EXEMPTION (BREWERIES): THE S & N CASE

Subject	Exemption Block exemption Non-competition clause Market entry Trade between Member States Consumer benefit
Industry	Breweries (Many implications for other industries)
Parties	Scottish & Newcastle plc
Source	Commission Decision published in the Official Journal, L.186, dated 19.7.99

(Note. Although a block exemption regulation applies to breweries, this case was decided on the basis of individual exemption, as the block exemption did not apply. The case was therefore decided largely on general competition principles and is interesting to industries other than brewing. It is an interesting case anyhow, with some colourful information about European drinking habits. It also contains a careful analysis of the criteria for granting individual exemption and shows how, in cases where the block exemption concerned does not apply, the Commission nevertheless follows as closely as possible the principles which the block exemption regulation follows. To avoid the inclusion of material having only a technical interest to the trade, the Commission's decision has been heavily edited. Like most of the Commission's decisions these days, it is pretty long, - there are 172 recitals, - partly no doubt to avoid any subsequent allegation of an infringement of Article 253, formerly 190, of the EC Treaty, requiring decisions to include a statement of the reasons on which they are based. In addition to the recitals, the Commission has now adopted the practice of adding footnotes to the text - there are 49 footnotes to the present case - which can be helpful but adds still more to the length. In the report which follows, the Commission's footnotes selected for inclusion are shown in square brackets.

In spite of the objections to the applicant's request for exemption, the Commission decided in the end that individual exemption could be granted. To an outsider, the objections did seem to be rather weak. At the same time, some of the criteria for granting individual exemption also seemed to be rather weakly founded. For example, the criterion that consumers should be allowed a fair share of the benefit resulting from the exempted restrictions appears to be supported mainly by evidence of a larger number of public houses remaining

open than would otherwise be the case. For the Commission, this may suffice: it is not, however, self-evident that this is necessarily in the consumers' interests. Much depends on the quality, pricing, facilities and other factors involved. Pricing is certainly examined in the Commission's decision, but once again a little unconvincingly. On the other hand, the question of brand variety is well covered and quite reassuring to those who felt that tied houses were too restrictive. It seems highly unlikely, on the face of it, that the decision will be contested.)

The Facts

(1) In February 1995, the Office of Fair Trading (OFT) started, at the request of the Commission, an enquiry into the UK brewers' wholesale pricing policy. This enquiry, which also covered Scottish and Newcastle plc (S & N), resulted in the internal OFT report on their enquiry into brewers' wholesale pricing policy (the OFT report) being adopted in May 1995; a press release on the report was issued by the OFT on 16 May 1995.

(2) On 25 April 1996 S & N notified eight standard forms of leases (the leases), the subject of each of the leases being a fully fitted-out, on-licensed public house in the United Kingdom with a tie for beer as described below. [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.] The eight standard forms can be put into three groups: the English leases consisting of the S& N standard England and Wales November 1993 lease (E & W November lease), the S & N Standard England and Wales 1993 lease, as amended by a letter of variation, and the Matthew Brown lease; the Scottish leases consisting of the S & N standard Scottish November 1993 lease, the Scottish E-type lease and the Scottish S-type lease, as amended by letter of variation; and finally, the short-term leases which include a temporary lease and a tenancy-at-will agreement. S & N requested negative clearance or confirmation that the leases 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 (the Regulation), as last amended by Regulation (EC) No 1582/97(5), or individual exemption pursuant to Article 81(3) of the EC Treaty to take effect as from the date on which the agreements were entered into.

(3) The information in the notification has been supplemented by way of a verification pursuant to Article 14(2) of Regulation No 17 at the premises of S & N, and by several requests for information.

(4) Following the publication in the Official Journal of the European Communities of the notice pursuant to Article 19(3) of Regulation No 17 (the notice), in which the Commission announced its intention to grant a retroactive exemption pursuant to Article 81(3), the Commission received observations from interested third parties. 21 observations by current and former tenants were provided on a model designed by the Scottish Licensed Trade Consultants (the SLTC model); two tenants enclosing the work of an accountant, who also

submitted observations on his own account; the Bavarian Lager Company; three trade associations and an employee of the Finnish Petrol Retailers Organisation.

(5) The information in these observations will be dealt with in the remainder of the Decision. 26 of the interested third parties requested the Commission to register their submission also as a formal complaint against S & N. Some of the complainants withdrew their complaint, but the 15 remaining complainants were informed in November 1998, pursuant to Article 6 of Commission Regulation No 99/63 of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 of the Commission's intention to reject their complaint. 11 of them presented further comments on this letter. Those comments have been integrated in this Decision.

The Parties

(6) The S & N group comprises three business divisions: brewing, pub retailing and leisure. S & N's brewing business is based principally in the UK and Ireland, where it brews and distributes its own brands and brews and/or distributes a number of other brands under licence.

(7) In August 1995, S & N acquired the brewing and distribution business of Courage Limited. The combined UK brewing businesses trade under the name Scottish Courage, while in Ireland S & N trades principally through Beamish and Crawford plc, acquired by S & N as part of the Courage acquisition. These brewing activities represent around 28 or 29 % of the UK beer market in volume production terms.

