COMMISSION

COMMISSION DECISION

of 29 September 2004

relating to a proceeding under Article 81 of the EC Treaty (Case COMP/C.37.750/B2 — Brasseries Kronenbourg — Brasseries Heineken)

(notified under document number C(2004) 3597)

(Only the Dutch and French versions are authentic)

(2005/503/EC)

On 29 September 2004, the Commission adopted a decision relating to a proceeding under Article 81 of the EC Treaty. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 [1], the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the full text of the decision can be found in the authentic languages of the case and in the Commission's working languages at DG COMP web-site at http://europa.eu.int/comm/competition/index_en.html

I. INTRODUCTION

(1) The decision relates to an 'armistice' agreement regarding the sale of beer in France for consumption away from home (on-trade sector). The Commission has gathered evidence showing that on 21 March 1996, the two main brewery groups in France, Brasseries Kronenbourg SA and Heineken France SA (previously: Sogebra) and their respective mother companies at the time of the facts, Groupe Danone and Heineken NV, have concluded this agreement, following an 'acquisition war' regarding drinks wholesalers. The agreement concerns, on the one hand, the acquisition of drinks wholesalers, with the aim of bringing a rapid end to the rising costs of acquiring these companies, and on the other hand, the balancing of the integrated distribution networks of the parties concerned. The 'armistice' agreement has, however, never been implemented.

II. SUMMARY OF THE CASE

1. Origin of the case and procedural steps

(2) The case started on the basis of information provided by Interbrew NV (now Inbev NV) in the framework of the Belgian brewery cartel case (Commission Decision 2003/569/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty, (Case IV/37.614/F3 PO/Interbrew and Alken-Maes) (OJ L 200, 7.8.2003, p. 1)). On the basis of this information, the Commission conducted several inspections in the year 2000 and has completed its investigation by requests for information.

(3) On February 4, 2004 the Commission opened the proceedings and adopted a statement of objections against Brasseries Kronenbourg SA, Heineken France SA, Groupe Danone and Heineken NV. All parties have submitted a written reply to the Commission. They have, however, renounced their right to a hearing.

2. The sector concerned

(4) This case concerns the sales of beer in France in the on-trade sector.

(5) Together, the companies participating in the agreement represented approximately three quarters of the volume of beer consumed in France in 1999.

3. Nature of the infringement

(6) The Commission withheld the following infringement: on 12 February 1996, Heineken NV and Heineken France SA announced their intention to acquire the groups Fischer and Saint Arnould to Groupe Danone and Brasseries Kronenbourg SA. Since the groups Fischer and Saint Arnould distributed an important volume of Kronenbourg beer, this triggered a genuine acquisition war. Each brewery group thus acquired a large number of drinks wholesalers, leading to a strong inflation of the acquisition price of such wholesalers. On 21 March 1996, Brasseries Kronenbourg SA, Heineken

[1] OJ L 1, 4.1.2003, p. 1.

France SA and their respective mother companies, Groupe Danone and Heineken NV, therefore concluded an 'armistice' agreement regarding the acquisition of wholesalers and the balancing of their integrated distribution networks. In particular, they agreed on:

— a temporary acquisition stop (prohibition to proceed with acquisitions of wholesalers outside an agreed list),

— the balancing of the total volume of beer distributed through the network of each party, and

— the balancing of the volume of beer brands commercialised by each party which should be distributed by the other party.

(7) The agreement is made clear from an internal note of the group Heineken. Groupe Danone and Brasseries Kronenbourg SA have moreover not contested the existence of the armistice agreement. It should however be noted that the Commission does not have any proof of implementation of the agreement. On the contrary, certain wholesalers indicated on the agreed list as attributed to one party have finally been acquired by the other party and the parties continued to acquire wholesalers outside the agreed list. Moreover, in the period from 1996 to 2002, the parties tended to supplant their competitors' beer by their own beer within the distribution network under their control. An agreement intended to ensure equilibrium between brands thus became pointless.

