

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
21 March 2002 *

In Case T-231/99,

Colin Joynson, residing in Manchester (United Kingdom), represented by
B. Bedford, Barrister, instructed by Messrs Ferdinand Kelly, Solicitors,

applicant,

v

Commission of the European Communities, represented by K. Wiedner, acting as
Agent, assisted by N. Khan, Barrister, with an address for service in Luxembourg,

defendant,

* Language of the case: English.
ECR

supported by

Bass plc, established in London (United Kingdom), represented by M. Farquharson, J. Block and N. Green, Solicitors, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Commission Decision 1999/473/EC of 16 June 1999 relating to a proceeding pursuant to Article 81 [EC] (Case IV/36.081/F3 — Bass) (OJ 1999 L 186, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: J. Azizi, President, K. Lenaerts and M. Jaeger, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2001,

gives the following

Judgment

Facts of the dispute

- 1 Bass PLC ('Bass') is a company quoted on the London Stock Exchange. The Bass group is an international group operating in the field of hotels, leisure and the manufacture of drinks, especially beer, in Europe, the United States and other countries.

- 2 In June 1996 the Bass group owned some 4 182 public houses in the United Kingdom, of which 2 736 were managed by an employee of the group and 1 446 leased. In March 1997 the Bass group's leased estate comprised 1 430 pubs, including 106 in Scotland. Of those 1 430 pubs, 1 186 were let on standard leases, 178 on tenancies at will, and 42 on short-term foundation agreements, and the remaining 24 were let under other agreements or were unoccupied.

- 3 During 1998 the Bass group progressively sold a large part of its leased estate, retaining only about 20 pubs.

- 4 The contractual relations between the Bass group and most of its tied lessees were governed by a standard lease, under which one of the companies in the Bass group made a licensed house available to the lessee, with the fixtures and fittings needed to operate it, in return for the payment of rent and an undertaking to buy the beers specified in the lease from Bass or a supplier designated by Bass.

- 5 The standard lease thus contained an exclusive purchasing obligation and a non-competition obligation.

- 6 The exclusive purchasing obligation required the tied tenant to buy exclusively from the other party to the agreement or a person designated by it the beers specified in the agreement, although with the possibility of purchasing beer from another brewery under the national provision generally known as the guest beer provision.

- 7 The non-competition obligation prohibited the tied tenant from selling or offering for sale in his establishment or bringing into the establishment for the purpose of sale any beer of the same type as a specified beer but not supplied by the other party to the contract or a person designated by it, except for a beer packaged in bottles, cans or other small containers or a draught beer if that beer was customarily sold in draught form or was necessary to satisfy a sufficient demand from the pub's customers.

The administrative procedure

- 8 In February 1995 the Office of Fair Trading (OFT) opened an inquiry, at the request of the Commission, into the wholesale pricing policies of the United

Kingdom breweries. Following that inquiry, which related to Bass among others, the OFT in May 1995 adopted a report 'Inquiry into breweries' wholesale pricing policy in the United Kingdom' and issued a press release on that report on 16 May 1995.

- 9 On 11 June 1996, Bass Holdings Ltd and Bass Lease Company Ltd, wholly-owned subsidiaries of Bass, notified pursuant to Article 4 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), the standard lease for a public house with an on-licence in England and Wales. They sought negative clearance or, failing that, confirmation by the Commission that the agreements could benefit from the application of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [81(3)] of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5), as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997 (OJ 1997 L 214, p. 27), or from an individual exemption under Article 81(3) EC, with retroactive effect from the date of conclusion of the agreements. Regulation No 1984/83 contains in Title II special provisions relating to beer supply agreements.
- 10 The Commission supplemented the information in the notification by carrying out a verification at Bass's premises in accordance with Article 14(2) of Regulation No 17, and by sending several requests for information. The Commission sought in particular confirmation of the data communicated by Bass.
- 11 Following publication in the *Official Journal of the European Communities*, in accordance with Article 19(3) of Regulation No 17, of a notice in which it announced its intention to grant Bass an exemption with retroactive effect

pursuant to Article 81(3) EC, the Commission received 20 responses from interested third parties. Sixteen of them followed a model drawn up by an action group of tied lessees. The Commission also received observations from three other tied lessees and from an accountant.

- 12 In those circumstances, the Commission adopted Decision 1999/473/EC of 16 June 1999 relating to a proceeding pursuant to Article 81 [EC] (Case IV/36.081/F3 — Bass) (OJ 1999 L 186, p. 1, ‘the contested decision’). It decided that the standard lease notified fell within Article 81(1) EC, but declared that provision inapplicable on the basis of Article 81(3) EC, with effect from 1 March 1991 to 31 December 2002.

- 13 Mr Joynson operated a public house in Bolton (United Kingdom) belonging to Bass Holdings from July 1992 under a standard lease. The agreement ended when Bass Holdings sold the pub in February 1998. During the administrative procedure, Mr Joynson submitted observations in response to the Commission’s notice pursuant to Article 19(3) of Regulation No 17.

Procedure and forms of order sought by the parties

- 14 Those were the circumstances in which the applicant on 12 October 1999 brought the present action.

- 15 By order of 13 April 2000 the President of the Third Chamber of the Court of First Instance granted the applicant legal aid.

16 By order of 4 July 2000 the President of the Third Chamber of the Court of First Instance granted Bass leave to intervene in support of the form of order sought by the Commission.

17 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. The parties presented argument and answered the Court's oral questions at the hearing which took place in public on 26 April 2001.

18 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission and Bass to pay the costs.

19 The Commission, supported by Bass, contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Admissibility

- 20 The Commission questions the applicant's interest in bringing proceedings, and Bass questions his capacity to bring proceedings.

1. *Interest in bringing proceedings*

Arguments of the parties

21 ...

- 22 The applicant considers that he can claim a sufficient interest in bringing proceedings.

Findings of the Court

- 23 A natural or legal person must show that he has a vested and present interest in the annulment of the contested act (Case T-138/89 *NBV and NVB v Commission* [1992] ECR II-2181, paragraph 33).

- 24 The supporting documents produced by the applicant during the procedure and the information obtained from him and the intervener show that he brought an action for damages against Bass in the English courts, seeking compensation for the damage allegedly suffered as a result of having been subjected in the standard lease, which was exempted by the Commission in the contested decision, to obligations contrary to Article 81 EC, and that the action is pending.
- 25 The applicant therefore retains a pecuniary and non-pecuniary interest in the outcome of the present proceedings notwithstanding the termination of the lease.

2. The applicant's capacity to bring proceedings

Arguments of the parties

26
to
27 ...

