Coca-Cola: Europe-wide remedies in fizzy drinks

Philipp GASPARON and Blaž VIŠNAR, Directorate-General Competition, unit B-2

1. Introduction

On 22 June 2005 the Commission adopted a commitment decision based on Article 9 of Regulation (EC) No 1/2003 (1) addressed to The Coca-Cola Company (‘TCCC’) and three of its major bottlers (2) (all together: ‘Coca-Cola’), making the commitments which were submitted by Coca-Cola binding upon it. (3) This commitment decision concerns the supply of carbonated soft drinks (‘CSDs’) in the EEA and prevents Coca-Cola from entering into exclusive supply arrangements, from practising growth and target rebates or from leveraging market power between various product categories. It brought to an end the Commission’s in-depth investigation relating to concerns under Articles 82 of the EC Treaty and 54 of the EEA Agreement.

2. Procedure

After receiving several complaints alleging abuse of dominant position by Coca-Cola, the Commission undertook dawn raids on Coca-Cola’s premises in Austria, Belgium, Denmark, Germany and the United Kingdom in 1999 and 2000. By 2004, the evidence gathered against Coca-Cola covered the 25 EC Member States, Norway and Iceland.

On 29 September 2004 the Commission opened proceedings under Chapter III of Regulation (EC) No 1/2003. From a procedural point of view, this had the effect to relieve the competition authorities of the Member States of their competence to act against Coca-Cola on issues dealt with by the Commission. (4)

In mid-October 2004 the Commission sent a so-called ‘preliminary assessment’ (5) to Coca-Cola. It stated the Commission’s competition concerns and gave Coca-Cola the opportunity to remedy these concerns by submitting commitments. In November 2004 the set of commitments which Coca-Cola submitted in response was market tested through publication in the Official Journal of the European Union, whereby interested third parties (e.g. consumers, customers and competitors) were invited to submit their critical observations. (6)

The Commission received observations from altogether 33 market players (19 retailers, such as supermarkets and restaurant/catering chains, and 14 beverage suppliers). These observations, on the whole, confirmed the effectiveness of the commitments in addressing the Commission’s concerns. They aimed at enhancing the commitments, either by adjusting their scope or by improving their wording. By February 2005 Coca-Cola, informed of these observations by the Commission, submitted an amended commitment proposal.

In May 2005 the Member States, consulted on the draft commitment decision in the Advisory Committee on Restrictive Practices and Dominant Positions, unanimously issued a favourable opinion.

3. Relevant market, dominance and practices raising concerns

According to Recital 13 of Regulation (EC) No 1/2003, a commitment decision should not conclude ‘whether or not there has been or still is an infringement’ but simply finds that ‘there are no longer grounds for action by the Commission’. As a consequence, the Commission’s assessment of the market definition and of Coca-Cola’s dominance and practices raising concerns is necessarily expressed in a way which is ‘preliminary’, aiming at identifying competition concerns rather than establishing infringements.

3.1. Relevant market

In the Commission’s preliminary assessment a CSD market was defined as consisting of cola-flavoured, orange-flavoured, lemon and/or lime-flavoured, other fruit-flavoured CSDs and bitter CSDs. Other beverages, such as packaged water and sport and energy drinks, were deemed to be outside the market. The CSD market definition was based on the fact that, as far as product characteristics and intended use are concerned, CSDs could be distinguished from other beverages. Moreover, the Commission’s preliminary view of this market definition was supported by consumer substitution preferences between various beverage categories.

---

(2) I.e. Bottling Holdings (Luxembourg) sarl, Coca-Cola Erfrischungsgetränke AG and Coca-Cola Hellenic Bottling Company SA.
(3) See http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_78.html#i39_116.
As to the dominance of TCCC and its respective bottlers, the Commission's preliminary assessment was based on strong market positions due to high market shares (1), unique brand recognition and the 'must stock' nature of TCCC's strongest brands — protected from competition by barriers to entry in the form of sunk advertising costs preventing significant market entry. In addition, it was 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 are in a weak position in the negotiations for the supply of TCCC-branded CSDs.

3.3. Practices raising competition concerns

The Commission's investigation into Coca-Cola's commercial activities, namely exclusivity related practices, target and growth rebates and assortment related arrangements, identified competition concerns by-and-large common to all three types of practices, namely the foreclosure of competitors, reduction of the variety of choice for the consumer and, consequently, avoidance of downward pressure on prices. Evidence indicated that one or more of the above practices existed in all the EC Member States, Iceland and Norway.

Exclusivity and exclusivity related practices

The Commission gathered evidence leading it to the preliminary view that some of the business practices of Coca-Cola would ensure them de iure or de facto exclusive supply of CSDs to customers. Their exclusivity agreements had sometimes directly prevented customers from being able to offer competing brands. Moreover, competing suppliers could also be denied access to outlets by virtue of the effects of Coca-Cola's financing agreements and technical sales equipment arrangements (in particular beverage coolers and fountain dispensers).

