

***Case No COMP/M.2504 -
CADBURY SCHWEPPEES
/ PERNOD RICARD***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 29/10/2001

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COMMISSION OF THE EUROPEAN COMMUNITIES

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 29.10.2001

SG (2001) D/291973

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sir/Madam,

**Subject: Case No. COMP/M.2504 - Cadbury Schweppes plc/Pernod Ricard S.A.
Notification of 26 September 2001 pursuant to Article 4 of Council
Regulation No. 4064/89¹**

1. On 26 September 2001, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No. 4064/89 by which Cadbury Schweppes plc acquires within the meaning of Article 3(1)(b) of the Council Regulation control of certain businesses and associated assets of Pernod Ricard S.A. by way of the purchase of those assets.
2. The Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I. THE PARTIES

3. Cadbury Schweppes plc ("CS") is a UK-listed company active in the manufacture and distribution of soft drinks and confectionery. Since the disposal of a large part of its beverage business to The Coca-Cola Company ("TCCC") in 1999/2000,² its beverage activities are located principally in Europe (excluding the UK, Ireland and Greece), North America, Mexico and Australia. Its confectionery business manufactures both chocolate and sugar confectionery, both of which are sold world-wide.
4. Pernod Ricard S.A. ("PR") is a French-based group, publicly quoted on the Paris Stock Exchange. The main activities of the Pernod Ricard group include: the production and distribution of wines, spirits, ciders and low alcoholic drinks; the production and distribution of soft drinks and fruit juices; the production of fruit preparations; and

¹ OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

² This operation was not notifiable under the Merger Regulation, as it did not meet the Regulation's turnover thresholds.

wholesale distribution. Only the non-alcoholic beverage business and associated assets (production and distribution of soft drinks) are being sold to CS.

II. THE OPERATION IS A CONCENTRATION

5. The proposed concentration will involve the acquisition of sole control within the meaning of Article 3(1) of the Merger Regulation, whereby CS will acquire the non-alcoholic beverage businesses and associated assets of PR from various companies owned and controlled directly or indirectly by PR. This acquisition will not relate to assets and activities in certain territories (specifically, the UK, Ireland and Greece). As to the assets and activities in these territories, PR will have a put option, which can be exercised once CS is free of the non-compete covenant in favour of TCCC.

III. COMMUNITY DIMENSION

6. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion.³ CS's world-wide turnover was EUR 7.5 billion and the acquired business had a turnover of EUR 464 million in 2000. Each of the undertakings has a Community-wide turnover in excess of EUR 250 million: EUR 2616 million for CS and EUR 331 million for the acquired business. Finally, CS and the acquired businesses do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

IV. COMPETITIVE ASSESSMENT

A. Relevant Product Markets

7. The parties submit that an appropriate working definition of product markets is carbonated soft drinks ("CSDs"), subdivided into separate markets for cola CSDs and non-cola CSDs. They also submit that there are additional product markets for (1) fruit juices as a distinct market and (2) still drinks and iced teas as a single market or as separate markets that are distinct from CSDs. Further, the parties submit that the two distinctive distribution channels for non-alcoholic beverages in France, that is, the home channel (including retail groceries and other retail outlets for consumers for take-home consumption) and the on-premises channel (including, for example, hotels, restaurants, and cafés, known as the "horeca" sector) constitute separate markets.

8. In prior merger decisions, the Commission has delineated certain relevant product markets in the non-alcoholic beverages sector, that is, NABs.⁴ In *Coca-Cola Enterprises, Inc./Amalgamated Beverages* the Commission concluded that CSDs were distinct from other NABs and beverage types. Within CSDs, it also concluded that there was a separate product market for cola-flavoured CSDs and left open whether other CSDs formed a single product market or should be further subdivided by flavour groups. Subsequently, in *The Coca-Cola Company/Carlsberg A/S*, the Commission confirmed that CSDs were distinct from other non-alcoholic beverages and indicated that cola CSDs might form a separate relevant market.

³ 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).

⁴ See, for example, Case No. IV/M.190 – *Nestlé/Perrier*; Case No. IV/M.794 – *Coca-Cola Enterprises, Inc./Amalgamated Beverages*; and Case No. IV/M.833 – *The Coca-Cola Company/Carlsberg A/S*.

