COMMISSION

COMMISSION DECISION

of 29 June 2000

relating to a proceeding pursuant to Article 81 of the EC Treaty (Cases IV/36.456/F3 — Inntrepreneur and IV/36.492/F3 — Spring)

(notified under document number C(2000) 1591)

(Only the English text is authentic)

(2000/484/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European 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 Regulation (EC) No 1216/1999 [2], and in particular Article 2 thereof,

Having regard to the applications for negative clearance and the notifications for exemption submitted on 27 March 1997 by the Inntrepreneur Pub Company Limited and The Inntrepreneur Beer Supply Company Limited and on 29 April 1997 by Spring Inns Limited pursuant to Articles 2 and 4 of Regulation No 17,

Having published a summary of the application and notification pursuant to Article 19(3) of Regulation No 17 [3],

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

Whereas:

I. THE FACTS

A. INTRODUCTION

(1) On 27 March 1997, the Inntrepreneur Pub Company Limited (hereinafter 'IPCL') and The Inntrepreneur Beer Supply Company Limited (hereinafter 'TIBSCO') notified, pursuant to Article 4 of Regulation No 17, the standard form tenancy agreements (hereinafter 'the Leases') used for the letting by IPCL and related companies of on-licensed premises [4] in the United Kingdom. The Leases are in the form used as from 1 January 1997, incorporating a Deed of Variation and Purchasing Agreement.

(2) On 29 April 1997, Spring Inns Limited (hereinafter 'Spring') notified pursuant to Article 4 of Regulation No 17, the Leases used for letting by Spring and related companies of licensed premises in the United Kingdom. The Spring Leases are also in the form of the lease used by IPCL, that is, as used from 1 January 1997, incorporating a Deed of Variation and Purchasing Agreement.

(3) By letter of 23 February 1998, the notifying parties added The Grand Pub Company Ltd (hereinafter 'GPC') as a party to both notifications and completed these notifications with information as to the operation of the Leases after 28 March 1998.

(4) The notifying parties have requested negative clearance of the Leases, or confirmation that the agreements could benefit from the application of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements [5], as last amended by Regulation (EC) No 1582/97 [6], or individual exemption pursuant to Article 81(3) of the Treaty. That Regulation contains in its Title II special provisions for beer-supply agreements.

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 148, 15.6.1999, p. 5.
[3] OJ C 133, 30.4.1998, p. 23 for both cases for the situation after 28 March 1998.
[4] On-licensed premises are those which are licensed to sell alcoholic beverages for consumption on and off the premises as opposed to off-licensed premises such as supermarkets which are licensed for off-premises consumption only.
[5] OJ L 173, 30.6.1983, p. 5.
[6] OJ L 214, 6.8.1997, p. 27.

(5) For the period before 28 March 1998 two notices [1] were published in the *Official Journal of the European Communities* pursuant to Article 19(3) of Regulation No 17. The parties, IPCL and Spring, have agreed to an exemption comfort letter by letter of 23 November 1999; that letter was issued on 24 January 2000. The Commission published an Article 19(3) notice pursuant to Regulation No 17 concerning the situation after 28 March 1998, when the beer supply structure changed. By letter of 23 November 1999, the notifying party informed the Commission that it requested a decision for the period after 28 March 1998. This Decision therefore only concerns the situation after 28 March 1998.

B. THE PARTIES

GPC

(6) On 21 September 1997, GPC, a company set up by the Japanese investment bank Nomura, entered into an agreement to acquire the IPCL and Spring pub companies. Under that agreement, GPC acquired an option to call (and the vendors, an option to put) the share capital of IPCL and Spring. That option was exercised on 27 March 1998.

(7) Following the exercise of the option, IPCL, Spring and the new nominated supplier under the Leases, Supply Line, are wholly-owned subsidiaries of GPC and as at 29 March 1998 GPC or its subsidiaries are the beneficial owner of the premises subject to the Leases.

(8) On 27 March 1998, the IPCL estate comprised some 2 898 on-licensed premises or pubs. Of these 2 286 IPCL houses were let on long leases, principally of 20 years duration and 612 houses were let on shorter term agreements of less than three years or temporary agreements of even shorter duration.

(9) On 28 March 1998, 851 Spring houses were let on long leases, principally of 20-year duration, and 555 houses were let on shorter term or on temporary agreements.