Findings of the Court

- 28 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the fourth paragraph of Article 230 EC only if that decision affects them by reason of

attributes peculiar to them or by reason of factual circumstances differentiating them from all other persons and, as a result, distinguishing them individually in like manner to the person addressed (Case 25/62 *Plaumann v Commission* [1963] ECR 95, at 107, and Case C-106/98 P *Comité d'entreprise de la Société française de production and Others v Commission* [2000] ECR I-3659, paragraph 39).

- 29 In the present case, the applicant brought an action for annulment of the decision to grant an exemption for an agreement to which he was a party and which he considers imposed discriminatory prices on him and so prevented him from competing on equal terms. He also brought proceedings against Bass in the English courts for damages for having had imposed on him under the standard lease obligations contrary to Article 81 EC. Furthermore, he took part in the administrative procedure.
- 30 In view of those circumstances, which show that the contested decision affects the applicant's personal legal situation, he is in circumstances which distinguish him individually in like manner to the person addressed. He is therefore individually concerned within the meaning of the fourth paragraph of Article 230 EC. As it is not disputed, moreover, nor could it be disputed, that he is also directly concerned by that decision, his action for annulment satisfies the conditions of admissibility defined by that provision.
- 31 Bass considers, however, that the action is nevertheless inadmissible, on the ground that for an individual party to challenge the validity of the decision granting an exemption to a standard agreement to which he is a party together with numerous other economic operators infringes the principle of legal certainty.

- 32 It must be remembered that individuals derive from Community law a right to complete and effective judicial protection (order of the President of the Court of Justice in Case C-393/96 P(R) *Antonissen v Council and Commission* [1997] ECR I-441, paragraph 36), and that it was intended, in the Treaty, to establish a complete system of judicial protection against acts of Community institutions which are capable of having legal effects (Case 302/87 *Parliament v Council* [1988] ECR 5615, paragraph 20).
- 33 That right of the individual would be deprived of substance if, despite being entitled, according to the conditions in the fourth paragraph of Article 230 EC, to bring an action for annulment against an act, he were unable to contest its validity, on the ground that, since that act also affected numerous other persons, the principle of legal certainty prevented it from being challenged.
- 34 Moreover, if it were accepted that the principle of legal certainty could block a person's right to bring an action for annulment against the decision granting an exemption to an agreement to which he is a party together with numerous other economic operators, that principle would also prevent a national court hearing a case in which that party to the contract has called into question the validity of the decision from making a reference to the Court of Justice under Article 234 EC for a preliminary ruling on the question of validity. The effects of a declaration of invalidity of an act by the Court of Justice following such proceedings are similar to those of an annulment decision of the present Court in an action for annulment on the basis of Article 230 EC. Bass's argument would thus have the consequence, as well as restricting the system of judicial protection of individuals, of allowing unlawful acts to be maintained in force on the ground of observance of the principle of legal certainty.
- 35 Bass's argument must therefore be rejected.

Substance

- 36 Review by the Community judicature of the complex economic appraisals made by the Commission when it exercises the discretion conferred on it by Article 81(3) EC, with regard to each of the four conditions laid down in that provision, must be limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated, and whether there has been any manifest error of assessment or a misuse of powers (Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 62, and Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, paragraph 190).
- 37 The applicant submits that the contested decision is vitiated by manifest errors of assessment and lacks an adequate statement of reasons.

A — *The plea of manifest errors of assessment*

- 38 The applicant considers that the Commission made manifest errors of assessment as regards the failure to take sufficient account of the profitability of Bass tied houses and the assessment of the price differential, rent subsidy and certain other countervailing benefits.

1. *Failure to take sufficient account of the effect of the standard leases on the profitability of Bass tied houses*

- 39 In the contested decision, the Commission took the view that a beer supply agreement generally leads to an improvement in distribution (points 168 to 172), but considered that it should be examined whether that advantage could materialise where the tied lessee faces appreciable price differentials (point 173).
- 40 It noted that price discrimination was an important element in the economic justification for an exemption in favour of exclusive purchasing agreements. In the first place, an exclusive purchasing agreement allows such discrimination, since throughout its duration it is impossible for the purchaser to have recourse to other sources of supply, unlike the other customers of the producer (point 174 of the contested decision). In the second place, with regard to the condition related to the improvement in distribution, the Commission considered that it could prove difficult for someone facing appreciable 'net' price discrimination to compete on a level playing field (point 175 of the contested decision).
- 41 It added that the idea that price discrimination can be incompatible with Article 81(3) EC also finds expression in Regulation No 1984/83. Recital 21 in the preamble to that regulation envisages that if, in particular cases, agreements exempted under the regulation may nevertheless have effects which are incompatible with Article 81(3) EC, the Commission may withdraw the benefit of the exemption. Moreover, Article 14(c)(2) of Regulation No 1984/83 expressly refers to unjustified price discrimination (point 175 of the contested decision).

- 42 It said that the application of these considerations to the standard leases meant, in the context of the United Kingdom on-trade beer market, that a tied lessee faced with unjustified price differentials might not be in a position to compete on equal terms. All other conditions being similar, his business would be less profitable than that of his competitors, or even unprofitable (point 176 of the contested decision).
- 43 It then said, however, that unjustified price discrimination has an appreciable negative impact on the competitiveness of the tied lessee, and affects the assessment of a lack of improvement in distribution, only if it is significant and lasts for a long time (point 177 of the contested decision).
- 44 On the basis of those considerations, the Commission assessed the price differentials suffered by Bass tied lessees and found that they had increased continually over the years (point 181 of the contested decision). However, it accepted Bass's argument that, to determine whether tied lessees could 'survive' in the market place, and hence whether there was an improvement in distribution, it was necessary to take into account, besides the price differentials imposed on tied lessees, the specific benefits which they enjoy, to the exclusion of their competitors (points 182 and 183 of the contested decision). Making that comparison between price differentials and countervailing benefits, the Commission concluded that the benefits compensated for the differentials and, exercising the discretion it has under Article 81(3) EC, deduced that the standard leases contributed to improving distribution in the United Kingdom on-trade beer market (points 184 to 188 of the contested decision).

Arguments of the parties

45
to
46 [...]]

