EN

Case No COMP/M.4999 - HEINEKEN / SCOTTISH & NEWCASTLE ASSETS

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 9 (3)
Date: 03/04/2008

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 03/04/2008
C(2008) 1323

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

COMMISSION DECISION

of 03/04/2008

relating to the partial referral of

case No COMP/M.4999 Heineken/Scottish & Newcastle assets

to the competent authorities of Ireland

pursuant to Article 9 of Regulation (EC) No 139/2004

COMMISSION DECISION

of 03/04/2008

relating to the partial referral of case No COMP/M.4999 Heineken/Scottish & Newcastle assets to the competent authorities of Ireland pursuant to Article 9 of Regulation (EC) No 139/2004

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings[1] (hereinafter, 'the Merger Regulation'), and in particular Article 9(3) thereof,

Having regard to the notification made by Heineken N.V. on 12 February 2008, pursuant to article 4 of the said Regulation,

Having regard to the request of the Competition Authority of Ireland of 29 February 2008,

WHEREAS:

1. On 12 February 2008, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertaking Heineken International N.V. ('Heineken', the Netherlands) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of parts of the undertaking Scottish & Newcastle plc ('S&N assets', United Kingdom) by way of public bid announced on 25 January 2008.

2. The Irish Competition Authority received a copy of the notification on 14 February 2008.

3. By letter dated 29 February 2008, Ireland requested the referral to its competent authorities of the part of the proposed concentration concerning Ireland with a view to assessing it under Irish national competition law, pursuant to article 9(2)(a) and (b) of the Merger Regulation ("the request"). The Irish Competition Authority considers that the proposed transaction threatens to significantly affect competition in a number of beer markets in Ireland, namely the market for beer (excluding cider) in Ireland, the "on-trade" and "off-trade" markets for beer[2] (excluding cider) in Ireland and the market for lager in Ireland. At the same time, the Irish Competition Authority considers that the proposed transaction threatens to significantly affect competition in the market for stout in the Munster region which

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[1] OJ L 24, 29.1.2004, p.1.

[2] The "on-trade" segment covers pubs, restaurants and hotels (i.e. where alcohol is sold for consumption on those premises). The "off-trade" segment comprises sales to supermarkets and off-licences (i.e. the sale of alcohol for consumption elsewhere than at the place of sale).

presents all the characteristics of a distinct market and does not constitute a substantial part of the common market.

4. The request does not cover the analysis of the transaction outside Ireland. The Commission will decide in a separate decision if the notified operation is compatible with the common market and the functioning of the EEA Agreement with respect to the remaining parts of the transaction.

5. A copy of the request made by the Irish Competition Authority was sent to the notifying party on 4 March 2008. By letter dated 7 March 2008, the notifying party informed the Commission that it did not have any comment in relation to the request made by the Irish Competition Authority.

I THE PARTIES

6. Heineken is an international company, based in the Netherlands, which is active in the production and distribution of beer and other beverages in a number of countries.

7. Scottish & Newcastle plc ('S&N') is a public limited company registered in the United Kingdom. It too is active in the production and distribution of beer and other beverages in a number of countries.

II THE OPERATION

8. The notified transaction is part of a recommended public offer by Heineken and Carlsberg A/S ('Carlsberg'), which, if successful, will lead to the break-up of S&N between the two companies.

9. Prior to the announcement of the bid, Carlsberg and Heineken signed a consortium agreement which will regulate the conduct of the offer and provide for the precise division of the assets and liabilities of Scottish & Newcastle between them and the terms on which this will be done. Clause 10.1 of the consortium agreement provides that the split of assets will occur […] after the closing date, while, pursuant to clause 10.2, […].

