

**Notice published pursuant to Article 19(3) of Regulation No 17<sup>(1)</sup> concerning notification  
COMP/A37.904/F3 — Interbrew**

(2002/C 283/05)

(Text with EEA relevance)

### I. THE NOTIFICATION

1. On 30 June 2000 Interbrew Belgium NV (hereafter 'Interbrew') notified pursuant to Article 4 of Council Regulation No 17 its brewery contracts concluded with operators of Horeca outlets<sup>(2)</sup> in Belgium. The notified brewery contracts can be divided in five different types: loan agreements, (sub)lease agreements, concession agreements, franchise agreements and the 'afstand openingstaks' agreements. Each of these agreements contains a tie for beer, that will be described below.
2. Interbrew has requested a negative clearance under Article 81(1) of the EC Treaty or an individual exemption pursuant to Article 81(3) of the EC Treaty. The notification was amended by Interbrew in November 2001 and in June 2002.

### II. INTERBREW

3. Interbrew is the largest Belgian brewer. Interbrew's most important brands in Belgium are Jupiler and Artois (pils), Hoegaarden (wheat beer) and Leffe (abbey beer). All four brands are in the top ten of most sold brands in Belgium.
4. Interbrew NV is the parent company of Interbrew. Interbrew NV is a public company based in Brussels and runs operations in 20 countries, across North America, western and eastern Europe and Asia.

### III. THE MARKET

5. This case concerns the distribution of beer to the Horeca market in Belgium.
6. Brewers sell roughly 60 % of all their beer in the Belgian Horeca sector. The remaining 40 % are sold in the take-home sector (supermarkets, shops, etc.). In the Horeca sector, about 65 % of all beer consumed is draught beer (as opposed to beer in bottles or cans).
7. Interbrew holds an overall market share of roughly 56 % of the Belgian Horeca sector. The second brewer Alken-Maes (now part of Scottish & Newcastle, previously part of Danone) has around 13 % of this market. The share of the third largest brewer Haacht is somewhere around 6 %. These three brewers all have a pils beer which generates most of their turnover. The fourth brewer, Palm, who holds roughly 7 % of the market, achieves most of its sales with an amber beer (although it also has a pils beer in its portfolio). Together, the four main

brewers represent around 80 % of the Belgian Horeca market.

8. Most of the 52 000 Horeca outlets in Belgium are pubs (35 500) and [< 20 000] pubs sell Interbrew beers. However, only [11 000-13 000] pubs are subject to a non-compete obligation and sell nothing but Interbrew beers.
9. In 1999, Interbrew's beer turnover in the Horeca sector was 3 382 657 hectolitres. Interbrew estimates that it sold [30-40] % through outlets which are tied to it by means of a non-compete obligation. It bases this estimate on an average pub output of 100 hl per year. This gives Interbrew a *tied* market share in the Horeca sector of [17-22] %.
10. Almost all of the [11 000-13 000] Interbrew ties are either loan ties or lease/sublease ties. In 1999 [8 000-9 000] were loan ties (i.e. operator of outlet owns his outlet or rents it from a third party but obtains from Interbrew a loan of money or material or a bank guarantee). These loan-tied outlets achieved sales representing a tied market share of [11-16] %. The remaining [3 000-4 000] outlets were lease or sublease ties (i.e. operator rents the outlet from Interbrew which is either the owner or the head lessee). Their sales correspond to a tied market share of [4-8] %.
11. Since 1999, the number of Interbrew loan and lease/sublease ties has decreased slightly. Figures on 31 August 2001 give [...] loan ties and [...] lease ties.

### IV. THE AGREEMENTS

#### 1. Loan ties

12. The general principle of the loan ties is that in return for a loan by Interbrew, the outlet operator accepts a non-compete obligation for beer. This means that he has the obligation to purchase all his beer requirements from Interbrew and is not allowed to resell beers from third brewers. Interbrew's loan ties cover a wide variety of loans: non-refundable loans, money loans, guarantees and equipment loans. The duration of these contracts is typically five years.
13. In the case of non-refundable loans, Interbrew grants the operator an amount of money for (re) refurbishing the pub. The publican is not obliged to repay the money as long as he strictly fulfils the non-compete obligation.