Findings of the Court

- 47 In recital 5 in the preamble to Regulation No 1984/83, the Commission states that exclusive purchasing agreements generally lead to an improvement in distribution, since they enable the supplier to plan the sales of his goods with greater precision and for a longer period and ensure that the reseller's requirements will be met on a regular basis for the duration of the agreement, thus allowing the undertakings concerned to limit the risk of variations in market conditions and to lower distribution costs.
- 48 As well as those benefits common to all exclusive purchasing agreements, beer supply agreements lead, from the point of view of the improvement in distribution, to certain specific benefits, rightly listed in recital 15 in the preamble to Regulation No 1984/83. The commercial and financial advantages conferred by the supplier on the reseller make it significantly easier to establish, modernise, maintain and operate premises used for the sale and consumption of drinks. The exclusive purchasing obligation and the prohibition of competition incite the reseller to devote all the resources at his disposal to the sale of the goods referred to in the contract. Such agreements lead to durable cooperation between the parties, allowing them to improve the quality of the contract goods and of the services to the customer of the reseller. They allow long-term planning of sales and consequently a cost-effective organisation of production and distribution. Finally, under the pressure of competition between products of different makes, the undertakings involved are obliged constantly to adjust the number and character of premises used for the sale and consumption of drinks to the wishes of customers.
- 49 In the contested decision, the Commission, while correctly referring to these benefits, also says that, having regard to the restrictive licensing system in the United Kingdom, the letting of premises at an agreed rent, as in the Bass standard leases, allows a tied lessee to operate a pub and thus at low cost enter the on-trade beer market. It observes similarly that this system, by which a United Kingdom brewery allows an independent operator to operate a licensed house owned by it,

increases the number of options for entry to the market (point 168 of the contested decision).

- 50 It follows that the Bass standard leases in principle have the effect of improving distribution. That is the basis on which to assess the question raised by the applicant as to the impact of the system of Bass standard leases on the profitability of that brewery's tied houses. That question of profitability would be relevant only in so far as the alleged impact were such as to block the materialisation of the benefits described above. That would be the case only if the profitability of the Bass tied houses was so poor that their capacity to distribute beer was in doubt. As long as tied houses are not seriously affected in their capacity to distribute beer, the benefits in question continue to exist. Profitability is therefore relevant only to the extent that it may threaten that capacity.
- 51 The Commission thus correctly took care to take the profitability of Bass tied houses into consideration only in so far as it was so poor that it threatened the capacity of tied houses to distribute beer. It was therefore right to state that, while deliberate price discrimination may prevent tied lessees from being in a position to compete on equal terms and, other things being equal, make their businesses less profitable than those of their competitors, not all discrimination is to be taken into consideration. As it stated at point 177 of the contested decision, only unjustified discrimination which is substantial and long-lasting and so has an appreciable negative effect on the competitiveness of the tied lessee is capable of affecting the positive assessment of the beer supply agreement in terms of improvement in distribution.
- 52 It is therefore not relevant whether the profitability of Bass tied houses is equivalent to that of their competitors.

- 53 The fact that the profitability of tied houses is not necessarily equivalent to that of their competitors is, moreover, part of the premiss of the examination of whether to grant an individual exemption under Article 81(3) EC. The standard leases, which are characterised by exclusive purchasing and non-competition terms, by definition prevent tied lessees from obtaining supplies freely on the market, and hence from obtaining beers of the same type as those specified in the agreement from other suppliers, possibly at better prices. To that extent they thus deprive tied lessees of possible ways of improving their profitability. The Commission took that into account in concluding, at points 155 and 164 of the contested decision, that the exclusive purchasing and non-competition obligations in the agreements at issue have a restrictive effect on competition and fall within Article 81(1) EC.
- 54 It follows that the Commission did not make a manifest error of assessment in omitting to ascertain whether the Bass tied houses are as profitable as their competitors.
- 55 As regards the only relevant question which could, in certain cases, be raised by the profitability of Bass tied houses, as defined in paragraph 51 above, the Commission was right to consider only the effect of possible deliberate price discrimination on the part of Bass and not the poor profitability said to be the consequence of the system of leases itself independently of any deliberate price discrimination.
- 56 In the first place, that position taken by the Commission is based on Regulation No 1984/83, to which it correctly referred.
- 57 The standard leases of Bass could not benefit from the block exemption defined by Regulation No 1984/83 but were the subject of an individual exemption

because, contrary to the conditions required by Article 6 of the regulation, they laid down a specification of the beer purchasing obligation by type of beer and not by brand or name (points 165 to 167 of the contested decision). The exclusion of block exemption for agreements containing a clause of that type is justified in recital 18 in the preamble to Regulation No 1984/83, in addition to the concern to preserve the economic freedom of the reseller, by the concern to preserve the access of other suppliers at retail level. In its assessment of the Bass leases with a view to the grant of an individual exemption, the Commission observed, however, at point 171 of the contested decision, that, having regard to the particular features of the United Kingdom on-trade beer market and to the specific conduct of Bass, that clause constituted a more effective possibility of implementing the exclusive purchasing agreements for beer in the United Kingdom than the specification provided for in Regulation No 1984/83, and that it makes it possible precisely to preserve the access to the market of foreign or United Kingdom brewers better than the specification of the beer tie by brand or name required by Regulation No 1984/83.

- 58 The principal ground for excluding beer supply agreements containing a specification of the purchasing obligation by type of beer from benefiting from the block exemption provided for by Regulation No 1984/83 thus required, in the present case, recourse to that clause. It follows that the Bass standard leases fail to comply with the conditions of Regulation No 1984/83 solely because of a purely technical matter which does not, however, prevent those agreements from complying with the spirit of that regulation.
- 59 In those circumstances, the Commission was right to refer, in the context of the examination of the possibility of granting an individual exemption, to the framework of analysis provided by the regulation.
- 60 That regulation envisages cases where agreements which in principle comply with the conditions defined by the regulation have effects which are incompatible with

the provisions of Article 81(3) EC. Those cases include that, analysed by the Commission, where the supplier, without an objectively justified reason, applies to a reseller bound by the exclusive purchasing commitment prices which are less favourable than those he applies to other resellers at the same level of distribution (Article 14(c)(2) of Regulation No 1984/83).

- 61 The Commission was therefore right to take into consideration, being guided by the framework of analysis provided by Regulation No 1984/83, the question of deliberate price discrimination mentioned by that regulation.
- 62 Regulation No 1984/83 does not, on the other hand, envisage the case of beer supply agreements which, for structural reasons peculiar to those agreements, provide tied lessees with a profitability so poor that the Commission should withdraw the benefit of the exemption. That regulation, in stating the various benefits produced by exclusive purchasing agreements in general (recitals 5 to 7) and beer supply agreements in particular (recitals 14 to 17), necessarily presumes that those agreements do not, structurally, have the effect of reducing the profitability of resellers' businesses to such a point that those benefits are called into question.
- 63 In the second place, the position adopted by the Commission is based on factors specific to the United Kingdom on-trade beer market which were analysed in the contested decision.
- 64 It follows from the contested decision that an economic operator who wishes to enter at retail level in the United Kingdom the market of alcoholic drinks for consumption on the premises does not only have the possibility of operating a pub belonging to a brewery. His other possibilities are of becoming the manager

of a pub belonging to a brewery or pub company, and being the owner of his own pub, which may or may not be tied to a brewery in return for a favourable loan (point 168 of the contested decision). Those options are not merely theoretical, since managed pubs belonging to breweries and pub companies distributed, in 1997, 25.5% of the beer consumed in on-licensed premises in the United Kingdom (point 26 of the contested decision, Table 2, columns (b) and (d)) and individually owned pubs, whether or not loan-tied to a brewery, sold 53.1% (point 26 of the contested decision, Table 2, columns (e) and (f)). Moreover, according to the findings of the Commission, the barriers to entry at retail level are relatively limited (point 36 of the contested decision).

