

REPUBLIC OF BULGARIA
COMMISSION FOR THE PROTECTION OF COMPETITION

DECISION

No. 136

22.06.2006

The Commission for the Protection of Competition, with members:

CHAIR:

Petko Nikolov

DEP.-CHAIR:

Veselin Bozhkov, PhD

DEP.-CHAIR:

Redzheb Mustafa

MEMBERS:

Vesela Antonova

Elena Stoimenova

Mariya Popova

Rumyana Karlova

with the participation of secretary record-keeper Paskalina Tabeva, reviewed in a closed session, conducted on June 22, 2006, correspondence No. CPC-73/2005, reported by the member of the Commission Mrs. Elena Stoimenova.

A proceeding had been initiated by the Commission for the Protection of Competition pursuant correspondence entry No. CPC-73/2005 on request of "BE GE IN" Ltd., city of Varna, against "Guinness United Distillers & Vintners Amsterdam B.V" – Amsterdam, "Justerini and Brooks Limited" – London, "R and A Bailey & Co" – Ireland, "Guinness UDV North America Inc" – USA, all participating in the "Diageo" group, represented by "UDV Central Europe and Asia Limited – branch of Bulgaria" Ltd., by means of which CPC is required to institute conducted violations pursuant article 9, article 30 and article 31, paragraph 1 LPC and practice its legal authority as per article 7, paragraph 1, item 1 and item 8 of LPC.

By means of ruling No. 282/ /22.11.2005 the Commission for the Protection of Competition refers the correspondence back to preliminary control and does not initiated proceeding for the purpose of eliminating faults, specified in the circumstantial section of the ruling.

By means of claim, entry No. CPC-394-B/05.12.2005 the claimant eliminates the irregularities of the claim and indicates the entities with regards to the complaint. The claim of "BE GE IN" Ltd. indicates that the company retains its claims toward "R and A Bailey & Co." – Ireland, with regards to the committed violations in the field of unfair competition, pursuant article 30 and article 31, paragraph 1 LPC and with regards to the brand "Bayleis".

"BE GE IN" Ltd. pleads the proceeding to be continued against the companies "Guinness United Distillers & Vintners Amsterdam B.V" – Amsterdam, "Justerini and

Brooks Limited” – London, “R and A Bailey & Co” – Ireland, that are all parties on the presented project for agreements, for committed legal violations pursuant article 9 of the LPC.

ACTUALITY OF THE CLAIM

In the claim, submitted by “BE GE IN” Ltd., city of Varna, the company indicates that it implements import and trade with alcoholic beverages for a term of more than four years. The claimant specifies that subject of an annual import are about 30 – 40 containers of alcohol, including the brands of “Johnny Walker”, “J&B”, “Guinness”, “Smirnoff”, “Baileys” and others. The claim indicates that the companies “Guinness United Distillers & Vintners Amsterdam B.V” – Amsterdam, “Justerini and Brooks Limited” – London, “R and A Bailey & Co” – Ireland, “Guinness UDV North America Inc” – USA, all participating in the "Diageo" group, represented by “UDV Central Europe and Asia Limited – branch of Bulgaria” Ltd. operate on the same market, holders of the rights of the above-specified alcoholic beverages. It is specified that the indicated companies implement import and trade activity of the specified brands of alcohol through its representative in the Republic of Bulgaria.

“BE GE IN” Ltd. claims that since 2001 actions had been initiated, aiming toward suspension of its commercial activity. The claimant indicates that legal proceedings are being conducted that had not been concluded, including proceedings that had not been granted consideration. In January 2005, based on a signal of the already liquidated company “UDV Central Europe and Asia Limited” – branch Bulgaria, a prosecution correspondence had been instituted, developing into a preliminary investigation pursuant article 227 of the Criminal Code and as a result of January 21, 2005 and January 26, 2005, based on prosecutor ordinance, commodities had been seized from the “BE GE IN” Ltd. in the city of Varna, West Industrial Zone, amounting to 93 000 bottles, as a tangible proof, due to the fact that “BE GE IN” had not presented a permit from the company holders for implementation of commercial activity. The claimant considers that seizure of said goods had resulted in a disability of implementing commercial activity, as a result of which all of its clients had been impeded to obtain the duly paid commodities in timely fashion, resulting in establishing contacts with other wholesale dealers and significant damaging of its interests.

The claimant contends that the actions of “UDV Central Europe and Asia Limited” – branch Bulgaria are an unfair commercial convention. “BE GE IN” Ltd. Specifies that the constant duress through various institutions – seizure of production, set for the market – affects the company operation and results in impossibility to deliver commodities to users who had already paid for them. The claimant contends that all of the above constitutes actions against it by the afore-specified competitor, contravening to the conscientious commercial practice and damage the claimant’s interests as a competitor, as well as its customers relations.

“BE GE IN” Ltd. Determines its activity as a parallel import of original alcoholic beverages and deems that it does not contravene to the conscientious commercial practice, because it provides opportunities for price competition The claimant contends, that the implemented import does not contravene to the active

normative regulations and most importantly to the text of article 13, paragraph 1 of the Law of Brands and Geographic Marking (LBGM) – regulating the relations, with regards to the right of use and control of rights over the brand. It is indicated that subject of interdiction pursuant article 13 of the LBGM is the use by third parties in their commercial activities of a MARK identical or similar to the registered trademark, as the purpose is to eliminate the option of customer obfuscation through offering imitations. “BE GE IN” Ltd. notes that the commodities, imported by the company, had not been denoted with a mark identical or similar to the commercial trademark, on the contrary – it bears the same original mark /no arguments on the original quality of the beverages/, but is offered by another distributor of the foreign manufacturers, with who the claimant maintains commercial relations.

“BE GE IN” Ltd. also contends that incorrect information and manipulative information had been disseminated against it, including through means of mass communication /newspaper “Dnevnik“, issue 34, page 7, 17.02.2005/, which, according to the claimant, implements the actual composition of the interdiction pursuant article 31, paragraph 1 of LPC.

To a claim entry No. CPC-394-B/29.03.2005 a project for an agreement between “Guinness United Distillers & Vintners Amsterdam B.V” – Amsterdam, “Justerini and Brooks Limited” – London, “R and A Bailey & Co” – Ireland as the first party and “BE GE IN” Ltd, city of Varna, as the second party, by means of which to directly determine discriminatory commercial clauses, including sources of supply. An already signed agreement with other beverage distributor companies is presented. The claimant indicates that the purpose of the agreements is discrimination of activities of beverage importers and distributors and limitation solely to a single main distributor. The claim contends that this type of vertical agreements lead to formation of cartels on the market through competition restriction and price determination.

Applications to the claim: the article in newspaper “Dnevnik”, issue 34, page 7, 17.02.2005, agreement dated 19.02.2002 on behalf of the representatives of the “Guinness” group, offered to “Jolly Trolley” and “Vitosha Combi Trade”, agreement of an identical content, offered to “BE GE IN”, protocol of search and seizure from the store of “BE GE IN” Ltd, dated 21.01.2005.

As per stated by the claimant, the defendants had perpetrated violations of **article 9, article 30 and article 31 paragraph 1 of the LPC** and a claim had been submitted to the Commission to determine the illegality of the perpetrated actions and to apply the respective sanctions.

In claim No. CPC-73/20.04.2005 “BE GE IN” Ltd. contends that through the period of the actions, committed against it, based on the signal of “Guinness United Distillers & Vintners Amsterdam B.V”, “Justerini and Brooks Limited”, “R and A Bailey & Co” and “Guinness UDV”, the drop in sales is significant and is a causal nexus of the unfair commercial competition, conducted against the claimant.

The claim also indicates that “BE GE IN” Ltd. had experienced occurrence of impediments with regards to supply of commodities, subject of purchase and sale.

A reference had been annexed of the sales of the company for the period between 01.11.2004 – 21.01.2005, letter from “Gloriam” Ltd. to “BE GE IN” Ltd., presentation of “BE GE IN” Ltd., contract for legal protection and assistance.

With a subsequent claim entry No. CPC– 73/05.05.2005, “BE GE IN” Ltd, city of Varna, withdraws its claim and requests, based on article 48, paragraph 2 of the LPC, for suspension of the proceeding against “UDV – Central Europe and Asia Limited” – branch Bulgaria. After ascertaining that the respective company had been liquidated by means of Decision No. 4, dated 11.10.2002 as per company record No. 8288/99 of Sofia City Court, the claimant indicates as defendants the following companies:

- Guinness United Distillers & Vintners Amsterdam B.V, duly incorporated and legal as per the laws of the Netherlands, with an address: No. 10-12 Molenwerf, 1014 BG Amsterdam, the Netherlands, represented by Geraldine Mary Patricia Downie;

- Justerini & Brooks Limited, company with limited liability, incorporated as per the English legislation, with an address: No. 61 “Saint James” street, London, S W 1 A 1 LZ, England, represented by Geraldine Mary Patricia Downie;

- R & A Bailey & Co, company with unlimited liability, incorporated pursuant the legislation of the Republic of Ireland, with an address: Nantor House, Western Estate, Dublin No. 12, Republic of Ireland, represented by Margot Louise Watts, attorney.

The claimant contends that the companies “Guinness United Distillers & Vintners Amsterdam B.V” – Amsterdam, & Brooks Limited – London, “R & A Bailey & Co” = Ireland, are interfering with the work of numerous Bulgarian companies – market competitors, by impeding their commercial activity /suspend the export-import activity for specific terms, enforce provision measures and do not initiated civil proceedings, assert duress for suspension of their activities etc./ Legal decisions are applied to the claim, from which, as the claimant contends, is evident that the convention of the abovementioned companies within the country includes implementation of activities by numerous companies and groups /in this case “Diageo”/, which they instantly terminate or by means of influxes amend names and addresses. As an example for this it is indicated that the general trend for the whole “Diageo” group is, that the participating companies are managed by Eli Zheleva Georgieva – manager, including manager of the closed branch “UDV – Central Europe and Asia Limited”. The claimant considers that the perpetrated constitutes an unconscientious commercial convention, aiming at maintaining high prices on the market of alcoholic beverages – high class.

