EN

Case No COMP/M.5633 - PEPSICO/ THE PEPSICO BOTTLING GROUP

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

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

In electronic form on the EUR-Lex website under document number 32009M5633

Office for Official Publications of the European Communities
L-2985 Luxembourg

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.10.2009

SG-Greffe(2009) D/7776
C(2009) 8452

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.5633 – PEPSICO/ THE PEPSI BOTTLING GROUP
Notification of 21.9.2009 pursuant to Article 4 of Council Regulation No 139/2004[1]

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 sole control of the whole of the undertaking The Pepsi Bottling Group Inc. ("PBG", USA) by way of purchase of shares. PepsiCo and PBG are together referred to as "the parties".

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[2], 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).

1 OJ L 24, 29.1.2004 p. 1.

2 Except in USA.

3. PBG is an international bottler of CSDs and other ready-to-drink beverages. It was founded in 1999 by PepsiCo, which spun-off its previously wholly-owned bottling activities into various separate entities. PBG conducts business in the United States, Mexico, Canada, Spain, Russia, Greece and Turkey where it is the manufacturer, seller and distributor of Pepsi-Cola beverages. PBG's EEA operations are limited to Spain and Greece where it has exclusive rights to bottle and sell PepsiCo branded beverages.

II. THE OPERATION

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

III. CONCENTRATION

5. PepsiCo already holds approximately 40% of the voting rights in PBG. However, PepsiCo does not have de facto control of PBG by virtue of it not having a stable majority of votes at PBG's last three annual general meetings. PepsiCo neither has any special or significant veto rights that would give it decisive influence in PBG nor any special rights to appoint a majority of the board or any senior management of PBG.

6. Accordingly, the proposed concentration consists in the acquisition by PepsiCo of control over PBG, therefore constituting a concentration in the sense of Article 3(1)(b) of the EC Merger Regulation.

IV. COMMUNITY DIMENSION

7. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion[3] (PepsiCo EUR 29.6 billion; PBG EUR 9.4 billion). The individual aggregate Community turnover of at least two of the undertakings concerned is more than EUR 250 million (PepsiCo EUR […], PBG EUR […]). PepsiCo and PBG 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

8. The parties in line with the Commission's practice in previous cases in this sector[4] propose to address the beverage market definition by reference to the supply of concentrate and downstream bottling and distribution together.

9. The parties submit that the product markets for non alcoholic beverages (NABs) comprise carbonated soft drinks (CSD) and non carbonated soft drinks (NCSD).

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

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

Carbonated soft drinks

10. Previous Commission decisions[5] 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[6].

11. 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

12. 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 ("RTD") teas.

13. 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[7].

14. 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

15. 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.

16. In its previous decisions[8], 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.

17. In a previous decision[9], 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.

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

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

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

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

9 M.3658 *Orkla/Chips.*

18. 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

19. 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[10].

20. 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.

Savoury snacks

21. 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

22. 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 beverages. In this respect PepsiCo's strategy, as a brand owner is to create consumer demand, whereas the role of PBG is to meet the demand.

Horizontal overlaps

23. The only overlap of the parties is in the supply of beverages in Greece. PepsiCo supplies in Greece (via PBG) the following brands: Pepsi-Cola, 7Up (both CSDs), Lipton (RTD teas) and Gatorade (Sport drink) and PBG owns and manufactures the Ivi brand which is provided in the form of CSD, juice and water.

24. On this basis, there is only a small horizontal overlap between the parties in the supply of CSDs in Greece. However, this horizontal overlap is not significant as in 2008 the parties' combined market share in CSDs was [5-10]% in value ([5-10]% in volume) with an increase of [0-5]% in value ([0-5]% in volume). Coca-Cola is clearly the market leader for CSD in Greece with a market share of [80-90]% by value ([70-80]% by volume). Other competitors, for which the market share in value is provided in brackets,

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10 M.2504 *Cadbury Schweppes / Pernod Ricard*.

include Carlsberg ([0-5]%), EPSA ([0-5]%), Loux Maraflekas ([0-5]%) and private label ([0-5]%).

