STATUTORY INSTRUMENTS

1989 No. 2390

MONOPOLIES AND MERGERS

The Supply of Beer (Tied Estate) Order 1989

Made - - - -	*19th December 1989*
Coming into force -	*19th December 1989*

Whereas the Secretary of State, in accordance with section 91(1) of and Schedule 9 to the Fair Trading Act 1973(a), caused notice of his intention to lay a draft of this Order to be published in the London Gazette and the Edinburgh Gazette on 22nd August 1989, the Belfast Gazette, the Daily Telegraph and the Financial Times on 25th August 1989 and the Morning Advertiser on 26th August 1989, stating that it was proposed to lay a draft of this Order before Parliament, indicating the nature of the provisions to be embodied in it, stating that a copy of the draft would be available to be seen at all reasonable times in the offices of the Department of Trade and Industry at 1 Victoria Street (Room 020), London SW1 and stating that any person whose interests were likely to be affected by this Order and who was desirous of making representations in respect of it should do so in writing before 10th October 1989;

And whereas the Secretary of State considered the representations duly made to him with respect to the draft of this Order and not withdrawn;

And whereas on 6th December 1989 the Secretary of State laid the draft of this Order before Parliament;

And whereas the said draft as so laid has been approved by resolution of each House of Parliament:

Now, therefore, the Secretary of State, being the appropriate Minister within the meaning of section 56 of the said Act, in exercise of the powers conferred by sections 56(2) and 90(2), (3) and (4) of, and paragraphs 1, 2 and 14 of Schedule 8 to, the said Act, and for the purpose of remedying or preventing adverse effects specified in a report of the Monopolies and Mergers Commission entitled "The Supply of Beer—a report on the supply of beer for retail sale in the United Kingdom"(b), hereby makes the following Order:–

1.—(1) This Order may be cited as the Supply of Beer (Tied Estate) Order 1989.

(2) In this Order–

"alcoholic strength" has the same meaning as in the Alcoholic Liquor Duties Act 1979(c);

"beer" includes any beverage of an alcoholic strength exceeding 1.2 per cent which is made with beer;

(a) 1973 c.41; Schedule 9 was amended by the Companies Act 1989 (c.40), section 153 and Schedule 20, paragraph 20.
(b) Cm. 651.
(c) 1979 c.4.

"brewer" means a person who carries on business in the manufacture of beer which is supplied by retail in the United Kingdom;

"brewery group" means a group which is–

(a) a group of interconnected bodies corporate, or

(b) a group consisting of a body corporate, or a group of interconnected bodies corporate, all other bodies corporate in which it, or any of them, has a substantial minority holding, and all subsidiaries of those other bodies corporate,

and at least one member of which is a brewer; and a brewery group is a "large brewery group" if one or more of its members holds interests in licensed premises, and the total number of licensed premises in which members of the group hold interests exceeds two thousand;

"interest in shares" includes an entitlement, by a person who is not the registered holder, to exercise any right conferred by the holding of the shares in question or an entitlement to control the exercise of any such right;

"licensed premises" means–

(a) in England and Wales, premises for which a justices' on-licence (within the meaning of the Licensing Act 1964(**a**)), other than a Part IV licence (within the meaning of that Act), is in force, or in respect of which a club is registered within the meaning of that Act;

(b) in Scotland, premises in respect of which a public house licence, a hotel licence or a refreshment licence (within the meaning of the Licensing (Scotland) Act 1976(**b**)) is in force or which are occupied by a registered club within the meaning of that Act;

(c) in Northern Ireland, premises in which the sale of intoxicating liquor is authorised by a licence granted under the Licensing Act (Northern Ireland) 1971(**c**), being premises of a kind mentioned in paragraph (a) or (f) of section 3(1) of that Act, or in respect of which a club is registered within the meaning of the Registration of Clubs (Northern Ireland) Order 1987(**d**);

"notified tied house" means licensed premises of which the name (if any) and address have been notified to the Director General of Fair Trading as premises to be treated as a notified tied house; and for that purpose–

(a) notification may be made or withdrawn at any time, and

(b) the making or withdrawal of notification may be effected only by or on behalf of the brewer, or a member of the group, in respect of which the notification is, or is no longer, required for the purposes of the Schedule to this Order;

"relevant purchase", in the context of an agreement to which a brewer or a member of a brewery group is a party, means purchase by any person who is not a member of the same group, for retail sale on licensed premises, of beer or other drink manufactured or supplied by any person not a party to the agreement;

"subsidiary" has the same meaning as in section 736 of the Companies Act 1985(**e**);

"substantial minority holding" means a holding by a body corporate of fifteen per cent or more, or an interest in shares conferring fifteen per cent or more, of the voting rights in another body corporate, other than its subsidiary;

"voting rights" means rights conferred on shareholders in respect of their shares, either at all times or for the time being, to vote at general meetings of the body corporate in question on all, or substantially all, matters.

