



EUROPEAN COMMISSION

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UNITED KINGDOM

VIA
Cabinet Shefet
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FRANCE

Subject: Case AT.40083 – Irish Distillers
Commission Decision under Article 7 (2) of Regulation 773/2004
(Please quote this reference in all correspondence)

Dear Madam/Sir,

- (1) I am writing to inform you that the European Commission (the "Commission") has decided, pursuant to Article 7(2) of Commission Regulation 773/2004¹ to reject the complaint dated 14 January 2013 filed with the Commission by Protégé International Ltd. ("the complainant"), represented by you, against Irish Distillers Limited, The Old Bushmills Distillery Co. Limited and Beam Inc. (hereinafter collectively referred to as "the three companies") alleging a violation of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") in connection with the refusal to supply whiskey on the Irish whiskey market ("the Complaint").

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

1. THE COMPLAINT

- (2) By letter dated 14 January 2013, you asked the Commission to launch an investigation into the behaviour of the three companies, which you consider to breach Article 101 of the TFEU.
- (3) The complainant markets Irish whiskey under five whiskey brands "Wild Geese", "Wild Geese Rare Irish Whiskey", "The Wild Geese", "The Wild Geese Irish Soldiers and Heroes" and "The Wild Geese Soldiers and Heroes"². Since 2002, the complainant have procured this whiskey through an exclusive supply agreement with Avalon Group (also referred to hereinafter as "Avalon/complainant"), which in turn procured Irish whiskey from Cooleys Distillery plc. The latter was taken over by Beam Inc. as of January 2012. In April 2014 Beam Inc. in turn, was acquired by Suntory Holdings Limited.
- (4) Cooleys Distillery/Beam Inc. informed Avalon/complainant that it did not intend to prolong the supply agreement signed on 1 July 2008 after its expiration on 1 July 2014. The complainant asked two other companies – Irish Distillers Limited and the Old Bushmills Distillery Co. Limited – to supply it with whiskey, but they have refused to do so. In the Complaint you submitted that the three companies are controlling the market for Irish whiskey. You further argued that they had either concluded an agreement or entered into concerted practices not to supply the complainant with whiskey, which would lead to the exclusion of the complainant from the market. On that ground, you conclude in the Complaint that the three companies would have infringed Article 101 (1) (b) and (c) TFEU.
- (5) On 19 March 2013 the Commission and the complainant represented by you had a conference call. On the same day you submitted further written information to the Commission.
- (6) You made additional written submissions to the Commission by emails of 29 April 2014, 7 May 2014, 13 June 2014 and 16 June 2014. On 4 June 2014 a meeting between the complainant and the Commission services took place.
- (7) By letter of 3 July 2014 ("the Article 7(1) Letter"), the Commission informed you of its intention to reject your Complaint. In response, you made additional observations in your letter of 30 July 2014 stating that it was not being possible to procure Irish whiskey on the wholesale market from companies other than the three companies because either the other distilleries produce too small quantities (Dingle Whiskey Distillery, Alltech) or they are not yet operational (Echlinville, William Grant & Sons, Walsh Distillery). Further, you strongly contested the allegation of Beam Inc. that Avalon would not have honoured the contractual obligations derived from the supply agreement signed with Cooleys Distillery. In addition, you submitted further information by email of 14 August.

2. THE NEED FOR THE COMMISSION TO SET PRIORITIES

- (8) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. The Commission has limited resources and must

² These brands are owned by another company - Stichting Lodestar.

therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.³

- (9) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. The Commission may also attach importance to the potential impact of the alleged infringement on the functioning of the internal market. Moreover, the Commission may take into account whether a national court or national competition authority might be well-placed to examine the allegations made.

3. ASSESSMENT OF YOUR COMPLAINT

- (10) In the Article 7 (1) Letter, the Commission indicated that, after examination of the information provided by you, it intended to reject the Complaint. The Commission considers that the additional information provided by you, notably in the submission of 30 July 2014 and 14 August 2014, does not bring forward new elements which would advise to review its preliminary assessment.
- (11) The Commission has therefore decided not to conduct a further in-depth investigation into your claims, for the reasons set out below.

