SUMMARY OF COMMISSION DECISION
of 17 December 2008
declarating a concentration compatible with the common market and the functioning of the EEA
Agreement
(Case COMP/M.5046 — Friesland Foods/Campina)
(notified under document number C(2008) 8459)
(Only the English version is authentic)
(Text with EEA relevance)
(2009/C 75/06)

On 17 December 2008 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address:
http://ec.europa.eu/comm/competition/index_en.html

I. THE PARTIES

(1) Friesland Foods counts 9,417 members (2007) and sells dairy products for consumers in Europe, the Middle East, Asia and Africa and ingredients for professional and industrial customers worldwide.

(2) Campina is a dairy cooperative with 6,885 farmers as members (2007), with activities in fresh dairy products, cheese, butter, fresh and long life flavoured drinks, and emulsions in various countries in Europe, North and South America and Asia.

II. THE OPERATION

(3) On 12 June 2008, the Commission received a formal notification pursuant to Article 4 of the Merger Regulation by which the cooperatives Zuivelcoöperatie Campina U.A. (hereinafter ‘Campina’) and Zuivelcoöperatie Friesland Foods U.A. (hereinafter ‘Friesland Foods’) merge by way of full legal merger. Campina and Friesland Foods are hereinafter collectively referred to as the ‘notifying parties’.

(4) After examination of the notification, the Commission adopted on 17 July 2008 a decision where it concluded that the operation falls within the scope of the EC Merger Regulation and raises serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement and initiated proceedings pursuant to Article 6(1)(c) of the EC Merger Regulation. Friesland Foods and Campina replied to the Statement of Objections on 17 October 2008. On 21 October 2008, at the request of the notifying parties, an Oral Hearing took place.

(5) On 3 October 2008, a Statement of Objections was sent to the notifying parties pursuant to Article 18 of the

EC Merger Regulation. Friesland Foods and Campina offered commitments with a view to rendering the proposed concentration compatible with the common market. These commitments were modified and the final version of the commitments was submitted to the Commission on 27 November 2008.

IV. EXPLANATORY MEMORANDUM

(7) The dairy sector comprises a series of interrelated product markets, reflecting the wide variety of milk-based end products. The typical business model for dairy companies, notably dairy co-operatives, is to valorise the raw milk collected from farmers into a wide variety of dairy products. The common raw material, raw milk, means that prices of dairy products follow similar trends.

(8) Raw milk consists of several nutritional components: fat, proteins, lactose (= milk sugar) and minerals. For some dairy products only the non-fat components (notably proteins and lactose) are used. Other products, notably butter and cream, are based on the fat from the milk. Many key products such as cheese and milk contain a mix of fat and non-fat components. Some products — in particular cream, buttermilk and whey — are in essence by-products resulting from the production of the primary dairy products such as drinking milk and cheese.
A. THE RELEVANT MARKETS

1. Procurement of raw milk

(9) With respect to the relevant product market, the market investigation confirmed that on the demand side organic raw milk and conventional raw milk are not substitutable for milk processors. On the supply side, organic dairy farmers do not have incentives to switch to produce conventional raw milk, in view of the price premium they obtain and the investments they have made to produce organic raw milk. Switching to organic raw milk is possible for a conventional dairy farmer but it requires significant investments in grasslands (more extensive use) and on average a 2-year transition period. Therefore, it has been concluded that procurement of conventional and procurement of organic raw milk constitute separate product markets.

(10) In relation to the relevant geographic market (for both conventional and organic milk), it has been found that the parties’ activities overlap only in the Netherlands. The volumes transported annually by Campina from Germany and Belgium to the Netherlands are negligible in comparison with the total volume of raw milk purchased by the notifying parties in the Netherlands (more than 8 000 million kg per year). It has therefore been considered that the merger has no significant impact on the procurement market outside the territory of the Netherlands and the assessment has been focused on the Netherlands.

2. Basic dairy products

(11) In relation to the relevant product market, it has been concluded that a distinction between fresh and long-life basic dairy is necessary. Within each category, a further distinction between organic and non-organic products can be made.

(12) Within non-organic and organic fresh basic dairy products, because of a lack of substitution by customers and the lack of supply-side substitutability, fresh milk, fresh buttermilk, plain yoghurt and custard are separate relevant product markets. Custard will be discussed in the fresh dairy desserts section. In fresh milk, fresh buttermilk, plain yoghurt, private label and branded products belong to the same product market upstream. A possible distinction, with regard to the distribution channel, into retail/OOH (Out of Home), is left open for non-organic fresh basic dairy, while in organic fresh basic dairy OOH and retail belong to the same market.

