COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12-11-1998
SG (98) D/9557

By courier service

Mr and Mrs Colin Roberts
Fox and Hounds Public House
18 High Street
Kempston
Bedfordshire MK42 7BT
United Kingdom

Dear Mr and Mrs Colin Roberts,

Subject: Case IV/36.511/F3 - Roberts / Greene King
(please quote this reference in all correspondence)

I refer to your application of May 23, 1997 pursuant to Article 3(2) of Council Regulation No. 17, regarding alleged infringements of Article 85 of the EC Treaty by Greene King PLC. Due to the erroneous numbering of the paragraphs in the decision which was sent to you on 5 November 1998, this decision replaces decision SGD (98) D/9269.

By this decision, I inform you that, for the reasons set out below, there are insufficient grounds for granting your application.

In reaching its decision, the Commission has taken due account of your comments of 18 and 19 December 1997 and 10 June 1998 on the letter of November 7, 1997 pursuant to Article 6 of Commission Regulation 99/63 indicating the Commission's preliminary view (hereafter "the Article 6 letter"). These comments combine a report by A B Jacobs (hereafter "Mr Jacobs"), a report prepared by an investment bank on Greene King, the comments by John Tracy Kelly (hereafter "Mr Kelly"), the comments by counsel Beckett Bedford (hereafter "Mr Bedford"), and a report of economist Professor Waterson (hereafter "Prof. Waterson") and an article on "Beer and the Tie: did divestiture of brewer owned public houses lead to higher beer Prices?" by Professor Margaret E. Slade.

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I. THE FACTS

1. The Parties

1.1. Mr and Mrs Roberts

1. Colin Arthur Roberts and Valerie Ann Roberts (hereafter "the tenants") are Greene King's tenants at the Fox & Hounds at Kempston in Bedfordshire. They entered into their lease with Greene King for a tenancy on Greene King's standard terms on 14 June 1994.

1.2 Greene King PLC

2. Greene King PLC (hereafter "the brewer") is a regional brewer of beer in the United Kingdom. It has one brewery located in Bury St Edmunds (East Anglia). It currently brews only ale, having closed its brewing operation at Biggleswade in Bedfordshire from where it used to brew Harp lager under licence. The brewer's best known brands are Abbot Ale, Greene King IPA and Wexford Irish Cream Ale.

3. The brewer's total turnover for the year ending May 1998 was £282.9 million.

2. The Market

2.1 The market as a whole

4. The report of the Monopolies and Mergers Commission (hereafter "MMC") of 1989 into the supply of beer led to a number of recommendations 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 (hereafter "the Orders"). The Tied Estate Order imposed the following changes upon the "national brewers", i.e. brewers with an estate of more than 2,000 on-licensed premises:

   - Their tenants/lessees would be free of tie for non-beer drinks and low-alcohol beers.

   - Their tenants/lessees would have the right to buy one cask-conditioned ale (a beer with fermentation in the cask)[1] from a source other than the brewer/landlord (hereafter "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.

Demand factors

5. Beer can be sold through the on-trade, e.g. pubs, hotels and restaurants, or through the off-trade, e.g. supermarkets and off-licences. In addition, imports brought into the

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

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 4% between 1989 and 1997 and volume sales of beer in the on-trade fell by 20% 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 68% in 1997 but, with the exception of Ireland, remains the highest proportion in the EC.

6. 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; and

   (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.

7. Mr Jacobs states that the increase in non-beer sales revenues has effectively lifted the total turnover by 11% over this period, but that pub rents have increased by approximately 20%.

8. Consumption of draught beer accounted in 1996 for 63% of total consumption. This is also, with the exception of Ireland, the highest figure in the EC. In contrast, the figure for Belgium, which has the third largest draught consumption in the EC, was 39%. UK pubs also offer a bigger choice of draught beers than elsewhere in the EC, with an average of 6.5 brands per pub.

9. Mr Jacobs says that it is factually incorrect that there are an average of 6.5 brands per pub as it is highly implausible on the grounds of product quality that the average pub of Greene King would have a turnover of only half a barrel[2] per product per week. The Commission points out that the number results from a specific study on the subject[3], that the average is for all pubs in the UK and that a draught beer can be purchased in containers of a size less than one barrel.

Supply factors

Brewing

10. The main change since 1989 is that the *brewing market* has become more concentrated. 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, commanded 78% of the UK beer market in terms of supply. The Herfindahl-Hirschmann index (hereafter "HHI"), used to help describe market concentration, for the UK beer market increased, on the basis of the market shares of

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2 1 barrel equals 1,63659 hl.; 1 hl. equals 0,611026 barrels.

3 Research International, quoted in "The case for the renewal of the block Exemption Regulation 1984/83 - The need for property ties", BLRA, April 1996.

the national brewers, from 1350 in 1991 to 1678[4] in 1996. With a HHI between 1000 and 1800, the market is described as "moderately concentrated". Some regional brewers[5] left the market between 1989 and 1996, reducing the number of regional brewers from 11 to eight. Greene King is one of these regional brewers.

Wholesaling

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

12. The pubs that were sold by the national brewers were purchased mainly by non-brewing *pub chains* or by regional brewers. In general, pub chains either have their own wholesaling operations or are supplied directly by the brewers.

Retailing

13. In the UK, the retail sale of beer and other alcoholic drinks for consumption on the premises requires a justices' (local courts of law) licence. Three distinct classes of licences are currently in operation[6]:

- full on-licences: where a person can buy an alcoholic drink, without being a resident or having a meal. There are approximately 83,100 full on-licences in issue, of which around 57,000[7] are pubs. The remainder include hotels and wine bars.

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

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

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4 The Commission does not have precise information on the market shares of the other UK brewers. Nevertheless, it does not estimate that the HHI for all brewers would reach the 1800 mark as from which a market is considered to be "highly concentrated".

5 Defined in the MMC Report as brewers which "have a business which is mainly, but not necessarily wholly, concentrated in a single region of the UK". The number of regionals in 1996 is defined taking the number of owned pubs and production volume for the smallest regional in the MMC Report as a benchmark.

6 The licensing system is slightly different in Scotland.

7 The BLRA (see paragraph 15) estimates that there are 61,000 pubs.

14. Mr Jacobs says that there are no statistics that differentiate with any accuracy between hotels, wine bars, night-clubs and disco's and pubs. That is correct. The indication of the number of pubs is based on estimates made by trade federations and trade papers that base themselves on public and/or internal information of the players on the market.