3.1. The likelihood of establishing the existence of an infringement

- (12) In the light of the information provided by you the Commission considers that the likelihood of establishing the existence of an infringement of Article 101 of the TFEU in this case appears limited.
- (13) First, there are no indications that the refusal to supply by the three companies has been the result of an agreement or concerted practices between them with a view to excluding the complainant from the market. In this respect, the complainant has failed to provide any concrete evidence or even indication of an agreement between the three companies not to supply Irish whiskey to it. In the absence of any direct documentary evidence or indication of anticompetitive contacts between the three companies, it seems unlikely that the decision of each company not to supply Irish whiskey to the complainant is the result of a concerted practice. Even assuming that the actions of the three companies would constitute “parallel conduct” that cannot be regarded as proof of a concerted practice, unless it is the only plausible explanation.⁴ That is not the case here.
- (14) Second, the three companies each seem to have legitimate business reasons to refuse to supply Irish whiskey to the complainant.
- (15) Firstly, Cooleys/Beam claimed in their correspondence with Avalon/complainant that the latter had not respected the supply agreement signed between the Avalon Group and

³ OJ C 101, 27.04.2004, p. 65. See also the Commission’s Report on Competition Policy 2005, p. 25-27.

⁴ Case C-89, 104, 114, 116, 117, 125-129/85, *Wood Pulp*, [1993] ECR I-1307, para. 71 and Case 48/69 *ICI v. Commission (Dyestuffs)* [1972] ECR 619, para. 65-68.

Cooleys Distillery. Both Cooleys Distillery, in a letter of 5 June 2012, and Beam Inc., in a letter dated 16 July 2012⁵, informed the complainant of Avalon Group's failure to comply with its obligation under the supply agreement to provide Cooley Distillery with a schedule of Avalon Group's anticipated yearly supply, which would have caused inventory problems and distillation difficulties to Cooleys Distillery. For that reason, Beam Inc. announced that it reserved the right to terminate the agreement immediately, and informed Avalon Group that the agreement would not be extended beyond its expiration on 1 July 2014. In a letter of 30 July 2012 Avalon Group disagreed with Beam Inc. that it had breached the terms of the supply agreement. Based on the above, the Commission considers that there appears to have been a commercial dispute between the two counterparties about the practical implementation of their contract and the absence of prolongation of the supply agreement may thus be explained by the existence of such dispute.

- (16) Secondly, in your submission of 16 June 2014 you listed a number of brands⁶ which would have ceased to exist following the acquisition of Cooleys Distillery by Beam Inc. This seems to suggest that Cooleys Distillery has stopped supplying a wide range of retailers and suppliers of Irish whiskey brands after it was acquired by Beam Inc. Were this the case, it would thus indicate that Cooleys Distillery's new owners would have changed its commercial strategy without necessarily targeting the complainant or coordinating its action with other players on the market.
- (17) Thirdly, the other two companies –Irish Distillers Limited and The Old Bushmills Distillery Co. limited- indicated in their correspondence with the complainant that they do not have capacities to supply it with whiskey. In particular, in its reply to the complainant of 21 February 2012, Irish Distillers submitted that due to "capacity constraints at its distillery" it would not be able to supply whiskey to the complainant. Likewise, Old Bushmills Distillery also pointed out in its reply of 29 March 2012 that the company would not supply whiskey to any third party as it intends to dedicate all its production to its brands.
- (18) In this respect, the Commission considers that the fact that the two companies cannot or do not wish to supply whiskey to the complainant is consistent with market expansion and the legitimate commercial interest in increasing their own sales⁷. This rapid market growth of the Irish whiskey seems to be further supported by the fact that there are several companies, which have built or are in the process of building new distilleries in Ireland. In this context, Alltech⁸ and the Dingle Whiskey Distillery⁹ invested in new

⁵ Letters of Cooleys Distillery of 5 June 2012 and of Beam dated 16 July 2012.

⁶ See Annex 3 of the submission of 16 June 2014.

⁷ See for instance the documents "Irish Whiskey boom" of February 2011 and "New Boys in town" of April 2012 from Spirits Review, which both state that Irish whiskey sales are growing. Both articles report that sales registered a near 8% compound annual growth rate in the period between 2005 and 2010. The latter article informs also that the sales of the flagship product of Irish Distillers were growing fast in 2012. The sales in volume of Jameson whiskey increased 20% in the first six months of 2011. The same article reports that the sales in volume of the whiskey brand Bushmills of the Old Bushmills Distillery increased in the same period 18 %. Further the article of the Irish Times "The Whiskey Rush" reports on a growth of sales of Cooleys Distillery of 60% in 2011 and 50% in 2012. Separately, the submission of 9 May 2014 indicates that in general the growth in sales of Irish whiskey has been strong since 2005.

⁸ <http://www.alltech.com/news/news-articles/2012/11/05/distilling-begins-carlow-alltechs-irish-whiskey-0>

distilleries which both started operations in November 2012¹⁰. In addition, a new distillery - Echlinville Distillery¹¹ - has recently started its operations in Northern Ireland. Further, other operators (William Grant & Sons, Belfast Distillery Company, The Irishman) announced that they are investing in new distilleries to produce Irish whiskey¹². In a market characterised by rapid growth of demand it may occur that operators without own production facilities like the complainant face difficulties in procuring whiskey.