(10) GPC entered into an agreement to sell 310 pubs to Scottish and Newcastle plc. Completion took place on 29 March 1998. Following this sale, the GPC estate numbered 3 996 pubs. On 1 November 1999, the GPC estate numbered around 1 000 pubs.

(11) GPC notified its 'upstream' beer supply agreements with brewers for use after 28 March 1998 to the Commission on 9 February 1998 (Case IV/36.916/F3). This case was closed by the Commission after the issue of a negative clearance comfort letter to GPC on 11 March 1998. None of the then 15 notified brand supply agreements with individual brewers contained a restriction on GPC's sourcing policy such as exclusive purchasing obligations, minimum purchasing obligations, 'must stock' obligations or non-compete obligations. The lessees can buy any of the brands included in the GPC price list. On 1 November 1999, GPC had 18 beer supply agreements with brewers.

The lessees

(12) The other parties to the actual agreements, that are based on the Leases, are individuals or their companies who, in general, have an interest in only one on-licensed establishment.

C. THE MARKET

(13) The United Kingdom on-trade beer market has changed significantly over the last decade. The 1989 Monopolies and Mergers Commission's (hereinafter 'MMC') report on the supply of beer and the resulting legislation were important factors in these changes. The 1989 MMC report into the supply of beer led to a number of recommendations being made which were aimed at relaxing the traditional tie (exclusive purchasing obligation and non-competition obligation) between brewers and pubs. Most of the MMC's recommendations were implemented, mainly by the Supply of Beer (Tied Estate) Order 1989 and the Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices) Order 1989 (hereinafter 'the Orders'). The Tied Estate Order imposed the following changes on 'national brewers', that is, brewers with an estate of more than 2 000 on-licensed premises:

— their tenants/lessees would be free of tie for non-beer drinks and low-alcohol beers,

— their tenants/lessees would have the right to buy one cask-conditioned ale (a beer with fermentation in the cask) [2] from a source other than the brewer/landlord, that is, the guest beer clause, and

— they were only allowed to tie a certain number of pubs. This forced them to sell or free of tie about 11 000 of the then estimated 60 000 United Kingdom pubs.

Demand factors

(14) Beer can be sold through the on-trade, for example, pubs, hotels and restaurants, or through the off-trade, for example, supermarkets and off-licences. In addition, imports brought into the United Kingdom by private individuals on which duty has been paid, mainly from

[1] OJ C 374, 10.12.1997, p. 11 for Case IV/36.456/F3 — Inntrepreneur; OJ C 61, 26.2.1998, p. 3 for Case IV/36.492/F3 — Spring.

[2] The United Kingdom Government extended the scope by also allowing for one bottle-conditioned beer from 1 April 1998.

Calais, are estimated to have accounted for almost 5 % of total beer consumption in the United Kingdom in 1998. The proportion of sales volume accounted for by the on-trade was around 68 % in 1998. With the exception of Ireland, this remains the highest proportion in the Community.

(15) Consumption of draught beer accounted in 1998 for 61 % of total consumption. This is also, with the exception of Ireland, the highest figure in the Community. United Kingdom pubs also offer a bigger choice of draught beers than elsewhere in the Community, with an average of 6,5 brands per pub.

Supply factors

Brewing

(16) In 1998, the remaining four national brewers, Scottish & Newcastle, Bass, Carlsberg Tetley Brewing and Whitbread, commanded 78 % of the United Kingdom beer market in terms of supply. The Herfindahl-Hirschmann index (hereinafter 'HHI'), used to help describe market concentration, for the United Kingdom beer market stood, on the basis of the market shares of the national brewers, at 1 678 ([1]) in 1996. With an HHI between 1 000 and 1 800, the market is described as 'moderately concentrated'. The increased price competition at the wholesale level, which can be associated with the emergence of pub companies (see recital 18), has led to the recent consolidation at brewing level, as regional brewing companies, in particular, have attempted to achieve necessary economies of scale. In 1999, there were five regional brewers ([2]).