15. By forcing changes in the ownership of pubs, the Orders have also had an effect on the proportion of beer sold through the different retail channels: (a) the tied estate of the brewers, (b) the managed estate of the brewers, (c) the tied estate of non-brewing pub companies, (d) the managed estate of non-brewing pub companies, (e) loan tied premises and (f) untied or free premises. This can be seen from the following overview on beer sales (volume). The 1985 data come from the MMC report and can be considered as representative for the years 1985-1989; the 1994-1997[8] data are from the Brewers and Licensed Retailers Association (hereafter "BLRA"), including estimates for non-members.

Table 1: UK on-trade beer consumption:

	(a)	(b)	(c)	(d)	(e)	(f)
1985	30,8%	24,2%	0,0%	0,0%	22,0%	23,0%
1994	12,1%	20,2%	9,4%	4,0%	21,2%	33,1%
1995	12,4%	20,2%	9,1%	3,5%	21,1%	33,6%
1997	10,0%	17,2%	11,4%	8,3%	18,1%	35,0%

16. The 10% figure for the sales going through the tied estates of the brewers in 1994-1997 include the tied purchases of the lessees and the cask-conditioned beer that the tenants and lessees of the national brewers purchase, with a discount, from their landlord-brewer[9]. The figure does not include the purchases by the national brewers' tenants and lessees of a guest beer from another supplier.

17. The 18.1 % figure for loan tied premises' volume in 1997 does include the total volume that a loan tied pub operator buys from the supplier with whom he has a loan tie. This volume may exceed the tied quantities foreseen in the loan agreement. It is, however, not known what part of the18.1% figure represents purchases in excess of the loan tied quantity. The 18.1% figure does not include the "free" purchases of a loan tied pub operator with other suppliers.

18. Whilst the above table gives an idea of the throughput in the on-trade by describing the ownership situation of the premises, it can also be noted that if one refers to the category of on-licensed premises, 70% of beer is sold through the estimated 57,000/61,000 pubs, 20% through clubs and 10% through restaurants, hotels, wine bars and so forth with full or restricted on-licences (1995 data).

19. Mr Jacobs considers that the table fails to identify the free houses that are tied by a discount agreement without any loan and that loan ties account for 30% of the market. The Commission considers that a discount agreement without an element of

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8 The statistics are not totally consistent as in 1994 and 1995 some companies that are considered as a brewer are catalogued as a pub company in 1997

9 This is also sometimes called a guest beer, although the legal definition of a guest beer refers to the purchase of a cask-conditioned beer from another supplier (see paragraph 15).

"exclusivity" cannot be considered a "tie" and notes that Mr Jacobs does not provide any documentary evidence for his statement nor the source of his information.

20. The Orders also reduced the restrictive scope of loan ties, by allowing their termination at any moment in time by the tenant on three months' notice. The Orders also introduced the guest beer right for publicans with trade loans from the national brewers. From information supplied by the BLRA (following a specific survey undertaken in 1996), it appears that the usual period of a loan is 5 or 10 years, and the average actual length is almost 4 years. Thirty-one brewers had some 37,000 loans outstanding at the end of the survey period (almost 35,000 at the start) with over the year almost 8,000 new loans entered into and over 5,000 repaid. The value of the loans repaid during the period exceeded the value of the new loans made (to existing or new customers); some 2% of the outstanding capital was written off as bad debts. The average value of a loan is around £30,000. There appear to be two types of loans, relatively small ones (a value of almost £5,000 at the start of the period, but only an average value of less than £2,000 at the end of the survey period) which are often made available to small free trade pubs and they appear to be very volatile. On the other hand, there are much larger loans to large volume outlets such as clubs (average value around £60,000) and these are usually non-exclusive. However, the purchasing obligations are usually for a specific quantity of beer. No estimate was made by the BLRA as to the volume split for small/big loans, the number of the non-exclusive (big) loans, the total on-trade volume-percentage accounted for by such non-exclusive loans, or the percentage of total throughput of the relevant premises accounted for by the quantity of beer stipulated in such loan ties. No information was given as to the proportion of loans which the publican pays back with money loaned to him by another brewer (in exchange for a new loan tie). Beer volumes sold through loan ties have reduced in the last couple of years and, for the years 1994-1996, the scale of loan repayments has exceeded the value of new loans.

Competition between brewers

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

22. Mr Jacobs considers that only rarely brand strength comes into question as competition takes place on price and "product strength".

Market entry at brewing level

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

small-scale entry may be increasing as the advertising spend for the national lager brands has increased substantially over the last couple of years, even on a brand basis.

24. The need to secure outlets has been reduced since the implementation of the Orders, owing to the reduction of the proportion of the market subject to ties and to the emergence of pub chains (in so far as they are not tied - see paragraph 21 above). It is easier for a new entrant to enter supply agreements with a chain rather than with individual pubs. Whereas it is relatively easy to set-up a distribution system limited to the supply of the wholesale depots of the other brewers and/or wholesalers, it is more difficult to reach the individual retail outlets.

25. Most foreign producers of beer (mostly lager) have chosen to enter the UK market by entering in exclusive licensing agreements with existing national brewers whereby the beer is brewed in the UK and sold as part of the national brewer's portfolio of brands. These foreign lagers have often been marketed as premium brands and supported by substantial advertising spending.

26. Mr Jacobs rightly indicated that foreign lagers are often marketed as premium brands to which higher prices are attached.

Market entry at retail level

27. 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.

28. Entry barriers in the retail market are relatively low. The only one of any significance is the presence of licensing laws, which can prevent new pubs from being opened unless there is a need for them. This law is not applied strictly throughout the UK, but where it is, it 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 greenfield sites in recent years.

29. Mr Jacobs considers that the figure of new greenfield sites over the past five years may be 2000 with many of these generating substantial barrelage and thus having a negative influence on the profitability of existing tenancies, more than existing managed houses.

Changes in arrangements between pub tenants and their landlords

30. Historically, pubs were let by means of "traditional" short term pub tenancies. Brewers retained responsibility for the fabric of the building and its fixtures and fittings and tenants were responsible for selling beer supplied by the landlord plus other drink and food. Following the MMC report, pub tenants in England and Wales were provided with security of tenure[10] by being brought within the Landlord and Tenant Act 1954.

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

However, well before the MMC's recommendation, the first long full repair and maintenance leases, which provided some security of tenure and the ability to assign the lease, were offered.

