

Anticipated acquisition by Heineken of Stassen SA

ME/5539/12

The OFT's decision on reference under section 33(1) given on 28 August 2012. Full text of decision published 18 September 2012 Anticipated acquisition by Heineken of Stassen SA
horiz.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **Heineken Holding N.V. (Heineken)** is active in the production, commercialisation and distribution of beer, cider and other beverages worldwide, as well as in the on-trade channel through the operations of bars and public houses. Heineken is headquartered in Amsterdam and is publicly listed on Euronext Amsterdam.
2. **Stassen SA (Stassen)** is an independent Belgian company principally active in the production, bottling and sale of ciders, including branded ciders and the contract manufacturing of ciders and beers for third parties. Stassen's global turnover was approximately £19.5 million in the financial year ending 31 March 2011, of which the merging parties submitted less than £[] was attributable to the UK.

TRANSACTION

3. Heineken, through its Belgian subsidiary Brouwerijen Alken Maes NV, proposes to acquire the entire issued share capital of Stassen for an initial consideration of around [] (the Transaction).

4. The merging parties entered into a share purchase agreement on 7 June 2012. The Transaction was notified to the Office of Fair Trading (OFT) on 3 July 2012 and the administrative timetable runs to 29 August 2012.

JURISDICTION

5. As a result of this Transaction, Heineken and Stassen will cease to be distinct. The merging parties submitted that Stassen's UK turnover in the most recent financial year ending 31 March 2011 was just below £[] and therefore does not exceed £70 million. Therefore, the turnover test set out in section 23(1)(b) of the Enterprise Act 2002 (the Act) is not met.
6. The merging parties overlap in the supply of branded cider where the merging parties submitted that Heineken's UK share of supply by volume in 2011 was [40-50] per cent ([40-50] per cent by value) and Stassen has to date made UK sales of [] in the current financial year ending March 2013.¹ The combined share of supply therefore exceeds 25 per cent. As such, the share of supply test in section 23(3) of the Act is met.
7. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

FRAME OF REFERENCE

Product scope

8. The merging parties' activities overlap in the production and sale of cider, both for the purposes of their own brands and under contract for third parties. With respect to their own brands, Heineken supplies cider in the UK under the brands Strongbow, Bulmers, Symonds, Jacques and Woodpecker. Stassen has supplied limited amounts of cider in the UK over the past three years under the brand Cider over Ice and is a leading supplier of cider in Belgium under the brand Stassen.

¹ Heineken has continued to supply branded cider in 2012. The merging parties therefore overlap in the supply of branded cider and the merging parties have not indicated that Heineken's share of supply in 2012 would be materially different to that in 2011.

9. The merging parties submitted that the supply of branded cider and the supply of contract manufactured cider are distinct product markets. The OFT has assessed the case considering the two as distinct on the basis that the two serve materially different purposes and levels of the supply chain with no demand-side substitution between the two.

Supply of branded cider

10. The OFT's approach to product market definition is generally to consider first if narrow candidate markets can be widened through substitution on the demand-side.²
11. The merging parties submitted that there is a single market for the supply of branded cider and it should not be further segmented. They noted that in previous decisions, the OFT considered the supply of cider to be a distinct product market from the supply of beer.³ The European Commission has also considered this to be the case.⁴
12. In previous decisions, the OFT has also considered whether further distinctions are warranted within the supply of cider, including:
- on-trade and off-trade distribution channels⁵
 - type of packaging format⁶
 - type of underlying input fruit⁷
 - price point,⁸ and

² See Merger Assessment Guidelines, A joint publication of the Competition Commission (CC) and the OFT, OFT1254, September 2010, paragraphs 5.2.6 to 5.2.19.

³ See Completed acquisition by C&C Group of the business and associated trading assets of Constellation Europe (trading as Gaymers Cider Co.), OFT, 21 May 2010 (*C&C/Gaymers*) as well as Report on the acquisition by Interbrew SA of the brewing interests of Bass plc, CC, 3 January 2001 (*Interbrew/Bass*), paragraph 4.22.

