

***Case No COMP/M.5632 -  
PEPSICO/ PEPSI  
AMERICAS***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 26/10/2009

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.10.2009  
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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.5632 – PEPSICO/ PEPSI AMERICAS  
Notification of 21.9.2009 pursuant to Article 4 of Council Regulation  
No 139/2004<sup>1</sup>**

1. On 21/9/2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertaking PepsiCo, Inc. ("PepsiCo", USA) acquires within the meaning of Article 3(1)(b) of the Council Regulation joint control of the whole of the undertaking PepsiAmericas, Inc. ("PAS", USA), jointly referred as "the Parties", by way of purchase of shares.

**I. THE PARTIES**

2. **PepsiCo** is a global beverage, snack and food company. PepsiCo is a brand owner and producer of concentrates and syrups and beverages (such as fruit juices and sports drinks), which it sells in Europe and around the world (its main beverage brands are Pepsi-Cola, 7Up<sup>2</sup>, Gatorade and Tropicana). In the case of concentrates and syrups, it sells these products to bottling and canning operators to produce carbonated soft drinks ("CSDs"). PepsiCo also sells savoury snack foods and breakfast cereals under the Frito-Lay and Quaker brands globally and under the Frito-Lay/Walkers and Quaker brands respectively in Europe. Finally, PepsiCo also owns a chilled soups business in Spain (the "Alvalle" brand).

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<sup>1</sup> OJ L 24, 29.1.2004 p. 1.

<sup>2</sup> Except in USA.

3. **PAS** is an international bottler of CSDs and other ready-to-drink beverages. PAS conducts business in the United States, and Central and Eastern Europe, where it is the manufacturer, seller and distributor of Pepsi-Cola beverages and also has operations in the Caribbean and Central America through a local joint venture. In some of its territories PAS has the right to manufacture, sell and distribute soft drink products of companies other than PepsiCo. PAS also has several of its own proprietary beverages which are distributed in various regions.
4. In the EEA, PAS has operations in the Czech Republic, Hungary, Poland, the Slovak Republic, Romania, Lithuania, Latvia and Estonia where it bottles and sells PepsiCo branded beverages on an exclusive basis. In addition, PAS has a number of – limited – EEA operations that are independent of its PepsiCo bottling and distribution agreement within the EEA. In particular, PAS owns various regional non-alcoholic beverage brands (Toma, Toma Frutado, Toma Svezi, Gorska Natura, Margitszigeti Kristalyviz and Roua Muntilor) and currently distributes two third party brands, PriGat juice in Romania owned by Gat Foods and certain Schweppes owned/licensed brands in Poland, the Czech Republic, the Slovak Republic and Hungary. It also distributes Frito-Lay snack foods brand owned by PepsiCo in the Czech Republic and Hungary.

## **II. THE OPERATION**

5. On 4 August 2009 (effective 3 August 2009) PepsiCo entered into an Agreement and Plan of Merger with PAS under which PepsiCo will acquire control over PAS when it is merged with Pepsi-Cola Metropolitan Bottling Company Inc, PepsiCo's wholly-owned subsidiary.

## **III. CONCENTRATION**

6. PepsiCo already owns approximately 43% of the voting rights in PAS. However, PepsiCo does not have de facto control over PAS given that it does not have a stable majority of votes at PAS' last three annual general meetings. Furthermore, PepsiCo does not have: a) any special or significant veto rights that would give it decisive influence in PAS; b) any special rights to board representation or nomination of persons to management positions in PAS. As a shareholder, PepsiCo can nominate directors to the board of PAS, if it disagrees with the directors proposed by the board. Any nominations proposed by PepsiCo are subject to a majority vote of shareholders at a shareholder meeting. However PepsiCo does not have the ability to either positively endorse or veto any shareholder meeting decisions; (c) any other agreement or arrangement with any other shareholder in PAS that could give rise to collective voting or any suggestion of commonality of interests between the shareholders. Furthermore PAS is not controlled by any single shareholder.
7. Accordingly, the proposed concentration consists in the acquisition by PepsiCo of control over PAS, therefore constituting a concentration in the sense of Article 3(1)(b) of the EC Merger Regulation.

