JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
5 July 2001 *

In Case T-25/99,

Colin Arthur Roberts and **Valerie Ann Roberts,** residing in Kempston, United Kingdom, represented by B. Bedford, Barrister, and S. Ferdinand and J. Kelly, Solicitors,

applicants,

v

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

defendant,

APPLICATION for annulment of the Commission's decision of 12 November 1998,

* Language of the case: English.

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 8 February 2001,

gives the following

Judgment

Facts of the dispute

1 In the United Kingdom, alcoholic beverages may be sold by retail for consumption on the premises only by establishments holding a licence. There are currently three categories of licence:

— full on-licences, which authorise the sale of alcoholic beverages to customers who need not be residents or take a meal. These are granted to pubs, hotel bars and wine bars;

— restricted on-licences, which authorise the sale of alcoholic beverages subject to the requirement that the customer is a resident or takes a meal. These are granted to hotels and restaurants;

— club licences, which authorise the sale of alcoholic beverages only to customers who are members of the club in question.

2 The majority of establishments in the United Kingdom selling alcoholic beverages for consumption on the premises belong or are tied to a brewery, which is thereby assured of an outlet for the sale of its beer. There are essentially three ways in which such establishments are operated:

— the brewery owns the establishment, which is managed by one of its employees (tied managed public houses);

— the brewery owns the establishment and leases it to an operator who undertakes, besides paying rent, to comply with an obligation to buy beer produced by the brewery (tied tenanted public houses);

— the brewery does not own the establishment, but creates a tie by granting a loan on favourable terms to the owner, who in return accepts *inter alia* an obligation to buy that brewery's beer (loan-tied houses).

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

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

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

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

7 In that context, on 23 May 1997, they lodged a complaint under Article 3(2) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), in which they claimed that the lease used by Greene King was contrary to Article 85(1) of the Treaty.

8 On 7 November 1997 the Commission, pursuant to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), sent the applicants a letter ('the Article 6 letter') informing them that the information it had gathered did not justify upholding the complaint, stating the reasons for that conclusion, and fixing a time-limit within which they could submit any comments in writing.

9 By its decision of 12 November 1998 ('the contested decision'), it rejected the complaint on the ground that the standard lease used by Greene King did not fall within the scope of Article 85(1) of the Treaty. In reply to the applicants' allegation in their observations on the Article 6 letter that there was an agreement on prices between the United Kingdom breweries, the Commission stated as an initial reaction that an assessment of the applicants' arguments did not allow the conclusion that such an agreement existed.

Procedure and forms of order sought by the parties

10 By application lodged at the Registry of the Court of First Instance on 22 January 1999, Colin Arthur Roberts and Valerie Ann Roberts brought the present action.

11 By order of 20 October 1999, the President of the Third Chamber of the Court of First Instance granted the applicants legal aid.

12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. As a measure of organisation of the procedure, it requested the Commission to give written answers to certain questions; this request was duly complied with.

13 The Court heard oral argument from the parties and their answers to its questions at the hearing on 8 February 2001.

14 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

15 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

The law

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

A — *Definition of the relevant market*

16 In point 60 of the contested decision, the Commission defined the relevant product market as that of the distribution of beer in establishments selling alcoholic beverages for consumption on the premises. It referred in particular to paragraph 16 of the judgment in Case C-234/89 *Delimitis* [1991] ECR I-935, where the Court of Justice made the following observations on beer supply agreements:

'The relevant market is primarily defined on the basis of the nature of the economic activity in question, in this case the sale of beer. Beer is sold through both retail channels and premises for the sale and consumption of drinks. From the consumer's point of view, the latter sector, comprising in particular public houses and restaurants, may be distinguished from the retail sector on the grounds that the sale of beer in public houses does not solely consist of the purchase of a product but is also linked with the provision of services, and that beer consumption in public houses is not essentially dependent on economic

considerations. The specific nature of the public house trade is borne out by the fact that the breweries organise specific distribution systems for this sector which require special installations, and that the prices charged in that sector are generally higher than retail prices.'

Summary of the arguments of the parties

17 The applicants submit that the Commission's definition of the market is seriously wrong in law and inadequately reasoned.

18 They submit that the relevant market concerns pubs alone, in other words only one of the kinds of establishment with a full on-licence.

19 They support that argument by submitting, first, that the *Delimitis* judgment relied on by the Commission in the contested decision is not relevant to deciding the point. It merely confirmed the fact, which was in dispute in that case but not in the present one, that the market of establishments selling alcoholic beverages for consumption on the premises is distinct from the retail market.

20 They argue, second, that consumers distinguish between pubs and clubs. They refer to the fact, noted by the Commission in point 59 of the contested decision, that the price of beer in clubs is only 82% to 83% of that charged in pubs, so that the price difference is of the order of 17% to 18%. They also rely on the

Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), point 17 of which states:

'The question to be answered is whether... customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase in the products and areas being considered.'

21 They observe that, despite the price difference between pubs and clubs, beer consumption in clubs has not increased over that in pubs. They therefore conclude that there are two distinct product markets.

22 They submit, third, that breweries distinguish pubs from other establishments selling alcoholic beverages for consumption on the premises. In support of that assertion, they refer to the annual report of Greene King for 1995/96, in which such a distinction is made, and to the *Pub Industry Handbook* 1997, published by the *Publican* newspaper, a trade publication which provides information solely on pubs, to the exclusion of hotels, wine bars, restaurants and clubs.

23 They submit, fourth, that Section 1(2) of the 1989 Order excludes from its scope establishments with restricted on-licences. The reason for that exclusion is that such establishments represent only an insignificant instrument of the power of the national breweries to close the market. Those establishments' share of the total volume of beer sales represents much less than 10%, as the Commission itself recognised in point 61 of the contested decision. It was therefore unnecessary to take it into account in the definition of the market.

24 They state, fifth, that in another case, concerning the national brewery Whitbread, the Commission recently assessed the market in the way they propose in the present case. They refer here to the notice pursuant to Article 19(3) of Regulation No 17 in Case No IV/35.079/F3 — Whitbread (OJ 1997 C 294, p. 2, 'the Whitbread notice'), in particular point 3, in which the Commission stated that the '1 970 outlets [leased by Whitbread] account for 2.4% of the full on-licensed premises in the [United Kingdom]'.