25. In case of a further segmentation of the beverage market according to distribution channels and based on the parties' own internal estimations, PepsiCo's or PBG's market shares by either retail or on-premise channel would not be significantly different from the market share comprising all channels and therefore are unlikely to give rise to additional affected markets[11].

26. Consequently, the transaction does not give rise to any horizontal competitive concern.

Vertical relationships

27. The transaction, according to figures provided by the parties, based on third party data from Euromonitor, leads technically to a single vertical affected market in the potential segment for RTD teas in Greece where in 2008 PepsiCo had a market share of [50-60]% in value ([50-60]% in volume).

28. However, the proposed transaction would not lead to foreclosure in Greece given that PBG is already PepsiCo's exclusive downstream bottler and distributor. In addition, PBG does not bottle any third party beverages in Greece. Consequently, the proposed transaction has neither effect on the distribution of PepsiCo's beverages nor on third party bottlers in Greece.

Portfolio/Bundling concerns

29. In addition to the beverages markets discussed above, the proposed transaction also leads to technically affected markets in savoury snacks in Spain and Greece. The notifying parties indicate that neither PepsiCo nor PBG command any market power in any relevant beverage or savoury snack market. Based on third party data (Nielsen) provided by the parties, PepsiCo's market shares in the snack market in Spain is [20-25]% by volume ([25-35]% by value) and in Greece [25-35]% by volume ([40-45]% by value). With respect to beverages, the highest market shares in Spain are [10-15]% in Colas while in Greece the highest market share is [50-60]% in RTD teas[12] .

30. According to the parties, PepsiCo will have no ability to bundle since it does not hold either position of dominance or significant degree of market power in any of the markets in which it is present. In addition, PepsiCo will not be able to exercise foreclosure due to the presence of a strong market leader such as Coca-Cola.

31. The notifying party argues that the risk of portfolio effects resulting from the transaction would be further mitigated by the fact that customers of beverages and, to a lesser extent, of snacks show a strong countervailing buying power. Large retailers can exert

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11 E.g., in Spain according to third party data from Nielsen, PepsiCo's market share in the retail channel (hyper and supermarket) by volume for CSDs and Colas was [5-10]% and [5-10]% respectively in 2008. This figure does not significantly differ from PepsiCo's market share in all channels in CSD ([10-15]%) and Colas ([10-15]%).

12 Although the market share in RTD teas in Greece is relatively high, it should be noted that RTD teas cannot be considered a "must-have" product that would make any customer bundle effective. In addition, PepsiCo faces a strong competitor in Nestle's product Nestea with [30-40]% market share.

strong bargaining power by threatening to introduce private labels in their portfolio and given that retailers serve as one-stop shop for the products of the parties. As to small retailers, although exerting less countervailing power, they can render any foreclosure strategy ineffective given the strong competition existing between small retailers. Small retailers will have the incentive to sell the products that allow them to maximise their profits. By accepting the bundling, although obtaining higher rebates, they might risk losing profits to their competitors. In particular, smaller retailers gain a competitive advantage over rivals by stocking "what the customer needs". If they would accept a bundle, which may include lesser brands or brands that they do not want to carry and which would take up shelf space otherwise used for products which customers do want, then that retailer risks losing competitive advantage and, therefore, customers, profits and market share.

32. The results of the market investigation conducted to assess any anti-competitive effects arising as a result of the transaction from the potential bundling of snacks and beverages confirmed this view.

33. Only with regard to Greece, a market participant indicated that in case of a narrower market definition for savoury snacks which excludes nuts and olives, PepsiCo via its wholly owned subsidiary Tasty Foods AVGE (Tasty), would have a market share close to [60-70]% in the Greek market and that as a result PepsiCo would be able to bundle snacks and beverages to maintain its dominance in snacks. In particular, concern was expressed as to the limitation in the ability of competitors to access small retail outlets ("down the street" channel).

34. The Commission examined the issue and for the reasons explained below reached the conclusion that PepsiCo will have no ability to foreclose competitors by bundling.