(8) Following undertakings given to the Secretary of State under the UK Fair Trading Act 1973 after the Courage acquisition, S & N was not allowed to tie or manage more than 2624 on-licensed premises. On 16 November 1998 the UK competition authorities released S & N from its undertaking, allowing it to tie 2739 public houses. This number represents approximately 1.9% of the total number of on-licensed premises in the UK and these outlets account for 4.4 % of total beer throughput in the UK on-trade market. Currently, 432 pubs are leased to tenants under the notified agreements, and those pubs bought in 152,000 barrels of beer from S & N in the year ended 3 May 1998, accounting for 0.6 % of the UK on-trade beer market.

(9) S & N's worldwide turnover for the year ended 30 April 1997 was £3,349million. In that year, S & N's retail division's turnover was £779 million.

The Market

(15) Since 1985, the date of introduction of the leases, significant changes have occurred in the structure and conduct of the UK on-trade beer market. These are for the most part the result of the Beer Orders made following the Monopolies and Mergers Commission's (MMC) report on the supply of beer, together with a fall in both overall demand and particularly on-trade beer sales, shifts in consumer demand towards pubs offering a wider choice of drinks and food, the withdrawal of several companies from brewing and the redefinition

of relationships between brewers and pub retail chains on the one hand and tenants on the other.

(16) The 1989 MMC report on 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 (the Orders). The Tied Estate Order imposed the following changes on the "national brewers", which means brewers having an estate of more than 2000 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) from a source other than the brewer/ landlord (the guest beer clause),
- 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 UK pubs. S & N is allowed to tie a maximum of 2739 pubs.

Demand factors

(17) Beer can be sold through the on-trade, namely pubs, hotels and restaurants, or through the off-trade, such as supermarkets and off-licences. In addition, imports brought into the UK by private individuals on which duty has been paid, mainly from Calais, are estimated to account for almost 5% of total beer consumption in the UK in 1996. Volume sales of all beer in the UK fell by 9.5% between 1989 and 1995 (in 1996 total volume increased marginally compared to 1995) and volume sales of beer in the on-trade fell by 17.3 % in the same period. The proportion of sales volume accounted for by the on-trade has thus fallen (from 79.3% in 1989 to around 69% in 1996) but, with the exception of Ireland, remains the highest proportion in the Community.

(18) Falling beer sales volume in the on-trade has been offset by:
(a) a rise, in real terms, in on-trade beer prices of 21% between 1989 and 1996, only a negligible proportion of which was accounted for by tax increases;
(b) a rise in the proportion of non-beer sales in pubs to 37 % of total revenues in 1996, largely as a result of the increase in catering sales.

(19) Consumption of draught beer accounted in 1996 for 63% of total consumption. This is also, with the exception of Ireland, the highest figure inthe Community. In contrast, the figure for Belgium, which has the third largest draught consumption in the Community, was 39%. UK 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

(20) The main change since 1989 is the increasing concentration of the brewing market. The increased concentration has been caused by companies leaving

the brewing market and selling their brewing operations to existing competitors. In 1996, the remaining four national brewers, Scottish & Newcastle, Bass, Carlsberg Tetley Brewing and Whitbread, controlled 78% of the UK beer market in terms of supply. The Herfindahl-Hirschmann index (HHI), used to help describe market concentration, increased for the UK beer market, on the basis of the market shares of the national brewers, from 1350 in 1991 to 1678 in 1996. With an HHI between 1000 and 1800, the market is described as moderately concentrated. Some regional brewers left the market between 1989 and 1996, reducing the number of regional brewers from 11 to 8. The SLTC model notes that S & N has 38% of the market in Scotland and Bass 42% ...

Market entry at retail level

(33) 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.

(34) 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. These laws are not applied strictly throughout the UK, but where they are, they can result in entry within that locality being difficult. Also, in some areas of the UK, licences are now being refused mainly on public order grounds. However, a particular pub company has succeeded in opening over 100 pubs on green field sites in recent years.

The Agreements

(36) The leases are contracts between S & N and the lessee, whereby S & N makes available a licensed public house together with the non-moveable fixtures and fittings to a lessee for the purpose of carrying on the business of the public house and under which the lessee pays a rent to S & N and agrees to purchase the beers detailed in the lease from S & N or its nominee and no other source ...

The beer tie

(38) The lessee agrees to buy all specified beers from S & N or its nominee with the exception of beer containing less than 1.2% alcohol and one brand of cask-conditioned beer. Specified beers are the beers of the type set out in the schedules of the lease which contain the terms of trading. These include: light, pale ale (including Scotch Ale) or bitter (also known as 70 shilling, heavy or special ale; export or premium ale (also known as 80 shilling ale; mild ale (also known as 60 shilling ale or light ale; brown ale; strong ale (including barley wine; fruit beers; wheat beers; stouts; sweet stout; porter; lager; export or premium lager (also known as malt lager or malt liquor); strong lager; "diat pils" (or premium low carbohydrate beer or lager); low carbohydrate (or "lite") beer or lager; and low alcohol beer or lager. These types are represented by the brands or denominations of beer listed in S & N's current price list.