By means of claim entry No. CPC-394-B/06.06.2005 “BE GE IN” Ltd. Confirms that the names of the companies, indicated as per item 2 of the former claim (entry No. CPC-73/05.05.2005) are identical to the ones, specified in the claim, dated 29.03.2005, as addresses for summoning had been specified. The claimant notes that the three indicated companies should be constituted as parties on the correspondence and the investigation should be conducted against them.

A copy of a certificate of actual status, dated 27.05.2005 is annexed to the claim, issued by Sofia City Court as per company No. 8288/1999, providing evidence to the fact that the company “UDV Central Europe and Asia Limited – branch” had been effaced from the commercial register.

In claim entry No. CPC-73/12.10.2005 by “BE GE IN” Ltd it is specified that with regards to the claim for institution of violations, constituting an unfair competition, the claimant withdraws its claim against the initially indicated companies and the petition is valid solely against “R and A Bailey & Co”, holder of the trademark “Baileys”.

By means of claim entry No. CPC-394-B/05.12.2005 “BE GE IN” Ltd. Indicates that the company retains its pretences against “R and A Bailey & Co” – Ireland, with regards to the perpetrated violations within the field of unfair competition and with regards to the trademark “Baileys”.

The three remaining companies are parties with regards to the presented agreement projects, grounds for instituting pretences pursuant article 9 of the LPC, “BE GE IN” Ltd. pleads for continuation of the proceeding against said companies.

Additional information by “BE GE IN” Ltd

“BE GE IN” Ltd. Indicates that as a result of the criminal proceeding, initiated by the defendants, on criminal allegations pursuant article 227 of the CC for the procedural trademark an investigation had been initiated and the alcoholic beverages, available at the stores of the claimant, had been seized by the officers of Office of Economic Police at the Regional Direction of Home Affairs, city of Varna. It had been noted, that by means of ruling of Varna Regional Court, endorsed by Varna District Court, return of the seized alcohol had been enacted. “BE GE IN” Ltd. contends that as a result of the seizure of the commodities, its relations to suppliers had been deteriorated, the good reputation of the claimant had been prejudiced and its clients had terminated commercial relations with the company due to the inability to implement the supplies.

“BE GE IN” Ltd. as its standpoint, repudiates any commercial relations with “Guinness United Distillers & Vintners Amsterdam B.V” – Amsterdam, “Justerini and Brooks Limited” – London, “R and A Bailey & Co” – Ireland, “Guinness UDV North America Inc” – USA and “UDV Central Europe and Asia Limited” – branch Bulgaria, with regards to the import of alcoholic beverages for the period between 2001 and 2005.

As a reason not to buy alcoholic beverages with trademarks “Johnnie Walker”, “Gordon’s”, “J&B”, “Baileys”, “Smirnoff” and other brands, property of the defendants directly from the manufacturers, the claimant indicates high price levels.

**STANDPOINT OF THE DEFENDANT FOREIGN COMPANIES<
REPRESENTED BY ATTORNEY BORISLAV TZVETKOV BOYANOV**

With regards to an inquiry regarding the procedural representation of “Guinness United Distillers Amsterdam B.V” – Amsterdam before the Commission by means of correspondence No. CPC – 73/2005, attorney Boruislav Tzvetkov Boyanov, by means of a letter with entry No. CPC – 73/06.06.2005, contends that he had not obtained instructions from the companies, participating in the Diageo group, including from “Guinness United Distillers Amsterdam B.V”, to represent them for the quoted proceeding before the CPC, respectively at this moment he is not their procedural representative with regards to the correspondence, indicated above.

By means of claim entry No. № CPC – 73/19.08.2005 attorney Borislav Boyanov presents powers of attorney from “Diageo Brands B.V” (former name “Guinness United Distillers Amsterdam B.V”) – the Netherlands, “Justerini and Brooks Limited” – England and “R and A Bailey & Co” – Ireland, signed on August 18, 2005, by means of the above-cited he is authorized to represent the defendants with regards to this correspondence before CPC. The companies plead for extension of the term for response of the letters, sent to them (reference No. CPC – 73/09.08.2005) for

an additional 30 (thirty) days, by indicating necessity of additional time to review and respond to the inquiries and due to the summer holidays.

By means of letter, dated 23.02.2006, attorney Borislav Tzvetkov Boyanov presents to the Commission as per correspondence No. CPC – 73/2005 power of attorney from “Diageo Brands B.V” (former name “Guinness United Distillers Amsterdam B.V”) – the Netherlands, “Justerini and Brooks Limited” – England and “R and A Bailey & Co” – Ireland, signed respectively on February 14, 2006, February 22, 2006 and February 17, 2006, by means of which he is authorized to represent the defendants with regards to the correspondence, indicated above.

By means of letter entry No. CPC - 73/23.02.2006 “Diageo Brands B.V” ((former name “Guinness United Distillers Amsterdam B.V”), Justerini and Brooks Limited” – England and “R and A Bailey & Co” – Ireland, represented by attorney Boyanov, present the general standpoint.

According to the defendant companies, “BE GE IN” Ltd, city of Varna, is a systematic transgressor of the intellectual property rights of the Diageo group. It is indicated that the violations, perpetrated by the transgressor, had been determined by four legal proceedings as per LBGM, by means of seven court decisions at first and appeal instance, as for two of the cases the decision are already operational.

The companies in the Diageo group had not undertaken any and all actions for suspension of the commercial activity of “BE GE IN” Ltd, city of Varna, but within the framework of LBGM had applied, as per the legal regulations, their right to protect their own trademarks. Exert of protection of legal rights does not constitute an act of unfair competition.

As another means of protection of trademarks, the Diageo group companies had requested application of article 78 of LBGM for border control of goods, bearing the Diageo trademarks. The measures had been applied with adherence to the procedure, pursuant the Decree for border measures for protection of rights of intellectual properties by the competent authorities – “Customs” agency.

“Guinness United Distillers and VintnersAmsterdam B.V” had signaled Regional Prosecution Office in the city of Varna for the offense, perpetrated pursuant article 227 (use of foreign trademark in commercial activities without the consent of its holder) and article 296 (frustration of an active legal decision) on behalf of “BE GE IN”, city of Varna, through actions of import.

As per claims of “Guinness UDV” against “BE GE IN” Ltd, city of Varna, based on article 13, paragraph 2, item 3, article 15, article 73 and article 76 of the LBGM, legal decisions of Sofia City Court had been enacted and operated. By means of said decisions, “BE GE IN” Ltd., city of Varna, is с тези решения Бе Ге Ин” ЕООД, гр. Варна е sentenced to discontinue any and all activities with regards to import of commodities with the brands “Johnny Walker” and “Gordon’s”, without the consent of the trademark holder – Guinness UDV or its legal representative.

According to the defendants, as far as the issue with the parallel import and the violation of commercial brands is an issue of the competence of a civil court, CPC is not competent to review the issue

The defendants indicate that the claim of “BE GE IN” Ltd., city of Varna for dissemination of false information is traversed by the proof, presented by the claimant – publication in newspaper “Dnevnik”, dated 17.02.2005. The article mentions that “BE GE IN” Ltd., city of Varna, implements import of alcoholic beverages with the

trademarks of the defendants and that the Economic police, upon seizing this alcohol and in view, together with representatives of Diageo had determined that a share of the commodities lacks laser codes that would normally certify the product origin. According to the defendants, the lack of laser codes had been determined and within the framework of the investigation of the case.

With regards to the violation, contended by the claimant, of article 9 of the LPC, the defendants specify, that “the agreements, offered by Diageo group companies to transgressors of trademarks constitute agreements, aiming at suspension of violation”, thus avoiding protection of the rights of Diageo by legal means. The agreements cannot constitute a violation of the regulations of article 9, since they aim at termination of illegal actions on behalf of the transgressors. Since the agreement offers of Diageo had not been accepted, review of this issue, according to the respective parties, is pointless.

According to the defendants, the proceeding before CPC with regards to the fact, stated by the claimant, is impermissible. The actual statements of the claim does not constitute a violation of LPC and a type of unfair competence, as the defense of legally protected rights as per the established regulations, as well as the actions of the respective authorities and suspension of illegal activities cannot constitute unfair competition.

The defendants request from CPC, based on article 55, paragraph 1, item 10 of the LPC, to suspend the proceeding with regards to the correspondence. In case the correspondence is not suspended, CPC, based on article 55, paragraph 1, item 3 and item 4, to not take the claim of “BE GE IN” into consideration.

STANDPOINT OF THE REGIONAL PROSECUTION OFFICE IN THREE CITY OF VARNA

In its response, the Regional Prosecutor of the city of Varna, Mrs. S. Genadieva indicates that “BE GE IN” Ltd. had obtained a copy of the ordinance of the Regional Prosecution Office – city of Varna, dated 15.02.2005, issued based on collected materials with regards to investigation No. 26/05 as per the inventory of Regional Direction of Home Affairs – city of Varna, for offence pursuant article 227, paragraph 1 of the CC against Georgi Georgiev, manager of “BE GE IN” Ltd. With regards to appeal of the ordinance of the Regional Prosecution Office – city of Varna, the letter indicates that the claimant is aware of the fact that the ordinance had been revoked by means of decision of Varna Regional Court, confirmed by Varna District Court. It had been indicated, that the proceeding before the Higher Administrative Court had been initiated as per request of “BE GE IN” Ltd.