(3) For the purpose of determining whether a body corporate has a substantial minority holding in another body corporate–

(a) it is immaterial whether a holding is direct or through a nominee or trustee,

(b) the holdings of the subsidiaries of a body corporate shall be treated as its own,

(c) where one body corporate has a holding in a second body corporate (not being

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(**a**) 1964 c.26.
(**b**) 1976 c.66.
(**c**) 1971 c.13 (N.I.).
(**d**) S.I. 1987/1278 (N.I. 14).
(**e**) 1985 c.6.

its subsidiary) and the second body corporate has a holding in a third body corporate (not being its subsidiary), the first body corporate shall be treated as having a holding in the third equivalent to the product of the two actual holdings expressed as percentages, and

(d) where a body corporate has, in consequence of the application of subparagraphs (a), (b) and (c) above, more than one holding in another body corporate, the holdings shall be aggregated and treated as a single holding.

(4) In the case of a body corporate which is both a brewer and a member of a brewery group, the provisions of this Order shall apply in relation to that body corporate both as a brewer and as a member of a brewery group.

(5) For the purpose of determining whether an agreement is an agreement to which article 5, 6 or 7 below applies, a person shall be regarded as a brewer who holds interests in more than two thousand licensed premises or a member of a large brewery group if he is for the time being such a brewer or a member of such a group, and it is immaterial that he may not have been such a person when the agreement was made.

(6) For the purposes of this Order–

(a) in England and Wales and Northern Ireland, an interest is an interest in licensed premises if it is–

(i) a right of occupation, or

(ii) a legal or equitable estate or interest conferring an actual or prospective right of possession,

except for any such interest which is merely by way of mortgage, charge or other security or an equitable interest created by a contract to convey, transfer or assign an existing legal estate;

(b) in Scotland, an interest is an interest in licensed premises if it is–

(i) any right of ownership in such premises (other than in the superiority of them), or

(ii) any right or interest of a tenant or sub-tenant of such premises, or

(iii) any other right to occupy such premises,

but not including any right or interest which arises under any heritable security or floating charge or other security;

(c) a person shall not be treated as carrying out an agreement by reason only that he refrains from doing something the doing of which is the subject of a prohibition or restriction imposed by the agreement; and

(d) an agreement precludes or restricts a relevant purchase whether it does so wholly or only in part, whether that is the object or merely the effect of the agreement, and whether the provisions in question are expressed as negative or positive obligations.

(7) Except as provided in article 6(2)(b) below, this Order shall extend so as to prohibit the carrying out of agreements already in existence on the date on which this Order is made as it prohibits the carrying out of agreements made subsequently.

(8) In the case of a person falling within paragraph (a), (b) or (c) of section 90(3) of the Fair Trading Act 1973, this Order shall extend to his acts and omissions outside the United Kingdom.

2.—(1) Every brewer who before 1st November 1992 holds interests in more than two thousand licensed premises shall do all such things as may be necessary to secure that on that date either–

(a) he is no longer a brewer, or

(b) he no longer holds interests in more than two thousand licensed premises, or

(c) the provisions of the Schedule to this Order are satisfied with respect to him.

(2) Every body corporate which before 1st November 1992 is a member of a large brewery group shall, subject to paragraphs (3), (4) and (5) below, do all such things as may be necessary to secure that on that date either–

(a) it is no longer a member of such a group, or

(b) the provisions of the Schedule to this Order are satisfied with respect to the group.

(3) The obligations under this article of a member of a brewery group which is a body corporate, or a subsidiary of a body corporate, in which another member of the group has a substantial minority holding shall be determined as if the holding did not exist.

(4) Paragraph (2) above shall impose no obligation on any body corporate which–

(a) neither is a brewer nor holds any interest in any licensed premises, and

(b) would not be a member of a brewery group or of a group one or more members of which hold interests in licensed premises were it not that it was a subsidiary of another body corporate.

(5) In any case in which both paragraph (2) above and article 4 below apply, the extent of the obligation imposed by paragraph (2) above shall be no greater than it would have been if the acquisition which caused article 4 below to apply had not been made.

3.—(1) Subject to paragraph (2) and article 8 below, it shall be unlawful on and after 1st November 1992 for any person to make or carry out an agreement if the carrying out of the agreement would result in any person becoming either–

(a) a brewer who holds interests in more than two thousand licensed premises and with respect to whom the provisions of the Schedule to this Order are not satisfied, or

(b) a member of a large brewery group with respect to which the provisions of the Schedule to this Order are not satisfied.

(2) This article shall not apply in respect of any agreement by which a body corporate, by acquiring shares in another body corporate or any interest in such shares, would become a member of a large brewery group or cause the other body corporate to become a member of such a group.