10. Pursuant to the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings where the subsequent break-up of assets is agreed between the parties in a legally binding way and is certain to take place within a short time period after the first step, 'only the acquisitions of the different parts of the undertaking in the second step will constitute concentrations, whereby each of these acquisition by different purchasers will constitute a separate concentration.' Consequently, as there are no indications which would put the certainty of the split-up and the foreseen timetable into question, each of the acquisitions of certain S&N assets by Carlsberg and Heineken respectively is considered to constitute a separate concentration.[3]

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[3] See the Commission Consolidated Jurisdictional Notice (paras. 30-32)

11. The notification relates to Heineken's acquisition of certain assets (including brands) and liabilities relating to the businesses operated by S&N in Belgium, Finland, Ireland, Portugal and the United Kingdom ('S&N assets'). The acquisition of the remaining assets of S&N was notified separately to the Commission on 1 February 2008 under the reference case No. COMP/M.4952 – Carlsberg/Scottish & Newcastle assets and was approved by the Commission pursuant to Article 6(1)(b) of the Merger Regulation on 7 March 2008.

12. Under the terms of the agreement, the allocation of S&N brands to either Heineken or Carlsberg is made according to the principle that the ownership of a particular brand shall be allocated to the company that acquires the S&N business which currently holds the brand in question. In this way, Heineken will acquire ownership of brands such as *Maes* and *Brugs* (S&N Belgium), *Lapin Kulta* and *Karjala* (S&N Finland), *Beamish* (S&N Ireland), *Luso* and *Sagres* (S&N Portugal) and *Foster's*, *John Smith's* and *Strongbow* (S&N UK).

13. One exception to the above-mentioned principle by which the ownership of S&N brands follows the allocation of S&N national businesses concerns the *Grimbergen* brand which is currently held by S&N Belgium. Although this business is to be acquired by Heineken as part of the notified transaction, Carlsberg will obtain worldwide ownership of the *Grimbergen* brand and will then grant a […] licence to Heineken. In addition, Heineken will receive a […] licence in respect of the *Kronenbourg* brand in the UK.

III CONCENTRATION

14. The proposed transaction will result in the acquisition of sole control by Heineken over S&N assets. It therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation

IV COMMUNITY DIMENSION

15. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5,000 million (Heineken EUR 11,829 million, S&N assets EUR 3,699 million). Each of them has a Community-wide turnover in excess of EUR 250 million (Heineken EUR […] million, S&N assets […] million). Heineken did not achieve more than two-thirds of its Community-wide turnover in any one Member State[4]. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

V ARTICLE 9 REQUEST

16. As noted above, by letter dated 29 February 2008, Ireland requested the referral to its competent authorities of the part of the proposed concentration relating to

4 The turnover figures provided for S&N assets are based on the notifying party's best estimates of the volumes sold by S&N assets and market knowledge on revenue per hectolitre. According to the notifying party's estimates, it is possible that S&N assets achieved more than two-thirds of its Community-wide turnover in the UK.

Ireland pursuant to article 9(2) of the Merger Regulation with a view to assessing it under Irish national competition law. Within the meaning of Article 9(2)(a) of the Merger Regulation, the Irish Competition Authority considers that Irish beer markets are distinct from other national beer markets and that the proposed transaction threatens to significantly affect competition in the following markets:

1) the market for beer (excluding cider) in Ireland,

2) the "on-trade" and "off-trade" markets for beer (excluding cider) in Ireland,

3) the market for lager in Ireland.

17. At the same time, the Irish Competition Authority considers that, within the meaning of Article 9(2)(b) of the Merger Regulation, the proposed transaction affects competition in the market for stout in the Munster region which presents all the characteristics of a distinct market and does not constitute a substantial part of the common market.

1. ART. 9 (2) A

18. Art. 9 (2) a / (3) requires that a concentration threatens to affect significantly competition in a market within the Member State, which presents all the characteristics of a distinct market.

19. The ICA first explains why it believes that the beer markets involved in the proposed concentration are at most national in scope (differences in the main competitors and brands between countries, different levels of excise duties, etc.).