- 65 It follows that an operator who wishes to enter the retail market in alcoholic drinks for consumption on the premises is not necessarily forced to conclude with a brewery a lease containing an exclusive purchasing clause. In view of that freedom of choice, it appears that an operator will not opt for that method of operation if it prevents him, for structural reasons, from carrying on his business in adequate conditions of profitability.
- 66 Such a situation would also be manifestly against the interests of the breweries. As the Commission correctly pointed out, if their pubs did not make adequate profits, they would no longer find lessees, which would threaten their distribution capacity.
- 67 Consequently, the Commission has not been shown to have made a manifest error of assessment in confining itself to analysing the effects of possible deliberate price discrimination by Bass and omitting to examine whether the system of Bass standard leases prevents tied lessees from operating their businesses as profitably as their competitors.

2. Assessment of the price differential

- 68 The applicant criticises, first, the Commission's definition of the price differential and, second, the definition of the reference group used to measure that differential.

(a) Definition of the price differential

- 69 The Commission observed, at point 60 of the contested decision, that operators of pubs who are not tied to an undertaking by exclusive beer purchasing obligations can in the United Kingdom obtain discounts on the beer they purchase, whereas operators of tied houses do not have that possibility. On the basis of that finding, it defined the price differential, at point 61 of the contested decision, as the difference between the average discounts in pounds sterling per barrel given by Bass to operators of free houses and the discounts given to tied lessees. Using that definition, it determined that the price differential, which was GBP 19 per barrel in 1990/91, increased progressively to GBP 48 per barrel in 1996/97 (point 108 of the contested decision, Table 3).

— Arguments of the parties

70
to
73 [...]]

— Findings of the Court

- 74 The applicant's argument assumes that it is relevant to assess, from the point of view of the condition of improvement in distribution, whether the system of Bass standard leases does not, for structural reasons, allow tied lessees to enjoy equivalent profitability to that of their competitors.
- 75 However, it was shown above that it was not necessary to carry out that assessment and that further, apart from the case of deliberate price discrimination which was duly analysed by the Commission, there were no sufficient reasons for assessing the only question which might have been relevant, but was a different one, namely whether the system of Bass standard leases reduced the profitability of Bass tied houses so much that their capacity of distributing beer was seriously affected.
- 76 It follows that the Commission has not been shown to have made a manifest error of assessment by failing to assess the difference between the average price at which beer is available on the open market generally and the price at which beer is sold by Bass to its tied lessees.
- 77 It should be added that the applicant's assertion as to the need to compare the amount of discount available generally on the open market, said to have been of the order of GBP 37.5 per barrel in 1990/91 and GBP 65 per barrel in 1997/98, with the price differential found by the Commission in the contested decision (point 108, Table 3), in particular the figures of GBP 19 per barrel for 1990/91 and GBP 48 per barrel for 1996/97, the most recent trading year mentioned in the contested decision, is not material. Apart from the fact that that assertion is not solidly documented, it comes up against the fact that the Commission recognised, at point 62 of the contested decision, that there are larger discounts than those it

used, which are averages. Moreover, the price differential, as defined at point 60 of the contested decision, is the difference between the discounts given by Bass to individual free house operators and those given to its tied lessees, whereas the figures put forward by the applicant relate to a discount calculated on the basis of the sales of the various breweries present in the market.

(b) Determination of the reference group

- 78 The Commission stated, at point 178 of the contested decision, that discounts are granted to all operators in the United Kingdom on-trade drinks market who have not concluded contracts with an exclusive purchasing obligation and who obtain supplies from Bass, namely wholesalers, pub companies, other breweries and individual free house operators. Moreover, the discounts granted to wholesalers, the brewery's own managed houses, pub companies and other breweries are on average higher than those granted to individual free house operators.
- 79 However, in assessing those discounts in the context of the comparison with the position of Bass tied lessees, it took into account only those granted to individual free house operators. It justified that restriction of the scope of the comparison by reference to Article 14(c)(2) of Regulation No 1984/83, which provides that the Commission may withdraw the benefit of the application of that regulation if it finds, in a particular case, that an agreement exempted under the regulation nevertheless has effects incompatible with the conditions of Article 81(3) EC, in particular where the supplier without any objectively justified reason applies to a reseller bound by the exclusive purchasing agreement prices which are less favourable than those he applies to other resellers 'at the same level of distribution'.

80 The Commission observed, at point 180 of the contested decision, that, of the various categories of competitors of tied lessees mentioned above, only individual free house operators are resellers at the same level of distribution as tied lessees, in other words at retail level, and buy their beer on market terms directly from Bass. Free house operators were therefore regarded by the Commission as the reference group.

— Arguments of the parties

81
to
82 ...

— Findings of the Court

83 It was observed in paragraph 61 above that the Commission was right to refer, in the context of examining the possibility of granting an individual exemption, to the framework of analysis provided by Regulation No 1984/83. Article 14(c)(2) of Regulation No 1984/83 refers to the case, relevant here, of a supplier who without any objectively justified reason applies to a reseller bound by the exclusive purchasing agreement prices which are less favourable than those he charges other resellers. That provision specifies that the other resellers are those who are at the same level of distribution.

84 In the present case, individual free house operators, who constitute the reference group used, are the only operators at the same level of distribution as Bass tied lessees, so that a reliable comparison with the latter may be made.

- 85 It is common ground that the discounts given by Bass are larger if the quantity of beer purchased is larger. From that point of view, only individual free house operators are in a comparable situation to Bass tied lessees, since they, like the latter, are retailers who obtain supplies individually from Bass. By contrast, the supply of beer produced by Bass to pubs operated by pub companies or other breweries is done collectively for the entire pub chain or brewery. It follows that the quantities of beer thus ordered are much larger than those ordered by independent free house operators, and that the price discounts given by Bass on those collective orders are consequently higher than those given on orders from individual free house operators.
- 86 It follows that the Commission has not been shown to have made a manifest error of assessment by excluding from the reference group establishments other than individual free houses, in particular pubs operated by pub companies or breweries.

3. Calculation of the rent subsidy

- 87 The Commission observed in the contested decision, at points 63 to 74, that the rent subsidy results from a comparison between the rent paid for a tied house and the equivalent costs incurred by a free house operator. If, following that comparison, those costs are higher than the rent paid by tied lessees, that rent constitutes a benefit for the lessees such as to compensate for the price differential referred to above.
- 88 The Commission reviewed the various methods of determining the rent subsidy and in the end chose that of calculating the difference between the rent/turnover

ratio for tied houses and the rent/turnover ratio for free houses. It made the following assumptions:

— for non-tied houses, the rent was assumed to be 15% of turnover;

— for tied houses, the rent was equal to 11.36% of turnover.