STANDPOINT OF THE EDITOR-IN-CHIEF OF “DNEVNIK” NEWSPAPER

In relation to an inquiry regarding the author of the article “The grey parallel of the alcohol import”, published in “Dnevnik” newspaper, issue 34, page 7, dated 17.02.2005, the newspaper editor in-chief indicates that the article had been composed by a team of journalists of “Dnevnik” newspaper, as per indicated in the respective issue of the newspaper. The standpoint indicates that the initiative for writing the article is of the editors of “Dnevnik” newspaper.

The editor in-chief indicates that the “Dnevnik” newspaper operates in conformity to the journalists Code of Ethics, in which it is indicated, that the editing contents is clearly differentiated from the paid publications. It is stressed that “Dnevnik” newspaper had never published paid publications without explicitly specifying this.

The standpoint contends that any and all information sources, used in the process of composing of said article, are indicated thereto.

STANDPOINT OF THE PATENT ADMINISTRATION OF THE REPUBLIC OF BULGARIA

In response to our letter, the Patent Administration presented CPC with the following information:

With regards to the companies:

“Guinness United Distiller and Vinters Amsterdam B.V” – the State registry of the brands as per national regulation one verbal trademark had been entered, with registry No. 46403- GOLD LABEL.

No license contracts are registered, by means of which use of the trademark, specified above, is granted, and no requests to that regard had been submitted.

Annexed the Patent Administration sent bibliographic reference of the trademark.

In the State registry of trademarks pursuant the regulations of the Madrid Agreement no trademarks with active registration are operating within the territory of the Republic of Bulgaria.

“Justerini and Brooks Limited” – London - the State registry of the brands as per national regulation one verbal trademark had been entered, with registry No. 27694- J END B

No license contracts are registered, by means of which use of the trademark, specified above, is granted, and no requests to that regard had been submitted.

Annexed the Patent Administration sent bibliographic reference of the trademark.

In the State registry of trademarks pursuant the regulations of the Madrid Agreement five trademarks with active registration are operating within the territory of the Republic of Bulgaria, with the following registration numbers: 788015; 188016; 788017, 788018 and 808160.

The Patent Administration had informed us no license contracts had been registered, by means of which right of use of the trademarks, specified above, had been granted and no requests to that regard had been submitted.

“R and A Bailey & Co” – Dublin – In the State registry of trademarks as per national regulation six trademarks with active registration are operating with the following registration numbers: 21602; 33860; 43658; 43773; 43774 and 48035

The Patent Administration had informed us no license contracts had been registered, by means of which right of use of the trademarks, specified above, had been granted and no requests to that regard had been submitted.

In the State registry of trademarks pursuant the regulations of the Madrid Agreement no trademarks with active registration are operating within the territory of the Republic of Bulgaria.

With regards to the brands:

1. "JOHNNIE WALKER"

Three brands with the name "JOHNNIE WALKER" had been entered in the State registry to the name of DIAGEO BRANDS BV, and the following registration numbers: 39311; 3459; and 3755.

The Patent Administration had informed us no license contracts had been registered, by means of which right of use of the trademarks, specified above, had been granted and no requests to that regard had been submitted.

In the State registry of trademarks pursuant the regulations of the Madrid Agreement no trademarks with active registration are operating within the territory of the Republic of Bulgaria with the name JOHNNIE WALKER.

2. "GORDON S"

Three brands with the name "GORDON'S" had been entered in the State registry to the name of DIAGEO BRANDS BV, and the following registration numbers: 1118; 7250; and 29707.

The Patent Administration had informed us no license contracts had been registered, by means of which right of use of the trademarks, specified above, had been granted and no requests to that regard had been submitted.

In the State registry of trademarks pursuant the regulations of the Madrid Agreement no trademarks with active registration are operating within the territory of the Republic of Bulgaria with the name "GORDON'S".

3. "J&B" – One verbal brand with registry No. 27694 had been entered in the State registry to the name of "Justerin and Brooks Limited".

4. "BAILEYS"

Four brands with the name "BAILEYS" had been entered in the State registry to the name of "R AND A BAILEY & CO", and the following registration numbers: 21602; 33860; 43773 и 43774.

The Patent Administration had informed us no license contracts had been registered, by means of which right of use of the trademarks, specified above, had been granted and no requests to that regard had been submitted.

In the State registry of trademarks pursuant the regulations of the Madrid Agreement no trademarks with active registration are operating within the territory of the Republic of Bulgaria with the name "BAILEYS".

No signals had been received by the Patent Administration and no proceedings had been initiated for establishment of violation of trademarks, property of the companies, indicated above.

FACTUAL CIRCUMSTANCES

Correspondence parties

Claimant:

“BE GE IN” Ltd. is a sole trading company with limited liability, registered pursuant article 3, paragraph 1 and in relation to article 174, paragraph 2 of the Commercial legislation by means of Decision No. 3276/15.01.2002 of Varna District Court, pursuant company record No. 3276/2001 and is entered in the Commercial registry at Varna District Court under No. 13, volume 244, page 50, UCN 0301032762. Headquarters and management address – city of Varna, “Troshevo” district, block 82, floor 3, flat 15. Subject of activity – home and foreign trade; commercial representation and agent activity. Sole proprietor of company stock capital – Georgi Georgiev Yordanov, civil ID No. 4602231100; the company has a stock capital of 290 000. The company is managed by its Manager and is represented by Georgi Georgiev Yordanov, civil ID No. 4602231100.

DEFENDANT COMPANIES:

A. R & A Bailey & Co, company with unlimited liability, incorporated pursuant the legislation of the Republic of Ireland, with an address: Nantor House, Western Estate, Dublin No. 12, Republic of Ireland, represented by Margot Louise Watts, attorney.

B. **“Diageo Brands B.V” (“Guinness United Distillers and Vintners Amsterdam B.V”)** – the Netherlands

“Diageo Brands B.V” (former name “Guinness United Distillers and Vintners Amsterdam B.V), partially liquidated company with limited liability, duly incorporated and existing pursuant the legislation of the Netherlands, with an address: No. 10-12 “Molenwerf, 1014 BG Amsterdam, the Netherlands, represented by Geraldine Mary Patricia Downie.

C. **“Justerini and Brooks Limited” – England**

“Justerini & Brooks Limited”, company with limited liability, incorporated as per the English legislation, with an address: No. 61 “Saint James” street, London, S W 1 A 1 LZ, England, represented by Geraldine Mary Patricia Downie;

With regards to this proceeding before the CPC, the three defendant companies are represented by attorney Borislav Tzvetkov Boyanov.

1. “BE GE IN” Ltd. is an importer of alcoholic beverages, among which is the liquor with the brand “Baileys”, “Johnnie Walker”, “Gordon’s” etc. The import of “Baileys” is implemented by “BE GE IN” Ltd. operating as per a contract, concluded by the latter and “Gloriam Washington DC 1030” (Gloriam LLC) – USA, dated 05.01.2004. Evident from the applied copies of taxation declarations, invoices and bank statements, document for paid excise tax and custom duties in 2004, the company had purchased alcohol with the brand “Baileys” in various packages from “Gloriam Washington DC 1030” (Gloriam LLC) – USA.

2. Based on collected materials as per investigation No. 26/05 as per the inventory of RDHP – city of Varna, for offense as per article 227, paragraph 1 of the CC against Georgi Georgiev Yordanov – manager of “BE GE IN” Ltd., police actions had been undertaken.

Based on Warrant dated 21.01.2005 of Varna Regional Prosecution Office, officers of RDHA-Varna conduct a search and seizure of bottles of alcohol of varying brands, for which a respective Protocol, dated January 21, 2005 had been composed. In the list of brands of seized alcohol with record brand “Baileys” it had been

indicated that it is a liqueur of 1 liter with the same brand – in boxes of 12 bottles each – first record 539 bottles, second record: 1752 bottles.

Based on Warrant dated January 26, 2005 of VRPO, officers of RDHA of MHA – Varna conduct a research and seizure of bottles of alcohol of various brands, for which a respective Protocol, dated January 26, 2005 had been composed. The list of seized alcohol bottle lacks the brand “Baileys”.

Evident from Ruling, dated 17.03.2005 of VRC, Investigation No. 26 as per the inventory for 2005 had been conducted on signal of:

- “Guinness United Distillers and Vintners Amsterdam B.V” – the Netherlands (holder of the brands “Johnnie Walker” and “Gordon s”; the company is not a holder of the “Baileys” brand);

- “Allied Domec Spirits and Wine Limited” – Great Britain (holder of the brands “Ballantine’s”, “TiaMaria” and “Teacher’s”);

- “Pernot Ricard” – France (holder of the brands “Passport”, “Jameson”, “Paddy”, “Four Roses”);

- “Maxium Bulgaria Ltd.-Sofia – license-holder of exclusive rights for import and distribution of brands of alcohol in Bulgaria (among said names lacks the brand “Baileys”).

3. By means of Decree No. 15846/17.02.2005 prosecutor at VRPO had declined the return of 93600 bottles of alcohol, seized as tangible proof with protocols for search and seizure, dated 21.01.2005 and 26.01.2005 by customs store, held by “BE GE IN” Ltd. as per investigation No. 26/2005 of RDHA - Varna.

4. Evident from the copy of the Ruling of VRC, dated 17.03.2005, applied as proof, based on lack of proof for illegal use of certain brands – “Baileys” among them, the court had ruled the seized alcoholic beverages to be returned to “BE GE IN” Ltd.

By means of Decision No. 359/04.05.2005 Varna District Court had fully confirmed the Ruling of VRC, dated 17.03.2005. The Decision is final and is not liable to appeal.

5. With regards to the press publication.

On 15.06.2005 in the electronic issue of “Dnevnik” newspaper (www.dnevnik.bg) had published an article with the name “The gray parallel of the alcohol import”, as a team of editors of “Dnevnik” newspaper had been indicated as author.

Evident from the conducted investigation and the response of the head newspaper editor, this is not a paid publication. The article composition is an initiative of the editor’s office. The information sources, used for composition of the article, are indicated in it.

