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**COMMISSION DECISION**

**of 22 June 2005**

relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA  
Agreement

**(Case COMP/A.39.116/B2 – Coca-Cola)**

(Only the English text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, in particular Article 54 and Article 56(2), second sentence, thereof,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>1</sup>, in particular Article 9(1) thereof,

Having regard to the Commission Decision of 29 September 2004 to initiate proceedings in this case,

Having expressed concerns in the preliminary assessment of 15 October 2004,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003<sup>2</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

WHEREAS:

## 1. SUBJECT MATTER

(1) This Decision is addressed to The Coca-Cola Company (hereafter: “TCCC”) and its three anchor bottlers, Bottling Holdings (Luxembourg) sarl, Coca-Cola Erfrischungsgetränke AG and Coca-Cola Hellenic Bottling Company SA. The subject matter of the procedure is the supply of carbonated soft drinks (hereafter: “CSDs”) in the Community, Iceland and Norway both through the distribution channel for consumption at home (hereafter: “*take-home channel*”) and through the channel for consumption on premise (hereafter: “*on-premise channel*”). In its preliminary assessment, the Commission considered that certain business practices of TCCC and its bottlers in the supply of CSDs relating to exclusive supply, growth and target rebates and leveraging of market power between various product categories raised concerns under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, which prohibit abuses of a dominant position by one or more undertakings.

## 2. PARTIES

(2) TCCC, incorporated in Atlanta, United States, is mainly a producer of soft drinks concentrates and syrups, which it sells to bottling and canning operations. It is the owner of the Coca-Cola, Fanta, Sprite and other brands.

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<sup>1</sup> OJ L 1, 4.1.2003, p.1, as amended by Regulation (EC) No 411/2004 (OJ L68, 8.3.2004, p.1)

<sup>2</sup> OJ C 289, 26.11.2004, p. 10.

- (3) Bottling Holdings (Luxembourg) sarl, is a holding company belonging to Coca-Cola Enterprises Inc. with local subsidiaries in Belgium, France, Great Britain, Luxembourg, and the Netherlands. Coca-Cola Enterprises Inc., incorporated in Atlanta, United States, is the world's largest bottler of TCCC products, active in production, distribution and marketing of non-alcoholic beverages.
- (4) Coca-Cola Erfrischungsgetränke AG, incorporated in Berlin, Germany, is the largest German Coca-Cola bottler and prepares, packages, markets, distributes and sells TCCC products within Germany.
- (5) Coca-Cola Hellenic Bottling Company SA, incorporated in Athens, Greece, is the second largest bottler of TCCC products and was created by the merger of the Athens-based Hellenic Bottling Company S.A. with Coca-Cola Beverages plc in August 2000. It is currently active in production, distribution and marketing of TCCC products in 26 countries, including Austria, Czech Republic, Estonia, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Slovak Republic and Slovenia.
- (6) TCCC, Bottling Holdings (Luxembourg) sarl, Coca-Cola Erfrischungsgetränke AG and Coca-Cola Hellenic Bottling Company SA are hereafter referred to as the "Parties".
- (7) Besides the three anchor bottlers referred to in recitals (3) to (5), TCCC has entered into a series of bottling agreements with third party bottlers in certain Member States, Norway and Iceland, or territories thereof, where none of the three anchor bottlers are present.

### **3. INVESTIGATED PRACTICES**

- (8) The investigated practices of TCCC and its bottlers in the supply of CSDs are, with respect to both distribution channels, as follows:
  - exclusivity requirements;
  - growth and target rebates, individually set for customers and most of which are calculated on a quarterly basis and separately set for colas and non-colas;
  - tying arrangements and arrangements requiring the customers to carry for sale a range of cola stock keeping units ("SKUs") and/or non-cola SKUs;
  - certain exclusivity-related restrictions to the installation of technical sales equipments such as beverage coolers, fountain dispensers or vending machines.
- (9) In the take-home channel, namely the distribution of CSDs through retail outlets for consumption at home (for example supermarkets, cash & carry, discounters etc.), the Commission investigated practices of TCCC and its bottlers consisting in applying shelf space arrangements whereby the supermarkets reserve a large part of their CSD shelf space for TCCC-branded products.
- (10) In the on-premise channel, namely the distribution of CSDs through outlets for consumption on the premises (for example restaurants, pubs etc.), the Commission investigated the practices by virtue of which customers receive up-front financing and

customers repay the loan by purchasing TCCC-branded products over a number of years.

- (11) During its investigation, the Commission gathered evidence of those practices in several EEA Contracting Parties, indicating that one or more of the practices have been implemented in all Member States, Iceland and Norway.

#### **4. PROCEDURAL STEPS UNDER REGULATION NO 17/62 AND REGULATION NO 1/2003**

- (12) In 1996, 1999 and 2001 the Commission received several complaints under Article 3 of Council Regulation (EEC) No 17 of 6 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty<sup>3</sup>, alleging an abuse of a dominant position within the meaning of Article 82 of the EC Treaty by TCCC and its bottlers.
- (13) In 1999 and 2000 the Commission undertook inspections pursuant to Article 14(3) of Regulation (EEC) No 17 on the Parties' premises located in Austria, Belgium, Denmark, Germany and the United Kingdom. By 2004, the evidence gathered on the investigated markets and practices covered the 25 Member States, Norway and Iceland.
- (14) On 29 September 2004 the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.
- (15) On 15 October 2004 the Commission adopted a preliminary assessment referred to in Article 9(1) of Regulation (EC) No 1/2003, stating the Commission's competition concerns. That assessment was subsequently notified to the Parties.
- (16) On 19 October 2004 the Parties submitted commitments to the Commission in response to its preliminary assessment.
- (17) On 26 November 2004 a notice was published in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the commitments submitted by the Parties and inviting interested third parties to give their observations on the commitments within one month following the publication date.
- (18) On 21 January 2005 the Commission informed the Parties of the observations received from interested third parties following the publication of the notice. On 25 February 2005 the Parties submitted an amended commitment proposal.
- (19) On 20 May 2005 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 26 May 2005 the Hearing Officer issued his final report.

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<sup>3</sup> OJ L3, 21.2.1962, p.204/62

## 5. PRELIMINARY ASSESSMENT

### 5.1. Relevant markets

- (20) In the Commission's preliminary assessment, the relevant product market was identified as being that of CSDs. CSDs were considered to comprise the following: cola-flavoured, orange-flavoured, lemon- and/or lime-flavoured, other fruit-flavoured CSDs and bitter drinks. Other beverages, such as packaged water (including flavoured water), juices and nectars, still drinks, ice tea as well as sports and energy drinks were deemed to be outside the relevant product market. This preliminary view of the product market definition was based on the fact that, from the point of view of product characteristics and intended use, CSDs could be distinguished from other beverages, as they contain carbonation and usually have a sweet taste, which appeals very much to younger consumers. Moreover, the preliminary view on the existence of a CSD market was supported by price differences, divergent volume trends and consumer substitution preferences between the various beverage categories as well as by the Parties' internal analysis.
- (21) In its preliminary assessment, the Commission also took the view that the take-home channel and the on-premise channel constitute distinct relevant markets. This preliminary view was reached on the basis that, contrary to the take-home channel, the sale of a CSD in the on-premise channel is linked to the provision of additional services. Moreover, the Commission's view was supported by significant price differences, the different use of package mixes and technical sales equipment as well as by the different role of intermediaries in the two channels.
- (22) In the Commission's preliminary assessment, the relevant geographic markets were identified as being national. This preliminary view on the geographic market definition was based on varying consumption patterns from country to country and differences between the national market shares. Furthermore, it was backed by evidence on divergent consumer preferences, price differences and divergent national packaging and recycling systems.

