market are nevertheless small. According to one department store, toys are considered to be a necessary component of the overall product range offered by such a store. Nevertheless, with such a small market share their ability to compete is limited.

(78) All other operators in the relevant market have market shares considerably lower than 5 %. Most of them can be characterised as specialised niche players which lack the possibility or the intention to compete against the retailers which carry broader ranges.

Competitive pressure from other outlets

(79) The Commission acknowledges that to some extent the specialised toy retail outlets do face competition from other outlets selling toys, in particular in the toy season. As stated above, toys are sold for the most part through specialised toy retail outlets. In reaction to the request from the Dutch Government, which estimates the importance of other outlets at 5 % of total sales, Blokker estimates this percentage at a maximum of 20 % of total sales.

(80) As regards the so-called classic toy products, certain other retail outlets have had some success with the sale of individual classic toy products. These retail outlets do not sell a broad assortment of toys but offer only individual items or a limited number of products from between one and three suppliers. These products are used to attract consumer traffic by offering a particularly attractive price or are intended to be bought as impulse purchases. For example, Shell has sold a considerable number of Lego products in its petrol stations. The drugstore chain Kruidvat currently sells Lego products, Barbie dolls and Fisher Price articles on a permanent basis and certain non-branded items as action sales. These sales can have a competitive effect on the same or similar products offered by specialised toy retail outlets. However, their effect on the overall position of the specialised toy retail outlets is limited. Moreover, to the extent that these sales are of a temporary nature, their competitive effect will also be limited in time. Therefore, this competition from drugstores, supermarkets and petrol stations is not regarded as sufficient to counteract the market power of Blokker in the relevant market.

(81) Electronic and videogames are more widely available through other retail channels such as computer shops, electronics shops and record shops. The sale of these items through other outlets can affect prices of these items in the specialised toy retail outlets of Blokker. However the competitive effect of these sales only concerns one category of the broad assortment of the specialised toy retail outlets, which makes up at most 10 % of total turnover of these outlets. Furthermore, the Bart Smit and Intertoys retail outlets of Blokker are still the most important vendors of these products.

Conclusion

(82) On the basis of the foregoing, it is the Commission's view that prior to the concentration Blokker already had a dominant position on the market for specialised toy retail outlets.

(v) Position of Blokker after the operation

Market share

(83) The market share of the Toys 'R' Us operation at the nine stores in the Netherlands is estimated at [3-10 %]. According to Toys 'R' Us, the six shops which Blokker has taken over account for [. . .] % of its total turnover, which leads to a market share of at least [. . .] %.

(84) [. . .].

(85) The combination of Blokker with the Toys 'R' Us operation in the Netherlands will lead to a combined market share of at least [60-70 %).

(86) The calculated increase in market share of the Blokker group does not include the increase in market share gained from three shops which will be closed. It can be expected that a significant part of the market share of those three stores will be obtained either by the existing chains of Blokker or by the remaining Toys 'R' Us stores. Therefore the actual combined market share after the operation will be higher.

(87) The parties argue that the increase in market share is insignificant and cannot be considered to strengthen a dominant position. They state further that 'irrespective of whether the transaction is approved, the accretion of market share will be insufficient to effect any meaningful change in the competitive structure of the market'.

(88) In the view of the Commission, the combination of the increase in market share with a number of factors which together demonstrate that the potential of the acquired business is much greater than is reflected in its actual market share, further strenghtens the dominant position of Blokker.

Strategic value and complementarity of Toys 'R' Us to Blokker

(89) Through the acquisition of the six Toys 'R' Us stores, Blokker adds a fourth formula to its three existing toy formulas. This fourth formula is distinct from the three formulas already under control of the Blokker group with respect to location, size and product ranges.

(90) [. . .].

(91) The Toys 'R' Us formula consists of megastores with substantial floor space located outside the city centres and urban shopping centres which are easily accessible by car. Toys 'R' Us sells toys in a supermarket-like environment which is aimed at efficient shopping without services such as gift wrapping. Because of their extensive floor space, Toys 'R' Us stores can offer a very large product range (according to Toys 'R' Us, 'the widest possible choice') which also includes therefore the widest range of branded toys and also the more bulky toy products. The Toys 'R' Us formula applies not only to toys but also to other child-related products such as nappies, baby food and baby furniture. These other products can be used as a means to attract consumers and increase the frequency of consumer visits to the store. Another distinctive feature of Toys 'R' Us is that a part of the warehousing is done in the stores themselves. Therefore Toys 'R' Us claims that it can guarantee that its products are always in stock.