#### IV. COMMUNITY DIMENSION

8. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion<sup>3</sup> (PepsiCo EUR 29.6 billion; PAS EUR 3.36 billion). The individual aggregate Community turnover of at least two of the undertakings concerned is more than EUR 250 million (PepsiCo EUR [...], PAS EUR [...]). PepsiCo and PAS did not achieve more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension according to Article 1(2) of the EC Merger Regulation.

#### V. COMPETITIVE ASSESSMENT

##### Product Market Definition

9. The parties, in line with the Commission's practice in previous cases in this sector<sup>4</sup>, propose to address the beverage market definition by reference to the supply of concentrate and downstream bottling and distribution together.
10. The parties submit that the product markets for non alcoholic beverages (NABs) comprise carbonated soft drinks (CSD) and non carbonated soft drinks (NCSD).

##### *Carbonated soft drinks*

11. Previous Commission decisions<sup>5</sup> have consistently distinguished separate markets for carbonated soft drinks (CSDs) and other non-alcoholic drinks on grounds of both demand and supply side factors. Furthermore, the Commission has distinguished a possible narrower market segmentation for cola-flavoured CSDs.<sup>6</sup>
12. However it is not necessary to reach a definitive market definition on possible further segmentation for CSD in this case, since irrespectively of the market definition adopted, the transaction cannot be regarded as significantly impeding effective competition.

##### *Non-Carbonated soft drinks*

13. The parties acknowledge that based on demand side considerations non carbonated soft drinks can be segmented into juice, mineral water, energy and sport drinks and ready to drink teas (RTD Teas).

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<sup>3</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

<sup>4</sup> See for example, M.2276 *The Coca-Cola Company/Nestle/JV* and M.1065 *Nestle/San Pellegrino*.

<sup>5</sup> M.833 *The Coca-Cola Company/Carlsberg A/S* and A.39.116/B2 – *Coca-Cola*.

<sup>6</sup> Case IV/M.794 *Coca-Cola/Amalgamated Beverages GB*, Case IV/M.1065 *Nestle/San Pellegrino*, Case COMP/M.2504 – *Cadbury Schweppes/Pernod Ricard*.

14. In previous decisions, the Commission has further considered separate product markets according to the distribution channel of NABS distinguishing between the retail market and the on-premises consumption market.<sup>7</sup>
15. In the present case, however the exact definition on non carbonated soft drinks can be left open since under any reasonable market delineation the proposed transaction does not raise any competitive concerns.

#### *Savoury snacks*

16. The parties consider that the relevant product market for snacks should comprise at least savoury snacks, with the potential for a broader market encompassing macro snacks such as sweet biscuits, confectionary and chocolate.
17. In its previous decisions<sup>8</sup>, the Commission based on demand side-considerations such as the salt and nutritional content of product types and different consumption habits by different types of consumers, has considered that savoury snack products are likely to constitute a separate product market from other snack foods.
18. In a previous decision<sup>9</sup>, the Commission has further considered that for the Nordic countries, snacks and salted biscuits constitute different product markets on the basis that snacks and salted biscuits are not consumed in the same way and at the same occasions and are not sold on the same shelves in the retail shops.
19. In the present case it is not necessary to take a position in this respect since the transaction will not give rise to any significant impediment to effective competition under any plausible relevant snack market definition.

### **Geographic Market Definition**

#### *CSD and non carbonated soft drinks*

20. The parties consider that given the existence of differentiated consumer preferences between countries, the importance of national brands, significance of marketing and advertising expenses, and the significance of transport costs in relative terms to the final value of the product, and since pricing is not a constraining factor across countries, the geographic scope of the supply of beverages is national in scope. The view of the parties is in line with previous Commission practice.<sup>10</sup>
21. In any event, the precise definition of the geographic markets for CSD and non carbonated soft drinks can be left open because the proposed transaction would not give rise to an affected market under any plausible relevant market definition.

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<sup>7</sup> See for example M.2504 *Cadbury Schweppes/Pernod Ricard*, Case IV/M.794 *Coca-Cola/Amalgamated Beverages GB*, Case IV/M.190 *Nestle/ Perrier*.

<sup>8</sup> See for example M.232 *PepsiCo/General Mills* and M.2275 *PepsiCo/Quaker*.

<sup>9</sup> M.3658 *Orkla/Chips*.

<sup>10</sup> M.2504 *Cadbury Schweppes / Pernod Ricard*.