### 5.2. Dominance

- (23) In its preliminary assessment, the Commission took the view that TCCC and its respective bottlers are jointly dominant within the meaning of Articles 82 of the EC Treaty and 54 of the EEA Agreement on the CSD market in a number of countries and channels. The Commission reached this preliminary view, since TCCC and its respective bottlers have "*the power to adopt a common market policy*"<sup>4</sup> and to present themselves "*from an economic point of view [...] as a collective entity*"<sup>5</sup> in the CSD markets due to economic links between them, the policy making and communication process they have established as well as the way the "*Coca-Cola system*" (TCCC and its bottlers) is presented and perceived on the market.

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<sup>4</sup> Cf. T-228/97, *Irish Sugar plc v. Commission*, [1999] ECR II-2969, para. 47 (appeal of this judgment dismissed by order of the Court, C-497/99P, [2001] ECR I-5333).

<sup>5</sup> Cf. C-395 & 396/96P, *Compagnie maritime belge transports SA e.a. v. Commission*, [2000] ECR I-1365, para. 36.

- (24) As to the dominance of TCCC and its respective bottlers, the Commission based its preliminary assessment amongst others on the high market shares, which TCCC brands achieve in the CSD markets. According to 2003 data available at the time of the preliminary assessment, the market shares of TCCC-branded CSDs exceeded 40% and were more than twice the size of the market shares of the next competitor in the following countries: Austria, Belgium, Denmark, Estonia, France, Germany, Greece, Hungary (only take-home channel), Italy, Latvia, Lithuania (only take-home channel), the Netherlands, Norway (only take-home channel), Poland (only take-home channel), Spain, Sweden and the United Kingdom.<sup>6</sup>
- (25) In its preliminary assessment the Commission considered that the strong position of TCCC and its respective bottlers (due to high market shares, unique brand recognition and the must stock nature of TCCC's strongest brands and the exceptional breadth of the CSD portfolio) is protected from competition by barriers to entry in the form of sunk advertising costs preventing any significant market entry. Furthermore, in its preliminary assessment, the Commission considered that there was no countervailing buying power that would likely pave the way for effective new entry, since, according to the evidence, most customers hold a weak position in the negotiations for the supply of TCCC-branded CSDs.

### 5.3. Practices raising concerns

- (26) In the preliminary view of the Commission, the investigated practices raising concerns correspond to a common strategy of TCCC and its bottlers, which is illustrated by their wide coverage. These practices could be split into three groups: exclusivity and exclusivity related practices, growth and target rebates and bundling practices.

#### Exclusivity and exclusivity related practices

- (27) The Commission gathered evidence leading it to the preliminary view that some of the business practices of TCCC and its bottlers would ensure them *de iure* or *de facto* exclusive supply of CSDs to customers, mainly through exclusivity agreements, financing agreements and technical sales equipment arrangements (beverage coolers and fountain dispensers).
- (28) With regard to exclusivity agreements, the investigation yielded evidence of both explicit clauses and tacit agreements aiming at securing exclusivity for TCCC and its bottlers with regard to the sale of CSDs in outlets. The Commission took the preliminary view that these exclusivity agreements, regardless of their form, would lead to foreclosure of rival suppliers of CSDs, particularly in the on-premise channel. Such practices were identified in a number of EEA Contracting Parties.<sup>7</sup>
- (29) Financing agreements are entered into where a loan is granted to an outlet in the on-premise channel and that outlet repays the loan by purchasing a certain quantity of TCCC branded beverages. The Commission took the preliminary view that financing agreements are likely to give rise to foreclosure of competing suppliers if concluded for long periods, if exit conditions are overly burdensome for the customers and if the

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<sup>6</sup> At the time of the preliminary assessment, data for Cyprus, Luxembourg and Malta was not yet available for 2003.

<sup>7</sup> E.g. Austria, Belgium and Germany.

TCCC branded beverages, with which the loan is repaid, are bundled together. Such agreements exist in a number of EEA Contracting Parties.<sup>8</sup>

- (30) The Commission has gathered evidence that in both the take-home and on-premise channel, TCCC and its bottlers provide beverage coolers to customers on a rent-free basis. In return, the customer commits to stock the cooler exclusively with TCCC branded CSDs. With regard to beverage cooler exclusivity, the Commission took the preliminary view that the combination of the Parties' strong product portfolio and the rent-free character would remove any incentive for the customer to place a second cooler. In the Commission's preliminary view, beverage cooler exclusivity might, in certain situations, lead to *de-facto* outlet exclusivity, thus reducing the diversity of the cold product offering to the detriment of the final consumer. Such arrangements are common practice in a number of EEA Contracting Parties.<sup>9</sup>
- (31) The investigation showed that in the on-premise channel free fountain dispensers are sometimes provided to outlets, which commit to use this equipment only to dispense TCCC branded CSDs. Where CSDs are only offered through fountain dispensers and alternative ways of dispensing are not considered as realistic complements, this requirement would amount to *de facto* outlet exclusivity. According to the Commission's preliminary assessment, these fountain dispenser exclusivity provisions unduly hinder the outlets from turning to rival suppliers and thus reduce the competitive pressure on the incumbent if their duration is excessive, because it extends beyond the amortisation period for such equipment. Such agreements exist in a number of EEA Contracting Parties.<sup>10</sup>

#### Growth and target provisions

- (32) The Commission's investigation demonstrated that TCCC and its bottlers have frequently offered considerable financial incentives for customers reaching individually specified purchase thresholds, often by reference to the customer's purchases during a previous period. These provisions took the form of target and growth rebates, most of which were calculated on a quarterly basis separately in respect of the total turnover in colas and non-colas. In the preliminary view of the Commission, these provisions are likely to offer strong financial incentives for the customer's additional purchases once it approaches the threshold. Since smaller suppliers are generally likely to be unable to match the incentives granted by TCCC and its bottlers due to their limited size, the customers incur significant financial loss if they do not reach the threshold. The Commission took the preliminary view that growth and target provisions increase customer's switching costs and bind them to TCCC and its bottlers to the detriment of competitors and final consumers by reducing

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<sup>8</sup> Austria, the Czech Republic, Germany, Greece, Hungary, Iceland, Malta and Spain in 2003.