(39) The lessee may sell any type of beer other than the specified types if it is packaged in bottles, cans or other small containers or if 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.

(40) A few lessees have commented on this issue. It is remarked that the specified type definitions cover substantially all beer types sold in the UK. This is not disputed. One complainant has argued that the 12 specified types are too generic and thus not clearly distinguishable by composition, appearance or taste, the relevant criteria indicated in the Regulation to define different types of beer. [Article 7(2).] The complainant referred to the difference between cask-conditioned beer (a beer with fermentation in the cask) and keg beer (no fermentation in the cask) types and the absence of any reference to this difference in the specification of the 12 types. The Commission recognises that discerning drinkers can taste the difference between the cask conditioned and the kegged version of the same brand. However, the Commission does not consider that this necessarily implies that the specification of the types should take account of this difference. The definition of beer types is a matter for experts to decide. [See also paragraph 51 of the Commission notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 81(3) of the Treaty to categories of exclusive *distribution and exclusive purchasing arrangements.*] As the specification of the 12 types was originally agreed between the respective federations of brewers and licensed victuallers in the United Kingdom, experts with regard to beer, the Commission accepts this definition as an appropriate, workable way of defining beer types in the UK ...

Legal Assessment: Article 81(1)

The relevant product market

(82) 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. [Case 27/76, *United Brands*, paragraph 12.] As the Court of Justice has stated in the Delimitis judgment [Case C-234/89, *Stergios Delimitis v. Henninger Bräu*, at paragraph 16], 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 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. In view of the specific licensing system in the UK, it has to be specified which sections of the three distinct classes of on-licences form the relevant product market of public houses and restaurants. In this respect, reference is made to paragraph

43 of the notice to the Regulation 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 the restricted on-licences, have the common feature that the drinks are purchased for consumption on the premises and that there is an important service element provided for. The Commission recognises that the price of beer in clubs, being in December 1994 some 82 to 83% of that prevailing in pubs, is lower than that charged in pubs. However, this reflects to a large extent the fact that these clubs operate on a non-profit basis. 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.

(84) 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 was stated in the *Delimitis* judgment, 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.

The relevant geographic market

(85) 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 has noted in the *Delimitis* judgment, at paragraph 18, most beer-supply agreements are still entered into at a national level. This is especially so for the United Kingdom, given the lack of land borders. It follows that, in applying the Community competition rules to the agreement, account is to be taken of the UK market for beer distribution in premises for the sale and consumption of drinks.

(86) The UK market is also distinct from beer markets in other Member States in view of the Orders, the high consumption of draught beer, the presence of pub-management companies, the pub-licensing regulations and the variety in types of ale offered.

Agreement between undertakings

(87) S & N and the lessees are undertakings within the meaning of Article 81(1).

(88) The individual leases, in similar form to the standard leases described above, between S & N and each of its lessees are agreements within the meaning of Article 81(1).

Restrictive effect on competition of the principal restrictions

(89) 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. These clauses are formulated in the lease as follows:
- the tenant shall purchase from S & N or its nominee and from no other person or firm such specified beers (with the exception of the guest-beer clause) as he shall require for sale in the premises; in practice, the brewer is free to add, replace or delete the actual brands of a specified type in the company's price list (exclusive purchasing obligation),
- the tenant shall not sell or expose for sale in the premises or bring on to the premises for the purpose of sale therein (a) any beer which is of the same type as a specified beer but which is not supplied by S & N or its nominees; or (b) any other beer unless either (I) it is packaged in bottles, cans or other small containers; or (ii) 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 circumstances (non-competition obligation).

(90) It can be noted that, apart from the explicit non-competition obligation with regard to specified types of beers, the exclusive purchasing obligation is so formulated that it already includes implicitly a non-competition obligation by reference to the general wording: such specified beers.

(91) 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 brewer and other beer wholesalers who offer the same brands is precluded (restriction of inter-brand competition).

(92) The explicit and implicit non-competition obligation for specified types of beer, that is to say, the prohibition on the lessees' purchase of other brands of specified types from other producers of beer restricts inter-brand 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.

(93) Having identified the nature of the restriction of competition brought about by the network of the brewer's leases, the restrictive effects on retailers and suppliers in the relevant market need to be demonstrated. [See also paragraph 13 of the *Delimitis* judgement: "If such (exclusive beer supply) agreements do not have the object of restricting competition within the meaning of Article 81(1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition".]

(94) In the case of *Brasserie De Haecht v. Wilkin* [Case 23/67], the Court of Justice held that the effects of a beer supply agreement had to be assessed in the economic and legal context in which they occur and where they might combine with others to have a cumulative effect on competition. It also follows from that judgment that the cumulative effect of several similar agreements constitutes one factor among others in ascertaining whether competition is prevented, restricted or distorted.