⁴ See Case No. COMP/M.3182 Scottish & Newcastle/HP Bulmer, 30 June 2003.

⁵ The on-trade refers to sales to outlets where purchases of alcohol are for consumption on the premises, whereas the off-trade refers to sales to outlets where purchases of alcohol are for consumption off the premises. See *C&C/Gaymers*. The OFT also notes that in past decisions, the CC has found that, at the retail level, the on-trade and off-trade are separate relevant markets (see *Interbrew/Bass*, paragraph 4.25).

⁶ Cider is packaged and supplied in different formats (bottles, cans or casks). In previous decisions, the OFT has not segmented by packaging format, although has left the precise product scope open in this regard (see, for example, *C&C/Gaymers*, paragraph 31).

⁷ Both Stassen and Heineken produce ciders using a number of different fruits in addition to apples. In previous decisions, the OFT has considered the extent to which ciders of different fruits should be considered separately, although it did not reach a conclusion on this issue (see *C&C/Gaymers*, paragraph 19).

- branded and own-label cider.⁹

13. The merging parties have not provided any substantiating evidence indicating these narrower segments should be aggregated.
14. However, in this case, it is not necessary for the OFT to come to a firm conclusion on the product scope given that no competition concerns arise under any candidate frame of reference. Therefore, on a cautious basis and for the purposes of this assessment, the OFT considers the impact of the Transaction on the supply of all branded cider together as well as on the narrower segments described above.

Supply of contract manufactured cider

15. Contract manufacturing arrangements can relate to branded cider and/or own-label cider products. The merging parties submitted that the scope of contract manufacturing arrangements can vary considerably, from the full manufacturing process (development of an entirely new product from early research and development (R&D) and recipe formulation to production and packaging and delivering the final product to the customer) to limited parts of the process. The contractual arrangements are determined by the third party customer's requirements.
16. The merging parties submitted that there is a single relevant market for contract manufacturing, which includes the entire development and production process.
17. It is not necessary for the OFT to come to a firm conclusion on the product scope in this regard given that no competition concerns arise under any candidate frame of reference. Therefore, on a cautious basis and for the purposes of this assessment, the OFT considers the impact of the Transaction on the supply of contract manufactured cider as a whole, as well as considering any additional effects from the supply of R&D or new product development expertise separately.

⁸ In *C&C/Gaymers* (paragraphs 20 to 22 and paragraph 35), the OFT noted that third parties in that case did not support delineation based on price categories (premium, mainstream and economy ciders), although no conclusions were made in the absence of competition concerns on any basis.

⁹ In *C&C/Gaymers* (paragraphs 23 to 26), the OFT considered this distinction although it did not conclude given that no competition concerns were raised contingent on this categorisation.

Geographic scope

Supply of branded cider

18. The merging parties submitted that the relevant geographic scope for assessment is the UK. This follows a recent previous OFT decision in this sector.¹⁰ In the absence of evidence to the contrary, and in line with previous decisional practice, the OFT assesses the Transaction on the basis of the UK albeit the precise geographic scope is left open.

Supply of contract manufactured cider

19. The merging parties submitted that as Stassen contract manufactures for Heineken in the UK from its manufacturing facilities in Belgium and Konings contract manufactures for ABInBev in Belgium, the geographic scope may be wider than the UK.
20. In previous decisions, it has been noted that private label cider could be procured from continental Europe.¹¹ Generally third parties indicated that contract manufacturers based in continental Europe compete with those based in the UK for sales in the UK.
21. Given that Stassen contract manufactures from Belgium, the OFT has assessed the Transaction in relation to the supply of contract manufactured cider on the basis of supplies to the UK market (including suppliers located in the UK, Ireland, Belgium and France). In the absence of competition concerns on any basis, the precise geographic scope is left open.

Conclusion

22. The OFT has assessed the impact of the Transaction on:

¹⁰ *C&C/Gaymers*, paragraph 34 although the OFT did not conclude on the geographic scope. The OFT nevertheless notes that in both *InBev/AB* and the Completed acquisition by C&C Group plc of the Tennent's business from Anheuser-Busch InBev NV/SA Group, OFT, 30 November 2009, the OFT considered the impact of the merger in GB and NI separately although it left the scope open in this second decision. The OFT received no evidence in this case to suggest these may be separate markets.