<sup>9</sup> In the take-home channel in 2003: Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom. In the on-premise channel in 2003: Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom.

<sup>10</sup> Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Lithuania, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom in 2003.

variety of choice and the downward pressure on prices. Such provisions exist in a number of EEA Contracting Parties.<sup>11</sup>

#### Bundling practices raising concerns

- (33) The commercial practices of TCCC and its bottlers often contain bundling of its different SKUs, which consists in rendering the purchase of a single SKU type impossible or less attractive than the purchase of a number of different SKUs together. In view of the breadth of TCCC and its bottlers' portfolio of CSD and non-CSD non-alcoholic-beverages (hereafter: "NAB") SKUs, encompassing best-selling brands, which are far stronger than the other brands, both of rivals and of TCCC and its bottlers, this bundling could give rise to concerns. The preliminary assessment identified the following three types of bundling practices raising concerns: tying, assortment and range provisions and space-to-sales arrangements.

#### Tying

- (34) The Commission has gathered evidence that, on some occasions, TCCC and its bottlers refused to supply a customer with only one of their brands unless the customer was willing to carry other CSDs or non-CSD NABs of TCCC or its bottlers. In the preliminary view of the Commission, making the supply of the strongest TCCC brands conditional upon the purchase of less-selling CSDs and non-CSD NABs leads to foreclosure of rival suppliers of CSDs and non-CSD NABs, since such tied purchases foreclose the customer's purchasing capacity within a flavour segment. This reduces the variety for final consumers and avoids downward pressure on prices. Such practices were detected in several EEA Contracting Parties.<sup>12</sup>

#### Assortment and range provisions

- (35) The evidence gathered demonstrates that TCCC and its bottlers have bundled wide ranges of 10-20 SKUs on the on-premise channels and 20-60 SKUs on the take-home channel by making considerable payments to customers purchasing these entire ranges. Such payments reached 2% of the total turnover, usually calculated separately in respect of cola and non-cola ranges, which both included highly demanded SKUs (such as Coca-Cola and Fanta Orange) and thus led to significant rebate amounts. The Commission took the preliminary view that the turnover of the best selling SKUs was used to obtain listing (that is, carrying on offer) of several less-selling SKUs. According to the preliminary assessment, this has the effect of making sales space in outlets (such as space in warehouses, on the supermarket shelves and in pubs) harder to obtain for rival suppliers and of raising sales space prices for those suppliers. The likely effect of this is reduced variety of choice and reduced downward pressure on

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<sup>11</sup> In the take-home channel in 2003: Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, The Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom. In the on-premise channel in 2003: Austria, Belgium, the Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, Luxembourg, The Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden and the United Kingdom.

<sup>12</sup> E.g. Austria, Belgium and Germany.

prices to the detriment of the consumer. Assortment and range provisions are common practice in a number of EEA Contracting Parties.<sup>13</sup>

#### Space-to-sales arrangements

- (36) The Commission's investigation demonstrated the existence of space-to-sales arrangements, whereby TCCC and its bottlers gave important financial incentives to home market customers if the latter committed to reserve a part of their total CSD shelf space to TCCC-branded products in proportion to TCCC's CSD share in the take-home channel. By way of example, if TCCC's share in overall CSD sales amounted to 60% and if the Parties required that the shelf space reserved for the entire TCCC brand portfolio accounted for 90% of this share, TCCC and its bottlers would be entitled to 54% of the total CSD shelf space for their products. In the preliminary view of the Commission, by using its best selling SKUs as leverage, TCCC and its bottlers reserve more shelf-space for the less-selling products than would be the case in the absence of such arrangements, where space would be allocated in relation to productivity. Since shelf-space in shops is limited, rival brands' access to shelves is likely to deteriorate or become much costlier due to these space-to-sales arrangements. This would lead to reduced variety of choice for the consumer and absence of downward pressure on prices. These arrangements are widespread in a number of EEA Contracting Parties.<sup>14</sup>
- (37) Moreover, according to the preliminary assessment, the effects of the space-to-sales arrangements strengthen the adverse effects of the assortment and range provisions. Whilst the assortment and range provisions could entice customers to carry less selling TCCC SKUs, the space-to-sales arrangements secure the requisite low-cost shelf space for those SKUs.

#### **5.4. Effect on trade between EEA Contracting Parties**

- (38) In its preliminary assessment, the Commission considered that, given the large number of territories – together covering a significant part of the EEA – on which, in the preliminary view of the Commission, dominance exists and in which practices of the same nature give rise to competition concerns, trade between EEA Contracting Parties may be appreciably affected by the practices.

#### **6. COMMITMENTS PROPOSED ON 19 OCTOBER 2004**

- (39) On 19 October 2004 the Parties submitted a set of commitments within the meaning of Article 9(1) of Regulation (EC) No 1/2003.

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<sup>13</sup> In the take-home channel in 2003: Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Norway, Poland, Slovakia, Spain, Sweden and the United Kingdom. In the on-premise channel in 2003: Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

<sup>14</sup> Austria, Belgium, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Hungary, Iceland, Latvia, Luxembourg, Malta, Norway, Poland, Portugal, Spain and Sweden in 2003.

- (40) The commitments contain provisions on general applicability, provisions relating to the take-home and/or on-premise channel and provisions on implementation.

### **6.1. General applicability of the commitments**

- (41) The Parties proposed to apply the commitments in all Member States, Norway and Iceland insofar as TCCC-branded CSDs accounted for more than 40%, and more than twice the share of the nearest competitor, of national CSD sales in either the take-home channel or the on-premise channel in the previous year. The Parties proposed to apply the commitments in those countries and channels where TCCC-branded CSDs occupy a very strong position compared to the rivals, but only in those countries and channels, and for as long as that strong position continues to exist. Likewise, in countries and channels in which the market position of TCCC-branded CSDs does not warrant the application of the commitments at the time the Commission Decision pursuant to Article 9(1) of Regulation (EC) No 1/2003 is notified to the Parties, the situation may subsequently evolve in such a way that the commitments should be applied in those countries and channels.

### **6.2. Take-home and on-premise channel**

- (42) With respect to both distribution channels, the Parties essentially proposed to commit
- not to impose any exclusivity provisions or percentage-based purchasing commitments on their customers;
  - to ensure transparency of performance and termination obligations;
  - not to offer any rebates or other advantages in exchange for a customer reaching individually set CSD purchase thresholds during a prescribed reference period or for achieving CSD purchase thresholds or growth rates calculated by reference to its purchases made in a previous period;
  - not to impose any tying arrangements making the supply of any TCCC-branded cola CSD or TCCC-branded orange CSD conditional on the purchase of one or more additional TCCC-branded beverages;
  - to define any assortment and range arrangements separately for TCCC-branded cola CSDs and TCCC-branded orange CSDs. However, whenever the commitments indicate the separate treatment of TCCC-branded orange CSDs, this only applies in countries where “Fanta Orange Regular” accounted for more than twice the share of the nearest competing brand of orange-flavoured CSDs in either the take-home channel or the on-premise channel, in the previous year;
  - not to make the supply of any TCCC-branded CSDs or the extent of any advantage conditional on the customer discontinuing, reducing or varying the relationship with any other supplier.