(95) The purpose of this assessment is to measure the degree of foreclosure of the UK on-trade market, thereby measuring the hindrance of the opportunities

for other producers of beer, national or foreign, to reach the on-trade market independently, resulting from the cumulative effect of all brewers' networks. In other words, the assessment relates to the opportunities open to such other brewers to reach the final consumer in competitive conditions(28) defined independently by the brewer in question.

(96) Furthermore, as S & N notified the leases in order to obtain an exemption to take effect as from the date on which the agreements were entered into, this assessment must go back to 1985, the year of introduction of the leases.

(97) The foreclosure resulting from the brewers' networks has different forms. First, there is the vertical integration by UK brewers down to the retail level. This vertical integration takes the form of managed houses and property tied houses. Secondly, the network includes also vertical agreements on either of two levels: either directly, with retail outlets via loan ties, or on the wholesale level, via tying supply agreements, namely agreements containing exclusive purchasing obligations, minimum purchasing obligations, must-stock obligations and so forth with traditional wholesalers, non-brewing pub companies or other brewers in their wholesale function.

(106) The Court of Justice also held that, as was last confirmed in the abovementioned Delimitis judgment, the effect of the network of exclusive purchasing agreements is only one factor, among others, pertaining to the economic and legal context in which an agreement must be appraised. The other factors to be taken into account are, in the first instance, those also relating to opportunities for access and, secondly, the conditions under which competitive forces operate on the relevant market.

(107) Paragraph 21 of the *Delimitis* judgment referred to the "real concrete possibilities for a new competitor to penetrate the bundle of contracts by acquiring a brewery already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new public houses. For that purpose it is necessary to have regard to the legal rules and agreements on the acquisition of companies and the establishment of outlets, and to the minimum number of outlets necessary for the economic operation of a distribution system. 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".

(108) It is not easy to open a substantial number of new pubs within a couple of years, in view of the licensing laws. Moreover, although there is an active trade in UK pubs and substantial numbers of pubs have been sold off in single deals, it has to be remarked that the investment that would need to be borne by a new competitor to acquire a network of sales outlets, or to open new public houses is a considerable one and would, in fact, involve a change in focus from being a brewer to also being a UK retailer. This would, furthermore, require additional horizontal links with other UK brewers to pro-vide all the different types of beer that a retail outlet would need to offer as new competitors (and especially foreign competitors) will tend to offer individual brands rather than the whole range of types of beer common in the UK.

(109) Direct takeovers of UK brewers (and their tied estate) by foreign brewers has occurred a few times in recent years, but in most cases the foreign brewer has since divested itself of its interest again (the Dutch brewer Grolsch in Ruddles, and the Australian brewer Foster's in Courage).

(110) In addition, the relatively small role played by traditional wholesalers in the distribution of beer in the UK, makes it difficult for a foreign brewer, or for a new brewer, to enter the market independently.

(111) Therefore, in most cases, foreign breweries license a major UK brewer to brew and distribute their products within the UK, thereby having access to their public houses and distribution facilities to free houses. In such circumstances, the UK brewer has a strong influence on the positioning and the marketing (advertising) of the foreign brewer's brand.

(112) The Commission accepts that the increased importance of retail sales volume in outlets operated by non-brewing pub companies offers, at least theoretically, an increased possibility for other brewers to have an access tithe UK on-trade beer consumer. It is indeed a lot easier for a newcomer on the market to conclude an agreement with a pub company, even if the newcomer only has one brand, and thereby gaining access to all the pubs in that network as compared to concluding agreements with individual outlets. However, for the reasons stated above in recital 99, the concrete opening of that segment of the market cannot be estimated accurately. In addition, a brewer wishing to supply a pub company without its own distribution facilities would need to organise the distribution.

Competitive forces on the market

(113) The UK brewing industry has been going through a process of concentration. Second, the overall demand for beer as well as the on-trade market are likely to continue to decline or remain, at best, static. Furthermore, the increasing advertising expenditure needed to support a single brand (a sunk cost), gives a further incentive to foreign brewers to enter via licensing agreements. Finally, the possibilities of building on a reputation in the off-trade beer market to gain independent access to the on-trade market is more limited in the UK than in most other European countries in view of the fact that the off-trade represents only 30% of total beer sales.

(114) It can thus be concluded that an examination of all tying agreements including, but not limited to, beer-supply agreements entered into, and the other factors relevant to the economic and legal context of the UK on-trade market, shows that the brewers' tying agreements had in 1985, and still have today, on the basis of the most recent available information, the cumulative effect of considerably hindering access to that market, for new national and foreign competitors.