89 On that basis, it calculated the rent subsidy as follows: after determining the figure for 15% of the turnover of the tied houses, it subtracted from that figure 11.36% of the turnover in question, and then divided the resulting figure by the total number of barrels sold by Bass to its tied houses.

90 The results of that calculation are given in Table 3 at point 108 of the contested decision. It thus appears that the rent subsidy was GBP 16 per barrel in 1990/91, GBP 15 per barrel in 1991/92, GBP 19 per barrel in 1992/93, GBP 23 per barrel in 1993/94, GBP 22 per barrel in 1994/95, GBP 22 per barrel in 1995/96 and GBP 24 per barrel in 1996/97. The rent subsidy is the largest countervailing benefit.

91 The applicant criticises the Commission's calculation of the rent subsidy as regards, first, the calculation method used, namely the rent/turnover method, and, second, the implementation of that method, namely the assessment of the rent of free houses as 15% of turnover.

(a) The complaint as to the choice of the rent/turnover method

— Arguments of the parties

92
to
95 ...

— Findings of the Court

- 96 The applicant's criticism of the method of assessing the rent subsidy adopted by the Commission in the contested decision and his proposal of another method are based on the premiss that the method to be used, which is applied in the context of analysing the condition of improvement in distribution provided for in Article 81(3) EC, must make it possible to compare the profitability of pubs tied to Bass with that of free houses, that comparison leading to the conclusion that the former have a lower profitability than the latter.
- 97 That argument of the applicant assumes also that it is relevant to assess, from the point of view of the condition of improvement in distribution, whether the system of Bass standard leases prevents, for structural reasons, tied lessees from having equivalent profitability to their competitors.
- 98 It has already been observed that, from the point of view of that condition, it was not relevant to carry out that assessment, and that there also were no sufficient reasons, apart from the case of deliberate price discrimination which was duly

analysed by the Commission, for assessing the only question which might have been relevant, but was different, namely whether the system of Bass standard leases reduced the profitability of Bass tied houses so much that their capacity of distributing beer was seriously affected.

- 99 The applicant's criticism is therefore of no relevance.
- 100 As to the applicant's argument that the alternative method suggested enables a better assessment to be made of the profitability of pubs tied to Bass because it takes into account the cost structure of those houses, it must be observed that the applicant has not averred, and *a fortiori* has not shown, that the cost structure of tied houses differs from that of free houses in matters other than the price differential and countervailing benefits found. Those matters were taken into account by the Commission.
- 101 It should be added that the applicant has not demonstrated what is the cost structure of the pub he operates.
- 102 Moreover, the method put forward by the applicant is more difficult to use than that adopted by the Commission, which correctly stated in this respect, at point 71 of the contested decision, that the advantage of its method over the applicant's is that it involves fewer estimates of variable parameters. The method suggested by the applicant is based on differences in the average rent/net profit ratio. It thus requires in particular an assessment of the net profit, which in turn requires an assessment not only of turnover but also of costs, which must be subtracted from turnover to determine the net profit. By contrast, the method adopted by the Commission, based on a rent/turnover ratio, does not require a calculation of costs and may thus be applied more simply and certainly than that proposed by the applicant.

103 The applicant's argument must therefore be rejected.

(b) The complaint as to the assessment of the rent of free houses as 15% of turnover

— Arguments of the parties

104
to
113 ...

— Findings of the Court

114 On the assumption that the method for calculating the rent subsidy on the basis of the rent/turnover ratio may be accepted, the applicant observes that the Commission used a reference rent for free houses equal to 15% of turnover. He says that that estimate could relate only to successful pubs and, from the point of view of determining the open market rent, there is no common measure between a flourishing pub and one performing less well.

115 On this point, it must be observed that the fact that some public houses perform less well than others may be attributable essentially to the publican's inability to bring about the performance the pub could reasonably achieve, or to structural

reasons independent of the publican such as the fact that the pub is located in a poor district or is of small size.

- 116 The first of those circumstances underlying lack of performance does not influence the assessment of the pub's rent and the consequences to be inferred from this from the point of view of the application of Article 81(3) EC. Since the rent of a tied house is fixed in the present case by reference to the performance achievable by a competent lessee (point 69 of the contested decision), the Commission rightly observes that, if an establishment is unprofitable because the publican does not come up to that reasonable standard, there is no reason to draw inferences as to the assessment of the rent which that pub might command on the free market, and hence of the rent subsidy.
- 117 The second of those circumstances underlying lack of performance influences the assessment of the rent. As the fixing of the rent depends on the performance of the lessee, the greater the performance, the higher the rent is. Those differences of performance between pubs are, however, *prima facie* incorporated by the method used by the Commission, so that, from the point of view of determining the rent, less successful pubs are comparable to more flourishing ones. The Commission considers that the rent of a free house is equivalent to 15% of its turnover. It follows that the greater the turnover, the higher the nominal amount of the rent. The nominal rent of a less well performing pub is therefore lower than that of a more successful pub. In this system, the ratio between the turnover and the rent remains fixed, however, whatever the level of turnover.
- 118 The applicant submits, however, that that ratio must not remain fixed and must change according to the amount of turnover. The assessment of a rent at 15% of turnover, as done by the Commission, applies only to very well performing pubs, which excludes Bass tied houses.

119 He adduces two arguments on this point.

120 As regards the first argument, he refers to the Scottish and Newcastle decision, in which the Commission, following reasoning similar to that applied in the contested decision, granted an individual exemption to the standard leases of the United Kingdom brewery Scottish and Newcastle. In the decision concerning that brewery, the Commission likewise calculated a rent subsidy, taking for that purpose a rent equal to 15% of turnover for free houses, as in the contested decision.

121 It justified that estimate by stating in particular, at point 71 of the Scottish and Newcastle decision, that that brewery had informed it by letter of 22 April 1998 that during that year it had released some 184 pubs from the tie within the space of six weeks in order to comply with the provisions of the Beer Orders enacted by the United Kingdom authorities, that having entailed negotiations for the purpose of determining new rents. The Commission found that the average rent increase following those negotiations had been about 18%, compared to the rent previously applicable to the tied houses, so that the rent/turnover ratio was of the order of 14.6%. It added that the brewery considered that if there had been more time for negotiations, the rent would have been higher. In the same decision, at point 65, it calculated the rent/turnover ratio of Scottish and Newcastle tied houses at 12.59%.