### **6.3. Take-home channel**

- (43) Specifically with respect to the take-home channel, the Parties essentially proposed to commit

- to define any arrangements reserving a proportion or amount of permanent ambient-temperature shelf space in customers’ outlets (hereafter: “*shelf space arrangements*”) separately for TCCC-branded cola CSDs, TCCC-branded orange CSDs and any other TCCC-branded CSDs;
- in any shelf space arrangements, not to reserve a share of permanent ambient-temperature CSD shelf space for TCCC-branded cola CSDs which would exceed the national share of CSD sales accounted for by TCCC-branded cola CSDs in the previous year minus 5% of that share;
- in any shelf space arrangements, not to reserve a share of permanent ambient-temperature CSD shelf space for TCCC-branded orange CSDs which would exceed the national share of CSD sales accounted for by TCCC-branded orange CSDs in the previous year.

#### **6.4. On-premise channel**

(44) Specifically with respect to the on-premise channel, the Parties essentially proposed to commit

- to limit the duration of any financing agreements to a maximum of five years while giving customers the option, at three months’ notice, (a) to repay any proportion of the loan payments due in cash at a commercial rate of interest or (b) to terminate the agreement without an early repayment penalty (other than to repay the outstanding balance with interest at a commercial rate up to the date on which payment is received). Moreover, any such agreements will not be conditioned on the purchase of a specified range of TCCC-branded CSDs;
- to limit the duration of any availability agreements, which determine the range of TCCC brands customers are required to have on offer, to a maximum of five years while giving customers, for the first time after three years, the annual option to terminate the agreement without penalty;
- when sponsoring venues (for example sports stadia or theme parks), to require exclusivity in the venue only in respect of the sponsoring brands or flavour categories. When sponsoring events (for example sporting events, festivals), the Parties may impose exclusive CSD supply rights for the full range of the Parties’ CSDs.

(45) Specifically with respect to commercial agreements in the on-premise channel entered into following competitive tendering, the commitments stipulate that the Parties may impose exclusive beverage supply. When the tender is organised by large, private sector customers, the agreements will have a maximum duration of five years while giving customers, for the first time after three years, the annual option to terminate the agreement without penalty. According to the proposed commitments, the Parties will also limit the sales volume of tender agreements entered into with private customers that contain exclusive CSD supply rights to 5% of the Parties’ annual CSD sales in the on-premise channel.

## **6.5. Technical sales equipment**

- (46) Specifically with respect to the placement of technical sales equipment, the Parties essentially proposed to commit:
- in the case of beverage coolers, to apply the following conditions: firstly, where the cooler is provided free on loan, the Parties may impose cooler exclusivity unless no other installed chilled beverage capacity to which the consumer has direct access is available in the outlet in which case the customer may use at least 20% of the beverage cooler for any products of his choosing. Secondly, where a customer rents a cooler, he may, in any event, use at least 20% of the beverage cooler for any products of his choosing. Thirdly, where a customer purchases a cooler, he is entirely free to decide how to stock it;
  - in the case of fountain dispensers, to leave customers the freedom to place competing fountain dispensers, while limiting the maximum duration of any purchase commitment for products sold through fountain dispensers to no more than three years, with an option for the customer to terminate the purchase commitment at any time following a term not exceeding two years.
  - in the case of vending machines, to leave customers the freedom to place competing vending machines.

## **6.6. Implementation**

- (47) The Parties proposed to apply the commitments to all their new commercial agreements with customers as of the date on which they were notified of the Commission Decision rendering the commitments binding upon them. All existing commercial agreements would be brought fully into line with the commitment at the latest by the full implementation date (that is, by 1 January 2006 or upon lapse of a nine months period following a notification of the decision after 30 June 2005).
- (48) In the territories not served by the three anchor bottlers to which this Decision is addressed (Cyprus, Denmark, Finland, parts of Germany, Iceland, Malta, Norway, Portugal, Spain and Sweden), TCCC works with one or more other bottlers to produce and market its drinks. In relation to these other bottlers, TCCC proposed to ensure that, in countries where the commitments are applicable, these other bottlers sign the commitments within 90 days of notification of this Decision to the Parties. As a result, all agreements by those other bottlers will be brought in line by the full implementation date in these countries.
- (49) For the countries where the commitments are not applicable from the outset, TCCC proposed to ensure that bottlers other than the anchor bottlers undertook to comply with the commitments in the event that the commitments subsequently became applicable because market share thresholds for the application of the commitments were reached in one or both channels in their respective country.
- (50) TCCC undertook to use its best efforts to attain compliance by bottlers other than anchor bottlers. As a means of last resort for ensuring the bottlers' compliance, TCCC proposed to commit to terminate the agreements with any bottlers that refuse to adhere to the commitments.

- (51) The Parties proposed to provide a written report to the Commission each year describing steps taken to comply with the commitments.
- (52) The Parties proposed that the commitments would remain in force for a period of five years starting with the full implementation date.

## **7. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) AND AMENDED COMMITMENTS**

(53) On 26 November 2004 a notice according to Article 27(4) of Regulation (EC) No 1/2003 was published in the *Official Journal of the European Union*. It invited the interested third parties to submit their observations on the commitments within one month following the publication date.

(54) In response to notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received 33 observations from interested third parties, of which 19 from on-premise and take-home operators and 14 from beverage suppliers. The observations received were, on the whole, positive, as they confirmed the effectiveness of the commitments in addressing the Commission's concerns. They were not such as to make the Commission reconsider its concerns as stated in the preliminary assessment and did not give rise to identification of new concerns. The observations aimed at enhancing the commitments, either by increasing or restricting the scope of the commitments or by improving their wording. Amongst others, the following observations were found relevant:

- in relation to the provision on financing agreements, it was observed that payment of interest at a commercial rate by the customer should only be required in case of repayment in cash or termination, where such interest is stipulated in the agreement;
- in relation to the provision on exclusive rent-free beverage coolers, interested third parties observed that it should be further ensured that the customer has alternative chilling capacity suitable to stock competing CSDs in the outlet;
- in relation to the provision on public tenders, an interested third party suggested that the monitoring of the compliance with that provision should be reinforced.

(55) These observations, together with the Commission's own analysis, led the Commission to suggest amendments to the proposed commitments.

(56) On 25 February 2005, the Parties submitted commitments amending the proposal of 19 October 2004, duly taking the relevant identified issues into account.