(13) In relation to the relevant geographic market, it has been concluded that such market is national for the upstream market of (organic and non-organic) fresh milk, fresh buttermilk and plain yoghurt.

(14) Since in long-life basic dairy products the only overlap arises in long-life milk and neither demand nor supply-side substitutability prevail, the relevant product market is long-life milk with no distinction between private label and branded products. A possible distinction with regard to the distribution channel into retail/OOH is left open. The relevant geographic market is wider than national and includes Belgium, Germany and the Netherlands.

3. Dutch type cheese

(15) In relation to the relevant product market, separate product markets for the sale of Dutch type cheese to specialised cheese wholesalers and to modern types of retail (supermarkets, hypermarkets, discounter) should be delineated. Any further distinction of the sale of Dutch type cheese to specialised cheese wholesalers (Gouda/Maasdam/Edam, nature/rindless, 15 day old nature cheese/other nature cheese) and of the sale of Dutch type cheese to modern types of retail (Gouda/Maasdam/Edam, nature/rindless) is left open as it would not have a material impact on the competitive assessment.

(16) With respect to the relevant geographic market, the markets for the sale of Dutch type cheese to specialised cheese wholesalers and modern types of retail (including all narrower segmentations except for rindless) are national in scope while the markets for the sale of rindless Dutch type cheese (including all narrower segmentations) to specialised cheese wholesalers and modern types of retail are wider than national and include at least the Netherlands and Germany.

4. Butter

(17) It has been found that the relevant product market for butter should, in the first place, be divided into separate markets for bulk butter and packet butter. Dairy bulk butter belongs to a separate market than bulk vegetable fats. In addition, it can be divided in basic butter (82 % fat content), non-fractionated butter oil (or, simply, butter oil, with a 99.8 % fat content) and fractionated butter oil (or, simply, fractionated butter, sorted according to its melting point). With respect to packet butter, dairy butter and vegetable fats belong to separate markets and the market for dairy packet butter must be further separated into packet butter sold to retailers and packet butter sold to OOH customers. It has been left open whether branded and private label packet butter belong to the same market, as the distinction would not have an impact on the competitive assessment.
(18) As to the relevant geographic market, the markets for bulk butter, fractionated butter oil and non-fractionated butter oil are EEA-wide. The relevant geographic market for packet butter includes at least the Netherlands, Belgium and Germany. The question whether the relevant geographic market for packet butter is EEA-wide can be left open as this conclusion is not such to have a determinant effect on the competitive assessment.

5. Value added yoghurts and quarks

(19) With respect to the relevant product market, there are separate markets for value added yoghurt and quark according to the distribution channel. A separation into value added yoghurt on the one hand and quark on the other, a separation into health/indulgence as well as into private label and branded products can be left open as it would not affect the competitive assessment. As Friesland Foods is not active in the health segment, health value added yoghurt and quark have not been further discussed.

(20) With respect to the relevant geographic market, such market is national for the upstream market of value added yoghurt and quark to OOH wholesalers and wider than national for the upstream market of value added yoghurt and quark to retailers.

6. Flavoured dairy drinks

(21) In this market a preliminary distinction was drawn between fresh flavoured dairy drinks and long-life flavoured dairy drinks.

(22) With respect to the relevant product market, there are separate relevant product markets for health related fresh flavoured dairy drinks and non-health related fresh flavoured dairy drinks, which can be further separated into the supply of branded and private label products and according to the distribution channel (retail/OOH). As the proposed merger would not lead to an impediment of effective competition in the market for health related fresh flavoured dairy drinks and the private label market would not be affected, the competitive assessment focuses on the branded non-health related market for fresh flavoured dairy drinks.

(23) With respect to long-life flavoured dairy drinks, chocolate-flavoured dairy drinks and fruit-flavoured dairy drinks were found to belong to distinct product markets. There is no need to conclude whether sourcing of branded and private label long-life dairy drinks belong to different product markets. A distinction according to the distribution channel between retail and OOH can also be left open.

(24) With respect to the relevant geographic market, such market is national for the upstream market of non-health related fresh flavoured dairy drinks. For long-life flavoured dairy drinks, it was found that on a market including private label and branded products, the geographic scope is wider than national and includes the Netherlands, Belgium and Germany. If the product market at upstream level is limited to branded products, given that brands differ to a large extent between countries, these markets have a national scope.