¹¹ See *C&C/Gaymers*, paragraph 57.

- the UK supply of all branded cider as well as narrower segments (on/off trade, by type of packaging format, by type of underlying input fruit, by price point and branded and own-label cider), and
- all stages of the contract manufacturing of cider as well as the supply of R&D and new product development for the UK market.

HORIZONTAL ISSUES

Supply of branded cider

23. The merging parties submitted that Heineken had a [40-50] per cent share of supply of branded cider (by volume) in the UK in 2011. The increment to the Transaction is negligible as Stassen has made very limited and sporadic sales in the UK.¹² The merging parties indicated that this is a reflection of the fact that Stassen has to date not established any meaningful importing arrangements.
24. The merging parties submitted that C&C Group is the second largest supplier of branded cider in the UK with a [20-30] per cent share of supply by volume. In addition, there are a number of other competitors supplying branded cider including Aston Manor, Kopparberg, H Weston & Sons and ABInBev. The merged entity will therefore continue to face a number of competitors post-merger.
25. The merging parties overlap in the following segments:
- with respect to distribution channels: the off trade segment
 - with respect to packaging type: bottled cider
 - with respect to fruit type: apple cider, pear cider and other fruits
 - with respect to price points: the premium price point, and
 - branded and own-label cider.
26. Heineken's share of supply (by volume) varies on each of these: [40-50] per cent off-trade, [20-30] per cent of bottled cider, [50-60] per cent of apple cider, [20-30] per cent of pear cider, [20-30] per cent of other fruit cider, [10-20] per cent of premium cider and [40-50] per cent of branded

¹² Stassen made no sales of branded cider in the UK in the financial year ending 31 March 2012. Since then, Stassen made a one-off sale of [], which is equivalent to [0-five] per cent share of supply based on the 2011 market size.

cider.¹³ However, even if all of Stassen's UK sales in 2010/11 or 2012/13 are attributed to any single segment, the increment arising from the Transaction would be [0-five] per cent.

27. The majority of third parties did not consider Heineken and Stassen to be close competitors in the supply of branded cider and some did not consider Stassen to compete with Heineken at all. Some third parties also indicated that the supply of cider is very competitive. No third parties raised competition concerns over unilateral effects arising from this Transaction in the UK.
28. Given Stassen is a leading supplier of branded cider in Belgium, the OFT considered the extent to which Stassen may be a potential entrant against Heineken in the supply of branded cider in the UK. The majority of third parties considered Stassen unlikely to be a potential entrant.
29. Whilst Stassen's business plan from January 2011 noted increasing branded cider exports as an opportunity, there is nothing in the plan pointing to any intention to begin supplying branded cider to the UK.¹⁴ A couple of customers also highlighted that there was nothing to suggest that Stassen had any plans to enter with no approaches having been made by Stassen to supply them in the last six months.
30. Even if it were the case that Stassen had intentions to enter the UK with a branded cider, the OFT notes that it is not clear (given some third party submissions that supply of branded cider in the UK is very competitive) that such entry would have any material effect on increasing the levels of competition in the UK. No third party has raised concerns over the elimination of Stassen as a potential entrant.
31. Given the small increment arising from the Transaction, the fact that the merging parties do not compete closely, the lack of potential competition and third party concerns, the OFT is of the view that the Transaction does

¹³ The merging parties were unable to provide the data for own-label cider, although the OFT notes that own-label cider will principally be supplied under contract manufacturing arrangements and so the competitive assessment for the supply of own-label cider will closely follow the assessment for the supply of contract manufactured cider below.

¹⁴ 'Leadership Meeting' dated 21 January 2011. Annex 13 of the merging parties' submission dated 3 July 2012.

not give rise to a realistic prospect of a substantial lessening of competition (SLC) in the overall supply of branded cider or any segment within it.