(92) Since the Toys 'R' Us megastores are all located at peripheral and suburban locations, the acquisition gives Blokker relatively easy access to the market segment of large-scale suburban retailing, which is considered to be of great importance for the future of retailing. This assessment is made by the majority of suppliers. As a result of this Blokker has an important first mover advantage. Although the Dutch Governmental policy on large-scale retailing has been relaxed recently, large-scale suburban retailing of products like toys is still restricted to only 13 urban agglomeration centres ('stedelijke knooppunten'). To date Toys 'R' Us is the only specialised toy retailer operating in this market segment.

(93) The franchising agreement permits Blokker to purchase toys through the central buying operation for sale by the franchisee or in any franchised store. This provides Blokker with an additional advantage which could be even more valuable to the extent that it could also apply beyond the Toys 'R' Us stores and directly to other Blokker chains. Although the parties claim that Blokker is not entitled to use the central buying operation for outlets other than Toys 'R' Us outlets, this interpretation is not supported by the wording of the Franchise Agreement. The parties further claim that joint purchasing is only of limited importance, representing about [. . .] of the Toys 'R' Us stores sales. However, this argument does not negate the potential value of joint purchasing.

(94) Moreover, by acquiring control over the Toys 'R' Us formula, Blokker can seek to ensure the greatest complementarity between the four formulas with respect to product ranges and prices. [. . .]. Although Blokker may have to keep up the Toys 'R' Us image of attractive prices to attract consumers out of the city centres, it can seek to prevent actual competition between the Toys 'R' Us stores and the Bart Smit and Intertoys stores by for example using selective low-price strategies on products which are only sold at Toys 'R' Us stores or using complementary product-range strategies. The fact that Blokker carries a large proportion of unbranded goods further increases its possibility to carry out such a strategy. In this respect it may be noted that the Franchise Agreement gives Blokker considerable freedom within the product categories given by Toys 'R' Us.

The potential of Toys 'R' Us in the Blokker Group

(95) Although the Dutch Toys 'R' Us operation had relatively little market success and is in a difficult financial position, the formula and the stores still have a considerable market potential, particularly in the hands of Blokker, which has the necessary knowledge of the Dutch market. Toys 'R' Us is a very strong brand name. According to Toys 'R' Us, it has a reputation of having the broadest product ranges at attractive prices. In a situation where a local partner acts as a franchisee of the Toys 'R' Us stores, the stores will still be linked to the network of stores of one of the world's largest toy retailers and can profit from any services provided by the network as well as its brand.

(96) The fact that Toys 'R' Us is now operated by what is by far the leading player in the market brings a number of significant advantages for Toys 'R' Us. More specifically, Blokker will bring in its extensive knowledge of the specific preferences and habits of consumers in the national market. It

is entitled to select the products and is likely to do so in a way that better suits the preferences of the Dutch consumers. Blokker will not face the same structural weaknesses as Toys 'R' Us and is unlikely to make the same marketing errors. [. . .]. In addition, all the advantages of economies of scale, including discounts, will apply. Furthermore, Toys 'R' Us can benefit from the advantages of being linked to a major Dutch retailer such as access to advertising, personnel management and support services (for example cleaning and security).

(97) From the above it can be concluded that it is likely that Toys 'R' Us controlled by a local partner with the required knowledge of the national market will perform significantly better than it has done to date and will show substantial growth in market share and potential expansion in the number of stores. [. . .].

(98) This argument is also borne out by the statement of Toys 'R' Us which cites the success of its partnerships with local distributors in other Member States. The poor performance of Toys 'R' Us in smaller markets was not only limited to the Dutch market. Similar situations have occurred in Sweden and Denmark. The Toys 'R' Us operations in Sweden and Denmark were started up in 1994 and were originally managed and supplied from the United Kingdom. The operations in Denmark (one store) and Sweden (three stores) did not achieve the financial returns required by Toys 'R' Us in 1994 and 1995. In 1996 the operations were transferred to local retailers operating under a franchise agreement. After the new franchise operators introduced a market-specific merchandise assortment, sales per store went up significantly in both Sweden and Denmark. In Denmark the number of stores increased from one to nine in the year 1996.

(vi) Comments of suppliers

(99) In the course of its investigation the Commission contacted a number of suppliers to Blokker as well as ORNES, the organisation in which Dutch subsidiaries of international branded toy manufacturers and Dutch suppliers of branded toys are represented.