The article indicates the research of “Coalition 2000” and notes explanations and opinions of “Customs” Agency; Andrew Souri – manager of “Perno Ricard” for Bulgaria, Macedonia, Albania, Serbia and Montenegro; Albena Trifonova – managing director of “Allied Domec Agencies Bulgaria”; Eli Gerganova¹ –

¹ Eli Zheleva Gerganova, together with Gilbert R. Gosteen was a co-manager of “UDV Central Europe and Asia Limited – branch Bulgaria” Ltd – company, effaced from the commercial registry as per Decision No. 4/11.10.2002 of SCC.

determined as “...*director of the offices of “Diageo” for eight countries from South-Eastern Europe...*”

6. With regards to the procedural brand “BAILEYS” and the remaining brands, subject of agreements.

The correspondence defendants are holders of the following brands: “Johnnie Walker”; “Gordon s”; “J&B”; “Baileys”.

“**JOHNNIE WALKER**” – three brands with the name “JOHNNIE WALKER” are registered with the State Registry of Brands as per national order to the name of DIAGEO BRANDS BV with the following registration numbers: 39311; 3459; и 3755.

“**GORDON S**” - three brands with the name “GORDON’S” are registered with the State Registry of Brands as per national order to the name of DIAGEO BRANDS BV with the following registration numbers: 1118; 7250; и 29707

“**J&B**” – one verbal brand is registered with the State Registry of Brands as per national order to the name of “Justerini and Brooks Limited” with registration number: 27694

“**BAILEYS**” - four brands with the name “BAILEYS” are registered with the State Registry of Brands as per national order to the name of “R and A Bailey & Co” - Republic of Ireland, with the following registration numbers: 21602; 33860; 43773 and 43774.

7. In its letter entry No. CPC-73/23.02.2006 the defendant companies explicitly state that they had offered conclusion of this agreement, as well as similar agreements to other companies, implementing parallel import.

8. Two copies of agreements had been applied to correspondence by the defendant as proof for availability of violations pursuant article 9 of LPC:

A) Agreement from 2002 not dated, between:

- as the first party, “Guinness United Distillers and Vintners Amsterdam B.V” (Amsterdam – the Netherlands); “Justerini and Brooks Limited” (London - England); “R and A Bailey & Co” (Dublin-ireland) – hereinafter referred to, jointly, as “Guinness” and represented by “UDV Central Europe and Asia Limited – branch Bulgaria” Ltd. (Sofia – Bulgaria)

- as the other party – “BE GE IN” Ltd. (Varna-Bulgaria).

The following items had been indicated as motives for signing:

- “Guinness” are companies from the “Diageo” group, holders of the following trademarks: “Johnnie Walker”; “Gordon s”; “J&B”; “Baileys”.

- On 03.05.2000 a contract between certain companies within the Diageo group and “UDV Central Europe and Asia Limited – branch Bulgaria”Ltd. had been concluded. Pursuant this contract, the branch is solely authorized to deposit and disseminate within the territory of the Republic of Bulgaria the group company products. No other parties had been authorized for import and sale of goods of the above-indicated brands in the country.

- “BE GE IN” Ltd. had conducted import of goods with the registration brands “Guinness” in Bulgaria without the respective authorization from “Guinness”, by means of which a violation of the “Guinness” rights over the intellectual property.

- “Guinness” had undertaken actions for protection of rights over intellectual property, as a result of which on 18.06.2002 and on 08.07.2002 the

Regional Customs Direction – city of Varna had detained commodities (alcohol – whisky, gin and liqueur) – property of “BE GE IN” Ltd.

- “Guinness” had presented petitions for securing future claims against “BE GE IN” Ltd. through imposing distraint on the commodities, detained by the Regional Customs Direction of the city of Varna.

- “Guinness” had submitted claims against “BE GE IN” Ltd.

- “The parties wish mutually acceptable settlement of the arguments, occurred between them”

Pursuant the clauses of this agreement, contract coverage is provisioned for the following:

- the “Guinness” group is obliged to terminate legal actions, initiated against “BE GE IN” Ltd. and allow release of the commodities of the applied detainment, on condition that following the release of the commodities, “BE GE IN” Ltd. or the Supplier exports the released commodities outside of the territory of the state.

- “BE GE IN” Ltd. and the Supplier admit that the import and sale in Bulgaria of goods with the registered trademarks of “Guinness” and without its consent constitute a violation of the rights of the group “Guinness” over its trademarks;

- Obligation of “BE GE IN” Ltd. and the Supplier not to import to the territory of the Republic of Bulgaria commodities with the registered trademarks of the group “Guinness”, considered from the date of signing of the agreement, without the availability of a preliminary written consent on behalf of “Guinness” for each separate occasion.

- “BE GE IN” Ltd. and the Supplier are obliged to jointly indemnify “Guinness” for all expenses on legal actions, undertaken by the group for protection of intellectual property rights up to the moment of signing of this agreement.

Financial sanctions are provisioned – jointly due by “BE GE IN” Ltd. and the Supplier, in case they do not adhere to the cited agreement.

It is noted that any and all arguments on implementation of this agreement will be regarded to and solved by the competent Bulgarian court in Sofia.

At the end of the agreement the following nominations, names and signatures are affixed:

For Guinness – Eli Gerganova, no signature, no seal;

For “BE GE IN” Ltd. – Georgi Georgiev Yordanov, no signature, no seal;

For the Supplier – no name, no signature, no seal.

B) Agreement, dated 19.02.2002 between:

- as the first party, “Guinness United Distillers and Vintners B.V” (Amsterdam – the Netherlands); “Justerini and Brooks Limited” (London - England); “R and A Bailey & Co” (Dublin-Ireland); “Guinness UDV North America Inc.” (Stamford – USA) – hereinafter referred to as “Guinness” and represented by “UDV Central Europe and Asia Limited – branch Bulgaria” Ltd. (Sofia – Bulgaria).

- as the other party– “Jolly Trolley” Ltd. (Sofia-Bulgaria) and “Vitosha Combi Trade” Ltd.² (at this moment Sofia-Bulgaria).

The contents of the agreement are similar to the contents of the above-specified agreement. Obligation of “Jolly Trolley” Ltd. and “Vitosha Combi Trade” Ltd. is also provisioned for importing to the territory of the Republic of Bulgaria goods with the

² The legally registered company bears the name “Vitosha Combi Trade” Ltd.

registered trademarks of the “Guinness” group, considered from the date of signing of this agreement, without availability of preliminary written consent of “Guinness” for each separate occasion.

Financial sanctions are considered in case the afore-specified agreement is not adhered to.

It is noted that any and all arguments with regards to implementation of this agreement will be referred to the competent Bulgarian court.

At the end of the agreement, the following nominations, names and signatures are affixed:

For Guinness– Eli Gerganova, signature and seal of “UDV” (European and Asian branch);

For “Jolly Trolley” Ltd. – Viktor Stefanov Nedelchev, signature, no seal.

For “Vitosha Combi Trade” Ltd.– Vasil Apostolov Shterev, no signature, no seal.

9. The conducted investigation established that “Jolly Trolley” Ltd. is a registered legal entity – sole trading company with limited liability (Ltd.) by means of Decision 1, dated 14.09.1994 pursuant company record 16959/1994 of Sofia City Court. Headquarters: region of Sofia, municipality Stolichna, city of Sofia, region Krasno Selo, postal code 1612, sector BELITE BREZI, block 18, floor 6, flat 23.

Owner and company manager is VIKTOR STEFANOV NEDELICHEV, civil ID No. 6511216789.

By means of letter reference No. CPC - 73/12.06.2005, information had been requested by “Jolly Trolley” Ltd., but no response had been provided.

"Vitosha Combi Trade " – Ltd. had been registered by means of decision as per company record No. 7231/2000 of Sofia City Court, as company with limited liability. With decision, dated 24.1.2002 as per company record No. 3152/2001, Varna Regional Court had entered a change for "Vitosha Combi Trade" – Ltd. – new headquarters and management address: Varna, , No. 7 “Pliska” street, flat 7.

Owner and company manager is GEORGI SAVOV DECHEV, civil ID No. 2612301027.

By means of letters reference No. CPC-73/12.06.2005 and CPC- 73/18.06.2005 information had been required from "Vitosha Combi Trade" – Ltd., but no response had been provided.

LEGAL CONCLUSIONS

Following the return of the correspondence to a preliminary control by a Ruling of CPC 282/22.11.2005 with a claim entry No. CPC-394-B/05.12.2005 a new establishment of correspondence parties had been conducted. The claims of “BE GE IN” Ltd., endorsed in the first claim for perpetrated violations of article 9 of the LPC remain with regards to the actions of “Guinness United Distillers and Vintners Amsterdam B.V” – the Netherlands, “Justerini and Brooks Limited” – England and “R and A Bailey & Co” – Ireland, and for violations against article 30 and 31, paragraph 1, LPC against “R and A Bailey & Co” - Republic of Ireland for the brand “Baileys”.

I. Applicability of LPC

Addressees of the regulation pursuant article 9 of the LPC are companies, implementing activity on the respective market. From a factual point of view in this case had been established that “Guinness United Distillers and Vintners Amsterdam B.V” – Amsterdam, the Netherlands (current name “Diageo Brands B.V” – the Netherlands), “Justerini and Brooks Limited” - London, England, “R and A Bailey & Co” - Dublin, Ireland, are producers of brands of alcoholic beverages – high class, and the claimant, “BE GE IN” Ltd. implements import and distribution of brands of alcoholic beverages – high class. It should be accepted that the regulation of article 9, paragraph 1 of LPC is applicable, as the companies implement activity on a vertically related markets and are eligible to be parties in a vertical agreement.