## **8. CONCLUSION**

(57) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The

Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the *preliminary* view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

- (58) In this case the Commission's main concern regarding the practices identified in the preliminary assessment was foreclosure of third party competitors leading to less downward pressure on prices and loss of product variety. The observations received from third parties following the publication of the notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 were not such as to make the Commission reconsider its concerns.
- (59) In their commitments the Parties have undertaken to modify their market conduct in various ways. The Commission considers that these commitments are sufficient to address the foreclosure concerns identified in its preliminary assessment. In particular, the Parties undertake to refrain from concluding exclusivity agreements save in specific circumstances and from granting growth and target rebates. In the preliminary assessment these practices were considered to make it more difficult for third parties to compete on the merits. By providing that requirements concerning assortment and shelf-space must be defined separately for certain categories of brands, the commitments address the concern identified in the preliminary assessment that strong brands would be leveraged in favour of weaker brands. In regard to financing agreements and technical equipment arrangements, the commitments reduce contract duration, give customers the option of repayment and termination without penalties and free up a certain share of cooler space, thus addressing the concerns that the pre-existing arrangements would unduly bind customers and lead to outlet exclusivity.
- (60) In the light of the commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) 1/2003, the proceedings in this case should therefore be brought to an end.
- (61) This Decision should apply from the date on which it is notified to the Parties until 31 December 2010. The present Decision is limited to the period, which is reasonably sufficient to deploy the effects of the commitments on competition in the markets.
- (62) The Commission retains full discretion to investigate and open proceedings under Article 82 of the EC Treaty and Article 54 of the EEA Agreement as regards practices that are not the subject-matter of this Decision.

HAS ADOPTED THIS DECISION:

*Article 1*

The commitments as listed in the Annex shall be binding on the undertakings referred to in Article 4.

*Article 2*

The proceedings in the present case shall be brought to an end.

*Article 3*

The Decision shall apply from the date on which it is notified to the undertakings referred to in Article 4 until 31 December 2010.

*Article 4*

This Decision is addressed to:

The Coca-Cola Company  
One Coca-Cola Plaza, NW  
Atlanta, GA 30313  
United States of America

Bottling Holdings (Luxembourg) sarl  
2 rue des Joncs  
1818 Howald  
Luxembourg

Coca-Cola Erfrischungsgetränke  
Aktiengesellschaft  
Friedrichstraße 68  
10117 Berlin  
Deutschland

Coca-Cola Hellenic Bottling Company SA  
9 Fragoklissias str.  
151 25 Maroussi  
Athens  
Greece

Done at Brussels, 22 June 2005

For the Commission  
Neelie KROES  
Member of the Commission

## ANNEX

### UNDERTAKING CASE COMP/39.116/B-2 – COCA-COLA

The Companies hereby give the following Undertaking concerning their commercial practices and those of other Bottlers of TCCC-Branded CSDs in the Relevant European Countries. This Undertaking is designed to provide clear, objective, and administrable rules governing commercial practices of The Coca-Cola Company and its Bottlers. It applies to all sales of TCCC-Branded CSDs destined for consumption in Countries in which the conduct of The Coca-Cola Company or its Bottlers may be subject to Article 82 of the EC Treaty or Article 54 of the EEA Agreement. This Undertaking is made without prejudice to the Companies' position should the European Commission or any other party decide to open proceedings or to commence any other legal action against any of the Companies. This Undertaking shall be interpreted in accordance with Community law.

#### **I. DEFINITIONS**

In this Undertaking, the following terms will have the meanings indicated below:

“Approved Methodology” means the following methodology used to calculate the shares prescribed in this Undertaking for purposes of defining “Countries” and “TCCC-Branded Orange CSDs.” Shares will be calculated using the best available value-based Channel-specific data for each of the Take-Home Channel (as currently provided by AC Nielsen) and the On-Premise Channel. Where Channel-specific value-based data are not available for a Channel, shares for that Channel will be calculated using the best available Channel-specific volume-based data (as currently provided by Canadean Limited). In situations where Channel-specific volume-based data are not available, shares for either or both Channels will be based on the best available national volume-based data (as currently provided by Canadean Limited).

“Assortment or Range Commitments” are contractual obligations accepted by a customer to maintain physically in stock a specified set or number of beverages or SKUs.

“Beverage Coolers” means installed equipment, other than vending machines and fountain equipment, used for chilling packaged CSDs to which the consumer has direct access.

“Bottler” means an entity licensed by TCCC to manufacture, distribute, and sell TCCC-Branded CSDs in a Relevant European Country.

“CCE” means Bottling Holdings (Luxembourg) sarl, a corporation organized under the laws of Luxembourg, with its registered office in Howald, Luxembourg, and all of its Subsidiaries.

“CCEAG” means Coca-Cola Erfrischungsgetränke AG, a corporation organized under the laws of Germany, with its principal office in Berlin, Germany, and all of its Subsidiaries.

“CCHBC” means Coca-Cola Hellenic Bottling Company S.A., a corporation organized under the laws of Greece, with its principal office in Maroussi, Greece, and all of its Subsidiaries.

“Companies” means TCCC, CCE, CCHBC, and CCEAG.

“Countries” means all Relevant European Countries and future EU Member States in which TCCC-Branded CSDs accounted for more than 40%, and more than twice the share of the nearest competitor, of national CSD sales in either the Take-Home Channel or the On-Premise Channel in the previous year. Where a Country qualifies under this definition in only one Channel, this Undertaking will apply only in that Channel. In situations where data are not available from an independent source for any Relevant European Country or future EU Member State, a Company will appoint, subject to the Commission’s approval, an independent third party to compile the market share information necessary to determine whether this Undertaking shall be applicable. Pursuant to Section III.E.2. of this Undertaking, TCCC will provide the European Commission annually with written reports listing the Countries and Channels to which this Undertaking will be applicable. For purposes of this provision, shares will be calculated on the basis of the Approved Methodology.

“Coverage Date” means the date on which a Country or Channel becomes subject to this Undertaking, corresponding to: (1) in respect of the Companies, the Effective Date; (2) in respect of non-Company Bottlers in Countries, the date on which each such Bottler commits to comply with the terms of this Undertaking; and (3) in respect of Bottlers active in a Country or a Channel that becomes subject to this Undertaking on the basis of the information contained in a report provided to the European Commission pursuant to Section III.E.2. of this Undertaking, the date on which such report is submitted.

“CSDs” means carbonates, as defined by Canadean Limited, excluding beverages listed in the “flavoured water” category.

“Effective Date” means the date on which the Companies are notified of the European Commission’s final decision under Article 9 of Council Regulation No. 1/2003 concerning this Undertaking.

“Existing Agreement” means any agreement, whether oral or written, entered into on or before the Coverage Date by a Company in a Country or Channel.

“Financing Agreements” are agreements entered into with On-Premise customers under which a supplier provides a customer with up-front financing. Such advanced funds are typically repayable either in cash or on the basis of purchases of beverages from the supplier that extended the funds.

“Full Implementation Date” means January 1, 2006, unless the Effective Date falls after June 30, 2005, in which case the Full Implementation Date will be nine months after the Effective Date.

“New Agreement” means any agreement, whether oral or written, entered into after the Coverage Date by a Company in a Country or Channel.