2.2 Greene King's presence on the market

31. The total amount of beer sold by the brewer in the fiscal year ending May 1998 was 442,000 barrels. Only 10,000 of these barrels were sold in the off-trade. Approximately 50% of beer sold was brewed by the brewer, giving the brewer thereby a share of around 0.7% of UK beer production. The remaining beer was sourced from other brewers in the UK.

32. The brewer currently has supply contracts with all the national brewers (under negotiation or re-negotiation) and a series of regional brewers; the oldest agreement has an effect since April 1996. Before that date, there were no contractual agreements with other brewers. Only one of the current contracts contains minimum purchasing obligations (hereafter "mpo"), namely a contract that has a five year duration with an mpo for less than 20% of beer wholesaled by the brewer. There are three other "restrictive" agreements containing certain stocking obligations. The duration of the supply agreements is between one and a half and five years.

33. On July 6, 1998, the brewer had 1101 public houses, of which 628 were tied tenanted public houses. The 1101 houses account for 0.7% of the total on-trade licences. Around 45% of the beer sold in the tenanted houses is brewed by the brewer. The brewer announced that he will acquire a further 43 houses that sell around 10,000 barrels/year.

34. The volume of beer sold in the fiscal year ending May 1998 to the on-trade via the brewer's tenanted, managed and loan tied houses totals around 350,000 barrels. The brewer's total tied network therefore accounts for approximately 1.3% of the UK on-trade beer market.

3. The agreement

35. The lease between the tenants and the brewer of 14 June 1994 is in the form of the main standard form agreement (hereafter "the agreement") operated by the brewer since 1990 and accounting to date for the vast majority of the brewer's tied leases. Under the agreement, the brewer makes available a licensed public house to a tenant for the purpose of carrying on the business of the public house and under which the tenant pays a rent to the brewer. The rent is reviewed every third year and the new rent shall be equal to whichever is the greater of the existing rent or the market rent as agreed between the brewer and the tenant. If the parties are unable to agree on the market rent, a surveyor acting as an expert will decide.

36. Mr Jacobs believes that the above paragraph contains a misrepresentation. He considers that the reference to "makes available a licensed public house" underlines the magnitude of the cartel effect. He considers that if the brewer, or all the other brewers collectively, does not wish to let a capable and bona fide tenant take a lease with them that is their decision they will operate a market foreclosure to this end. He considers it interesting that the Upward Only Rent Review (hereafter "UORR") comes into play here. The brewer knows that it will earn out of an involvement on greenfield sites and they can also retain a percentage of a profit in the rent calculation of the

tenanted site that they have placed elsewhere to their benefit. Mr Jacobs considers that the brewer could steal all the trade from the tenant by directing this trade to the greenfield site and still keep the rent from the tenant. He, therefore, alleges that the UORR is tantamount to extortion.

37. The agreement does not specify duration but is typically for a period of nine years less any period spent on a probationary agreement. Sometimes it may be shorter.

38. Under the agreement, the brewer has responsibility for repairs and redecoration to the outside and structure of the public houses, while the tenant has responsibility for the inside.

39. The tenant shall purchase from the Landlord or its nominees (i.e. the brewer) and from no other person all such specified beers as he shall require for sale in the Premises (Clause 2 of the Fifth Schedule of the Main Standard Form Agreement). The Tenant shall not sell or expose for sale in the Premises any specified beer which is not supplied by the Landlord or its nominees (Clause 3 of the Fifth Schedule). The specified beers are beers of the types set out in Part I of the Appendix to the Fifth Schedule and are light pale or bitter ale, export or premium ale, mild ale, brown ale, strong ale (including barley wine), bitter stout or porter, sweet stout, lager, export or premium lager, strong lager, "diat pils" (or premium low carbohydrate beer), low carbohydrate (or "lite") beer and low alcohol (including dealcoholised or alcohol-free) beer. The tenant is not allowed to sell any unspecified beers unless either (i) it is packaged in bottles, cans or other containers or (ii) it is in draught form and the sale of beer in draught form is necessary to satisfy a sufficient demand from the tenant's customers.

40. The tenant has also an exclusive purchasing obligation in respect of 32 specified non-beer products, unless the tenant can obtain these drinks on more favourable terms or the drink bears a different trade mark from the drink of the same type included in the brewer's current price list.

41. The brewer insures the premises and the tenant insures his trade fixtures, stock, profit and against third party liability and employer's liability. The brewer does recommend an insurer but there is no tie.

4. The complaint

4.1 The content of the complaint as lodged

42. The tenants claim that the brewer is operating exclusive beer-supply agreements, including that with the tenants, in breach of Article 85(1) of the Treaty of Rome.

43. The tenants claim that the relevant market is the UK pub market. The tenants recognise that this differs from the Commission's definition as used in paragraph 40 of the Commission's Notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements as amended by Commission Notice 92/C 121/02[11] (hereafter "the beer de-minimis

[11] OJ C 121, 13.5.1992, p. 2.

notice") which refers to the total on-trade market, in line with the Delimitis judgment[12]. This narrower definition is taken based upon the UK consumer's point of view, who distinguishes between the consumption of beer in public houses and other licensed premises such as clubs, in part because clubs cater only for members and not the general public. The tenants also claim that this distinction was a key element of the MMC Beer Report and is also commonly made in the annual reports of brewers, who distinguish between their retail public house estates, their other outlets, and their off licence investments if any.

44. With regard to the actual number of pubs, the tenants argue that it is not the total number of licences which should be the relevant yardstick, but the total number of *active* licences (i.e. pubs which are open and trading, as opposed to those which are temporarily or definitively closed), for which an estimate of 57,305 as at April 1996 is given.

45. The tenants claim that the market so defined is effectively sealed off to new entrants. Further the standard exclusive purchasing agreement does not comply with Regulation 1984/83, inter alia, because the beers are specified by type.

46. The tenants claim that the Greene King agreements fall within the scope of Article 85(1) in view of the contribution by the brewer to the foreclosure. In calculating this contribution, account should be taken not only of the leased estate, but also of the managed and loan tied part of the business. The tenants also claim that if the supply agreements with national lager brewers last in excess of three years, the estates of such producers should be aggregated with that of the brewer to determine the brewer's contribution to foreclosure.

47. The assessment as to foreclosure should be made also in relation to the past, bearing in mind that the tenant's lease is dated June 1994.

