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European Union: Competition—Abuse of dominant position

European Commission Decision—art.102 TFEU—dominant undertaking seeking to prevent parallel trade in EU—relabelling of consumer products—level of fines

Abuse of dominant position; Brewing industry; EU law; Fines

Introduction

On 13 May 2019, the European Commission (the Commission) fined Anheuser-Busch InBev NV/SA (AB InBev) €200,409,000 for abusing the company's dominance in the Belgian beer sector because the company relabelled one of its beer brands and also restricted supply of that brand so as to deter the cross-border sales of the brand within the EU.[1]

AB InBev

AB InBev is the world's biggest beer brewer. According to the Commission, AB InBev's most popular beer brand in Belgium is Jupiler, which has about 40% of the total Belgian beer sector—this share was measured by the Commission in terms of volume rather than value. The Commission regarded this 40% share as evidence of AB InBev's dominance. More particularly, the Commission stated in its press release that the

> "decision concludes that AB InBev is dominant on the Belgian beer market. This is based on its constantly high market share, its ability to increase prices independently from other beer manufacturers, the existence of barriers to significant entry and expansion, and the limited countervailing buyer power of retailers given the essential nature of some beer brands sold by AB InBev".[2]

The Commission also noted that AB InBev also sells Jupiler beer in other EU Member States, including the Netherlands and France. More particularly, in the

[1] Case No.AT.40134—*AB InBev Beer Trade Restrictions*. "Antitrust: Commission fines AB InBev €200 million for restricting cross-border sales of beer", Press Release IP/19/2488 (13 May 2019) (IP/19/2488) available at: *http://europa.eu/rapid/press-release_IP-19-2488_en.htm* [Accessed 16 July 2019].

[2] IP/19/2488.

Netherlands, AB InBev sells Jupiler to retailers and wholesalers at lower prices than it does in Belgium owing to increased competition in the Netherlands. The languages used for the labelling of these products in Belgium are the French and Dutch languages. If a product did not show both languages then it could not be sold so there was a tactical value to limiting the number of bottles and cans which bilingual labels so as to curb parallel trade from the Netherlands to Belgium.

Legal background—the legislation

The case turned on art.102 TFEU.

Article 102 prohibits the abuse of a dominant position which may affect trade between Member States as well as prevent, restrict or distort competition. Article 102 does not prohibit the existence of dominance but only the *abuse* of the dominance. This distinction between dominance and the abuse of dominance was made clear on 30 June 2016 when the Commission announced that it had opened an investigation, on its own initiative, to assess whether AB InBev had abused its dominance in this case; the Commission's Competition Commissioner, Margrethe Vestager, said:

> "AB Inbev's strong position on the Belgian beer market is not a problem. However, we want to make sure that there are no anti-competitive obstacles to trade in beer within the European Single Market. Keeping out cheaper imports of its beer from neighbouring countries would be both against the interests of consumers and anti-competitive."[3]

Factual background—the conduct

In this case, the Commission says that InBev abused its dominance on the Belgian beer market by trying to curb or hinder cheaper imports of its Jupiler beer from the Netherlands into Belgium by deliberating changing the language of the labelling on the product. The Commission says that this strategy was designed to restrict the possibility for supermarkets and wholesalers to buy Jupiler beer at lower prices in the Netherlands and then import it into Belgium for sale to Belgian-based consumers. The Commission said that the "overall objective of this strategy was to maintain higher prices in Belgium by limiting imports of less expensive Jupiler beer products from the Netherlands".[4]

In specific terms, the Commission alleged that InBev used four different strategies:

> "(1) AB InBev changed the packaging of some of its *Jupiler* beer products supplied to retailers and wholesalers in the Netherlands to make these products harder to sell in Belgium, notably by removing the French [language] version of mandatory information from the label, as well as changing the design and size of beer cans.

[3] "Antitrust: Commission opens formal investigation into AB InBev's practices on Belgian beer market", Press Release IP/16/2361 (30 June 2016) (IP/16/2361).

[4] IP/19/2488.

(2) AB InBev limited the volumes of *Jupiler* beer supplied to a wholesaler in the Netherlands, to restrict imports of these products into Belgium.

(3) A number of AB InBev's products are very important for retailers in Belgium as customers expect to find them on their shelves. AB InBev refused to sell these products to one retailer unless the retailer agreed to limit its imports of less expensive *Jupiler* beer from the Netherlands to Belgium.