25 The Commission observes that the question raised by the complaint is the same as that which was before the Court of Justice in the *Delimitis* case, and that the contested decision is based on the criteria set out in that judgment, which are material in the present case. The applicants' arguments against that conclusion are unfounded.

Findings of the Court

26 To establish whether the definition of the market adopted by the Commission in point 60 of the contested decision is correct, it should be observed, at the outset, that delimitation of the relevant market is essential in order to analyse the effects on competition of beer supply agreements with an exclusive purchasing obligation, and in particular to analyse the opportunities available to new domestic and foreign competitors to establish themselves in the market of the consumption of beer or to increase their market shares (see *Delimitis*, paragraphs 15 and 16, Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraph 60, and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 39).

27 The Commission's delimitation of the relevant market in the contested decision follows that used by the Court of Justice in *Delimitis*. In that case, the Court *inter*

alia had to rule, in the context of a dispute between a tenant of licensed premises and a German brewery, on the compatibility of beer supply agreements with Article 85(1) of the Treaty. It concluded that the reference market was that for the distribution of beer in premises for the sale and consumption of drinks, which could be distinguished from the retail sector and comprised in particular public houses and restaurants (*Delimitis*, paragraph 17) and thus extended to all establishments selling alcoholic beverages for consumption on the premises.

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

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

30 Establishments selling alcoholic beverages for consumption on the premises share a common feature, in the United Kingdom as in Germany: from the consumer's point of view, sales in those establishments are associated with the provision of services and the consumption of beer does not depend essentially on economic

considerations, and, from the breweries' point of view, distribution is organised by means of specific systems for the sector and the prices charged are generally higher than retail prices.

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

32 Those common features, which are material for the definition of the relevant market, apply without distinction to all establishments selling alcoholic beverages for consumption on the premises, notwithstanding the fact that these establishments present quite substantial differences as regards the environment in which sales are made, the nature of the associated services, and even in certain cases the prices charged.

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

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

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

36 The applicants submit, first, that the *Delimitis* judgment did no more than confirm the fact, which was not in dispute in that case, that the market of establishments selling alcoholic beverages for consumption on the premises is distinct from the retail market. It must be observed, on this point, that in the context of the *Delimitis* case — a reference for a preliminary ruling on interpretation — the defendant in the main proceedings did indeed submit that sales of beer by supermarkets and other retailers should be included in the relevant market (see the Report for the Hearing in *Delimitis*, at p. I-945). However, it does not follow that the Court of Justice's definition of the relevant market in that case is material only as a refutation of that argument, which was moreover not as such the subject of a question referred by the national court. The Court of Justice explained that that definition of the market was intended, in accordance with its judgment in Case 23/67 *Brasserie De Haecht* [1967] ECR 407, to take into consideration the economic and legal context of the beer supply agreement (*Delimitis*, paragraph 14) and constituted the premiss of the analysis of the effects of such an agreement, taken together with other agreements of the same type, on the opportunities of national competitors or those from other Member States to gain access to the market for beer consumption (*Delimitis*, paragraph 15). Its approach was guided by a single criterion, namely the nature

of the economic activity in question, in this case the sale of beer. The definition of the market thus addressed much wider considerations than ascertaining whether the relevant market also included the retail sector.

37 Second, the applicants submit that consumers distinguish between pubs and clubs, from which they deduce that clubs do not belong to the same market as pubs. They rely on the fact, mentioned by the Commission in point 59 of the contested decision, that the price of beer in clubs represented (in December 1994) 82% to 83% of that charged in pubs. They set that fact against the Commission Notice on the definition of relevant market for the purposes of Community competition law, which states that the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer (point 15). The Commission gives as an example of a criterion which can provide indications as to the evidence that is relevant in defining markets the effect which small, permanent changes in relative prices might have on demand substitution (point 15). The Commission observes in the Notice that the question is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a small (in the range 5% to 10%) but permanent relative price increase in the products being considered in the areas concerned. If the substitution is enough to make a price increase unprofitable because of the resulting loss of sales, the substitute products are included in the relevant market (point 17).

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

39 It should be noted that the fact that consumers distinguish between several kinds of establishments selling alcoholic beverages for consumption on the premises is not a ground to consider that each of those kinds of establishment constitutes a

separate market, since all those establishments, both from the consumer's point of view (the purchase of beer is associated with the provision of services and the consumption of beer in those establishments does not depend essentially on economic considerations) and from the breweries' point of view (existence of specific distribution systems and higher sales prices compared to those charged in the retail sector), have features in common which mean that they must be considered as belonging to one single market.

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

41 Third, the applicants submit that pubs constitute a separate market for the breweries. In support of that argument they refer to the annual report of Greene King for 1995/96, which is said to distinguish between the different kinds of establishment selling beer for consumption on the premises, and to the *Pub Industry Handbook* 1997, a trade publication which provides information on pubs only.

42 In response to that point, it must be stated that the Greene King annual report, whose purpose is to inform shareholders of the company's financial results, does indeed list the different distribution channels for beer. However, that listing includes categories such as tied and non-tied establishments which, even in the

applicants' view, do not constitute separate markets. The criterion used in the annual report for differentiating between the various categories of establishment was thus clearly not the definition of separate markets.

43 That the *Pub Industry Handbook* 1997 provides information on pubs alone, to the exclusion of other kinds of establishment selling beer for consumption on the premises, is due to the fact that that publication is addressed essentially to owners and tenants of pubs. That circumstance illustrates the diversity of establishments selling beer for consumption on the premises and the possibility of classifying them in different categories. It does not follow, however, that each of those categories should be regarded as constituting a separate market. As was seen in paragraphs 29 to 34 above, all the establishments in question, regardless of the category they belong to, have features in common which mean that they must be considered as belonging to one single market.

44 That conclusion also counters the applicants' fourth argument, based on the fact that Section 1(2) of the 1989 Order excludes from its scope establishments with restricted licences. Such an exclusion by a provision of national law, the extent of which is moreover not clear, as the Commission rightly observes in point 61 of the contested decision, does not in itself constitute a decisive reason for considering that those establishments, which share with all other on-licensed establishments the common features mentioned in paragraph 30 above, the existence of which is moreover not called into question by that provision, form part of a different market.

45 Fifth, the applicants refer to the Whitbread notice. They submit that in that notice the Commission measured that brewery's market share not, as in the present case, by reference to the total number of establishments with on-licences, but by reference only to establishments holding full on-licences. They support that

argument by citing a passage from point 3 of the notice, in which the Commission states that on-licensed establishments owned by Whitbread and let on permanent leases accounted for 2.4% of establishments with full licences in the United Kingdom.