Although the branch, “UDV Central Europe and Asia Limited – branch Bulgaria” – Sofia, had been terminated by means of Decision No. 4, dated 11.10.2002 of SCC, the relevant fact is that throughout the procedural period the respective companies implement activity on the respective geographic market – the territory of the Republic of Bulgaria – through the branch. In 2002 the indicated subjects import and distribute on the market in the territory of the Republic of Bulgaria alcoholic beverages, produced by them, through “UDV Central Europe and Asia Limited – branch Bulgaria”. Respectively in the procedural period, the companies, implementing activity in the territory of the Republic of Bulgaria and their behavior is reflected on the competitive conditions of this market. Respectively it should be concluded that LPC is applicable with regards to the actions of the defendant companies throughout the procedural period and the Commission is competent to assess them.

In support to this conclusion is one of the main principles of the European legislation for determining the applicable competitive right (in cases, where actions of companies, registered outside EU, have an effect over the competitive environment of the EU market), formulated by the EC Court in the decision *Woodpulp*³ and followed by the First instance court of EC for the decision on the case *Gencor v Commission*⁴. CEO emphasizes that the decisive factor for determining the applicability of the European competitive legislation in the indicated circumstance is whether the reviewed agreement, decision or coordinated practice intends as a purpose or result the restriction of competition in the general European market, regardless of whether the participants are подчертава, че решаващият фактор за определяне приложимостта на европейското companies, registered outside the EU. The respective conclusion is that the key factor for determining the applicable competition legislation is the geographic market, with regards to which the reviewed agreement, decision or coordinated policy has an anti-competition purpose or result.

In the reviewed case, the actions of the foreign companies “Guinness United Distillers and Vintners Amsterdam B.V” – Amsterdam, the Netherlands (current name “Diageo Brands B.V” – the Netherlands), “Justerini and Brooks Limited” - London, England, “R and A Bailey & Co” - Dublin, Ireland, throughout the procedural period are effecting the competitive environment on the respective market within the territory of the Republic of Bulgaria, which determines the applicability of the LPC.

II. With regards to article 9, paragraph 1, item 2 of LPC

³ Cases 114/85 etc *A Ahlström Oy v Commission* [1988] ECR 5193, paras 11-23.

⁴ Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paras 48-111.

Pursuant article 9, paragraph 1 (published SG, issue 52, dated 1998)⁵ by LPC, all kinds of agreements between companies, decisions of related or unified companies, aiming as a purpose or result prevention, restriction or violation of competition at the respective market are prohibited, as sample forms of prohibited behavior are listed.

The purpose of the prohibition pursuant article 9 of the LPC is to guarantee to each new company, actually participating on the respective market or could potentially enter it, the possibility to independently and freely determine its business policy, as well as its specific market behavior, including with regards to its partners (suppliers, customers, etc.). The regulation forbids agreements of all types between companies, regardless of formality or informality, of substance, resulting in an anti-competitive effect.

In the specific case, to determine a violation of the prohibition pursuant article 9, paragraph 1, item 2 of the LPC, the following should be specified:

- agreement between companies, that:
- has an article of restrictive commercial clauses, including distribution of supply sources;
- aims or purposes prevention, restriction or violation of competition.

II. 1. Availability of an agreement

A project of Agreement, dated back to 2002 had been presented to CPC, with regards to which the claimant “BE GE IN” Ltd, city of Varna, claims to contradict to article 9, paragraph 1 of the LPC, as it determines the restrictive commercial conditions, including sources of supply of specific commodities. In the project of Agreement indicated as parties are: as the first party, “Guinness United Distillers and Vintners Amsterdam B.V” - Amsterdam, the Netherlands, “Justerini and Brooks Limited” - London, England, “R and A Bailey & Co” - Dublin, Ireland – referred to jointly as “Guinness” and represented by “UDV Central Europe and Asia Limited – branch Bulgaria” - Sofia, Bulgaria, and as the second party– “BE GE IN” Ltd - Varna, Bulgaria. None of the parties decline the fact that this agreement project genuinely exists. In its letter, entry No. CPC-73/23.02.2006 the defendant companies explicitly state, that they have offered the conclusion of this agreement, as well as other similar agreements with other companies, implementing parallel import. This statement is approved on its own by the presented written agreement between the correspondence defendants and “Jolly Trolley” Ltd, by means of which the same restrictive clauses are applied.

Although the offered agreement project had not been accepted by the claimant, from the established factual circumstance of the correspondence it could be deducted that the market behavior of the defendants through the procedural periods is characterized with activities, aiming at coordination of their market presence and their business activity through participation in agreements, imposing restrictive commercial clauses and determination of supply sources.

Respectively it should be considered that the defendant companies, manufacturers of alcoholic beverages had concluded and offered similar vertical offers, aiming at imposing restrictive commercial conditions and supply sources.

II. 2. Distribution of supply sources

⁵ The actions, endorsed by means of the claim should be reviewed pursuant article 9, [aragraph 1 of the LPC upon editing of the regulation, enacting for 2002, as this is the date, specified in the reviewed agreement project.

As per the presented project of agreement, an obligation for “BE GE IN” Ltd. and the Supplier had been provisioned not to import and/or sell within the territory of the Republic of Bulgaria, directly or through other entities, of commodities with the registered trademarks of “Guinness”, considered from the date of signing of this agreement, without the availability of a preliminary explicit consent on behalf of “Guinness” for each separate case. It is indisputable that the reviewed agreement project has a subject of activity control of sources of supply of “BE GE IN” Ltd. Through explicit contracting of restrictive commercial clauses, it is aimed to establish an objective opportunity for restriction and determination of supply sources. Practical application of the agreement would lead to restriction of the claimant to cooperate solely with the exclusive distributor of “Guinness” for Bulgaria.

The reviewed agreement project would allow “Guinness” to control and restrict the access of the claimant to alternative suppliers, by interfering in its independent commercial activity and violate the free selection of suppliers, offering lower prices, more advantageous commercial clauses, etc. It is doubtless that the reviewed project, provisioning the explicit written consent for each specific occasion of import, is of substance, permitting “Guinness” to coerce the applicant into implementing import solely through a single source, thus depriving it fully of its independence of selecting its own business policy. Application of the provisioned agreement would provide objective possibility for “Guinness” to entirely avert the implementation of a parallel import of the respective products of the claimant. It should be concluded that the agreement has a subject of restriction and control of supply sources.

II. 3. Anti-competition purpose of the agreement

In order to establish a violation pursuant article 9 of LPC, establishment of an anti-competition purpose and/or outcome of the agreement is required, as both conditions are not cumulative, but are of an alternative disposition. It is sufficient for the actions to be perpetrated with a purpose and result in restriction of competition. The legal consequences are identical for both hypotheses. The commission notes, that establishment of an anti-competitive purpose of agreement refers not to the subjective intention of the parties, but the establishment of an objective opportunity within the specific economic context, within the frame of which the agreement will operate, when it leads to imparity of competition on the respective market. “The purpose” pursuant article 9 of LPC has no disposition of a subjective effect. In order to be legally relevant, a prohibited agreement should be objectively eligible to effect the competitive environment. Objectively it is sufficient for the restriction of competition to be directly or indirectly comparable to the economic functionality of the agreement. The purpose need not be explicitly stated, it could be deducted upon interpreting the contents of the agreement or the agreement parties behavior. If, however, the agreement includes typical means of restriction of competition, it should be deducted that it is objectively eligible to result in an anti-competition outcome.

From the plainly stated alternation of the hypotheses within the text of article 9 of LPC it is also deductible implementation or initiation of the agreement or the decision is not required, as well as occurrence of the anti-competition outcome.

The explicit purpose of the presented project for vertical agreement in the specific case is achievement of contracting “BE GE IN” Ltd. and the Supplier not to import within the territory of the Republic of Bulgaria commodities with the registered trademarks of

the “Guinness” group, considered from the date of signing of the agreement, without the availability of an explicit written agreement from “Guinness” for each specific case. In the agreement project no objective criteria is indicated, bases on which the “Guinness” group will determine whether to grant its explicit written agreement for parallel import. Practically, application of the provisioned agreement would allow “Guinness” to directly interfere with the commercial activity of “BE GE IN” Ltd. by restricting and controlling its access to alternative suppliers with the purpose protection against the competitive pressure of the parallel import that finally infringes the users interest.

It should be noted that the respective practice of the Court of European Community and of the EC agreements, provisioning restrictions of the parallel trade are deemed as agreements, substantiated as competition restricting and are respectively prohibited, with no requirement of a definition of a resulted outcome hereby (Decision of EC 2001/791/EC Glaxo Wellcome⁶, *NV IAZ International Belgium v Commission*⁷, *Sandoz v Commission*⁸, *Volkswagen v Commission*⁹).

It should be concluded that the reviewed agreement is eligible to establish an objective opportunity of infringement of competition on the respective market within the framework of the specific economic context, by which it will be operating. Due to the arguments presented above, CPC considers the declarations, documented in the reviewed agreement project between “BE GE IN” Ltd. and the defendant companies, the anti-competition purpose is objectified – restriction of supply sources that would result in infringement of the normal competitive process on the respective market.

It is also required to note that the specific economic context, within the framework of which the reviewed agreement will operate, is determined by the opportunity of applying a parallel import that would exert a competitive stress upon determining the commercial policy of the defendant companies. As it had been indicated above, in its letter entry No. CPC-73/23.02.2006 the defendant companies explicitly note that they had offered conclusion of similar agreements with other companies, implementing parallel import. Respectively in the specific case the reviewed agreement project would lead to infringement of the competition in this specific context, as well as an additional restrictive effect of the companies that could potentially and would like to operate on the market of import and distribution of alcoholic beverages with the registered trademarks “Guinness”.

