

***Case No COMP/M.5201 -
TOTAL PRODUCE /
HALUCO/JV***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 11/08/2008

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11/08/2008

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 party:

Dear Sir/Madam,

**Subject: Case No COMP/M.5201 – Total Produce/ Haluco/ JV
Notification of 19/06/2008 pursuant to Article 4 of Council Regulation
No 139/2004¹
Publication in the Official Journal of the European Union No. C186,
23.07.08, p.37**

1. On 4 July 2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No. 139/2004 ('the Merger Regulation') by which the undertakings Total produce plc ("Total Produce", Ireland) and Haluco Beheer BV ("Haluco", the Netherlands) will acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the company TP Haluco ("TP Haluco", the Netherlands) by way of purchase of shares. Through a distinct transaction, Total Produce will also acquire sole control of Haluco UK, a 100% owned subsidiary of Haluco. As indicated in §11, these two distinct transactions constitute one concentration in the sense of Article 5 (2) subparagraph 2 of the Merger Regulation.
2. After examination of the notification, the Commission concluded that this concentration falls within the scope of the Merger Regulation and that it does not raise serious doubts with regard to its compatibility with the Common Market and the EEA agreement.

¹ OJ L 24, 29.1.2004, p. 1.

I. THE PARTIES

3. Total Produce is an Ireland-based company which is primarily active in the procurement, importation, marketing and distribution of a full range of fruit, vegetables and pot plants.
4. Haluco is the current controlling entity of TP Haluco (being incorporated) and Haluco UK.
5. Once incorporated, TP Haluco will have two trading subsidiaries in the Netherlands, namely Haluco BV and Nedalpac BV. The business activities of these companies consist of the procurement, importation, marketing and distribution of a range of fresh products, primarily vegetables which are sourced from growers in the Netherlands, Spain and Israel.
6. Haluco UK is a UK-based wholesaler which procures a full range of fresh products from suppliers throughout Europe and sells them to local retailers and caterers.

II. THE OPERATION

7. The operation consists of the following two transactions:
8. On 22 May 2008 the parties entered into a Share Purchase Agreement outlining the terms of the acquisition of TP Haluco. According to this agreement, Total produce will control 60% of the shares in TP Haluco whilst Haluco will hold the remaining 40%. According to a Shareholders Agreement entered into between Total produce and Haluco, the day to day management of TP Haluco will be performed by the Management Board and a number of strategic decisions, such as approval of business plans and change of strategy of the group, will require the agreement of the majority of the members of the Supervisory Board. Furthermore, Haluco as a minority shareholder is granted veto rights [...].
9. Against this background, it can be concluded that the transaction constitutes an acquisition of joint control of TP Haluco. This conclusion is not modified by the notifying parties' argument to the effect that this acquisition constitutes a first transitory phase of an overall concentration giving Total Produce sole control² and that it should therefore not be considered a separate change of control on a lasting basis. In fact, the Commission considers that the joint control period can be considered not to have a distinct impact on the market structure only if this period does not exceed one year³. In the present case, as the acquisition of joint control will last for a period exceeding two years, the transaction should be considered an acquisition of joint control by Total Produce and Haluco.

² According to the Shareholder Agreement, the veto rights will elapse at the latest on [...] with the result that the joint control will be converted to sole control by Total produce.

³ See paragraph 34 of the Jurisdictional notice (Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings - OJ C 95, 16.4.2008).

10. On 2 May 2008, Total Produce also entered into an agreement with Haluco to acquire 100% of the business of Haluco UK, including the goodwill, records, equipment, business information, benefit of business contracts, stock, IT system and certain other assets of the company needed to operate the business.
11. These two transactions constitute one concentration in the sense of Article 5 (2) subparagraph 2 of the Merger Regulation since they take place between the same undertakings within a two year timeframe⁴.

III. COMMUNITY DIMENSION

12. The parties have a combined worldwide turnover of more than EUR 2 500 million (Total Produce: EUR 2 431 million; Haluco: EUR 317 million. In three Member States (Germany, UK and the Netherlands), each of the parties has sales of more than EUR 25 million and their aggregate sales exceed EUR 100 million. None of the undertakings concerned achieves more than two thirds of its EU-wide turnover in one Member State. The concentration therefore has Community dimension within the meaning of Article 1(3) of the Merger Regulation.