### *Savoury snacks*

22. The parties consider that the geographic relevant market for savoury snack is national in scope. In this case, it is not necessary to reach a conclusion on the relevant geographic market since even on the narrowest basis of national market definition the transaction does not give rise to a significant impediment to effective competition.

### **Competitive Assessment**

#### *CSD production stream*

23. The supply of colas and other flavoured CSDs to retail customers consists of two interrelated activities: brand ownership and bottling. The brand owner creates and promotes the beverage brands, provides the supply of concentrate (or authorises its production), and authorises local bottlers to prepare, package, market, distribute and sell the beverage. Distribution can also be performed by third parties. In this respect PepsiCo's strategy, as a brand owner is to create consumer demand, whereas the role of PAS is to meet the demand.

#### *Horizontal overlaps*

24. The parties have horizontal overlaps in the supply of beverages in the Czech Republic, Hungary and Poland. However, the combined market share is below 15% in each of the overlapping markets and therefore the transaction does not lead to horizontal affected markets.<sup>11</sup>
25. In case of a further split of the beverage market according to distribution channel and based on the parties' own internal estimations, the parties consider that PepsiCo's or PAS's market shares would not be significantly different from the market share comprising all channels and therefore are unlikely to give rise to additional affected markets.<sup>12</sup>
26. Consequently, the transaction does not give rise to any horizontal competitive concern.

#### *Vertical relationships*

27. In view of the data provided by the parties, technically vertical affected markets arise with respect to CSDs, Colas and RTD Teas in Hungary, with respect to Colas and RTD

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<sup>11</sup> In the Czech Republic, the only area of overlap between the parties is in juices with a combined market share of [10-15]% in value (<0.1% addition) in 2008. In Hungary, the only area of overlap between the parties is also in juices with a combined market share of [0-5]% in value (negligible addition). In Poland the only area of overlap between the parties is in waters with a combined market share of [0-5]% in value (<0.1% addition) in 2008.

<sup>12</sup> E.g., in Poland according data provided by the parties base on third party data from Nielsen for 2008, PepsiCo's market share in modern trade (broadly retail hyper and supermarkets) for CSD by volume was [10-15]% and [15-20]% in traditional trade (which includes other stores and small format stores such as corner shops). This is broadly similar to the Euromonitor data which considers that PepsiCo's all channel CSD market share in Poland by volume was [15-20]% in 2008. As to modern trade and traditional trade channels for Colas in Poland, PepsiCo's market share in 2008 by volume was respectively [15-20]% and [20-30]%. This is broadly in line with PepsiCo's all channel Colas market share in Poland which was [20-25]% in value in 2008.

Teas in Poland and with respect to CSDs, Colas, RTD Teas and Sports Drinks in Romania.<sup>13</sup>

28. The transaction could not lead to foreclosure of third party beverage manufacturers or distributors since PAS is already the exclusive distributor of PepsiCo beverages in each of the identified affected markets of Hungary, Poland and Romania, and, accordingly, there will be no change to the supply of the products as a result of the transaction and consequently no effect on third party bottlers/distributors. It should be noted in respect to the supply of concentrate to bottlers, as shown by the PAS agreement with PepsiCo, that exclusive manufacture and distribution agreements are prevalent in the CSD business.
29. As to PAS distribution of PriGat juice in Romania and certain Schweppes owned/licensed brands in Poland, the Czech Republic, the Slovak Republic and Hungary, the parties consider that the transaction would not lead to a change in the current relation with PAS since both PriGat and Schweppes products will continue to be distributed by PepsiCo/PAS post-merger [...], which means any form of post-merger discrimination is not possible. In the event that either Gat Foods or Schweppes wanted to terminate the PAS arrangements, they would not be foreclosed from any relevant market given the large number of alternative bottling solutions available from both large companies and local bottlers and distributors<sup>14</sup>. The view that after the transaction PepsiCo would not have the ability to foreclose manufacturers and distributors of third party brand beverages currently distributed by PAS has been further supported by the market investigation.