9. The Commission's investigation found convincing indications that there is a market for CSDs in France that is distinct from still drinks, fruit juices, waters and milk drinks. The distinction between CSDs, on the one hand, and waters and milk drinks, on the other, are due to such factors as the high volume and conditions of consumption of the latter categories of products. Similarly, a distinction exists between CSDs and fruit juices, especially refrigerated fruit juices, which have a different handling and delivery system and a different, more healthy, image. Moreover, the substitution between CSDs and other still drinks is considered unlikely, because of their different images and target groups (still drinks mainly target children, while CSDs primarily target teens and adults).
10. The Commission's investigation in this case confirms the findings that cola CSDs may form a distinct product market. Cola CSDs appear to be different from non-cola CSDs for a number of reasons, including the fact that brand image is more important for cola CSDs, while taste is more important for non-cola CSDs; cola CSDs are better accepted as a replacement for alcoholic drinks within adults' consumption patterns; and, even in the face of price changes, substitution from cola CSDs to non-cola CSDs is not likely.
11. Certain market participants indicated that individual flavours of non-cola CSDs may constitute distinct product markets, referring to such factors as consumer preferences for different flavours.
12. In the present case, the relevant product market definition can be left open as to whether cola CSDs and non-cola CSDs constitute separate relevant markets, and further, whether individual non-cola flavours of CSDs constitute distinct relevant markets, given that, in any event, the concentration will not create or strengthen a dominant position in any of these possible product market definitions. Whether or not still drinks and iced teas constitute one or several separate product markets can also be left open.
13. With respect to the distribution of NABs in France, the investigation found convincing indications that the distribution channels for home-consumption and on-premises consumption constitute different markets. In the on-premises market, there is immediate consumption of the beverages, they are sold as individually packed items (or in fountain servings), and have higher prices. This contrasts with the home-consumption market where products are marketed in multiple packaging, frequently stored in large quantities by the end consumer, and have lower per unit prices. Moreover, the types of promotions in the two channels often differ substantially. These particular features of each distribution channel have an influence on the purchasing policy of NAB manufacturers' customers. While some customers and competitors pointed to a certain overlap in the types of customers now served by wholesale suppliers, and the types of promotions and other discounts offered to both large retail and on-premises customers, the Commission finds that the evidence in this investigation, on balance, supports a finding that these two channels for distribution constitute separate markets in France.
14. Within NABS, both parties produce a range of drinks under several brands. Specifically, CS's product lines include: *Oasis* (including still drinks and still flavoured iced teas); *Schweppes* (including tonics, orange/mandarin, lemon and "agrum" CSDs); *Gini* (cloudy lemon carbonate); *Canada Dry* (ginger ale carbonate); and *Energade* (flavoured water). PR's product lines include: *Orangina* (orange carbonate); *Brut de Pomme* (carbonated apple); *Banga* (still orange); *Ricqlès* (mint

carbonate); *Champomy* (carbonated apple); *Les Givrés* (cloudy lime, grapefruit, lemon and exotic fruit carbonates); *Pampryl* (fruit juices); and *Pam-Pam* (fruit juices sold only to on-premises customers).

B. The Relevant Geographic Market

15. In all its previous decisions regarding various non-alcoholic beverages, the Commission has concluded that the relevant geographic markets have been national on the basis, *inter alia*, of licensing agreements covering national territories as a rule, nationally organised distribution arrangements, varying consumer preferences in different Member States, price differentials between different countries, high transport cost/product value ratios and limited trade flows. The parties concur in a finding of national geographic markets and the investigation confirmed this finding.
2. 16. For each of the drink products identified above, the only affected markets in the operation would be in France.

C. General Competitive Conditions

17. As the Commission has found in its earlier decisions, the supply of NABs to retail customers consist of two interrelated activities: brand ownership and bottling.⁵ In France, this is the case for both parties to this transaction – CS and PR – as well as for its major competitors, including The Coca-Cola Company (“TCCC”), PepsiCo International (“PepsiCo”), Procter & Gamble Co. (“P&G”), Unilever plc, Groupe Danone and Nestlé S.A. While not all of the above competitors produce drinks in each NAB category, they are all multinational food and drink manufacturers involved in the production, distribution and/or sale of certain NABs in both distribution markets in France.⁶
18. Among these international brand owners, their degree of vertical integration varies as does the breadth of their portfolio of NABs, that is, the range of drinks, which they offer to retail and wholesale customers. It is not necessary for a company to produce internally all drinks products that they offer within their portfolio; rather, in some cases, they may sub-contract production (co-packing arrangements), enter co-distribution agreements, or license the use of given products in order to “round out” their respective portfolios to meet their customers’ requirements.
19. The responsibility for the marketing and promotion of these products is normally shared between the brand owner and bottler. Marketing activities are a combination of brand-specific advertising and trade-oriented promotion. The marketing of CSDs are characterised by the leading brands being advertised on an international basis, termed “above-the-line” advertising in the industry, paid for by the brand owner. In comparison, “below-the-line” marketing involves promotion of products at the trade level and includes promotional discounts and trade marketing (such as payment to