Wholesaling

(17) The Orders caused the sale of part of the national brewers' tied estates. This was expected to lead to an increase in the free trade and to a greater role for traditional wholesalers. However, in 1995/96 traditional wholesalers still only accounted for some 6 % of distribution, compared to 5 % in 1985. The national brewers still dominate the wholesale sector, with a share of distribution similar to their share of production. As regional brewers do not require the services of traditional wholesalers either, this, combined with the general decline in sales of beer and the increased efficiency of national brewer-wholesalers, has resulted in marginal growth in the traditional wholesale sector.

(18) The pubs that were sold by the national brewers were purchased mainly by retail pub chains or by regional brewers. In general, pub chains either have their own wholesaling operations or are supplied directly by the brewers.

Retailing

(19) In the United Kingdom, the retail sale of beer and other alcoholic drinks for consumption on the premises requires a justices' (local courts of law) licence. Three distinct classes of licences are currently in operation ([3]):

— full on-licences: premises where a person can buy an alcoholic drink, without being a resident or having a meal. There are approximately 83 100 full on-licences in issue, of which around 57 000 ([4]) are pubs. The remainder include hotels and wine bars,

— restricted on-licences: premises where it is a condition on buying a drink that the customer is either a resident or having a meal. Covers some 32 300 private hotels and restaurants,

— clubs: of which a person has to be a member before buying a drink. Covers some 31 500 outlets, mainly jointly owned by their members.

(20) The following table indicates how beer was sold through the different retail channels in 1997: (a) the tied estate of the brewers, (b) the managed estate of the brewers, (c) the tied estate of non-brewing pub companies (including IPCL and Spring), (d) the managed estate of non-brewing pub companies, (e) loan-tied premises and (f) untied or free premises. The 1997 data are from the Brewers and Licensed Retailers Association (hereinafter 'BLRA'), including estimates for non-members.

Table 1: UK on-trade beer consumption

	(a)	(b)	(c)	(d)	(e)	(f)
1997	10,0 %	17,2 %	11,4 %	8,3 %	18,1 %	35,0 %

([1]) The Commission does not have precise information on the market shares of the other United Kingdom brewers. Nevertheless, it does not estimate that the HHI for all brewers would reach the 1 800 mark as from which a market is considered to be 'highly concentrated'.

([2]) Defined in the MMC report as brewers which 'have a business which is mainly, but not necessarily wholly, concentrated in a single region of the United Kingdom'. The number of regionals is defined taking the number of owned pubs and production volume for the smallest regional in the MMC report as a benchmark.

([3]) The licensing system is slightly different in Scotland.

([4]) Other publications have estimated the number of pubs at 61 000.

(21) The 10 % figure for sales going through the tied estates of the brewers in 1997 includes the tied purchases of the lessees and the cask-conditioned beer that the tenants and lessees of the national brewers purchase, at a discount, from their landlord-brewer [1]. The figure does not include purchases of guest beer from another supplier.

(22) The 18,1 % figure for loan-tied premises' volume in 1997 includes the total volume that a loan-tied pub operator buys from the supplier with whom he has a loan tie. This volume may exceed the tied quantities foreseen in the loan agreement. It is, however, not known what part of the 18,1 % represents purchases in excess of the loan-tied quantity. The 18,1 % figure does not include 'free' purchases of a loan-tied pub operator from other suppliers.

(23) While Table 1 gives an idea of the throughput in the on-trade by describing the ownership situation of the premises, it can also be noted that if one refers to the category of on-licensed premises, 70 % of beer is sold through the estimated 57 000 pubs, 20 % through clubs and 10 % through restaurants, hotels, wine bars and so forth with full or restricted on-licences (1995 data).

(24) The Orders also reduced the restrictive scope of loan ties, by allowing their termination at any moment in time by the tenant on three months' notice. The Orders also introduced the guest beer right for publicans with trade loans from the national brewers. From information supplied by the BLRA (following a specific survey undertaken in 1996), it appears that the usual period of a loan is five or 10 years, and the average actual length is almost four years. Thirty-one brewers had some 37 000 loans outstanding at the end of the survey period (almost 35 000 at the start) with over the year almost 8 000 new loans entered into and over 5 000 repaid. The value of the loans repaid during the period exceeded the value of the new loans made (to existing or new customers); some 2 % of the outstanding capital was written off as bad debts. The average value of a loan is around GBP 30 000.