35. The merger would not change the parties' actual ability to bundle. The ability to bundle of the merging parties is limited since PepsiCo does not have a "must-have" brand in beverages in Greece[13]. Even in RTD teas, in which PepsiCo has a [50-60]% market share in Greece, it does not have a "must-have" brand that PepsiCo could leverage on the snacks market.[14] Competition is unlikely to deteriorate as a consequence of current or potential bundling following the transaction since Coca-Cola remains to be an effective single-product player in beverages. Accordingly, any attempt to bundle post transaction would risk deteriorating PepsiCo's market presence in beverages instead of strengthening its position in snacks.

36. The ability to bundle effectively to customers in Greece is further limited by market characteristics. In the "organised trade" channel,[15] all sales to retailers are made through direct contact and negotiation with either a PepsiCo (for snacks) or PBG (for beverages) sales representative. There is no wholesale sales channel for organised trade customers. Once an order is placed, PepsiCo for snacks, and PBG for beverages, will arrange delivery of their respective products to the retailer. Although PBG and PepsiCo

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13 Must-have brand is a brand with strong spontaneous demand that most retailers have on their shelves.

14 According to third party data from Euromonitor, RTD teas represent only about [1-2]% of the total soft drinks sales ([2-3]% excluding water) by volume in Greece in 2008.

15 Large retailers.

organised trade customers are the same, these products are not bought at the same time by these retailers as –critically – they are bought by different buying teams within each retailer. The described sales process will not change as a result of the proposed transaction.

37. In the "down the street" channel,[16] customers of PBG's beverages and PepsiCo's snacks are essentially different and these products are not bought simultaneously. For foreclosure to be a potential concern it must be the case that there is a large common pool of customers for the individual products concerned. It should be noted that in Greece, PBG's beverages and Tasty, PepsiCo's snacks brand, use completely separate distribution channels. The point of sale to retailers of PepsiCo snacks in Greece is directly through a Frito representative[17] and not a third party (wholesalers or otherwise), save in very limited circumstances[18]. In beverages on the contrary, PBG uses a mixture of traditional wholesalers and authorised independent distributors to sell and deliver beverages for 80% of its sales. These third parties - of which there are approximately 500, control both the point of sale and delivery for beverages to retailers[19].

38. Finally, effective bundling of beverages and snacks appears to be also limited since both products do not tend to be bought simultaneously as their sales cycles are different. While 70% of beverage sales in Greece are made in the same three to four months of the year over summer, snack sales are spread out much more throughout the year. As an illustration of the lack of bundling ability in the snacks and the beverages markets, the parties indicate that – even with its large market share in beverages – Coca-Cola has not pursued strategies to bundle beverages with Tsakiris snacks.

39. In addition, the transaction does not change the incentives for joint promotions of beverages and snacks which have already been conducted by PepsiCo and PBG. Given Greek customer preferences these appear to have had a limited impact in the past.[20]

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16 Includes hotels, restaurants, kiosks and traditional stores.

17 Frito is a division of PepsiCo which manufactures, markets and sells a variety of corn chips, potato chips and other snack foods. Once the sale is made by a Frito representative the products are delivered by a "core distributor" which acts solely as a logistic supplier although it could act also as wholesaler for other product manufacturers.

18 The limited circumstances representing about 5% of the total sales according to the parties in which customers can buy PepsiCo snacks from third parties are when a wholesaler approaches Frito and request goods and wholesaler sales in remote Greek Islands.

19 Of the 500 PBG beverage wholesalers and distributors, there are only 3 or 4 companies that also happen to be a PepsiCo "core distributor" of snacks in Greece, however their role as distributors is limited to logistics.

20 Promotions in Greece are run once year, with the promotion being "Buy 2 Lays and get 1 Pepsi free" in certain retailers, although […], this promotion was not repeated in 2009. These bundles were in respect of the larger retail channel. PepsiCo has also attempted promotional bundles in the small retail outlets channel – in particular in 2004. However, following the information gathered through the Commission's market investigation, these promotions were unsuccessful and have not been repeated. […]

40. In view of the abovementioned considerations, and as further supported by the evidence gathered in the investigation, the Commission concludes that the transaction will not raise foreclosure concerns through bundling.

41. On this basis, the Commission finds that the notified concentration does not raise serious doubts as to its compatibility with the common market

VI. CONCLUSION

42. 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