7. Fresh dairy desserts

(25) With respect to the relevant product market, separate relevant product markets exist for fresh custard, porridge and portion pack desserts. For custard a separation into private label/branded products is not necessary. Whether the market has to be further separated according to the distribution channel between retail and OOH can also be left open as it would not affect the competitive assessment.

(26) In relation to the relevant geographic market, such market is national for the markets of custard and porridge.

8. Cream

(27) It was found that the relevant product market for cream should, in the first place, be divided into separate markets for liquid cream and spray cream. In relation to liquid cream, a distinction exists between dairy and non-dairy liquid cream and, within each segment, between liquid cream sold through the retail, the OOH and the industrial sales channel. The market for dairy liquid cream includes both low fat and high fat liquid cream. Within the market for dairy liquid cream, the distinction between fresh cream and long-life cream has been left open, as it would not have an impact on the competitive assessment. Similarly, the question as to the difference between branded and private label liquid cream has been left open as it would not have an impact on the final conclusion of the effects of the transaction. Finally, as the parties’ activities do not overlap in the market for non-dairy liquid cream, the assessment focused on dairy liquid cream.
With respect to spray cream, two relevant product markets exist: dairy spray cream sold to retail and dairy spray cream sold to OOH customers. The retail spray market includes both branded and private label products, while the questions as to the distinction between branded and private labels can be left open for the OOH market, as it would not have an impact on the competitive assessment.

The relevant geographic market for dairy liquid cream sold to OOH, to retail and to industrial customers and for spray cream sold to retail and OOH customers exceed the national boundaries and include at least the Netherlands, Belgium and Germany.

9. Liquid coffee whiteners

With respect to the relevant product market, there are separate relevant product markets for coffee milk and coffee cream. No separation into private label/branded products is necessary for these products. A distinction with regard to the distribution channel into retail/OOH should also be made.

With respect to the relevant geographic market, the relevant geographic markets for coffee milk and coffee cream are wider than national and include the Netherlands, Belgium and Germany.

10. Spray-dried emulsions (SDEs)

With respect to the relevant product market, liquid emulsions and SDEs are separate product markets. In addition, different categories of SDEs, such as creamers, foamers and toppings belong to separate product markets. As Campina is not active in fat concentrates and encapsulated nutritional oils and Friesland Foods is not present in the batter stabilisers segment, the precise product market definition for these three products is not addressed.

With respect to the relevant geographic market, the markets for creamers, foamers, toppings and batter stabilisers are EEA-wide in scope.

11. Lactose

With respect to the relevant product market, food grade lactose and pharmaceutical grade lactose form two distinct relevant product markets. In relation to pharmaceutical lactose, excipients such as starch, Mannitol, MCC are not effective sources of alternative supply for the customers and can hence not be a competitive constraint. Furthermore, as the transaction would not lead to competition concerns on the market for pharmaceutical lactose nor on the narrower possible markets for direct compression pharmaceutical grade lactose and wet granulation pharmaceutical lactose, should these be defined, the distinction is left open. Ultimately, a separate relevant product market should be defined for DPI lactose. Within DPI lactose a separate relevant market should be defined for sophisticated DPI lactose and less sophisticated DPI lactose.

With respect to the relevant geographic market, in food grade lactose, it is not necessary to conclude since no competition concerns arise irrespective of relevant geographic market definition. In pharmaceutical and DPI lactose, the geographic market definition was left open. Indeed, on the worldwide market both for pharmaceutical grade lactose and DPI pharmaceutical lactose, the position of the combined entity would be virtually the same as on an EEA-wide market. The transaction would not significantly impede effective competition on the worldwide markets and EEA-wide markets for pharmaceutical and DPI lactose, irrespectively of the exact definition of the geographic scope of the markets.

B. COMPETITIVE ASSESSMENT

1. Introduction

A thorough investigation as to the structure and the functioning of the dairy markets concerned by the proposed merger was carried out. As a result of such investigation, it was found that the merger is not likely to determine a significant impediment of effective competition in the markets for long-life milk, organic fresh basic dairy products, cheese, value added yoghurt and quark, fresh flavoured dairy drinks, long-life dairy drinks (‘LLDDs’) and fresh custard and porridge.

The proposed merger would lead to a significant impediment of effective competition in the markets for procurement of raw milk, fresh basic dairy products, cheese, value added yoghurt and quark, fresh flavoured dairy drinks, long-life dairy drinks (‘LLDDs’) and fresh custard and porridge.
2. Procurement of raw milk

With respect to the procurement of raw milk, the merger would bring together the two main purchasers of raw milk in the Netherlands which would control roughly [70-80 %] of the market.