46 On this point, it must be stated that, contrary to the applicants' suggestion on the basis of a passage from the Whitbread notice, the Commission defined the relevant market in that case in the same way as in the present case, as comprising all establishments holding a licence for the sale of alcoholic beverages for consumption on the premises.

47 That conclusion rests, first, on the notice itself. In points 12 and 13, and in Table 1, all establishments selling alcoholic beverages for consumption on the premises are taken into account, with an indication of the number of them in each category of establishment according to the type of licence held and of the amount of beer sold. Moreover, in the same passage from point 3 of the notice on which the applicants rely, the Commission adds that Whitbread's leased establishments purchased from that brewery a barrelage accounting for 1.6% of beer consumption in on-licensed establishments in the United Kingdom. The Commission thus measures Whitbread's market share in terms of the amount of beer purchased and sold by its leased establishments in relation to all establishments with on-licences, whether they hold full licences, restricted licences or club licences.

48 That conclusion is based, second, on Commission Decision 1999/230/EC of 24 February 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/35.079/F3 — Whitbread) (OJ 1999 L 88, p. 26, 'the Whitbread decision'), adopted after the lodging of the application in the present

case and referred to by the parties in the written procedure. In points 95 to 97 of that decision, the Commission adopts a definition of the relevant market which is the same in all respects as that in points 58 to 60 of the contested decision.

49 The applicants' argument, which would moreover show merely inconsistency in the Commission's approach in two distinct but similar cases, not an incorrect definition of the market in the present case, is therefore unfounded.

50 It follows that the applicants are wrong to allege an error of law on the part of the Commission in the definition of the relevant market and an inadequate statement of reasons.

51 It should be added that the effect of the plea is very limited. Even if the reference market had to be defined in the manner suggested by the applicants, Greene King's market share, expressed according to the most important parameter, the amount of beer sold, which is 1.3% on the basis of the Commission's definition of the market, would rise only to 1.86% using the definition of the relevant market proposed by the applicants. It would thus still be very small. The expert instructed by the applicants, Professor M. Waterson, moreover acknowledges that the definition of the market proposed by the applicants would have only a limited effect on the market share of Greene King (Annex A to the application, p. 99).

52 This plea in law must accordingly be rejected.

B — *Contribution of Greene King's network of agreements to foreclosure of the market*

53 In the contested decision the Commission considered, on the basis of the criteria set out by the Court of Justice in the *Delimitis* judgment, that the relevant market, namely the market of the distribution of beer in establishments selling alcoholic beverages for consumption on the premises in the United Kingdom, was closed, but that Greene King's network of agreements, consisting of the leases with a purchasing obligation concluded between that brewery and its tenants, did not make a significant contribution to that foreclosure of the market, so that the agreements were not caught by the prohibition in Article 85(1) of the Treaty.

54 The applicants contest that conclusion. They consider that Greene King's network of agreements makes a significant contribution to foreclosure of the market. That finding follows if the contribution of that network is taken into consideration in isolation, and in the alternative if the contribution of the beer supply agreements concluded by Greene King with the national breweries is added.

1. Contribution of Greene King's network of agreements considered in isolation

55 The applicants contest the Commission's assessment of Greene King's share of the relevant market and the duration of Greene King's leases. They also submit that the Commission failed to state why Article 85(1) of the Treaty was not applied despite Greene King's failure to satisfy the criteria of the 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 purchasing agreements (OJ 1984 C 101, p. 2), as amended by Commission Notice 92/C 121/02 (OJ 1992 C 121, p. 2) ('the notice on the regulations').

(a) Greene King's share of the relevant market

56 In the contested decision the Commission concluded, first, that Greene King's market share in terms of the number of establishments with on-licences was 0.7%. It noted that in the United Kingdom there were 146 900 such establishments, comprising 83 100 establishments with full licences, 57 000 of which were pubs and the remainder hotel bars and wine bars; 32 300 establishments with restricted licences, consisting of private hotels and restaurants; and 31 500 clubs. It then noted that Greene King owned 1 101 establishments with on-licences, 628 of which were leased to operators obliged to buy beer from the owning brewery. It observed, in paragraph 29 of the Article 6 letter, that as well as those 1 101 establishments there were those which did not belong to Greene King but to operators who had been granted loans by Greene King in return for which they *inter alia* accepted a beer purchasing obligation, of which there were 1 500. It noted that, even including those establishments, Greene King's share of the beer distribution market in the United Kingdom in establishments with on-licences was less than 2% (see footnote 34 to the contested decision).

57 The Commission found, second, in point 102 of the contested decision, that the beer sold by all Greene King's establishments, that is, managed and tenanted establishments owned by it and loan-tied establishments, accounted for 1.3% of the volume of beer sold in the United Kingdom in all establishments with on-

licences. It concluded that that market share was much less than the 5% or more held by each of the four national breweries.

Summary of the arguments of the parties

58 The applicants submit that Greene King contributes significantly to closing the market in the United Kingdom. They criticise the Commission's conclusions in the contested decision on the subject of that brewery's market share, which they consider to be larger.

59 As regards, first, Greene King's market share in terms of the number of establishments, the applicants observe that if the relevant product market comprises pubs only, as they claim, the reference figure for the total number of establishments by reference to which the market share should be calculated is not 146 900 but 57 000.

60 They consider, next, that the number of establishments belonging to Greene King was not 1 101, as the Commission stated in the contested decision, but 1 133, as appears from point 27 of the Article 6 letter.

61 They consider that the 1 500 establishments loan-tied to Greene King should be added to those 1 133 establishments owned by it, so that the reference figure is 2 633 establishments.

62 They conclude that Greene King's market share was not 0.7%, as the Commission asserts, but 4.6%.

63 As regards, second, Greene King's market share in terms of the volume of beer sold, the applicants consider that that share, calculated on the basis of their definition of the relevant product market, that is, by reference to the volumes of beer sold in pubs only, amounted to 1.86%.

64 The Commission submits that, whatever the analysis or presentation of the facts, Greene King alone cannot be considered to make a significant contribution to foreclosure of the market.