<sup>(1)</sup> OJ 13, 21.12.1962, p. 204/62.

<sup>(2)</sup> Hotels, restaurants and cafés.

14. Interbrew also provides money loans to operators. The borrower will have to repay the loan, but the financial benefit for the operator is that the loan is provided under favourable conditions (e.g. lower interest rates than standard bank rates).
15. In order to provide the outlet operator with a loan, Interbrew can also act as an intermediary with banks and other credit institutions. Often, Interbrew enters into a financial obligation towards the bank in favour of the operator: Interbrew either guarantees the loan and/or contributes to the payment of the interest of the loan. These are the so-called guaranteed loans.
16. The last type of loans are the equipment loans: Interbrew provides the operator with the equipment he needs (e.g. beer taps, coolers, furniture, publicity materials etc.). Upon expiry of the contract, the operator has to return the equipment to Interbrew in good condition.

## 2. Lease and sublease ties

17. There are outlets which Interbrew either owns or leases from a third party. It then leases or subleases the premises to an outlet operator who in return accepts a non-compete obligation. These are the so-called lease and sublease ties (sometimes also called property ties). In line with Belgian law, the duration of the lease contracts is nine years, which is renewable for further terms of nine years, up to a maximum duration of 27 years.

## 3. Franchises

18. Interbrew has around 20 franchise contracts for either Leffe pubs, Hoegaarden pubs or Radio 2 pubs. As in the case of lease or sublease ties, Interbrew mostly owns the premises of the franchised pub or it is the head lessee of these premises.
19. In all these cases, Interbrew gives the outlet operator a concession for the exploitation of the franchise formula. The operator has to pay a monthly royalty fee to Interbrew. Interbrew grants the operator a territorial exclusivity for the franchise formula and provides him with commercial assistance services. In return, the operator accepts a non-compete obligation. The franchisee does not enjoy an exclusivity for the beers sold in the exclusive territory.

## 4. Concessions

20. Interbrew regularly tenders for public contracts to operate an outlet in cultural centres, sports facilities, recreation parks etc. The concession is awarded by the public authority to the brewer or beer wholesaler that offers the best conditions.

21. If Interbrew wins the concession, it enters into an agreement with the outlet operator allowing it to run the outlet for the period of the concession. Interbrew also provides the equipment (beertaps, coolers, furniture, etc.). The operator subscribes to a non-compete obligation.
22. Interbrew has approximately 100 concession outlets. The duration of the concession varies from five to 10 years, sometimes even longer.

## 5. 'Afstand openingstaks'

23. According to Belgian statutory law, every outlet operator must pay an 'opening tax' of three times the rental value of the outlet as estimated by the public administration. When the brewers or beer wholesalers are the owners or the head lessees of the property, they — rather than the outlet operator — will pay the opening tax.
24. The payment of the opening tax is valid for 15 years, but every five years the rental value is re-estimated and the brewer or beer wholesaler has to pay a surcharge. When Interbrew decides to terminate the exploitation of the outlet, it is legally obliged to inform the competent public authorities. It cannot claim back part of the opening tax. However, if Interbrew transfers the Horeca outlet to someone else within one year of terminating the exploitation, the new outlet operator will only have to pay an opening tax of once the estimated rental value.
25. In return for this financial benefit (which amounts to twice the estimated rental value), Interbrew imposes a non-compete obligation upon the new outlet operator.
26. Although in Flanders the opening tax was reduced to zero on 1 January 2002, there are still Flemish operators that are tied to Interbrew based on a contract concluded before this date.

## 6. The non-compete obligations in the notified contracts

### A. The originally notified contracts (30 June 2000)

27. For all types of brewery contracts, i.e. loans, leases, subleases, franchises, concessions and 'afstand openingstaks' situations, the original notification contains in principle (and subject to two exceptions which are explained below) unqualified non-compete obligations for the operator of the outlet. This means that the outlet operator is obliged to buy all his requirements for beers as well as other drinks specified in the brewery contract from Interbrew for the duration of the contract and cannot resell competing beers or other drinks. In the franchise agreements, the operator must in addition achieve a minimum sale of Leffe or Hoegaarden (depending on the franchise formula) of 25 % of his sales of all beer.