Through financing agreements, on-premise outlets may gain loans repayable by purchases of a certain quantity and assortment of CSDs. De facto exclusion of competitors might ensue in cases

---

(1) 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. At the time of the preliminary assessment, data for Cyprus, Luxembourg and Malta was not yet available for 2003.


where such agreements are of unduly long duration, imply burdensome termination conditions or bundle different Coca-Cola beverages.

Beverage coolers and fountain dispensers represent by far the most attractive way of serving CSDs for certain types of operators. For example, fast-food restaurants prevailingly resort to fountains since this facilitates and speeds up the service. Corner-shops satisfy impulsive demand, and beverage coolers are a superior mean to sell ready-to-drink CSDs in such outlets. If such sales equipment, reserved for Coca-Cola beverages only, is the sole CSD source in the outlet (often the case in small shops and gastronomy due to space constraints), access to such outlets would be foreclosed to competing suppliers.

**Target and growth rebates**

In the take-home channel, Coca-Cola has frequently offered considerable financial incentives to customers reaching individually specified purchase objectives, often by reference to the customer's purchases during a previous period. These provisions took the form of target rebates (individually set on the basis of a customer's past performance) and growth rebates (a form of target rebates implying sales growth), most of which were calculated on a separate quarterly basis with respect to total turnovers in colas and non-colas to reflect the conditions of an earlier undertaking to the Commission (1989) (1).

However, notwithstanding quarterly reference periods and split into colas and non-colas, competition concerns linked to target and growth rebates persevered. Since they were calculated on the overall purchases of the customer, such rebates were considered likely to offer strong financial incentives for his not insignificant additional purchases once the threshold was approached. Coca-Cola customers incurred significant financial loss if they did not reach the threshold. Since smaller suppliers are generally likely to be unable to match the rebate due to their limited size they do not, for the customer, represent a real alternative to Coca-Cola’s incentives. As a consequence, growth and target rebates increase the customer’s switching costs and his loyalty.

**Tying, assortment and space-to-sales arrangements**

On some occasions Coca-Cola made the supply of the strongest TCCC brands conditional upon the purchase of less well-selling CSDs and non-CSD soft drinks. This could lead to foreclosure of rival suppliers of CSDs and non-CSD soft drinks, since such tied purchases exhaust the customer's purchasing capacity within a flavour segment.

Coca-Cola also bundled wide ranges of 10 to up to 60 stock keeping units (‘SKUs’ — e.g. 0.33 l PET bottles) by considerable payments to customers purchasing these entire ranges, sometimes reaching 2% of all customer's CSD purchases from Coca-Cola. Since such ranges, generally distinguishing between cola and non-cola CSDs, included highly demanded SKUs (such as Coca-Cola Regular and Fanta Orange), assortment related rewards paid out to customers were significant. The competition concern was that the turnover of the best selling SKUs was leveraged to favour customers' orders of less well-selling SKUs. Due to space constraints in outlets, e.g. supermarket shelves, access to sales space for rival suppliers would be rendered more difficult and costly.

In addition, through its space-to-sales arrangements, Coca-Cola financially enticed its retail customers to reserve a part of their total CSD shelf space to TCCC-branded products in proportion to Coca-Cola's sales share in the take-home channel. (2) Due to a large turnover of its three major brands, Coca-Cola Regular, Coca-Cola Light and Fanta Orange, a significant proportion of shelf space was assigned to Coca-Cola's products. Within the shelf space thus reserved, Coca-Cola allocated space in a manner to favour less-selling products, whilst such space would otherwise be allocated in function of the productivity of SKUs. This further deteriorates conditions for access to shops for rival suppliers of CSDs, especially those competing with Coca-Cola's less well-selling CSDs.

4. Decision making the commitments binding upon Coca-Cola

The Commission decision renders the commitments, which it considered sufficient to address its foreclosure concerns identified in the preliminary assessment, binding upon Coca-Cola. The binding nature of the decision also means that Coca-Cola could be sanctioned in case of breach. (3) In its decision the Commission equally finds that, in view of the commitments, grounds no longer exist for it to take action against Coca-Cola. Notwith-

---

(2) For example, if Coca-Cola's share in overall CSD sales amounted to 60% and if it required that the shelf space reserved for the entire TCCC brand portfolio accounted for 90% of this share, Coca-Cola would be entitled to 54% of the total CSD shelf space for their products.
(3) The Commission may impose a fine of up to 10% of Coca-Cola’s turnover or periodic penalty payments (Articles 23(2) and 24 of Regulation (EC) No 1/2003).
standing, the Commission retains the power to investigate Coca-Cola’s practices that fall outside the scope of the commitment decision. (1)

The commitments define their geographical scope and contain provisions relating to the take-home and/or on-premise channel. They also include rules as to the implementation of the commitments. A brief overview is provided below.