20. Second, to express its *prima facie* concerns on the merger, the ICA relies on market shares and explained that it is concerned that the merger would result in a creation of a virtual duopoly in the on-trade lager market.

a) RELEVANT MARKETS

Product Markets

21. The Commission's decisional practice[5] and the European Court of Justice's case law[6] suggest that the relevant product market is that for the production and distribution of beer which is to be distinguished from other beverages. Furthermore, the Commission has generally considered that a distinction between the "on-trade" distribution (that is, beer sold by pubs, bars, restaurants, etc.) and "off-trade" distribution (retail outlets) is relevant. In a number of instances, the Commission has also considered whether a further segmentation of the beer market

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5 See COMP/M.3372 – Carlsberg/Holsten which refers to further decisions of the Commission: COMP/M.3032 – Interbrew/Brauergilde; COMP/M.2569 – Interbrew/Beck's: COMP/M.2877 Carlsberg/Brauholding Int./JV: COMP/M.2387 – Heineken/Bayerische Brauholding JV/; COMP/M.2152 S&N/Centralcer

6 See C-234/89 – Stergios Delimitis v. Henninger Bräu, judgment of the Court of 28.2.1991

by type (e.g. lager or ale) or by quality (e.g. standard vs. premium) might also be relevant in some countries[7] but the question was ultimately left open.

22. The notifying party agrees that in general the market for beer should be distinguished from the market for other beverages. It also submits that a further distinction can be made between beer sold through the "on-trade" channel and beer sold though it suggests that this distinction is not necessarily compelling given the cross-selling between both channels.

23. Whilst the notifying party submits that the above general product market characteristics also apply to the Irish beer market, it suggests that cider should also be included in the relevant product market. In support of this argument, it notes that 'there is a high level of similarity in packaging, distribution, appearance and pricing between cider and beer and from the consumers' perspective there is a considerable substitution between cider and beer. Similar to beer, cider is packaged in kegs and bottles.'[8]

24. At the same time, whilst it acknowledges that three different types of beer can be distinguished in the Irish market, namely lager, stout and ale, it is of the opinion that these different beer types belong to one and the same product market, in particular because of a high degree of supply side substitutability. It submits that it is relatively easy for a brewer to switch production to a certain type of beer without incurring significant additional costs or risks given that the brewing of stout, lager and ale follow a similar production process in the same production facilities. From the demand side perspective, the notifying party submits that although lager, ale and stout can arguably be considered to differ in terms of taste and appearance, the strong growth of lager over recent decades vis-à-vis other beers, notably stout, demonstrates that 'lager is considered a substitute for and therefore competes with other beers'.[9]

25. The preliminary market investigation carried out by the Commission in the present case has not supported the notifying party's argument that cider should be considered as part of the relevant product market alongside beer. Whilst cider sales have increased significantly in volume in recent years following a successful marketing strategy by the main producer in Ireland, the rate of increase appears to have slowed and cider sales are not expected to significantly change as a percentage of total beer sales in future[10]. During the same period, lager sales have also increased albeit at a slower rate. This would suggest that the increase in cider consumption has not been wholly at the expense of lager. In fact, due to the different nature of the two products, customers do not generally believe that beer prices are significantly constrained by cider prices. In other words, while cider (and wine) provide some alternatives in terms of taste, 'cider [and wine] are not directly

7 See for example Case COMP/M.2569 Interbrew/Beck's and COMP/M.2044 Interbrew/Bass

8 Form CO, p. 23.

9 Form CO, p. 23.

10 It has been suggested in the market investigation that the slow down in cider sales was a consequence of a change in excise policy by the Irish government which increased the duty on cider to the same level as beer in its 2002 budget

switch products'[11] to the extent that these types of alcohol would exert significant price constraints on each other. In addition, when asked whether a 10% increase in the price of lager would cause customers to switch to other products such as ale or stout and/or other alcoholic beverages such as cider ('the SSNIP test'), many respondents explained that such a price increase would not be significant enough to lead to changes in consumption patterns.

