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

In Case T-131/99,

Michael Hamilton Shaw, residing in Wixford, Alcester, Warwickshire (United Kingdom),

Timothy John Falla, residing in Brighton (United Kingdom),

represented by J.H. Maitland-Walker, Solicitor, with an address for service in Luxembourg,

applicants,

v

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

defendant,

* Language of the case: English.

supported by

Whitbread plc, established in London (United Kingdom), represented by N. Green QC and J. Flynn and M. Lowe, Solicitors, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of 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 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 Whitbread plc ('Whitbread') was at the material time a United Kingdom food, drinks and leisure company. It brewed, marketed and distributed beer and was a wholesaler of other drinks. It owned public houses which it leased or managed, and operated restaurants, hotels, off-licences and leisure clubs.

2 At the end of the trading year to February 1997, Whitbread owned approximately 4 490 public houses with on-licences, 2 170 of which were managed (that is, the operator was an employee of the company), 2 130 let to lessees subject to a beer tie and 190 let to operators free of tie. Of the leased houses, 1 643 were let on 20-year leases, 276 on five-year leases and 19 on 'pre-retirement' leases.

3 Those three kinds of leases are agreements between Whitbread and a lessee by which Whitbread makes a licensed public house together with fixtures and

fittings available to the lessee for the purpose of operating it, in return for payment of a rent and a commitment to buy the beers specified in the lease from Whitbread or a supplier nominated by it and from no other source.

4 The leases thus include an exclusive purchasing obligation and a non-competition obligation.

5 The exclusive purchasing obligation compels the lessee to buy exclusively from Whitbread or its nominee the beers specified in the agreement which the lessee requires for sale in his establishment, with the exception of one cask-conditioned draught beer and, from 1 April 1998, one bottle-conditioned beer. The types of beer to which the exclusive purchasing obligation applies are set out in the schedule to the lease which contains the terms of trading. These types of beer are represented by the brands or denominations on Whitbread's current price list. In practice, the brewery may add, substitute or delete the brands of beer on its price list. The tied lessee may sell another type of beer provided that it is bottled, canned or packaged in other small containers, or in draught form if the sale of that beer on draught is customary or is necessary to satisfy a sufficient demand from the pub's customers.

6 The non-competition obligation prohibits the tied lessee from selling or exposing for sale in his establishment or bringing into the establishment for the purpose of sale any beer which is of the same type as a specified beer but is not supplied by Whitbread or a person nominated by Whitbread, or any other beer unless it is either packaged in bottles, cans or other small containers or is in draught form if the sale of that beer on draught is customary or is necessary to satisfy a sufficient demand from the pub's customers.

Administrative procedure

7 On 24 May 1994 Whitbread notified the three types of leases mentioned above, namely the 20-year lease, the pre-retirement lease and the five-year lease. It sought negative clearance or, failing that, confirmation by the Commission that the leases qualified for the application of Commission Regulation (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 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 for an individual exemption pursuant to Article 85(3) of the EC Treaty (now Article 81(1) EC)), with retroactive effect from the date on which the agreements were concluded.

8 As part of the administrative procedure and pursuant to Article 19(3) 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), the Commission published Notice 97/C 294/02 (OJ 1997 C 294, p. 2). In response to the notice, it received 135 observations from interested third parties, including observations dated 27 October 1997 from a group of lessees of which Mr M.H. Shaw was a member. The group requested the Commission to register its observations as a formal complaint against Whitbread pursuant to Article 3(2) of Regulation No 17.

9 By letter of 16 July 1998, the Commission informed the group of lessees, 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 Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), that it intended to reject their complaint.

10 In those circumstances, the Commission adopted Decision 1999/230/EC of 24 February 1999 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 contested decision'). It decided that the standard leases notified fell within Article 85(1) of the Treaty, but declared that provision inapplicable on the basis of Article 85(3) of the Treaty, with effect from 1 January 1990 to 31 December 2008.

Procedure and forms of order sought by the parties

11 Those were the circumstances in which Mr M.H. Shaw and Mr T.J. Falla, tied lessees who have each concluded with Whitbread a 20-year lease of a public house, which is one of the standard leases referred to in the contested decision, and WPP Luxembourg Appeal Group Ltd, an association of tied lessees who have concluded with Whitbread standard leases referred to in the decision, brought the present action on 27 May 1999.

12 By order of 29 November 1999, the Court of First Instance (Third Chamber) declared the action inadmissible with respect to WPP Luxembourg Appeal Group Ltd.

13 By order of 10 January 2000, the President of the Third Chamber of the Court granted Mr Shaw legal aid.

14 By order of 19 January 2000, the President of the Third Chamber of the Court granted Whitbread leave to intervene in support of the form of order sought by the Commission.

15 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, as measures of organisation of the procedure, asked the parties to reply to various written questions. The parties did so.

16 The parties presented oral argument and answered the oral questions put by the Court at the public hearing on 26 April 2001.

17 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission and Whitbread to pay the costs.

18 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicants to pay the costs.

19 Whitbread supports the form of order sought by the Commission, but also contends that the action for annulment is inadmissible.

Admissibility

20 to 21 ...