**Geographical scope**

The commitments will be applicable where, in the 25 EC Member States, Norway and Iceland, TCCC-branded CSDs (e.g. Coca-Cola, Fanta, Sprite) account, in the previous year for more than 40%, and double the share of the nearest competitor of national CSD sales in either one of the distribution channels. This provision enables the commitments to adapt to potential evolutions of Coca-Cola’s market power.

**Rules for the take-home and/or on-premise channels**

There is a general ban on any exclusivity provisions or percentage-based purchasing commitments, nor is Coca-Cola allowed to interfere with other suppliers’ commercial relationships with the customers. (2) On top of these commitments applicable to both channels, Coca-Cola will, with respect to financing agreements, limit the repayment period to 5 years and allow the customer to (a) repay any proportion of the loan due in cash where the loan is repayable by purchases of TCCC-branded CSDs and (b) to terminate and repay the outstanding balance without penalty. The length of availability agreement obliging the customer to make available certain TCCC products is limited to 5 years with annual termination options after the initial three years.

Rent-free beverage coolers supplied by Coca-Cola can only be exclusive if the outlet has other installed chilled beverage capacity to which the consumer has direct access and which is suitable for stocking CSDs other than Coca-Cola's. Where there is no alternative CSD capacity, the customer will be free to use at least 20% of Coca-Cola’s beverage cooler for any products of his choosing. When renting a beverage cooler the customer may in any event use at least 20% for any product of his choosing.

The fountain dispenser arrangements by Coca-Cola will not hinder outlets from offering rival CSDs, either through competing fountain dispensers or in packaged format. The duration of purchase commitments for dispensed beverages is limited to 3 years, with the option to terminate such commitments after the initial two years.

Coca-Cola will refrain from offering target and growth rebates.

The commitments ban tying the sales of Coca-Cola and Fanta Orange (3) to purchases of other beverages of Coca-Cola, and likewise prohibit assortment arrangements linking either of the said CSDs brands to additional beverages of Coca-Cola. Shelf-space reservations in the take-home channels (e.g. supermarkets) are to be done separately for Coca-Cola, Fanta Orange and other CSDs, respectively. In addition, caps are imposed on shelf-space available for Coca-Cola and Fanta Orange items.

**Implementation**

The commitments will be made binding until 31 December 2010. In countries where the commitments are applicable, all new agreements of Coca-Cola will have to comply with the commitments from the very notification of the decision. All agreements (including existing ones) will need to be aligned with the commitments by 1 January 2006. In the territories served by bottlers other than Coca-Cola (4), TCCC will use best efforts that those other bottlers also adhere to and implement the commitments where they are applicable. Such best efforts may also lead to termination of bottling agreements by TCCC, where the bottlers refuse to adhere to the terms of the commitments. An annual compliance report shall be provided to the Commission.

**5. European-wide perspective of the Coca-Cola commitment decision**

The Coca-Cola commitment decision was of particular relevance for the Member States, given its Europe-wide dimension and the fact that there were ongoing national investigations against Coca-Cola. Such national investigations came to a halt with the opening of formal competition proceedings at EC level. During the proceedings, Member

(1) For practices falling under the decision, revision pursuant to Article 9(2) of Regulation (EC) No 1/2003 is, under certain circumstances, possible.

(2) Notwithstanding the exclusivity ban exclusive CSD supply agreements are exceptionally allowed in the on-premise channel provided that they result from sponsorship arrangements or from tendering procedures, the latter held either by public authorities or large private sector customers. In the case of private tenders, such exclusive supply may amount to maximum 5% of Coca-Cola’s CSD sales in the on-premise channel and is limited to a maximum of five years giving the customer an annual option to terminate the supply agreement without penalty following an initial term not exceeding three years.

(3) Unbundling of Fanta Orange is subject to a market share threshold throughout the commitments.

(4) Cyprus, Denmark, Finland, parts of Germany, Iceland, Malta, Norway, Portugal, Spain and Sweden.
States remained associated to the EC proceedings (e.g. ongoing information exchange between the Commission and the Member States, consultation of Member States in the Advisory Committee).

By bringing the Coca-Cola case to an end with the Commission’s commitment decision Member States regained their competence to act against Coca-Cola. In fact, Recital 13 of Regulation (EC) No 1/2003 stipulates that ‘commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make a finding of infringement and to decide upon the case’, since, as must be recalled, a commitment decision only finds that there are no longer grounds for action by the Commission without taking any position on the existence of an infringement. This being said, Member States would not be allowed to run counter to the effet utile of the Commission’s commitment decisions. (1)

6. Conclusions
The Coca-Cola decision shows that the commitment procedure introduced by Regulation (EC) No 1/2003 may also be used in cases involving a global player resulting in decisions bearing a Europe-wide dimension. During the coming five years, the European fizzy drinks markets will benefit from a set of clear and binding obligations incumbent on Coca-Cola which are aimed at increasing competition on the merits.