(25) There appear to be two types of loans, relatively small ones (a value of almost GBP 5 000 at the start of the period, but only an average value of less than GBP 2 000 at the end of the survey period) which are often made available to small free-trade pubs; they appear to be very volatile. On the other hand, there are much larger loans to large volume outlets such as clubs (average value around GBP 60 000) and these are usually non-exclusive. However, the purchasing obligations are usually for a specific quantity of beer. No estimate was made by the BLRA as to the volume split for small/big loans, the number of the non-exclusive (big) loans, the total on-trade volume-percentage accounted for by such non-exclusive loans, or the percentage of total throughput of the relevant premises accounted for by the quantity of beer stipulated in such loan ties. No information was given as to the proportion of loans which the publican pays back with money loaned to him by another brewer (in exchange for a new loan tie). Beer volumes sold through loan ties have reduced in the last couple of years and, for the years 1994 to 1997, the scale of loan repayments has exceeded the value of new loans.

[1] This is also sometimes called a guest beer, although the legal definition of a guest beer refers to the purchase of a cask-conditioned beer from another supplier (see recital 13).

Competition between brewers

(26) At the wholesale level, the major brewers have some guaranteed sales through their tied and managed estates. The brewers have to compete to supply the remainder of the market, through individual agreements with free houses (with or without loan ties) and supply agreements with pub chains and other brewers (with or without 'ties' such as minimum purchasing obligations, non-compete and must-stock obligations). The competitive parameters are mainly price and brand strength, although the brewers also try to gain sales by offering other benefits such as promotional support.

Market entry at brewing level

(27) The main hindrances to entry at this level are the need to secure outlets for supplies and to have access to a distribution system. A new entrant has to secure supplies to free houses, pub chains or to the brewer's estates as part of their portfolio of beers or (in the case of a national brewer) as a guest beer. Possession by competitors of well-known brands may hinder entry, or expansion of existing brewers. This may be more important in lagers, which are normally marketed nationally, and where economies of scale in advertising may make small-scale entry less viable. The difficulties involved in small-scale entry may be increasing as the advertising spend for the national lager brands has increased substantially over the last couple of years, even on a brand basis.

(28) The need to secure outlets has been reduced since the implementation of the Orders, owing to the reduction of the proportion of the market subject to ties and to the emergence of pub companies. It is easier for a new entrant to enter supply agreements with a chain rather than with individual pubs. Whereas it is relatively easy to set up a distribution system limited to the supply of the wholesale depots of the other brewers and/or wholesalers, it is more difficult to reach the individual retail outlets.

(29) Most foreign producers of beer (mostly lager) have chosen to enter the United Kingdom market by entering into exclusive licensing agreements with existing national brewers whereby the beer is brewed in the United Kingdom and sold as part of the national brewer's portfolio of brands. These foreign lagers have often been marketed as premium brands and supported by substantial advertising spending. However, there is one example where a brewer has come into the United Kingdom market directly. Anheuser Busch has recently become a brewer in the United Kingdom, taking over the former Courage brewery in Mortlake to produce the Budweiser lager.

Market entry at retail level

(30) Pubs compete only with others in their locality. Broadly speaking, each area has a local price for a certain type of package, which comprises the total pub 'offer' (facilities, ambience) and not just the price of beer.

(31) Entry barriers in the retail market are relatively low. The only one of any significance is the presence of licensing laws, which can prevent new pubs from being opened unless there is a need for them. This law is not applied strictly throughout the United Kingdom, but where it is, it can result in entry within that locality being difficult. Moreover, in some areas of the United Kingdom, licences are now being refused mainly on public order grounds. However, a particular pub company has succeeded in opening over 100 pubs on greenfield sites in recent years.

Changes in arrangements between pub tenants and their landlords

(32) Historically, pubs were let by means of 'traditional' short-term pub tenancies. Brewers retained responsibility for the fabric of the building and its fixtures and fittings and tenants were responsible for selling beer supplied by the landlord plus other drink and food. Following the MMC report, pub tenants in England and Wales were provided with security of tenure [1] by being brought within the Landlord and Tenant Act 1954. However, well before the MMC's recommendation, the first long full repair and maintenance leases, which provided some security of tenure and the ability to assign the lease, were offered.