1. *Whether the applicants are individually concerned by the contested decision*

Summary of the arguments of the parties

22 to 24 ...

Findings of the Court

25 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).

26 In the present case, the applicants brought an action for annulment of the decision to grant an exemption for an agreement to which they were parties, claiming that that agreement imposed discriminatory prices on them and so prevented them from competing on equal terms. They started proceedings in the English courts against Whitbread for compensation for having had obligations contrary to Article 85 of the Treaty imposed on them under the exempted agreement. Moreover, one of the two applicants took part in the administrative procedure.

27 In view of those circumstances, which, contrary to Whitbread's submissions, show that the contested decision affects the personal legal situation of the applicants, they are in factual circumstances which distinguish them individually in like manner to the person addressed. They are therefore individually concerned.

28 That conclusion is not affected by the fact that the leases concluded by the applicants were terminated after the application was brought. Whitbread refers on this point to *Kruidvat*, in which it was held that the mere fact that the lawfulness of a decision is relevant to the outcome of proceedings pending in a national court does not mean that an applicant, in an action for annulment of that decision, may claim to be sufficiently distinguished individually for the purposes of the fourth paragraph of Article 230 EC (*Kruidvat*, paragraph 32).

29 In the first place, the conditions governing the admissibility of an action must be judged, subject to the separate question of the loss of an interest in bringing proceedings, at the time when the application is lodged (Case 50/84 *Bensider and Others* v *Commission* [1984] ECR 3991, paragraph 8). At that time, the applicants were still bound by the leases at issue. In the second place, in the

Kruidvat case, the applicant, who had brought an action for annulment of a decision on an individual exemption for a selective distribution network, was legally affected by that decision only because an action had been brought against him in a national court by a member of the network alleging unfair competition. Those national proceedings thus constituted a mere incident of the general relationship between those who are within and without the network (Opinion of Advocate General Fennelly in *Kruidvat*, paragraph 51, referred to by the Court of Justice in paragraph 32 of the judgment). In the present case, by contrast, the applicants are legally affected by the contested decision not only by reason of the existence of the national action for damages but also because they were parties to the agreement exempted by that decision. The decision confirms the lawfulness of the agreement which they had considered to be contrary to Article 85 of the Treaty and, partly for that reason, had not performed in full, that situation justifying the termination of their leases and the claims for payment by Whitbread.

2. *Interest in bringing proceedings*

Summary of the arguments of the parties

30 to 31 ...

Findings of the Court

32 A natural or legal person must show 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).

33 It is not disputed that the applicants had an interest in bringing proceedings at the time of lodging the application.

34 Whitbread submits that that interest has since lapsed as a result of the termination of the lease. It relies here on the judgment in *Casillo Grani* v *Commission*. In that case, an undertaking had brought an action for annulment of a Commission decision authorising the grant of aid to a competitor. Since the undertaking had been declared bankrupt during the proceedings, the Court of First Instance considered that there was no need to adjudicate, on the ground that the applicant's interest in bringing proceedings, namely its position of competition with the recipient of the aid, had ceased as a result of the bankruptcy. In reaching that conclusion, the Court was careful to point out that the aid at issue had not been paid to the competitor prior to the declaration of bankruptcy, so that the contested decision could not have affected the competition situation of the applicant before it was made bankrupt. In that case, the threat to the applicant's competitive position corresponded, at the time of the event putting an end to its interest in bringing proceedings, namely the declaration of bankruptcy, to a legal situation which, although certain, was entirely in the future. At the time of the event which, in that case, was considered to have deprived the applicant of its interest in bringing proceedings, the contested act had thus not yet produced the effects which were the reason for the application.

35 In the present case, on the other hand, those effects, namely the imposition of contractual obligations considered to be anti-competitive, appeared as soon as the agreements at issue were concluded and took effect, in other words before the event which, according to Whitbread, deprived the applicants of their interest in bringing proceedings, namely the termination of the leases.

36 Moreover, the applicants retain, after the termination of their leases, a pecuniary and non-pecuniary interest in the outcome of the present proceedings, since they have brought actions in the English courts for compensation for the damage they claim to have suffered as a result of having had a beer tie imposed on them which they consider, contrary to the position taken by the Commission in the contested decision, to be contrary to Article 85 of the Treaty.

37 The action is therefore admissible.

Substance

38 Review by the Community judicature of the complex economic appraisals made by the Commission when it exercises the discretion conferred on it by Article 85(3) of the Treaty, 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).

39 The applicants criticise a number of assessments made by the Commission in the contested decision, namely the assessments of the specification of the purchasing obligation by beer type, the compensation for the price differentials, the existence of other restrictions, and the possibility of granting an individual exemption the conditions for which are not satisfied until after the conclusion of the exempted agreement.

1. *Specification of the purchasing obligation by beer type*

40 The Commission observed in the contested decision (point 42) that the beer purchasing obligation under the leases at issue relates to the beer types specified in the schedule to the lease. It noted that that specification of the tie by type of beer does not satisfy the requirements of Article 6 of Regulation No 1984/83,

which provides that block exemptions apply only to agreements concerning 'certain beers, or certain beers and certain other drinks, specified in the agreement', that is, a specification by brand or denomination. It concluded that the agreements at issue cannot benefit from the block exemption in question (points 147 to 149 of the contested decision).

41 In its analysis of the possibility of an individual exemption, it found, at point 153 of the contested decision, as general considerations on whether the condition of improvement of distribution was met, that the specification of the tie by type is considered to enable a more practical operation of exclusive beer supply agreements in the United Kingdom than the specification provided for in Regulation No 1984/83, because it makes it easier to introduce the brands of foreign or new breweries to price lists as the consent of all the lessees is not required. That is particularly the case here in view of the large number of beers supplied by Whitbread to its lessees and the frequency with which Whitbread adds or substitutes a beer on its price list, including foreign brands.

Summary of the arguments of the parties

42 to 46 ...

Findings of the Court

47 It must be observed, primarily, that point 153 of the contested decision describes one of the arguments which the Commission rehearsed, at points 150 to 154 of the decision, with a view to concluding that the agreements in question bring an

improvement in distribution. The arguments other than that set out at point 153, in particular the argument that the agreements at issue make it significantly easier to establish, modernise, maintain and operate on-licensed premises (point 150 of the contested decision) and the argument that those agreements give the reseller an incentive to devote all the resources at his disposal to the sale of the contract goods, lead to durable cooperation between the parties allowing them to improve the quality of the contract goods and of the reseller's services to the consumer, and allow cost-effective organisation of production and distribution and hence the determination of the number and character of on-licensed premises in accordance with the wishes of customers (point 151 of the contested decision), have not been criticised by the applicants. So even if their criticism of the argument set out at point 153 of the contested decision were accepted, that would not establish that the agreements at issue do not bring about an improvement in distribution. That criticism is not therefore capable in itself of showing that a condition for granting an individual exemption is not satisfied. It is therefore irrelevant.

48 Alternatively, as regards the merits of the criticism, it should be observed, in the first place, that from the point of view of access by foreign or new breweries to the United Kingdom on-trade beer market, the benefit which the Commission deduced from the specification of the tie by beer type, namely that it makes it easier to introduce the brands of foreign or new breweries to the price lists because that does not require the consent of all the lessees, is not seriously called into question by the fact that it implies, as a corollary, that tied lessees are subject to more extensive exclusive purchasing obligations. Admittedly, under the system provided for by Regulation No 1984/83, the purchasing obligation relates solely to certain beers or to certain beers and drinks specified in the agreement (Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 36). It thus does not relate to beers of the same type, but only to brands of beer other than those specified in the agreement. It is thus conceivable that a tied lessee may obtain beers of the same type as the brands specified in the agreement from third-party undertakings, who may thus have access to the market via tied lessees. That possibility is purely theoretical, however. Article 7(1)(a) of Regulation No 1984/83 expressly permits the supplier to impose on the reseller the obligation not to sell beers and other

drinks supplied by other undertakings which are of the same type as the beers or other drinks supplied under the agreement in the premises designated in the agreement.

49 In the system defined by Regulation No 1984/83 as qualifying for a block exemption, which requires a specification by brand of beer, the supplier is thus entitled, and in practice will be sure, to prohibit his tied lessees from obtaining from third parties beers of the same type as the brands specified in the agreement. Lessees who are tied by agreements exempted under Regulation No 1984/83, which thus provide for a specification by brand of beer, are therefore not in fact free to conclude supply contracts directly with foreign or new breweries. From the point of view of the access of foreign or new breweries to the relevant market, it thus makes no difference whether the agreements provide for a specification by brand of beer, in accordance with the system under Regulation No 1984/83, or a specification of the tie by beer type, as in the agreements at issue. The Commission rightly states, at point 153 of the contested decision, that in any event a tied lessee, even one tied by an agreement exempted under Regulation No 1984/83, is not in a position to add brands of beer on his own initiative, since the brewery is entitled to prohibit sales by the lessee of other brands of the same type in his pub. It follows that, whether he has concluded an agreement exempted by Regulation No 1984/83 or one of the agreements at issue, a tied lessee cannot affect positively or negatively the level of foreclosure of the United Kingdom on-trade beer market.

50 As a result, contrary to the applicants' assertion, the specification of the tie by beer type does not magnify the foreclosure of the market. It also follows that the applicants' claim that the purely indirect method of access to the market promoted by that specification is less satisfactory than the direct method promoted by the specification of the tie by beer type is unfounded. Where there is a specification of the tie by beer type, foreign or new breweries are unable in practice, as a result of Article 7(1)(a) of Regulation No 1984/83, to sell directly to tied lessees beers of the same type as the brands specified in the exclusive purchasing agreement. Specification of the tie by brand thus does not, in practice,

promote a more direct means of access to the relevant market than specification of the tie by type.

51 In the second place, specification of the tie by beer type promotes access to the market by foreign or new breweries more effectively than the specification by brand provided for by Regulation No 1984/83. As the Commission rightly states at point 153 of the contested decision, it makes it possible to add the brands of foreign or new breweries within the beer types covered by the exclusive purchasing agreement to price lists without the consent of all the lessees being required. By contrast, specification of the tie by brand allows access to the relevant market by foreign or new breweries only under much more difficult conditions. They are forced in practice, as a result of the right given to the leasing brewery by Article 7(1)(a) of Regulation No 1984/83, in addition to obtaining that brewery's authorisation to be able to sell their beer to its tied lessees, to obtain the individual consent of each tied lessee.