(115) It is now necessary to assess, as the Court clarified in paragraph 24 of the *Delimitis* judgment, "the extent to which the agreements entered into by the brewery in question contribute to the cumulative effect produced in that respect by the totality of the similar contracts found on that market. Under the

Community rules of competition, responsibility for such an effect of closing off the market must be attributed to the breweries that make an appreciable contribution thereto. Beer-supply agreements entered into by breweries whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition under Article 85(1)". Therefore, in assessing the extent of the contribution made by the brewery in question, in this case S & N, the brewer's total tied network, including but not limited to the exclusive purchasing obligation and the inherent non-competition obligation in the leases, must be assessed. In other words, it is the network that, according to the Delimitis judgment, "must make a significant contribution tithe sealing-off effect brought about by the totality of the brewers' tying agreements in their economic and legal context".

(116) In so doing, consideration will be given to the effect of the network of S & N as a whole; the finding of a restrictive effect for the network would then apply equally to each of its constituents. [The Court of First Instance pointed out in Cases T-7 & 9/93, *Langnese-Iglo and Schöller*, paragraphs 129 and 95 respectively (the German ice-cream cases) that "where there is a network of similar agreements concluded by the same producer, the assessment of the effects of that network on competition applies to all the individual agreements making up the network".]

The beer de minimis notice

(117) S & N is clearly not a "small brewer" as defined by the notice as it produces more than 200,000 hl, its market share is more than 1% of the UK on-trade market and one of the standard leases is in some cases longer than the maximum of 15 years indicated in the notice.

Individual assessment

(118) The Court has ruled in the Delimitis judgment(37) that "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". In paragraphs 25 and 26 of the judgment, the Court has clarified that "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 held 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".

(119) 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. [See paragraph 87 for *Schöller* and paragraph 112

for *Langnese-Iglo*.] The CFI has thus based itself primarily on the broader concept of the overall market share.

(120) An assessment of the contribution by the brewer therefore needs to take into account his position on the relevant market, and in particular his contribution by way of tying arrangements to the foreclosure and, secondly, the duration of his restrictive agreements, and in particular his standard agreements.

(121) The assessment of the contribution of the brewer takes into account the managed estate of the brewer, although this latter part in itself does not fall under Article 81(1) as it does not concern an agreement between independent operators. In considering the notified agreements (as part of the brewer's network), it is particularly important that due account is given to the foreclosure resulting from the managed estate of a national brewer as the total number of property ties is limited by the Orders. However, within that number the brewer is free to choose whether he wants to operate the house by way of a tenancy/lease agreement or by way of a managed house. The brewer has thus the possibility of offering at any moment a lease agreement for a currently managed house, and, after the end of a lease the brewer may turn the leased house into a managed house.

(122) The other segments of the tied network of S & N are S & N's loan ties and the amounts of beer for which its wholesale partners are under an obligation to buy (exclusivity, minimum purchasing, must-stock, non-compete and so forth). As indicated at recital 13, the Commission has some limited data for this channel. Furthermore, in assessing any brewer's role on the market, consideration can also be given to his overall market share of the UK on-trade market, and its share on the related UK beer production market.

(123) The 892 pubs (of which 421 were operated by way of tenancies/leases) owned by S & N in 1990/91 and the 2600 (432 leased) owned in 1997/98 account for 0.57 and 1.9% respectively of the total number of on-licensed premises. Moreover, they account for around 2.8 and 4.12% of the on-trade volume in 1990/91 and 1997/98 respectively (the property tied part accounting for 1.32 and 0.89% respectively). The S & N tied sales for which the Commission has the data, namely the above and including the loan tie sales, account for 6.16(39) and 9.44% respectively. The tied part (property, loan and managed) thus accounts for around a quarter of S & N's total sales on the on-trade market share of around 28%. To this should be added the wholesale partner ties as described in recital 122.

(124) With regard to the duration of the segments of S & N's tied network, it has to be understood that all the houses that S & N owns are, in principle, always locked in to the company. This is not only the case for the managed house, but also the leased houses will after the end of one (short or long-term) lease, be re-let to another operator on a tied basis. The longest of the leases extends in some cases for 20 years. S & N's loan ties last on average 2.5 to 3.5 years.

(125) It is therefore concluded that S & N's tied sales, of which the notified agreements are a part, contribute significantly to the foreclosure of the UK

on-trade market. The exclusive purchasing obligation and the non-competition obligation in the leases therefore have a restrictive effect on competition.

Restrictive effect on competition of other restrictions

(126) The leases contain the following clauses by which it has been argued by some of the respondents to the notice that they have a restrictive effect on competition:
- to put and keep the interior of the public house and fixtures and fittings in good repair,
- to use the premises only as a fully licensed public house,
- restrictions on assignments,
- to sell trade fixtures and fittings, furniture and effects and stock on the termination of the lease to S & N or to the new lessee,
- not to place amusement machines without the consent of S & N,
- clauses relating to advertising in some of the leases (the advertising clause):
    - the obligation to display advertisements supplied by S & N (in the England and Wales 1993 leases, and in the Scottish lease and
    - permission to advertise goods supplied by third parties only in proportion to the share of those goods in the total turnover of the premises (in all the English leases).

(127) The first four of the above clauses cannot be considered to have the object or the effect of restricting competition in a particular market. The clause with regard to the amusement machines is not restrictive in view of the influence of amusement machines on the character of the premises. [See also paragraph 53 of the notice to the Regulation] ...

(129) ... In these circumstances the advertising clause is not considered to be an appreciable restriction of competition.

Effect on trade between Member States

(130) Where, for the reasons described above, the effect of the exclusive purchasing and non-competition obligations in the leases in question is to eliminate the freedom of the lessees to stock and offer for sale to the consumer specified beers of competing suppliers, those suppliers are impeded, irrespective of their geographical location and the origin of the goods, in gaining access to the premises concerned unless they have concluded a specific agreement with S & N. This restriction has the effect that the level of trade in beer may be at a lower level than would otherwise be the case. The opportunities for foreign suppliers to establish themselves independently in the UK on-trade beer market are in particular affected; the restrictive agreements, including the exclusive beer-supply agreements, are likely to protect a substantial part of the UK market from direct competition from competing goods originating in other Member States. Indeed, as was noted in recital 32, most foreign producers have chosen to enter the UK market by entering licensing agreements with existing brewers, including S & N, to gain access to their on-trade network. [Commission Decision 90/186/EEC - *Moosehead/ Whitbread* (OJ L 100, 20.4.1990,p. 32, at recital 16).] Accordingly, the leases affect trade between Member States.

Appreciability

(131) The exclusive purchasing and non-competition obligations fall within the scope of Article 81(1), however, only if they affect competition and trade between Member States to an appreciable extent.

(132) The quantification of the restrictive effect of the cumulative networks and the other factors contributing to the foreclosure of the UK on-trade beer market, and of the significant contribution made by S & N's network to that effect, as laid out in recitals 95 to 130 demonstrate their appreciable nature in restricting competition and trade between Member States with respect to the UK on-trade beer market.

Conclusion

(133) The exclusive purchasing and non-competition obligations of the leases fall foul of Article 81(1) since the introduction of the leases in 1985.

Article 81(3)

(134) The Court has confirmed in the *Delimitis* judgment (paragraph 36) that Article 6(1) of the Regulation requires that the exclusive purchasing obligation on the part of the reseller shall relate solely to certain beers or to certain beers and drinks specified in the agreement. The purpose of requiring that they be so specified is to prevent the supplier from unilaterally extending the scope of the exclusive purchasing obligation. A beer-supply agreement which refers, for the products covered by the exclusive purchasing agreement, to a list of products which may be unilaterally altered by the suppliers does not satisfy that requirement and thus does not enjoy the protection of Article 6(1). The Court thus concluded (paragraph 37) that the conditions for the application of Article 6(1) of the Regulation are not satisfied if the drinks covered by the exclusive purchasing terms are not listed in the text of the agreement itself but are stated to be those set out in the price list of the brewery or its subsidiaries, as amended from time to time.

(135) The standard leases provide for a specification of the beer tie by type which allows S & N to add to, delete or substitute the brands of beer that it supplies to the lessees by amending the contents of its price list from time to time for specified beers. The specification of the beer tie by type thus allows S & N unilaterally to extend the scope of the exclusive purchasing obligation and therefore does not fulfil the conditions of Article 6 of the Regulation, which requires a specification by brand or denomination.

(136) It is for this reason that the standard leases do not fulfil the conditions of the Regulation.

Individual exemption

(137) A beer-supply agreement generally leads to an improvement in distribution as it makes it significantly easier to establish, modernise, maintain and operate premises used for the sale and consumption of drinks (see also

recital 15 to the Regulation). This is true for the brewer/supplier who does not need to integrate vertically as well as for the lessee. The letting of premises at an agreed rent as in the S & N standard leases, particularly in view of the restrictive UK licensing system, is a method of providing the means of a lessee to operate such premises and, as such, allows a low-cost entry of a newcomer on the on-trade market for the distribution of beer. The system whereby brewers in the UK allow an independent business person to operate a licensed property owned by the brewer thereby increases the options for entry into the market. In a way, property tied houses are sometimes described as a "half-way house" between being a manager (in a managed pub owned by the brewer/pub company) and owning one's own pub (which may be loan tied or totally free).

(138) The incentive on the reseller, following from the exclusive purchasing and the non-competition obligation, to devote all the resources at his disposal to the sale of the contract goods will thereby generally lead to an improvement of the distribution of the contract goods. In other words, as is stated in recital 15 to the Regulation, such agreements lead to durable cooperation between the parties allowing them to improve or maintain the quality of the contract goods and of the services to the consumer and sales efforts of the reseller. They allow long-term planning of sales and consequently a cost-effective organisation of production and distribution and the pressure of competition between products of different makes obliges the undertakings involved to determine the number and character of premises used for the sale and consumption of drinks in accordance with the wishes of customers.

(139) With regard to long duration of the exclusivity obligation and non-compete clause contained in the leases it has to be noted that special rules are applied in cases where the premises used for the sale and consumption of drinks are let by the supplier to the reseller. In this respect reference is made to Article 8(2)(a) which states that "exclusive purchasing obligations and bans on dealing in competing products specified in the Title may be imposed on the reseller for the whole period in which the reseller in fact operates the premises". On this basis the long-term duration of the exclusivity obligation and the non-compete clause contained in the lease therefore do not constitute an obstacle to exempting the exclusive obligation and non-compete clause.