The principle of preserving the opportunity for implementation of a parallel import in case of existing vertical restriction (for example a contract of exclusive distribution rights) is a permanently settled procedure, effecting in restriction of competition (*Consten and Grundig*¹⁰, *Sandoz*¹¹, *Merck v Primecrown*¹², *Bristol Myers Squibb v Paranova*¹³,

⁶ Decision of EC 2001/791/EC dated 8.05.2001 regarding IV/36.957/F3 Glaxo Wellcome, IV/36.997/F3 Aseprofar and Fedifar, IV/37.121/F3 Spain Pharma, IV/37.138/F3 BAI, IV/37.380/F3 EAEPCC, item 124 of the decision.

⁷ Decision of CEO Joined Cases 96-102, 104, 105, 108, 110/82 NV IAZ International Belgium v Commission [1983], item 24, 25 and 27 of the decision.

⁸ Decision of the First instance court, Case T-62/98 Sandoz v Commission [2000], item 89 and 178 of the decision.

⁹ Decision of the First instance court, Case T-62/98 Volkswagen v Commission, item 178

¹⁰ Joined Cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, Decision of the Court of EC, dated 13.07.1966.

¹¹ Case 277/87 Sandoz v Commission [1990].

¹² Joined Cases C-267/95 and C-268/95 *Merck & Co.Inc. V Primecrown Limited*, item 47 of the decision.

¹³ Case C-436/93 *Bristol Myers Squibb v Paranova A/S* [1996], item 46 of the decision.

*Centrafarm v Winthrop*¹⁴, *Sirena v. Eda*¹⁵, *Lacke/Farben v Commission*¹⁶, Decision of EC 2002/758/EC *Mercedes-Benz*¹⁷). EC characterizes the actions on behalf of an exclusive distributor, aiming at prevention of parallel import and elimination of competition within the respective territory as restrictions, which effectively are a “very serious violation” of article 81(1) of DEC¹⁸. It is also indisputable that vertical agreements, guaranteeing protection against parallel import and restricting distributors in their interaction with supply sources by forcing them to pay prices that had not been formed as a result of the normal competitive process within the respective market. To that end is the former operation of CPC (see Decision CPC No. 98/22.04.2004, Decision CPC 113/01.07.2003, Decision CPC No. 110/25.10.2001)¹⁹.

Despite the objectification of the hypothesis of article 9, paragraph 1, item 2 of LPC it should be noted that for the application of the legally provisioned *sanctions*, the subjective standpoint of the participating parties is of importance. With the vertical agreements the intention of the offering party to disrupt the competition is sufficient for occurrence of responsibility on his behalf; the consequences for the other party are determined by its relation toward the agreement functions. This principle is a key one for the decision of the European Commission on the case *Fisher -Price/Quaker Oats Ltd – Toyco*²⁰. With the purpose of protecting its exclusive representative in Ireland Quaker Oats Ltd., a company, manufacturing and trading with products of the brand Fisher-Price, threatens to terminate its commercial relations with Toyco, in case the latter does not terminate implementation of parallel import of the same products in Ireland. EC notes, that Toyco accepts the offer of Quaker Oats Ltd under heavy stress on behalf of the latter and despite its own economic interests, as the decision indicates that those circumstances are not a hindrance to the establishment of availability of agreement between both parties (vertical agreement between manufacturer and wholesale dealer)²¹. The same principle had been approbated by the Court of EC with regards to the decision *BMW Belgium* and followed by EC in *Johnson and Johnson*²². The decision indicates that a vertical agreement, aiming at restriction of the parallel import, imposes ‘one of the most serious restriction of competition’, which in its essence is not required for a normally functioning system and undisputedly infringes customers’ interests²³.

In the decision of EC on the case Fisher-Price/Quaker Oats Ltd – Toyco cited above, it is emphasized, that with regards to determination of the sanction, all relating

¹⁴ Case 16/74 Centrafarm BV and De Peijper v Winthrop BV [1974], item 15, 16 and 17 of the decision.

¹⁵ Case 40/70 Sirena Srl v Eda Srl and others [1971], item 5 of the decision.

¹⁶ Case T-175/95 BASF Lacke + Farben AG v Commission Decision of the First instance court, dated 19.05.1999.

¹⁷ 2002/758/EC Decision of EC, dated 10.10.2001 on Case COMP/36.264 - Mercedes-Benz.

¹⁸ 2003/675/EC Decision of EC, dated 30.10.2002 on COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega – Nintendo, item 374 of the decision.

¹⁹ In the indicated decisions of CPC it is noted that the parallel import has a stimulating and not a restrictive effect over the competition, as the availability of numerous importers on the same market provides an opportunity to create price competition between them and averts the risk of occupation of an entire market niche solely by a single participant, which would in turn result in commandment of market conditions. The commission also notes that parallel import is of use to the consumers by granting an opportunity to identical products to be offered at varying prices and at varying commercial conditions, which improves the customer selection.

²⁰ Decision of EC 88/86/EEC dated 18.12.1987 on Case IV/31.017 - Fisher-Price/Quaker Oats Ltd – Toyco.

²¹ Decision of EC 88/86/EEC, paragraph 9 of the Decision.

²² Decision of EC, dated 25.11.1980 on Johnson and Johnson and united decisions of the Court of EC Cases 32/78 and 36-82/78 *BMW Belgium* [1979] ECR 2435.

²³ Decision of EC 88/86/EEC, paragraph 23 of the decision.

factors should be taken into consideration. *Upon determination of the sanction*, EC also considers the availability of a *subjective intent* on behalf of the representatives of Quaker Oats Ltd. to isolate a national market of the competitor's pressure of the parallel import. EC takes notice that the wholesale dealer Toyco *should not be sanctioned*, as the company had accepted to participate in an agreement, contradictory to its own economic interest solely as a consequence of a serious duress on behalf of the offering party and the threat of termination of commercial relations.²⁴

It should be noted that in the reviewed case the agreement project had not been accepted and had not been signed by a representative of the offering party. Additionally the claimant had not conformed practically its actions to the agreement project. Due to this reason, the amenability of "BE GE IN" Ltd. to article 9 of the LPC should not be engaged. As "Guinness United Distillers and Vintners Amsterdam B.V" – Amsterdam, the Netherlands (current name "Diageo Brands B.V" – the Netherlands), "Justerini and Brooks Limited – London", England and "R and A Bailey & Co" – Dublin, Ireland, hereinafter referred to jointly as "Guinness", had been specified as party on the reviewed agreements and the availability of an anti-competition purpose had been established, thus the amenability of those three companies to article 9, paragraph 1, item 2 of the LPC should be engaged.

In the practice of EC and the European Communities Court and the First instance court, the problem, related to application of European competition law in the field of parallel import of goods, on which a protected right of intellectual property is held, a permanent decision had been found. Therefore the Commission had found it necessary to analyze the European practice on similar cases.

Pursuant the regulations of article 64, paragraph 1 and paragraph 2 of the European Contract for Association (ECA)²⁵, obligation occurs for the Bulgarian competition administration to conform its practice to the principles and criteria, resulting from the application of the regulations of article 85 and article 86 of the Contract for Establishment of the European Economical Society (CEES) (currently article 81 and article 82 of CEC). It should be accepted that in the specific case, the assessment whether any given action or inaction contradicts to the right of competition should consider the permanently approved practice of the European Commission and the Court of European Communities and the First instance court.

In the decisions of EC and CEC, the principle had been determined that use of right over intellectual property with the purpose of hindering the parallel import and isolation of national markets is impermissible. Back in 1966 in the decision on the case *Grundig/Consten v Commission*²⁶ CEC confirms, that use of a state regulation registered trademark from a general distributor for the purpose of protection against the risk of parallel import, is impermissible. CEC emphasizes, that the anti-competition effect consists of maintenance of an isolated national market through hinder of parallel import –

²⁴ Decision of EC 88/86/EEC, paragraph 25-26 of the decision.

²⁵ Ratified by law at 15.04.1993, published SG, issue 33, dated 20.04.1993, active since 1.02.1995

²⁶ Joined Cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, EC Court Decision dated 13.07.1966. The court of EC confirms the accepted appealed decision of EC, namely that the registration as per state regulation in France of the commercial brand "Gint" for the Grundig products on behalf of Consten, holder of exclusive rights for distribution of the Grundig products in France, had been conducted with the purpose of using the protection, related to the trademark rights, against the risk of parallel import (page 343 of the Decision).

²⁶ Page 343 of the Decision.

situation, allowing the exclusive distributor to apply prices, protected by any effective competition whatsoever.²⁷

The CEC decision indicates that the established violation results from the combination of availability of a registered trademark as per national regulation by the exclusive distributor and use of protected right of the trademark within the frames of a national territory, effecting to restriction of parallel import. This allows the exclusive distributor to secure “absolute territorial protection”²⁸ against competition pressure of the parallel import. In a series of consecutive decisions, CEC confirms this principle (*Centrafarm, CNL-SUCAL v HAG, IHT v Ideal-Standard*, and others).²⁹

In *Hoffmann-La Roche v Centrafarm*³⁰ CEC determines the scope of rights over the trademark to the essential function of said rights, namely **proof of origin** of products, denoted with the trademark. This principle had been permanently established by the European practice (some of the more significant decision of the EC court to that regard is *Hoffmann-La Roche, Centrafarm, CNL-SUCAL v HAG*, and others).³¹ In the decision *Centrafarm v Winthrop* the EC court accepts that any use of a trademark registered as per state regulation, purposing to restrict parallel import of original products remains outside the scope of its essential function and results in an anti-competition effect.³² In the same decision it is indicated that the filial company of a manufacturer of pharmaceutical products in another country cannot use the right over the trademark, registered in this state commercial brand with the purpose of hindering the parallel import of original pharmaceutical products of the same brand.³³ In *IHT Internationale v Ideal-Standard*³⁴ the court of EC again contradicts the restrictive interpretation of the national legislation with regards to the principle of depletion of the right over a trademark that would allow hindering of a parallel import of original goods with the same trademark. The decision emphasizes that the principle of depletion of right over a trademark is applicable in case, in which the trademark holder in a country of import and the trademark holder in the country of export is the same entity or in case they are separate entities, but economically related. CEC indicates the characteristic configurations, where the right of the commercial brand had been depleted and cannot be used to the purpose of restriction of the parallel import of original goods with the same brand: commodities, released to the market by the company holder, by its exclusive distributor or license holder, filial company of the same group or of the principal company. The principle of depletion of the right over a trademark is codified in the regulation of article 7 of the Council Directive 89/104/EEC.³⁵

²⁷ The EC court specified that the anti-competition effect in that case consists of isolation of the French market through hindering of the parallel import of the Grundig products (page 343 of the Decision)..