(4) AB InBev made customer promotions for beer offered to a retailer in the Netherlands conditional upon the retailer not offering the same promotions to its customers in Belgium."[5]

The Commission said in its press release that these practices

> "deprived European consumers of one of the core benefits of the European Single Market, namely the possibility to have more choice and get a better deal when shopping".[6]

In particular, Belgian-based consumers could not get Dutch-sourced Jupiler at a lower price.

Interestingly, the Commission implied in its press release that it identified the breach:

> "Through market monitoring the Commission identified *ex-officio* restrictions for the imports [sic] of consumer goods into Belgium from neighbouring Member States."[7]

Typically, such breaches come to light because of information from an informant, a complaint or information gleaned from a procedure before the Commission. Unlike anti-competitive arrangements contrary to art.101 TFEU,[8] there are no immunity applications in regard to art.102 because one cannot receive immunity in respect of breaches of that latter provision. It is interesting that the Commission picked up on this breach itself. This occurred because of widespread suggestions at the time, which the Commission investigated to some extent, that there inexplicable differences in the prices of food and drink across the EU.

[5] IP/19/2488. When the Commission issued its Statement of Objections, it is interesting that the Commission only identified two practices (but alluded to the possibility of others):

> "In particular, the Commission is concerned with a number of AB InBev business practices, which have been in place since at least 2009. These include:
>
> - AB InBev changed the packaging of Jupiler and Leffe beer cans in the Netherlands and France to make it harder to sell them in Belgium: for example, it removed French text from its cans in the Netherlands, and Dutch text from its cans in France, to prevent their sale in the French and Dutch speaking parts of Belgium, respectively;
> - AB InBev limited access of Dutch retailers to key products and promotions, in order to prevent them from bringing less expensive beer products to Belgium: for example, it did not sell and/or limited the quantity of certain products sold to Dutch retailers and restricted the availability of certain promotions, if there was a chance that the Dutch retailers could import the products into Belgium.
>
> The Commission's preliminary view is that these practices have created anti-competitive obstacles to trade and partitioned the EU's Single Market along national borders. If confirmed, this would infringe Article 102 of the … TFEU that prohibits the abuse of a dominant market position." ("Antitrust: Commission sends Statement of Objections to AB InBev for preventing cheaper imports of beer into Belgium", Press Release IP/17/5041 (30 November 2017) (IP/17/5041).)

[6] IP/19/2488.

[7] IP/19/2488.

[8] Such as the rule on anti-competitive arrangements.

The Commission believed that the infringement of art.102 TFEU lasted from 9 February 2009 until 31 October 2016.

Penalty—the fine

While the fine was very high—a fine of over €200 million is not small by anyone's standards—this was a fine which had been reduced by 15% because AB InBev had co-operated with the Commission (over and above what it was legally obliged to do). In particular, it did so by expressly acknowledging the facts, acknowledging the infringement of EU competition rules and by proposing a remedy.

The reduction in the fine is symptomatic of the Commission's new approach of offering a reduction in the case of a settlement of an abuse of dominance case (and not just in the case of cartel matters).

The Commission says that, in setting the level of the fine, the Commission took into account several factors, including the value of AB InBev's sales of Jupiler beer not only in Belgium but also in the Netherlands, the gravity of the infringement and its duration as well as the fact that AB InBev co-operated with the Commission during the investigation.

Remedy—the relabelling of products

Many of these cases typically end with a fine but this is a curious case because AB InBev proposed a remedy. The Commission has described the remedy in the following terms: AB InBev

> "will ensure that AB InBev provides mandatory food information in both [the] French and Dutch [languages] on the packaging of its products. The remedy will specifically ensure that the packaging of all existing and new products in Belgium, France and the Netherlands will include mandatory food information in both Dutch and French for the next five years. The Commission decision has made this remedy legally binding on AB InBev.
>
> Therefore, the Commission granted AB InBev a 15% fine reduction in return for this cooperation".[9]

The remedy means that products destined for the French and Dutch markets could also be sold in Belgium. It is interesting that there is a temporal limit to the remedy (i.e. five years) and it is not clear (from the Commission's Press Release) as to what happens at the end of that period: if AB InBev was still dominant, then surely the same issue would arise but this is one aspect of the decision which will be worth studying (assuming that the decision addresses the issue).

Procedural dimension—the process

The case moved relatively quickly. The Commission opened its investigation on 30 June 2016 to determine whether AB InBev abused its dominant position in breach of art.102 TFEU in the Belgian wholesale beer market to illegally restrict

[9] IP/19/2488.

imports of cheaper beer into Belgium. On 30 November 2017, the Commission issued a Statement of Objections to AB InBev.[10]

It is notable that, in the Statement of Objections, the Commission identified a potential problem with the Leffe brand of beer as well as the Jupiler brand. Interestingly, however, the Commission appears to have dropped its concerns about the Leffe brand in the final decision. It is also notable that the Commission mentioned France and the Netherlands at the stage of issuing the Statement of Objections but was less concerned about France by the time of the final decision.

