

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

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 03/04/2008

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 03/04/2008
SG-Greffe(2008) D/201513

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.4999 - Heineken / Scottish & Newcastle assets
Notification of 12 February 2008 pursuant to Article 4 of Council
Regulation No 139/2004¹**

1. On 12 February 2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("the Merger Regulation") by which the undertaking Heineken NV ("Heineken", Netherlands) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of parts of Scottish & Newcastle plc ("S&N assets", United Kingdom) by way of a public offer announced on 25 January 2008.
2. After examination of the notification, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the EEA agreement regarding the parts of the transaction that have not been referred to the Irish Competition Authority under Article 9 of the Merger Regulation.

I. THE PARTIES

3. Heineken is an international brewing company active in the production, commercialisation, and distribution of beer and other beverages world wide.
4. Scottish & Newcastle is a public limited company registered in the United Kingdom and listed on the London Stock Exchange. It is active worldwide in the production, sale, marketing, wholesaling and distribution of beer, soft drinks and mineral water.

¹ OJ L 24, 29.1.2004, p. 1.

II. THE OPERATION

5. The notified transaction is part of a recommended joint public bid by Carlsberg and Heineken, which, if successful, will lead to the break-up of Scottish & Newcastle. The present notification relates to Heineken's acquisition of certain assets (including brands) and liabilities relating to the businesses operated by Scottish & Newcastle in the United Kingdom, Ireland, Finland, Belgium, and Portugal as well as exports to other EU member states. On 7 March 2008, the acquisition of the remaining assets of Scottish & Newcastle by Carlsberg was cleared by the Commission (Case No. COMP/M.4952 - Carlsberg/Scottish & Newcastle assets).
6. While the *Kronenbourg* brand and brewery will be acquired by Carlsberg, Heineken will receive a licence for the marketing of the *Kronenbourg* brand in the United Kingdom². As an exception to the principle agreed between the parties by which ownership of S&N brands follows the allocation of S&N national businesses, Carlsberg will also acquire the *Grimbergen* brand which is currently held by S&N's business in Belgium which is to be acquired by Heineken³.
7. 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, [...]
8. 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 and is certain to take place within a short time period after the first acquisition, "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.

III. CONCENTRATION

9. 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.

² Carlsberg will acquire the worldwide ownership of the *Kronenbourg* brand via the acquisition of S&N's French business (Brasseries Kronenbourg S.A.). The *Kronenbourg* brand is currently manufactured and sold in the UK by S&N UK under licence from Brasseries Kronenbourg. Under the terms of the consortium agreement signed by the parties, Heineken, which is to acquire S&N's business in the UK, will receive a [...] -year licence for the *Kronenbourg* brand in that country.

³ Under the terms of the consortium agreement signed by the parties, Heineken will receive a [...] -year licence in respect of the *Grimbergen* brand in Belgium and will commit to continuing production of the brand for Carlsberg's sales outside Belgium ([...])

IV. COMMUNITY DIMENSION

10. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (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 State⁴. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

V. PROCEDURE

11. By letter dated 29 February 2008, Ireland requested the referral to its competent authorities of the part of the proposed concentration relating to Ireland with a view to assessing it under the Irish national competition law, pursuant to Art. 9(2) of the Merger Regulation. By Commission decision of today the concentration was referred to the competent authorities of Ireland pursuant to Art. 9(3) of the Merger Regulation to the extent it concerns the markets for beers in Ireland. This decision will therefore only address the part which relates to the markets for beers in Member States other than Ireland.

VI. COMPETITIVE ASSESSMENT

A. Relevant markets

Relevant product market

12. The proposed transaction concerns the drinks industry and in particular the beer sector. The Commission's decisional practice⁵ and the European Court of Justice's case law⁶ 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 by type (e.g. lager, ale and stout in the UK) or by quality (e.g. standard vs. premium) might also be relevant in some countries⁷ but the question was ultimately left open.
13. In the present case, the notifying party submits that the relevant product market is at least as wide as to include all beer but that it is not necessary to reach a definitive conclusion since, even on a narrower basis, the proposed transaction will not give rise to a significant impediment to effective competition.

⁴ The turnover provided for S&N assets are based on the notifying party's best estimates and publicly available information including Scottish & Newcastle's 2006 annual report. [...].

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 – Delimitis v. Henninger Brau, judgment of the Court of 28 February 1991

⁷ See for example M.2569 Interbrew/Beck's and M.3032 Interbrew/Brauergilde

14. In considering the relevant product market for beer, it is to be noted that the market investigation in the present case has generally confirmed the conclusions reached by the Commission in prior cases concerning the beer sector. However, as the proposed transaction does not raise any competition concerns irrespective of the definition chosen, it is not necessary for the purposes of this decision to define the precise delineation of the relevant market.