26. In addition, the preliminary market investigation indicated that there is limited interaction between cider and beer prices in the Irish market to the extent that beer producers do not take the price of cider into account when determining their beer prices. Although the notifying party submitted that cider is marketed in a very similar way to beer and also has the same price level as beer, a number of respondents indicated that cider is generally priced at a premium to beer and that the two products do not necessarily exhibit the same price development or as one respondent answered 'cider in Ireland is priced at a premium to beer. The premium to beer has remained relatively constant over the last 5 years in the on trade, in the off trade the gap between cider pricing and beer pricing has risen during the same period – the price of beer has fallen while the price of cider has risen.'[12]

27. As to the question whether a distinction should be made between the different categories of beer in the Irish market, and in particular between lager and stout (as Heineken and S&N's Irish subsidiary, Beamish & Crawford, both produce these types of beer) a majority of respondents indicated such a distinction would indeed be appropriate. In the first instance, lager prices do not appear to be sufficiently constrained by stout prices to warrant the definition of a market that would include lager and stout. Moreover, there are marked differences between lager brands on the one hand and stout brands on the other in terms of brand image and consumer profile, with stout being viewed as a drink for the more mature drinker whereas lager is more popular with younger drinkers. Stout brands such as Diageo's *Guinness*, Heineken's *Murphy's* and S&N's *Beamish* all have a strong Irish heritage and have been present on the market for many years. In contrast, lager brands have an international pedigree[13] and many have entered the market more recently. Such introductions have come about partly though the acquisition of Irish breweries by foreign brewers that have subsequently promoted their international brands (*Heineken* and *Amstel* by Heineken, *Foster's* by S&N, *Stella Artois* by InBev), partly through licences with Irish brewers (*Budweiser* and *Carlsberg* licensed to Diageo, *Coors* licensed to Heineken and *Miller* and *Carling* licensed to S&N) and partly through direct exports to Ireland. As a consequence, the lager segment has seen considerably more changes in the number and positions of brands than the stout market. The preliminary market investigation has also indicated that the existence of regional particularities in the stout market, most notably the close competition between *Murphy's* and *Beamish* in the Munster region, which are absent from the lager market.

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11 Excerpt from the market investigation among customers, question on the influence of other alcohols on beer.

12 Excerpt from answer to question 14 of the questionnaire to competitors.

13 A possible exception would be Diageo's *Harp* lager brand which is seen as being Irish in origin.

28. Similarly, a majority of respondents confirmed that it would be appropriate to make the distinction between the supply of beer to the on-trade and off-trade channels in Ireland. According to a market study provided by the notifying party, approximately 68% of beer in Ireland is currently sold through the on-trade channel with the remaining 32% passing through the off-trade channel.[14] Whilst this remains one of the highest on/off-trade ratios in Europe, the importance of the on-trade channel has been declining in recent years. As recently as 1998 for example, the on-trade channel accounted for nearly 87% of total beer sales with a mere 13% accounted for by the off-trade. The increase in the percentage share of sales through the off-trade has coincided with a dramatic increase in the number of off-trade premises in Ireland, from 1,181 in 2000 to 4,719 in 2007.[15]

29. Moreover, on the basis of information gathered during the investigation, it appears that the two channels experience very different competitive dynamics. In the off-trade segment, where beer prices are seen as a means for retailers to attract customers (i.e. increase 'footfall'), competition is much fiercer than in the on-trade segment and prices have been stable or even declining. In this regard, since the abolition of the Groceries Order in March 2006, which imposed a ban on the below cost selling of alcohol from 1987-2006, the price of alcohol sold by the off-trade has fallen by 3% between March 2006 and December 2007.[16] The offer of lower priced imported beers in the off-trade channel whether via wholesalers or imported directly by multiple retailers is also considered by some to have led to an overall reduction in price.

30. In contrast, beer prices in the on-trade channel have increased on regular basis in recent years. The number of on-trade outlets has fallen from 11,014 to 9,422 between 2000 and 2007 as sales volumes have also decreased. In contrast to the ownership structure of on-trade premises in the United Kingdom, the Irish on-trade channel remains very fragmented with almost all public houses being freehold and owned by individuals. With limited exceptions, major brewers inform their on-trade customers in writing each year of price increases. There is as such no negotiation on price as may take place between brewers and their larger off-trade accounts.

31. Finally, it should be noted that due to the specifics of the Irish market, some respondents explained that it would be relevant to make a distinction between draught beer and packaged beers (i.e. in bottles and cans). Indeed, in Ireland, draught beer is directly distributed by brewers to public houses, whereas packaged beers are distributed by wholesalers even if they are intended to be sold in the on-trade segment. The requirement to reach sales by each customer of at least ca. 1 keg of draught beer per week for quality reasons would be another factor that could lead to the definition of a specific draught market in Ireland. However, as

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14 Canadean, Ireland annual report 2007, p.7.