D. THE AGREEMENTS

(33) For leases granted after 28 March 1998, GPC use (a) the 'standard variable term lease', long fully repairing and insuring leases for terms between 10 and 30 years, and (b) the 'variable term agreement' for a term of between three and five years. Both incorporate a Purchasing Agreement and a Deed of Variation.

(34) The Purchasing Agreement sets out the discount structure. The Deed of Variation (a) incorporates the Purchasing Agreement in the existing lease, (b) introduces a new beer tie but allows GPC to vary the tie so as to tie by brand, (c) removes the minimum purchasing obligation and the penalty for shortfall that were in the existing leases issued by IPCL and Spring before 1 February 1997, (d) allows the arrangements of the Purchasing Agreement to be considered for rent reviews after 31 March 1998, (e) introduces the opportunity for the lessees to have the rent review determined by an expert for a fixed fee, and (f) allows the lessees to call for a rent review if the Purchasing Agreement is terminated; such a review could be downwards, but not to a level below the rent prior to the time of entering into the Purchasing Agreement.

(35) The Leases issued after 28 March 1998 do not contain a guest beer provision. However, they do contain a tie for cider, no-alcohol and low-alcohol beers.

Beer tie

(36) The lessee agrees to purchase all specified beers that he requires for sale in the property only from the company or its nominees. 'Specified beers' means the following types of beer: light, pale ale or bitter, export or premium ale, mild ale, brown ale, strong ale (including barley wine), bitter stout or porter, sweet stout, lager, export or premium lager, strong lager, 'diet pils' (or premium low carbohydrate beer), low carbohydrate (or 'lite' beer).

(37) The brands or denominations of the specified beers type are indicated on the company's price list. The company may as often as it wishes add, substitute or delete brands or denominations from a specified beers type on the price list.

[1] Except for a limited number of specified reasons, i.e. the owner of the pub wants to use the outlet for his own purposes as a managed house, in which case the lessee receives compensation fixed by law, the parties can negotiate a new agreement. In the absence of a new agreement, the United Kingdom courts will renew the agreement on similar terms to the existing agreement with the exception of the rent and the duration which cannot exceed 14 years.

(38) Except for the guest beer provision, the lessee shall not sell or expose for sale in his pub any specified beer not supplied by the company or any unspecified beer unless (a) it is packaged in bottles, cans or other small containers; or (b) it is in draught form and the sale of that beer in draught form is customary or is necessary to satisfy a sufficient demand from the lessee's customers ([1]).

(39) The lessee must not advertise on the property goods which are not supplied by the company except in the same proportion that those goods bear to the total turnover of the lessee in the property.

II. **LEGAL ASSESSMENT**

ARTICLE 81(1)

1. **The relevant market**

1.1. *The relevant product market*

(40) The relevant product market includes, in principle, all goods or services which are perceived by the consumer, on the grounds of their characteristics, price or intended purpose, as being reasonably interchangeable with each other ([2]). As the Court of Justice of the European Communities stated in the *Delimitis* judgment ([3]), 'the relevant market is primarily defined on the basis of the nature of the economic activity in question, in this case the sale of beer. Beer is sold through both retail channels and premises for the sale and consumption of drinks. From the consumer's point of view, the latter sector, comprising in particular public houses ([4]) and restaurants, may be distinguished from the retail sector on the grounds that the sale of beer in public houses does not solely consist of the purchase of a product but is also linked with the provision of services, and that beer consumption in public houses is not essentially dependent on economic considerations. The specific nature of the public house trade is borne out by the fact that the breweries organise specific distribution systems for this sector which require special installations, and that the prices charged in the sector are generally higher than retail prices.'

(41) In view of the specific licensing system in the United Kingdom, it has to be clarified which sections of the three distinct classes of on-licences (see recital 19) form the relevant product market of 'public houses and restaurants'. In this respect, reference is made to paragraph 43 of the Commission notice concerning Regulations (EEC) No 1983/83 and (EEC) No 1984/83 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements ([5]) where it is stated that 'the concept of "premises for the sale and consumption of drinks" covers any licensed premises used for this purpose. Private clubs are also included.' This is understandable as all these outlets, including also the restricted on-licences, have in common that the drinks are purchased for consumption on the premises and that there is an important service element provided for. The Commission recognises that beer price in clubs, being in December 1994 some 82 to 83 % of that prevailing in pubs, is lower than that charged in pubs ([6]). However, this reflects to a large extent the fact that these clubs operate on a non-profit base. It remains the case that, in view of the service element, the price in clubs is still in excess of the price of beer in supermarkets. Furthermore, the specific distribution system for the whole on-trade, including clubs, is the same: the special installations for draught dispense, the brewers' beer list prices, and the operation of loan ties.