4.2 The content of the comments on the Article 6 letter

48. The tenants have presented three uncoordinated sets of comments to the Article 6 letter and, in addition, a copy of a report prepared by an investment bank on the brewer. On June 10, 1998, they have presented another report, described at paragraphs 116-117 below.

49. The first comments are a report prepared by AB Jacobs - Forensic Accountant F.C.C.A. Mr Jacobs indicates that some of the most relevant points that seem to have been omitted or overlooked in the Article 6 letter are:

- Brands and products are different and should not be confused. Sometimes the products are referred to as types. Supply tie agreements should show the products by brand as indicated by the Delimitis judgment rather than by the style "type" which is collectively used by the UK brewing cartel.

- Pubs probably include night-clubs and disco's that are not members clubs. This is very important to appreciate since the word "clubs" is frequently misused. Night-clubs and disco's although opening fewer hours often produce substantial barrelage.

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12 Court of Justice, Case C-234/89, Stergios Delimitis v. Henninger Bräu, ECR 1991, p.I-935.

- Profit is highly dependant on Brands.

- Profit is materially affected by volume of barrelage throughput.

- Due to a high level of fixed operating costs in the tenanted estate a reduction of 8% in volume can cause total loss of profit. In some specific locations this may be marginally higher but almost certainly not more than 12%. The managed estate has proportionally a much lower break-even level in the region of 25%. Reductions of throughput for tenant locations are therefore critical.

- Profit is the basis of rent, generally about 45% of true net profit before rent. That is until such time as the historical rent exceeds the current computed rent.

- A change of brands does alter volume of throughput.

- For the brewer a fall in volume due to a change from externally sourced produce to own manufacture can yield higher profits. The brewer can have all the manufacturing and wholesaling profit from their own produce. Very approximately switching from full external sourcing to own produce would result in the same "wholesale and manufacturing" profit with a 20% fall in volume. Such a fall for the tenant could result in the destruction of profit and creation of a loss.

- The "freedom to add and delete products" for the brewer (made possible by the specification of the beer tie by type) is an abuse of the supply tie, particularly in view of the "upward only rent review".

- The tied trade are effectively financing the free trade through "dumping".

- There is a belief that the BLRA represents the views of the retail sector of the licensed trade.

50. Mr Jacobs' report continues with breaking down the information in the investment bank's report in order to make some assessment of the profitability and volume involved over the different sectors. Furthermore, he outlines differences between the figures used in the investment bank's report (fiscal year ending May 1997) and those with regard to Greene King in the Article 6 letter (calendar year 1996). However, since the date of the Article 6 letter, the Commission has obtained the above-described data covering fiscal year ending May 1998.

51. Mr Jacobs' comments on the description of the market in the Article 6 letter are summarised in the relevant paragraphs above. Mr Jacobs also argues that the brewer's leases fall under Article 85(1) as the brewer satisfies a substantial part of its trade from national brewers who already foreclose the market. There is therefore no scope for new competitors to make their brands known. Mr Jacobs indicates that, although there is no tangible evidence, it does seem clear that no one brewer, and in particular Greene King, would be allowed by the Brewers Fraternity to purchase a substantial slice of their requirements from a brewer other than a national one. None of the regionals do so, nor do the nationals. He also indicates that the national brewers tend to raise prices in unison and the regional brewers follow suit. This means, according to Mr Jacobs, that the competition between the national brewers cannot operate for the benefit of

consumer and thereby blocks out the competitive forces of brewers within the member states. This is further aggravated by the fact that is the national and local brewers that control the UK distribution.

52. Mr Kelly comments on the brewer's contribution to foreclosure and indicates that the network of the brewer's agreements with their tenants matters because it is the basis of its agreements with the national brewers whereby trade prices to tied tenants are fixed. Such a fixing means that no landlord (be it a regional brewer, a small brewer or a non-brewing pub company) has an incentive to buy from new entrants to the market. National brewers give such landlords very good deals which newcomers would find difficult to match. For the national brewers, such sales do not provide any benefits unless they help them maintain high prices in the managed sector, high prices to their own tied tenants and a very large share of the market. To do this landlords must agree with national brewers to charge high prices to their own tied tenants. As a matter of economics one would expect a landlord charged a cheap price to pass on some of the benefit to enable its pubs to out-compete others, but they do not in practice.

53. As evidence for price-fixing agreements between national brewers (and each other) and landlords, Mr Kelly refers to rises in the on-trade beer prices, the increase in the differences between prices to free and tied trade, a statement/practice by a non-brewing pub company that it sells national brewers' products to its own tied tenants at the list prices of those national brewers, the profit made by that company on the barrels it so purchases from the national brewers and the fact that the brewer's accounts tend to suggest similar large profits, the fact that the brewer has claimed on oath that it never had a price list for tied tenants despite the reference to a current price list in the lease and a practice of another non-brewing pub company relating to the price lists for its tenants which just contain the name of the national brewer.

54. With respect to the reference to the oath made by the brewer, the affidavit concerned states "Greene King has one price list for the free trade and tenanted trade and some discounts may be negotiated with some free trade customers. This price list is not generally handed to tenants, but tenants are informed in correspondence about price increases."

55. Mr Bedford's comments concentrate on three points where the tenants are in disagreement with the Article 6 letter, namely (1) the definition of the relevant product market, (2) the application of the de minimis thresholds and (3) the failure to aggregate Greene King with UK national larger suppliers. The arguments on (1) and (3) will be dealt with in the Legal Appreciation section below. The arguments related to the beer de minimis notice relate to statements in the Article 6 letter that paragraph 5 of the beer de minimis notice, dealing with "wholesalers", is not applicable to brewers which are governed by only paragraphs two and three of the beer de minimis notice. This, Mr Bedford considers to be a rigid application of paragraph 5, whereas the Article 6 letter indicated, in citing from the beer de minimis notice, that paragraph two should not be applied rigidly so that brewers with more than 1% of the market are not necessarily caught by Article 85. However, this decision is not based on the beer de minimis notice so that there is no need to deal with any arguments relating to the "wholesale" part of the beer de minimis notice.

