

CASE FILE NO.: CCC/ACBP/5/2/2021

**DECISION OF THE COMMITTEE RESPONSIBLE FOR
INITIAL DETERMINATIONS ON THE INVESTIGATION
INTO ALLEGED ANTI-COMPETITIVE BUSINESS
PRACTICES BY HEINEKEN HOLDING N.V**

ECONOMIC SECTOR: Alcoholic Beverages

10 March 2025



Reference: CCC/ACBP/5/2/2021

Parties: COMESA Competition Commission Secretariat (the Commission)

Heineken Holdings N.V (Heineken)

In the matter: Investigation into alleged anti-competitive business practices by Heineken Holding N.V (the matter).

The Committee Responsible for Initial Determinations:

Cognisant of Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (the “**COMESA Treaty**”);

Having regard to the COMESA Competition Regulations of 2004 (the “**Regulations**”), and in particular Part 4 thereof;

Mindful of the COMESA Competition Rules of 2004, as amended by the COMESA Competition [Amendment] Rules, 2014 (the “**Rules**”);

Recalling the overriding need to establish a Common Market;

Recognising that anti-competitive conduct may constitute an obstacle to the achievement of economic growth, trade liberalization and economic efficiency in the COMESA Member States;

Considering that the continued growth in regionalization of business activities correspondingly increases the likelihood that anti-competitive conduct in one Member State may adversely affect competition in another Member State;

Desirability of the overriding COMESA Treaty objective of strengthening and achieving convergence of COMESA Member States’ economies through the attainment of full market integration;

Determines as follows:

A. Introduction and Background information

1. On 23 June 2021, the COMESA Competition Commission Secretariat (the Commission) commenced an investigation against Heineken on its own motion pursuant to Article 22 of the COMESA Competition Regulations (Regulations) for a possible violation of Article 16(1) of the Regulations through a Notice of Investigation.
2. The Commission’s Notice of Investigation concerned Heineken’s alleged practice of market allocation which had been enforced through its distribution agreements with



third party distributors. In particular, the Commission's Investigation identified the following concerns in respect of Heineken's distribution system:

- a. Restrictions on distributors amounting to Minimum Resale Price Maintenance;
 - b. Restrictions on distributors amounting to Single Branding Restrictions; and
 - c. Restrictions on distributors amounting to Territorial Restrictions.
3. The Commission thus issued its Statement of Concerns on 7 September 2023 and invited Heineken to respond to the Statement of Concerns by 5 October 2023. The Statement of Concerns outlined the investigation findings and proposed to impose the following remedial measures;
 - a. Prohibit the distribution agreements as incompatible with Article 16 of the Regulations. However, where it is possible to sever the anti-competitive clauses in the agreement without affecting the performance of the entire agreement, only such offending clauses should be expunged from the agreements, and
 - b. Impose a maximum monetary penalty set in accordance with Rule 79 of the Rules. Specifically, the Commission recommended that Heineken be fined USD 300,000, for each of the restrictions contained in their distribution agreements which would amount to a total of USD 900,000.
4. Heineken submitted its responses to the Statement of Concerns on 22 January 2024 after seeking and obtaining extensions from the Commission on the applicable timeline to respond.
5. The above notwithstanding, Heineken engaged the Commission in commitment negotiations in line with section 13 of the Commission's Guidelines on Settlement and Commitment Procedures with a view of achieving an expedited and amicable resolution of the investigation on a non-admission of liability basis. The Commission was of the considered position that Heineken had breached Article 16(1) of the Regulations. On the other hand, Heineken's position was that the Commission did not establish a case against it that it had breached Article 16(1) of the Regulations.
6. In view of this and in the interest of expedient resolution of the matter amicably without resorting to a lengthy litigation process, the Commission and Heineken negotiated a commitment agreement which was presented to the Committee Responsible for Initial Determinations (CID) for consideration during its meeting held on 28 February 2025.



B. The Parties

The COMESA Competition Commission Secretariat

7. The Commission is a regional body established under Article 6 of the Regulations whose core mandate is to enforce the provisions of the Regulations with regard to trade between Member States and promote competition within the Common Market. The Commission is responsible for the enforcement of the Regulations. The purpose of the Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of the consumers in the Common Market, and to protect consumers against offensive conduct by market actors.

Heineken Holdings N.V.

8. Heineken reported that it is a global company active in the production, marketing and distribution of beer and other beverages through its subsidiaries and together with its associated companies and has a portfolio of 170 beer brands and approximately 300 products, including both global and regional brands.
9. Heineken reported that it currently has significant operations in Algeria, **Burundi, Democratic Republic of Congo (DRC), Egypt, Ethiopia, Rwanda, Tunisia**, Sierra Leone, Ivory Coast, Mozambique, Nigeria, South Africa and Reunion. Heineken submitted that its strategy in Africa is to make significant investments in local production and distribution operations and in turn to drive domestic growth of its beverage brands.

C. Jurisdiction

10. Article 3(2) of the Regulations prescribes that the Regulations apply to conduct covered by Parts 3, 4 and 5 which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.
11. According to Article 16(1) of the Regulations, certain conduct is prohibited as incompatible with the Common Market. Specifically, Article 16(1) states that: *"[T]he following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which:*
 - a. may affect trade between Member States; and*
 - b. have as their object or effect the prevention, restriction or distortion of competition within the Common Market."*
12. Article 16(2) provides that Article 16(1) applies *"...only if the agreement, decision or concerted practice is, or is intended to be, implemented within the Common Market."*



Article 16(3) provides that any agreement or decision which is prohibited by Article 16(1) is void. It is noted that in line with established case law, this nullity only applies to clauses in an agreement which are caught by the prohibition. It is only the offending clauses which would be required to be amended or expunged, and not the agreement as a whole, to the extent that this does not affect the performance of the agreement. The agreement as a whole will only be void where those clauses are not severable from the remaining terms of the agreement.

