



EUROPEAN COMMISSION
DG Competition

***Case M.10435 - REFRESCO GROUP /
HANSA-HEEMANN***

Only the English text is available and authentic.

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

Article 4(4)
Date: 28/10/2021



EUROPEAN COMMISSION

Brussels, 28.10.2021
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PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Refresco Holding B.V.
Fascinatio Boulevard 270, Brainpark
III, The Mark
3065 WB Rotterdam
The Netherlands

Bundeskartellamt
Kaiser-Friedrich-Straße 16
53113 Bonn
Germany

**Subject: Case M.10435 – REFRESCO GROUP / HANSA-HEEMANN
Commission decision following a reasoned submission pursuant to
Article 4(4) of Regulation No 139/2004¹ for referral of the case to Germany
and Article 57 of the Agreement on the European Economic Area².**

Date of filing: 29.9.2021

Legal deadline for response of Member States: 20.10.2021

Legal deadline for the Commission decision under Article 4(4): 5.11.2021

¹ OJ L 24, 29.1.2004, p. 1 (the ‘Merger Regulation’). With effect from 1 December 2009, the Treaty on the Functioning of the European Union (‘TFEU’) has introduced certain changes, such as the replacement of ‘Community’ by ‘Union’ and ‘common market’ by ‘internal market’. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p. 3 (the ‘EEA Agreement’).

Dear Sir or Madam,

1. INTRODUCTION

- (1) On 29 September 2021, the Commission received by means of a Reasoned Submission a referral request pursuant Article 4(4) of the Merger Regulation with respect to the acquisition of Hansa-Heemann AG and its subsidiaries ('Hansa-Heemann' or the 'Target', from Germany) by Refresco Deutschland Holding GmbH, a wholly owned company of Refresco Holding B.V. ('Refresco', from Germany; hereinafter Refresco and the Target are jointly referred to as the 'Parties'). The Parties request the operation to be examined in part by the competent authorities of Germany.
- (2) According to Article 4(4) of the Merger Regulation, before a formal notification has been made to the Commission, the parties to a transaction may request that their transaction be referred in whole or in part from the Commission to a Member State, if the concentration may affect competition significantly in a market within that Member State, and that market presents all the characteristics of a distinct market within that Member State.
- (3) A copy of this Reasoned Submission was transmitted to all Member States on 30 September 2021.
- (4) By letter of 20 October 2021, the German Competition Authority as the competent authority of Germany informed the Commission that Germany agrees with the requested partial referral.

2. THE PARTIES

- (5) Refresco is a Dutch producer and supplier of non-alcoholic beverages globally. To a lesser extent, it also produces and supplies beers, ciders and some other carbonated alcoholic mix drinks (e.g. gin and tonic).
- (6) Hansa-Heemann is a German company active in the production and supply of non-alcoholic beverages, almost exclusively in Germany.

3. THE CONCENTRATION

- (7) The proposed transaction involves the acquisition of sole control over Hansa-Heemann by Refresco (the 'Proposed Transaction'). According to the information provided by the Parties, the Proposed Transaction will be implemented by means of purchase of shares. On 7 July 2021, Refresco, on the one side, and the Target's current owners, on the other side, executed a share sale and transfer agreement pursuant to which Refresco will purchase all of the shares in the Target. Thereby, following the Proposed Transaction, Refresco will solely control Hansa-Heemann.
- (8) The Proposed Transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

4. EU DIMENSION

- (9) The Proposed Transaction has a Union dimension within the meaning of Article 1(2) of the Merger Regulation. First, the combined worldwide turnover of Refresco and the Target in the last completed financial year exceeded EUR 5 billion (Refresco:

EUR [...],³ Hansa-Heemann: EUR [...]). Second, each of Refresco and the Target had a Union-wide turnover of more than EUR 250 million (Refresco: EUR [...], Hansa-Heemann: EUR [...]). While the Target achieves more than two-third of its Union-wide turnover in Germany, Refresco does not achieve more than two-thirds of its respective Union-wide turnover in the same Member State.

- (10) The Proposed Transaction therefore has a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

5. ASSESSMENT

- (11) Based on the information submitted in the Reasoned Submission, the activities of Refresco and Hansa-Heemann overlap in the production and supply of non-alcoholic beverages ('NABs') in the EEA.

- (12) Refresco produces and supplies NABs (for its own brands, private label brands and third party brand owners) at global level. In the EEA, Refresco has production facilities in the Netherlands, Belgium, Finland, France, Germany, Italy, Poland and Spain. In Germany, Refresco produces and supplies carbonated soft drinks ('CSDs'), including carbonated sports & energy drinks; and non-carbonated soft drinks ('NCSDs'), namely fruit juices, nectars, ready-to-drink ('RTD') teas, still drinks, non-carbonated sports & energy drinks and mineral water (for private label brands and third party brand owners).