15 Submission of the Irish Competition Authority to the Government Alcohol Advisory Group, January 2008.

16 Source: Irish Central Statistics Office – Consumer Price Index, quoted in the submission of the Irish Competition Authority to the Government Alcohol Advisory Group.

explained below, the analysis of a draught lager segment would be very similar to that of the on-trade lager market.

32. In light of this preliminary analysis, the Commission considers for the purposes of this decision and without prejudice to the analysis of the Irish authorities that in the present case cider cannot be considered to form part of a relevant product market alongside beer. At the same time, there are indications that in assessing the beer market in Ireland, it would be appropriate to look at each of lager, ale and stout. Finally, in line with previous Commission decisions and the case law of the European Court, the relevance of the distinction between the supply of beer to the on-trade and off-trade channels is again confirmed.

<u>Geographic markets</u>

33. The Commission and the European Court of Justice have historically considered the market for the production and distribution of beer to be national in scope[17]. The notifying party agrees with this view and submits that the geographic market in the present case should therefore be taken to mean the whole of the Republic of Ireland.

34. The notifying party submits that the market should not be considered to be broader than national so as to include Northern Ireland citing *inter alia* differences on the demand and supply side as well as contrasting levels of excise and tax. At the same time, it submits that the market should not be defined as narrower than the whole of the Republic of Ireland as the major brewers are active throughout the country as are all major retailers in the off-trade channel. Furthermore, it submits that the conditions of supply are uniform across Ireland including pricing, levels of taxation and the way in which products are manufactured. It also submits that 'products are available nationwide and there are no regional variations.'[18]

35. The market investigation in the present case has confirmed that the relevant geographic market for lager is national in scope and therefore comprises the whole of Ireland. However, as regards stout, some respondents pointed to certain regional differences in terms of consumer preferences— stout brands *Beamish* and *Murphy's* which were said to be most closely competing in the region of Munster. It can therefore not be excluded at this stage that the market for stout is narrower than national in scope.

36. In light of the above, the Commission has concluded that the relevant geographic market for the production and supply of beer to both the on-trade and off-trade is no wider than Ireland.

37. It can therefore be concluded that the relevant beer markets in Ireland present all the characteristics of a distinct market under Article 9(2)(a) of the Merger Regulation.

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17 See for example COMP/M.3195 Heineken/BBAG and C-234/89 – Delimitis v. Henninger Brau.

18 Form CO, p. 26.

b) COMPETITION ASSESSMENT

38. The proposed transaction would combine the current number two and three players in Ireland. Heineken is the second largest brewer with a [15-25%] share of beer sales based on volumes sold in 2006. S&N is the third largest brewer on the market with a share of [5-15%]. The first player in Ireland is Diageo with a share accounting for [55-65%] of beer sales in Ireland.

39. If the beer market is considered on a narrower basis in terms of distinct segments for lager and stout as suggested by the preliminary market investigation of the Commission, the position of the parties and their competitors would be as shown in the table below. The ale segment is not shown as Heineken is not active in the production or supply of ale in Ireland and consequently there is no overlap between the merging parties' activities.[19]

Table 3 Market shares by beer segments (excluding cider), Ireland, 2007

	Lager		**Stout**	
	On-trade	Off-trade	On-trade	Off-trade
Heineken	[35-45%]	[15-25%]	[0-5%]	[0-5%]
S&N	[5-15%]	[10-20%]	[0-10%]	[0-10%]
Combined	**[45-55%]**	**[30-40%]**	**[5-15%]**	**[10-20%]**
Diageo	[35-45%]	[25-35%]	[85-95%]	[80-90%]
InBev	[0-5%]	[0-10%]	[0-5%]	[0-5%]

Source Form CO

a) Lager markets

On-trade/draught

40. As a result of the proposed transaction, the merged entity would become the market leader in the on-trade lager market with a share of [45-55%] followed by Diageo with [35-45%]. As other competitors do not have appreciable market positions, the transaction would result in a virtual duopoly in this market.

