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Case No IV/M.1409 - FYFFES / CAPESPAN

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 27/04/1999

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.04.1999

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No IV/M.1409-Fyffes/Capespan
Notification of 19.03.1999 pursuant to Article 4 of Council Regulation No 4064/89.

1. On 19.03.1999 the Commission received a notification of a concentration by which Fyffes Plc will acquire joint control over the UK based company Capespan International Holdings Limited, a full subsidiary of Capespan Group Holdings Limited, in order to set up a joint venture company in the field of imports and distribution of fresh fruit in Europe.

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Council Regulation No 4064/89 and does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

I. THE PARTIES.

3. Fyffes Plc. ("Fyffes") is an Irish based company whose main activity consists of distributing all kind of fresh fruits and vegetables in Europe. It is also active as importer of these goods through its Dutch subsidiary Velleman & Tas. It has other related activities in the UK concerning general distribution and shipping companies.

4. Capespan Group Holdings Limited ("Capespan Group") is a newly formed South African company, established with effect of 01.01.1999 following the merger of Outspan International Limited and Unifruco Limited, namely South Africa's two major produce sales and export marketing organisations.

5. Capespan International Holdings Limited ("Capespan International" or "JV") is a UK based company which is an indirect subsidiary of Capespan Group and acts as the holding

company for all the Capespan Group's European activities. Its European trading activities have been carried on through its wholly owned subsidiary Capespan International plc., currently acting as an importer and trader of fresh fruit and allied products in Europe.

II. THE OPERATION

6. On 23 December 1998 the parties concluded agreements :

   6.1 a Share Sale and Purchase Agreement relating to the acquisition by Fyffes of 50 % of Capespan Group's subsidiary Capespan International and also establishing provisions concerning cross shareholders agreements with the effect of Fyffes acquiring […] of Capespan Group and Capespan Group acquiring a minority interest in Fyffes (a maximum of […] from different concepts);

   6.2 a Joint Venture Agreement ("JV Agreement");

   6.3 a Supply Agency Agreement relating to an exclusive agency arrangement between Capespan Group and the JV company concerning the supply of fresh fruit to be marketed into Europe.

7. The operation consists in the creation of a Joint Venture company which results from the transfer by Capespan Group of 50 % of the issued ordinary shares of Capespan International Holdings Limited to Fyffes.

8. On the one hand the object of the operation is to enable Capespan International to increase the volume of fresh fruit to be supplied into the European market as well as to obtain new sources of supply. In autumn 1997 the South African market for fresh fruit distribution was de-regulated and as a result Capespan Group lost its monopoly of access to the export market for South African grown fruit and lost substantial proportion of market share.

9. On the other hand the operation enables Fyffes to operate "at source" through Capespan Group and so to guarantee security of supply and ensure variety of products as well as quality at every stage of the supply chain. By being vertically integrated back at source Fyffes will be able to […].

III. THE CONCENTRATION

<u>Joint Control</u>

10. As explained above, Fyffes and Capespan Group will each hold 50 % of Capespan International equity capital. According to the JV Agreement, the JV will be managed by a board of directors consisting of an equal number of directors for each of the parties. The directors appointed by Fyffes and those appointed by Capespan Group will have equality of votes and the chairman, nominated by Fyffes and agreed by Capespan Group, will not have a second or casting vote. Decisions on key matters will require either unanimity or a majority. Key matters cover the approval of business plan, annual plans and budget. The JV agreement also sets up dead-lock mechanisms that will force the parties either to reach to an agreement or to withdraw the proposal. These provisions show that both

parents will together exercise joint control over Capespan International as none of them will be in a position to unilaterally determine its behaviour.

Full functionality

11. The Joint Venture company has an independent management structure and independent directors. It also has access to sufficient resources : it employed a sufficient number of permanent employees throughout the EU; has sales offices in main European cities as well as specific facilities such as port facilities, cold stores, warehouses and depots; it leases its premises on an arm's length basis; it has its own administrative and accounting systems which are operated in a distinct way from either of its parents. Therefore it has sufficient resources and assets to conduct on a lasting basis its business activities.

12. In order to […], Capespan International is developing and diversifying the scope of its business. To this effect the JV will perform logistical and commercial and technical services together with its traditional function as a trading company.

13. The JV will develop a sales and marketing activity with respect to fresh fruit. However its activities in this sector will also encompass ancillary products different from fresh fruit, such as wines, juices and other fruit related products. Together with the trading activities the JV will provide services for third parties:

    - Logistical services connected with the import and distribution of their products in Europe. To this effect it already operates agreements with third partners to operate modern warehousing and logistic facilities at maritimael terminals in various Atlantic European ports, namely Sheerness (UK) and Bremerhaven, Flushing and Antwerp.