(100) On an individual basis, suppliers tended to be neutral or indifferent to the operation while acknowledging the already strong position of Blokker. Some, however, were more critical of the operation while others recognised advantages and disadvantages arising from the operation. ORNES has stated: 'ORNES is of the opinion that Toys "R" Us puts a formula in the market which is necessary for a healthy and balanced toy market in the Netherlands. A takeover of Toys "R" Us has become necessary at this moment to secure the continuity of this undertaking in the Netherlands. The fact that this formula is picked up by a professional party in the Dutch toy market is very favourable for the Durch consumer. The possible takeover of the Toys "R" Us activities by Blokker will not influence the competitive situation significantly further'.

(101) In a meeting with the Commission services, ORNES confirmed its support for the operation, particularly on the premise that otherwise Toys 'R' Us would exit the market. At this meeting, it also confirmed the potential success of Toys 'R' Us in the hands of Blokker.

(102) It must be said at the outset that the interests of suppliers and consumers in a retail market are not necessarily the same. The consumer's interest is not generally served by the concentration of supply in the hands of a single player. In addition, it is noted that the Dutch Toys 'R' Us stores were previously not supplied by the Dutch sales offices but through the German Toys 'R' Us operation. In this respect, therefore, the Dutch sales offices will gain in sales from the operation, a fact which has been expressly recognised by many individual suppliers.

(vii) The ability of competitors to react

(103) As explained above, the operation will further increase the substantial lead of Blokker over its competitors. These will be even less able to compete with Blokker, in particular as one of the potentially strong competitors is now in the hands of Blokker. In addition, Blokker will be able to minimise any negative effects of the increase in market share by Toys 'R' Us on its other operations by adapting its product range and pricing strategy.

(104) Since products stocked in Toys 'R' Us stores by the German sales organisation prior to the operation will now be purchased by Blokker, this will increase the latter's control over the products supplied on the Dutch market, especially branded products. This can only further weaken the negotiating position of competitors *vis-à-vis* suppliers by comparison with the position of Blokker.

(viii) Barriers to entry and potential competition

Barriers to entry

(105) There are no regulatory barriers to entering the market of specialised toy retailing except that planning restricitons may apply to large-scale outlets. In recent years, three toy retail formulas have entered the Dutch market, Toys 'R' Us, the Early Learning Centre and In Den Olifant. However, the market share of the latter two is minimal. Moreover, Toys 'R' Us and the Early Learning Centre, which have been managed from outside the Netherlands, have since been taken over by Dutch operators. This underlines the difficulties for new entrants from outside the Netherlands to penetrate successfully the Dutch market. Moreover, the dominant position of Blokker is in itself a barrier to entry. In addition, market entry has not necessarily been encouraged by a generally declining value of the toy retail market in recent years.

Potential entry into the relevant market

(106) The reactions from Dutch retailers approached by the Commission indicate that there is little likelihood that other Dutch retailers will enter the market for specialised toy retailing in the foreseeable future. There is nothing to indicate that those retailers which already carry a small selection of toys intend to become specialised toy retail outlets in the near future.

(107) Argos, a major catalogue retailer in the UK, is planning to enter the Dutch market in 1998 and will start operations with five stores. The concept of Argos is based on the publication of a catalogue which features a wide range of predominantly branded products which the consumer can collect and pay for at an Argos store. Argos will carry among its products a specialised assortment of toys. Argos will start operations on a relatively small scale. It is unlikely to compete at a significant level in the short to medium term. There are no indications that other retailers from neighbouring countries will enter the market.

(ix) Conclusion

(108) For the reasons set out above, the view of the Commission is that the operation leads to the strengthening of a dominant position on the market for specialised toy retail outlets by Blokker.

VII. FAILING COMPANY DEFENCE

(109) Toys 'R' Us has argued that its Dutch operations are not financially viable without the support of a local partner and has put forward the 'failing company defence'. It has stated that Toys 'R' Us will close its operation in the Netherlands if the transaction is not permitted. In its initial reaction Toys 'R' Us said that the market share of Toys 'R' Us would inevitably go to Blokker; later it said that Blokker will pick up most of the Toys 'R' Us share. It is also claimed that there is no alternative solution which is less anti-competitive.