13. Lastly, Article 16(4), stipulates that the provisions of Article 16(1) may be declared inapplicable if the agreement under review *"contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*

- a. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
- b. afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question."*

14. Accordingly, the Commission, in its investigations, assessed and established the following cumulative elements in line with Article 16(1) of the Regulations:

- a. Existence of agreements between Heineken and its third party distributors;
- b. Implementation of the Agreements within the Common Market;
- c. The agreements have the effect of preventing, restricting and/or distorting competition within the Common Market; and
- d. The agreements have an effect on trade between Member States.

D. Competition Concerns

15. The CID observes that Commission's investigation identified the following competition concerns;

a. Resale Price Maintenance

16. The Commission observed that the distribution agreements stipulate the price at which the products must be sold by the distributor and include a table which provides the amount of the distributor's margin inclusive and exclusive of the applicable taxes. The Commission was concerned that these stipulations limit the freedom of distributors to determine their own prices by effectively setting the price at which the distributors are expected to sell the products.



b. Single Branding

17. The Commission found that the distributors are restricted from dealing in competing products. The Commission observed that while there are benefits arising from single branding clauses, the effects of the restrictions were likely to outweigh the benefits emanating therefrom.

c. Territorial Restrictions

18. The Commission noted the distribution agreements contained clauses which prohibit the distributor from selling outside their allocated territories and purchasing products from any other source other than Heineken. The Commission further observed that distribution agreements restrict distributors from responding to passive sales, and from selling outside their allocated territories including sales to persons whom they believe would export the products.
19. The Commission noted that such restrictions offend Article 16(1) of the Regulations and have the effect of reducing trade between Member States by carving out the Common Market according to national borders. Further, the Commission took the view that the vertical restraints imposed in the distribution agreements between Heineken and their respective distributors have an exacerbated effect on the market owing to the market position enjoyed by Heineken in some Member States.

E. Commitments by Heineken

20. The CID notes that on a non-admission of liability basis, Heineken has agreed to sign a Commitment Agreement to address the concerns raised by the Commission by:
- a) Undertaking a full audit of its distribution agreements in the Common Market and amend the clauses which could be interpreted as containing restrictions on passive sales, single branding and resale price maintenance,
 - b) Training of its distributors, staff and management on the amended distributor agreements and the Distributor Management System to ensure they fully understand the provision of the amended distribution agreements,
 - c) Submitting periodic compliance reports to the Commission, and
 - d) Paying administrative penalties of USD 300,000 for each of the concerns raised by the Commission i.e. territorial restrictions, single branding and resale price maintenance. The total financial penalty to be paid by Heineken being USD 900,000.
21. The CID has considered the Commitment Agreement and is satisfied that the undertakings are sufficient to address the competition concerns identified by the



Commission. The CID has also considered the judicial economy of the process while achieving the desired outcomes in the market.

F. Confirmation of the Commitment Agreement by the Committee Responsible for Initial Determinations

22. Having regard to the foregoing, the CID confirmed that the undertakings by Heineken were sufficient to address the identified competition concerns.

23. **NOW THEREFORE**, the CID hereby confirms the Commitment Agreement between Heineken and the Commission as follows:

- a. As of the Effective Date, Heineken shall put in place corrective measures to ensure that its Distribution Agreements do not contain any provisions which could be considered to amount to Territorial Restrictions, Single Branding Restrictions, or Minimum Resale Price Maintenance. In particular, Heineken shall amend or remove the provisions (including any other provisions having direct or indirect relation with the offending provisions) in its Distribution Agreements which amount to the above-mentioned restrictions;
- b. At the latest fourteen (14) days after the Effective Date, Heineken shall notify its distributors affected by the Commitments that it will no longer enforce such provisions;
- c. As of the Effective Date, Heineken shall not include in any new Distribution Agreements, which are the subject of the offered Commitments, provisions relating to Territorial Restrictions, Single Branding Restrictions and Minimum Resale Price Maintenance;
- d. Heineken, within 30 days after the Effective Date, undertakes to pay the sum of USD 300,000 in settlement of each of the Commission's competition concerns, i.e., Territorial Restrictions, Single Branding Restrictions and Minimum Resale Price Maintenance. For the avoidance of doubt, Heineken shall pay a total of USD 900,000; and
- e. Heineken shall train its staff, management, and distributors on the amended Distribution agreements and Heineken's distribution management system, to ensure that they fully understand the provisions of the Distribution Agreements.

Monitoring and Compliance with the Commitment Agreement

24. Heineken shall, within 30 days of the effective date, submit to the Commission an affidavit confirming compliance with the undertakings provided in paragraph 23(a) above, accompanied by the amended distribution agreements.



25. Heineken shall, within forty-five (45) days of the effective date, submit to the Commission a proof of payment of the fine imposed by the Commission as provided in paragraph 23(d) above.
26. Heineken shall, within twenty-one (21) days of the effective date, submit to the Commission an affidavit confirming compliance with the undertaking provided in paragraph 23(b) above.
27. Heineken shall, within 45 days of each of each anniversary of the effective date and for a period of three years, submit to the Commission an affidavit confirming compliance within paragraph 23(e) above.
28. After 3 years, the Commission shall review and assess the relevance of the continuation of monitoring compliance with the undertakings by Heineken.
29. Any party aggrieved by the decision of the CID may appeal to the Appeals Board within 30 days pursuant to the Appeals Board Procedure Rules, failing which the decision of the CID shall be final and binding.

Dated this 10th day of March 2025

Commissioner Dr Mahmoud Momtaz (Chairperson)

Commissioner Lloyds Vincent Nkhoma

Commissioner Vipin Naugah

