PRICE FIXING (BREWING): THE BREWERS' CARTEL CASES

Subject: Price fixing
Market sharing
Import restrictions
Information exchanges

Industry: Brewing
(Implications for other industries)

Parties: Listed in text below

Source: Commission Statements IP/01/1739-40, dated 5 December 2001

(Note. Several cases are involved in the following report, two from Belgian, one from Luxembourg; some of the parties overlap. The Luxembourg case illustrates the point made by the Commission elsewhere that even small and medium-sized enterprises may be caught by the rules prohibiting anti-competitive cartels. The reports contain an interesting discussion of the way in which "aggravating" and "mitigating" circumstances are taken into account in the assessment of the infringement and hence in the calculation of the fines imposed on the parties.)

Summary of the Belgian cases

The Commission has fined several companies a total of over €91m for participating in two distinct secret cartels on the Belgian beer market between 1993 and 1998. The infringements included market sharing, price fixing and information exchange. They affected the "horeca" sector (hotels, restaurants and cafés) as well as the retail sector (supermarkets and other food shops), including the sale of private label beers. This is the first Commission prohibition decision in a series of cartel cases in the beer sector. It involves major market operators. One of the extraordinary features of this case is the personal involvement of Interbrew's, Alken Maes' and Danone's top managers at the time.

In the course of 1999 the European Commission undertook surprise inspections at the premises of Interbrew, Alken-Maes and the Belgian Brewers Confederation (CBB). These inspections led to an investigation providing the Commission with evidence of two distinct cartels in the Belgian market. The first cartel involved Interbrew (by far the biggest brewer in Belgium, with a market share of around 55%, and the second largest brewer in the world) and Alken-Maes (the second biggest brewer in Belgium, with a market share of around 15%) as well as its parent company at the time, Danone. This cartel covered a wide range of anti-competitive arrangements in the horeca sector (sales for consumption away from home in hotels, restaurants and cafés) as well as the retail sector (for example, sales in supermarkets or smaller food shops for consumption at home). The second cartel concerned specifically the segment of so-called private label beers, that is, beers which supermarkets order from brewers but sell under their own

brand name. Interbrew, Alken-Maes, Haacht and Martens (a brewer whose production consists almost entirely of private label beer) participated in this second cartel.

Total fines were imposed on the companies involved as follows:

Interbrew:	€46,487,000
Danone/Alken-Maes:	€44,628,000
Haacht:	€ 270,000
Martens:	€ 270,000

The cartel involving Interbrew and Danone/Alken-Maes

From early 1993 until the beginning of 1998, the two parties were involved in wide ranging cartel activities on the Belgian beer market. Interbrew used the code name "Université de Lille" or "project Green" for these activities. The cartel activities encompassed a general non-aggression pact and more specifically the limitation of investments and advertising in the horeca sector, the allocation of horeca customers, price-fixing in the retail sector, a new tariff structure to be applied in the horeca sector as well as in the retail sector and finally a detailed monthly information exchange system concerning sales volumes in both sectors. A striking feature of this cartel is that the CEO's themselves and other top management of the companies regularly met to initiate and monitor the above mentioned arrangements. Another feature worth mention is that Danone, which was Alken Maes' parent company during the relevant period of time, was itself actively involved in these arrangements.

The cartel took off with a price fixing agreement for the retail sector and an agreed limitation of commercial investments in the horeca sector. An internal Interbrew note from the spring of 1993 showed that Interbrew's and Danone's top management were already considering to enter into a closer cooperation. However, the Interbrew people thought that Danone had more to gain from this. Moreover, they had anti-trust concerns. In May 1994, contacts between the two companies intensified. This was due to a threat from Danone: if Interbrew did not transfer 500,000 hl (roughly a 5% share of the Belgian market) to Alken-Maes in the Belgian retail sector, it would make life difficult for Interbrew-France. Evidence of this threat stems from declarations made by former Interbrew representatives but also from an internal Heineken document. This document was found during an inspection at Heineken's premises, concerning another cartel investigation.