41. The preliminary market investigation has also confirmed that the removal of S&N as an independent market player on the on-trade/draught lager market could have

[19] According to the notifying party, S&N is itself a relatively minor player in the Irish market with two brands, *Beamish Ale* and *Newcastle Brown*, each of which made limited sales in 2007 of [3000-4000] hl and [500-1500] hl respectively. This would correspond to a market share of less than [0-5%] of the total Irish beer market and a market share of [0-5%] of the Irish ale market. The leading ale brands by market share and their owners are: *Smithwicks*, [85-95%] (Diageo), *Bass*, [0-5%] (InBev), *Macardles*, [0-5%] (Diageo) and *Kilkenny*, [0-5%] (Diageo).

anti-competitive effects in that it would remove a company that has an innovative and aggressive pricing policy.

42. It seems clear that S&N plays the role of the most price aggressive player on the market and its efforts are in strong contrast with the existing commercial policy of Heineken. According to one respondent, '[S&N] has always been more price aggressive than Heineken. (…) [S&N's] Miller is sold in a variety of discounted price packages while Heineken is always priced at a premium with little or no dealing. [S&N's] Foster's is sold at EUR […] a pint offering [regular price is EUR […]]. Heineken has never engaged in discounting.'[20]

43. This assessment is substantiated by S&N's submission to the Commission in which it explained how it has implemented discount schemes to promote its *Foster's* (lager) and *Beamish* (stout) brands in the on-trade channel.[21] In summary, if a publican participates in the price promotion and passes a discount to the consumer, S&N reimburses this discount to the publican. These schemes have not been mirrored by competitors such as Diageo or Heineken. One reason suggested for this is that it is simply more expensive to implement such schemes where a brand is already established on the market with a significant market share. This is because when discounts are implemented, they are paid by the brewer to the publican on all volumes that are sold, not just on the incremental volumes. This said, S&N does not believe that any competitor has implemented a discount strategy with smaller brands. Rather, competitors have tended to respond to discount schemes by spending more on advertising and promotional activity in on-trade outlets.

44. It is S&N's belief that customers and consumers support the schemes as evidenced by increased demand for its products: 'Since 2004, Foster's draught volumes have increased [155-165%]. At the same time, the draught lager market declined by 3.7%.'[22] Comments received during the market investigation from the trade association representing the interests of approximately 5,000 publicans geographically spread throughout Ireland outside of the Greater Dublin area have confirmed the validity of this belief: 'The [S&N] offering is primarily a price based one and they have proved to be very competitive in the marketplace in their pricing policy. This has created a reasonable level of support for the brand in specific areas and one of our concerns would be that this offering to the publican, and in turn to the publican's customers, would be diluted in any way as a result of this merger.'[23]

45. In addition to these price promotion schemes, S&N has on several occasions deviated from the general price increases triggered by the market leader, Diageo. According to the notifying party, Diageo is typically the first to announce its price increase to customers in the on-trade segment. Heineken then usually follows 'a

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20 Response to question 41 of the market investigation, questionnaire retailers/wholesalers

21 In response to the Commission's request for information, the parties (Heineken and S&N) submitted documents on a separate basis.

22 S&N submission of 18.2.2008. The price promotion scheme for Beamish stout has also yielded increased market share.

23 Submission of the Vintners' Federation of Ireland, 7.3.2008

few weeks later with similar price increases.'[24] However, S&N has played what could be called the role of a maverick in the Irish market and has not always followed the price increases of its two major competitors either in terms of amount or timing: 'On the occasions that [S&N] has followed the announcements, it has usually (although not in every instance) applied the same amount, although on two occasions, it only did so several months later. However, in 2004, 2005 and 2007, [S&N] deviated from the price increases. (…)'[25]

46. While S&N's share on the on-trade lager segment (and draught lager segment) is still limited (respectively [5-15%] and [0-10%]), S&N's ambition is for *Foster's* to reach a [5-15%] share of the draught lager market within 3-5 years and to make *Miller* a "*tier 1*" lager brand. […].