The competitive concern is not that the merged entity would be able to exert market power in the upstream market and lower prices of milk paid to farmers. Rather, the market power that the new operator would have on downstream markets would enable it to raise additional profits and therefore pay higher prices to farmers. Consequently, the merged entity would be in a position to attract more farmers and maintain and/or strengthen its farmers' base. This situation would increase barriers to entry and/or to expansion on the primary downstream dairy markets where Dutch raw milk is needed to compete effectively.

3. Fresh dairy products

The notion of fresh dairy products includes fresh basic dairies (fresh milk, fresh buttermilk and plain yoghurt), value added yoghurt and quark, fresh flavoured dairy drinks, fresh custard and porridge.

The proposed transaction would significantly impede effective competition as a result of the creation of a dominant position on the market for fresh milk, fresh buttermilk, plain yoghurt in the Netherlands, a substantial part of the Common Market regardless of whether this market should be further segmented according to the distribution channel. The conclusion was based, inter alia, on the parties' high combined market share, on the fact that they were regarded as the closest competitors, on the difficulty for customers to switch to alternative suppliers and on the difficulty for customers to expand production in case of a price increase.

For the same reasons set out above, the notified concentration would significantly impede effective competition as a result of the creation of a dominant position on the market for value added yoghurt and quark in the Netherlands supplied to the OOH segment and on the market for branded non-health fresh flavoured dairy drinks in the Netherlands, separated according to the distribution channel in retail and OOH.

In the markets for fresh desserts, the notified concentration would be likely to significantly impede effective competition on (i) the market for fresh custard in the Netherlands; and (ii) the market for porridge in the Netherlands, which are a substantial part of the common market, regardless of whether these markets need to be further segmented according to the distribution channel. Also in this case, the conclusion was based, inter alia, on the parties' market position, on the fact that they were regarded as the closest competitors and it was thus difficult for customers to switch to alternative suppliers.

4. Dutch type cheese

The concentration would lead to a significant impediment of effective competition on the markets for the sale of Dutch type cheese to specialised cheese wholesalers (including narrower segmentations into nature, Gouda and 15 day old cheese) and to modern types of retail (including narrower segmentations into nature and Gouda cheese) in the Netherlands. Each of these markets constitutes a substantial part of the Common Market.

As regards sales to specialised cheese wholesalers, this assessment is based, inter alia, on the high market shares of the parties ([40-70 %]), the closeness of competition between the parties, the limited abilities of specialised cheese wholesalers to switch to alternative domestic or foreign suppliers, the limited prospects for entry and expansion in the near future and the fact that all countervailing factors put forward by the parties (e.g. decreased demand and increase of re-imports/sales of cheese originally destined for exports in case of price increases, alleged dependence on wholesalers' storage and maturing capacity) are insufficient to prevent the merging parties from increasing prices.

As regards sales to modern types of retail, this assessment is based, inter alia, on the high market shares of the parties ([60-70 %]), the closeness of competition between the parties, the limited degree of competition between the parties and specialised cheese wholesalers, the limited possibilities of modern types of retail to switch to alternative domestic or foreign suppliers, the limited prospects for entry and expansion in the near future and the fact that all countervailing factors put forward by the parties (e.g. buyer power, increase of re-imports/sales of cheese originally destined for exports and increased use of rindless cheese in case of price increases) are insufficient to prevent the merging parties from increasing prices.

No competition concerns were identified on the markets for the sale of Maasdam and rindless Dutch type cheese (including narrower subsegmentations) to specialised cheese wholesalers and modern types of retailers in the Netherlands.
5. LLDDs

(48) With respect to the market for LLDDs, that the notified concentration is likely to significantly impede effective competition on the market for branded long-life chocolate-flavoured dairy drinks in the Netherlands, the market for branded long-life fruit-flavoured dairy drinks in the Netherlands, the market for branded long-life chocolate-flavoured dairy drinks in Belgium, the market for branded and private label long-life chocolate-flavoured dairy drinks in the Netherlands, Belgium and Germany and the market for branded and private label long-life fruit-flavoured dairy drinks in the Netherlands, Belgium and Germany, regardless of whether these markets need to be further segmented according to the distribution channel.

(49) This conclusion rests upon the finding that, inter alia, merging firms have large market shares, are regarded as closest competitors and own strong brands. In addition, the market investigation indicated that customers are unlikely to switch and new entry to the market is unlikely to occur.