4. Where a body corporate, by acquiring shares in another body corporate or any interest in such shares, becomes after 1st May 1992 a member of a large brewery group or causes the other body corporate to become a member of such a group and as a result (in either case) the provisions of the Schedule to this Order are not satisfied with respect to the group, it shall do all such things as may be necessary to secure that at the end of the period of six months beginning on the day of the acquisition in question, either–

(a) the group is no longer a large brewery group, or

(b) the provisions of the Schedule are satisfied with respect to the group.

5.—(1) This article applies, except as provided in paragraph (4) below, to any agreement which is, or has the effect of, a lease or a licence and under which a brewer who holds interests in more than two thousand licensed premises or a member of a large brewery group permits another person not a member of the same group to occupy licensed premises other than a notified tied house, and to any agreement relating to any such agreement.

(2) Subject to article 8 below–

(a) the parties to any agreement to which this article applies made before 1st November 1992 shall terminate it before that date to the extent that it precludes or restricts relevant purchases; and

(b) it shall be unlawful on and after 1st November 1992 for any person to make or carry out an agreement to which this article applies except to the extent that it does not preclude or restrict any relevant purchase.

(3) For the purposes of this article, an agreement under which one person permits another to occupy premises and which does not preclude use of those premises as licensed premises shall be regarded as an agreement under which one person permits another to occupy licensed premises.

(4) This article does not apply to an agreement made before 1st November 1992 if immediately before that date no party to it is any longer a brewer who holds interests in more than two thousand licensed premises or a member of large brewery group unless

subsequently a party to it becomes or, as the case may be, becomes again such a brewer or a member of such a group.

6.—(1) This article applies to any agreement which is, or has the effect of, a lease or a licence and to which article 5 above applies, except an agreement–

(a) which does not impose upon the brewer or any member of the group, as the case may be, any obligation on or after 1st November 1992 to put or keep all or any part of the premises in repair at any time when the premises are licensed premises, and

(b) under which the rent or other consideration for occupation on or after 1st November 1992 is an amount which, at the time when the agreement is (or was) made, might reasonably be (or might have reasonably been) sought and obtained on the open market by a lessor or licensor who was not a brewer or a member of a brewery group.

(2) Subject to article 8 below–

(a) the parties to any agreement to which this article applies made after the date on which this Order is made and before 1st November 1992 shall terminate it before the latter date; and

(b) it shall be unlawful on and after 1st November 1992 for any person to make an agreement to which this article applies or to carry out such an agreement if it was made after the date on which this Order was made.

7.—(1) This article applies, except as provided in paragraph (4) below, to any agreement to which one of the parties is–

(a) a brewer who holds interests in more than two thousand licensed premises, or

(b) a member of a large brewery group,

and which precludes or restricts relevant purchases.

(2) Subject to article 8 below–

(a) the parties to any agreement to which this article applies made before 1st May 1990 shall terminate it before that date–

(i) so far as it relates to beer of an alcoholic strength exceeding 1.2 per cent, to the extent that the person who is precluded or restricted from making relevant purchases is prevented by the agreement from purchasing from whomsoever he may choose at least one brand of draught cask-conditioned beer selected by him, and

(ii) so far as it relates to beer of an alcoholic strength not exceeding 1.2 per cent or any drink other than beer, to the extent of every provision which precludes or restricts relevant purchases, and

(b) it shall be unlawful on and after 1st May 1990 for any person to make or carry out an agreement to which this article applies except to the extent that subparagraph (a) above would not require it to be terminated if made before that date.

(3) In this article, "cask-conditioned beer" means beer which undergoes fermentation in the container from which it is served for consumption; and a person is prevented by an agreement from purchasing from whomsoever he may choose at least one brand of draught cask-conditioned beer selected by him if the agreement imposes any prohibition or restriction on his so doing or if it subjects him to any disadvantage should he do so (including liability to pay as rent, interest or the price of goods or services an amount greater than he would otherwise pay).

(4) This article does not apply to an agreement made before 1st May 1990 if immediately before that date no party to it is any longer a brewer who holds interests in more than two thousand licensed premises or a member of a large brewery group unless subsequently a party to it becomes or, as the case may be, becomes again such a brewer or a member of such a group.

8.—(1) This Order shall not apply in respect of an agreement so far as it is or, if made, would be an agreement to which the Restrictive Trade Practices Act 1976(a) applies or, as the case may be, would apply.

(a) 1976 c.34.

(2) Articles 5, 6 and 7 above shall not apply in respect of an agreement so long as none of the parties to it is a brewer who holds interests in more than two thousand licensed premises and every member of a large brewery group party to it–

(a) is a body corporate, or a subsidiary of a body corporate, in which another member of the group has a substantial minority holding, and

(b) would not be a member of a large brewery group if the holding did not exist.