Findings of the Court

65 The calculation of Greene King's market share proposed by the applicants differs from the Commission's calculation in the contested decision on three points: first, the definition of the reference market, which should in the applicant's opinion comprise pubs only and not, as the Commission considers, all establishments with on-licences; second, the determination of the number of establishments owned by Greene King, assessed by the applicants at 1 133, rather than 1 101 as in the contested decision; third, the total number of establishments which should be taken into account in determining the market share, the applicants considering that in addition to those owned by Greene King the loan-tied establishments, which they estimate at 1 500, should be included.

66 First, as regards the definition of the reference market proposed by the applicants, which is the principal reason for the divergence between them and the Commission with respect to the calculation of Greene King's market share, it was found above (paragraphs 16 to 52) that the Commission was entitled to consider that all establishments with on-licences formed part of the relevant market. The applicants' argument must therefore be rejected.

67 Second, as regards the assessment of the number of establishments owned by Greene King, the figure put forward by the applicants is based on the wording of the Article 6 letter, in point 27 of which the Commission stated that on 4 May 1997 Greene King owned 1 133 establishments. That figure differs from the one used by the Commission in the contested decision, in point 33 of which it states that on 6 July 1998 the number of establishments in question was 1 101. The divergence between the applicants and the Commission is thus due to the different dates of assessment, the Commission having preferred to update at the time of drawing up the decision the figures it had used earlier in its Article 6 letter. The applicants, moreover, do not challenge the correctness of those figures.

68 In any event, the difference, which is only 32, is clearly not capable of having a decisive influence on the assessment of Greene King's market share. The argument must therefore be rejected.

69 Third, as regards the argument that loan-tied establishments should be included in addition to those owned by Greene King, the Commission did in fact take that approach into account in the contested decision. It states in footnote 34 of the decision that, even if that argument is accepted, Greene King's market share in terms of the number of establishments is less than 2%, and therefore negligible, that market share being calculated in relation to all establishments holding on-

licences. Moreover, the effect of this approach on the market share in terms of the volume of beer sold is also slight. As noted in paragraph 51 above, that market share, even if calculated with regard to the applicants' three premisses, was only 1.86%. Finally, the applicants' expert Professor Waterson states in his observations of 8 July 1997 (Annex A to the application, p. 2, point 1) that he is not convinced that Greene King's loan-tied establishments constitute a significant factor in assessing the contribution of the Greene King network of agreements to foreclosure of the market. The average amount of the loans is not large and it would probably not be too difficult for a publican to obtain a comparable classic commercial loan with no purchasing obligation. The argument must therefore be rejected.

(b) Duration of the leases

70 The Commission states in point 102 of the contested decision that the normal duration of the standard agreements concluded by Greene King, nine years, is considerably shorter than the duration of 20 or more years of other operators' standard leases.

Summary of the arguments of the parties

71 The applicants challenge, first, the assertion that the duration of the standard Greene King agreements is not manifestly excessive compared to the average duration of the agreements normally concluded in the market.

72 They submit, second, that even if that duration is not excessive account should be taken of the fact that the establishments owned by Greene King are, on expiry of the lease, re-let to another operator on the same terms, and so remain 'locked into' the company.

73 In support of this argument, they refer to Commission Decision 1999/474/EC of 16 June 1999 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case IV/35.992/F3 — Scottish and Newcastle) (OJ 1999 L 186, p. 28, 'the Scottish & Newcastle decision'), in which it is stated:

'... all the houses that [Scottish & Newcastle] owns are, in principle, always "locked in" to the company. This is not only the case for the managed house[s], but also the leased houses will after the end of one (short or long-term) lease, be re-let to another operator on a tied basis' (point 124).

74 The Commission states that the extensive information gathered at the time of adoption of the contested decision enabled it to affirm that other breweries owning many more establishments than Greene King customarily conclude leases of 20 years.

75 It considers that the findings in the Scottish & Newcastle decision are not applicable to the present case.

Findings of the Court

76 In order to assess the extent to which the beer supply agreements concluded by a brewery contribute to the cumulative effect of closing off the market produced by all such agreements, the position of the contracting parties in the market must be taken into consideration. The contribution also depends on the duration of the agreements. If it is manifestly excessive in relation to the average duration of agreements generally concluded in the relevant market, the individual agreement falls under the prohibition laid down in Article 85(1) of the Treaty (*Delimitis*, paragraphs 25 and 26, and Case C-214/99 *Neste Markkinointi* [2000] ECR I-11121, paragraph 27). A brewery holding a relatively small share of the market which ties its sales outlets for many years may contribute to foreclosure of the market as significantly as a brewery with a comparatively strong position in the market which regularly frees its outlets at frequent intervals (*Delimitis*, paragraph 26).

77 First, as regards the assessment of the duration of Greene King's standard agreements, it appears from recent decisions of the Commission in cases concerning national breweries, referred to by the parties during the written or oral procedure, that the normal duration of the standard agreements concluded by Greene King, nine years, is not manifestly excessive in relation to the average duration of the beer supply agreements generally concluded in the market. Thus it appears from the Whitbread decision (point 8) that in February 1997 that brewery owned 1 938 establishments let under one of the agreements notified to the Commission, of which 1 643 or 85% of the total were let on 20-year leases, 276 or 14% on five-year leases and 19 or 1% on 'pre-retirement' leases. According to points 8 and 39 of Commission Decision 1999/473/EC of 16 June 1999 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case IV/36.081/F3 — Bass) (OJ 1999 L 186, p. 1), that brewery in March 1997 had

1 186 establishments let on standard leases, which were generally concluded for a duration of 10 years, or even 15 or 20 years in some cases. From the Scottish & Newcastle decision (points 8 and 37) it appears that at the date of its adoption that brewery owned 432 establishments let under agreements concluded, apart from short-term leases, for a duration of 3 to 20 years.

78 Moreover, according to Commission Decision 2000/484/EC of 29 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (Cases IV/36.456/F3 — Inntrepreneur and IV/36.492/F3 — Spring) (OJ 2000 L 195, p. 49, 'the Inntrepreneur decision'), concerning a pub company, that company on 27 March 1998 owned 2 898 establishments, of which 2 286 or 79% of the total were let on long-term leases, mostly of 20 years' duration.

79 It follows that the three of the present four national breweries in the United Kingdom which have recently been the subject of Commission decisions and one of the principal pub companies in the United Kingdom have, to a large extent, concluded leases whose duration is longer than that of the Greene King standard leases, and may even extend to 20 years.