“On-Premise Channel” means accounts or groups of accounts that operate on-premise or immediate beverage consumption outlets in the Relevant European Countries or that purchase or specify for purchase beverages for resale to such accounts in the Relevant European Countries.

“Other TCCC-Branded CSDs” means TCCC-Branded CSDs other than TCCC-Branded Cola CSDs and TCCC-Branded Orange CSDs, provided that in Countries or Channels where the threshold for TCCC-Branded Orange CSDs is not satisfied, orange-flavoured CSDs marketed under trademarks incorporating or consisting of the “Fanta” trademark will be included in Other TCCC-Branded CSDs.

“Private Tender Agreements” means commercial arrangements for the supply of CSDs in the On-Premise Channel that are entered into following an open and competitive tendering process based on objective, transparent, and non-discriminatory criteria and are organized by large, private sector customers for sales in the On-Premise Channel.

“Public Tender Agreements” means commercial arrangements for the supply of CSDs that are entered into following an open and competitive tendering process based on objective, transparent, and non-discriminatory criteria and are organized by Government agencies and public authorities that prescribe a standard form agreement.

“Rebates” are payments, credits, or other advantages obtained or retained by a customer by reference to multiple purchases made over a preceding period.

“Relevant European Countries” means Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom.

“Shelf Space Commitments” are contractual obligations accepted by a customer to dedicate a proportion or amount of its permanent ambient-temperature CSD sales space to beverages sourced from a given CSD supplier.

“SKUs” means stock-keeping units.

“Sponsorship Agreements” means commercial arrangements whose principal purpose is to sponsor an event or venue for its promotional value, with beverage supply being an ancillary aspect. Sponsorship Agreements are typically entered into with sports clubs or organizers of periodic entertainment or sporting events.

“Subsidiaries” means an entity in which a Company, directly or indirectly, holds an interest exceeding 50% and which is involved in the distribution or sale of TCCC-Branded CSDs in one or more Relevant European Countries.

“Take-Home Channel” means accounts or groups of accounts that are engaged in the business of retailing packaged beverages to consumers in Relevant European Countries primarily for at-home consumption or that supply such accounts (including cash and carry accounts).

“TCCC” means The Coca-Cola Company, a corporation organized under the laws of the State of Delaware, U.S.A., with its principal office in Atlanta, Georgia, U.S.A., and all of its Subsidiaries.

“TCCC-Branded” means marketed under trademarks owned by or licensed to TCCC.

“TCCC-Branded Cola CSDs” means TCCC-Branded Light Cola CSDs and TCCC-Branded Regular Cola CSDs.

“TCCC-Branded Light Cola CSDs” means low-calorie cola-flavoured CSDs sold under TCCC trademarks, including “Coca-Cola Light” and “Coke Light,” other than those incorporating additional flavours (*e.g.*, Coke Light Lemon).

“TCCC-Branded Orange CSDs” means orange-flavoured CSDs marketed under trademarks incorporating or consisting of the “Fanta” trademark and defined as “Fanta Orange Regular” by Canadean Limited that in any Country accounted for more than twice the share of the nearest competing orange-flavoured CSD brand in either the Take-Home Channel or the On-Premise Channel in the previous year. Where this threshold is met in only one Channel, the provisions of this Undertaking concerning TCCC-Branded Orange CSDs will apply only in that Channel. TCCC will provide the European Commission annually with written reports listing the Countries and Channels in which the provisions of the Undertaking concerning TCCC-Branded Orange CSDs will be applicable. For purposes of this provision, shares will be calculated on the basis of the best available industry data sources (currently Canadean Limited and AC Nielsen) using the Approved Methodology.

“TCCC-Branded Regular Cola CSDs” means cola-flavoured CSDs sold under the “Coca-Cola” or “Coke” trademarks other than those incorporating additional flavours (*e.g.*, Cherry Coke, Vanilla Coke).

“Technical Equipment” means Beverage Coolers, fountain dispensers, and CSD vending machines.

## **II. SUBSTANTIVE PROVISIONS**

Each Company undertakes to apply the following measures.

### **A. THE TAKE-HOME AND ON-PREMISE CHANNELS**

The commitments in this section are applicable to all commercial arrangements in the Take-Home and On-Premise Channels under which a Company sells TCCC-Branded CSDs in the Countries for resale within the Relevant European Countries, other than Sponsorship Agreements and Public and Private Tender Agreements.

#### **1. Exclusivity Provisions**

Each Company’s customers will remain free to buy and sell any CSDs of any third party. The Companies will not require a customer not to list, purchase, or sell CSDs of a third party or offer any payment or other advantage conditioned on a customer’s committing not to do so.

## 2. **Percentage-Based Purchasing Commitments**

The Companies will not require a customer to purchase a specified minimum percentage of that customer's total CSD requirements (or requirements in a specific CSD flavour category) or offer any payment or other advantage conditioned on such purchasing obligation.

## 3. **Transparency**

The Companies' agreements will reflect the following principles:

- **Transparency of Performance Obligations.** Where an agreement offers a payment or other advantage in exchange for a customer's agreeing to carry out a service in relation to the sale of CSDs (*i.e.*, pay-for-performance), both the service and the associated payment will be clearly specified by a Company in the relevant agreement.
- **Transparency of Termination Obligations.** Where an agreement allows a customer either to terminate that agreement or to reduce its commitments to a Company pursuant to that agreement, the requirements for early termination or reduction of the customer's obligations will be clearly specified, including the basis for the calculation of any payment or payments owed to the Company.

## 4. **Target Rebates**

No Rebates will be conditioned on a customer's achieving purchase thresholds or growth rates calculated by reference to its purchases of any product or group of products that includes TCCC-Branded CSDs made in a previous reference period or on reaching otherwise individually set purchase growth or purchase target objectives during a prescribed reference period for any product or product group that includes TCCC-Branded CSDs.

## 5. **Tying Provisions**

The Companies will not enter into or maintain in force in any agreement provisions that condition the supply of any TCCC-Branded Cola CSD or TCCC-Branded Orange CSD upon agreement by a customer to purchase one or more additional beverages of the Companies.

## 6. **Assortment or Range Commitments**

Where a Company's agreements include Assortment or Range Commitments for TCCC-Branded CSDs, these will be based on the following principles:

- **Separate Stocking Commitments.** Each Company will define stocking commitments separately for TCCC-Branded Regular Cola CSDs, TCCC-Branded Light Cola CSDs, and TCCC-Branded Orange CSDs.

- **No Combined Payments.** The Companies will not condition any payment or other advantage granted with respect to any TCCC-Branded Cola CSDs or TCCC-Branded Orange CSDs upon a customer's stocking one or more additional beverages of the Companies.
- **Percentage-Based Assortment or Range Payments.** The Companies will not condition any payment or other advantage on a customer's agreeing that a Company's CSDs (or any subset of a Company's CSDs) comprise a specified percentage of the total number of CSD SKUs (or of that subset of CSD SKUs) listed by the customer in the previous year.