III. LEGAL ASSESSMENT

1. Restriction by subject

(8) The 'armistice' agreement of 21 March 1996 was first intended to control investment by the Heineken and Danone groups, since its purpose was to bring about a rapid end to the rising cost of acquiring wholesalers. Moreover, the agreement is akin to one whose purpose was to share the on trade-markets between the two groups. Indeed, by establishing the dual equilibrium mentioned in point 2.3 above, the parties were aiming to ensure that one party did not dominate the other on this market.

(9) It is settled case-law that, for the purpose of applying Article 81(1), of the Treaty, there is no need to take account of the actual effects of an agreement once it appears that its aim is to prevent, restrict or distort competition within the common market. Since the agreement at issue in this case had as its object the restriction of competition by requiring a freeze on acquisitions and by establishing equilibrium between the parties' integrated distribution networks, the Commission concludes that there is an infringement within the meaning of article 81 of the Treaty even if the agreement did not produce any effects.

2. Appreciable effect on trade between Member States

(10) It is settled case-law that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to envisage, with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, the pattern of trade between Member states. This is the case here.

(11) The distribution networks of the French breweries constitute one of the main means of access to the market for foreign breweries that do not have such networks in France. Under these circumstances, the armistice agreement, which aims at establishing equilibrium at national level between the integrated distribution networks of Heineken NV/Heineken France SA and Groupe Danone/Brasseries Kronenbourg SA, could influence the conditions of access to the on-trade market for foreign breweries and thus the volume of importations. Moreover, Interbrew France, main importer of beer in France, depended and still depends on the distribution networks of Heineken France SA and Brasseries Kronenbourg SA to distribute an important volume of its product on the on-trade market in France. An agreement that aims at restricting competition between the distribution networks of the latter companies could influence the commercial conditions which these companies propose to Interbrew France for the distribution of its products.

IV. FINES

1. Basic amount

Gravity of the infringement

(12) The Commission takes into account: (i) the nature of the infringement; (ii) its actual impact on the market when this can be measured, and (iii) the size of the relevant geographic market.

(i) The armistice agreement is a horizontal agreement designed to restrict competition between undertakings holding large market shares. However, an agreement designed to bring wholesaler acquisition costs under control in the short term by putting an end to an acquisition war cannot be regarded as a clear infringement on a par with a price-fixing agreement. As far as the agreement establishing longer-term equilibrium between the two brewery groups' distribution networks is concerned, any such agreement is akin to a market-sharing agreement. However, what is involved is not market sharing in the 'conventional' sense, since the agreement was intended mainly to prevent one group from dominating the market rather than to eliminate all competition between the groups or impede third parties.

(ii) The agreement was not implemented and therefore did not have any impact on the market.

(iii) Concerning the scope of the geographic market, the Commission takes into account the fact that the agreement covers the whole of mainland France, but that it was confined to the on-trade sector, which accounts for less than one third of the total sales volume in France.

(13) On the basis of all these elements, the Commission considers that the addressees of this decision have committed a serious infringement to article 81 of the Treaty.

Duration of the infringement

(14) Since the agreement has not been implemented, there is no reason to increase the basic amount of the fine which is imposed on the companies concerned.

(15) A basic amount of EUR 1 000 000 was therefore withheld for both Groupe Danone/Brasseries Kronenbourg SA and Heineken NV/Heineken France SA.

2. **Aggravating circumstances**

(16) In 1984, Groupe Danone (then BSN) was already fined for market-sharing agreements aimed at maintaining the *status quo* and at establishing an equilibrium within the market (Commission Decision 84/388/EEC of 23 July 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.988 — Agreements and concerted practices in the flat-glass sector in the Benelux countries) (OJ L 212, 8.8.1984, p. 13)). Recidivism, as aggravating circumstance, thus justifies an increase of the basic amount of the fine for Groupe Danone/Brasseries Kronenbourg SA by 50 %. No other aggravating circumstance has been retained.

3. **Attenuating circumstances**

(17) No attenuating circumstance has been retained.

4. **Final amount of the fine**

(18) Consequently, the final amount of the fine imposed on each undertaking is the following:

— Groupe Danone and Brasseries Kronenbourg SA are jointly and severally liable for the sum of EUR 1 500 000,

— Heineken NV and Heineken France SA are jointly and severally liable for the sum of EUR 1 000 000.