⁵ While there may be some variations in the business model, including the extent of vertical integration, the brand owner creates and promotes the beverage brands, provides the supply of concentrate (or authorises its production), and authorises local bottlers to prepare, market, distribute and sell the beverages. The bottler is typically assigned a territory within which it is responsible for the preparation, packaging, sales (including pricing), marketing and distribution to retail and wholesale customers.

⁶ For example, TCCC sells Coca-Cola, Fanta, and Sprite CSDs, and Minute Maid juices; PepsiCo sells Pepsi and 7Up CSDs, and Tropicana juices; and Unilever is present with a range of still and carbonated iced teas, and still fruit drinks.

customers for listings, shelf displays and in-store advertising) which is done at the national level. Typically, such promotions are offered by the bottler.

20. During the investigation, both retail and wholesale customers reported on the importance of joint advertising and promotional support from the brand owner/bottlers as an important marketing tool. Some stated that the combined firm would be likely to spend more on such activities than the two firms had done previously. These customers stated that this could in fact lead to more growth in CSDs and other NABs, by providing added “dynamism” which would lead to increased demand for drinks across this spectrum. Certain industry participants added that a combined CS/PR would have greater capabilities to compete against TCCC, with its powerful portfolio of CSDs and other NABs.

D. The Affected Markets

21. Only two categories of drinks qualify as affected markets: non-cola CSDs and still drinks in France. Within the category of non-cola CSDs, possible affected markets are the orange and cloudy lemon flavoured CSDs. The competitive assessment is conducted, alternatively, on a market definition encompassing all non-cola CSDs, as well as on markets for the two individual non-cola CSD flavours which constitute affected markets. It is noted that a market encompassing all CSDs together would give the parties a far lower market share, given that neither party has a cola CSD in its portfolio. Indeed, in such a calculation, the parties’ combined share would not reach the level of an affected market.
22. The assessment for still drinks is made, alternatively, in a market excluding iced teas (where the parties would have a higher combined share), as well as in a market including iced teas.

1. CSDs

23. Essentially, the acquisition will combine two portfolios that are generally complementary. Within affected markets in CSDs, the parties’ only two flavour overlaps are in orange/mandarin carbonates and cloudy lemon carbonates. As set out below, where there are overlaps in individual flavours of CSDs, the accretion of market share is fairly small, the other party’s product does not represent the closest direct substitute, and the next largest market share is usually held by TCCC, a strong competitor with a full range of CSDs. Indeed, even after the acquisition, CS will still not be present in certain key CSD flavour groups (including cola CSDs, which represent 65% of total CSD consumption in France).
24. If the parties’ shares are examined at the individual flavour level, it appears that the market shares obtained by the merged entity in non-cola CSDs result from the combination of two complementary product portfolios: PR’s strength is in orange flavours (*Orangina* brand), as compared to CS which is stronger in lemon (*Gini* and *Schwepes* brands).

a. Market Structure

i. Home Market for Non-Cola CSDs

25. In the home market, in looking at market shares for all non-cola CSDs taken together (accounting for 35% of all CSD consumption in France), the parties would have 42.6% market shares in volume (19% for CS, and 23.6% for PR) and 54.2% in value (24.7% for CS, and 29.5% for PR). These high market shares result from the importance in France of PR's *Orangina* brand and the range of CS in various flavours, including *Gini*, *Canada Dry* and *Schweppes* brands. TCCC is the second largest player with 12.0% in volume and 12.5% in value, with own labels representing 25% market shares in volume and 14.7% in value, and PepsiCo representing 4.6% in volume and 4.5% in value.
26. In the home market, CS would have 3.3% in an orange-flavoured segment with its Schweppes orange/mandarin products, which, added to *Orangina*'s 53.5% share would give it a share of 56.8% in this flavour category. TCCC is present in the market with its orange-flavoured *Fanta*, which has 19.9% of the market; and private labels account for approximately 15% of this flavour group. In the cloudy lemon flavour, PR would have 4.6% with its "*les Givrés Citron vert*" products, which, added to CS's *Gini* and *Schweppes* share of 60.1%, would give it a total of 64.7% in the cloudy lemon category. Both TCCC and PepsiCo are present in the market: TCCC, with its lemon-flavoured *Fanta*, which has a market share of 9.9% and Pepsi's *Kas Lemon* has approximately 6.8%. In addition, Perrier has recently introduced *Pschitt Lemon*, which has taken around 1% of the market; and private labels account for 15.8%.