#### 7. **Agreements Concerning Products of Other Suppliers**

The Companies will not enter into or maintain in force in any agreement provisions that condition the supply of any TCCC-Branded CSD or the availability or extent of any payment or other advantage on the customer's obligation to discontinue, reduce, vary the terms of, or to refrain from entering into any agreement or commercial relationship with any other supplier.

### B. **THE TAKE-HOME CHANNEL**

In addition to the commitments in Section II.A above, the commitments in this section will be applicable to each Company's dealings with Take-Home customers in the Countries.

#### 1. **Shelf Space Commitments**

Where a Company's agreements include Shelf Space Commitments for TCCC-Branded CSDs, these will be based on the following principles:

- **No Exclusivity.** The Companies will not require a customer to dedicate all of its permanent ambient-temperature CSD sales space to TCCC-Branded CSDs or offer any payment or other advantage conditioned on a customer's doing so.
- **Separate Commitments.** Each Company will define Shelf Space Commitments separately for TCCC-Branded Cola CSDs and TCCC-Branded Orange CSDs. Any Shelf Space Commitments relating to Other TCCC-Branded CSDs will not be calculated by reference to sales of or space allocated to TCCC-Branded Cola CSDs or TCCC-Branded Orange CSDs.
- **TCCC-Branded Cola CSDs.** The Companies will not condition Shelf Space Commitments for TCCC-Branded Cola CSDs on a customer's providing a proportion of its permanent ambient-temperature CSD sales space in excess of the national share of CSD sales accounted for by TCCC-Branded Cola CSDs in the previous year, less 5% of that share, as measured by AC Nielsen.

- **TCCC-Branded Orange CSDs.** The Companies will not condition Shelf Space Commitments for TCCC-Branded Orange CSDs on a customer's providing a proportion of its permanent ambient-temperature CSD sales space in excess of the national share of CSD sales accounted for by TCCC-Branded Orange CSDs in the previous year, as measured by AC Nielsen.

## C. **THE ON-PREMISE CHANNEL**

In addition to the commitments in Section II.A above, the commitments in this section will be applicable to commercial arrangements, other than Sponsorship Arrangements and Public and Private Tender Agreements, concerning each Company's dealings with On-Premise customers in the Countries.

### 1. **Financing Agreements**

Where a Company enters into Financing Agreements, these will be based on the following principles:

- **Maximum Repayment Term.** The term over which a customer may repay funds advanced under any Financing Agreement will not exceed five years.
- **Loans Not Conditioned on Specified Assortment or Range Commitments.** The Companies' Financing Agreements will not be conditioned on agreement by a customer to purchase a specified assortment or range of TCCC-Branded CSDs.
- **Customer Option To Repay.** Where a Company provides financing to a customer that is repayable by purchase of TCCC-Branded CSDs from that Company, the customer will have the option, upon three months' notice, to repay any proportion of the loan payments due in cash and, where the Financing Agreement so provides, interest at a commercial rate up to the date on which payment is received. In case the customer repays a proportion of the loan payments due in cash, the amount of TCCC-Branded CSD purchases needed to repay the loan for the relevant period will be reduced proportionally.
- **Customer Option To Terminate.** Each Company's Financing Agreements will give customers the option, at any time and on no more than three months' notice, to repay the outstanding balance of advanced funds and terminate the Agreement without any early repayment penalty or other financial compensation. Where the Financing Agreement so provides, the customer may be required to pay interest at a commercial rate on the outstanding balance up to the date on which payment is received.

### 2. **Availability Agreements**

Any agreement that requires a customer to make any set of TCCC-Branded CSDs available in its associated outlets will not exceed five years and will give the customer an annual option to terminate the agreement without penalty following an initial term not exceeding three years.

## D. SPONSORSHIP AND PUBLIC AND PRIVATE TENDER AGREEMENTS

### 1. Sponsorship Arrangements

The Companies' Sponsorship Agreements will be based on the following principles:

- **Venue Sponsorship.** Where a Company sponsors venues (*e.g.*, sports stadia, theme parks), it will not require or provide payments or other incentives conditioned on agreement that non-TCCC-Branded CSDs will not be available in the venue, other than in respect to the sponsoring brands or flavour categories.
- **Event Sponsorship.** Where a Company sponsors events that are limited in duration (*e.g.*, sporting events, festivals), exclusive CSD supply rights for the full range of that Company's CSDs may be linked to the sponsorship agreement. This exclusion will apply only to events that do not exceed sixty days per year, which need not be consecutive.

### 2. Public and Private Tender Agreements

The Companies' Public and Private Tender Agreements will be based on the following principles:

- **Public Tender Agreements.** Each Company may compete for and enter into Public Tender Agreements containing exclusive CSD supply rights.
- **Private Tender Agreements.** Each Company may compete for and enter into Private Tender Agreements containing exclusive CSD supply rights, provided that the duration of any such arrangements is limited to a maximum of five years and gives the customer an annual option to terminate the agreement without penalty following an initial term not exceeding three years. A Company will not enter into any Private Tender Agreement that, at the time of contracting, causes any exclusive CSD supply rights contained in its Private Tender Agreements, in the aggregate, to represent more than 5% of that Company's annual CSD sales in the On-Premise Channel. Each Company will maintain a complete record of Private Tender Agreements that, upon request, it will provide to the Commission.

## E. TECHNICAL EQUIPMENT PLACEMENT

The commitments in this section will be applicable to commercial arrangements concerning the installation and use of technical equipment, other than as agreed in Sponsorship Agreements and Public and Private Tender Agreements, to the exclusion of any inconsistent provisions in this Undertaking.

### 1. Beverage Coolers

The Companies' policies for the placement of Beverage Coolers will be based on the following principles:

- **Rent-Free Placement.** Where a Company provides a Beverage Cooler on a rent-free basis, a customer may be required to stock that Beverage Cooler only with beverages distributed by the Company placing the equipment, provided the customer has other installed chilled beverage capacity in the outlet to which the consumer has direct access and which is suitable for stocking CSDs other than those of the Company. Where a Beverage Cooler is provided on a rent-free basis and the customer does not have other installed chilled beverage capacity in the outlet to which the consumer has direct access and which is suitable for stocking CSDs other than those of the Company, the customer will be free to use at least 20% of that Beverage Cooler's capacity for any products of its choosing.
- **Rental Placement.** Where a Company provides a Beverage Cooler in exchange for rental payments, a customer will be free to stock any products of its choosing in at least 20% of the capacity of the rented Beverage Cooler.
- **Purchase Placement.** Where a customer purchases a Beverage Cooler from a Company or a cooler manufacturer to which a Company refers the customer, that customer will be free to stock the purchased Beverage Cooler with any products of its choosing.