52 In the third place, the applicants do not challenge the Commission's finding at point 173 of the contested decision that, on the basis of the specification of the tie by beer type, Whitbread has introduced competing brands into its tied houses to a considerable extent. According to point 173, in the period 1994 to 1998, Whitbread introduced on average three draught beer brands into its leased tied houses each year, including ales such as Fullers London Pride, Greene King IPA and Adnams. Whitbread also included in its range about 30 bottled beers of other brands, including Budweiser, Hoegaarden Grand Cru and Leffe Blonde.

53 The applicants' very general allegation that United Kingdom breweries do not introduce brands of beer belonging to foreign or competing breweries, unless they are a different type of beer, is thus contradicted by that circumstantiated finding.

54 It follows that the applicants have not shown that the Commission's finding at point 153 of the contested decision that the theoretical advantage produced by specification of the tie by beer type does materialise in Whitbread's practice, in view of the large number of beers supplied by Whitbread to its tied lessees and the frequency with which Whitbread adds or substitutes beers on its price list, including foreign brands, is vitiated by a manifest error of assessment.

55 The challenge to the Commission's assessment of the specification of the tie by beer type must therefore be rejected.

2. *Compensation for price differentials*

56 In the contested decision, the Commission considered, in the context of its examination of the conditions laid down by Article 85(3) of the Treaty, whether the apparent improvement in distribution was called into question by the fact that tied lessees were charged higher prices than free trade operators. It concluded that such price discrimination does indeed exist, but is compensated by the existence of benefits which are enjoyed only by tied lessees.

57 The applicants criticise both parts of the Commission's reasoning. First, they argue that the price differentials suffered by tied lessees are greater than acknowledged by the Commission. Second, the countervailing benefits are less extensive than found by the Commission in the contested decision.

Price differentials

58 The Commission stated, at point 160 of the contested decision, that discounts are given to all operators in the United Kingdom on-trade market who have not concluded an agreement with an exclusive purchasing obligation and who obtain supplies from Whitbread, namely wholesalers, pub companies and other breweries, and individual free house operators. Furthermore, the discounts granted to wholesalers, the brewery's own managed houses, and pub companies and other breweries are, on average, higher than those granted to individual free house operators.

59 However, it took into account in assessing those discounts, in the context of the comparison with the situation of the lessees tied to Whitbread, only those given to individual free house operators. That restriction of the field of comparison was justified by reference to Article 14(c)(2) of Regulation No 1984/83. That article provides that the Commission may withdraw the benefit of that regulation where it finds in a particular case that an agreement which is exempted by the regulation nevertheless has certain effects which are incompatible with the conditions set out in Article 85(3) of the Treaty, in particular where the supplier, without any objectively justified reason, applies less favourable prices to resellers bound by an exclusive purchasing obligation as compared with other resellers 'at the same level of distribution'.

60 The Commission observed in this respect, at point 162 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 this case retail level, and purchase their beer directly from Whitbread on market terms. Free house operators were therefore considered to constitute the reference group.

61 It therefore calculated the differential between the price paid by tied lessees and the average price paid by individual free house operators, which it showed in Table 3 at point 93 of the contested decision, from which it appears that the differential, which was GBP 21 per barrel of beer in 1990/91, increased progressively to GBP 40 in 1996/97.

Summary of the arguments of the parties

62 to 65 ...

Findings of the Court

66 It must be noted, to begin with, that the Commission, at point 20 of the contested decision, took into account the small part played in the United Kingdom market by non-brewing wholesalers, by stating that in 1995/96 they accounted for only about 6% of distribution, compared to 5% in 1985. From that finding it deduced, at point 123 of the contested decision, that it is difficult for a foreign brewery, or for a new brewery, to enter the market independently. That and other factors led the Commission to conclude, at point 127 of the contested decision, that the United Kingdom on-trade beer market was closed, and that is not in dispute.

67 According to the applicants, the small part played by non-brewing wholesalers and the corresponding strong position of the national breweries in wholesaling

have a substantial effect on the price of beer, since the breweries, acting as wholesalers towards free house operators, give them discounts whose size was underestimated by the Commission.

68 In this respect, the applicants state, first, that the Commission's definition of the reference group was too restrictive, since it should have covered pub companies, managed houses and clubs as well as individual free house operators.

69 However, the individual free house operators who constitute the reference group used are the only operators at the same level of distribution as Whitbread's tied lessees, so that a reliable comparison may be made with those lessees.

70 It is common ground that the discounts given by Whitbread increase as the amount of beer purchased by the reseller increases. From that point of view, only individual free house operators are in a comparable situation to Whitbread tied lessees, since, like them, they are retailers who obtain supplies individually from Whitbread. By contrast, the supply of beer produced by Whitbread to houses managed by pub companies or by breweries other than Whitbread is done collectively for the whole pub company or brewery. It follows that the amounts of beer ordered are much greater than those ordered by individual free house operators, and the discounts given by Whitbread on those collective orders are consequently higher than those given on orders from individual free house operators.