ii. On-Premises Market for Non-Cola CSDs

27. In the on-premises market, in looking at market shares for all non-cola CSDs taken together, the parties' respective market shares are [5-10]% for CS and [25-30]% for PR, thus accounting for [30-40]%, as against [25-30]% for TCCC. Under these circumstances, the Commission concludes that a dominant position would not be created or strengthened in a possible market for all non-cola CSDs in the on-premises channel.
28. If one distinguishes among individual flavoured non-cola CSDs, then in the on-premises market, where there are no private label CSDs, the shares of the smaller party's products in these two flavour categories leads to a limited market share accretion in each flavour.
29. When looking at only orange-flavoured CSDs, PR, through its brand *Orangina*, accounts for [55-60]% of the market (in volume). CS, through its brand *Schweppes Orange*, will only add a very limited market share of [less than 1]%. The merged entity will have [55-60]% market share, and, as in the pre-merger situation, there will be competition in particular from TCCC, which has a market share of around [25-30]% with its *Fanta Orange*. Consequently, the operation will not have a significant impact on this market.
30. For cloudy lemon-flavoured CSDs, (whose total volume accounts for approximately 10.5 million litres out of a total volume of 203.7 million litres for all non-cola CSDs), CS would have a [55-60]% market share and PR would have [less than 5]%, accounting for a total share of [55-65]%. The merged entity will still face competition from TCCC, with *Fanta Lemon*, which has [25-30]% in the cloudy-lemon CSDs market.

b. Additional Elements

31. The high market shares in some possible markets (that is, possible markets for all non-cola CSDs in the home market, as well as orange-flavoured CSDs and cloudy lemon CSDs in both the home and on-premises markets, respectively) do not fully reflect the actual market position of the merging parties, but tend to overstate their competitive position in both channels of distribution. Certain additional elements should be taken into consideration. It is important to note that the TCCC portfolio – the broadest in the market – contains what some industry respondents described as a “must stock” product (that is, Coca-Cola CSD), in addition to being able to offer the full line of flavours. Moreover, TCCC owns the brand *Fanta* (under which it produces several fruit flavoured CSDs) and, consequently, it has the strength of brand image as well as the means to compete vigorously in non-cola CSDs. Furthermore, TCCC has expanded its line of flavoured CSDs under its *Fanta* brand name to include lemon, limette and recently introduced a pomelo flavour as well. In view of the fact that TCCC has, by far, the largest above-the-line budget in CSDs, the ability of its non-cola CSDs to compete is further assured. According to certain retail customers and competitors, own label products exercise an additional competitive constraint.
32. The importance of offering a full line of CSDs is a significant competitive feature. This is true in both distribution channels, and particularly in the on-premises channel, because customers prefer to obtain as full a line as possible through one-stop shopping from a single supplier. This not only reduces logistical costs for customers, but also may result in additional discount and promotional benefits from the supplier.
33. Under these circumstances, the Commission finds that the operation does not create or strengthen a dominant position in a possible market for all non-cola CSDs. Furthermore, the operation does not create or strengthen a dominant position in possible markets for the individual orange- or cloudy lemon-flavoured CSDs in either the home or on-premises markets.