(42) It follows that the reference market is that for the distribution of beer in premises for the sale and consumption of drinks (the whole on-trade market). As stated in the *Delimitis* judgment at paragraph 17, that finding is not affected by the fact that there is a certain overlap between the on- and off-trade, namely inasmuch as retail sales allow new competitors to make their brands known and to use their reputation in order to gain access to the market constituted by premises for the sale and consumption of drinks.

1.2. *The relevant geographic market*

(43) The objective competitive conditions of supply and demand for the supply of beer to the on-trade vary considerably in the different parts of the Community. As the Court of Justice noted in the *Delimitis* judgment at paragraph 18, most beer supply agreements are still entered into at a national level. It follows that, in applying the Community competition rules to the agreement, account is to be taken of the United Kingdom market for beer distribution in premises for the sale and consumption of drinks.

([1]) Subject to some further formalities.
([2]) Case 27/76, *United Brands*, ECR [1978], 207, paragraph 12.
([3]) Case C-234/89, *Stergios Delimitis* v *Henninger Bräu*, ECR [1991] I-935, paragraph 16.
([4]) The German (procedural language) version of the judgment uses the term 'Schankwirtschaften'. In the French version, being the working language within the Court, the term 'cafés' is used.
([5]) OJ C 101, 13.4.1984, p. 2.
([6]) Extracts from Stats MR's survey of retail prices, submitted by a national brewer to the Office of Fair Trading.

(44) The United Kingdom market is also distinct from beer markets in other Member States in view of the Orders (see recital 13), the high consumption of draught beer (see recital 15), the presence of pub management companies (see recital 18), the pub-licensing regulations (see recitals 19 and 31) and the variety in types of ale offered (see recital 36).

2. **Agreement between undertakings**

(45) GPC, on the one hand, and the lessees, on the other, are undertakings within the meaning of Article 81(1).

(46) The individual leases, in a form similar to the notified Leases, between the notifying companies and each of its lessees are agreements within the meaning of Article 81(1).

3. **The beer tie's restrictive effect on competition**

3.1. *Description and nature of the beer tie*

(47) A beer supply agreement such as the Leases is generally qualified by referring to the exclusive purchasing obligation which is generally backed by a non-competition obligation ([1]). These clauses are formulated in the lease as follows (see also recitals 36 to 38):

— the lessee agrees to purchase all specified beers that he requires for sale in the property only from the company or its nominees. The brands or denominations of the specified beers type are indicated on the company's price list. The company may as often as it wishes add, substitute or delete brands or denominations of a specified beers type on the price list (exclusive purchasing obligation),

— except for the guest beer provision, the lessee shall not sell or expose for sale in his pub any specified beer not supplied by the company or any unspecified beer unless (a) it is packaged in bottles, cans or other small containers; or (b) it is in draught form and the sale of that beer in draught form is customary or is necessary to satisfy a sufficient demand from the lessee's customers (non-competition obligation).

(48) It can be noted that, apart from the explicit non-competition obligation, the exclusive purchasing obligation is so formulated that it already includes implicitly a non-competition obligation by reference to the general wording 'all specified beers'.

(49) Because of the exclusive purchasing obligation, the lessees are precluded from accepting offers of contract goods from other suppliers. Competition for the lessees between the company's nominated supplier and other beer wholesalers who offer the same brands is precluded (restriction of intra-brand competition).

(50) The explicit and implicit non-competition obligation for beer, that is, the prohibition on the lessees to purchase other brands of specified types from other producers of beer, restricts interbrand competition. The contractual provisions on the purchase of non-specified types impose certain administrative constraints on the lessees but do not in effect restrict their ability to offer such non-specified types on their premises. These clauses therefore lack a restrictive effect on competition.

3.2. *The Delimitis tests*

(51) The Court held in paragraph 27 of the *Delimitis* judgment that 'a beer supply agreement is prohibited by Article 85(1) of the EEC Treaty, if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks'. That is, the first test concerns whether the United Kingdom on-trade beer market is foreclosed.

