SUPPLY AGREEMENTS (BREWING): THE INTERBREW CASE

Subject: Supply agreements
Conditions (of approval)
Tying arrangements
Non-competition clauses

Industry: Brewing

Parties: Interbrew and others

Source: Commission Statement IP/03/545, dated 15 April 2003

(Note. British readers are familiar with the concept of "tied houses"; but the present case has a somewhat wider impact, affecting the whole sector of pubs, restaurants and hotels – known in Commission jargon as "horeca" outlets. The arrangement approved by the Commission involves a substantial relaxation of the tying principle. On the whole, the arrangement probably benefits the consumer; but it remains to be seen whether the restrictions on tying are likely to lead to any reluctance by the brewers to grant loans to outlets on favourable terms.)

Today the Commission approved the amended supply agreements between Interbrew, the largest brewer in Belgium, and pubs, restaurants or hotels, located in Belgium. As a condition of approval, the Commission has required Interbrew to amend these agreements in order to offer competitors access to the tied outlets. The Commission pointed out that consumers would now have an additional choice of beer brands in more than 10,000 outlets which had so far been exclusively supplied by Interbrew and that, in view of Interbrew's strong position, this could be expected to bring an extra dynamic to the Belgian beer market. The amended agreements will give Belgian outlets - those having concluded loan agreements as well as those having entered into a lease or sublease agreement with Interbrew - significantly increased commercial freedom to carry beers not brewed by Interbrew.

Loan agreements

For the more than 7000 outlets which have so far been entirely tied to Interbrew under a loan agreement, the non-competition obligation (that is, a clause forcing them to serve exclusively Interbrew's beer) vis-à-vis Interbrew will in the future be limited to draught pils. The exclusivity covers the Stella, Jupiler and Safir lager brands which are served from 30 liter or 50 liter kegs. Only in the unlikely event that Interbrew's draught pils would account for less than 50% of the outlet's total beer throughput, the outlet has to ensure that it purchases the shortfall also from Interbrew's portfolio of brands. Therefore, these outlets will now be able to buy from Interbrew's competitors: a) any draught beer other than pils and b) any beer (including pils) in bottles or cans. A loan agreement is an agreement whereby Interbrew provides independent outlets with a loan, a bank guarantee or valuable

material (such as cooling installations). It usually has a maximum duration of five years.

In addition, the outlets can now also terminate their loan agreement more easily. They can do so at any time before normal termination after five years provided they give Interbrew three months' notice. If the outlets do so, they (or the competing brewer from whom they intend to buy in future) must of course repay the outstanding capital of the loan or the remaining value of the material (or return this material in kind). However, in the event of their having to repay the outstanding capital of the loan, they do not have to pay the usual penalty the lender is normally entitled to claim from them for early repayment.

Lease or sublease agreements

The non-competition obligation of the more than 3000 other outlets which operators lease or sublease from Interbrew will be limited to draught beer. This gives competing brewers the opportunity to sell their bottled or canned beer, including pils, to these outlets. In addition, the outlet operator will have the right to serve one draught beer other than pils as "guest beer". Interbrew will be obliged to accept such a guest beer even if it brews this type of beer (for example, white beer, amber beer, and so on) itself. The Commission accepts that this guest beer will be supplied by Interbrew or a wholesaler appointed by it. The Commission will review the impact of the guest beer clause after one year of operation to verify whether it has given competing brewers a real entry into Interbrew's lease and sublease outlets.

Under a lease or sublease agreement lasting for at least nine years, Interbrew owns the outlet and lets it to an independent operator or it is the principal lessee of this outlet and sublets it to such an operator.

Commission's approval

The Commission has informed Interbrew that its amended agreements no longer lead to an appreciable restriction of competition. Before the Commission reached its final position, it collected and examined comments from other stakeholders in the sector (in particular competitors, wholesalers and outlets). Interbrew has undertaken to implement the amended agreements within two months after the Commission's approval.

The competition policy context

Interbrew is the largest Belgian brewer and holds an overall market share of roughly 56% of the Belgian outlet sector. Due to this market share, it is the only Belgian brewer whose exclusivity agreements are clearly not covered by the Block Exemption Regulation on Vertical Agreements from the end of 1999. This Block Exemption Regulation allows a brewer with a market share not exceeding 30% to oblige outlets to buy all their beer from it in exchange for a five year loan or for as long as they would lease or sub-lease the premises from it. This new regime came into force on 1 January 2002.

In the past, Interbrew had the right, like any other brewer, to tie outlets without much legal constraint. Indeed the previous Block Exemption Regulation provided in practice a safe haven even for brewers with very substantial market shares. In view of the changed situation, Interbrew notified its brewery contracts and offered some amendments. The Commission found these amendments insufficient. After lengthy discussions and additional concessions made by Interbrew, the Commission is now satisfied that the amended brewery contracts no longer restrict competition in an appreciable manner.

Dealing with the underlying case the Commission has kept the Belgian competition authority informed throughout the procedure. It also responded to a request from the Dutch competition authority (NMa) to obtain guidance from it in the context of its handling of brewery contracts notified by Heineken, the leading Dutch brewer with a market share also exceeding 30%. The NMa approved Heineken's amended brewery contracts on 29 May 2002, broadly following the line suggested by the Commission.

In view of the need to intensify contacts with the National Competition Authorities (NCA) through the European Competition Network (ECN), the Commission intends to organise a workshop with them in the near future. This will provide it with an opportunity to ensure a coherent application of the principles underpinning its above mentioned Block exemption and its corresponding Guidelines on vertical restraints to brewery contracts throughout the Community. ■

State Aid: the Scott Paper Case

The Court of First Instance has confirmed the Commission's decision of July 2000 to recover State aid granted illegally to the Scott Paper Company in August 1987. In the judgment, the Court endorses the Commission's interpretation of the 10-year limitation rule and concludes that recovery of the aid granted to Scott Paper in August 1987 was not time-barred. The Court upholds the Commission's view that a request for information it sent in January 1997 effectively interrupted the 10-year limitation period. The judgment concerns aid granted by City of Orléans and the Conseil Général du Loiret to the US company Scott Paper in August 1987 and was intended to induce Scott Paper to locate a new factory in Orléans and not in any other part of France or the European Union. Most of the local authorities' aid was in the form of a land sale at below market price.

Source: Commission Statement IP/03/532, dated 10 April 2003

The texts referred to on page 116 of this issue are published at the following website:

http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments