TYING AGREEMENTS (BREWERIES): THE WHITBREAD CASE

Subject: Tying agreements
Exemption
Complaints

Industry: Breweries

Parties: Whitbread plc

Source: Commission Statement IP/99/104, dated 11th February 1999

(Note. This is, on the face of it, an unsatisfactory decision. If the full text of the decision, not yet available, modifies our view, we shall publish it in due course, or the relevant extracts from it. The Commission rightly treats the tying arrangements as restrictive of competition, rightly treats them as outside the scope of the block exemption regulation, but questionably regards exemption as justified. The Commission Statement makes no reference to the interests of consumers; this may be covered in the full text.)

The Commission has decided to grant a retroactive - back to 1990 - exemption to the standard pub leases used by Whitbread pic, the UK's third largest brewer. This conclusion follows an examination by the Commission services of the way in which Whitbread has operated the contractual agreements with its lessees. The Commission considers that the tied lessees can compete on a level playing field with their "free trading" competitors, and that an exemption from EC competition rules is justified.

The Commission's involvement in UK public houses leases stems from the fact that the Commission considers that the specification of the beer tie as it is commonly used in the UK does not fulfil the requirements of the so-called beer block exemption (Title 11 of Regulation No 1984/83). Due to the price differential between beer sold to tied and free-of-tie public houses, extensive litigation was initiated in the UK. This led UK brewers to notify their standard lease agreements to the Commission.

Whitbread notified its standard leases on 24 May 1994: it was the first case for which the Commission was able to make its preliminary assessment of the price differential and countervailing benefits. The Notice under Article 19(3), published in September 1997, was the first to announce that the Commission intended to exempt the notified leases, based upon a calculation of the net benefits of the standard lease for the whole estate. The Commission received 135 observations, 92 of which requested that their observations be also registered as a formal complaint against Whitbread.

The Whitbread standard lease is a typical UK property tie agreement. In other words, a company, in this case a national brewer, owns a retail outlet which it does not operate itself, but the company rents it out to an independent business man in exchange for a contractual rent and the obligation to buy all his beer, of certain specified types. from the landlord-brewer.

Such leases fall within the scope of Article 85(1) if they meet two conditions set down in the *Delimitis* judgment (Case C-234/89, *Stergios Delimitis v. Henninger Brau*):
(a) if the national on-trade beer market is foreclosed and
(b) if the agreements of the brewer in question contribute significantly to that foreclosure.

The Commission considers that the UK on-trade beer market is foreclosed in view of the totality of on-trade beer throughput covered by the property tied, managed houses and loan tied outlets of all the brewers operating in the UK and the beer which non-brewing pub companies are obliged to buy from local brewers, and also other factors relating to the opportunities for access to, and the competitive forces on, the market.

The Commission also considers that Whitbread's tied network, which consists of Whitbread's property tied, managed houses and loan tied outlets, plus, in principle, the beer which its wholesale partners such as non-brewing pub companies are under an obligation to buy, contributes significantly to that foreclosure, as it accounted for 7.6% of volume-throughput in 1990/91 and 6.1% in 1996/97. In contrast, the tied leases of small and regional brewers fall outside the scope of EC competition rules as they do not significantly contribute to the foreclosure of the UK on-trade beer market: see the Greene King / Roberts case, 1998. The analysis can also be applied to non-brewing pub companies supplied by more than one brewer.

The Commission has found that, on average, the lessees which are tied to Whitbread pay more for their beer purchases than individual operators who buy the same beer from the same brewer (so-called free traders). However, Whitbread lessees benefit, inter alia, from lower rents, professional assistance, capital investment and bulk purchasing rebates which are not readily available to these free traders and which compensate more or less for the price differential.

Moreover, the Commission considers that the specification of tie by type enables a more practical operation of beer supply arrangements in the UK than the specification provided for in the beer block exemption. The specification of tie by type makes it easier to introduce the brands of foreign or new brewers to Whitbread's price lists. This is important in view of the high percentage of all beer sold in the UK as draught beer in public houses and the difficulties faced by foreign and new brewers to penetrate the UK market independently.

The Commission has therefore decided to grant an individual exemption to the standard leases of Whitbread. This exemption will be limited. The Commission has decided to let the exemption take effect from 1 January, 1990, the date of the first introduction of the standard Whitbread agreements until 31 December 2008, to enable Whitbread to base its decisions to invest in its estate with a reasonable level of legal security.

As the decision also addresses the complaints made by lessees it also constitutes a rejection of these complaints and therefore the remaining complainants will shortly receive a copy of the decision. □