(52) Even if any foreclosure exists on the United Kingdom on-trade beer market, for the notifying parties' tied leases to fall within the scope of Article 81, it is necessary to consider, as the Court went on to do in paragraph 27 of the *Delimitis* judgment, that 'the agreement in issue must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the Contracting Parties in the relevant market and on the duration of the agreement'.

(53) The Court clarified this further in paragraphs 25 and 26 of that judgment, 'That position is not determined solely by the market share held by the brewery and any group to which it may belong, but also by the number of outlets tied to it or to its group, in relation to the total number of premises for the sale and consumption of drinks found in the relevant market'. As to the duration, the Court indicated that 'if the duration is manifestly excessive in relation to the average duration of beer supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 85(1). A brewery with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to a sealing-off of the market as a brewery in a relatively strong market position which regularly releases sales outlets at shorter intervals'.

([1]) *Delimitis*, loc. cit.; paragraph 10 of the judgment.

(54) In the German ice-cream cases, the Court of First Instance, in assessing the significant contribution of the companies in question, referred to 'the strong position occupied by the [company concerned] in the relevant market, and, in particular, its market share' ([1]). The Court thus based itself primarily on the broader concept of the overall market share.

(55) In applying this test to the notifying party, their tied leases must also be looked at in their 'economic and legal context'.

(56) The assessment of the agreements concerning the purchase of beer from brewers (the 'upstream' beer supply agreements) has to be differentiated from the assessment of the property and loan-tie agreements (the 'downstream' agreements).

(57) Where the former category of agreements, the 'upstream' beer-supply contract, contains a sort of tie (minimum purchasing obligation, non-compete obligation, must-stock obligation) it is to be considered as part of the tied network of the supplying brewer. This contract can thus fall within the scope of Article 81(1) if the supplying brewer contributes significantly to the foreclosure on the market. The agreements can, however, be exempted if they fulfil the criteria of Article 81(3).

(58) In this respect, it should be noted that whereas the restrictive links between the brewers, which are in effect national players, and the other wholesale players are limited, access to the 'downstream' tied network of the wholesale players is possible for other, United Kingdom or foreign, brewers. Furthermore, it is easier for these other brewers to conclude an agreement with one wholesale player and thereby obtain access to all the outlets tied to such a player, than to conclude agreements with each individual retail outlet. The existence of an open beer-supply structure should therefore not have an impact on the assessment of the tied network of the 'wholesaler'. The tied network of the 'wholesaler' cannot simply 'be attributed to the (brewery) which makes an appreciable contribution (to the foreclosure)' ([2]).

(59) In contrast to the *Delimitis* case, which concerns a brewer, the notifying party is a free-standing pub company, which is not vertically integrated with any United Kingdom brewer. The relationship between the notifying party and its tenants, on the one hand, and the brewers, on the other, is therefore economically different from that of a brewer which wishes to see its beer sold through its network of agreements.

(60) Since 29 March 1998, the supply of beer to the GPC estate has been characterised by multi-sourcing and periodic tendering. Brands are sourced on the basis of a diversified portfolio from national and regional brewers. The duration of contracts with supplying brewers (typically two to five years) is structured so that a proportion of the business can be re-tendered at frequent intervals. Over the period 1998 to 2003, approximately 98 % of the beer throughput will provide an opportunity for third party brewers to tender. The notifying parties do not have a single volume commitment to any of the current 18 brewers whose brand(s) are currently listed on their price list. The notifying parties thereby offer a gateway for the already substantial number of brewers, and, theoretically ([3]) for all other national or foreign brewers, to the UK on-trade market. Furthermore, it is easier for another brewer, and in particular a newcomer on the UK market, to conclude an agreement with one wholesale player and thereby obtain access to all the outlets tied to such a player, than to conclude agreements with each individual retail outlet.

(61) The effect of the leases is therefore to mitigate rather than reinforce any network effect of brewers' agreements in the United Kingdom on-trade beer market. The role of such an independent distribution structure in reducing foreclosure was recognised by the Court in paragraph 21 of the *Delimitis* judgment, 'the presence of beer wholesalers not tied to producers who are active on the market is also a factor capable of facilitating a new producer's access to that market since he can make use of those wholesalers' sales networks to distribute his own beer'.