71 It follows that the Commission did not make a manifest error of assessment by excluding pubs managed by pub companies or breweries from the reference group.

72 As to the third category of establishment mentioned by the applicants, namely clubs, it may be seen from point 162 of the contested decision that the discounts given to non-loan-tied clubs were taken into consideration on the same basis as the discounts given to individual free house operators. Those clubs thus form part of the reference group. Clubs which are loan-tied to a brewery other than Whitbread, on the other hand, have in common with houses managed by pub companies or breweries that they do not make individual arrangements for obtaining supplies of Whitbread beers, that being done collectively at a previous level of distribution by the brewery to which they are tied. From the point of view of their supply with Whitbread beers, and hence of any discounts which may be given, those clubs are not therefore at the same level of distribution as Whitbread tied houses, and thus cannot be included in the reference group which is intended to enable a reliable comparison to be made with the situation of the tied lessees. Moreover, as the Commission observes at point 161 of the contested decision, clubs are direct competitors of the tied lessees only to a limited extent in view of the restricted access to them.

73 It follows that the Commission did not make a manifest error of assessment by excluding loan-tied clubs from the reference group.

74 The applicants submit, in the second place, that the price differential taken by the Commission does not correspond to the discounts actually offered by Whitbread.

75 On this point, it is apparent from point 53 of the contested decision that the Commission calculated the price differential by making use as a reference document of the report produced by the Office of Fair Trading (OFT) in May 1995 following its inquiry into breweries' wholesale pricing policies, that report being supplemented by the results of further investigations. It follows from annex 5 to Whitbread's statement in intervention that, in the course of drawing up that report, the OFT repeatedly obtained information from Whitbread in order to

determine the price differentials. It appears, finally, from annex 4 to the statement in intervention that that question was also the subject, during the administrative stage prior to the adoption of the contested decision, of numerous requests for information by the Commission following up its verification at Whitbread's premises on 17 and 18 March 1997 and of a meeting between representatives of the Commission and Whitbread on 16 December 1997.

76 The price differentials shown in Table 3 at point 93 of the contested decision were determined on the basis of a painstaking investigation by the Commission.

77 The applicants challenge the soundness of that conclusion, submitting that non-tied houses could obtain discounts of GBP 85.53 per barrel and that the average price differential per barrel was in fact GBP 60.

78 The first of those assertions is based on an offer made by Whitbread in November 1997 to a pub with annual beer sales in excess of the equivalent of 400 barrels, which the applicants' representative communicated to the Commission by letter of 26 February 1998. Quite apart from the question whether such a pub is comparable in terms of beer sales with Whitbread tied houses and individual free houses, it must be noted that the figure of GBP 85.53 expresses the gross amount of a discount. However, the price differential as defined by the Commission at point 54 of the contested decision expresses the difference between the discounts given by Whitbread to individual free houses and those given to its tied houses. Moreover, the discounts granted to the individual free houses used for calculating the price differential are averages determined on the basis of the discounts given to all the individual free houses supplied by Whitbread. The applicants' argument is thus unfounded.

79 The second assertion, made at point 4.16 of the application, namely that the average price differential per barrel is in fact GBP 60, is not explained or supported by any evidence. It was already put forward in the observations submitted by the applicants' representative on 27 October 1997 on behalf of three tied lessees, including the applicant Mr Shaw, concerning the Commission's notice under Article 19(3) of Regulation No 17. The only element which might have been regarded as evidence consists of questionnaires filled in by those three lessees, in which they noted what, in their opinion, were the discounts granted to their competitors.

80 The information provided by those lessees cannot be regarded as evidence. They are mere unsupported assertions, from only three tied lessees out of a total of nearly 2 000. Moreover, the discounts indicated are gross figures which do not express the price differential as defined by the Commission at point 54 of the contested decision.

81 In the absence of adequate supporting evidence, the second assertion must also be rejected.

82 The challenge to the Commission's assessment of the price differentials must therefore be rejected.

Existence of countervailing benefits

83 The Commission examined in the contested decision the question whether the price differential from which tied lessees suffered was compensated by specific benefits available only to them. It found, at points 57 to 93 of the contested

decision, that four benefits existed, which it assessed, namely a lower rent payable by tied lessees (rent subsidy), professional services, procurement benefits and capital expenditure.

84 It summarised the data in Table 3 at point 93 of the contested decision, from which it may be seen that the countervailing benefits were smaller than the price differential in the trading years for the period from 1990 to 1994, but greater in recent trading years, up to 1997.

85 The applicants criticise the Commission's assessments concerning the rent subsidy, professional services, procurement benefits and capital expenditure. They also challenge the Commission's assessments of the possibility of a lessee receiving a premium on assignment of the lease. Finally, they consider that the Commission should have verified the existence of countervailing benefits at individual level.

Rent subsidy

86 The Commission stated in the contested decision, at points 57 to 66, 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 such a comparison, those costs are higher than the rent paid by tied lessees, that constitutes a benefit for the latter which may compensate the price differential referred to above.