56. In addition, Mr Bedford states that the Commission has not considered the probability of collusion between Greene King and other regional and small brewers with national brewers in order to maintain beer prices. This argument starts from the fact that, in

spite of the very substantial discounts on beer which they obtain from national brewers, these are not passed on at all to their tenants. If the brewer would do so, his tenants would be able to compete with the national's estates very effectively on price and in so doing the brewer could expect to increase its market share as its pubs became known for selling beer in pubs more cheaply than nationals. The fact that this does not happen suggests prima facie distortion of the market and the maintenance of prices in the national chains as well as the regional chains. The conduct of all the brewers suggests collusion. The nationals in return for giving substantial discounts obtain the agreement of the small and regional brewers and wholesalers not to sell beer in their (managed or tied) pubs at prices below those at which beer is sold in the nationals' (managed or tied) pubs. The evidence for this is that (i) the small and regional brewers and wholesalers do not pass the discounts on to their tied tenants, as one would expect in a market free from distortion wrought by an anti-competitive agreement, (ii) the real price of beer has gone up notwithstanding a reduction in overall demand, (iii) price increases tend to occur at the same time throughout the industry. The Commission notes that no evidence has been presented on the respective price levels in tied and managed pubs of national and/or regional brewers.

57. Mr Bedford concludes his comments with a statement that if such agreements exist other foreign and national competitors will not be able to win supply agreements from the small and regional brewers and wholesalers unless they too offer the inducement of a large discount and sacrifice the possibility of price competition at the retail level.

II. LEGAL APPRECIATION

A. ARTICLE 85(1)

1. The relevant market

1.1 The relevant product market

58. 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[13]. As the Court of Justice has stated in the Delimitis judgment (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[14] 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."

59. In view of the specific licensing system in the UK, it has to be clarified which sections of the three distinct classes of on-licences (paragraph 13) form the relevant product market of "public houses and restaurants". In this respect, reference is made to paragraph 43 of the Commission Notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements[15] (hereafter "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 also the restricted on licences, have in common that the drinks are purchased for consumption on the premises and that there is an important service element provided for. The Commission recognises that the beer price in clubs, being in December 1994 some 82-83% of that prevailing in pubs, is lower than that charged in pubs[16]. However, this reflects to a large extent the fact that these clubs operate on a non-profit base. It remains the case that, in view of the service element, the price in clubs is still in excess of the price of beer in supermarkets. Furthermore, the specific distribution system for the whole on-trade, including clubs, is the same: the special

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13 Case 27/76, United Brands, ECR 1978, p. 207, paragraph 12.

14 The German (authentic language) version of the judgment uses the term "Schankwirtschaften". In the French version, being the working language within the Court, the term "cafés" is used.

15 OJ C 101, 13.4.1984, p. 2.

16 Extracts from Stats MR's survey of retail prices, submitted by a national brewer to the OFT.

installations for draught dispense, the brewers' beer list prices, and the operation of loan ties.

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

61. The tenants disagree with the definition of the whole on-trade market as the relevant product market. They consider that the relevant market is limited to the *active* or open (as opposed to temporary or permanently closed) public houses with a full on-licence. They argue that the distinction between full on licensed, restricted and clubs is not only made by consumers, but also by industry in their accounts and national competition authorities. The Commission does not dispute that there are differences between the outlets in view of their respective licence, but refers to the reasons stated above in paragraph 59 in support for the "general" market definition. Furthermore, the accounts of the brewer do not split up the sales according to the nature of the licence hold by the outlet, nor have the tenants presented examples of "industry" presenting its accounts or statistics in such a way. The tenants have not made clear either how the Orders made the distinction between the distinct classes of licences. The Commission understands that the Orders define the concept of "licensed premises" as including, e.g. in England and Wales, all full on-licences and members clubs. However, even if the sales through the restricted licences were excluded, this would not materially change the assessment made by the Commission as beer sales (volume) through this channel account for considerable less than 10% of the total on-trade (see paragraph 18).

62. The tenants consider that the Commission fails to take into account the peculiar market characteristics of the UK market, which is, according to the tenants, the sales of draught beer, and equates the UK market with the German market. The reference to Germany follows from the original argument of the tenants that the Delimitis judgment only referred to the German market and that the precise definition will vary in the Member States. The Article 6 letter mentioned that there are also in Germany, a country that has no licensing system of the sort as in the UK, on-trade outlets for which access is limited to members. It is not clear as to why this argument implies an equation of the UK market with the German market.

63. In addition, it has to be borne in mind that draught sales occur in all Member States and that they are in most Member States the most common way of dispense of beer in the on-trade.

64. A final argument that is used is an alleged inconsistent application by the Commission of the market definition. Reference is made to the notice pursuant to Article 19(3) of Regulation No 17 in the case of Whitbread[18] where at paragraph 3 the Commission

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17 Delimitis judgment, o/c., paragraph 17.

18 OJ C 294, 27.9.1997, p. 2.

states “[...] These 1970 outlets account for 2,4% of the full on-licensed premises in the UK and [...]”.

65. As the purpose of a 19(3) notice is not to present a legal assessment, which is confined to the ultimate decision, but to summarise the notification for which the Commission announces its intention as to its future decision, no argument should be deducted from this factual element as to the market definition retained by the Commission.

1.2 The relevant geographical market

66. 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 EU. 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. 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.

67. The UK market is also distinct from beer markets in other Member States in view of the Orders (paragraph 4), the high consumption of draught beer (paragraph 8), the presence of non-brewing pub companies (paragraph 12), the pub licensing regulations (paragraphs 13 and 28) and the variety in types of ale offered (paragraph 39).

2. Agreement between undertakings

68. The brewer and the tenants are undertakings in the sense of Article 85(1).

69. The lease between the two parties is an agreement in the sense of Article 85(1).

3. Restrictive effect on competition

3.1 Description and nature of the restrictions

70. A beer supply agreement such as the lease is generally qualified by referring to the exclusive purchasing obligation which is generally backed by a non-competition obligation[19]. These clauses form the principle restriction and are formulated in the lease as follows (paragraph 46):

- The tenant shall purchase from the Landlord or its nominees and from no other person or firm all such specified beers 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 any specified beer which is not supplied by the Landlord or its nominees; the tenant is also prevented from purchasing beers of non-specified types from other producers of beer unless they are supplied in bottled form or sold in draught form under certain specified circumstances. (non-competition obligation)

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19 Delimitis judgment, o/c., paragraph 10.

71. 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 wording "all such specified beers".

72. Because of the exclusive purchasing obligation, the tenants are precluded from accepting offers of contract goods from other suppliers. Competition for the tenants between the brewer and other beer wholesalers who offer the same brands is precluded (restriction of intra-brand competition).