2. Still Drinks

34. As the parties point out, although there are reasons for separating iced teas from other still drinks, the growth of these products has a competitive significance for other still drinks because they compete for grocery shelf space and exert pressure on producers of other still drinks to offer attractive and competitive terms. In addition to teas, new flavoured waters have been developed and launched which are increasingly aimed at taking share from other still drinks, particularly as these products are combining flavours such as strawberry and peach with a low sugar content. Some of these products and new entries are discussed below.

a. Home Market for Still Drinks

35. In measuring market shares in still drinks, the parties’ combined market share would differ substantially depending on whether still iced tea products are included in the calculation, and thus the market shares are calculated in both alternative markets. In a market including iced tea products, the parties would have the following shares: in volume terms: a combination of CS’s share of 34.8% with PR’s share of 2.3%, accounting for 37.8%; and in value terms: CS’s share of 33.9% combined with PS’s 1.9% would account for 35.8%.

36. In this market, the parties face substantial competition from Lipton iced tea, with market shares of 21.4% (in volume) and 28.3% (in value); P&G, with market shares of 5.7% (in volume) and 8.0% (in value); Danone, with 2.4% (in volume) and 2.5% (in value); TCCC, with 1.9% (in volume) and 2.1% (in value); and additional competition from own label brands which together account for 24.9% (in volume) and 18.1% (in value). Consequently, in a possible market for still drinks including iced teas, the operation would not create or strengthen a dominant position.
37. In a market for still drinks excluding iced tea products, in the home market, the parties would have the following shares: CS has 48.8% (in volume) and 52.5% (in value), which when added to PR's 3.7% share (in volume) and 3.3% (in value) would count for, respectively, 52.6% (in volume) and 55.8% (in value). Again, the parties face competition from major players, including P&G, with market shares of 8.9% (in volume) and 14.0% (in value), the Virgin Cola Group, Vittel and Volvic (whose individual market shares are not available), and retailers' own labels that account for 28.6% (in volume) and 21.7% (in value).
38. It is important to note the limited nature of the overlap between the parties in still drinks: PR only has a single still product that it offers, *Banga*, and its sales have been declining sharply. It was re-launched in 1998, but was again unsuccessful. [...].
39. In addition, this market has seen several products successfully introduced recently. For example, Procter & Gamble launched *Sunny Delight*, a still drink, in 1999. Within a year, it had gained a 1% market share, and it is projected to increase to 2-3% in 2001. Other major market participants who have also introduced new entries into the still drinks category include Nestlé, who has also recently launched two new products, *Petit Vittel* and *Vittel Fruits* (in 2000), Danone, with *Volvic Magique* (in 1999), and the Virgin Cola Group, with a still product called *Surpriz*. Given the significant expertise and resources of these competitors in NABs, the parties face competition that will serve as a substantial competitive constraint in still drinks.
40. Under these circumstances, in a possible market for still drinks excluding iced teas in the home market, the operation does not create or strengthen a dominant position.

b. On-Premises Market for Still Drinks

41. In the on-premises market, the parties' market shares were again assessed in the alternatives of including and excluding iced teas. When iced teas are included, the parties' shares by volume are as follows : PR's [less than 5]% market share would be added to the [25-30]% of CS, accounting for a total share of [30-35]%. No competition concerns would arise under that market definition.
42. When iced teas are excluded, the parties' combined shares would be [5-10]% for PR and [45-50]% for CS, accounting for a total share of [50-60]%. However, these figures tend to overstate the parties' actual competitive position, and in particular the importance of the overlap.
43. In the on-premises market, as in the home market, the volume of sales for PR's only brand for still drinks, *Banga*, has experienced decreasing market share as well, and thus is unlikely to strengthen the parties' position with on-premises customers to any significant extent. CS's still brand, *Oasis*, is sold primarily through petrol stations, snack and "grazing" outlets, where a wider range of competitive still drinks are available as compared to traditional horeca outlets, where space limitations lead to a

limited line of still drinks being offered. Consequently, CS's brand faces competition from the other still drinks identified earlier. Here too, it is important to note that TCCC is present with its broader portfolio combining CSDs with its still drinks and, thus, it has strong leverage over customers.

44. Furthermore, in the on-premises market, wholesalers consider it an advantage to be able to negotiate their pricing with suppliers based on the full range of NAB products which they want from a given supplier. Consequently, the parties have stated that, in their experience, still drinks products which account for a small part of an on-premises customer's portfolio (and accounting for only [10-15]% of volume of NABs in the on-premises market) are the first to come under pressure in any such price negotiations. Therefore, in the possible market examined (that is, the on-premises market for still drinks excluding iced teas), the operation does not create or strengthen a dominant position.

V. CONCLUSION

45. For the above reasons, the Commission has decided 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
Franz FISCHLER
Member of the Commission