47. From the above it appears that S&N is essentially the only player in the market which competes with Diageo and Heineken on price in order to gain market share. The proposed transaction would remove S&N from the market and any effect it might have on the behaviour of its two larger competitors. At the same, the proposed transaction, by reducing the number of competitors in the market, could increase the likelihood of coordinated effects: agreement on the terms of coordination would be facilitated by the elimination of the sole player that so far did not fully follow the regular price increases adopted by Heineken and Diageo. Transparency and monitoring capability would increase by the reduction to two main players, which post-merger are closely aligned and symmetric. The transaction further eliminates an innovative and price aggressive player actively competing with the current two main players. The Commission therefore concludes that the proposed concentration threatens to affect significantly competition on the on-trade lager market (or the draught lager market) in Ireland.

Off-trade

48. As noted previously, the off-trade channel is much more open to competition than the on-trade channel. As a result, the number of market players, brands, and products is significantly higher. By way of example, Diageo enjoys a share of [35-45%] of the on-trade lager market but only [25-35%] of the off-trade lager market. At the same time, companies such as Comans, which acts as an importer and wholesaler of alcoholic beverages, has only a [0-5%] share of the lager on-trade market but more than [5-15%] of the off-trade market.

49. Given that the combined market share of the parties is limited to [30-40%], the probability of competition concerns arising on the off-trade lager segment is less likely. Furthermore, no retailers in the market investigation have expressed concerns regarding the proposed transaction.

50. Nevertheless, a range of factors could point to the existence of competition concerns. […][26]. Second, despite its relative openness, the market would become

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24 Form CO, p.88.

25 S&N submission of 18.2.2008.

26 […].

concentrated with two players controlling nearly [65-75%] of the market. Finally, the concern has been expressed that the merger may have anti-competitive effects on the wholesale distribution of lager in Ireland. In particular, it has been suggested that the merged entity, with its broadened product portfolio, will choose to distribute its products solely through its own distribution system[27] thereby depriving other wholesalers of the opportunity of distributing some of the leading off-trade lager brands.

51. On this basis, and without prejudice to the Irish Authorities' further investigation, the Commission considers that competition concerns relating to the off-trade lager market cannot be excluded at this stage.

b) Stout markets

52. The proposed transaction would bring together the number two and three stout brands in the Irish market: S&N's *Beamish* brand and Heineken's *Murphy's*. The market share of the merged entity would be relatively modest at [5-15%] in the on-trade channel and [10-20%] in the off-trade channel. In both instances, the merged entity would be a distant second to the market leading stout brand *Guinness* which is owned by Diageo. This brand has a share of [85-95%] in the on-trade and [80-90%] in the off-trade channel and is viewed by many respondents in the market investigation as a 'must stock' brand.

53. Although the market share of the combined entity on the stout markets is not such as would normally raise competition concerns, certain factors peculiar to the stout markets suggest that further investigation is warranted. First, it has been brought to the attention of the Commission by the Irish Competition Authority in its request and confirmed by several respondents in the market investigation that the stout market could have marked regional differences. In particular, it has been suggested that Heineken's brand, *Murphy's*, and S&N's *Beamish* are most closely competing in and around Cork, where each party has its brewery. Indeed, it has been suggested in the market investigation that Heineken has abandoned any attempt to compete with Diageo on a national basis and has retreated to its Cork heartland. Thus, the market share of the parties in Cork and the surrounding Munster region would be much higher than on a national basis at [45-55%] with the remaining part of the market accounted for by the Guinness.

54. Second, although S&N is still a modest player on the market, it is the only actor that challenges Diageo's dominant position in stout. As noted above, S&N supports the *Beamish* brand with a price promotion scheme that has shown some success in gaining market share from Diageo. As noted by S&N in its submission to the Commission, 'By consistently emphasising this promotion, the brand has achieved the number 2 market position in the stout category.' This is reflected by the brand's

[27] Heineken owns 100% of Western Beverages and Western Cork Bottling and 50% of Nash Beverages. Western Beverages, Western Cork Bottling and Nash Beverages are multi-brand drinks wholesaler active in the west of Ireland. S&N does not have any wholesale operation in Ireland. Heineken estimates its share of the national distribution market to be [5-15%]. According to Heineken, other wholesalers active in Ireland include M&J Gleeson ([25-35%]), C&C Wholesale ([10-20%]) Comans Wholesale ([5-15%]) and Gilbeys, a subsidiary of Diageo ([5-15%]).

share of the on-trade market which has grown from [0-5%] in 2004 to [0-10%] in 2007. During the same period, *Murphy's* share decreased from [0-5%] to [0-5%].

