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Heineken and Comans: A merger notification relating to the wholesale supply of beverages

by **Marco Hickey**

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A joint venture between Heineken and Comans was cleared by the Competition and Consumer Protection Commission on 5 April, 2016.

The proposed joint venture is between Heineken Ireland (t/a Western Beverages Limited) (Heineken), a wholly-owned subsidiary of Heineken NV, and Comans Beverages Limited (Comans).

Proposed transaction

In Ireland, Heineken primarily manufactures beer for supply to wholesalers as well as being involved in the wholesale supply of alcoholic and non-alcoholic beverages. Comans is a wholesale supplier of alcoholic and non-alcoholic beverages with a single distribution depot located in Co. Dublin.

The stated rationale for the transaction is that both Heineken and Comans have drinks wholesale businesses, but neither has national coverage so combining the two wholesale businesses will achieve efficiencies and national coverage.

Competition Assessment

The Competition and Consumer Protection Commission (CCPC) found that there was a horizontal overlap between the parties' activities in Ireland with respect to the wholesale supply of packaged alcoholic and non-alcoholic beverages.

The CCPC found that no competition concerns arose in the wholesale supply of packaged alcoholic and non-alcoholic beverages, largely in light of the number of other undertakings currently active nationally and in the individual regions deemed to be the narrowest possible potential geographic markets (counties Cork, Limerick, Galway and Donegal).

Overall, the CCPC found that no horizontal competition concerns arose since the parties operate, to a large extent, in different parts of the State and are not particularly close competitors. Furthermore, notwithstanding that, following the proposed transaction, the joint venture's combined segment share will be approximately 25-30%, the CCPC found that significant competitive restraints would continue to be present, in particular the national distribution network of C&C Gleeson with an estimated segment share of approximately
30-35%.

The CCPC found there to be a vertical relationship between the parties in the State since Heineken, as a manufacturer, sells alcoholic beverages to downstream wholesalers, such as Comans. Comans also sells certain brands (owned by Comans and manufactured on its behalf) to downstream wholesalers in the State, including Heineken's distribution unit.

Two theories of competitive harm were assessed by the CCPC: input foreclosure and customer foreclosure.

Paragraph 5.10 of the CCPC's Guidelines for Merger Analysis states that: "competition concerns may arise from input foreclosure only when the merged entity has market power in the upstream market."

The Heineken beer brand has an estimated share of the total beer sector in the State of 15-20%, while Diageo holds a 50-55% share. Within the lager segment, Heineken has an estimated share of around 45-50% with Diageo having a 30-35% segment. Based on the presence of other competitors, chiefly Diageo, the CCPC did not consider Heineken to have sufficient market power in the State such that it would have the ability to foreclose downstream wholesale competitors post-transaction.

Similarly, the CCPC considered that Comans will not have the ability to foreclose rival wholesalers post-transaction since none of its lager brands is an important lager brand with a significant share of the lager segment.

As regards customer foreclosure, the CCPC refers to Paragraph 5.15 of the Guidelines for Merger Analysis:

> *The ability of a merged entity to harm an upstream competitor through customer foreclosure depends on a number of factors. For example, harm to competitors is more likely if the merged entity is a significant customer and hence a significant source of sales revenue for the upstream competitor than if the merged entity is but one of many customers.*

The CCPC found that the joint venture post-transaction will not have the ability or incentive post-transaction to foreclose upstream alcoholic beverage manufacturers which compete with Heineken. The CCPC noted that there are a number of other wholesalers currently active in the State through which upstream alcoholic beverage manufacturers can sell their products and, furthermore, that the joint venture will not have the ability to foreclose rival manufacturers because the joint venture would not be able compete effectively with rival wholesalers since it does not offer customers a full range of alcoholic and non-alcoholic beverages.

Third Party Submission

A confidential third party submission suggested that the proposed transaction will give Heineken greater ability and incentive to foreclose other competing alcoholic beverage manufacturers through the "making of cash advances to pubs in return for the pubs committing to stock Heineken products to the exclusion of competing products."

In relation to these third party claims, the CCPC again points (1) to the weakness of the brands owned by Comans and (2) to how Heineken lacks sufficient market power to foreclose other competing alcoholic beverage manufacturers/brewers post-transaction.

Furthermore, the CCPC states that there is no evidence to indicate that Heineken has been successful in foreclosing other competing alcoholic beverage manufacturers/brewers in the State, noting that the alleged activities described by the third party submission were limited to a small number of outlets in the State.

In essence, the CCPC finds that the ability and incentive of Heineken to foreclose other competing manufacturers through the making of cash advances in return committing to stock Heineken products to the exclusion of competing products is not merger specific since the proposed transaction will not increase the ability and incentive of Heineken to continue doing so.

Comment

In relation to the competition analysis, the CCPC's approach to the transaction relies greatly on the presence of large competitors acting as a competitive restraint on the activities of the joint venture post-transaction, with Diageo and C&C Gleeson singled out in particular. Whether or not the CCPC's assessment of the transaction would have been different in the absence of such considerable rivals in the

same marketplace is unclear.

Lastly, as regards the treatment of the third party submission, the CCPC has cleared the transaction without conducting a full investigation of the alleged conduct on the basis that, in any event, the parties' ability to pursue such conduct is not increased as a result of the proposed transaction. As such, the CCPC's approach is in line with merger decisions handed down by the European Commission such as Google/Motorola Mobility where the Commission received complaints, amongst other things, that Motorola's royalty rates are excessive and discriminatory, but deemed it not to be a merger specific issue. It will be interesting to see if any formal complaint is lodged under Section 5 of the Irish Competition Act 2002 (as amended) and/or Article 102 of the Treaty on the Functioning of the European Union in relation to the conduct alleged in the third party submission.

Link to the CCPC's Determination of Merger Notification M/16/011 — Heineken/Comans.

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