John Redwood
Parliamentary under Secretary of State for Corporate Affairs,
Department of Trade and Industry

19th December 1989

SCHEDULE

Articles 2(1) and (2), 3(1) and 4

PROVISIONS GOVERNING LARGE BREWERS AND LARGE BREWERY GROUPS

1. The provisions of this Schedule are satisfied with respect to a brewer only if each of the licensed premises–

(a) on which he carries on business in the supply of beer by retail, or

(b) which he permits another person not a member of the same group to occupy under an agreement precluding or restricting relevant purchases,

is a notified tied house and if the total number of the notified tied houses falling within subparagraph (a) or (b) above does not exceed the permitted maximum determined in accordance with paragraph 3 below.

2. The provisions of this Schedule are satisfied with respect to a group only if each of the licensed premises—

(a) on which any member of the group carries on business in the supply of beer by retail, or

(b) which a member of the group permits another person not a member of the group to occupy under an agreement precluding or restricting relevant purchases,

is a notified tied house and if the total number of the notified tied houses falling within subparagraph (a) or (b) above does not exceed the permitted maximum determined in accordance with paragraph 3 below.

3.—(1) In respect of each brewer and each group, the permitted maximum referred to in paragraphs 1 and 2 above is the sum of–

(a) two thousand, and

(b) subject to the following provisions of this paragraph, one half of the total number of licensed premises in excess of two thousand in which the brewer in question or one or more members of the group in question hold, or at any time on or after 10th July 1989 have held, interests.

(2) No licensed premises may be taken into account in determining the permitted maximum in respect of more than one brewer or group; and if, apart from this subparagraph, any licensed premises would fall to be taken into account in respect of more than one brewer or group–

(a) they shall be taken into account in respect of that one of those brewers or groups in respect of which they first fall to be taken into account (or would first have fallen to be taken into account during the period beginning on 10th July 1989 and ending immediately before the making of this Order if this Order had then been in force), and

(b) where subparagraph (a) above fails to determine the matter in a case in which one of the brewers in question, or a member of one of the groups in question, holds an interest in the premises which is superior to that held by another of the brewers in question or by a member of another of the groups in question, they shall be taken into account in respect of the holder of the first-mentioned interest or (as the case may be) the group of which the holder of that interest is a member,

unless (in either case) that brewer or a member of that group, with the agreement of another of the brewers in question or of a member of another of the groups in question, gives notice to the

Director General of Fair Trading that they should be taken into account in respect of that other brewer or group.

(3) No licensed premises may be taken into account in determining the permitted maximum in respect of a brewer or a group in any case in which the brewer does not hold, or (as the case may be) no member of the group holds, any interest in them for the time being if the brewer or a member of the group is party to an agreement in respect of the premises the carrying out of which is unlawful by virtue of article 7 above, or would be so unlawful but for article 8 above.

(4) No licensed premises which are not a notified tied house may be taken into account in determining the permitted maximum in respect of a brewer or a group if the brewer or (as the case may be) a member of the group is party to an agreement in respect of the premises the carrying out of which is not unlawful by virtue of article 7 above but would be so unlawful but for article 8 above.

(5) Premises which are not licensed premises shall be deemed to be licensed premises for the purpose of taking them into account in determining the permitted maximum in respect of a brewer or a group if–

(a) the brewer does not hold, or (as the case may be) no member of the group holds, any interest in them for the time being, and

(b) they were licensed premises immediately after–

(i) the brewer ceased to hold an interest in them, or

(ii) the member of the group last to hold an interest in them ceased to do so.

(6) In determining the permitted maximum in respect of a brewer or a group, no account shall be taken of any number of premises in excess of the greatest number of licensed premises in which the brewer or members of the group in question actually held interests at one and the same time on or after 10th July 1989.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order provides that brewers, and groups of companies including brewers, which own more than two thousand licensed premises have until 31st October 1992 to dispose of either their brewery business or the excess of licensed premises or to release their ties on half the excess. (A "group" for this purpose is defined as companies related by holdings of or interests in fifteen per cent or more of voting rights.) Any person who finds himself in the position of owning a prohibited interest by the acquisition of shares after 1st May 1992 has six months to get out of that position.

The half-excess on which ties must be released must be sold or let at a market rent without an obligation on the brewer, or on a member of the group, to put or keep the premises in repair.

From 1st May 1990, brewers and brewery groups owning more than two thousand licensed premises must allow their 'tied' premises to sell a draught cask-conditioned beer supplied by someone else and may not impose any ties relating to non-alcohol beers, low alcohol beers and non-beer drinks.

The Order does not apply in respect of agreements so far as they are agreements to which the Restrictive Trade Practices Act 1976 applies, and imposes no obligations on companies which are members of a brewery group because of a minority holding by another member of the group.

Copies of the report of the Monopolies and Mergers Commission on which the Order is based (Cm. 651) may be obtained from Her Majesty's Stationery Office.