Supply of contract manufactured cider

32. Heineken, through its subsidiary, Universal Beverages Limited (UBL), currently produces only [] of cider for third parties from its production facilities in the UK, which it estimates to represent a [five-10] per cent share of contract manufactured cider in the UK and Ireland. Heineken's business plan suggests that it is looking to increase its supply of contract manufactured cider.¹⁵
33. Stassen currently supplies cider under contract (from its production facilities in Belgium) to only one customer in the UK, namely Heineken.¹⁶ Despite Heineken having significant capacity at its production facility in the UK, Heineken continues to have a contract manufacturing agreement with Stassen as the merging parties submitted that much of that produced at Stassen's facilities is sold in mainland Europe. Stassen's facilities are also more flexible as they allow for smaller production runs. Thus, the Transaction has the effect of internalising this current commercial relationship. In the past, however, Stassen has supplied cider under contract in the UK for ABInBev [] and Tesco [].
34. The merging parties have submitted estimated shares of capacity for contract manufactured cider for themselves and competitors, as they are unable to provide shares of competing suppliers by actual volumes produced and sold.¹⁷ The merging parties submitted that their combined share of supply of contract manufacturing (based on capacity that can feasibly serve the UK) is [20-30] per cent.¹⁸ However, the OFT considers that other competitors such as Aston Manor ([20-30] per cent share), C&C Group ([20-30] per cent), Konings ([10-20] per cent), Eclor ([five-10] per cent) and Westons ([0-five] per cent) will continue to constrain the merged entity post-merger.

¹⁵ Submitted as Annex 15 to the merging parties' submission.

¹⁶ The merging parties have a rolling 12 month supply agreement since March 2008 under which Stassen produces various cider (and beer) products for Heineken.

¹⁷ The OFT is of the view that capacity may be a more accurate predictor of competitive effects in this context, given Heineken's relatively recent entry and the way in which contract manufacturers compete.

¹⁸ Stassen production capacity of [] excludes [] for production of its own brands.

35. A few third party customers did not consider either Heineken and/or Stassen to be active in the supply of contract manufactured cider and so did not consider them to compete at all. Of those customers that did consider them both to be active, the majority did not consider them to be close competitors and all but one considered that there were numerous alternative suppliers available, highlighting C&C Group, Aston Manor, Westons, Aspoll, Thatcher's, Bevisol and Halewood.
36. Only one third party raised concerns, pointing to a limited number of alternatives, with some of the UK suppliers at capacity or prohibitively expensive. However, the third party later indicated that there was potential to source from another alternative supplier in continental Europe, albeit with a greater administrative burden.
37. Given the merging parties' limited presence in the supply of contract manufactured cider and the number of competitors that will remain to constrain the merging parties post-merger, as well as the lack of concern from the large majority of third parties, the OFT is of the view that the Transaction does not give rise to a realistic prospect of a SLC in the overall supply of contract manufactured cider.

Barriers to entry and expansion

38. The merging parties made no submissions regarding barriers to entry and expansion into the supply of branded cider. However, the OFT notes that there has been entry in recent years, with ABInBev's Stella Cidre brand having entered in April 2011 and reached an estimated share of supply (by volume) of [0-five] per cent in the UK. Other examples have been provided, including Carlsberg's entry through the Somersby Cider brand in July 2012 and C&C's entry under the brand St. Aubel in 2012.
39. The merging parties submitted that barriers to entry in the supply of contract manufactured cider are low as the technology involved in facilities for milling, fermentation and blending is mature and requires very little, if any, intellectual property rights. The merging parties pointed to Heineken's entry through the new facilities developed by its subsidiary UBL in 2008 as evidence of the ease of entry. The lead time from conception to operation, according to the merging parties, was one year and the level of investment in the region of [].

40. However, as the Transaction does not give rise to competition concerns over unilateral effects in the supply of branded cider or the supply of contract manufactured cider, there is no need for the OFT to reach a firm conclusion regarding barriers to entry and expansion.

VERTICAL ISSUES

41. The OFT considers below two potential vertical issues arising as a result of the Transaction, namely:

- the supply of R&D and new product development under contract to (potential) third party rival branded cider, and
- the input supply of apples.