80 The duration of the Greene King agreements is thus not manifestly excessive in terms of the criterion laid down by the Court of Justice in the *Delimitis* judgment.

81 Second, as regards the argument that the establishments belonging to Greene King are, on expiry of the lease, re-let to another operator on the same terms, and so remain 'locked into' the brewery whatever the initial duration provided for by the lease, the Commission rightly observed in its pleadings that this argument is misplaced in the case of establishments which, although not owned by Greene

King, are nevertheless tied to Greene King by a loan agreement. There is no reason to suppose that those establishments will remain tied to the brewery in question once the loan has been repaid, and they account for 40% of Greene King's beer sales (point 29 of the Article 6 letter).

82 In those circumstances, the establishments which may be regarded as 'locked into' Greene King in the sense of the Commission's observation in point 124 of the Scottish & Newcastle decision are those which belong to the brewery and are either managed by the brewery or tied by a lease with a purchasing obligation. It appears from the contested decision (points 33 and 102) that those establishments of Greene King account for only 0.7% of the total number of establishments in the United Kingdom with on-licences.

83 It also appears (point 102) that the volume of beer sold by all Greene King's establishments, that is, those referred to in the preceding paragraph and those tied to it by a loan agreement, represents 1.3% of the volume of 'on-sales' of beer in the United Kingdom. Taking into account that 40% of Greene King's beer sales are effected by its loan-tied establishments, the share of establishments owned by it of the volume of 'on-sales' of beer in the United Kingdom is much less than 1%.

84 By way of comparison, in 1997/98, the reference period closest to that material in the present case, the establishments owned by Scottish & Newcastle accounted for 1.9% of the total number of establishments in the United Kingdom with on-licences, and the volume of beer sold by them accounted for 4.12% of the total volume of 'on-sales' of beer in the United Kingdom (point 123 of the Scottish & Newcastle decision).

85 It follows that the market share of the establishments which may be regarded as 'locked into' Greene King in the sense of the Commission's observation in point 124 of the Scottish & Newcastle decision is much less than 1%, whether that market share is expressed in terms of the number of establishments or — a more significant criterion — of the volume of beer sold. Consequently, since Greene King's market share is so small, there is clearly no occasion to consider that the existence of the 'locking-in' effect is such as to warrant the conclusion that that brewery contributes significantly to foreclosure of the market.

86 The argument must therefore be rejected.

(c) Failure to state reasons

Arguments of the parties

87 The applicants observe that the fact that a brewery cannot rely on the notice on the regulations does not necessarily mean that Article 85 of the Treaty is applicable. They submit that if, as in the present case, the Commission considers that that article does not apply, it must give reasons for this, so that it is possible to know on what basis its decision may be contested. They argue that the Commission did not in the present case state the reasons which justified not applying that article.

88 The Commission submits that the applicants' argument is unfounded, since it took care to specify the reasons why Greene King's network of agreements did not fall within Article 85(1) of the Treaty despite the fact that in the present case the notice on the regulations was not applicable.

Findings of the Court

89 The statement of reasons required by Article 190 of the EC Treaty (now 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).

90 It must also be observed that the notice on the regulations is intended only to define those agreements which, in the Commission's view, do not have an appreciable effect on competition or trade between Member States. It cannot, however, be inferred with certainty that a network of exclusive purchasing agreements is automatically liable to prevent, restrict or distort competition appreciably merely because the thresholds laid down in it are exceeded (*Langnese-Iglo*, paragraph 98).

91 In the present case, the Commission, having found that the notice on the regulations was not applicable (point 99 of the contested decision), made a detailed examination of the specific situation of Greene King (points 100 to 106), in particular that brewery's market share, the duration of the beer supply agreements concluded with its tied publicans and the effect of the supply agreements concluded with national breweries, and set out on the basis of those factors the grounds on which it concluded that Greene King did not contribute significantly to foreclosure of the market.

92 Consequently, in the present case, the Commission adequately stated its reasons for reaching that conclusion, and so made it entirely possible for the applicants

and the Court to ascertain its reasoning. The applicants were thus in a position to assess whether the Commission's decision should be contested, and moreover did so. The Court for its part has been able to review the lawfulness of the contested decision in the light of that reasoning.

93 The argument must therefore be rejected.

2. Effect of the supply agreements concluded by Greene King with the national breweries

94 In the contested decision (points 103 to 106), the Commission rejected the applicants' argument that the Greene King network of agreements falls within Article 85(1) of the Treaty if account is taken of the impact of the beer supply agreements concluded by Greene King with national breweries whose networks of agreements come under the prohibition in that article. It considered that the assessment of the agreements concluded between the brewery acting as a 'wholesaler' and its suppliers (the 'upstream' agreements) had to be differentiated from the assessment of the agreements between the brewery and its publicans (the 'downstream' agreements). The existence of the 'upstream' agreements should not affect the assessment of the network of 'downstream' agreements. That network could not simply be attributed to the network of agreements of the supplying brewery which makes an appreciable contribution to foreclosure of the market. Moreover, taking into account that the supply agreements concluded by Greene King with the national breweries were not very restrictive, the most restrictive of them having only a minimum purchase obligation of less than 20% of the beer sold to the publicans within that brewery's network of agreements, it was clear that that network could not be attributed to the networks of agreements of the national breweries.

95 The applicants submit that the Commission made a manifest error of assessment and also failed to state its reasons.

(a) Manifest error of assessment

Arguments of the parties

96 The applicants submit that Greene King contributes significantly to foreclosure of the market because of its supply agreements with the national breweries. According to the contested decision, it has concluded such agreements with the four national breweries. One of the agreements, with a duration of five years, includes a minimum purchase obligation of nearly 20% of the beer sold wholesale by Greene King. The other three agreements contain restrictive terms concerning stocks, and have a duration of one and a half, three and five years.

97 The applicants deduce from the figures in the contested decision (point 33) that only about 45% of the beer sold in Greene King's tenanted tied houses is brewed by that brewery. They conclude that 55% of the beer sold in those establishments, and probably an equivalent percentage in Greene King's managed and loan-tied houses, is supplied to Greene King by other breweries. In the reply, they amended those figures by reference to the information in the Article 6 letter, and concluded that Greene King's production accounts for only 39% of the beer sold in its tied houses, the remaining 61% being supplied by other breweries.

