Anticipated acquisition by Heineken N.V. of Emprex Cerveza, S.A. de C.V.

The OFT's decision on reference under section 33(1) given on 30 March 2010. Full text of decision published 20 April 2010

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 N.V.** (**'Heineken'**) is part of the Heineken Group, which is active in the production and distribution of beer and other beverages world-wide. In the UK, Heineken's main brands are 'Foster's', 'Newcastle Brown Ale', 'John Smith's', 'Heineken' and 'Kronenburg 1664'.

2. **Emprex Cerveza, S.A. de C.V.** (**'Emprex Cerveza'**) is one of the leading brewers in Mexico and also has operations in Brazil. Three Emprex Cerveza's brands are sold in the UK: 'Sol', 'Dos Equis' and 'Bohemia'. Emprex Cerveza's beers are distributed in the UK by two third parties: Coors Brewers Limited ('Coors UK', for Sol and Dos Equis) and Inspirit Marketing Ltd ('Inspirit', for Bohemia).

3. Emprex Cerveza's 2009 turnover in the UK was approximately [ ].

TRANSACTION

4. Heineken proposes to acquire 100 per cent of the shares of Emprex Cerveza, which will give it indirect ownership of Emprex Cerveza's operational subsidiaries.[1]

[1] They are: FEMSA Cerveza S.A. de C.V., Cervecería Cuauhtémoc Moctezuma S.A. de C.V., Cervezas Cuauhtémoc S.A. de C.V. and Cervejarias Kaiser Brazil S.A., collectively referred to as 'FEMSA'.

5. Following the transaction, FEMSA shall be issued shares in two of the Heineken Group's holding companies. As a result, FEMSA will hold a 20 per cent economic interest in the Heineken Group.

6. On 4 March 2010, Heineken submitted a Merger Notice to the OFT pursuant to section 96 of the Enterprise Act 2002 ('the Act'). The 20 working day statutory deadline within which the OFT must make a decision on reference in this case therefore expires on 1 April 2010.

JURISDICTION

7. As a result of this transaction Heineken and Emprex Cerveza ('the parties') will cease to be distinct. Each of the parties constitutes enterprises for the purposes of the Act.

8. Heineken submitted that the OFT does not have jurisdiction to assess the proposed merger because neither the turnover test, nor the share of supply test, in section 23 of the Act is met.

9. As noted earlier, Emprex Cerveza's annual UK turnover is less than £70 million per annum, and so the turnover test is not met.

10. The parties concede that Heineken supplies over 25 per cent of all lager beer in the UK (by volume). However, Heineken argues that the merger parties do not overlap in the supply of beer in the UK because:

    - Emprex Cerveza does not supply beer 'in the UK' (as required by section 23 of the Act); rather, it supplies to UK importers, who are responsible for setting the price of the beer products and distributing them in the UK, and

    - the merger parties are active at different levels of the supply chain, with Heineken supplying wholesalers (for example, pubs, supermarkets) while Emprex Cerveza supplies UK importers; thus, there is no increment in the share of supply of any goods or services.

11. On the basis of both, or either, of the above propositions, Heineken argues that the 'share of supply' test in section 23 of the Act is not satisfied.

Supply of goods 'in the UK'

12. The OFT appreciates that Emprex Cerveza brews its beer outside the UK and that it relies on UK importers to distribute its beer in the UK. However, it does not believe this to be determinative.

13. The question for the OFT is whether: '**... in relation to the supply of goods of any description, at least one-quarter of all the goods of that description which are supplied in the United Kingdom ... are supplied by one and the same person ...'** (section 23(3) of the Act).

14. The OFT's Jurisdictional and Procedural Guidance[2] states that: **'Services or goods are generally supplied in the UK where they are provided to customers who are located in the UK. That is, in most circumstances, the place where competition with alternative suppliers takes place. The OFT will apply this general rule in a flexible and purposive way. In all cases, it will have regard to where relevant procurement decisions are likely to be taken and where, in turn, any competition between suppliers takes place'** (paragraph 3.59).

15. In this case, the OFT believes that Emprex Cerveza can properly be said to supply beer 'in the UK' given the following factors:

    - Emprex Cerveza's customers (the importers) are located in the UK

    - Emprex Cerveza bears the contractual responsibility for delivery of the beer to the UK and legal ownership passes to the importers only at the port of disembarkation (although Heineken noted that the risk of loss or damage during shipment passes to the importers at the port in Mexico), and

    - in at least one of its agreements with UK importers, Emprex Cerveza has significant influence over how and where the beer is sold. In particular, the supply contract with Coors UK states that Sol and Dos Equis must be sold in the UK, must be marketed in the 'Premium Specialty' category, and provides for a 'committed volume target' for the sale of Sol and Dos Equis that Coors UK must reach every year.