#### *Portfolio/Bundling concerns*

30. The notified transaction would allow PepsiCo to combine sales efforts for its beverage products and its savoury snacks into one coordinated approach to market its product portfolio in the countries where it operates. However, the ability of pursuing a joint offering of snacks and beverage products does not equate to the ability of conducting an anti-competitive foreclosure strategy through product bundling.
31. Prior to the transaction, the parties already offer bundled promotions to end-consumers through joint promotions and the notifying party argues this is a common practice in the sector. Hence, PepsiCo's and PAS's incentives to maximise promotional sales are already to a large extent aligned before the transaction.
32. According to the parties' view, no risk of competition concerns arise from the bundling of beverages and snacks as a result of the transaction. PepsiCo will have no ability to

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<sup>13</sup> Hungary: CSD ([25-30]% in value, [25-30]% in volume) Colas ([35-40]% value, [35-40]% in volume) and RTD Teas ([20-30]% in volume, [25-30]% in value). Poland: Colas ([25-30]% in value, [20-30]% in volume) and RTD Teas ([15-20]% in volume, [20-30]% in value). Romania: CSD ([25-30]% in value, [20-30]% in volume), Colas ([35-40]% in value, [30-40]% in volume), Sport drinks ([45-50]% in value, [45-50]% in volume) and RTD Teas ([40-45]% in volume, [40-45]% in value).

<sup>14</sup> In respect to the distribution of PriGat in Romania, there are various beer distributors that currently carry juice brands or could consider adding PriGat to their existing portfolios (e.g. Carlsrom, a subsidiary of Gat Foods or Romaqua). In respect of Schweppes, it could switch to a number of alternative bottling options. Schweppes could switch its distribution to Coca-Cola (as it is doing in the Netherlands at the end of 2009 from Vrumona) and there are a number of regional competitors such as Maspex covering the Czech Republic, Romania and Poland. Given the very small volumes and market shares held by Schweppes in these markets, these bottlers/distributors could easily accommodate the Schweppes brands.

bundle since it does not hold a position of dominance or significant market power in any of the markets in which it is present.

33. As to beverages, in most cases, PepsiCo's share of the market is below 15% (including all markets in the Slovak Republic, Lithuania and Estonia). Even in those beverage markets in which the transaction leads to affected markets<sup>15</sup>, PepsiCo cannot exercise any market power. This is the case since in these affected markets, PepsiCo will meet competition from Coca-Cola with a larger market share in CSD and Colas or will meet competition from Coca-Cola and other competitors in RTD Teas and sport drinks. Moreover, as to PepsiCo significant presence in sport drinks and RTD Teas in some geographic markets, these two products cannot be considered "must-have" brands<sup>16</sup> that would allow any bundle to be effective. In respect of savoury snacks, in the respective relevant markets where there is a significant presence of PepsiCo<sup>17</sup>, the existence of other significant providers such as Kraft, Lorenz/Polsnack, Balsnack, and private label brands appear to exert a competitive constraint on PepsiCo's pricing policy.
34. Moreover, customers have significant buyer power<sup>18</sup>. Further, the ability for effective bundling is limited by market characteristics in certain countries where PAS does not hold its own sales force or distribution capability and makes use of third party distributors (e.g. Lithuania, Estonia and Latvia).
35. Furthermore, the conducted market investigation has not gathered evidence of foreclosure concerns through bundling arising from the proposed transaction.
36. In view of the above mentioned considerations, the Commission has reached the conclusion that the transaction will not raise foreclosure concerns through bundling.
37. On this basis, the Commission finds that the notified concentration does not raise serious doubts as to its compatibility with the common market

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<sup>15</sup> Colas in the Czech Republic ([15-20]%), CSDs ([20-30]%) Colas ([35-40]%) and RTD Teas ([20-30]%) in Hungary; CSD ([15-20]%), Colas ([25-30]%) and RTD Teas ([20-30]%) in Poland; Colas ([15-20]%) in Latvia and CSD ([25-30]%), Colas ([35-40]%), Sport drinks ([45-50]%), RTD Teas ([45-50]%) in Romania.

<sup>16</sup> Must-have brand is a brand with strong spontaneous demand that most retailers have on their shelves.

<sup>17</sup> The transaction, according to third party data from Nielsen, leads to affected markets in value terms in Estonia ([30-35]%), Latvia ([20-25]%), Lithuania ([20-25]%), Poland ([40-45]%) and Romania ([20-25]%).

<sup>18</sup> On average, PepsiCo's products constitute less than 1% of the turnover of any of its major customers.



## **VI. CONCLUSION**

38. 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