98 They submit that, in that Greene King has thus committed itself to selling beer supplied by other breweries to the extent of more than half the volume of beer sold through its tied houses, under supply agreements of a comparatively long duration, the establishments tied to Greene King are tied to those breweries as well.

99 They refer on this point, first, to the *Delimitis* judgment, in which the Court of Justice said as follows (paragraph 19):

'In order to assess whether the existence of several beer supply agreements impedes access to the market... it is further necessary to examine the nature and extent of those agreements in their totality, comprising all similar contracts tying a large number of points of sale to several national producers... The effect of those networks of contracts on access to the market depends specifically on the number of outlets thus tied to national producers in relation to the number of public houses which are not so tied, the duration of the commitments entered into, the quantities of beer to which those commitments relate, and on the proportion between those quantities and the quantities sold by free distributors.'

100 They observe, second, that the Commission recognised in the notice on the regulations the principle that a wholesaler's contribution to foreclosure of the market may be assessed by reference to the position of the supplying brewery with which a beer supply agreement has been concluded. That principle is justification for a wholesaler's contribution to foreclosure of the market and that of a single brewery being assessed together, in aggregate, even if the brewery is not the exclusive supplier.

101 They refer, third, to an interpretation of the Commission's position on this point given by Mr Dirk Van Erps, a Commission official in the Directorate-General for Competition, in a speech made in London in June 1997, entitled 'The application of EC competition law to United Kingdom pub contracts', and to a Commission press release in the Inntrepreneur case. They conclude that, prior to the contested decision, the Commission did not distinguish 'upstream' agreements between a wholesaler and its suppliers from 'downstream' agreements between a wholesaler and its licensees.

102 The Commission submits, primarily, that the 'upstream' agreements are not relevant to the assessment of the 'downstream' agreements.

103 It adds, in the alternative, that the 'upstream' agreements in any event diminish Greene King's contribution to the foreclosure effect. Unlike the situation described in the press release on the Inntrepreneur case, Greene King's licensees have a wider choice of brands, and inter-brand competition thus exists within the Greene King tied estate. In so far as Greene King acts as a pub company/wholesaler, it contributes to the opening of the United Kingdom market in beer for consumption on the premises.

Findings of the Court

104 The applicants' arguments are aimed at attributing, for the purposes of the analysis of the applicability of Article 85(1) of the Treaty, the Greene King network of agreements, which, according to the Commission's findings, does not in itself contribute significantly to foreclosure of the market, to the national breweries' networks of agreements, which do contribute significantly to foreclosure.

105 As the Commission rightly stated in point 105 of the contested decision and in points 57 and 58 of the Inntrepreneur decision, to which the parties referred in the oral procedure, for such an attribution two conditions must be satisfied.

106 First, the beer supply agreements concluded between the wholesaling brewery, in this case Greene King, and the supplying breweries, namely the national

breweries — the 'upstream' agreements — may be regarded as forming part of the supplying breweries' networks of agreements if they contain terms which may be analysed as a purchasing obligation (commitments to purchase minimum quantities, stocking obligations or non-competition obligations). It follows that a supply contract which does not contain a purchasing obligation, in whatever form, does not form part of the network of agreements of a supplying brewery, even if it relates to a substantial proportion of the beer sold by the establishments tied to the wholesaling brewery.

107 Next, for not only the 'upstream' agreements but also the agreements concluded between the wholesaling brewery and the establishments tied to it — the 'downstream' agreements — to be attributed to the supplying breweries' networks of agreements, it is also necessary for the agreements between the supplying breweries and the wholesaling brewery to be so restrictive that access to the wholesaling brewery's network of 'downstream' agreements is no longer possible, or at least very difficult, for other breweries in the United Kingdom or elsewhere.

108 If the restrictive effect of the 'upstream' agreements is limited, other breweries are able to conclude supply agreements with the wholesaling brewery and so enter the latter's network of 'downstream' agreements. They are thus in a position to have access to all the establishments in that network without it being necessary to conclude separate agreements with each outlet. The existence of a network of 'downstream' agreements thus constitutes a factor which can promote penetration of the market by other breweries.

109 The Commission was therefore correct to consider that the assessment of the supply agreements between wholesaling breweries and licensees must in principle, subject to what has been stated in paragraphs 106 to 108 above, be distinguished from the assessment of the supply agreements between supplying breweries and wholesaling breweries.

110 It appears from the contested decision (point 32) that Greene King has concluded supply agreements with all the national breweries and with several regional breweries. Of these agreements, only four contain provisions which may be analysed as purchasing obligations. One of the contracts, with a duration of five years, contains a minimum purchasing obligation for less than 20% of the volume of beer sold wholesale by Greene King. The other three agreements contain stocking obligations.

111 Of the supply agreements concluded by Greene King, those which do not contain any purchasing obligation, in whatever form, and consequently may not be regarded as forming part of the supplying breweries' networks of agreements are thus not relevant to the question of the attribution of the Greene King network of agreements to those of the national breweries.

112 The other agreements, that is, the four which contain a term which may be analysed as a purchasing obligation, must be taken into consideration, on the other hand. However, the above attribution presupposes, as stated in paragraph 107 above, that the agreements between the supplying breweries and Greene King are so restrictive that access to the latter's network of 'downstream' agreements is no longer possible, or at least very difficult, for other breweries in the United Kingdom or elsewhere.

113 It must be observed here that the most restrictive purchasing obligation has the consequence that Greene King must purchase from the supplying brewery concerned a minimum amount of beer which is less than 20% of the beer it sells wholesale, so that at least 80% of that beer may come from other supplying breweries. In those circumstances, the purchasing obligations in the four

agreements mentioned above are so little restrictive that access to Greene King's network of 'downstream' agreements is not seriously compromised for other breweries, even taking the cumulative effect of those agreements into account.

114 The Commission was therefore right to conclude in the contested decision (point 106) that Greene King's network of 'downstream' agreements could not be attributed to the supplying breweries which had concluded beer supply agreements with Greene King.

115 The four arguments put forward by the applicants on this point must be rejected.

116 They refer, first, to paragraph 19 of the *Delimitis* judgment, according to which *inter alia* it is necessary, in order to assess whether the existence of several beer supply agreements impedes access to the market, to examine the nature and extent of those agreements in their totality, comprising all similar contracts tying a large number of points of sale to several national producers.