[2] OFT526, Mergers – Jurisdictional and Procedural Guidance.

16. In light of the above, the OFT considers that in substantive terms Emprex Cerveza has sufficient control over the supply of its beer in the UK that it should properly be said to supply beer 'in the UK' for the purposes of section 23 the Act. The fact that it sells to importers does not undermine this conclusion.

Overlap for the purposes of the share of supply test

17. Regarding Heineken's second argument (no increment to the share of supply), the OFT notes that both parties are active in the supply of beer that is available for distribution in the UK.[3] The OFT considers that there is therefore an overlap in the parties' activities for the purposes of the share of supply test and that their combined share of supply of beer available for distribution in the UK exceeds 25 per cent (by volume).

18. The OFT therefore considers that the share of supply test in section 23 of the Act is met, and 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.

MARKET DEFINITION

Product scope

19. In previous mergers in the beer industry,[4] the OFT has defined 'lager' to be in a separate market from other types of beers, such as 'ale' and 'stout'. The OFT has also considered whether further segmentations of the lager market are appropriate. For example, it has considered whether there are different markets for standard and premium lager, and whether the market

[3] It is not the OFT's practice to aggregate shares of supply of merger parties at different levels of the supply chain for the purpose of asserting jurisdiction over purely vertical mergers (see OFT516, Mergers- Substantive Assessment Guidance, at paragraph 3.55). In this case, however, both Heineken and Emprex Cerveza are active in the supply of beer available for distribution in the UK (that is, such that there is a horizontal overlap). The fact that Heineken is vertically integrated, and supplies its own distributors, whilst Emprex Cerveza relies on third parties to distribute its products does not exclude application of the share of supply test.

[4] See, for example, ME/3826/08: *Anticipated acquisition by InBev NV/SA of Anheuser-Busch Companies, Inc*, 18 November 2008 ('*InBev/Anheuser-Busch')* and ME/4256/09: *Completed acquisition by C&C Group plc of the Tennent's business from Anheuser-Bush InBev NV/SA Group*, 30 November 2009 ('*C&C/Tenant's')*.

can be split by packaging format (bottled, canned, and draught lager). However, the OFT has not, in the past, needed to conclude on these issues.

20. The OFT has also considered whether the supply to the on-trade and the off-trade channels[5] are separate product markets, but again has not needed to conclude.

21. In this case, Heineken submits that the relevant product market is the supply of all beer in the UK.

22. Heineken and Emprex Cerveza both manufacture 'premium' bottled beer, which is supplied through on- and off-trade venues. These areas of overlap are therefore the starting points for the process of market definition.

23. The OFT has not found it necessary to conclude on whether the scope of the product market is broader than these narrow markets, however, since the proposed transaction does not give rise to competition concerns on these bases. This is explained further in the 'Horizontal Issues' section, below.[6]

Geographic scope

24. In *Inbev/Anheuser-Busch* and *C&C/Tennant's*, the OFT assessed the competitive effects of these mergers in, separately, Great Britain and Northern Ireland. Given the OFT did not find competition concerns arose on these narrow bases,[7] it did not need to conclude on whether the appropriate geographic market was as broad as the UK.

25. In this case, there is no evidence before the OFT which would justify it adopting narrower markets than in previous cases. Given the merger does not give rise to a realistic prospect of a substantial lessening of competition in any plausible candidate market, the OFT has not needed to conclude on the geographic scope of the market(s).

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[5] The on-trade channel refers to pubs, bars and restaurants, where consumers drink alcohol in the premises, while the off-trade channel refers to supermarkets, off-licences and other retail outlets where consumers buy alcohol for consumption off-premises, typically at home.
[6] See paragraphs 28 to 35.

[7] The OFT also ruled out that Scotland represented a separate geographic market; see paragraphs 38-39 of *Inbev/Anheuser-Busch*.

Conclusion

26. Given there is no realistic prospect of a substantial lessening of competition on the narrowest plausible market definition(s), the OFT has not considered it necessary to come to any firm conclusions about market definition.

27. The OFT has therefore considered the potential competition effects on each of the following candidate markets:

- the off-trade supply of premium bottled lager in Northern Ireland
- the on-trade supply of premium bottled lager in Northern Ireland
- the off-trade supply of premium bottled lager beer in Great Britain, and
- the on-trade supply of premium bottled lager beer in Great Britain.