²⁸ Page 344 of the Decision.

²⁹ Case 16-74 *Centrafarm BV et Adriaan de Peijper v. Winthrop BV*, Decision of CEC, dated 31.10.1974, Case C-10/89 *SA CNL-SUCAL NV v. HAG GF AG*, Decision of CEC, dated 17/10/1990, Case C-9/93 *IHT Internationale Heiztechnik GmbH and Uwe Danzinger v Ideal-Standard GmbH and Wabco Standard GmbH*, Decision of CEC, dated 22.06.1994.

³⁰ Case 102/77 *Hoffmann-La Roche v Centrafarm* [1978].

³¹ Case 102/77 *Hoffmann-La Roche v Centrafarm* [1978], Case 3/78 *Centrafarm v American Home Products Corporation* [1978], Case C-10/89 *SA CNL-SUCAL NV v HAG GF AG* [1990].

³² Case 16-74 *Centrafarm BV et Adriaan de Peijper v. Winthrop BV*, Decision of CEC dated 31.10.1974.

³³ Case 16-74 *Centrafarm BV et Adriaan de Peijper v. Winthrop BV*, Decision of CEC dated 31.10.1974.

³⁴ Case C-9/93 *IHT Internationale Heiztechnik GmbH and Uwe Danzinger v Ideal-Standard GmbH and Wabco Standard GmbH*, Decision of CEC dated 22.06.1994.

³⁵ Directive of the Council 89/104/EEC dated 21.12.1988.

It should be noted that the above-stated interpretation of the scope of rights over a registered trademark had been acquired by the Bulgarian legal conventions. To that significance is Decision No. 1071/2.12.2004 of HCC³⁶, according to which the right over a registered trademark cannot be used with the purpose of prohibiting the import of original commodities, bearing this brand. According to the Decision of HCC, the regulations of article 13 of LBGM had been established to protect the trademark against imitations and cannot be applied in case of import of original goods, bearing authentic brands. According to the Decision of HCC, the regulations of article 13 of LBGM had been established to protect the brand against imitation and cannot be applied in case of implemented import of original goods, bearing authentic brands. The Decision specifies that the import of original goods, bearing a registered trademark, does not constitute “use” of the trademark pursuant the meaning of article 13, paragraph 1 and 2 of LBGM, for which the law had provided protection. The conclusion of HCC concurs completely to the principle, specified above, restricting the scope of trademark legal rights to the essential function of that right – guarantee of product origin, denoted with the brand.

As an addition it can be indicated that Decision No. 249, dated 22.03.2006 of HCC follows the same principle, by means of which the claim, laid by “Justerini and Brooks Limited”- London against “BE GE IN” Ltd. – city of Varna for determination based on article 76, paragraph 1, item 1 of LBGM, in relation to article 73, paragraph 1 and article 13, paragraph 2, item 3 LBGM, the fact of violation of trademark rights by means of import of 1200 bottles of whisky with the brand “J&B” without consent of the claimant, holder of the trademark. ³⁷ In the decision it is explicitly notes that import by the defendant of an original commodity, and not a commodity illegally marked by him with an assumed brand, does not constitute a “use” of the trademark pursuant article 13, paragraph 1 and 2 of LBGM, with regards to which is the provisioned legal protection, due to which the claim pursuant article 76, paragraph 1, item 1, is unfounded. The court specifies that in order a use of trademark with regards to commercial activity to occur, pursuant article 13, paragraph 2 of LBGM, including import and export of goods with this denotation pursuant article 13, paragraph 2, item 3, a legal norm should be available – article 13, paragraph 1 of LBGM, determining the contents of right over a trademark, which is generally reduced to the right of the trademark holder to forbid to third parties to use a sign, identical to the registered trademark, without providing explicit consent, or due to similarity to the trademark or identity of goods and services an opportunity of confusing consumers exists that relate the offered sign to the trademark, registered by the claimant. In order to accept that a violation of the commercial rights of the claimant over the registered trademark pursuant article 73, paragraph 1 LBGM, as a sign used in the commercial activity pursuant article 13m paragraph 1 of LBGM without the consent of the holder, a violation of the prohibition of using a sign on behalf of the defendant, misleading the consumers into buying alcohol bearing the registered trademark of the claimant should be available. The Decision emphasizes import in the country of original whisky, bearing the trademark of the claimant, is not a violation pursuant article 73, paragraph 1 of LBGM, as no activity on behalf of “BE GE IN” Ltd. had been implemented, constituting an illegal use of the trademark, registered by the claimant.

³⁶ Decision No 1071/2.12.2004 of HCC pursuant c.c. No 158/2004.

³⁷ By means of this decision of HCC the Decision of Sofia Court of Appeals, dated 8.06.2005 on civil case No 424/2005 is revoked.

With respect to this is the Ruling dated 18.03.2005 of VDC³⁸, by means of which a return of the alcohol, property of “BE GE IN” Ltd, city of Varna, seized as per Investigation No. 26/2005 of RDHA, city of Varna, is enacted. In conformity to the established legal practice, VRC emphasizes that implementation of import of original commodities does not violate the right of commercial brand. The Ruling had been completely approved by means of Decision No. 359, dated 04.05.2005 of VDC. It should be noted that by means of Ruling dated 25.05.2005 SCC repeals Ruling, dated 01.04.2005 of SRC, enacted as per civil case No 4100264/2005³⁹ and rejects the claim for permitting securing of future claims with legal grounds article 76, paragraph 1 and 2 of LBGGM by “Guinness United Distillers and Vintners Amsterdam B.V”, “Justerini and Brooks Limited”, “R and A Bailey & Co” toward “BE GE IN” Ltd., city of Varna, as unjustified. SRC emphasizes that through systematic and logical interpretation of the respective regulations of LBGGM (article 13, paragraph 1 and paragraph 2) “the conclusion is inferred they had been established with the purpose of protecting the brand of imitation and misleading consumers and respectively cannot apply in case of implemented by the claimant import of original commodities”. In the same Ruling, the court explicitly indicates “import of commodities, produced by the claimants, bearing their registered marks, cannot be accepted as ‘use’ of right of a trademark in the context of LBGGM”.

Based on the above-stated considerations, it should be accepted that the parallel import of original commodities is a result of the normal process of competition.

As it had been permanently established in the European practice, the use of right over a registered trademark with the purpose of restricting the access to sources of supply with original products is impermissible and would result in isolation of the national market against the competitive pressure of the parallel import.

Agreement, limiting the access to alternative supply sources is of substance to lead to violation of market competition and is harmful to consumers, as they would be forced to pay prices formed not as a result of the normal market competition process.

III. With regards to violations as per unfair competition

The regulation prohibits any and all activity or inactivity upon implementation of a business activity, contradicting to the conscientious business practice and damages or could result in damaging the interests of competitors with regards to their mutual or customer relations. Respectively it is necessary to determine the availability of an economic activity, competition relation between both correspondence parties and activity or inactivity, contradictory to the conscientious business practice. In order to have an unfair competition pursuant article 30 of the Law of Protection of Competition, actions and inactions should damage or create a risk of damaging of interests of competitors with regards to their mutual or customers relations.

³⁸ Ruling dated 18.03.2005 pursuant PCC No 1283/2005r. Of VRC, XXII composition, rescinding decree No 15846 dated 17.02.2005 of the prosecutor with VRPO in its section, by means of which “BE GE IN” Varna had been declined the return of the seized factual proof with search and seizure protocols, dated 21.01.2005 and from 26.01.2005 of Customs store, held by “BE GE IN” Ltd., city of Varna, as per investigation No. 26/2005 of RDHA, city of Varna 93 600 bottles of alcohol and decrees their return.

³⁹ Ruling dated 01.04.2005r. of CRC, enacted pursuant civil case No. 4100264/2005, by means of which securing of future claims had been permitted, with legal grounds article 76, paragraph 1 and paragraph 2 in relation to article 75 of LBGGM, through interdiction of the detailed movable property.

Addressees of the decree are the companies, implementing their activity on the respective market. From a factual point of view, in this case it had been determined that “R and A Bailey & Co” - Dublin, Ireland, is a producer of brands of alcoholic beverages – high class, and the claimant, “BE GE IN” Ltd. implements import and distribution of brands of alcoholic beverages – high class. Although the branch, “UDV Central Europe and Asia Limited – branch Bulgaria” – Sofia, Bulgaria, had been liquidated by means of Decision No. 4, dated 11.10.2002 of SCC, the relevant fact is that throughout the procedural period the defendant company had implemented activity within the respective geographical market – the territory of the Republic of Bulgaria. In 2002 the company imports and releases on the market alcoholic beverages. Respectively, throughout the procedural period, the company implements activity within the territory of the Republic of Bulgaria, acting as a competitor of “BE GE IN” Ltd., city of Varna, at the level import and distribution and its behavior is reflected to the competitive situation on this market.

With regards to the subsequent elements of the general regulations of article 30 of LPC, they should be reviewed first and foremost in view of the factual composition of article 31, paragraph 1 of LPC, indicated by the claimant as a specific form of unfair commercial conduct on behalf of the defendant.