87 The Commission rehearsed 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 12.72% of turnover.

88 The Commission indicated that the figure of 12.72% came from internal Whitbread documents, produced mainly in preparation for rent or rent review negotiations, and was fixed on the basis of a sample of 30 pubs. It said that Whitbread had informed it that the average rent/turnover ratio for the entire Whitbread estate was 12.19%.

89 The Commission referred (for the years 1992/93 to 1996/97) to the data transmitted by Whitbread relating to the rental income and barrelage supplied for the pubs let on the notified agreements, with that data being supplemented by a number of estimates made by the Commission on the basis of the information supplied.

90 On the basis of those premisses, it calculated the rent subsidy in the following way: after determining the figure for 15% of the turnover of the tied estate, it subtracted from that figure 12.72% of the turnover in question, and then divided

the result of that subtraction by the total number of barrels sold by Whitbread to its tied estate.

91 The results of that calculation are to be found in Table 3 at point 93 of the contested decision. It thus appears that the rent subsidy was GBP 9 per barrel in 1990/91, GBP 11 in 1991/92, GBP 15 in 1992/93, GBP 15 in 1993/94, GBP 16 in 1994/95, GBP 17 in 1995/96 and GBP 19 in 1996/97. The rent subsidy was the largest countervailing benefit.

— Summary of the arguments of the parties

92 to 95 ...

— Findings of the Court

96 The applicants' criticisms relate, first, to the method of determining the turnover on which the calculation of the rent subsidy was based and, second, to the failure to take sufficiently into consideration the practice of upward-only rent reviews.

97 With respect, first, to the method of determining the turnover, the applicants submit that the Commission relied on unilateral estimates by Whitbread which were not reliable.

98 It may be seen from point 58 of the contested decision that the estimate of the total turnover of a tied house was made on the basis of the assumption of a rent equal to 12.72% of turnover. It was thus determined from the rent on the basis of an estimated rent/turnover ratio.

99 It is apparent from the contested decision, and from the Commission's reply to the written question put by the Court, that that ratio was not taken over from Whitbread without any further check by the Commission.

100 In fact, the Commission requested access to Whitbread's books, pursuant to Article 14(1) of Regulation No 17. In that verification, which was carried out at one of Whitbread's regional offices, it selected from the files concerning nearly 350 tied houses a sample of 30 houses representative of Whitbread's tied estate. It took note, for each of those pubs, of the amount of beer sold supplied by Whitbread, the prices at which that beer was sold, the rent paid and the percentage of turnover represented by the sale of items other than Whitbread beers, in particular wines, spirits, tobacco and food. On the basis of those factors, it reached the conclusion that the rent represented an average of 12.72% of the turnover of those public houses.

101 It follows that the ratio in question is the result of checks and calculations by the Commission. Admittedly, the Commission relied in part on internal documents of Whitbread. Contrary to the applicants' assertion, those documents do not directly concern the turnover of a public house, but relate to a variety of specific factual elements — in fact the amount of beer sold supplied by Whitbread, the prices at which that beer was sold, the rent paid and the percentage of turnover represented by the sale of items other than Whitbread beers — whose correctness and credibility are not prima facie open to challenge. It would be otherwise only in the case of fraud, which is not alleged by the applicants and which is moreover unlikely in view of the number and complexity of the factors involved.

102 That the Commission's calculations were genuine and thorough is, moreover, also shown by the fact that it reached a rent/turnover ratio for the sample chosen that was higher, in fact 12.72%, and so less favourable to Whitbread, than that which Whitbread had calculated for its entire tied estate, 12.19%.

103 It may be added that the applicants do not submit that the rent/turnover ratios of the pubs leased by them are higher than the figure found by the Commission, which is an average.

104 It has thus not been shown that the Commission relied in the present case on an exaggerated potential turnover figure.

105 It also follows that the ratio in question was arrived at on the basis of data on beer sales by Whitbread. It is not thus based, contrary to the applicants' assertion, on Whitbread's turnover in the pub leasing sector.

106 The method of assessing the turnover of public houses used by the Commission in this case is thus the same as it used in the Bass decision. In that decision it was stated (point 65, footnote 15) that the Bass internal documents from which the rent/turnover ratio of that brewery's tied houses was calculated had as their subject a detailed assessment of the business of each pub and thus included a large number of figures which could be used as reference data.

107 With respect, second, to the failure to take sufficient account of the practice of 'upward only rent reviews', it must be observed, to begin with, that the Commission took care to analyse the effect of that practice at point 52 of the contested decision. It states there that the practice relates to all sorts of commercial property and is not peculiar to pub leases. It considers that it encourages property investment because of the more predictable flow of letting income, and that in its absence the level of rent at the time of entry into the lease could be higher to compensate for possible downward variations in income flow. Those assessments have not been criticised by the applicants.

108 The applicants submit that the practice in question was not taken into consideration in the context of the assessment of the rent subsidy. On this point, it must be observed that the rent subsidy was calculated for each of the trading years in the period from 1990 to 1997 and that for that purpose, as is apparent from point 58 of the contested decision, account was taken of the rent charged by Whitbread for each trading year. The Commission's assessment is thus based on the actual annual rent, including any increases which may have been made in implementation of a rent review clause. The practice in question was thus taken into consideration in the calculation of the rent subsidy.