The threat eventually led to a "gentlemen's agreement" between the parties at the end of 1994. They committed themselves generally to respect each other's market positions. They further agreed on a number of specific points, including price-fixing in the retail sector, market sharing in the horeca (initially the classic outlets, later on also the national accounts), commercial investments and a new tariff structure in both sectors. In addition, throughout this period the parties exchanged monthly information about their sales volumes in both sectors. At the beginning of 1998, the parties noted that they had achieved many of their aims.

The private label cartel

In the course of the investigation into the cartel involving Interbrew and Danone/ Alken-Maes, Interbrew informed the Commission about a series of meetings in the period from October 1997 until July 1998 between itself, Alken-Maes, Haacht and Martens concerning the private label beer market in Belgium. The discussions during these meetings aimed at avoiding a price war and at consolidating the existing allocation of customers. This amounted to a concerted practice within the meaning of Article 81 of the EC Treaty. The parties also agreed to exchange information about their clients in the private label segment. Interbrew and Alken-Maes took the initiative in organising the four meetings; However, Haacht and Martens did not merely play a passive role in the concerted practice: both participated in all meetings and actually exchanged information about sales volumes. Moreover, Martens suggested at one point that the Dutch private label beer producers should be invited to the meetings.

The calculation of the fines

When setting fines, the Commission takes into account the gravity of the infringement, its duration, any aggravating or mitigating circumstances as well as the cooperation of the company. It also takes into account a company's market share in the product market and its overall size. The upper limit of any fine is established at 10% of a company's total annual turnover.

As to the cartel involving Interbrew and Danone/Alken-Maes, the Commission considers that the price fixing and market sharing cartel represents a serious breach of the rules on competition. For such a breach, the normal amount of the fines is at least €20m. Interbrew and Danone are both big, international companies; and cartel was of medium duration (five years). This led the Commission to increase the basic fines for both companies by almost 50%.

For Danone there are two aggravating factors which led to a further increase of the fine by 50%. First, Danone – or, as it was called at the time, Boussois-Souchon-Neuvesel (BSN) - has participated in similar antitrust infringements already twice before (in 1974 and 1984). The fact that these infringements occurred in a different sector (flat glass) is irrelevant. It is the nature of the infringement and the identity of the company that matter. Moreover, the Commission notes that, for the entire period during which BSN, later Danone, committed these infringements, the same person acted as CEO of the company and that some flat glass managers at the time were active in Danone's retail business during the period of the beer cartel. The Commission views the repetition of infringements as a serious aggravating factor.

The second aggravating factor concerns Danone's threat to make Interbrew's life difficult in France if Interbrew did not meet its request to have 500,000 hl of beer transferred to its subsidiary Alken-Maes. As pointed out above, this threat led to an increase of the cartel activity.

As a mitigating circumstance, the Commission recognises that Alken-Maes ended the information exchange with Interbrew. For this a reduction of 10% is granted. Both parties have co-operated to a certain extent during the investigation by supplying information to the Commission. However, Interbrew's cooperation was more material than that of Danone/Alken-Maes. On this basis, Interbrew is granted a reduction of 30% and Danone/Alken-Maes a reduction of 10%.

As to the fines imposed in respect of the private label cartel, the Commission considers that, since the cartel was limited to the small private label beer segment in Belgium (roughly 5% of beer consumption in Belgium), the parties' infringement justified a fine between €1m and €20m. The cartel was of a short duration (nine months). The fact that Interbrew and Alken-Maes took the initiative for these meetings is aggravating for them. This results in an increase of the fine by 30% for both parties.

All parties co-operated with the Commission during the procedure. Interbrew even disclosed the cartel. Although it blew the whistle, it cannot, however, benefit from full immunity under the Commission's so-called Leniency notice because it was one of the instigators of the cartel. For its co-operation, it is granted a reduction of 50%. The other brewers are granted a reduction of 10% for their co-operation.