IV. With regards to article 31, paragraph 1 of LPC

The regulation prohibits damaging of the reputation and trust toward competitors, as well as to goods or services, offered by them through statement or dissemination of incorrect information, as well as presenting facts in a distorted status.

In order for violations of the hypothesis of article 31, paragraph 1, it is required to be determined that an unconscientious competitor had performed an identification of its competitor, to its company or to the offered goods. As a second prerequisite HAC, 5 members⁴⁰ indicates, that in its aspect the conduct should be actually able to harm the interest of the competitors with regards to their mutual or customers relations. According to HAC, composition pursuant article 31, paragraph 1 of LPC, as well as with more of the violations pursuant chapter seventh of LPC, an actual occurrence of specified composition-marked negative consequences is required – damaging of good reputation and trust toward competitors, i.e. negative change (damage) of the notion of consumers for the competitive business subjects and of their goods and services. The assessment of occurrence of said negative consequences is factual⁴¹ HAC indicates that the possibility of occurrence of a damaging result should be actual, based on specific facts and circumstances and not abstract.

The statement of “BE GE IN” Ltd., city of Varna, with regards to the availability of a perpetrated violation by the respective party will be reviewed with regards to the contents of the text of the article “The gray parallel of alcohol import”, published in “Dnevnik” gazette, issue 34, dated 17.02.2005.

It is required to emphasize, that the article does not incorporate statements of “R and A Bailey & Co” - Dublin, Ireland. It indicates research of “Coalition 2000”,

⁴⁰ Decision No. 5574 dated 5.06.2003 of HAC pursuant administrative proceeding No. 2130/2003, 5 members

⁴¹ To this effect is Decision No. 12/2001 of CPC

explanations and opinions of “Customs” agency; of Andrew Soury – manager of “Pernot Ricard” for Bulgaria, Macedonia, Albania, Serbia and Montenegro; of Albena Trifonova – managing director of “Allied Domec Agencies Bulgaria”; to Eli Gerganova – specified in the article as director of the offices of “Diageo” for eight countries from South-Eastern Europe.

More specifically, the article uses a statement of Eli Gerganova, who according to the facts, established pursuant the correspondence, together with Gilbert R. Gosteen had been a co-manager of “UDV Central Europe and Asia Limited – Bulgaria branch”, effaced from the commercial registry pursuant the Decision of SCC No. 4/11.10.2002. Respectively it cannot be accepted that the statement had been made as a representative of “UDV Central Europe and Asia Limited – Bulgaria branch”, as to this date the branch had been liquidated and effaced from the commercial registry. On another note, although it had been noted that Eli Gerganova is a manager of “Diageo” offices for eight countries from South-Eastern Europe, solely with regards to this conclusion an explicit and substantiated conclusion that the statement is on behalf of the defendant company could not be reached. The statement includes the specification that the Company is conducting lawsuits in Bulgaria for protection of commercial brands against a series of companies, among which “BE GE IN” Ltd., city of Varna, had been cited.

The article indicates that “Diageo” doubts the inertness of the conduct of the customs office with regards to sanctioning parallel import and respectively the issue had been referred to the court. On one hand it should be emphasized that this statement is true, as at that moment a signal to RDHA – Varna had been sent and an investigation of crime pursuant article 227, paragraph 1 of the CC against Georgi Georgiev Yordanov, manager of “BE GE IN” Ltd. On the other hand, the Commission notes, that in case damaging of interests, good reputation of the company or goods offered by the claimant occurs, this negative result is not a consequence of the specified statement.

As the article is not commissioned and a team of journalists is indicated as the author, as per stated in the respective issue 34, dated 17.02.2005 of the newspaper, with regards to the interpretation of afore-mentioned facts⁴², responsibility should be brought after another fashion from its author. This is the established practice of the Commission⁴³ under similar circumstances.

Based on the above-specified, the Commission considers that on behalf of “R and A Bailey & Co” - Dublin, Ireland, no violation had been perpetrated of article 31, paragraph 1 of LPC and respectively the claim of “BE GE IN” Ltd in this section should not be granted.

V. With regards to article 30 of the LPC

No other claims, substantiated with other applied proofs, had been submitted with regarding perpetration on behalf of “R and A Bailey & Co” - Dublin, Ireland of actions or inactions upon implementing of business activities not contravening to the conscientious commercial practice and damaging or bearing a risk of damaging the competitor’s mutual or customers relations.

⁴² With regards to the article, “parallel import equals illegal import, due to the decreased rates, at which the goods are imposed customs duty at, as a result damage is inflicted to the budget...most often the customs office is presented with documentation of incorrect content/invoices with a lower value...”.

⁴³ Decision of CPC No.165/26.11.2002., confirmed by means of Decision of HAC No. 4469/10.05.2003 and active.

Based on the above-specified, the Commission considers that on behalf of the defendant no violations of the general composition of article 30 of the LPC had been perpetrated.

On behalf of the claimant, as actions, constituting violation of LPC, the initial claim indicates only violations of article 9, article 30 and article 31, paragraph 1. No subsequent expansion of the petitum on behalf of "BE GE IN" Ltd and/or indication of specific actions that could be deemed as violation of the right over the trademark "BAILEYS".

No proof with regards to use of a mark or sign, identical or similar to the ones, property of the claimant in a way that could lead to damaging of interests within the relations with the competitors and/or users, violation endorsed in article 33, paragraph 2 of LPC, had been presented to the proceeding.

With regards to the sanction amount

Pursuant the Methods of determination of the amount of property sanctions and penalties pursuant the law of protection of competition, carried by CPC, the basic amount of the property sanction is determined dependant of the scale, continuity of violation and the respective aggravating and mitigating circumstances.

Violations pursuant article 9 of LPC, reviewed by this proceeding, are serious and imply an actual possibility to permanently alter the competition environment of the affecting markets. By means of the vertical agreement, restrictive commercial clauses are imposed, imposing and determining supply sources, concerning the whole national market, i.e. the effect of the perpetrated violations is not limited in a geographic aspect, but has a national effect. Determination of the violation as serious determines imposing of penalty of about average amount.

Upon determination of the continuity of the violation, the Commission accepts as an initial date the date of signing the agreement with "Jolly Trolley" Ltd - 19.02.2002 and considering the acknowledgement of the defendants as per this correspondence that similar agreements are an established practice with their work, accepts that it continues to this moment. According to the Methods, violations, perpetrated for a period between one and five years, have an average duration, in which the amount of sanction, calculated dependant on the seriousness, is increased to 50% of this sum.

According to the Methods and the established practice of CPC it is accepted that the sanction should not exceed 10% of the turnover. The presented accounts and balances of companies – defendants on this correspondence indicate that they had realized high enough turnovers, at which the upper limit of the sanction pursuant article 59, paragraph 1 of the LPC does not exceed 10 % of their amount.

The companies – defendants on this correspondence, are initiators of signing of the reviewed agreements. The presented information determines them as large companies, availing with sufficient legal and economical knowledge and resources that would allow them to predict the extent of violation in their actions and what the legal competitive consequences will be. This determines a more severe position toward the violations, perpetrated by them. The amount should be large enough in order to have a precautionary and preventive action with regards to the perpetrators.

The prerequisites of article 59a for diminishing the property sanction pursuant article 9 and article 596 for release of administrative and criminal responsibility for violation of article 9 are not available with regards to the reviewed case.

Evident from the detailed considerations is that the perpetrated violation is heavy and capable of causing serious negative consequences on the market. It had been perpetrated for a relatively long period of time and reveals permanent intentions on behalf of the perpetrators to conduct similar policy. The companies are economically stable, which determines imposing of property sanction to a high amount.

The defendants on the correspondence are on the same side of the procedural vertical agreements and obtain the following rights thereto. Because of this they cannot be separated into diverse groups in view of their role and the consequences of their actions. In view of the specifically established circumstances and the necessity of adequate and equitable penalties, all three companies should be sanctioned.

Based on the established facts and the conducted legal conclusions based on article 55, paragraph 1, item 1, item 3 and item 11 with regards to article 59, paragraph 1 of the LCP, Commission for the Protection of Competition

D E C I D E D

1) Imposes property sanction to the amount of 200 000 (two hundred thousand) BGN to “Diageo Brands B.V” (“Guinness United Distillers and Vintners Amsterdam B.V”), No. 10-12 Molenverf, 1014 BG Amsterdam, the Netherlands, for a perpetrated violation of article 9, paragraph 1, item 2 of the LPC.

2) Imposes property sanction to the amount of 200 000 (two hundred thousand) BGN to “Justerini and Brooks Limited”, No. 61 “Saint James” street, London SW1A 1LZ, England, for a perpetrated violation of article 9, paragraph 1, item 2 of the LPC.

3) Imposes property sanction to the amount of 200 000 (two hundred thousand) BGN to “R and A Bailey & Co”, Nangor House, Western Estate, Dublin No. 12, Ireland, for a perpetrated violation of article 9, paragraph 1, item 2 of the LPC.

4) Enacts termination of violations pursuant items 1; 2; 3;

5) Does not grant the claim of “BE GE IN” Ltd. in its section for establishment of violation of article 30 and article 31, paragraph 1 of LPC by “R and A Bailey & Co” – Ireland, due to lack of perpetrated violation;

The sums should be deposited within 30 days of operation of the decision to bank account of CPC, opened at BNB – Central Management, No. 1 “Al. Batenberg” square, IBAN: BG32 BNBG 9661 30 00101701; BIC code of BNB: BNBG BGSD or in cash to the cash registry of the Commission.

The decision can be appealed before the Higher Administrative Court within 14 days of announcement of composition, together with the motives, to both parties.

CHAIR:

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Petko Nikolov

DEP.-CHAIR:

DEP.-CHAIR:

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Veselin Bozhkov, PhD

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Redzheb Mustafa

MEMBERS:

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Vesela Antonova

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Elena Stoimenova

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Mariya Popova

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Rumyana Karlova