73. The explicit and implicit non-competition obligation for specified types of beer, i.e. the prohibition on the lessees to purchase 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.

74. The standard leases also contain an exclusive purchasing obligation for non-beer products (paragraph 40). That this clause is not the main focus of the standard agreements follows from the fact that the total value of the purchases of all non-beer drinks by all the tied tenants accounts for only 20% of the value of their beer purchases. The market share of the brewer on any of the relevant non-beer product markets is estimated to be less than 1% in view of the fact that the pubs are clearly "beer based". In addition, the tenants are entitled to make use of the contractual possibilities of the so-called "English clause"[20]. For the above reasons, the Commission considers that this clause does not constitute an appreciable restriction of competition.

3.2 Restrictive effect

75. Having identified the nature of the restriction of competition brought about by the network of the brewer's leases and its restrictive effects on retailers and suppliers in the relevant market, those effects fall to be demonstrated[21].

76. In the case Brasserie De Haecht v. Wilkin[22], 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 is therefore necessary to assess, as a first step, the overall effect of all networks in the UK. However, it also follows from that judgment that the cumulative

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20 Which does not contain any specific requirements with regard to quantity or identity of purchaser as was the case for the English clause in the BP Kemi – DDSF Decision (Paragraphs 62-67 of the Commission Decision of 5 September 1979, JO L286, 14.11.1979, p. 32).

21 See also paragraph 13 of the Delimitis judgment: "If such (exclusive beer supply) agreements do not have the object of restricting competition within the meaning of Article 85(1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition."

22 Case 23/67, ECR 1967, p.407.

effect of several similar agreements constitutes one factor amongst others in ascertaining whether competition is prevented, restricted or distorted.[23]

3.2.1 Cumulative effect of several similar networks

77. The purpose of this assessment is to measure the degree of foreclosure of the UK on-trade market, thereby measuring the hindrance of the possibility 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 possibility for such other brewers to reach the final consumer in competitive conditions[24] defined independently by the brewer in question.

78. Furthermore, as the tenants entered into their agreement in 1994, this assessment must go back to that year.

79. The foreclosure resulting from the brewers' networks has different forms. Firstly, 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 two levels. On the one hand directly with retail outlets via loan ties, or on the wholesale level, via "tying" supply agreements, i.e. 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.

80. From Table 1 (paragraph 15) it can be seen that sales of the property tied and managed houses of brewers represented in 1994-97 between 32-27%[25] of sales in the on-trade. Loan ties account for 21-18% of the on-trade market in these years. An unidentifiable part of the volume for loan ties is not supplied subject to a legal binding commitment of the retailer to buy the volume of the tying brewer (see paragraph 17)[26], but it is most likely that the binding commitment will at least cover 10% of on-trade volume throughput. Therefore, the conclusion must be that the UK brewers tie themselves directly *a maximum* of 53-45%, but most likely at least 42-37%. This volume throughput of the UK on-trade market offers no direct opportunities for independent access by other brewers directly to the retail level.

81. It has been argued that since the Orders made it possible to terminate a loan tie upon three months' notice, such ties should no longer be considered as hindering any opportunities for access.

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23 Delimitis judgment, o/c., paragraph 14.

24 With regard to competition policy, the main parameters are what is called the "above the line" parameters: overall positioning of the brand (including pricing), general marketing policy (advertising concept, national advertising, promotions) as opposed to "below the line" which is more "point of sale"-related marketing.

25 See also the footnote to paragraph 15.

26 The intrinsic link between the loan tie and the actual volume purchased cannot be denied, the best evidence for this link is the inability of the brewers to dissociate the two in their internal accounts.

82. The Commission accepts that independent access to the loan-tied outlets in question is not always excluded as there are an unidentified number of non-exclusive loan tie agreements[27]. However, for the volume covered by loan ties, "the possibility for other brewers to reach directly the final consumer in competitive conditions defined independently by the brewer in question" is limited.

83. The Commission also recognises that the Orders make it easier to terminate a loan tie. However, the average duration of four years indicates that the contractual relationship is not a temporary one. Furthermore, the brewer that wants to enter independently into a loan tied premise needs to offer the individual pub operator the finance to pay back the first loan (by way of, most likely, a new loan tie). Competition between such brewers is thus not restricted to the quality and (direct) price of the beer, but requires the other brewer to also offer loan ties. In addition it needs to be remarked that such an independent entry in a loan tied premise would only make sense for a brewer that offers all or most types of beer typically offered by a pub retailer to the public because otherwise the total finance cost of the loan would need to be recouped by the sale of one brand (or a limited number of brands).

84. It is not disputed that the tied volume might still offer *indirect* access for other brewers insofar as the (property or loan) tying brewer/wholesaler is prepared to supply to its tied outlets beer from other brewers. However, the assessment on foreclosure focuses on opportunities for **independent** access for other brewers which clearly does not result from "horizontal" co-operation between actual competitors. Such co-operation may limit the level of inter-brand competition between the brewers in question and the tying brewer will only allow an other brewer's beer in his outlets when this is in the tying brewer's interest.

85. In addition to the direct (managed and leased houses and loan ties) ties by UK brewers of retail outlets, reference has to be made to the 18.1% (in 1997)[28] going through the non-brewing pub companies' property tied and managed houses. It is estimated that around 13% is accounted for by "tying" supply agreements between pub companies and brewers. This percentage includes the volume throughput of Inntrepreneur Pub Company Limited, Spring Estates Limited and Allied Domecq Retailing, all of which had to buy in 1997[29] all the beer requirements of their estate from one national brewer. Also included are the estimates of the four national brewers of their supplies subject to contractual restriction to other pub companies.

86. It can thus be concluded that a maximum of around 58% (but most likely at least 50%) of the UK on-trade volume is accounted for in 1994-1997 by tying restrictions of brewers. Therefore, the bundle of tying agreements of UK brewers has since 1994 had considerable effect on the opportunities for gaining independent access to the UK on-trade beer market.

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27 This access could be excluded in practice by way of multiple non-exclusive loans.

28 As indicated in the footnote to paragraph 15, the statistics are not totally consistent for the period 1994-1997.

29 The exclusive supply agreement for the Inntrepreneur and Spring estates ended on March 28, 1998; that for the Allied Domecq estate on December 12, 1997.