(62) It can therefore be concluded that rather than significantly contributing to the foreclosure, the tied leases of a 'non-tied' pub company are more likely to enhance the competitive structure of the market ([4]). In those circumstances, the importance of a pub company's tied estate (in terms of number of outlets tied and the beer throughput of those outlets) is not currently relevant to an assessment of the contribution to market foreclosure.

([1]) Cases T-7 & 9/93 *Langnese-Iglo* and *Schöller*, [1995] ECR II-1539 and II-1611, paragraphs 112 and 87 respectively.
([2]) *Delimitis*, loc. cit.; paragraph 24 of the judgment.
([3]) The Commission recognises that there are practical limits as to the number of 'product lines' (not necessarily equal to brands as one brand might be stocked in different container sizes) that a pub company can stock and distribute efficiently to its tied outlets.
([4]) In the case of a non-brewing pub company, given the current market structure at the retail level, the duration of the IPCL and Spring standard leases is irrelevant for the assessment of whether they contribute significantly to foreclosure, when the 'upstream' beer supply structure is open.

3.3. *Conclusion on the Delimitis tests*

(63) GPC does not operate a network of 'restrictive' agreements, including its standard lease agreements, that contribute significantly to the foreclosure of the United Kingdom on-trade beer market; nor can their standard lease agreements be considered, in view of the beer-supply agreements with brewers, to form part of such a 'supplying' brewer's tied network.

4. **Conclusion**

(64) The exclusive purchasing and non-competition obligations contained in the notified Leases after 28 March 1998 fall outside the scope of Article 81(1).

5. **Restrictive effect on competition of the advertising clause**

(65) The notified leases contain a clause which states that the lessee should avoid advertising goods supplied by other undertakings in a higher proportion than the share of those goods in the total turnover realised in the premises (hereinafter 'the advertising clause').

(66) Whether or not the advertising clause falls within the scope of Article 81(1) of the Treaty is only relevant to the market for the distribution of beer. With regard to all other neighbouring markets for the supply of goods to on-licensed premises in the United Kingdom, such as non-beer drinks, crisps and amusement machines, the clause is not restrictive. The Leases, in the absence of an exclusive purchasing obligation and a non-competition obligation for the supply of such products, do not restrict competition on such markets, if such were considered to exist, to an appreciable extent by the mere imposition of an advertising clause.

(67) With regard to the supply of beer, the advertising clause has the object of limiting the lessee's ability to advertise the beer supplied by particular undertakings. The only beer that a GPC lessee is entitled, pursuant to his Lease, to buy from undertakings other than the nominated suppliers is the guest beer and beer of non-specified types. In particular, brands of beer of non-specified types may not be well known to the United Kingdom consumer and therefore would require specific on-the-spot advertising. The letter of the clause would make advertising for these new products impossible, as the clause requires the advertising to be proportionate to the turnover of these goods, which by definition, is virtually zero as the goods are new.

(68) The exclusive purchase obligation contained in the beer tie allows GPC to exclude any third-party beer from being offered by the lessee merely by adding it to the price list as a specified beer (see recital 47). As demonstrated at recital 64, this beer tie falls outside the scope of Article 81(1) of the Treaty. It follows that an advertising clause which can make advertising for such third-party beer impossible cannot be caught by Article 81(1) of the Treaty either.

(69) In any event, the Commission possesses no information to the effect that the advertising clause has been applied. On the contrary, GPC confirmed in a letter dated 29 June 1999 that, 'IPCL/Spring did not enforce the clause in the lease allowing for advertising of product' and further in a letter of 15 March 2000, whereby GPC also confirms that it has no intention of enforcing this clause in the future, 'this is apparent from the fact that lessees have the freedom to advertise, promote and market according to the marketing mix of their choice of brewers' products as appropriate to their business plan'.

(70) It follows that the advertising clause falls outside the scope of Article 81(1) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 81(1) of the Treaty in respect of the notified agreements for the period after 28 March 1998.

Article 2

This Decision is addressed to The Grand Pub Company Ltd, c/o Mill House, Aylesbury Road, Thame, Oxfordshire OX9 3AT, United Kingdom.

Done at Brussels, 29 June 2000.

For the Commission

Mario MONTI

Member of the Commission