- (13) Hansa-Heemann produces and supplies CSDs (for its own brands, private label brands and third party brand owners), including carbonated sports & energy drinks, as well as NCSDs packaged mineral water and, to a lesser extent, other types of NCSDs (still drinks, non-carbonated sports & energy drinks and RTD teas). Hansa-Heemann has five production sites all of which are located in Germany, where it operates mainly. Hansa-Heemann has limited exports to the Netherlands, Belgium, Denmark, France, Poland and Switzerland.

5.1. Relevant product markets

- (14) In past decisions regarding the production and supply of beverages,⁴ the Commission has distinguished between alcoholic beverages ('ABs') and NABs.

- (15) As to NABs, the Commission has previously considered that the production and bottling of CSDs and NCSDs constitute two separate product markets.⁵ The Commission also found that NCSDs could be segmented further into different types of beverages, such as packaged water, fruit juices, RTD teas, still drinks with fruit or non-fruit flavour, and others. With regard to water and RTD teas, the Commission has defined separate markets in the past.⁶ With regard to the other possible segments

³ Refresco's turnover figure includes the revenues of PAI Partners S.A.S. and British Columbia Investment Management Corporation, as the controlling shareholders of Refresco.

⁴ M.2268 – Pernod Ricard/Diageo/Seagram Spirits, paragraph 17, M.2276 – The Coca-Cola Company/Nestlé/JV, paragraphs 17 to 21, M.2504 – Cadbury Schweppes/Pernod Ricard, paragraphs 7 and 8, M.3182 – Scottish & Newcastle/HP Bulmer, paragraphs 8 to 14, M.5114 – Pernod Ricard/V&S, paragraph 8, M.7292 – Demb/Mondelez/Charger Opco, paragraphs 43 to 45, M.8150 – Danone/The Whitewave Foods Company, paragraph 50 and M.9369 – Pai Partners/Wessanen, paragraphs 116 and 117.

⁵ M.6924 – Refresco Group/Pride Foods, paras. 13-15; M.9122, TCCC / Costa, para. 19; M.8244, The Coca-Cola Company / Coca-Cola HBC Neptuno Vandenys, para. 18.

⁶ M.6924 – Refresco Group/Pride Foods, paragraph 23.

of the NCSD markets, the Commission ultimately left the exact market definition open.

- (16) In addition, with regard to NCSDs, the Commission's has previously defined separate markets for the production and bottling of private label products for retailers on the one hand and contract manufacturing of branded products for brand-owners on the other hand.⁷
- (17) Moreover, the Commission has identified a separate product market for the wholesale distribution of beverages including ABs and NABs, which is downstream from production.⁸ Furthermore, the Commission has considered, but ultimately left open, a further segmentation based on the distribution channel. In particular, the Commission considered a potential segmentation of the market for the wholesale distribution of beverages depending on whether beverages are sold to retail outlets ('off trade' channel) or to points of sale for direct consumption, e.g. restaurants or hotels ('on trade' channel).
- (18) As to the type and size of packaging, the Commission has in the past distinguished between types of packaging, i.e., carton vs. PET⁹. In addition, the Commission has considered that the market should not be further segmented according to the size of packaging, because the majority of the production plants are able to produce packages of different sizes on the same production line¹⁰.

5.2. Relevant geographic market

- (19) In past cases, the Commission has concluded that the relevant geographic markets for the production and bottling of NABs (including CSDs and NCSDs) are national in scope. Moreover, the Commission has considered the markets for the wholesale distribution of beverages to also be national in scope¹¹.

5.3. Assessment of the referral request

5.3.1. Legal requirements

- (20) According to the Commission Notice on Case Referral in respect of concentrations (the 'Commission Notice on Case Referrals')¹², in order for a referral to be made by the Commission to one or more Member States pursuant to Article 4(4) of the Merger Regulation, the following two legal requirements must be fulfilled:
- (a) there must be indications that a concentration may significantly affect competition in a market or markets,¹³ and
 - (b) the market(s) in question must be within a Member State and present all the characteristics of a distinct market.¹⁴

⁷ M.6924 – Refresco Group/Pride Foods, paras 41-45.

⁸ M.5560 – Carlsberg Deutschland/Nordmann/JV Nordic Getränke, para. 10.

⁹ M.6924 – Refresco Group/Pride Foods, paras 24-27.

¹⁰ M.6924 – Refresco Group/Pride Foods, para 29.

¹¹ M.2276 – The Coca-Cola Company/Nestlé/JV, paragraph 23, M.3182 – Scottish & Newcastle/Hp Bulmer, paragraphs 15 to 16, M.5114 – Pernod Ricard/V&S, paragraph 43, M.7292 – Demb/Mondelez/Charger Opco, paragraph 157, M.8150 – Danone/The Whitewave Foods Company paragraph 51 and M.9369 - Pai Partners / Wessanen, paragraphs 116 and 117.

¹² OJ L 24, 29.1.2004, p. 1.

¹³ Further developed in paragraph 17 of the Commission Notice on Case Referrals.