(140) Furthermore, the specification of the tie by type is considered to enable a more practical operation of exclusive beer-supply arrangements in the UK than the specification provided for in the Regulation. The specification of the tie by type makes it easier to introduce the brands of foreign or new brewers to their price lists because it does not require the consent of all the tenants. This is particularly the case in view of the large number of beers supplied by S & N to the lessees and of the frequency with which S & N adds or substitutes a beer on its price list, including foreign brands. This is important in view of the high percentage of all beer sold in the UK as draught beer in pubs, and the foreclosure of some 70% (in 1989) or a maximum of around 58%, but most likely at least 50% (in 1997) of the UK on-trade by UK brewers: nevertheless, foreign or new brewers may still find it particularly difficult to penetrate the UK market independently. It is further noted that, in any case, the tenant would not be in a position to add brands as the brewer would anyway have been allowed

to prohibit sales by the lessee of the other brands of the same type in his outlet through the non-compete clause exempted under Article 7(1)(a) of the Regulation. The tenant is therefore in no position to affect, whether positively or negatively, the level of foreclosure in the UK on-trade beer market ...

Price differentials

(142) However, the Commission considers that where there are price differences, faced by the tied lessee, it has to be further assessed whether the abovedescribed advantages can materialise.

(143) Price discrimination is an important element in the economic justification for an exemption to exclusive purchasing agreements. This is because, in the first place, the possibility to discriminate is enabled by the exclusive purchasing agreement, which for the duration of the agreement gives the purchaser, unlike the other clients of the producer, no legal sourcing alternative. A brewer might therefore decide to "cash in" on his leverage vis-à-vis his tied customers.

(144) Secondly, with regard to the condition related to the improvement in distribution, the Commission considers that someone who faces an appreciable "net" price discrimination might have difficulties to compete on a level playing field. Therefore, any improvements in distribution resulting from such agreements may remain theoretical, or be structurally inhibited in such a way that they cannot outweigh in the longer term the anti-competitive features of the agreement. This idea that price discrimination can be incompatible with Article 81(3) is also expressed in the Regulation where recital 21 points out that "in particular cases in which agreements satisfying the conditions of this Regulation nevertheless have effects incompatible with Article 85(3) of the Treaty, the Commission may withdraw the benefit of the exemption". These circumstances, laid down in Article 14 of the Regulation, include unjustified price discrimination. [See Article 14(c)(2) of the Regulation: "the application of less favourable prices or conditions for sale ... without any objectively justified reason".]

(145) The relevance of the above considerations to the standard leases, in the context of the UK on-trade beer market, is that the lessee who faces (unjustified) price differentials may not be in a position to compete on a level playing field. His business, all other conditions being similar, will be less profitable or might even become unprofitable. The impact of this adverse effect on profitability, either at the moment of entering as a newcomer into the market or during any considerable period in time during the operation of his business, means that the lessee may be unable to keep up with his competitors, who can make use of the beer price discounts either by passing them on in part to the final consumer by lowering temporarily or permanently the price at which they sell the same beer, or by investing in their total pub offer (new kitchen, toilets, family facilities, and so forth). This will lead, all other conditions being equal, to an even further loss of competitiveness for the lessee, whose clients will receive a better offer for the same price in other pubs.

(146) Unjustified price discrimination will only have an appreciable negative impact on the competitiveness of the lessee, and will therefore only affect the

appreciation of any lack of improvement in distribution, if and when it is significant and lasts over a considerable period of time. It is estimated that the level of discounts (before taking into account any possible justification) traditionally found on the UK on-trade market up to the mid-1980s (MMC report of 1985: individual free houses receiving a discount from 3 to 5%) were not of such a significant nature. However, since that date, and over the period of the standard leases, the situation has altered and certain groups of purchasers receive discounts of a substantially higher level than those granted to the tied lessees. This was looked at in some detail in the OFT report.

(147) Such higher discounts are available to all other operators in the UK on-trade market who do not have an agreement with similar exclusive purchasing obligations and with whom S & N trades: wholesalers, pub management companies and other brewers, and the individual free traders. Furthermore, the discounts granted to wholesalers, the own managed houses, and pub management companies and other brewers are, on average, higher than those granted to the individual free traders.

(148) Most of the direct competitors of the tied lessees, namely brewers' managed pubs, managed and tied houses of pub companies, loan-tied houses and free-trade operators, and clubs (being only to a limited extent direct competitors of the tied lessees in view of the restricted access) are thereby enabled to buy their beer cheaper than the tied lessees.

(149) As for the above competitors, only the free-trade operators (the non-loantied supplies to clubs) have been included in the S & N data on the discounts for the free-trade operators) directly purchase their beer on market terms from S&N; this group is considered to be the "reference group". They are indeed the only group where "the supplier ... applies less favourable prices ... to resellers bound by an exclusive purchasing obligation as compared with other resellers at the same level of distribution" [Article 14(c)(2) of the Regulation.] ...