    - Other agreements with port authorities and stevedores have been implemented for processing services (ripening, netting, bagging, etc.); technical co-ordination services (for ship side inspection, monitoring of product quality, temperature control etc) and commercial services (including customs clearing, invoicing and cash collection). The JV also provides these services for third parties.

      In return for their logistics and technical and commercial services the JV will receive commissions.

14. Capespan International will have sufficient access to the market. It will sell its products both to big wholesalers as well as directly to large multiple retailers. Fyffes is progressively […] in order to focus on […], where none of the parents is active.

15. As far as the market for the supply of fresh fruit is concerned the parties have concluded a supply agreement by which Capespan Group appoints the JV as its exclusive agent in Europe. However the JV is not obliged to source South African product from Capespan Group. The proportion of supplies from third parties for the year […] is expected to be nearly […] of total supplies and after a start-up period of […] years it is expected that this percentage will increase up to […], reaching […] in the fifth year.

16. Products other than fresh fruit will be obtained by the JV from sources other than the parents. It is expected that by the end of the fifth year this segment will represent over […] of total turnover.

17. On the above basis the Joint Venture Company is to perform, on a lasting basis, all the functions of an economic autonomous economic entity and is geared to play an active role on the market. Therefore the operation constitutes a concentration in terms of Article 3(2) of the Merger Regulation.

IV. COMMUNITY DIMENSION

1. The combined aggregate worldwide turnover of the undertakings concerned exceeds € 2500 million[1] (Fyffes € 1,906 million; Capespan Group € 786 million). The aggregate Community-wide turnover of each party exceeds €100 million (Fyffes € 1,905 million; Capespan Group € 485 million). In each of the UK, the Netherlands, France and Germany each of the parties have a turnover in excess of € 25 million, and in each of those Member States the parties' combined aggregate turnover exceeds € 100 million. The undertakings concerned do not achieve more than two-thirds of their turnover in one and the same Member State.

19. The notified operation therefore has a Community dimension in accordance with Article 1(3) of the Merger Regulation.

V. COMPETITIVE ASSESSMENT

Relevant product markets

20. Capespan International will import fresh fruit (apples, pears, oranges, easy peelers, grapefruit, lemons, grapes and stone fruit), allied products (such as wine, fruit juice, jam, dried fruit, snacks and other elaborated products) and will also render related services. […].

According to the parties the relevant product markets are the markets for <u>fresh fruit</u> (i) <u>at the import/production level</u> and (ii) <u>at the wholesale level.</u>

<u>Fresh fruit at the import/production level</u>

21. On this market importers and producer organisations supply fresh fruit sourced from all over the world to big wholesalers and large multiple retailers.

22. The parties consider that the relevant product market is the market for fresh fruit in general with the exception of bananas. However, they also have provided data broken down more narrowly (for apples, pears, oranges, easy peelers, grapefruit, lemons, grapes and stone fruit). The parties consider the import of bananas as being part of a separate market due to the different EU regime for the import of bananas (for which a licence is required and quotas are fixed) and to the special installations that are needed for the ripening of the product. According to the results of the market investigation it is not necessary to distinguish between the different categories of fruit, with the exception of bananas.

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[1] Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

23. The parties also argue that imported fruit and EU domestic grown fruit compete with one another. This is due to the increase in use and technological improvements with regard to the cold storage of fruit that extends its lifespan. Even if some categories of fruit grown in the EU are not available during certain periods of the year, they can be sourced from a variety of third countries.

The results of the market investigation confirm the parties' views.

24. However, for the purpose of the present case, the definition of the relevant product market can be left open given that the operation is not likely to lead to any problem of dominance in any of the alternative markets considered above.

Fresh fruit at the wholesale level

25. On this market big wholesalers supply smaller wholesalers and small retailers. According to the parties it is important for a big wholesaler to be able to offer a complete range of fresh fruit in the same way as smaller wholesalers and smaller retailers – who in turn need to be able to offer a complete range of fresh fruit and prefer to deal with few fruit suppliers in order to save costs. Therefore it is not necessary to split up the fresh fruit into different categories.

26. The results of the market investigation largely confirm the parties' views. Final consumers tend to spend a fixed amount of the household budget for fresh fruit in general, without having certain categories of fruit in mind that they absolutely want to buy, with the exception of bananas bought for children. The consumers' choice between the different categories of fresh fruit will be driven by their price, quality and availability.