In its Press Release, the Commission said that, in setting its fine, it took into account the value of AB InBev's sales of Jupiler beer in Belgium and the Netherlands. This is interesting because it took into account the value of sales in an area (the Netherlands) outside the area in which AB InBev was held to be dominant (i.e. Belgium). If there were an appeal in this matter, it would be interesting to see how the General Court or the Court of Justice would view this approach.

In procedural terms, it is notable that the Commission dealt with the case on the basis of art.102 TFEU rather than art.101 and this aspect is worth considering further.

Conclusions—the significance of the case

This case is interesting because it is not the traditional anti-competitive arrangements case about parallel trade (e.g. an agreement between a manufacturer and a distributor to curb parallel trade) but rather an abuse of dominance case about parallel trade (i.e. a unilateral act by a dominant undertaking).

In terms of dominance, the Commission seems satisfied to use market share by volume to indicate dominance. It is possible to have different outcomes depending on value or volume. In the absence of the published decision, it is impossible to speculate on the Commission's thinking on this issue but it will be interesting to see how the Commission decided on the existence of dominance.

The case is also interesting because it related to consumer goods and the European Commission's desire to demonstrate competition law working for consumers. Competition Commissioner Vestager said, in announcing the fine, that

> "consumers in Belgium have been paying more for their favourite beer because of AB InBev's deliberate strategy to restrict cross border sales between the Netherlands and Belgium. Attempts by dominant companies to carve up the Single Market to maintain high prices are illegal. Therefore we have fined AB InBev €200 million for breaching our antitrust rules".[11]

There is a certain populist message in this, but this may be more of an "effect" than a "cause" in this context.

It is interesting that the Commission approached this case on the basis of art.102 rather than art.101 or a combination of arts 101 and 102. In some ways, approaching the case as an abuse of dominance case was not surprising as some of the conduct (e.g. the relabelling and the limiting of supply) were unilateral actions that would

[10] IP/17/5041.
[11] IP/19/2488.

fall outside the scope of art.101 and might potentially fall within the scope of art.102 but some of the other strategies might well have raised art.101 issues (e.g. a retailer agreeing with AB InBev to limit its imports of less expensive Jupiler beer from the Netherlands to Belgium). Clearly by proceeding on the basis of art.102, the Commission avoided the need to prove the existence of an agreement between undertakings, a decision by association of undertakings or a concerted practice, but the Commission nonetheless needed to prove the existence of a dominant position.

It is possible, but somewhat unlikely, that there would be extensive follow-on damages actions by wholesalers, retailers and/or consumers for the overcharge but the possibility could not be ruled out. In any event, the scale of the fine alone is a good reminder to businesses and their executives that, while they may enjoy the *benefits* of the Internal or Single Market, there are also some *burdens*, namely rules on arrangements to prevent parallel trade or any abuse of dominance which limits such parallel trade.

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Hong Kong: Banking—Virtual banks

Hong Kong Monetary Authority—Banking Ordinance (Cap.155)—initial granting of licences—regulation and supervision—monitoring of impact

Banking regulation; Banks; Electronic banking; FinTech; Hong Kong

The Hong Kong Monetary Authority (HKMA) has now, since the end of March 2019, granted a total of eight virtual banking licences—to strategic joint ventures and financial technology (or FinTech) companies—under the Banking Ordinance (Cap.155). The newly licensed virtual banks are due to launch their services within six to nine months of receiving their respective licences, as required by the HKMA. As noted by the Chief Executive of the HKMA on its website, the introduction of virtual banks in Hong Kong is "a key pillar supporting Hong Kong's entry into the Smart Banking Era" and "a major milestone in reinforcing Hong Kong's position as a premier international financial centre".[1]

So, what exactly is a "virtual bank"? How will virtual banks shape the financial landscape? How are they different from existing "online banking"?

A virtual bank essentially provides retail banking services through the internet, or some other form of electronic channel, rather than through physical bank branches. It offers an exclusively digital end-to-end service, from customer onboarding to applications for, and delivery of, products and services. The strategic joint ventures

[1] Government of the Hong Kong Special Administrative Region, "Granting of virtual banking licences", Press Release available at: *https://www.info.gov.hk/gia/general/201903/27/P2019032700634.htm* [Accessed 5 August 2019].