Countervailing benefits

(156) The Commission concludes that for the whole duration of the standard leases there are no arguments to support the conclusion that the improvements in distribution described in a general terms above have not been obtained.

(157) The standard leases, including the tying restrictions, have thus contributed to an improvement of distribution on the UK on-trade beer market.

Benefits to the consumer

(158) With regard to the general benefits created by tied leases, recital 16 of the Regulation indicates that "consumers benefit from the improvements described, in particular because they are ensured supplies of goods of satisfactory quality at fair prices and conditions while being able to choose between the products of different manufacturers". [This refers to the possibility under Article 6, read in conjunction withArticle 7(1)(a) of the Regulation, whereby lessees can buy beer brands of a different type from those supplied

under the agreement and can offer these to the consumers. This possibility is equally maintained by the standard leases, that is, the procedure for the non-specified types.]

(159) In addition to these general references, it can be noted that property ties create an incentive for brewers to invest, or maintain investment, in outlets that may be too small to be economically run by the brewers' own managers. The system is therefore a means of maintaining pubs that might otherwise close, or not attract the investment made by S & N and/or the lessee. The continued availability of those outlets and/or the improved facilities due to investment(s) made is a clear benefit to the consumer. It is self-evident that the property ties of a particular brewer can only be considered to contribute to this benefit if the long-term operation of the houses is not endangered. In other words, when, in market circumstances there are price differences, such differences are broadly offset by other specific benefits. As indicated above, this is the case with S & N.

(160) With regard to the specification of the tie by type, the Commission also notes that in the period 1990 to 1997 S & N introduced on average around five brands each year into its leased public houses. These brands include well known foreign brands such as Budweiser and Miller Pilsner and less well known brands such as Webster's Green Label ale.

(161) The Commission therefore concludes that a fair share of the benefits of the standard leases accrues to the consumers.

Indispensability of the restrictions

(162) The exclusive purchasing obligation, together with a non-compete clause, is indispensable to the advantages produced by beer-supply agreements, as noted in recital 137. As described in recital 17 of the Regulation, these advantages cannot otherwise be secured to the same extent and with the same degree of certainty.

(163) It can also be noted that the specification of the beer-tie by type is indispensable for the ease of introduction of brands to the tied networks of the brewers on the UK on-trade beer market (recitals 140 and 160).

Possibility of eliminating competition

(164) It is evident that S & N cannot eliminate competition from a substantial part of the market as they accounted for only around 28 to 29% of the UK on-trade beer market in 1997. Moreover, even taking into account the fact that in 1997 at most 58% of the UK on-trade beer market for beer was foreclosed through the parallel networks of brewers' agreements, S & N's agreements do not lead to the elimination of competition in respect of a substantial part of the UK on-trade beer market.

Conclusion

(165) The standard S & N leases, and the beer tie (exclusive purchasing and non-competition obligations) which they contain, fulfil the conditions of Article

81(3) ...

Retroactive nature and duration of the exemption

(169) The standard leases are agreements in the sense of Article 4(2)(1) of Regulation No 17 where "the only parties thereto are undertakings from one Member State and the agreements ... do not relate to imports or to exports between Member States". It follows from Article 6 of Regulation No 17 that for such agreements the date from which a decision pursuant to Article 81(3) takes effect may be earlier than the date of notification.

(170) The Court has held in its judgment in *Fonderies Roubaix* [Case 63/75, *Fonderies Roubaix v. Société Nouvelle des Fonderies*, at paragraph 8] that "the fact that the products involved in [the agreements to be assessed] have previously been imported from another Member State does not by itself mean that these agreements must be regarded as relating to imports within the meaning of Article 4(2) of Regulation No 17". Therefore, the application of this Article should not be excluded in view of the brands on S & N's price list that are imported from outside the United Kingdom.

(171) Since it has been found above that the standard leases have fulfilled the conditions under Article 81(3) since the date of the first introduction of one of the notified agreements on the market on 1 January 1985, this Decision should apply from 1 January 1985.

(172) Pursuant to Article 8(1) of Regulation No 17, an exemption should be issued for a limited period. The period until 31 December 2002 is appropriate, as the remaining S & N leased estate is small and expected to decline as public houses are sold off or converted into managed houses. The exemption period therefore allows S & N to make its commercial decisions on the remaining tenanted houses with a reasonable level of legal certainty.

Article 1

1. The provisions of Article 81(1) of the Treaty are, pursuant to Article 81(3), declared inapplicable to the individual lease agreements in the standard form of (a) the English leases, (b) the Scottish leases and (c) the short-term leases, and to the exclusive purchasing and non-competition obligations (beer tie) which they contain.

2. This Decision shall apply from 1 January 1985 until 31 December 2002.

Article 2

This Decision is addressed to:

Scottish and Newcastle plc, 50 East Fettes Avenue, Edinburgh EH4 1RR, United Kingdom. □