The Luxembourg Cartel

At the same time as the Belgian case,the Commission fined three Luxembourg brewers (Brasserie Nationale-Bofferding, Brasserie de Wiltz and Brasserie Battin) a total of €448,000 for their participation in a market sharing cartel affecting the Luxembourg horeca sector. A fourth company, Brasserie de Luxembourg, a subsidiary of Interbrew, escaped any fine because it disclosed the cartel to the Commission. The brewers agreed to guarantee each other's exclusive purchasing arrangements with horeca customers and took steps to restrict penetration of the Luxembourg horeca sector by foreign brewers. The cartel lasted from October 1985 to February 2000. It consisted of a written agreement signed in 1985 by which the parties agreed not to supply beer to any horeca customer, including beer wholesalers, which was tied to another party by an exclusive purchasing agreement or "beer tie". This beer tie guarantee extended to beer ties which were invalid or unenforceable in law, as well as to supply arrangements where a brewer simply invested in a drinks outlet but did not sign an exclusive purchasing contract. It therefore served to protect each party's clientele. The beer tie guarantee was reinforced by a consultation mechanism, obliging the parties to check with each other about the presence of a beer tie before supplying new customers, as well as by financial penalties for non-compliance.

The cartel agreement also contained provisions intended to keep foreign brewers out of the Luxembourg horeca sector. First, there was a common defensive mechanism whereby the parties agreed to consult each other in the event that a foreign brewer attempted to negotiate a supply contract with one of their tied outlets. Priority would then be allocated to one of the parties to attempt to keep the outlet as a customer. If that party succeeded in negotiating a new contract

with the outlet, it was obliged to compensate the party which had lost the outlet by transferring an equivalent outlet to him. Other clauses allowed for the exclusion from the cartel of any party which co-operated with a foreign brewer or distributed its beer.

The cartel agreement was signed for an unlimited duration and required the parties to give twelve months written notice to terminate. No party gave notice before Interbrew, the parent company of Brasserie de Luxembourg Mousel-Diekirch, disclosed the cartel to the Commission in February 2000. Interbrew made this disclosure in the context of the Commission's investigation of the Belgian beer cartel case. There was also evidence that parts of the agreement had been implemented until 1998.

The Commission imposed the following fines:

SA Brasserie Nationale-Bofferding:	€400,000
Brasserie de Wiltz:	€ 24,000
Brasserie Battin:	€ 24,000

The cartel was a form of market sharing and included measures to impede trade from other Member States into Luxembourg. Market sharing is among the most serious infringements of the rules on competition. However, the cartel was limited to the relatively small Luxembourg on-trade market and was not implemented in full. The Commission has taken into account the fact that Bofferding, Wiltz and Battin are small or medium-sized companies whose activities are concentrated in Luxembourg and whose total turnover is correspondingly limited. By contrast, Brasserie de Luxembourg is a subsidiary of the Interbrew group, the second largest brewer in the world. The cartel lasted for more than fourteen years, which led the Commission to double the amount imposed.

As a mitigating circumstance, the Commission recognised that there was legal uncertainty about the enforceability of beer ties in Luxembourg at the time when the cartel agreement was signed and that this may have led the parties to doubt whether certain provisions of the cartel constituted an infringement. This merited a 20% reduction in the fines. Brasserie de Luxembourg Mousel-Diekirch was granted total exemption from the significant fine that would otherwise have been imposed because it was the first to inform the Commission about the cartel, it provided decisive evidence and co-operated fully throughout the investigation.

Other cases

The Commission is also investigating suspected cartels on beer markets in other European countries. In this context, inspections have taken place between January 2000 and January 2001 in France, the Netherlands, Italy, Denmark and Portugal. At this moment it is impossible to prejudge the outcome or the timing of these investigations. ■

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