II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 23 March 1990

relating to a proceeding under Article 85 of the EEC Treaty (IV/32.736 — Moosehead/Whitbread)

(Only the English text is authentic)

(90/186/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (1), as last amended by the Act of Accession of Spain and Portugal and, in particular, Articles 6 and 8 thereof,

Having regard to the notification dated 2 June 1988 by Whitbread and Company plc and Moosehead Breweries Limited, concerning the grant by Moosehead to Whitbread of an exclusive licence to brew and sell beer under Moosehead's trademarks within the United Kingdom,

Having regard to the summary of the notification (2) as published pursuant to Article 19 (3) of Regulation No 17,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas;

I. FACTS

The notification

(1) On 2 June 1988, pursuant to Article 4 of Regulation No 17, Moosehead Breweries Limited, New Brunswick, Canada, and Whitbread and Company plc, London, notified to the Commission a number of agreements concluded between them dated 12 May 1987, and 1 May 1988.

(2) The parties have applied for negative clearance or, failing that, exemption pursuant to Article 85 (3) of the Treaty.

The parties

(3) Moosehead is a wholly-owned subsidiary of Sevenacres Holding Limited and based in New Brunswick, Canada. Moosehead is principally engaged in the manufacture, sale and distribution of beer, and owns no brewing interests within the Community.

(4) Whitbread, a company incorporated in England, is a brewer and operates approximately 6 000 managed or tenanted public houses. The turnover of Whitbread in 1987 was £ 1 554 million.

The product and the market

(5) The agreements concern the manufacture of a beer in the United Kingdom which is sold by Moosehead in Canada and other countries under the trademark 'Moosehead' (henceforth refered to as 'the Product'). The Product is similar in nature and alcoholic strength to other 'non-premium lagers' presently sold in the United Kingdom, although according to the notifying parties, it has a particular taste typical of Canadian lagers.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 179, 15. 7. 1989, p. 13.

(6) 1. As was explained in Commission Decision 84/381/EEC (Carlsberg) (1) the following factors distinguish the United Kingdom beer market from other European markets:

2. Most beer sold in the United Kingdom is sold in draught form in public houses licenced for the consumption of liquor; 81 % (2) of all beer consumed in the United Kingdom is sold in on-licenced premises and 75 % of all beer sold in the United Kingdom is in draught form. In 1987 lager represented 45 % of the beer consumption in the United Kingdom (3). In order to achieve substantial sales of a new beer in the United Kingdom it is therefore necessary for the seller to have access to a certain number of public houses.

3. Brewers largely distribute their beer in the United Kingdom using their own lorries. No large-scale independent distribution facility therefore exists for beer in the United Kingdom.

4. The majority of public houses in the United Kingdom are operated by tenants who are 'tied' by contract to purchase beer from one brewer alone. They are, in fact, owned by the brewer with which they sign such agreements. Since almost all draught beer, which accounts for over 75 % of total beer sales, is sold in public houses and 57 % of all on-licensed premises in the United Kingdom are owned by brewers and 'tied', it is very useful, if not indispensable, for a foreign brewer wishing to enter the United Kingdom market to gain the assistance of a large national brewer.

The number of tenants of on-licensed premises that are required to purchase from one brewer alone is likely to decrease by 1 November 1992 when, as a result of implementation of The Supply of Beer Order, all national brewers with more than 2 000 licensed premises must release from all product ties one half of their premises above the 2 000 threshold. Also, all on-licenced tenants tied by national brewers will be free to choose a guest beer as well as to purchase other non-alcoholic drinks from any source by 1 May 1990. Nevertheless, a substantial part of total United Kingdom beer consumption will continue to pass through 'tied' outlets.

5. The six major United Kingdom brewers (4), which in 1987 held approximately 82 % of the United Kingdom beer market, sell between them many different types of beers and also many different brands of lager. Whitbread held 12 % of the United Kingdom retail sales of beer in 1987.

(1) OJ No L 207, 2. 8. 1984, p. 26.
(2) The statistics in this section are estimates of Whitbread.
(3) MMC Report p. 10.
(4) Allied, Bass, Elders, Grand-Metropolitan, Scottish & Newcastle and Whitbread.

The agreements

General provisions

(7) 1. The agreement in question is set out in three contracts: the Marketing and Technical Agreement; the Trade Mark User Agreement dated 12 May 1987, and the Assignment Agreement dated 1 May 1988. The Commission considers that these three contracts form part of a single agreement, henceforth referred to as 'the Agreement'.