6. Commitments offered by the notifying parties

(50) In order to remove the identified competition concerns arising from the transaction, Campina and Friesland Foods have proposed commitments under Article 8(2) of the EC Merger Regulation. The first set of commitments was submitted on 28 October 2008, complemented on 5 November 2008 with a view of obtaining a clearance of the operation from the Commission. The remedy package consists of divestment businesses in fresh dairy, cheese, long-life dairy drinks and access to raw milk.

(51) Subsequently the Commission market tested the commitments. The results of the first market test showed that significant improvements were needed. As a consequence, the parties submitted on 19 November a revised commitments package, which appropriately addressed the weaknesses identified in the first remedy package concerning the fresh dairy divestment business, the cheese divestment business and the long-life dairy drinks package as such. However, the Commission still had concerns that the lack of access to raw milk would create a significant impediment of effective competition on the downstream markets for fresh basic dairy products and Dutch type cheese in the Netherlands in general and resulting in a lack of viability for the downstream divestment businesses in particular. The market testing of the second package confirmed that improvements were needed in this respect.

(52) Subsequently, on 27 November 2008 the parties submitted a final commitments package.

(53) Against the above background, the final commitment package includes:

(54) The entire fresh dairy business of Friesland Foods in the Netherlands covering the products fresh milk, fresh butter-milk, plain yoghurt, value added yoghurts and quark, fresh custard, porridge, fresh flavoured dairy drinks, fresh cream and organic fresh basic dairy products (hereinafter the ‘Fresh Divestment Business’).

(55) An exclusive, renewable 5 year license to use the Friesche Vlag brand name in the Netherlands for the current FF Fresh product portfolio, followed by a perpetual black out period.

(56) The ownership of Campina’s Melkunie brand and the ownership of all Friesche Vlag sub-brand names and all brands that are specific to the products of FF Fresh (with the exception of the Friesche Vlag brand itself) are included in the divestiture.

(57) The divestment of Campina’s Bleskensgraaf production facility and the carve out of a sales team and other employees for R&D, planning and logistics and general support from the sales organisation of the merged entity (hereinafter referred to as the Cheese Divestment Business).

(58) For long-life dairy drinks, the divestiture of Campina’s brand in the chocolate flavoured segment Choco Choco and the divestiture of the fruit-flavoured brand Yogho Yogho in the Netherlands.

(59) The divestment businesses includes, inter alia, all tangible and intangible assets (including intellectual property rights), which contribute to the current operation. Furthermore all licences, permits and authorisations issued by any governmental organisation are included as well as all contracts, leases, commitments and customer orders of the divestment businesses as well as all customers, credit and other records of the divestment businesses. The personnel is also included.

(60) Three elements aim at ensuring access to raw milk for downstream competitors, including the divestment businesses. First, there is a transitional supply agreement ensuring raw milk for both production facilities. Under this transitional supply agreement the Divestment Businesses can source raw milk from the merged entity at the ‘guaranteed price’ (which is the price that the merged entity guarantees to its farmers) minus 1 %.
Secondly, following the period covered by the transitional supply agreement, a foundation (Dutch Milk Fund, DMF) will be set up to ensure access to raw milk to a maximum volume of 1.2 billion kg of raw milk per year. This will be based on a system of drawing rights for downstream competitors. The Fresh Divestment Business and the Cheese Divestment Businesses will have preferential drawing rights as set out in the improved commitments, i.e. up to the volume representing the total production capacity of those businesses. Likewise, the price for raw milk through this arrangement will be the 'guaranteed price' minus 1 % during the first five years.

The third element aims at structural change. Exit barriers for farmers of the merged entity are reduced, in order to ensure (i) sourcing of raw milk independent of the merged entity and (ii) the ability for the downstream divestment businesses to set up a long-term structural solution for the sourcing of raw milk. It consists of an exit payment (Start Up Payment) of EUR 5/100 kg to be paid to any member exiting the merged entity until members representing a volume of 1.2 billion kg of raw milk have left FrieslandCampina.

V. CONCLUSION

For the reasons mentioned above, the decision concludes that the proposed concentration will not significantly impede effective competition in the Common Market or in a substantial part of it.

Consequently the concentration should be declared compatible with the Common Market and the functioning of the EEA Agreement, in accordance with Article 2(2) and Article 8(2) of the EC Merger Regulation and Article 57 of the EEA Agreement.