IV. COMPETITIVE ASSESSMENT

13. The two merging parties are both active in the wholesale supply of fresh fruit and mainly vegetables⁵. Total Produce is also active in imports and production of fresh fruit and vegetables, while Haluco has only insignificant import activities⁶. The parties' activities overlap mainly in Ireland, Denmark and Sweden.

Relevant product markets

14. The notifying parties submit that due to the small differences in characteristics, prices and intended use between fresh fruit on one hand and fresh vegetables on the other, these therefore belong to the same relevant product market. Furthermore, the notifying parties disagree with the findings in previous decisions that within both the fruit and vegetables businesses, a further distinction can be made between two levels of supply chain that is the import/production level and the wholesale level. Finally, the notifying parties argue that, at the wholesale level, the respective markets should not be broken down further according to sub-segments of different types of fruit and vegetables. They have nevertheless provided information in accordance with these market segmentations.
15. In this respect, in previous Commission decisions⁷, due to significant differences in characteristics, prices and intended use between fresh fruit on one hand and fresh

⁴ Article 5(2)(2) of the Merger Regulation applies also when one transaction is an acquisition of joint control and the other transaction is an acquisition of sole control, provided that the other jointly controlling parent in one transaction is the seller of the solely controlling stake in the other transaction, which is the case in the present circumstances (see paragraph 50 of the Jurisdictional notice Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings - OJ C 95, 16.4.2008).

⁵ Haluco achieves more than [...] of its turnover in vegetables.

⁶ Haluco's total sales of fresh fruit and vegetables in 2006 amounted to only [...] million euros at import level. Total size of the market of fruit and vegetables in the EEA at import/production level are roughly 68 billion euros.

⁷ Decisions COMP/M.4896 CVC Capital Partners/Katopé International of 8 February 2008 and COMP/M.4216-CVC/Bocchi/De Weide Blik.

vegetables on the other, it was considered that there is no sufficient demand-side substitutability between the supplies of these two categories of products and thus they do not belong to the same relevant product market. The notifying parties have not provided any elements leading to a different conclusion. This distinction has been confirmed by the market investigation. Therefore the Commission takes the view that fruit and vegetables constitute separate markets.

16. Furthermore, although the precise product market definitions were ultimately left open, the Commission stated in previous decisions⁸ that in the fruit and vegetables sectors, a further distinction can be made between two levels of supply chain i.e. import/production level and wholesale level. In fact, at the import/production level, importers and producers organisations supply fresh fruit sourced from all over the world to large wholesalers and large retailers. At the wholesale level, large wholesalers supply smaller wholesalers, retailers and food service companies, such as restaurants and hospitals. A large majority of respondents confirmed that this distinction is still valid. Therefore, for the purpose of the present case, the Commission will consider distinct markets for import/production and wholesale levels.
17. The Commission agreed in previous decisions⁹ both as regards fruit and vegetables at the wholesale level, that it is not necessary to split into different categories since end-consumers tend to spend a fixed amount of the household budget on fresh fruit in general, without having specific fixed categories in mind, with the exception of bananas which are very often bought for children. According to the notifying parties, the same is true also in the present case. The Commission did not reach a firm conclusion on this issue in the CVC/Katopé decision and it can also be left open in the present case as it would not change the competitive assessment.
18. In conclusion, precise product market definitions can be left open in the present case as the transaction does not raise serious doubts even under the narrowest possible product market definition.

Relevant geographic markets

19. In this respect, as regards the markets of fresh fruit and vegetables respectively at the import/production level, this can be left open whether these markets are EEA-wide or national in scope, as Haluco has a very limited presence at this level of supply.
20. As regards the market for fresh fruit (including bananas) at the wholesale level, the Commission so far has left open its exact geographical scope, even if it has noted that geographic proximity for customers plays a role and that they tend to purchase at national or regional (cluster of countries) level¹⁰. The question whether the geographic scope of the wholesale market for fruit (including bananas) is national or broader can be left open.

⁸ Decisions COMP/M.4896 CVC Capital Partners/Katopé International, and COMP/M.4216-CVC/Bocchi/De Weide Blik.