27. However, for the purpose of the present case, the definition of the relevant product market can be left open given that the operation is not likely to lead to any problem of dominance in any of the alternative markets considered above.

28. Capespan International's activities with regard to allied products and related services do not give rise to any affected market.

Relevant geographic markets

Fresh fruit at the import/production level

29. According to the parties the geographic scope of the market for fresh fruit at the import/production level is at least EU wide. Importers sell the fresh fruit to customers throughout the EU. Fresh fruit is a commodity product, prices are transparent and on the same level throughout the EU and the access to transportation is easy.

30. The market investigation has in general confirmed the parties' view. Some suppliers however considered it more logical to define areas which are linked to ports and distribution centers and to distinguish for instance between northern EU (with Germany the Benelux countries and to a lesser extent Austria) and other areas.

31. However, for the purpose of the present case the definition of the relevant geographic market can be left open given that the operation is not likely to lead to any problem of dominance in any of the alternative markets considered above.

Fresh fruit at the wholesale level

32. With regard to the market for fresh fruit at the wholesale level, the parties claim that the market has a national dimension.

33. The market investigation has in general confirmed these views, although there seems to be a trend towards cross-border regional markets. An important factor in this respect is the distance and therefore the time it takes to have the fruit transported and delivered. All orders that can be delivered by the next morning are part of the same geographic market (for instance Germany and the Benelux countries could be considered as a geographic market).

34. However, for the purpose of the present case, the definition of the relevant geographic market can be left open given that the operation is not likely to lead to any problem of dominance in any of the alternative markets considered above.

Assessment

Fresh fruit at the import/production level

35. According to the parties the operation gives rise to a small horizontal overlap on the market for fresh fruit at the import/production level. Capespan International's and Velleman & Tas' combined market share would amount to [less than 10%] (in 1997) of fresh fruit consumed in the EU. With regard to the different categories of fruit these combined market shares would be <5% for each type of fruit[2], except for grapefruit where they would have [between 15-25%].

36. The other companies active on this market are numerous : Dole, Agrexco (Israeli fruit exporting body), Enzafruit (the New Zealand exporting board), Del Monte, De Groot International, Citronas, The Greenery Group and others.

37. The operation will therefore not give rise to the creation or strengthening of a dominant position.

Vertical links

38. According to the information provided by the parties the vertical links between Capespan International, as an importer, and Fyffes, as a wholesaler, will neither lead to foreclosure of wholesalers nor to foreclosure of the importers for the following reasons : Fyffes' supplies on the market for the wholesale of fresh fruit (including bananas) is [less than 10%] in 11 out of the 15 EU Member States. In Ireland, Denmark, the Netherlands and the UK Fyffes' market share is [between 40% and 50%], [between 20-30%], [between 15% and 25%] and [between 10% and 20%] respectively. In Ireland and

2 Except bananas.

Denmark Fyffes is already the exclusive wholesaler for Capespan. Given the fact that Fyffes' competitors can source fresh fruit from throughout the EU and that Capespan International's and Velleman & Tas' supplies of fresh fruit in the EU represent [<5%] of fresh fruit consumption in the EU this operation is not likely to lead to any foreclosure.

39. The operation will therefore not give rise to the creation or strengthening of a dominant position.

VI. ANCILLARY RESTRAINTS

40. The parties have requested two contractual provisions to be considered as ancillary to the concentration.

41. The first relates to the non-compete convenants contained in the Joint Venture Agreement by which Fyffes agrees not to compete with the Joint Venture for the procurement of fresh fruit from the South African region to be marketed in Europe. This provision shows the parent company intention to withdraw from the JV's market and therefore it can be considered as an integral part of the transaction.

42. The second provision refers to the exclusive supply agreements between Capespan Group and the JV by which Capespan Group appoints Capespan International as its sole and exclusive agent for the sale, marketing and distribution of their products in Europe for the whole duration of the JV. This provision goes beyond what is necessary to ensure the continuity of supply of the products. However it could be considered as ancillary to the concentration if it can help the JV to assure its sales of the product during its start-up period. In this respect the supply agency agreement can be considered as directly related and necessary to the implementation of the concentration and will be covered by the present decision for a period of 3 years from the creation of the JV.

VII. CONCLUSION

43. For the above reasons, the Commission decides not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6 (1) (b) of Council Regulation (EEC) No 4064/89.

For the Commission,