109 The challenge to the Commission's assessment of the rent subsidy is thus unfounded.

Professional services

110 The Commission set out at points 67 to 77 of the contested decision the criteria it used for evaluating the professional services received by Whitbread tied lessees, which constitute, with the rent subsidy, a benefit such as to compensate the price differential.

— Summary of the arguments of the parties

111 to 114 ...

— Findings of the Court

115 With respect, first, to the criticism relating to point 68 of the contested decision, it must be stated that the purpose of point 68 is to describe a method put forward by Whitbread for estimating the value of the professional services. That method consists in calculating the cost to Whitbread of services provided free of charge to tied lessees and comparing that cost with the cost of the services provided by Whitbread to individual free house operators. It was accepted by the Commission at point 77 of the contested decision.

116 The applicants consider that that method fails to take into account, in addition to the professional services provided to individual free house operators, those provided to pubs belonging to pub companies and to clubs, with which Whitbread tied lessees compete.

117 The applicants thus repeat, with reference to the assessment of professional services, an argument already submitted with reference to the assessment of the price differential.

118 In reply to that argument, it was found above that the Commission did not make a manifest error of assessment in considering that the reference group used for calculating the price differential should consist solely of individual free house

operators. Only they are in a comparable situation to lessees tied to Whitbread, because they are the only ones at the same level of distribution as tied lessees.

119 If the reference group used for calculating the price differential may correctly consist only of individual free house operators, that to be used for determining the benefits which compensate that differential must be identical in composition, in order to ensure that the reasoning is reliable.

120 The criticism concerning point 68 of the contested decision must therefore be rejected.

121 With respect, second, to the criticism relating to point 69 of the contested decision, it must be stated that the purpose of point 69 is to describe another method put forward by Whitbread for estimating the value of the professional services. That method is based on an estimate of the number of days a year spent by Whitbread management on support services for lessees. It was accepted, with certain reservations, by the Commission at point 74 of the contested decision.

122 The applicants claim that with this method the Commission fails to take into account that the time spent by Whitbread management on the situation of the lessees also serves to a large extent to monitor compliance by tied lessees with their contractual obligations towards Whitbread. The applicants consider that that activity does not benefit the tied lessees.

123 It must be observed that the Commission stated at point 74 of the contested decision, in response to similar comments made during the administrative

procedure, that the basis for the calculation concerning the assessment of the professional services was not the total cost of the personnel providing the services, but what Whitbread considered to be the proportion of time, as a percentage of the total, spent by its employees working directly in the interests of the tied lessees. Thus the two most important departments of Whitbread, the business development management and the property department, spend 78% and 55% respectively of their total working time providing support services for tied lessees.

124 It follows that the method of assessing the professional services takes account of the criticism expressed by the applicants.

125 The applicants also assert that the Commission relied on unilateral assessments by Whitbread without checking the genuineness and quality of the alleged benefits.

126 That claim is wholly unfounded. First, while the Commission's evaluation of the professional services is based on information supplied by Whitbread, that information derives from a large number of detailed documents, namely, as appears from point 74 of the contested decision, reports of visits by the business development managers from January to November 1997 to the 30 pubs which Commission officials had chosen for the rent subsidy calculation, quarterly and annual time surveys of Whitbread's property department, examples of time sheets submitted, and job descriptions for all lessee-facing functions of Whitbread. The Commission did not therefore base its assessment on Whitbread's, but on cross-checks of a number of documents, admittedly internal ones of Whitbread, but whose credibility is not in doubt, having regard in particular to their detailed nature.

127 Next, the Commission was careful to state, at point 77 of the contested decision, that, in order to reduce the margin of error as much as possible, it based its assessment of the value of this countervailing benefit on a slightly lower figure than that indicated by Whitbread. Thus, the amount of the benefit was reduced by 10% and the figures for professional services in Table 3, set out at point 93 of the contested decision, take account of that reduction.

128 With respect, third, to the criticism relating to point 73 of the contested decision, it should be noted that point 73 summarises a comment made by some tied lessees during the administrative procedure that the cellar maintenance service provided by Whitbread to tied lessees is also provided to free houses.

129 The applicants rely on that finding to argue that most management services provided to tied lessees are also provided to non-tied customers.

130 It must be said at the outset, as regards Whitbread's cellar maintenance service, that it follows from points 74 and 77 of the contested decision that that service was not included in the calculation of the countervailing benefit obtained by tied lessees from the professional services. According to the Commission's explanation at point 17 of its defence, that was precisely because the service in question benefits free houses as well and does not thus constitute a benefit exclusive to tied lessees. Next, the applicants do not indicate what other services are provided to non-tied customers too and ought therefore to be excluded from the assessment of the professional services.

131 The challenge to the Commission's assessment of the professional services provided by Whitbread to its tied houses must therefore be rejected.

Procurement benefits

132 The Commission set out at points 78 to 86 of the contested decision the criteria by which it assessed procurement benefits, which consist in the possibility for Whitbread tied lessees to acquire various products or services (gas, insurance, credit cards, glassware, crisps and nuts, frozen food, water-saving devices, butchers, pest control, etc.) from third-party suppliers with whom Whitbread has negotiated terms which it regards as advantageous. That possibility constitutes, with the rent subsidy and the professional services, a benefit such as to compensate the price differential.