3.2.2 Other factors

87. The Court of Justice also held that, as last confirmed in the above-mentioned Delimitis judgment, the effect of the network of exclusive purchasing agreements is only one factor, amongst 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.

3.2.2.1 Opportunities for access

88. 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."

89. It is not easy to open a substantial number of new pubs within a couple of years in view of the licensing laws (see paragraph 28). And although there is an active trade in UK pubs and substantial numbers of pubs have been disposed 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[30] 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 provide 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.

90. Direct take-overs 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 its interest again (the Dutch brewer Grolsch in Ruddles, and the Australian brewer Foster's in Courage).

91. In addition, the relatively small role played by "traditional" wholesalers in the distribution of beer in the UK (paragraph 11), make it difficult for a foreign brewer, or for a new brewer, to enter the market independently.

92. 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 will have a strong influence on the positioning and the marketing (advertising) of the foreign brewer's brand.

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30 The average sales price of a private freehold UK pub is around £200,000. (Source: Fleurets).

93. 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 to the 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 would only have one brand, and thereby gaining access to all the pubs in that network as compared to concluding agreements with individual outlets. However, as stated above in paragraph 85, 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 (see also paragraphs 12 and 24).

3.2.2.2 Competitive forces on the market[31]

94. The UK brewing industry has been going through a process of concentration (paragraph 10). Second, the overall demand for beer as well as the on-trade market are likely to continue to decline or remain, at best, static (paragraph 5). Furthermore, the ever increasing advertising expenditure to support a single brand (a sunk cost), gives a further incentive to foreign brewers to enter via licensing agreements. Finally, the possibilities to build upon a reputation in the off-trade beer market to gain 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 (paragraph 5).

3.3 Conclusion on first Delimitis test

95. It can thus be concluded that an examination of all tying agreements, included 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 1994 and still have today, on the basis of the most recent available information, the cumulative effect of considerably hindering independent access to that market, for new national and foreign competitors.

3.5 Significant contribution

96. 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 which 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 Greene King, 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 to the sealing-off effect

31 See also paragraph 22 of the Delimitis judgment

brought about by the totality of the brewers' tying agreements in their economic and legal context."

97. In so doing, consideration will be given to the effect of the network of Greene King as a whole; the finding of a restrictive effect for the network would then apply equally to each of its constituents[32].

98. The Commission has given the most recent available data only (fiscal year ending May 1998) and does not have data before 1996. However, it is accepted by the tenants that the brewer's presence on the on-trade market has been growing since 1994, especially by the acquisition of two pub companies since then, so that a conclusion that the brewer would not contribute significantly to the foreclosure of the UK market now is all the more valid for the earlier years.

3.5.1 The beer de-minimis notice

99. The brewer cannot benefit from the notice as at least two of the criteria are not fulfilled:

- the brewery brews 423,470 hl (more than the 200,000 hl. threshold of the notice);
- the main standard lease has a duration of nine years (more than the seven and a half years of the notice for agreements that cover beer and other drinks);

3.5.2 Individual assessment

100. The Court has ruled in the Delimitis judgment[33] 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 indicated that "if the duration is manifestly excessive in relation to the average duration of beer supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 85(1). A brewery with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to a sealing-off of the market as a brewery in a relatively strong market position which regularly releases sales outlets at shorter intervals."

101. An assessment of the contribution by the brewer therefore needs to take into account its position on the relevant market, and in particular his contribution by way of tying

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[32] The Court of First Instance pointed out in Cases T-7 & 9/93, Langnese-Iglo & Schöller, ECR 1995, II, p. 1539 & 1611, paragraph 129/95 (hereafter "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.".

[33] Last sentence of point 1 of the operative part of the judgment.

arrangements to the foreclosure and, secondly, the duration of his restrictive agreements, and in particular his standard agreements.

102. As indicated in paragraph 34, the brewer has a tied network (including in addition to the 628 tied tenanted public houses, its managed houses and the loan tied houses) accounting for 1.3% of volume beer throughput in the UK on-trade beer market. The 1101 premises owned by the brewer account for 0.7% of the total on-trade licences[34]. In these circumstances, the brewer cannot be considered as a "significant contributor" to the foreclosure. This tied market share of 1.3% is considerably less than the 5% or more contribution of the "tied network" of each of the four national brewers taken individually. In addition, the normal duration of the standard agreement of nine years is considerably below the 20 year (or longer) duration of standard leases from other operators.

103. The tenants argue that the brewer's standard agreements fall within the scope of Article 85(1) in view of the brewer's "wholesale" function. In other words, as the brewer buys beer from national brewers (for whom it can reasonably be argued that their tied network falls within the scope of Article 85(1)), the brewer's network also falls within the scope of Article 85(1).

104. The Commission does not accept this reasoning. The assessment of the agreements concerning the purchase of beer from more than one brewer (the "upstream" beer supply agreements) has to be differentiated from the assessment of the property and loan tie agreements (the "downstream" agreements)

105. The former category, i.e. the beer supply contract that contains a sort of tie (minimum purchasing obligation, non-compete obligation, must stock obligation) is a part of the tied network of the supplying brewer. The contract thus can fall within the scope of Article 85(1) if the supplying brewer contributes significantly to the foreclosure on the market. This is, with the current market structure, only the case for each of the four national brewers. The agreements can, however, be exempted if they fulfil the criteria of Article 85(3). In this respect, it can be remarked that if the restrictive links between the, in effect, national brewers and the other wholesale players are limited, access to the tied network of the wholesale players is possible for other, UK or foreign, brewers. Furthermore, it is easier for these other brewers to conclude an agreement with one wholesale player and thereby obtaining access to all the outlets tied to such a player, than to conclude agreements with each individual retail outlet.

106. The existence of beer supply agreements should therefore not have an impact on the assessment of the tied network of the "wholesaler". The tied network of the "wholesaler" cannot simply "be attributed to the (brewery) which makes an appreciable contribution (to the foreclosure)"[35]. The most restrictive beer supply contract entered into by Greene King (see paragraph 32) contains a mpo for less than 20% of beer "wholesaled" by the brewer. It is obvious that the whole tied network of Greene King cannot be attributed to the tied network of the brewer entitled to supply less than 20%.

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34 Even including the loan tied houses, the brewer would have a tie with less than 2% of the number of on-trade licences.