Relevant geographic market

15. The Commission and the European Court of Justice have historically considered the market for the production and distribution of beer to be national in scope⁸. The notifying party submits, for the purposes of the present notification, that the market should be defined as national. The market investigation supports the conclusion that the scope of the relevant geographic market for the production and distribution of beer in the countries affected by the concentration is indeed national.

B. Competitive assessment

16. The proposed transaction would give rise to a number of technically affected markets in the sense that a market share of 15% or more is increased by a minimal amount. Moreover, the overlap remains minimal even if a segmentation by distribution channel (i.e. off or on-trade) and/or by type of beer is considered.

Table 1 - Parties' market share for beer in 2006 (based on volumes)

| | Heineken | S&N | Market Size (1 000 hl) |
|----------------|-----------------|-------------------------------------|-------------------------------|
| Austria | [45-55%] | Assets [5%] | 9082 |
| Bulgaria | [25-35%] | [<5%] | 5229 |
| Finland | [<5%] | [30-40%] | 4630 |
| France | [25-35%] | [<5%] | 20263 |
| Greece | [75-85%] | [<5%] | 4295 |
| Hungary | [20-30%] | [<5%] | 7812 |
| Italy | [25-35%] | [<5%] | 17625 |
| Netherlands | [40-50%] | [<5%] | 12974 |
| Poland | [30-40%] | [<5%] | 32546 |
| Portugal | [<5%] | [40-50%] | 6715 |
| Romania | [20-30%] | [<5%] | 17249 |
| Slovakia | [35-45%] | [<5%] | 4437 |
| Spain | [40-50%] | [<5%] | 37014 |
| United Kingdom | [<5%] | [20-30%] | 56834 |

Source: Notifying party

⁸ See for example COMP/M.3195 Heineken/BBAG and C-234/89 – Delimitis v. Henninger Brau.

17. The overlaps are negligible but given the original high market shares (>50%) in Austria and Greece, and concentration level in France, the Commission investigated whether the overlaps brought about by the proposed transaction could have any impact. It was however confirmed that the very small addition of market shares would not have any effect on the market⁹.
18. With regard to the UK, it can be observed that the overlap and combined market shares remain limited¹⁰. However, some market participants pointed to the fact that Heineken/S&N will market the *Kronenbourg* brand under a licence from Carlsberg, who is also present as a competitor on the UK market with other brands, and questioned the competitive interaction between the two players. The licence stems from the country principle of the agreed split-up whereby Carlsberg acquires the French business including *Kronenbourg* and Heineken the UK business where *Kronenbourg* has a non-negligible market position. However, *Kronenbourg* only accounts for about [0-5%] of the UK market¹¹. Post-merger, Heineken/S&N would account for [20-30%] (including *Kronenbourg*; Heineken accounts for [0-5%]), followed by Coors ([15-25%]), InBev ([10-20%]), and Carlsberg ([5-15%], total market figures). Given the limited importance of the *Kronenbourg* brand, it cannot be assumed that competition between Carlsberg and Heineken will lapse on the UK market. Furthermore, even under the assumption that competition will be limited regarding this particular brand, the market structure does not suggest that this could lead to competition concerns.
19. Another market participant commenting on the effects of the transaction in the UK explained that large brewers would have an incentive to attempt to make the consumer demand for ale shift to lager and promote higher priced international lager brands at the expense of local ale brands¹². However, the Commission notes that, according to the claim, this alleged practice is already being implemented by S&N so that, even if Heineken were to continue this policy after the merger, this would not be specific to the merger. It can be added that the lager segment would not experience any significant structural change with the proposed transaction¹³ and that it can be assumed that brewers would find it profitable to continue to promote and distribute ale if consumer demand was strong enough.
20. The same respondent more generally explained that the proposed concentration would have anti-competitive effects on the European markets due to the lowering of competition and rise of entry barriers. However, these concerns did not find any further

⁹ Some French and Greek customers expressed concerns but these concerns are due to a misunderstanding of the asset split-up between Heineken and Carlsberg. In France, the *Kronenbourg* brewery will be the property of Carlsberg and Heineken's strong position (ca. [25-35%] of the market) will not be changed. In Greece, the *Mythos* brand also goes to Carlsberg and thus, allegations that Heineken's market share would be strengthened after the merger are not founded.

¹⁰ This remains valid under narrower market definitions.

¹¹ This figure remains below [0-5%] under any segmentation (on-trade vs. off-trade and lager vs. other beers).

¹² Sales of lager and ale in the UK respectively account for ca. 75% and 20% of the overall beer market. The remainder is sales of stout.

¹³ The market shares of the parties on the lager segment in the UK are: Heineken: [0-5%]; S&N: [15-25%].

substantiation in the market investigation. Indeed, the Commission notes that the proposed concentration does not have any impact on the number of major independent players in each national market and the overlaps are extremely limited.

21. Thus, it can be concluded that the proposed concentration will not significantly impede effective competition in the common market.

VII. CONCLUSION

22. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission

(signed)

Neelie KROES
Member of the Commission