⁹ See footnote n°8.

¹⁰ See footnote n°8.

21. The same applies to the market for fresh vegetables at the wholesale level where imports to Europe are less important and therefore the market has probably a smaller dimension compared to fruit¹¹. The majority of the respondents to the market investigation consider these markets to be national in scope although certain suggest that supply takes place on a regional or even European level. Nevertheless, as the present transaction does not raise serious doubts under any possible geographic market definition, this question can be left open.

Competitive assessment

Wholesale level : EEA

22. Based on a EEA-wide market definition, at the wholesale level the combined market share of the parties would according to the notifying parties' best estimate not exceed [<5] % in fresh fruit (including or not bananas) and [<5] % in fresh vegetables. However, as noted in previous decisions, reliable market share data is not generally available and is very difficult to estimate at EEA or national level as there are no third party reports that gather such data in a comprehensive way. Therefore, while the market investigation has not been able to confirm these market share data estimates, it confirmed that the parties' combined share at a EEA-level would not under any circumstances exceed 15% and that the market share increment would be well below [<5] % both as regards fruit or vegetables. Hence there are no affected markets on a EEA-level.

Wholesale level : National markets

23. Should the markets be national, the notifying parties consider that affected markets would exist in Ireland, Denmark and Sweden.

24. In the Irish markets for fresh fruit (with or without bananas), the concentration would lead to a combined share of [30-40] % and for fresh vegetables to a combined share of [10-20] %, albeit with a very small increment (below [<5] %). The impact of the transaction in Ireland is therefore marginal and the transaction does not raise serious doubts on national markets for wholesale distribution of fruit (including or not bananas) and wholesale distribution of vegetables in Ireland. The same is true if a distinction was made according to different fruit or vegetables categories.

25. Affected markets would also arise in Sweden with a combined share of [20-30] % for fresh fruit (with or without bananas) and [10-20] % for fresh vegetables but the increment brought about by the proposed transaction does not exceed [<5] % for fresh vegetables and [<5] % for fresh fruit. The impact of the transaction in Sweden is marginal and the transaction does not raise serious doubts on national markets for wholesale distribution of fruit (including or not bananas) and wholesale distribution of vegetables in Sweden.

26. The same is true if a distinction was made according to different fruit or vegetables categories. One respondent considered that Total Produce has high shares (above [40-50] %) in the wholesale market of bananas in Sweden. However, the market position of

¹¹ See footnote n°8.

Haluco in the bananas markets in this country is very limited. Haluco is primarily a wholesaler of vegetables and its market share in the wholesale market of bananas would be [<5] % in Sweden. Finally, none of the respondents to the market investigation has raised other substantiated concerns to the effect that the parties would be in a position to exercise market power following the concentration. Therefore the Commission does not consider that the transaction would reinforce the alleged strong market position of Total Produce. As regards the Swedish market for the wholesale of bananas, it can be concluded that the concentration does not raise serious doubts.

27. The Danish market for fresh fruit (with or without bananas) is also affected with a combined share of [10-20] % but again with a very small increment below [<5] %. The impact of the transaction in Denmark is therefore very limited and the transaction does not raise serious doubts on national markets for wholesale distribution of fruit (including or not bananas) and wholesale distribution of vegetables in Denmark.
28. The same is true if a distinction was made according to different fruit or vegetables categories. One respondent considered that Total Produce has high shares (above [40-50] %) in the wholesale market of bananas in Denmark. However, the market position of Haluco in the bananas markets in this country is very limited. Haluco is primarily a wholesaler of vegetables and its market share in the wholesale market of bananas would be [<5] % in Denmark. None of the respondents to the market investigation has raised other substantiated concerns to the effect that the parties would be in a position to exercise market power following the concentration. Therefore the Commission does not consider that the transaction would reinforce the alleged strong market position of Total Produce. As regards the Danish market for the wholesale of bananas, it can be concluded that the concentration does not raise serious doubts.
29. For the reasons outlined above, in none of the potential national markets would the transaction raise serious doubts as to its compatibility with the common market and the EEA agreement.

V. CONCLUSION

30. 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 (EC) No 139/2004.

For the Commission
(signed)
Neelie KROES
Member of the Commission