- (21) Moreover, paragraph 20 of the Commission Notice on Case Referrals provides that concentrations with a Union dimension which are likely to affect competition in markets that have a national or narrower than national scope, and the effects of which are likely to be confined to, or have their main economic impact in, a single Member State, are the most appropriate candidate cases for referral to that Member State. This applies in particular to cases where the impact would occur on a distinct market, which does not constitute a substantial part of the common market.
- (22) Taking into account all the plausible combinations of product and geographic market definitions outlined in Sections 5.1 and 5.2 above, the Proposed Transaction would lead to several affected markets in Germany, namely the markets for the production and bottling of (i) packaged water and (ii) RTD teas sold in the off-trade sales channel. The markets in question present all the characteristics of distinct markets. For these markets, the Parties' combined share is above 20%:
- (a) the production and bottling of packaged water, all packaging, private label drinks, sold in the off-trade channel in Germany ([20-30]%)
 - (b) the production and bottling of packaged water, PET only, private label drinks, sold in the off-trade channel in Germany ([20-30]%)
 - (c) the production and bottling of RTD teas, all packaging, private label and branded drinks, sold in the off-trade channel in Germany ([20-30]%)
 - (d) the production and bottling of RTD teas, PET only, private label and branded drinks, sold in the off-trade channel in Germany ([20-30]%)
 - (e) the production and bottling of RTD teas, all packaging, private label drinks, sold in the off-trade channel in Germany ([20-30]%) and
 - (f) the production and bottling of RTD teas, PET only, private label drinks, sold in the off-trade channel in Germany ([20-30]%).
- (23) With regard to the second requirement, the Commission considers that the relevant markets are national in scope. Furthermore, the markets in question present all the characteristics of distinct markets with conditions of competition that are clearly distinguishable from those in other markets, in particular in other EEA Member States.
- (24) Therefore, the Proposed Transaction meets the legal requirements set out in Article 4(4) of the Merger Regulation. The Proposed Transaction is a concentration within the meaning of Article 3 of the Merger Regulation, it has a Union dimension and it may significantly affect competition in distinct markets in Germany.

¹⁴ Further developed in paragraph 18 of the Commission Notice on Case Referrals.

5.3.2. *Additional factors*

- (25) In addition to the verification of the legal requirements, paragraph 19 of the Commission Notice on Case Referrals provides that it should also be considered whether the competition authority or authorities to which the case would be addressed is the most appropriate authority for dealing with the case. To this end, consideration should be given both to the likely locus of the competitive effects of the transaction and to how appropriate the national competition authority would be for scrutinising the operation.
- (26) In addition, paragraph 23 of the Commission Notice on Case Referrals states that consideration should also, to the extent possible, be given to whether the national competition authorities to which referral of the case is contemplated may possess specific expertise concerning local markets, or be examining, or about to examine, another transaction in the sector concerned.
- (27) First, with regard to the locus of the competitive effects, the Proposed Transaction would give rise to, among others, several potentially affected markets that are not wider than national in scope and that are located in Germany.
- (28) Second, the German Competition Authority has considerable experience in assessing competition in the beverages sector¹⁵ and the food sector in its own territory¹⁶ and, as a result, has substantial experience and expertise in examining the markets in question. Therefore, the German Competition Authority is well equipped to assess the impact of the Proposed Transaction on competition in Germany in the markets in question.

5.3.3. *Conclusion on referral*

- (29) In light of paragraphs (20) to (28) above, and on the basis of the information provided by the Parties in the Reasoned Submission, the case meets the legal requirements set out in Article 4(4) of the Merger Regulation in that the concentration may significantly affect competition in a market(s) within a Member State which presents all the characteristics of a distinct market.
- (30) Moreover, the requested partial referral would be consistent with paragraphs 19 and 23 of the Commission Notice on Case Referrals, in particular because the German Competition Authority appears to be the most appropriate authority to assess the impact of the Proposed Transaction on the affected markets in Germany.

6. CONCLUSION

- (31) For the above reasons and given that Germany has expressed its agreement with respect to the partial referral of the Proposed Transaction within 15 working days of receiving the submission, the Commission has decided to refer the Proposed Transaction in part to Germany, to be examined by its competent authorities in so far as the Proposed Transaction concerns Germany.

¹⁵ FCO annual report for 2001-2002, page 127 (Karlsberg/Überkingen-Teinach); annual report for 2003-2004, page 87 (Hansa-Brunnen/Ernst Heemann Mineralbrunnen); annual report for 2005-2006, page 71 (The Coca Cola Company; Krombacher Brauerei).

¹⁶ FCO decision of March 17, 2021, B2-85/20 – Edeka/Real and FCO decision of 28 October 2010, B2-52/10 – Edeka/Trinkgut.

- (32) The Commission will retain jurisdiction over the merger control assessment of the Proposed Transaction in relation to the Netherlands, Belgium, Denmark, France and Poland.

For the Commission

(Signed)
Olivier GUERSENT
Director-General