(110) The Commission has decided in earlier cases [15] that a merger is generally not regarded as leading to a deterioration in the competitive structure if it is clear that the acquired undertaking would in the near future be forced out of the market, the acquiring undertaking would take over the market share of the acquired undertaking if the latter were forced out of the market, and that there is no less anti-competitive alternative purchaser in the market. The burden of proof in this respect is on the parties themselves.

(111) The 'failing company' doctrine as developed in these cases and confirmed by Advocate-General Tesauro [16] is based on the lack of causality between the concentration and the creation or strengthening of a dominant position. This means that it is the disappearance of the failing company, which is unavoidable whether or not the concentration takes place, and not the concentration itself, which creates or strengthens the dominant position.

(112) This lack of causality between the operation and its effects on the market has not been established in this case. It has not been established that the whole of the market share of Toys 'R' Us would

[15] Commission Decision 94/449/EC in Case IV/M.308 — Kali & Salz Mdk Treuhand (OJ L 186, 21.7.1994, p. 38, paragraph 71); Commission Decision 97/610/EC in Case IV/M.774 Saint-Gobain/Wacker-Chemie/NOM (OJ L 247, 10.9.1997, p. 1, paragraph 247).

[16] Opinion of Advocate-General Tesauro of 6 February 1997 in Joined Cases C-68/94 and C-30/95 France v. Commission [1998] ECR I, p. 1375, paragraph 49 *et seq.*

go to Blokker. Furthermore, it is not only the gain in market share but also the potential of Toys 'R' Us as part of the Blokker group which leads to the deterioration of the competitive situation. Therefore, it cannot be said that it is the disappearance of the Toys 'R' Us operations which would lead to the same results as the merger, the deterioration of the competitive situation.

(113) Furthermore, Toys 'R' Us hash not shown that there was no less anti-competitive purchaser. The claim of Toys 'R' Us that only the Blokker group met its requirement of having sufficient knowledge of the Dutch toy retail market and the necessary infrastructure is not in itself an argument that there were no other potential buyers. On the contrary, it rather supports the assessment that Toys 'R' Us selected the strongest player on the market. In its description of other potential buyers. Toys 'R' Us said that it rejected those parties which had no specific knowledge of the market conditions in the Benelux or operators which were potential competitors in other Member States.

VIII. OVERALL CONCLUSION

(114) For the above reasons the Commission concludes that the acquisition by Blokker of the Dutch operations of Toys 'R' Us strengthens a dominant position on the market for specialised toy retail outlets in the Netherlands, as a result of which effective competition is significantly impeded in the Netherlands.

IX. APPLICATION OF ARTICLE 8(4) OF THE MERGER REGULATION

(115) Article 8(4) states that, where a concentration has already been implemented, the Commission may, in a decision pursuant to Article 8(3), require the undertakings or assets brought together to be separated or any other action that may be appropriate to restore conditions of effective competition.

(116) The Commission takes note of a supplementary agreement [. . .]. In the statement of objections the Commission referred to that supplementary agreement and stated that conditions of effective competition could be restored by ordering Blokker to terminate all agreements which implement the Letter Agreement of 24 December 1996.

(117) On 4 June 1997 Blokker and Toys 'R' Us submitted to the Commission undertakings by which they sought to resolve the competition concerns raised in this case. The parties requested the Commission, in the light of those undertakings, to grant a clearance decision under Article 8(2) of the Merger Regulation. Subsequently those measures were clarified and supplemented in a certain number of respects.

(118) It is noted that Blokker has been operating the Toys 'R' Us business since 3 February 1997. As such, therefore, the concentration has been fully implemented since that date. [. . .].

(119) For the reason the Commission considers it appropriate to maintain the decision under Article 8(3) of the Merger Regulation and considers the parties' proposals as a means of divestiture to be seen in the light of Article 8(4), rather than under Article 8(2), of the Merger Regulation.

(120) In summary the undertakings submitted by Blokker and Toys 'R' Us include the following.

(121) Blokker undertakes to transfer to its wholly owned subsidiary Speelhoorn BV (Speelhoorn): (i) all of Blokker's rights and obligations pursuant to the Franchise Agreement; (ii) all of Blokker's rights and obligations pursuant to the Marketing Subsidy Agreement; and (iii) all the assets acquired by Blokker pursuant to the Asset Purchase Agreement.

(122) Blokker unertakes as soon as practical after the notification of this decision, to begin negotiations with interested third parties with a view to transferring at least 60 % of the share capital of Speelhoorn to a viable and independent undertaking not connected with either Blokker or Toys 'R' Us, which is capable of maintaining the Dutch Toys 'R' Us on the market and fulfilling the social commitment made by Blokker. The choice of such an independent third party will be subject to the Commision's reasonable approval.