35 Paragraph 24 of the Delimitis judgment, see paragraph 96 above.

3.5.3. Conclusion on second Delimitis test

107. Greene King does not operate a network of "restrictive" agreements, including its standard tenancy agreements, that contributes significantly to the foreclosure of the UK on-trade beer market, nor could Greene King's standard tenancy agreements be considered to form part, in view of the beer supply agreements with other brewers, as being part of such a "supplying" brewer's tied network.

4. Conclusion on the application of Article 85(1)

108. Greene King's main standard form agreement, including the lease between the tenants and the brewer, does not fall within the scope of Article 85(1) and the complainant's application cannot be granted.

109. The Commission therefore does not need to assess any further elements brought up by the tenants relating to the profitability of the brewer's tenancies as compared to his managed houses, the specification of the beer tie by type of beer, the availability of discounts to other operators on the market and so forth.

B. THE ALLEGED UK BREWING CARTEL

110. The tenants have raised in their comments on the Article 6 letter their suspicion that the UK brewers operate a cartel which (a) acts so as to exclude access to the market for other producers and (b) operates a price cartel. The "evidence" given by the tenants is (i) none of the regional and national brewers buys a substantial part of his beer requirements from other brewers than regionals and nationals, (ii) price increases tend to occur at the same time throughout the industry, (iii) the small and regional brewers and wholesalers do not pass the discounts on to their tied tenants, and (iv) the real price of beer has gone up notwithstanding a reduction in overall demand.

111. In his submission of 10 June 1998, Prof. Waterson concludes that the evidence seems to him consistent with the allegation that there is some collusion or co-ordination in pricing as between certain major brewers and Greene King. The evidence is suggestive, but there is no proof. However, the professor suggests that collusion is not so unlikely a possibility as to be cast aside without further investigation and he recommends that such an investigation be undertaken.

112. The professor's conclusion derives from the fact that the brewer is likely to have some market power in his region as a result of its relative concentration of pubs. The professor argues that there exists the possibility that the brewer, when deciding to stop the production of lager at the Biggleswade plant, came, in making this decision, to understandings with major brewers regarding the conditions pertaining to their supply of product generally, in particular relating to future pricing strategies, as part of the brewer's strategy for outsourcing lager. He continues with the statement that the fact that the brewer does not pass on to tenants the discounts on beer received from major brewers reduces the likelihood of active price competition between the brewer's tenants and the tenants of major brewers. The professor goes on by indicating that there is thus the possibility that major brewers' power is extended by virtue of their linkages with regionals such as Greene King, who have the power to pass on price rises to their managed houses and tied tenants. The impact on tenants is likely to be

adverse and this possibility, and the conditions which may give rise to it, deserve, according to the professor, investigation. The professor also reserves to an academic paper of Prof. Slade.

113. As a first reaction, the Commission would point out that the fact that economic players on a particular geographical market only buy the products of players on that market is in no way an indication of a cartel, but a consequence of the way the market works. All national and regional brewers account for almost all production on that market, so that it is not surprising that they account for almost all purchases by brewers in their wholesale function. And as long as such supply agreements do not contain a tying element, it is difficult to see how such agreements could then be considered to extend the major brewers' market power.

114. With regard to the simultaneous price increases, the brewer has indicated that price changes traditionally happen during the summer months when demand is highest. The brewer traditionally reviewed its beer prices in September while a number of the national brewers review their prices over the early summer in May and June. Some of the brewer's customers assumed that the brewer had reviewed its prices in May and June and was therefore introducing a second review in September. The brewer therefore decided to bring forward its own price review. In 1996 this was held in August and in 1997 in June. The brewer stated that the basis of each review is a review of its costs, consideration of brand strengths, and a market assessment to enable its prices to be competitive. According to the brewer, the substitutability of products mean that it is hardly surprising that price changes occur within a short time frame.

115. Whilst it is true that most "wholesalers" do only pass on a marginal discount to their tenants, this is not so for the whole industry. For instance, the Inntrepreneur Pub Company Limited and Spring Inns Limited have introduced a discount scheme in February/March 1997 and before that Scottish & Newcastle has offered its lessees the possibility to have some discounts if they agreed to a rent increase.

116. The first of Prof. Waterson's arguments relates to the market power of the brewer in his region. In this respect, the Commission has concluded, for the reasons indicated above, that the relevant market for EC competition law purposes is the whole United Kingdom. It is not denied that there can be regional differences, but no supportive evidence has been presented that would indicate that this is enough to consider the markets regional and, thereby, attribute market power to a regional brewer.

117. With regard to the brewer's understandings with major brewers as to the pricing strategies for lager, the supply agreements with other brewers contain different formula with regard to the price that the brewer will pay for the product over the duration of the respective agreements. The relatively short duration (one and a half years to three years and one for five years) of each of these agreements, the fact that most of these agreements involve lager brands, and the fact that it is the tenant that decides upon the individual lager brands (figuring on the brewer's price list) he wants to stock in his pub, plus the freedom of the tenant to decide his own retail prices, make the conclusion of an "understanding as to pricing strategies" all the more unlikely.

118. In sum, the tenants have not begun to prove the existence of a cartel agreement. With regard to the possibility of the existence of a concerted practice, no indication was

given as to why the alleged behaviour could not be explained as evolving from "the right [for the brewers concerned] to adapt themselves intelligently to the existing or anticipated conduct of their competitors"[36].

119. The Commission's assessment of the tenants' arguments has not resulted in an indication that there is a cartel between Greene King and any of the other brewers active on the UK on-trade beer market. Furthermore, in the vertical relationship between the brewer and the tenants, the focus of the tenants' complaint, there is no price fixing as the tenants are able to set their retail prices independently. This has been explicitly stated in the Second Affidavit of Jonathan Gleadow Clarke[37], dated 18 December 1996, in the procedure in the Manchester County Court between the tenants and the brewer at paragraph 6: "[…] The document Mr Roberts refers to is a retail price guide, which was prepared by Greene King for the benefit of its tied tenants in order to assist them in calculating the margins achieved by selling products at different prices. *It is up to the tenant to decide the price at which he wants to sell the products,* and, therefore, the margin he will be able to achieve. […] *Greene King does not control the prices which consumers pay.* […]" (*italics added).*

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36 ECJ, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 Suiker Unie and Others v. Commission, [1975] ECR 1663.

37 Attached to the comments of Mr Kelly to the Article 6 letter.

As there are, for the reasons set out above, insufficient grounds for granting your application, the Commission rejects your application.

Yours faithfully,

For the Commission,

(signed)

Karel van Miert
Member of the Commission