122 The applicant notes, first, that the turnover of Scottish and Newcastle houses is greater than that of Bass tied houses and, second, that the rent subsidy for the former was only about 2%, that is, the difference between 14.6% and 12.59%. He deduces from this that the subsidy was less than that found in the contested

decision for Bass tied houses, namely 3.64%, the difference between 15% and 11.36%. He concludes that it is improbable that Bass tied houses, whose turnover is lower than that of Scottish and Newcastle houses, should be allocated a larger rent subsidy than that fixed for the latter brewery's tied houses.

- 123 On this point, it must be observed that the example cited by the applicant has the advantage of enabling a comparison to be made, concerning the same pubs, between the rent payable when they were tied houses and that payable when they had become free of tie, the rents having been negotiated under free market conditions. The example confirms the existence of a rent subsidy for the tied houses.
- 124 It also confirms, at first sight, the correctness of the Commission's conclusion in the Scottish and Newcastle decision and in the contested decision that an estimate of the rent negotiated on the open market at 15% of turnover should be used. It should be observed here that the Commission, despite the fact that the rent of the pubs released from the tie by Scottish and Newcastle represented 14.6% of their turnover, took a rent/turnover ratio of 15%. It stated, at point 71 of the Scottish and Newcastle decision, that the level of rents could have been higher if the negotiating period, which as a result of the specific circumstances had been extremely limited, had been longer, and it derived that ratio from other information it had obtained.
- 125 The appropriateness of the Commission's adoption in the contested decision of the rent/turnover ratio of 15% for Bass tied houses is not called into question by the mere fact that those pubs perform less well than those of Scottish and

Newcastle. On the basis of the ratio in question, that less good performance, in the form of a lower turnover, is reflected in a lower nominal rent. The method used by the Commission takes account of variations in turnover. On the other hand, the difference in performance between Bass and Scottish and Newcastle tied houses does not in itself justify, besides a variation in the nominal amount of rent, a change of the ratio between the turnover and the rent.

126 The applicant's argument is therefore relevant only on the basis of the premiss he advances, namely that pubs with a lower turnover cannot be compared to pubs which perform better and that their rent/turnover ratio is lower. However, the argument produces nothing to show that that premiss is well founded.

127 The first argument is thus irrelevant and must therefore be rejected.

128 As regards the second argument, the applicant refers to the reports of an accountant, who states that assessing the rent at 15% of turnover is realistic only for pubs with a very high turnover. A rent calculated in that way is, he maintains, equivalent, for a pub with a high turnover corresponding to sales of 375 barrels of beer a year, to 54% of net profit, a level which corresponds substantially to the alternative criterion proposed by the applicant for calculating the rent. On the other hand, according to the applicant, for a pub with an average turnover corresponding to sales of 325 barrels a year, the rent already represents 72% of net profit, and for a pub with a low turnover, corresponding for example to sales of 275 barrels a year, the rent thus assessed is equivalent to as much as 108% of net profit. The rent/turnover ratio used of 15% thus applies, according to the applicant, only to pubs with a very high turnover, and not to those which, like the Bass tied houses, have only a low turnover.

- 129 That position is based on an estimate of the profit of a particular public house achieving a specified turnover. It thus assumes a delicate and complex assessment of the costs which have to be subtracted from the turnover to determine the profit.
- 130 On this point, it must be observed that the accountant produced two reports, the first of which was submitted in the administrative procedure and the second was submitted together with the application (reports of 1 March 1998 and 8 October 1999). There are substantial unexplained inconsistencies between the reports, showing the difficulty of carrying out the assessments mentioned above.
- 131 Thus in the first report the expert assesses at GBP 94 000 the gross profit of a pub with a turnover corresponding to annual sales of 260 barrels of beer. In the second report he assesses at GBP 87 700, in other words a lower figure than that in the first report, the gross profit of a pub with a turnover corresponding to sales of 275 barrels of beer a year (the figure of GBP 87 700 derives from subtracting the costs of sale (GBP 89 700) from the sales (GBP 177 400)). Similarly, in the first report, the gross profit of a pub with a turnover corresponding to sales of 360 barrels of beer a year is estimated at GBP 134 000, whereas in the second report that of a pub with a higher turnover corresponding, for example, to sales of 375 barrels a year is estimated at a lower figure, GBP 119 500, that figure being obtained in the same way as the one indicated above.
- 132 Moreover, in the second report, the expert distinguishes, in assessing costs, between those regarded as fixed whatever the turnover of the pub, estimated at

GBP 50 000, and those which vary according to the amount of the pub's turnover, estimated at GBP 8 900 for a pub with a turnover corresponding to sales of 275 barrels of beer a year and GBP 12 100 for a pub with a turnover corresponding to sales of 375 barrels a year.

133 That assessment raises questions as to whether proper account has been taken of staff costs. In the first report, those costs were estimated at GBP 24 500 for a pub with a turnover corresponding to sales of 310 barrels of beer a year. In the same way as in the second report, the costs varying according to the amount of turnover were assessed as being in the range of GBP 8 900 to GBP 12 100 and fixed costs at GBP 50 000. Staff costs are included under fixed costs in the second report. The Commission rightly points out that it does not appear realistic to consider that staff costs are the same whatever the size of the pub, whether that pub has a turnover corresponding to annual sales of 275 or 375 barrels, as the second report contemplates.

134 The difficulty of calculating the operating costs of a public house, considered theoretically, is illustrated by the first report, in which the expert lists 31 different types of costs. The delicate nature of that operation is confirmed by the fact that it appears from the report that the calculation of operating costs takes place within a considerable margin of appreciation. According to the expert, those costs may be considered as representing 27.5% to 35% of turnover. It should be observed, on that point, that the higher the proportion chosen for operating costs, the lower the net profit will be. Since the rent is assessed by the expert at 50% of net profit, then the higher the proportion of fixed costs the lower the rent will be deemed to be. That estimate of the rent at a low figure will mean that the rent/turnover ratio will in turn have to be low.

- 135 Those conclusions are illustrated by the fact that the expert states that, other things being equal, a pub with a low turnover corresponding to sales of 260 barrels of beer a year would be regarded as showing a rent/turnover ratio of only 11% if the operating costs were estimated at 35% of turnover. On the other hand, the ratio would be 14.4%, and thus close to the conclusions of the contested decision, if those costs were estimated at 27.5% of turnover.
- 136 The accountant's conclusions are thus based on complex premisses, namely the calculation of the profit and hence the costs generated by operation of a public house, considered theoretically, which in view of their number and complexity do not permit sufficiently definite conclusions, as is confirmed by the inconsistencies mentioned above.
- 137 Those conclusions are not therefore capable of establishing that the Commission made a manifest error of assessment by considering that rents of free houses correspond in general to 15% of turnover. That estimate is moreover based on solid foundations, set out at point 73 of the contested decision. The Commission observed there that it followed from the facts presented to the OFT that 'free houses pay 2 to 3 percentage points more of their turnover in rent than the tied tenants of brewers and that in the free trade rent equivalents amounted to between 14% and 15% of turnover'. It added that this enabled the OFT in its report to base its calculation of the rent subsidy on the difference between the actual rent paid by the tied lessees and the rent of free houses estimated at 14% to 15% of turnover.
- 138 The applicant questions the credibility of the OFT report, referring to a speech made in June 1996 by the OFT's assistant director of legal affairs, in which he said that the OFT had completed its study in three months and was aware that the conclusions of the inquiry were heavily dependent on the nature of the data received and the assumptions made in interpreting the data.