117 It must be stated that paragraph 19 of the *Delimitis* judgment describes the factors to be taken into account in order to ascertain whether the first criterion defined by the Court of Justice for assessing whether a beer supply agreement is compatible with Article 85(1) of the Treaty has been complied with, the purpose of that criterion being to ascertain whether access to the relevant market is difficult. But it was found in the contested decision (point 95) that the market is closed, and that has not been the subject of debate between the parties. The

question which is at the centre of debate is that of compliance with the second criterion defined by the Court in *Delimitis*, which in the present case consists in assessing the extent to which the agreements concluded by Greene King contribute significantly to that foreclosure of the market. The passage cited by the applicants is therefore of no relevance to the present case.

118 The applicants refer, second, to the notice on the regulations, in so far as it states:

'As regards exclusive beer supply agreements in the sense of Article 6, and including Article 8(2) of Regulation (EEC) No 1984/83 which are concluded by wholesalers, the above principles apply *mutatis mutandis* by taking account of the position of the brewery whose beer is the main subject of the agreement in question' (fifth subparagraph of paragraph 40).

119 The applicants deduce that a wholesaler's contribution to foreclosure of the market may be assessed together with that of the brewery supplying the wholesaler.

120 Leaving aside the question of the relevance in the present case of the notice on the regulations, which cannot prejudge the view taken by the Community judicature (paragraph 3 of the notice), it must be stated that the passage does not bear the meaning the applicants wish to give it. It is intended to allow wholesalers to benefit from the notice as if they were breweries, that is, to rely on the thresholds below which the application of Article 85(1) of the Treaty is automatically excluded. The passage in question does not raise the possibility of making a joint assessment of the networks of agreements of the wholesaler and the brewery in

order to determine whether the wholesaler makes a significant contribution to foreclosure of the market.

121 Moreover, as the Commission rightly observes, the application in the present case of the notice on the regulations to the position of Greene King, regarded as a wholesaler, would mean that, in order to assess its position, account would be taken of the position of the brewery whose beer is the principal subject of the agreement in question, in the present case the standard Greene King agreements. But the brewery whose beer is the principal subject of those standard agreements is undeniably Greene King itself, which would therefore be both a brewery and a wholesaler within the meaning of paragraph 40 of the notice. That shows that that provision cannot apply in the present case.

122 The applicants refer, third, to two statements of position of the Commission, from which they claim to deduce that the Commission did not, prior to the contested decision, differentiate between 'upstream' and 'downstream' agreements.

123 They refer to the speech mentioned above, in particular the following passage:

'The current thinking of the Commission is that the crucial question to answer is, yet again, whether or not [the pub companies] contribute significantly to the foreclosure of the market. The criteria, apart from the number of pubs [the pub companies] operate, are the duration and number of their supply agreements with (United Kingdom) brewers. In other words, the higher the number of such contracts, and the shorter their duration, the easier it is for UK and foreign brewers to conclude supply contracts with these pubcos (which give immediate

access to all the pubs operated by the company) and, hence, the more limited their contribution is to foreclosure.'

124 They also refer to a press release of the Commission in the Inntrepreneur case, which said that 'the Commission considers that Article 85(1) [of the Treaty] applies to the leases of the major brewers [of the United Kingdom] and equally to pub companies that are tied to such a brewer'.

125 It must be said that the Commission was right to distinguish, in the contested decision, between the 'upstream' and 'downstream' agreements.

126 The correctness of that distinction cannot in any case be called into question by contrary statements of position which may have been made earlier.

127 The documents cited by the applicants clearly do not constitute conclusive proof of the existence of such statements of position.

128 First, as regards Mr Van Erps's speech, the passage quoted does not contradict the contested decision. It appears from that passage that 'upstream' agreements concluded by pub companies may be a factor imposing the conclusion that those companies' networks of 'downstream' agreements contribute significantly to closure of the market and that the essential question is the extent to which those 'upstream' agreements prevent other breweries from concluding supply agreements with the pub companies. As explained in paragraph 107 above, if these

'upstream' agreements are restrictive to the point of making it impossible, or at least very difficult, for other breweries to have access to the network of 'downstream' agreements of the wholesaling brewery, then that network must be attributed to the network of agreements of the supplying brewery, which *ex hypothesi* contributes significantly to closure of the market. On that condition, the network of 'downstream' agreements is treated in the same way as the network of 'upstream' agreements, and as a result of that attribution is thus likewise regarded as making a significant contribution to foreclosure of the market. However, as stated in paragraphs 105 to 115 above, that condition is not satisfied in the present case.

129 Moreover, the passage cited by the applicants relates not to regional breweries such as Greene King but to pub companies. There was a reference to regional breweries in the speech in question, which noted that 'the general competition policy is that the standard leases of the small and regional UK brewers fall outside the scope of Article 85(1)' of the Treaty.

130 Second, as regards the Commission's press release on the Inntrepreneur case, it must be pointed out that that pub company was at the time tied to a national brewery, Scottish & Newcastle, and the agreement between the two companies contained an obligation for the pub company to buy all the beer required for its network from that national brewery. The position of Inntrepreneur thus corresponded to the case described in paragraphs 106 to 108 above, in which the network of 'downstream' agreements may be attributed to the network of 'upstream' agreements tied to the supplying brewery. That is not, however, the situation of Greene King, which, as found in paragraphs 110 to 114 above, is not tied to a national brewery by such a restrictive agreement.

131 This plea in law is accordingly unfounded.

(b) Failure to state reasons

Summary of the arguments of the parties

132 The applicants criticise the Commission for not giving sufficient detail of the content of the supply agreements concluded between Greene King and the national breweries, in particular their duration and the actual volumes of beer bought under the agreements. They claim that they were consequently unable to determine whether there were sufficient grounds for challenging the Commission's assessment on the point of whether Greene King contributed significantly to foreclosure of the market.

133 The Commission submits that the contested decision gives sufficient reasons. It considers in particular that it was not obliged to specify the quantities of beer bought by Greene King from the national breweries. Although the decision referred to the 'upstream' agreements, the only element to be taken into consideration for assessing their restrictive effect was the volume of beer which had to be purchased in accordance with the purchasing obligations in the agreements, not the volume actually purchased.

Findings of the Court

134 To assess whether Greene King's network of 'downstream' agreements should be attributed to the networks of 'upstream' agreements with the supplying breweries which supply Greene King, account must be taken, as set out in paragraphs 106 to 108 above, only of those supply agreements which contain a purchasing obligation so restrictive that access to Greene King's network of 'downstream' agreements is no longer possible, or at least very difficult, for other breweries.