HORIZONTAL ISSUES

28. Heineken and Emprex Cerveza overlap in the supply of beer in the UK. As noted, above, Heineken distributes beer via its in-house distribution arm. Emprex Cerveza, however, has agreements with two third parties, Coors UK and Inspirit. Post-merger, the OFT considers it plausible that Heineken may terminate these supply agreements and supply Emprex Cerveza's brands through its own distribution network. The merger has therefore been assessed on this basis.

29. In relation to Northern Ireland, the parties note that Sol sold in bottles accounts for nearly all of Emprex Cerveza's sales there in the off- and on-trade channels. Sales of bottled Sol in Northern Ireland amount to less than [negligible], giving it a market share of [negligible] in the on-trade, the off-trade or both together. Given this small increment, no realistic prospect of a substantial lessening of competition arises in any candidate product market in Northern Ireland and, thus the effect of this merger in Northern Ireland is not considered further in this decision.

Unilateral effects in Great Britain

30. The OFT does not consider there is a realistic prospect that the merger may lead to a substantial lessening of competition by virtue of unilateral effects, for the reasons set out below.

31. First, the parties have low market shares in both the on- and off-trade channels, and the increment in Heineken's share will be very small. In the on-trade, Heineken's share will increase from approximately [0 - 10] per cent to [0 - 10] per cent. In the off-trade, Heineken's share will increase from approximately [0 - 10] per cent to an estimated [0 - 10] per cent.

32. Second, market enquiries indicated that Heineken will continue to face significant competition from other major players going forward, such as AB InBev, Carlsberg, Coors UK, Miller and Wells and Young.

33. Third, most third parties surveyed indicated that the parties' brands are not particularly close competitors. For example, market participants identified brands such 'Corona', San Miguel', 'Peroni' and other international brands to be Emprex Cerveza's main competitors, rather than any of Heineken's brands.

34. Finally, no market participants raised concerns that the merger would allow Heineken to increase the price of any of its own individual brands, or Emprex Cerveza's brands, post merger.

Conclusion

35. In light of the above, the OFT did not consider there was a realistic prospect that the merger would allow Heineken to increase the price of any of its, or Emprex Cerveza's, brands such as to give rise to a realistic prospect of a substantial lessening of competition.

Barriers to entry and expansion

36. Given the OFT did not find there to be a realistic prospect of a substantial lessening of competition based on in-market competition, it did not need to conclude on the nature of barriers to entry.

PORTFOLIO EFFECTS

37. Notwithstanding the fact that the merger parties' brands are not particularly close competitors, a small number of market participants noted that the addition of Emprex Cerveza's brands would increase the strength of Heineken's overall portfolio of beer products.

38. Noting that it generally considers non-horizontal mergers as competitively benign at worst, the OFT does not consider that there is a realistic prospect of competition concerns arising by virtue of an increase in the strength of Heineken's portfolio, for a number of reasons.

39. First, given the low market shares of Emprex Cerveza's brands, the strength of Heineken's portfolio is not materially increased by the merger.

40. Second, Heineken will continue to face competition from significant players in the sector with strong portfolios, such as AB-Inbev, Carslberg UK, and Coors UK.

41. Third, the majority of market participants which responded to the OFT request for information did not consider any of Heineken's or Emprex Cerveza's beers to be 'must-stock' brands which would allow Heineken to tie or bundle any of its products to wholesalers or foreclose competitors.

Conclusion

42. In light of the above, the OFT did not consider there to be a realistic prospect that competition concerns may arise by virtue of portfolio effects in this case.

THIRD PARTY VIEWS

43. Market participants were mostly unconcerned by the merger, although a small number raised concerns regarding the increased strength of Heineken's portfolio arising from the merger. This issue has been dealt with above.

ASSESSMENT

44. Heineken is acquiring Emprex Cerveza, which brews three beer brands sold in the UK: Sol, Dos Equis and Bohemia.

45. Even on the most conservative candidate markets – the supply of premium bottled lager to the on-trade and to the off-trade in Northern Ireland and in Great Britain – the merger represents a small increment to Heineken's market share. Heineken will continue to face significant competition from competitors such as AB In-Bev, Carlsberg and Miller post-merger, and market enquiries indicated that the brands of the merger parties are not particularly close competitors.

46. Although some third parties raised concerns that the merger may increase the strength of Heineken's portfolio, given the above factors, and the fact that the majority of the market participants which responded to the OFT request for information did not describe any of Heineken's or Emprex Cerveza's brands as 'must-stock' brands, the OFT did not consider competition concerns arose on this basis.

47. 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

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