Supply of R&D under contract

42. The OFT considered the extent to which Stassen could be said to have particular expertise in R&D of cider brands, in particular because it was responsible for the introduction of Jacques and Bulmers No. 17, for example, as well as the development of Stella Cidre for ABInBev. The OFT has examined the extent to which Heineken, by acquiring specialist R&D expertise, may potentially restrict new entrants in the supply of branded cider through the Transaction.¹⁹

43. However, third parties do not consider Stassen to have any specialist expertise and note that alternative suppliers of contract manufactured cider are active in all stages of the production process for developing and manufacturing cider. Other suppliers also indicated that they had R&D capacity. No third party raised any vertical concerns with respect to the Transaction. As a result, the OFT does not consider any competition concerns to arise in relation to the supply of R&D under contract.

Input supply of apples

44. One third party pointed to the potential for the Transaction to reduce the availability of apples as an input (albeit that they did not currently source

¹⁹ This may be the case if a new entrant would in some way be reliant on Stassen to develop a new cider brand or the alternative R&D options were less efficient or preferable.

bittersweet apples from Stassen) and that the Transaction puts more orchards under the control of Heineken.

45. The merging parties submitted that bittersweet apples tend to be used only in the production of cider and calvados.²⁰ Cider producers procure the apples through contracting with orchard owners or purchasing their own orchards.
46. The merging parties submitted that, with respect to Stassen's agreements with producers of bittersweet apples, Stassen's supplies in Belgium and France ([]) account for only [five-10] per cent of Belgium's and France's combined production.²¹
47. Stassen currently uses all its supplies for its own product and for Heineken (to whom it sells its surplus). The OFT therefore considers that the availability of apples for third party cider manufacturers will not be materially changed as a result of the Transaction. In addition, the evidence available indicates that Stassen's supplies of bittersweet apples are not significant enough to have any material effect on the overall supply.

THIRD PARTY VIEWS

48. Third party comments have been taken into consideration and discussed above where relevant. Other concerns raised by third parties about potentially anti-competitive practices are discussed below.
49. One third party raised concerns over the potential for confidential know-how (particularly relating to the R&D and development of branded cider) of other cider suppliers who had worked with Stassen to be passed on to Heineken. However, according to the merging parties, Stassen has no ownership rights to the data, recipes or formulations, suppliers usually vary recipes during the production process such that Stassen's knowledge becomes historic and, in one case, Stassen is contractually required to return documentation relating to the product. The OFT therefore does not

²⁰ Cider can be produced from bittersweet apples or culinary apples or from both. Juices from both types are mixed in different proportions according to the specific recipe.

²¹ Stassen's supplies would be equivalent to only [0-five] per cent of UK production and represent [0-five] per cent of all European production by professional growers supplying cider manufacturers.

consider this could lead to foreclosure of any cider manufacturers. Further, no other third parties raised this as a concern.

50. A couple of third parties raised concerns around the Transaction increasing Heineken's share in the UK or Europe. However, the OFT has found the increment in branded cider to be negligible and that no competition concerns arise as a result of the overlap in contract manufacturing. One third party indicated that the Transaction was positive as it would increase competition.

ASSESSMENT

51. The merging parties overlap in the supply of branded cider in the UK as well as contract manufactured cider in Europe. The merging parties have more than a quarter of the supply of branded cider in the UK such that the share of supply test is met.
52. With respect to branded cider, the increment is negligible, the merging parties are not close competitors, a number of competitors will constrain the merged entity post-merger, there is a lack of potential competition and no third parties raised concerns.
53. With respect to contract manufactured cider, the shares of supply (based on capacity) are not high, there are a number of other suppliers who will continue to constrain the merged entity post-merger and the majority of third parties did not raise any competition concerns in this regard.
54. With respect to vertical issues, third parties did not consider Stassen to have particular specialist R&D knowledge and listed a number of other suppliers who could provide them with such services, such that the Transaction will not lead to foreclosure of cider manufacturers from access to R&D. In addition, Stassen does not currently supply bittersweet apples to third parties other than Heineken and its supplies account for a relatively small proportion of UK and European apple supplies.
55. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

56. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.