2. Under the Agreement, Moosehead grants to Whitbread the sole and exclusive right to produce and promote, market, and sell beer manufactured for sale under the name 'Moosehead' in the licenced territory (the United Kingdom, the Channel Islands and the Isle of Man, henceforth referred to as 'the Territory'), using Moosehead's secret know-how. Whitbread pays to Moosehead a royalty for this exclusive right.

3. Whitbread agrees that the quality of the beer and the type and quality of the raw materials shall comply with Moosehead specifications.

4. Whitbread agrees that it will neither seek customers, nor establish any branch or maintain any distribution depot for distribution of the Product, outside the Territory. It may, however, fill unsolicited orders from purchasers in the Member States.

5. During the term of the Agreement, Whitbread agrees not to produce or promote within the Territory any other beer identified as a Canadian beer.

Trade mark provisions

(8) 1. Under the Agreement, Whitbread agrees to sell the Product only under the trademark 'Moosehead'. Whitbread also agrees to use the trademark Moosehead only on or in relation to the Product.

The property rights in the trademarks in the United Kingdom are assigned to Whitbread and Moosehead jointly. This assignment is intended, according to the parties, to give Whitbread a stronger guarantee of its right to use the trademarks during the term of the Agreement. Moosehead grants to Whitbread the exclusive licence to use the trademarks in relation to the Product in the Territory during the term of the Agreement.

2. The Agreement stipulates that Moosehead shall not, without the consent of Whitbread, register or use, nor shall Whitbread apply to register, any trademark which resembles, or may reasonably be confused with, any of Moosehead trademarks in the Territory.

3. Furthermore, Whitbread acknowledges the title of Moosehead to the trademarks and the validity of the registrations of Moosehead as proprietor thereof. Whitbread undertakes to observe all conditions which may be prescribed by the terms of the registration of the trademarks and also not to do any act which would, or may, invalidate such registration or title, nor apply to vary or cancel any registration of the trademarks.

4. The Agreement provides that upon its termination Whitbread shall reassign to Moosehead all its rights, title and interest in the trademarks and in the goodwill associated therewith, and shall join with Moosehead in any application to register Moosehead as sole proprietor of the trademarks. Thereafter Whitbread shall desist from all use of the trademarks.

Know-how provisions

(9) 1. Moosehead agrees to provide Whitbread with all the relevant know-how necessary to produce the Product, and furthermore agrees to supply Whitbread with all yeast which may be necessary.

2. Whitbread agrees to comply with the directions and specifications of Moosehead in relation to the know-how, and to purchase yeast only from Moosehead or a third party designated by Moosehead.

3. Whitbread agrees to use the know-how only for the manufacture of the Product and agrees to keep all know-how provided by Moosehead confidential.

(10) The marketing strategy for the promotion of the Product, the brand plans and sales forecast in the Territory must be jointly agreed by the parties. Whitbread, however, is solely responsible for implementing that policy and bearing its costs.

Duration of the Agreement

(11) The Agreement came into force on 1 May 1987, and operates for an indefinite period unless terminated pursuant to the following provisions:

— either party may terminate by giving notice to the other party varying from one to ten years, if specified amounts of the Product have not been sold by Whitbread;

— either party may terminate the Agreement by giving a shorter notice if a party commits a breach of any of its contractual obligations or if there is a substantial change in the ownership or control of either party.

(12) On termination of the Agreement, Whitbread is obliged to cease producing the Product, to return all know-how to Moosehead and not to use this know-how in future. Furthermore, Whitbread may not use the trademarks following termination and must assign to Moosehead any right title and interest that it has acquired in the trademarks. Whitbread is also obliged to keep this know-how secret from any third party.

The parties' submissions

The parties have made the following submissions.

(13) 1. As Moosehead has no branch in Europe and neither Moosehead nor any of its associate companies has a manufacturing facility in the Community, a distribution network for beer, or any experience of marketing beer in the United Kingdom, it would not, over the short term, be commercially feasible for Moosehead to set up its own manufacturing facility for the product. In view of the nature of the retail market for beer and given the distance and the scale on which sales would be established, it would not be economic for Moosehead to establish its own distribution network or to sell through independent wholesalers.

2. Whitbread has limited experience of Canadian lagers and, in particular, has no access to the unique culture yeast that gives Moosehead lager a particular taste that distinguishes it from the other lagers, nor to the technical information held by Moosehead necessary to manufacture the Product to which the Agreement relates. Whitbread, therefore, lacks the expertise to manufacture the Product for the United Kingdom market without assistance from Moosehead. However, its general brewing facilities and experience mean that it is capable of producing Moosehead beer for sale in the Territory if this assistance is given by Moosehead. Furthermore, Whitbread does not possess a well-known Canadian trademark.