55. S&N remains committed to the *Beamish* brand and has set itself ambitious targets in terms of increased market share in the medium term. Heineken has submitted that it anticipates that it should be possible to use the *Beamish* and *Murphy's* brands to pursue a differentiated approach to sales in the stout segment and place more competitive pressure on the market leader, *Guinness*.[28] However, the market investigation has raised concerns that the merged entity might choose to rationalise its brand portfolio post-transaction and as a consequence would be unlikely to promote two stout brands, each of which has its roots in Cork. This would reduce the number of competing stouts in Ireland from three to two and therefore consumer choice.

56. In light of the above, the Commission considers that competition concerns relating to the stout markets (on-trade and off-trade) cannot be excluded at this stage and merit further investigation by the Irish Authorities.

57. Given that the transaction threatens to affect significantly competition in a market which present all the characteristics of a distinct market, the two legal requirements for an Art. 9(2)(a) referral are fulfilled.

c) Discretion

58. Under Article 9 (2) a, the Commission has discretion as to whether to refer the case. According to the Referral Notice, the following principles guide the exercise of the Commission's discretion: *In principle, jurisdiction should only be re-attributed to another competition authority in circumstances where the latter is more appropriate for dealing with a merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority. Particular regard should be had to the likely locus of any impact on competition resulting from the merger. Regard may also be had to the implications, in terms of administrative effort, of any contemplated referral (para. 9).*

59. The ICA argues that it would be the most appropriate authority to review the Irish part of the case for a number of reasons. In particular, public houses are mainly owned by private individuals (rather than large pubcos as is the case in the UK), which makes for a dispersed and fragmented customer base. Furthermore, there might be regional differences within Ireland (for example in the stout market), that would be better grasped and analyzed by the ICA. These two factors (dispersed customer base and regional differences) were confirmed by the market investigation and indeed place the Irish Authority in a better position to investigate the effect of the merger in Ireland. Furthermore, the ICA has undertaken several recent merger investigations and a sector enquiry type of investigation in the beer sector and therefore has experience and expertise in the markets concerned.

60. As regards the administrative burden brought about by such a referral, the ICA explains that a referral would not have significant implications in terms of time delay, legal uncertainty, and risk of conflicting assessment as the investigation will

[28] Form CO, p.32.

be carried out only by the Irish Competition authority. The conclusions drawn from the market investigation, and in particular the lack of existence of competition concerns outside of Ireland, support this view.

61. Finally, it should be noted that Heineken has expressed to the Irish Competition Authority its support for the partial referral of the case to Ireland.

62. Consequently, for the above reasons, the referral request of the Irish beer markets to the ICA under the Article 9(2)(a) of the Merger Regulation is justified.

2. Art. 9 (2) b

63. The ICA further argues that the concentration may affect competition on local markets for stout in Ireland, which would not be a substantial part of the Common market. This limb of the request is redundant as the case including all beer markets in Ireland is to be partially referred under Article 9(2)(a). It is therefore not necessary for the Commission to take a final position on this element of the request in this referral decision.

VIII CONCLUSION

64. The conditions to partially refer the case to the Irish Competition Authority under Article 9(2)(a) are met.

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration resulting in the acquisition of control of Scottish & Newcastle assets is, as regards the aspects concerning the markets for beer in Ireland, hereby referred to the competent authorities of Ireland, pursuant to Article 9(3)(b) of Council Regulation (EC) No 139/2004.

Article 2

This decision is addressed to Ireland.

Done at Brussels, 03/04/2008

For the Commission

(signed)

Neelie KROES
Member of the Commission