135 The Commission stated in the contested decision (point 32) that Greene King had concluded supply agreements with all the national breweries and with several regional breweries, that only one of those agreements, with a duration of five years, contained an obligation to purchase minimum quantities relating to less than 20% of the beer sold wholesale by Greene King, and that there were three other agreements with stocking obligations.

136 It thus provided information on the supply agreements which contained terms capable of being analysed as purchasing obligations, and specified the nature and, at least with respect to the more restrictive ones, the precise extent of those purchase obligations and the duration of the agreements. It therefore adequately provided the necessary information for assessing its reasoning in the present case, so enabling the applicants to ascertain the reasons for the contested decision and the court to exercise its power of review, in accordance with the requirements of the case-law cited in paragraph 89 above.

137 The Commission was not required to state the actual quantities of beer bought from the supplying breweries. Attribution of Greene King's network of 'downstream' agreements to the networks of 'upstream' agreements with the supplying breweries is conditional on the existence of very restrictive purchasing obligations on the part of Greene King in the context of its contractual relations with its supplying breweries. The material question is therefore the extent to which Greene King was obliged to take supplies from its supplying breweries, not the extent to which it actually did so. This is because access by other breweries to the Greene King network of 'downstream' agreements is affected, from the point of view of Community competition law, only by the existence and extent of purchasing obligations resting on Greene King in the context of agreements made with certain supplying breweries and preventing it, to the extent of those obligations, from obtaining supplies elsewhere. Access is not affected, on the other hand, by the fact that Greene King buys from such a supplier without being obliged to do so under a contractual purchasing obligation. In the absence of a purchasing obligation, it is free to approach any supplier of its choice and

subsequently buy from other breweries. Consequently, it was not material in the present case to specify the actual quantities of beer bought by Greene King from supplying breweries.

138 This plea in law is therefore unfounded.

II — *Existence of an agreement on prices between the United Kingdom breweries*

139 In the contested decision, the Commission observed that in their comments on the Article 6 letter the applicants accused the breweries of the United Kingdom of operating an agreement on prices with the aim of excluding other breweries from access to the market. As evidence of this, the applicants asserted, first, that none of the regional and national breweries purchased a substantial proportion of its beer from breweries other than the national and regional ones; second, that price increases had taken place at the same time throughout the industry; third, that small or regional breweries and wholesalers did not pass discounts on to their tied publicans; and, fourth, that actual beer prices had risen despite a general fall in demand.

140 After examining the applicants' allegations, the Commission concluded, as an initial reaction, that they did not disclose any indication of the existence of an agreement between Greene King and any other brewery operating in the United Kingdom market for the sale of beer for consumption on the premises.

Summary of the arguments of the parties

141 In the application, the applicants submitted that they had 'complained' of the existence of a horizontal agreement between the United Kingdom breweries aimed at controlling the wholesale price of beer supplied to pubs. They criticised the Commission for closing the file on that complaint without carrying out an investigation, even though there was a Community interest in the complaint. By so doing, it did not seek to balance, or did not properly balance, the significance of the alleged infringement for the functioning of the common market, the likelihood of being able to establish the existence of the infringement, and the scope of the investigation required, as it should have done in order to fulfil, under the best possible conditions, its task of ensuring that Article 85 of the Treaty and Article 86 of the EC Treaty (now Article 82 EC) are complied with.

142 In the reply, they conceded that they had first raised the point not in the complaint but in their comments on the Commission's Article 6 letter. They consider that the point is relevant, in the context of their complaint, to show that Greene King contributes substantially to foreclosure of the on-trade market in the United Kingdom, having regard to its position in the market, the number of its tied houses and its agreements with the national breweries.

143 The Commission observes that the allegation of a horizontal agreement between breweries did not appear in the complaint, but for the first time in the applicants' response to the Commission's Article 6 letter. It considers that even if that allegation may be regarded as also constituting a complaint, which it disputes, the response made on the point in the contested decision constitutes only an initial reaction which is not a decision and cannot therefore be the subject of an action for annulment.

Findings of the Court

144 The applicants' allegation of the existence of a horizontal agreement on prices between national and regional breweries — including Greene King — and pub companies, which was made for the first time during the administrative procedure, was not relevant in the context of the examination of the complaint, the aim of which was to determine whether the Greene King network of agreements contributed significantly to foreclosure of the market and was thus caught by Article 85(1) of the Treaty, having regard to the criteria laid down by the Court of Justice in the *Delimitis* judgment.

145 The allegation was made in the context of a complaint relating to the assessment, following the *Delimitis* criteria, of whether Article 85(1) of the Treaty applied to beer supply agreements, that is, to agreements which are not intended to restrict competition within the meaning of that article but which might at most have the effect of preventing, restricting or distorting it (*Delimitis*, paragraph 13). Yet the allegation complains of an agreement on prices, that is, an agreement intended to restrict competition. It therefore refers to a breach of competition law which is not only much more serious than that which is the subject of the complaint but also completely distinct. The allegation in question, different by its very nature, is thus outside the context of the complaint.

146 It follows that the allegation could at most be regarded as a fresh complaint, different from that which gave rise to the administrative procedure in the context of which it was raised. Even if it may be classified as a complaint, the observations of the Commission in the contested decision that the applicants had

not, as matters stood, provided evidence to show the existence of an agreement may at most, in view of their provisional nature, be regarded as an initial reaction by the Commission, forming part of the first of the three stages of the course of the procedure governed by Article 3(2) of Regulation No 17 and Article 6 of Regulation No 99/63, namely the stage which follows the submission of the complaint and precedes the stages of the notification prescribed in Article 6 of Regulation No 99/63 and of the final decision (judgment in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraphs 45 to 47). Since these preliminary observations form part of the first stage of the procedure, they cannot be classified as acts open to challenge (*Automec*, paragraph 45).

147 This plea in law must therefore be rejected.

Costs

148 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

149 Since the applicants have been unsuccessful and the Commission has asked for costs to be awarded against them, they must be ordered to pay the Commission's costs as well as bearing their own.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicants to pay the costs.**

Azizi Lenaerts Jaeger

Delivered in open court in Luxembourg on 5 July 2001.

H. Jung
Registrar

J. Azizi
President