(123) Blokker undertakes not to retain a minority shareholding in Speelhoorn that exceeds 20 %. Blokker undertakes to transfer to Toys 'R' Us a minority shareholding corresponding to its own shareholding. Blokker and Toys 'R' Us will both be entitled to a maximum of one seat on the board of Speelhoorn which will comprise five members. Furthermore, Blokker and Toys 'R' Us will not be granted any special rights beyond those typically provided to minority shareholders.

Blokker undertakes that it will not interfere with Speelhoorn's freedom to determine independently its commercial policy.

(124) Prior to the completion of the transfer of a majority shareholding in Speelhoorn to a third party, Blokker will ensure that Speelhoorn and the Dutch Toys 'R' Us stores are managed as distinct and saleable undertakings with their own management accounts. Durint this period, Blokker will ensure the continued viability and market value of those stores and will provide sufficient financial resources to this end in the ordinary course of business.

(125) [. . .].

(126) [. . .].

(127) [. . .].

(128) The parties have subsequently clarified and supplemented these measures as follows. The third party will be an independent undertaking unconnected to the Blokker group, which is able to maintain and develop the Toys 'R' Us business as an active competitive force on the market. Blokker will end its presence on the management board of Speelhoorn after [. . .] years following the transfer of a majority shareholding to a third party. [. . .]. Blokker will provide to the Commission on a monthly basis written reports concerning the relevant developments in its or the banker's negotiations with third parties concerning the transfer of a majority shareholding in Speelhoorn.

Assessment and measures pursuant to Article 8(4) of the Merger Regulation

(129) In the Commission's view, the total package of measures agreed by the parties will restore conditions of effective competition on the market. As such, therefore, the package of measures can be accepted as an alternative order for divestiture under Article 8(4) as compared with an order to undo the deal immediately, as set out in the statement of objections.

(130) The Commission acknowledges that the transfer of up to 80 % of the share capital of Speelhoorn (up to 20 % to Toys 'R' Us and the remainder to an independent third party) provides the opportunity for an independent undertaking to acquire a substantial interest in the Toys 'R' Us business and, should that undertaking wish to do so, to acquire the whole share capital of Speelhoorn immediately or after a certain period of time. In the Commission's view, an essential element to restore effective competition is that the purchaser of a majority share must be an independent undertaking unconnected to the Blokker group which is able to maintain and develop the Toys 'R' Us business as an active competitive force on the market.

(131) In addition, the Commission must be put in a position to evaluate whether a chosen purchaser satisfies the abovementioned requirements. Therefore, it is necessary for Blokker to obtain the approval of the Commission before entering into a binding agreement with such a third party. In a request for approval, evidence that the third party satisfies the abovementioned requirements must be produced in order to put the Commission in a position to assess the choice of third party. If the Commission does not either formally indicate its disagreement with the choice of the third party or require further evidence that the third party satisfies the abovementioned requirements, within two weeks after submission of the request, the transfer of the share capital to a third party should be free to proceed.

(132) The Commission further acknowledges that, in the light of the specific circumstances of the case, in particular the poor performance of the Toys 'R' Us business in the Netherlands since its establishment in 1993, there may be difficulties in attracting a third party to purchase the whole of the Toys 'R' Us business. For this reason, the Commission considers that the continued presence of Blokker in the form of a 20 % minority shareholding in combination with the active presence of Blokker on the management board of Speelhoorn can, at least for a certain period of time, serve both to demonstrate the confidence of Blokker in the future viability of the company and to guarantee the development of the company into a viable business within this period. However, in the light of the specific circumstances of this case, the Commission considers that Blokker's representation on the board should not only be reduced but, after a certain period of time, in this case [. . .] years after the transfer of the shareholding to the third party, eliminated completely.

(133) In reaching this conclusion, the Commission takes into account the following specific circumstances of the case. The management board of a small retail company such as Speelhoorn will by its nature be composed of a small number of representatives which are closely involved in the commercial policy of the company. Although Blokker undertakes not to interfere with Speelhoorn's freedom to determine independently its commercial policy, the presence of Blokker on the board will still give it access to information on

the commercial decisions which it could use for its own competitive strategy and also in relation to the competitive strategy of the Toys 'R' Us business operated by Speelhoorn. This possibility is to be evaluated especially in the light of the fact that, for a certain period of time, Blokker will have been operating the Toys 'R' Us business on its own and that, even after the implementation of the divestiture asset out in the proposals, Blokker has a dominant position on the market. Therefore the Commission considers it necessary in order to ensure that effective competition is restored on the market, that Blokker's active presence on the management board should be eliminated once the viability of the company is established. This can be achieved by ordering Blokker to end its presence on the management board [. . .] years after the transfer of a majority shareholding in Speelhoorn to a third party.