3. The parties argue that as a result of these facts the Agreement contributes towards improving production/distribution of the Product because (i) in the absence of the Agreement, the Product could not have been made available as quickly, or over as wide an area, and would thus have been available to fewer customers and at a later date; and (ii) the Agreement enables the Product to be produced in the Territory, which means it is likely to be fresher and cheaper, since it would be transported over a shorter distance.

The fierce competition in the lager sector of the beer market will ensure that the benefits of the Agreement are passed on to consumers and, furthermore, will prevent the Agreement from eliminating competition in respect of a substantial part of the products in question.

The clauses to the Agreement which are restrictive of competition are indispensable in order to give Whitbread sufficient confidence to invest substantial sums in the launch of a new beer onto an already competitive market, and to enable Moosehead to entrust the brewing and sale of the Product to another brewer in full knowledge that the licensee will concentrate its efforts, concerning the promotion and sale of Canadian lagers, exclusively on the Product.

4. The obligation upon Whitbread not to sell certain competing beers during the Agreement is indispensable to its objective.

(14) Third parties have made no objections subsequent to the publication made under Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

Article 85 (1)

(15) 1. The exclusive trademark licence for the production and marketing of the Product, the prohibition of active sales outside the Territory and the non-competition clause, as listed respectively in the last sentence of (8) 1, and at (7) 2, (7) 4 and (7) 5 above, fall under the prohibition of Article 85 (1) since they have as their object or effect an appreciable restriction of competition within the common market.

In this case, the exclusive character of the licence has, as a consequence, the exclusion of third parties, namely the five other large brewers in the Territory, from the use, as licensees, of the Moosehead trademark, in spite of their potential interest and their ability to do so.

Likewise, the prohibition of active sales outside the Territory by the licensee and the ban on marketing competing brands of beer are appreciable restrictions of competition since Whitbread, because of its large production capacity, would be able to supply other markets within the Common Market and to distribute other Canadian brands.

These restrictions of competition may affect trade between Member States to an appreciable extent because their effect will be that trade will develop between Member States in conditions different from those which would have prevailed without the restrictions and, given the size of the parties to the Agreement, their influence on market conditions is appreciable. This is the case, in particular, for the prohibition of active sales outside the Territory.

2. The other clauses of the Agreement do not fall within Article 85 (1) because they do not have as their object or effect an appreciable restriction of competition within the common market. This applies to Whitbread's obligation to maintain certain qualitative standards, to the know-how clauses, and to the trademark no-challenge clause.

3. The know-how provisions set out in paragraphs (9) 1, (9) 2 and (9) 3 do not fall under Article 85 (1) because the grant of know-how is not exclusive and the obligations imposed on the licensee are simply ancillary to the grant of the trademark licence and enable the licence to take effect.

In particular the exclusive purchasing obligation regarding yeast set out in paragraph (9) 2, does not fall under Article 85 (1) because it is necessary to ensure technically satisfactory exploitation of the licenced technology and a similar identity between the lager produced originally by Moosehead and the same lager produced by Whitbread.

4. In relation to the trademark non-challenge clause:

(a) in general terms, a trademark non-challenge clause can refer to the ownership and/or the validity of the trademark:

— The ownership of a trademark may, in particular, be challenged on grounds of the prior use or prior registration of an identical trademark.

A clause in an exclusive trademark licence agreement obliging the licensee not to challenge the ownership of a trademark, as specified in the above paragraph, does not constitute a restriction of competition within the meaning of Article 85 (1). Whether or not the licensor or licensee has the ownership of the trademark, the use of it by any other party is prevented in any event, and competition would thus not be affected.

— The validity of a trademark may be contested on any ground under national law, and in particular on the grounds that it is generic or descriptive in nature. In such an event, should the challenge be upheld, the trademark may fall the public domain and may thereafter be used without restriction by the licensee and any other party.

Such a clause may constitute a restriction of competition within the meaning of Article 85 (1), because it may contribute to the maintenance of a trademark that would be an injustified barrier to entry into given market.

Moreover in order for any restriction of competition to fall under Article 85 (1), it must be appreciable. The ownership of a trademark only gives the holder the exclusive right to sell products under that name. Other parties are free to sell the product in question under a different trademark or tradename. Only where the use of a well-known trademark would be an important advantage to any company entering or competing in any given market and the absence of which therefore constitutes a significant barrier to entry, would this clause which impedes the licensee to challenge the validity of the trademark, constitute an appreciable restriction of competition within the meaning of Article 85 (1).