## 2. **Fountain Dispensers**

The Companies' policies for the placement of fountain dispensers will be based on the following principles:

- **Competing Dispensers.** The Companies will not require or provide payments or other incentives for a customer to refrain from placing competing fountain dispensers or packaged CSDs on any premises.
- **Limited Contractual Duration.** The duration of purchase commitments for products sold through fountain dispensers provided by each Company will not exceed three years.
- **Customer Option To Terminate.** Customers will have the option to terminate such purchase commitments without penalty with effect at any time following an initial term not exceeding two years. A Company may require a customer to provide up to three months' written notice of its intention to exercise that option.

## 3. **Vending Machines**

No agreement under which a Company provides CSD vending machines to a customer (*i.e.*, where the vending machine is provided either directly to an outlet or to an independent vending operator or wholesaler) will require or provide payments or other incentives for the customer to refrain from placing competing vending machines on any premises.

### **III. IMPLEMENTATION**

#### **A. ENTIRE AGREEMENT**

This Undertaking comprises the entire extent of the Companies' commitments to or agreements or understandings with the European Commission and supersedes all prior undertakings entered into or agreements or understandings with the European Commission by any of the Companies.

#### **B. SCOPE OF APPLICATION**

The Companies will be bound by this Undertaking.

To ensure that this Undertaking is implemented by all Bottlers in all Countries, TCCC will use its best efforts to ensure that, within 90 days of the Effective Date, all such Bottlers (other than the Companies) sign both this Undertaking and a Bottler's Agreement committing them to abide by the Undertaking's terms if and as it applies to Countries and Channels in which they sell TCCC-Branded CSDs. Such best efforts will include informing each such Bottler that, should it fail to sign both the Undertaking and a Bottler's Agreement committing it to abide by its terms, TCCC will exercise its right to terminate the relevant Bottler's Agreement. In the event that any such Bottler does not sign both this Undertaking and a Bottler's Agreement committing it to abide by the Undertaking's terms, TCCC will serve written notice terminating the relevant Bottler's Agreement within 120 days of the Effective Date.

TCCC will use its best efforts to procure, by the Full Implementation Date, the commitment of all Bottlers (other than the Companies) that are not subject to the Undertaking, by reason of the fact that their respective territories in the Relevant European Countries are not Countries, to implement this Undertaking immediately on their territories in the Relevant European Countries becoming Countries. Such best efforts will include informing each such Bottler that, should it fail to sign both the Undertaking and a Bottler's Agreement committing it to abide by its terms, TCCC will exercise its right to terminate the relevant Bottler's Agreement. In the event that any such Bottler does not sign both this Undertaking and a Bottler's Agreement committing it to abide by the Undertaking's terms, TCCC will serve written notice terminating the relevant Bottler's Agreement within 30 days of the Full Implementation Date.

Any company that becomes a Bottler in a Country after the Effective Date will be required, as from the date of becoming a Bottler, to comply with this Undertaking and, notwithstanding Section III.C below, to implement the terms of this Undertaking immediately. Any company that, after the Effective Date, becomes a Bottler in a Relevant European Country that is not a Country because the applicable thresholds are not met will be required, as from the date of becoming a Bottler, to sign both this Undertaking and a Bottler's Agreement committing it to abide by the Undertaking's terms and, notwithstanding Section III.C below, to implement the terms of this Undertaking immediately on their territory becoming a Country.

Upon committing to implement the terms of this Undertaking, any non-Company Bottler in a Country will be treated as a Company for purposes of this Undertaking.

## **C. IMPLEMENTATION TIMEFRAME**

Upon a Country or Channel becoming subject to this Undertaking on the Coverage Date, each Company will comply with this Undertaking as set forth below. Each Company will be responsible for ensuring its compliance with the Undertaking.

### **1. New Agreements**

All New Agreements will comply with this Undertaking.

### **2. Existing Agreements**

All Existing Agreements will be brought into compliance with this Undertaking by: (1) in respect of the Companies, the Full Implementation Date; (2) in respect of non-Company Bottlers in Countries, the Full Implementation Date; and (3) in respect of Bottlers active in a Country or a Channel that becomes subject to this Undertaking on the basis of the information contained in a report provided to the European Commission pursuant to Section III.E.2. of this Undertaking, no later than the end of the calendar year in which such report is submitted, unless the report is submitted after June 30, in which case the relevant Bottler will have nine months from the date on which the report is submitted to bring all existing agreements in a Country or Channel into compliance with this Undertaking.

## **D. CHANGES IN APPLICABILITY**

Where a Country or Channel ceases to be subject to this Undertaking because the applicable thresholds are no longer met, the relevant provisions of the agreements of the Company in question will not be subject to this Undertaking from the date on which the reports referred to in Section III.E.2 below are provided to the Commission.

## **E. REPORTING**

### **1. Notice of Third Party Actions**

Each Company will provide the Commission with written notice promptly upon becoming aware that any third party has commenced an action before a competent regulatory authority or court alleging that it has violated any of the terms of this Undertaking.

### **2. Scope**

Each Company will be responsible for identifying among its territories in Relevant European Countries those Countries and Channels to which this Undertaking will be applicable.

TCCC will provide the European Commission annually with written reports listing such Channels and Countries. Such reports will be accompanied by the market share information (currently available from A.C. Nielsen and Canadean Limited) on which they are based and an explanation of the conclusions reached as to the application of this Undertaking.

TCCC will deliver such written reports to the European Commission within 30 days of the publication of the market share information (currently available from A.C. Nielsen and Canadean Limited) on which those reports are based.

### **3. Compliance Certification**

Each Company will provide annually a written report describing steps taken by that Company to comply with this Undertaking. Such statements shall also confirm that the reporting Company has implemented a compliance program according to which it has made the Undertaking known to all of its management and commercial employees and that all such employees are familiar with the terms of this Undertaking. Such reports will be delivered to the European Commission on or before March 31 of each year.

## **F. PUBLICITY**

### **1. Scope of Application**

TCCC will publish and keep updated on its website a list of those Countries and Channels to which this Undertaking is applicable.

### **2. Provisions of Undertaking**

Each Company will use its best efforts to ensure that this Undertaking is made known to and is understood by its customers and other industry participants. Such efforts shall include two specific measures:

- **General Terms and Conditions of Sale.** The general terms and conditions of sale of each Company will state expressly on the back of invoices for all agreements, other than Sponsorship Agreements and Public and Private Tender Agreements, that the Company's customers are free to list, buy, and sell any CSD of any third party.
- **Websites.** The full text of this Undertaking and a list of Countries and Channels in which it is applicable will remain prominently present on the website (or the parts thereof that are addressed to customers) of each Company.

## **G. DURATION AND REVIEW**

### **1. Duration**

This Undertaking will remain in force for a period of five years following the Full Implementation Date.

### **2. Review**

Pursuant to Article 9(2)(a) of Council Regulation (EC) No. 1/2003, a Company may request the European Commission to reopen the proceedings with a view to modifying

this Undertaking where there has been a material change in any of the facts on which the European Commission's decision pursuant to Article 9(1) of that Regulation is based.

#### **H. GOVERNING LANGUAGE**

In the event of any dispute, the English-language version of this Undertaking will be dispositive.