- (19) Furthermore, you argue in your submissions of 30 July 2014 and 14 August 2014 that several of the operators, investing in new production facilities, namely Alltech and Echlinville are procuring whiskey from Beam. Further, you report that William Grant & Sons and Walsh Whiskey Distillery would procure Irish whiskey for their brands from Pernod-Ricard S.A.¹³, which is the owner of Irish Distillers Limited. It is difficult to reconcile your allegation that the three companies would have agreed to evict the complainant from the market in order to limit competition with the fact that they are supplying several other competitors.
- (20) Regarding the other players besides the three companies, you consider in your submission of 30 July 2014 that it is not possible to procure Irish whiskey on the wholesale market from other companies because either the other distilleries produce too small quantities (Dingle Whiskey Distillery, Alltech) or they are not yet operational (Echlinville, William Grant & Sons, Walsh Distillery). You submit that in the short term only the three companies will have capacity to supply third parties. However, you also reported ¹⁴ that [CONFIDENTIAL], this would show the possibility of procuring Irish whiskey in the wholesale market from companies other the three companies. In any event, even if that is an exceptional situation, the fact that producers other than the three companies are constrained to supply whiskey to third parties does not in itself necessarily mean that the three companies would have agreed to evict the complainant from the market as explained in the previous paragraphs.

3.2. The impact on the functioning of the internal market

- (21) The product concerned is Irish whiskey which is produced in Ireland. Even though Ireland constitutes a substantial part of the internal market, the Commission generally gives priority to cases which concern a number of Member States or which present a

⁹ <http://www.dingledistillery.ie/>

¹⁰ There appear to be other distilleries which were put in operation in recent years: e.g. West Cork Distillery in 2008. See http://en.wikipedia.org/wiki/Irish_whiskey#cite_note-11

¹¹ <http://www.thespiritsbusiness.com/2014/05/echlinville-distillery-releases-irish-whiskey-casks/>

¹² For William Grant & Sons and for the Belfast Distillery Company see: <http://www.fdbusiness.com/tag/irish-whiskey/> "William Grant to Invest €35 Million in New Irish Whiskey Distillery" " New Irish Whiskey Distillery For Belfast". For the Irishman and its new Walsh Whiskey distillery see <http://www.theirishmanwhiskey.com/2013/11/walsh-whiskey-distillerywalsh-whiskey-distillery-unveils-e25m-expansion-programme-build-share-global-irish-whiskey-market/>.

¹³ Submission of 16 June 2014.

¹⁴ [CONFIDENTIAL].

strong cross-border dimension. Regarding cross-border trade, the trade volumes of Irish whiskey are relatively limited compared to total whiskey trading. In a context where producing areas export most of their production, the Datamonitor report annexed to the Complaint, shows that Scotch whiskey production volumes are about fifteen times larger than Irish whiskey volumes.

- (22) Further, you claim that only the three companies produce Irish whiskey and that the supply of Irish whiskey consequently requires procuring it from them. However, as noted in the paragraphs 18 and 19, it seems that operators other than the three companies are operating or developing production capacity. Therefore, even if the three companies were collectively trying to exclude the complainant from the market, there would be several other suppliers growing and investing in the market. Therefore, the potential impact of the action of the three companies appears to be limited on the markets concerned and as a consequence on the functioning of the internal market.

3.3. National courts and authorities appear to be well-placed to handle the matters raised

- (23) Irish national courts and competition authority appear particularly well-placed to handle the matters as the practices described in your complaint are essentially taking place in Ireland. These courts and authorities are thus able to obtain the relevant evidence and explanations from the parties.¹⁵

4. CONCLUSION

- (24) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringement(s) and consequently rejects the complaint pursuant to Article 7(2) of Regulation No. 773/2004.

5. PROCEDURE

5.1. Possibility to challenge this Decision

- (25) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidentiality

- (26) The Commission reserves the right to send a copy of this Decision to the three companies. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.¹⁶ If you consider that certain parts of this Decision contain

¹⁵ We took note that you already approached the Irish Competition Authority in 2012 when the acquisition of Cooleys Distillery by Beam Inc. was announced as stated in your submission of 14 January 2013 Annex 25 and the submission of 16 June 2014 Annex 5. Back then the authority did not plan to take action, however did not exclude taking action in the future as stated in your submission of 14 January 2013 Annex 26.

¹⁶ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.

confidential information, I would be grateful if within two weeks from the date of receipt you would inform [...]. Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to the three companies.

- (27) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission

*Margrethe VESTAGER
Member of the Commission*