(b) In the present case Whitbread is unable to challenge both the ownership and the validity of the trademark.

As far as the validity of the trademark is concerned it must be noted that the trademark is comparatively new to the lager market in the Territory. The maintenance of the 'Moosehead' trademark will thus not constitute an appreciable barrier to entry for any other company entering or competing in the beer market in the United Kingdom. Accordingly, the Commission considers that the trademark non-challenge clause included in the Agreement, in so far as it concerns its validity (see the second indent of point 15.4 above), does not constitute an appreciable restriction of competition and does not fall under Article 85 (1).

Furthermore, in so far as this clause concerns ownership, it does not constitute a restriction of competition within the meaning of Article 85 (1) for the reasons stated in the first indent of point 15.4 above.

Article 85 (3)

(16) 1. The block exemption provided by Commission Regulation (EEC) No 556/89 [1] applies to agreements combining know-how and trademark licenses where, as stated in Article 1 (1), the trademark license is ancillary to that of the know-how. In the present case the principal interest of the parties lies in the exploitation of the trademark rather than of the know-how. The parties view the Canadian origin of the mark as crucial to the success of the marketing campaign, which promotes the Product as a Canadian beer. Under these circumstances, the provision of the agreement relating to the trademarks is not ancillary and Regulation 556/89 therefore does not apply.

2. In the light of the particularities of the United Kingdom beer market, described at points 6.1 to 6.5 above, the Commission considers that the Agreement is likely to contribute to the improvement of the production and distribution of the Product in the Territory and to promote economic progress. In particular, the following considerations are pertinent in this regard:

— The turnover presently achieved by Moosehead would not justify the capital costs involved in building custom production facilities for sales in the Territory. Thus, at the Agreement provides for Whitbread to brew the beer in its existing facilities, it is likely to improve the production of the Product in the common market. Furthermore, production will be at the point-of-sale and the beer need no longer be imported from Canada. The Agreement will thereby reduce transport costs and thus contribute to economic progress.

— Through the Agreement, the Product will automatically benefit from Whitbread's comprehensive distribution network. In the light of a market characterized by a paucity of independent distribution facilities, the Commission considers that the Agreement is likely to contribute to the improvement in the distribution of the Product in the Territory.

[1] OJ No L 61, 4. 3. 1989, p. 1.

— Whitbread owns a number of 'tied-houses'. The Agreement will therefore enable Moosehead to guarantee immediate access for the Product to a wider number of retail outlets without expending the time and expense of approaching a large number of independent retailers. The Commission considers that, in this manner, the Agreement is also likely to contribute to the improvement in the distribution of the Product in the Territory.

Consumers will also benefit from the Agreement since they will have a wide choice with the entry of the Product in the market of the Territory.

Taking account of the existence of many similar competing beers and of the ability of the parties to sell the Product to other parties for export to other Member States, the parties to the Agreement will not have the possibility of eliminating competition in respect of a substantial part of the products in question.

In examining the compatibility of the Agreement with these two requirements of Article 85 (3), the Commission has paid particular attention to the liberalizing measures that the United Kingdom Government is implementing in relation to the United Kingdom beer market. These measures are expected to become fully effective during the course of the exemption granted by the presented Decision.

After having considered the favorable effects for the production and marketing of beer resulting from the clauses which are restrictive of competition, and in particular the non-competition clause, the Commission considers that they are deemed to be indispensable to the attainment of the objectives of Article 85 (3). A decision pursuant to Article 85 (3) may, therefore, be adopted.

3. The Agreement remains in force until it is terminated by either party. The Agreement was notified to the Commission on 2 June 1988. It appears appropriate, pursuant to Articles 6 (1) and 8 (1) of Regulation No 17, to adopt such a decision for a period of 10 years.

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable for the period from 3 June 1988 to 2 June 1998 to the Agreement notified to the Commission on 2 June 1988 by Moosehead Breweries Limited and by Whitbread and Company plc.

Article 2

This Decision is addressed to:

1. Moosehead Breweries Limited,
   89, Main Street,
   Saint John West,
   New Brunswick, E2M 3M2,
   Canada.
2. Whitbread and Company plc,
   The Brewery,
   Chiswell Street,
   London EC1Y 6SD,
   United Kingdom.

Done at Brussels, 23 March 1990.

For the Commission

Leon BRITTAN

Vice-President