(134) The active presence of Blokker in Speelhoorn can also be ended by giving the third party the opportunity, should it wish to do so, to purchase the share capital of Speelhoorn held by Blokker. [. . .].

(135) The Commission considers it necessary and appropriate that Blokker should provide to the Commission on a monthly basis written reports concerning the relevant developments in its or the banker's negotiations with third parties concerning the transfer of a majority shareholding in Speelhoorn.

(136) The Commission underlines that the parties are free, at any stage during the period set out above, to terminate the agreements provided for in the Letter Agreement of 24 December 1996 with the aim of transferring all rights, obligations and assets acquired by Blokker back to Toys 'R' Us. In addition, Blokker is not obliged to terminate any employment agreements,

HAS ADOPTED THIS DECISION:

Article 1

The concentration by which Blokker Holding BV acquires the Dutch operations of Toys 'R' Us Inc. is declared incompatible with the common market and with the functioning of the EEA Agreement.

Article 2

Blokker is ordered:

(a) to transfer the following assets, rights and obligations to its wholly owned subsidiary Speelhoorn BV: (i) all of Blokker's rights and obligations pursuant to the Franchise Agreement dated 3 February 1997, between Blokker and Toys 'R' Us, (ii) all of Blokker's rights and obligations pursuant to the Marketing Subsidy Agreement of 3 February 1997 between Blokker and Toys 'R' Us; and (iii) all the assets acquired by Blokker pursuant to the Asset Purchase Agreement of 3 February 1997 between Blokker and Toys 'R' Us. This transfer must be implemented as soon as practical after the notification to Blokker of this Decision and in any event no later than the date on which Blokker enters into a binding letter of intent with a third party on the sale of a majority shareholding in Speelhoorn BV;

(b) to divest itself of at least 80 % of the total share capital of Speelhoorn BV in the following way. Up to 20 % of the total share capital of Speelhoorn BV shall be transferred to Toys 'R' Us. At least 60 % of the total share capital of Speelhoorn BV shall be transferred to a third party. The third party shall be given the possibility to purchase the total share capital of Speelhoorn BV or at least the 80 % held by Blokker. The third party must be an independent undertaking unconnected to the Blokker group and must be able to maintain and develop Speelhoorn BV as a viable and active competitive force in the market for specialised toy retailing. Blokker may hold one seat on the management board of Speelhoorn BV on condition that the third party has at least three seats and Toys 'R' Us has one seat. Blokker may hold the seat no longer than for a period of [. . .] years, following the transfer of a majority shareholding to a third party [. . .];

(c) to appoint a banker with recognised experience in the sale of undertakings to act on its behalf to sell a majority shareholding in Speelhoorn BV, if it has not entered into a binding letter of intent on the sale of a majority shareholding in Speelhoorn BV by [. . .];

(d) to provide to the Commission written reports on a monthly basis concerning the relevant developments in its or the banker's negotiations with third parties concerning the transfer of a majority shareholding in Speelhoorn BV;

(e) to obtain the approval of the Commission before entering into a binding letter of intent with such a third party. In a request for approval, evidence that the third party satisfies the requirements set out in (b) must be produced in order to put the Commission in a position to assess the choice of a third party. If the Commission does not either formally indicate its disagreement with the choice of the third party or require further evidence that the third party satisfies the requirements set out in (b) within two weeks after submission of the request,

the transfer of the share capital to a third party shall be free to proceed.

Article 3

In the event that Blokker fails to enter into a binding letter of intent with a third party before [. . .] in the manner set out in Article 2, Blokker is ordered to transfer all rights, obligations and assets acquired pursuant to the Letter Agreement of 24 December 1996 to Toys 'R' Us [. . .]. Blokker is not obliged to terminate any employment agreements.

Article 4

This Decision is addressed to:

Blokker Holding BV
Van der Madeweg 13
The Netherlands 1099 BS Amsterdam

Done at Brussels, 26 June 1997.

For the Commission
Karel VAN MIERT
Menber of the Commission