- 139 It must be stated here that, in the context of that speech, the assistant director's comment relates not to the question of assessing the rents of free houses but to the much more general question of assessing the effect on competition of beer supply agreements in view of the existence of price differentials. The comment is thus not in itself capable of casting doubt on the factors taken into consideration by the OFT and the correctness of the calculations it carried out.
- 140 Moreover, the Commission took care, at point 73 of the contested report, to set out other factors confirming the OFT's conclusions. It referred to a letter of Fleurets, chartered surveyors and hotel and licensed property valuers, to Bass of 28 September 1998, stating that rents on new lettings of free houses were often in the range of 15% to 18% of turnover. It also said that that conclusion accorded with estimates given by other experts to other national brewers.
- 141 The applicant attempts to question the relevance of those elements on the ground that it has not been shown that the pubs which were the subject of that assessment are comparable in quality and type to the Bass tied houses which made up the sample used by the Commission, on the basis of which the rent of Bass tied houses was assessed (point 65 of the contested decision).
- 142 That challenge is based on the premiss that only pubs of equivalent performance are comparable and that a rent/turnover ratio of 15% can apply only to successful pubs. However, as stated above, the applicant has not been able to produce convincing evidence in support of that argument.

- 143 It has not therefore been shown that the Commission made a manifest error of assessment by considering that the rent of free houses should be assessed at 15% of turnover.
- 144 It follows that it has also not been shown that the Commission made a manifest error of assessment by omitting to have an expert valuation made of the rent, expressed as a percentage of turnover, which would have been generated by the Bass tied houses it used as a sample if they had been free houses.
- 145 The applicant's argument must therefore be rejected.

4. The assessment of other countervailing benefits

- 146 At points 76 to 108 of the contested decision, the Commission rehearsed and evaluated, in addition to the rent subsidy, other benefits which could compensate for the price differential. These are value added services, investment, repairs, financial support, direct operational support, contribution to set-up and development costs, and promotions.
- 147 The applicant criticises, first, the fact that the Commission took account of benefits which were not based on contractual obligations of Bass and, second, the Commission's assessment of those benefits.

(a) The argument that only benefits provided under a contractual obligation should have been taken into account

— Arguments of the parties

148
to
149 ...

— Findings of the Court

150 The purpose of evaluating the countervailing benefits was to determine whether the improvements of distribution brought about in principle by the standard leases could materialise notwithstanding the existence of price differentials for tied lessees. To that end, a specific comparison had to be made between the position of Bass tied lessees and that of individual free trade operators. It follows that all the benefits received exclusively by tied lessees had to be taken into consideration. In that regard, it was not relevant whether those benefits originated in specific contractual obligations or were provided voluntarily by Bass, once it was certain that they were actually made available only to tied lessees and were quantifiable.

151 The applicant's argument must therefore be rejected.

(b) The assessment of certain countervailing benefits

— Arguments of the parties

152
to
153 ...

— Findings of the Court

154 As regards the admissibility of the submissions relating to the reasoning in the contested decision concerning the value added services, the ‘support franchise’ system and the benefit of promotions, it must be pointed out that under the first paragraph of Article 19 of the EC Statute of the Court of Justice and Article 44(1) of the Rules of Procedure of the Court of First Instance the application initiating the proceedings must contain a summary of the pleas in law relied on. Since that requirement is mandatory, the issue of compliance with it may be raised by the Court of its own motion. The summary of the pleas relied on, it should be pointed out, must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. Similar requirements are called for where a submission is made in support of a plea in law (see, for example, Case T-352/94 *Mo och Domsjö v Commission* [1998] ECR II-1989, paragraph 333). In order to guarantee legal certainty and sound administration of justice it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on are indicated, at least in summary form, coherently and intelligibly in the text of the application itself (see, for example, the order in Case T-145/98 *ADT Projekt v Commission* [2000] ECR II-387, paragraph 66). While the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed to it, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the above provisions, must appear in the application (order in Case T-154/98 *Asia Motor*

France and Others v Commission [1999] ECR II-1703, paragraph 49). Moreover, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (judgment in Case T-84/96 *Cipeke v Commission* [1997] ECR II-2081, paragraph 34).

155 In the present case, the submissions mentioned above were not set out, even briefly, in the body of the application, but were the subject of a general reference to an annexed document. They are therefore inadmissible.

156 As regards the admissibility of the substance concerning direct operational support, which was put forward for the first time at the reply stage, it must be noted that it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the application must state the subject-matter of the proceedings and a summary of the pleas in law relied on, and that the introduction of a new plea in law in the course of proceedings is not allowed unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a plea which constitutes an amplification of a submission previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible (see, for example, Case T-37/89 *Hanning v Parliament* [1990] ECR II-463, paragraph 38). The same applies to a submission made in support of a plea in law.

157 In the present case, the new submission disputing the countervailing benefit constituted by direct operational support, which is moreover presented very briefly, is not based on new matters which have come to light in the course of the procedure. Nor is it an amplification of a submission previously made, expressly or by implication, in the application and closely linked to the application.

158 It must therefore be declared inadmissible.

159 It follows from all the foregoing that the plea must be rejected.

B — *The plea of inadequate statement of reasons*

Arguments of the parties

160
to
162 ...

Findings of the Court

163 In contrast to a plea of manifest error of assessment, which goes to the substantive legality of the contested decision and can be examined by the Community judicature only if it is raised by the applicant, a plea of absence of reasons or inadequacy of the reasons stated goes to an issue of breach of essential procedural requirements within the meaning of Article 230 EC and involves a matter of public policy which must be raised by the Community judicature of its own motion (Case C-265/97 P *VBA v Florimex and Others* [2000] ECR I-2061, paragraph 114).

164 The reasoning required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Community judicature to exercise its power of review (Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 96).

165 The requirement to state reasons must be assessed in relation to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case T-198/98 *Micro Leader v Commission* [1999] ECR II-3989, paragraph 40). It is not necessary for the reasoning to go into every relevant point of fact and law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Germany v Commission*, paragraph 97).

166 In particular, the Commission cannot be required to discuss all the matters of fact and law which may have been dealt with during the administrative procedure (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743, paragraph 99). The Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request, and need only set out the facts and legal considerations having decisive importance for the structure of the decision (Case T-5/97 *Industrie des poudres sphériques v Commission* [2000] ECR II-3755, paragraph 199).

