SUPPLY AGREEMENTS (BREWING): THE ROBERTS CASE

Subject: Supply agreements
Relevant market

Industry: Brewing

Parties: Colin and Valerie Roberts
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 5 July 2001, in Case T-25/99, (*Colin Arthur Roberts and Valerie Ann Roberts v Commission of the European Communities*)

(Note. Although there are several points of interest in this case, the judgment is long and circumstantial; and a single point has been selected for emphasis in the extract from the judgment set out below. The point concerns the relevant market in the industry in question: that is, in the British system of licensed premises. The case provides a classic example of the authorities determining the identity and extent of the relevant market and differentiating between the sectors of what may appear to be a single product or service market. The applicants in this case took the view that the outlets for alcoholic beverages constituted the relevant market; but the Commission drew a distinction, which the Court upheld, between retail shops, public houses or restaurants and clubs. The Court relied on, and went out of its way to explain, the judgments in the Delimitis and Brasserie de Haecht cases: it repeated, more than once, the principle that "beer consumption in public houses is not essentially dependent on economic considerations". Taken out of context, this is nonsense; and, even taken in context, it is an inaccurate and questionable way of expressing the position. However that may be, on this and on the many other points on which the applicants challenged the Commission's decision, the action was dismissed.)

Facts of the dispute

1. In the United Kingdom, alcoholic beverages may be sold by retail for consumption on the premises only by establishments holding a licence. There are currently three categories of licence:
- full on-licences, which authorise the sale of alcoholic beverages to customers who need not be residents or take a meal. These are granted to pubs, hotel bars and wine bars;
- restricted on-licences, which authorise the sale of alcoholic beverages subject to the requirement that the customer is a resident or takes a meal. These are granted to hotels and restaurants;
- club licences, which authorise the sale of alcoholic beverages only to customers who are members of the club in question.

2. The majority of establishments in the United Kingdom selling alcoholic beverages for consumption on the premises belong or are tied to a brewery, which is thereby assured of an outlet for the sale of its beer. There are essentially three ways in which such establishments are operated:
- the brewery owns the establishment, which is managed by one of its employees (tied managed public houses);
- the brewery owns the establishment and leases it to an operator who undertakes, besides paying rent, to comply with an obligation to buy beer produced by the brewery (tied tenanted public houses);
- the brewery does not own the establishment, but creates a tie by granting a loan on favourable terms to the owner, who in return accepts inter alia an obligation to buy that brewery's beer (loan-tied houses).

3. Since 1989 the British market in beer for consumption on the premises has undergone great changes in its structure. In that year the Monopolies and Mergers Commission produced a report on the supply of beer, containing recommendations. These were followed up by the adoption of the Supply of Beer (Tied Estate) Order 1989 (the 1989 Order) and the Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices) Order 1989. These orders were intended to limit the number of on-licensed establishments owned by or tied to a brewery.

4. Concentrations in the brewing sector in the United Kingdom led to the appearance by the mid-1990s of four breweries whose interests and geographical markets were no longer regional, as had traditionally been the case, but national. These were Scottish & Newcastle, Bass, Carlsberg-Tetley and Whitbread, which provided 78% of supplies of beer on the United Kingdom market. There remained several regional breweries, one of which is Greene King.

5. Mr and Mrs Roberts operate a pub in Bedfordshire belonging to Greene King. As tenants, they are subject to an obligation to obtain beer from Greene King.

6. They challenged in the national court the lawfulness of the beer purchasing obligation in their lease, arguing that it infringed Article 85(1) of the EC Treaty (now Article 81(1) EC).

7. In that context, on 23 May 1997, they lodged a complaint under Article 3(2) of Regulation 17 of 1992, in which they claimed that the lease used by Greene King was contrary to Article 85(1) of the Treaty.

8. On 7 November 1997 the Commission, pursuant to Article 6 of Commission Regulation 99/63/EEC on the hearings provided for in Article 19(1) and (2) of Regulation 17, sent the applicants a letter (the Article 6 letter) informing them that the information it had gathered did not justify upholding the complaint, stating the reasons for that conclusion, and fixing a time-limit within which they could submit any comments in writing.

9. By its decision of 12 November 1998 (the contested decision), it rejected the complaint on the ground that the standard lease used by Greene King did not fall

within the scope of Article 85(1) of the Treaty. In reply to the applicants' allegation, in their observations on the Article 6 letter, that there was an agreement on prices between the United Kingdom breweries, the Commission stated as an initial reaction that an assessment of the applicants' arguments did not allow the conclusion that such an agreement existed.

[Paragraphs 10 to 15: Procedure and forms of order sought by the parties]

The law

I - Applicability of Article 85(1) of the Treaty to the standard agreements concluded by Greene King

A - Definition of the relevant market

16. In point 60 of the contested decision, the Commission defined the relevant product market as that of the distribution of beer in establishments selling alcoholic beverages for consumption on the premises. It referred in particular to paragraph 16 of the judgment in Case C-234/89, *Delimitis*, where the Court of Justice made the following observations on beer supply agreements:

> 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 that sector are generally higher than retail prices.

[Paragraphs 17 to 25: Summary of the arguments of the parties]

Findings of the Court

26. To establish whether the definition of the market adopted by the Commission in point 60 of the contested decision is correct, it should be observed, at the outset, that delimitation of the relevant market is essential in order to analyse the effects on competition of beer supply agreements with an exclusive purchasing obligation, and in particular to analyse the opportunities available to new domestic and foreign competitors to establish themselves in the market of the consumption of beer or to increase their market shares (see *Delimitis*, paragraphs 15 and 16, Case T-7/93, *Langnese-Iglo v Commission*, paragraph 60, and Case T-9/93, *Schöller v Commission*, paragraph 39).

27. The Commission's delimitation of the relevant market in the contested decision follows that used by the Court of Justice in *Delimitis*. In that case, the Court inter alia had to rule, in the context of a dispute between a tenant of licensed premises and a German brewery, on the compatibility of beer supply agreements with Article 85(1) of the Treaty. It concluded that the reference market was that for the distribution of beer in premises for the sale and consumption of drinks, which could be distinguished from the retail sector and comprised in particular public houses and restaurants (*Delimitis*, paragraph 17) and thus extended to all establishments selling alcoholic beverages for consumption on the premises.

28. The Court of Justice observed that beer is sold through both retail channels and premises for the sale and consumption of drinks. It noted that from the consumer's point of view the latter sector, comprising in particular public houses and restaurants, can be distinguished from the retail sector on the grounds that the sale of beer in public houses is not dependent essentially on economic considerations. It said that 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 required special installations, and that the prices charged in the sector are generally higher than retail prices (*Delimitis*, paragraph 16).

29. The Commission was right to use that definition of the market in the present case, since the reasons which justified it in the *Delimitis* case can be applied to the present case.

30. Establishments selling alcoholic beverages for consumption on the premises share a common feature, in the United Kingdom as in Germany: from the consumer's point of view, sales in those establishments are associated with the provision of services and the consumption of beer does not depend essentially on economic considerations, and, from the breweries' point of view, distribution is organised by means of specific systems for the sector and the prices charged are generally higher than retail prices.

31. In this respect, the Commission correctly observes, in point 59 of the contested decision, that all establishments in the United Kingdom with on-licences, whether full, restricted or club licences, have the following features in common: drinks are purchased for consumption on the premises, the concept of service is important, and there is a specific distribution system common to all these establishments which includes in particular special dispense equipment for draught beer. While the Commission acknowledges that the price of beer in clubs is lower than that charged in other establishments, which it explains by the fact that clubs are not operated for profit, it states that prices in clubs are nevertheless higher than in supermarkets.

32. Those common features, which are material for the definition of the relevant market, apply without distinction to all establishments selling alcoholic beverages for consumption on the premises, notwithstanding the fact that these establishments present quite substantial differences as regards the environment in

which sales are made, the nature of the associated services, and even in certain cases the prices charged.