28. For the loan contracts and 'afstand openingstaks' contracts, the original notification provides for two exceptions. First, all contracts entered into from 1 March 2001 contain a non-compete obligation covering draught beer only (so no beer in bottles and cans nor other drinks) and those concluded as from 1 June 2001 are terminable annually by the operator on three months' notice. Second, for loan and 'afstand openingstaks' contracts entered into after 1 July 2001, Interbrew changes the non-compete obligation into a minimum purchase obligation by requiring from the operator that he purchase at least 75 % of his total beer turnover from Interbrew.

B. *The first amendments of the original notification (November 2001)*

29. In November 2001, Interbrew harmonised the non-compete obligations for all its existing loan and 'afstand openingstaks' contracts: (i) the non-compete obligation covers beer only (no other drinks); (ii) the operator is obliged to purchase at least 75 % of his total beer turnover from Interbrew; (iii) the contracts are terminable annually by the operator on three months' notice; and (iv) the penalty for not respecting the minimum purchase obligation (in absolute volume) has been deleted.

30. For all other contracts (lease/sublease ties, franchises and concessions), the non-compete obligations remained those described in the original notifications (see paragraph 26 above).

C. *The second amendments of the original notification (June 2002)*

31. Following discussions with the Commission services, Interbrew offered further amendments to the originally notified agreements. These amendments were formally notified in June-October 2002.

6.1. **Loan ties**

32. As said (see paragraph 10 above), loan ties represent the largest number of brewery contracts and yield a tied market share of [11-16] %. Interbrew now accepts to limit the quantity forcing clause to *draught pils*, provided that the outlet at least buys 50 % of its total beer requirements from Interbrew. In other words, the quantity forcing clause on the operators no longer covers bottled or canned pils nor does it cover any other type of beer than pils (e.g. wheat beer, abbey beer, amber beer), whether draught or bottled. This means that in future other brewers will be able to have access to Interbrew's loan-tied outlets with all their beers, except draught pils.

33. Moreover, Interbrew now accepts that the operator can terminate its brewery contract any time, provided the operator gives a three months' notice. Interbrew will insert a clear reminder of this right to terminate in its sales conditions featuring on the back of every invoice.

34. When the outlet operator terminates the contract, he/she (or any brewer who takes over) has to repay the outstanding balance of the loan without an early repayment penalty or other financial compensation <sup>(1)</sup>.

35. In the case of an equipment loan, the operator will have to either return the equipment in good condition (fair wear and tear excluded) or buy the equipment for its residual value, based on a linear depreciation over five years or 60 months.

36. The duration of the loan contracts is maximum five years. However, Interbrew still has approximately 2 000 money loan and bank guarantee agreements which it entered into with operators between 1 January 1997 and 1 January 2000 and which have a duration of 10 years. Interbrew has committed itself to terminate the quantity forcing clause at the latest on 31 December 2006 (i.e. five years after the end of the transitional period provided for in Article 12 of Commission Regulation (EC) No 2790/1999).

6.2. **Lease and sublease ties**

37. Lease or sublease ties represent a tied market share of [4-8] % (see paragraph 10 above). For these ties, Interbrew limits the non-compete obligation to *all types of draught beer (pils or any other type) brewed by Interbrew under its own brands or under a licence agreement*. The amended tie no longer applies to types of draught beer not brewed by Interbrew (i.e. Trappist). Furthermore, since the reference to licence agreements in fact only refers to Tuborg and not to existing cooperation agreements under which Interbrew distributes beers from third brewers, the non-compete obligation no longer applies to beer from Orval, Rodenbach, Van Honsebrouck (Kasteelbier) or De Koninck. Interbrew has also deleted the minimum purchase obligation (in absolute volume) for the operator.

38. This means that in future the tied outlet operator will be free to sell draught Trappist beer and all types of beer in bottles and cans.