167 As regards the alleged inadequate statement of reasons for the rejection, in connection with the assessment of the rent subsidy, of the observations submitted in the administrative procedure by the applicant and the accountant he had instructed, it must be observed that the object of those observations was essentially to criticise the use of the rent/turnover method adopted by the Commission and to advocate the use of the rent/net profit method. In that regard, it is sufficient to observe that the Commission examined, at points 68 to 72 of the contested decision, the merits of observations by an accountant and some lessees who 'consider that, in practice, rents are determined by an expert valuer on the basis of 50% of the divisible balance, namely the net profit' and claim that 'the

assumption that rent is properly based on a percentage of turnover is false, and that the assumption that free-of-tie rent is based on 15% of turnover is therefore also false’.

- 168 In reply to those observations, the Commission disputed that the model put forward by the accountant corresponded to normal practice in the open market. It noted that while, in negotiations on rent or rent review, account is taken of future profits, other factors such as positioning in the market and product range are also considered. It observed that the contractual rent negotiated by the parties is not automatically determined on the basis of 50% of net profit, but may in fact vary from 40% to 60% of net profit. It found that the rent/turnover ratio method had practical advantages over the method proposed by the applicant. Finally, it noted that if the results of the various methods are compared, it is not unusual to find that their results may coincide.
- 169 Having regard to that detailed reasoning, even leaving aside the case-law which states that the Commission is not obliged to discuss every point of fact or law dealt with in the administrative procedure and need only set out the facts and legal considerations having decisive importance for the structure of the decision, it cannot validly be maintained that the Commission failed to take account of the observations of the applicant and the accountant.
- 170 As regards the calculation of the rent subsidy, the applicant submits first that the reasons stated are inadequate with respect to the method chosen for that calculation. In that regard, it must be noted that the Commission, at point 63 of the contested decision, referred to three possible methods of assessing the rent subsidy, that it chose the rent/turnover ratio method because that method had been adopted by the OFT, and that it considered that it could build on the work of the OFT. It then set out, at points 64 to 66 and 73 of the contested decision, the way in which it applied that method, and, at points 67 to 72 of the contested

decision, justified the choice of that method from the point of view of the criticism made by lessees as to the pertinence of the method based on a rent/net profit ratio.

171 In those circumstances, bearing in mind also what has been stated above on the complaint of failure to take into consideration the similar observations made by the applicant in the administrative procedure, it cannot validly be maintained that the Commission did not give sufficient reasons for its choice for calculating the rent subsidy of the method based on the rent/turnover ratio rather than that based on the rent/net profit ratio.

172 The applicant further considers that the Commission did not give adequate reasons, at point 65 of the contested decision, for its assessment of the reference rent of Bass tied houses at 11.36% of turnover. According to the applicant, adequate reasoning on that point would have involved mentioning the total turnover of the houses tied to Bass, the total number of tied houses and the total letting income from all the tied houses.

173 On this point, it must be observed that the Commission stated, at point 65 of the contested decision, that the figure of 11.36% came from internal documents of Bass, mostly compiled in preparation for rent or rent review negotiations, for a random sample of 30 pubs chosen by the Commission. It said that those documents included individual estimates of the turnover of each pub, from which the average rent/turnover ratio was calculated. The Commission thereby indicated, summarily but in a clear and consistent manner, the criteria on the basis of which the figure of 11.36% was reached. The reasoning in question is thus adequate.

- 174 In so far as the submission, in support of the plea of inadequate statement of reasons, seeks to dispute the correctness of the grounds of the contested decision, it is irrelevant. The absence or inadequacy of a statement of reasons constitutes a plea of breach of essential procedural requirements, and as such is distinct from a plea of incorrectness of the grounds of the decision, which is reviewed in the context of the question whether a decision is well founded (Case T-266/97 *Vlaamse Televisie Maatschappij v Commission* [1999] ECR II-2329, paragraph 144).
- 175 Since none of the submissions in support of the plea of inadequate statement of reasons is well founded, that plea must be rejected.
- 176 It follows that the application must be dismissed in its entirety.

Costs

- 177 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, he must be ordered to pay the costs as applied for by the defendant.
- 178 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the intervener shall bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. Dismisses the application;
2. Orders the applicant to bear his own costs and pay those of the Commission;
3. Orders the intervener to bear its own costs.

Azizi

Lenaerts

Jaeger

Delivered in open court in Luxembourg on 21 March 2002.

H. Jung

M. Jaeger

Registrar

President

II - 2136

Table of contents

| | |
|--|-----------|
| Facts of the dispute | II - 2092 |
| The administrative procedure | II - 2093 |
| Procedure and forms of order sought by the parties | II - 2095 |
| Admissibility | II - 2097 |
| 1. Interest in bringing proceedings | II - 2097 |
| Arguments of the parties | II - 2097 |
| Findings of the Court | II - 2097 |
| 2. The applicant's capacity to bring proceedings | II - 2098 |
| Arguments of the parties | II - 2098 |
| Findings of the Court | II - 2098 |
| Substance | II - 2101 |
| A — The plea of manifest errors of assessment | II - 2101 |
| 1. Failure to take sufficient account of the effect of the standard leases on the profitability of Bass tied houses | II - 2102 |
| Arguments of the parties | II - 2103 |
| Findings of the Court | II - 2104 |
| 2. Assessment of the price differential | II - 2110 |
| (a) Definition of the price differential | II - 2110 |
| — Arguments of the parties | II - 2110 |
| — Findings of the Court | II - 2111 |
| (b) Determination of the reference group | II - 2112 |
| — Arguments of the parties | II - 2113 |
| — Findings of the Court | II - 2113 |
| 3. Calculation of the rent subsidy | II - 2114 |
| (a) The complaint as to the choice of the rent/turnover method | II - 2116 |
| — Arguments of the parties | II - 2116 |
| — Findings of the Court | II - 2116 |

| | |
|---|---------|
| (b) The complaint as to the assessment of the rent of free houses as 15% of turnover | II-2118 |
| — Arguments of the parties | II-2118 |
| — Findings of the Court | II-2118 |
| 4. The assessment of other countervailing benefits | II-2127 |
| (a) The argument that only benefits provided under a contractual obligation should have been taken into account | II-2128 |
| — Arguments of the parties | II-2128 |
| — Findings of the Court | II-2128 |
| (b) The assessment of certain countervailing benefits | II-2129 |
| — Arguments of the parties | II-2129 |
| — Findings of the Court | II-2129 |
| B — The plea of inadequate statement of reasons | II-2131 |
| Arguments of the parties | II-2131 |
| Findings of the Court | II-2131 |
| Costs | II-2135 |