33. This diversity of types of establishment sharing the above characteristics and thus forming part of the relevant market is illustrated by the fact that the Court of Justice cited, as examples and expressly stating that the list was not exhaustive, public houses and restaurants (*Delimitis* judgment, paragraph 16), in other words types of establishment which differ from each other in general in terms of the environment and atmosphere, the nature of the services provided, and the prices charged for alcoholic beverages, including beer.

34. These differences, admittedly not insignificant in the consumer's perception but secondary in relation to the common features described above, are not therefore such as to invalidate the conclusion that establishments selling alcoholic beverages for consumption on the premises all belong to the same market.

35. In this respect, the arguments put forward by the applicants to show that the relevant market is represented by pubs alone, to the exclusion of other establishments with full licences and of those with restricted licences and club licences, are not founded.

36. The applicants submit, first, that the *Delimitis* judgment did no more than confirm the fact, which was not in dispute in that case, that the market of establishments selling alcoholic beverages for consumption on the premises is distinct from the retail market. It must be observed, on this point, that in the context of the *Delimitis* case - a reference for a preliminary ruling on interpretation - the defendant in the main proceedings did indeed submit that sales of beer by supermarkets and other retailers should be included in the relevant market. However, it does not follow that the Court of Justice's definition of the relevant market in that case is material only as a refutation of that argument, which was moreover not as such the subject of a question referred by the national court. The Court of Justice explained that that definition of the market was intended, in accordance with its judgment in Case 23/67, *Brasserie De Haecht*, to take into consideration the economic and legal context of the beer supply agreement (*Delimitis*, paragraph 14) and constituted the premiss of the analysis of the effects of such an agreement, taken together with other agreements of the same type, on the opportunities of national competitors or those from other Member States to gain access to the market for beer consumption (*Delimitis*, paragraph 15). Its approach was guided by a single criterion, namely the nature of the economic activity in question, in this case the sale of beer. The definition of the market thus addressed much wider considerations than ascertaining whether the relevant market also included the retail sector.

37. Second, the applicants submit that consumers distinguish between pubs and clubs, from which they deduce that clubs do not belong to the same market as pubs. They rely on the fact, mentioned by the Commission in point 59 of the contested decision, that the price of beer in clubs represented (in December 1994) 82% to 83% of that charged in pubs. They set that fact against the Commission Notice on the definition of relevant market for the purposes of Community

competition law, which states that the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer (point 15). The Commission gives as an example of a criterion which can provide indications as to the evidence that is relevant in defining markets the effect which small, permanent changes in relative prices might have on demand substitution (point 15). The Commission observes in the Notice that the question is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a small (in the range 5% to 10%) but permanent relative price increase in the products being considered in the areas concerned. If the substitution is enough to make a price increase unprofitable because of the resulting loss of sales, the substitute products are included in the relevant market (point 17).

38. Referring to these factors, the applicants submit that the price difference between pubs and clubs, in the light of the figures provided by the Commission in point 59 of the contested decision, is of the order of 17% to 18% and that there is no indication of an increase in beer consumption in clubs as opposed to pubs. They therefore conclude that there are two distinct markets.

39. It should be noted that the fact that consumers distinguish between several kinds of establishments selling alcoholic beverages for consumption on the premises is not a ground to consider that each of those kinds of establishment constitutes a separate market, since all those establishments, both from the consumer's point of view (the purchase of beer is associated with the provision of services and the consumption of beer in those establishments does not depend essentially on economic considerations) and from the breweries' point of view (existence of specific distribution systems and higher sales prices compared to those charged in the retail sector), have features in common which mean that they must be considered as belonging to one single market.

40. The applicants, who rely on a very simple example taken from the Commission Notice on the definition of relevant market for the purposes of Community competition law, consider the question of demand substitution only by reference to the single criterion of price difference. They thus disregard a specific feature of the sale of beer, noted by the Court of Justice in the *Delimitis* judgment, namely that the consumption of beer in establishments selling it for consumption on the premises does not depend essentially on economic considerations. In this respect, the Commission rightly observes in its pleadings that the consumer's choice between those establishments is influenced primarily by their environment and atmosphere, even within the sub-category of pubs distinguished by the applicants ... ■

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