39. If in future, other types of draught beers would appear to exist that are not brewed by Interbrew, if Interbrew would start brewing a Trappist beer or if it would wish to conclude licence agreements with other third party brewers, the Commission will reassess the scope of the amended quantity forcing clause.

<sup>(1)</sup> In most term loans, the borrower is not only obliged to pay back the outstanding capital when he/she repays early, but on top of that a sum of money to compensate the lender for the fact that the latter gets his capital back too early and will no longer receive the expected interest income on it.

### 6.3. Franchises

40. For the small number of Leffe or Hoegaarden franchises, Interbrew will limit the non-compete obligation to the type of beer (draught, bottled and canned) that is subject of the franchise formula. It will, however, impose a minimum purchase obligation for this type of beer of 25 % of all beer purchases. For the Radio 2 franchise system, there will not be any non-compete obligation or quantity forcing clause.
41. This means that in future any Leffe or Hoegaarden franchisee will be free to purchase and resell any type of beer (be it draught, bottled or canned) from third brewers, with the exception of abbey beer for a Leffe pub or wheat beer for a Hoegaarden pub. A Radio 2 franchisee will be free to purchase and resell any type of beer from third brewers (draught, bottled and canned).
42. As stated above (paragraph 18), Interbrew owns most franchised outlets or rents them as head lessee. Interbrew reserves itself the right to convert the existing franchise contracts into a sublease contract. In that case, it will impose the loosened quantity forcing clause for lease/sublease contracts without combining it with the 25 % minimum purchase obligation for the 'franchise beer'.

### 6.4. Concessions

43. Interbrew will treat the 100 or so concession agreements in the same way as the (sub)lease contracts. Where Interbrew wins the concession, the situation is very similar to that where Interbrew is the head lessee. It will appoint an outlet operator as sublessee and the latter will be subject to the non-compete obligation for lease/sublease contracts.

44. This means that the outlet operator who effectively run the concession will be free to sell draught Trappist beer and all other types of beer in bottles and cans.

### 6.5. 'Afstand openingstaks'

45. Interbrew has informed the Commission that it will no longer impose non-compete obligations or quantity forcing clauses on outlet operators who take over the outlet from Interbrew within one year after Interbrew has terminated its exploitation.

## V. CONCLUSION

In view of the amendments of the notified agreements, the Commission intends to take a favourable position in respect of these agreements. Before adopting a favourable position, the Commission invites third parties to send their observations within one month of the publication of this notice by mail to the following address or by fax to the following number quoting the reference Case COMP/A37.904/F3 — Interbrew:

European Commission  
Directorate-General for Competition  
Directorate F  
B-1049 Brussels  
Fax (32-2) 296 98 02.

If a party considers that its observations contain business secrets, it must indicate the passages which in its opinion ought not to be disclosed on the ground that they contain business secrets or other confidential material, and state the reasons. If the Commission does not receive a request with reasons it will assume that the observations do not contain any confidential information.

## Prior notification of a concentration (Case COMP/M.2981 — Knauf/Alcopor)

### Candidate case for simplified procedure

(2002/C 283/06)

(Text with EEA relevance)

1. On 12 November 2002 the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 <sup>(1)</sup>, as last amended by Regulation (EC) No 1310/97 <sup>(2)</sup>, by which the French undertaking Knauf La Rhénana SAS, belonging to the German Knauf Group (Knauf), acquires, within the meaning of Article 3(1)(b) of the Regulation, control of the Swiss undertaking Alcopor Knauf Holding AG (Alcopor) by way of purchase of shares.

2. The business activities of the undertakings concerned are:

- Knauf manufacture of thermal and acoustic insulation products, gypsum and gypsum products, and other building materials,
- Alcopor: manufacture of thermal and acoustic insulation products.

<sup>(1)</sup> OJ L 395, 30.12.1989, p. 1; corrigendum: OJ L 257, 21.9.1990, p. 13.

<sup>(2)</sup> OJ L 180, 9.7.1997, p. 1; corrigendum: OJ L 40, 13.2.1998, p. 17.