— Summary of the arguments of the parties

133 to 134 ...

— Findings of the Court

135 At point 85 of the contested decision, the Commission noted the results of a recent survey of 155 tied lessees on the *1997 Buying Guide*, which contains Whitbread's offers concerning procurement, asking those lessees to award marks

from 1 to 5. Of the 155 lessees surveyed, 37 (24%) gave the best mark, 49 (32%) gave a 2, 42 (24%) a 3, 13 (8%) gave mark 4 and only 11 (7%) gave the lowest mark, 5. Three lessees gave no reply.

136 First, as regards the relevance of the survey, it appears that despite the limited sample questioned the results are of some significance, since almost all the tied lessees surveyed (98%) agreed to answer and 56% of them gave Whitbread's offers mark 1 or 2, in other words a mark which may be regarded as at least good, 80% mark 1, 2 or 3, in other words a mark which may be regarded as at least satisfactory, and only 20% mark 4 or 5, indicating an expression of dissatisfaction. Having regard to the high rate of participation of the tied lessees surveyed and to their very positive assessment of the quality of Whitbread's offers, the small number taking part in the survey may not validly be regarded as pointing to a negative assessment of the offers on the part of the tied lessees.

137 Second, the passage from point 85 of the contested decision concerning the survey must be placed in its context.

138 In the first place, it is only one of the arguments with which the Commission replies, in the context of assessing the reality and extent of the procurement benefits alleged by Whitbread, to the observation made by numerous tied lessees in the course of the administrative procedure that it is possible for a tied lessee to obtain on his own better offers than those negotiated by Whitbread, sometimes from the same supplier.

139 That objection, according to the Commission, does not lead to the conclusion that the procurement offers made by Whitbread do not constitute a benefit which may compensate the price differential. To that end, it puts forward three further arguments besides the survey. First, since the procurement offers offered by Whitbread to its tied lessees were originally negotiated for that brewery's managed houses, passing them on to the tied lessees gives the latter access to a list of suppliers with a track record of supplying Whitbread's large managed estate (point 86 of the contested decision). Next, the offers negotiated through Whitbread provide the tied lessee with a reference point which is in itself an advantage in starting negotiations (point 83 of the contested decision). Finally, numerous lessees have in fact accepted Whitbread's offer: 1 010 for frozen food, 988 for insurance, 842 bulk LPG, 384 credit and debit cards, 251 glassware, 177 gas, 158 crisps and nuts, and 239 butchers (point 85 of the contested decision). There is thus objective evidence to demonstrate the interest shown by tied lessees in Whitbread's offers.

140 Those three arguments have not been criticised by the applicants.

141 In the second place, the Commission relativised Whitbread's conclusion on the value of the procurement benefits enjoyed by tied lessees and took account of the lessees' objection that it was possible for them to obtain more advantageous offers than those negotiated by Whitbread. To reduce the margin of error as much as possible, it took a figure for the 'countervailing benefit' of 25% less than indicated by Whitbread (point 86 of the contested decision).

142 The challenge to the Commission's assessment of the procurement benefits provided by Whitbread to tied lessees must therefore be rejected.

Capital expenditure

143 The Commission set out at points 87 to 92 of the contested decision the criteria by which it assessed the benefit consisting in investment carried out by Whitbread in tied houses. That investment constitutes, with the rent subsidy, professional services and procurement benefits, a further benefit such as to compensate the price differential.

— Summary of the arguments of the parties

144 to 145 ...

— Findings of the Court

146 It appears from point 88 of the contested decision that almost all the tied lessees submitted in the administrative procedure that investment by Whitbread in a tied house entails a rent increase which applies, with no possibility of reduction, until the end of the lease, which may have a term of 20 years.

147 In response to that objection, which the applicants repeat, the Commission, before adopting the contested decision, rechecked whether and to what extent capital expenditure actually constitutes a benefit compensating the price differential.

148 At point 87 of the contested decision, the Commission described a method of assessing the benefit in connection with capital expenditure, taking account of the increase in rent. With that method the benefit is calculated by subtracting from that expenditure the average ensuing rent increase for a period of five years.

149 In response to the criticisms of some tied lessees that the calculation takes account of rent increases only for a period of five years following the expenditure, whereas the lease may last for up to 20 years, the Commission rightly countered, at point 90 of the contested decision, that while it is of course correct that the rent increase is for longer than five years, so is the benefit of the investment to the lessee.

150 The Commission none the less took care to recheck the benefit in question by making use of two other methods of assessment. The first method consists essentially in comparing the cost to the lessees of the rent increase over time with the cost to Whitbread of the upfront investment. On the basis of that calculation, the Commission found, at point 91 of the contested decision, that despite the rent increase the capital expenditure constitutes a benefit for 16 years, that is, until the expiry of the lease in most cases.

151 A second method, described at point 92 of the contested decision, is, essentially, to contrast the amount of the capital expenditure with the estimated profit of the lessee after payment of rent, in other words taking into account the rent increase resulting from the capital expenditure. On the basis of that method, the Commission also concluded that there was a benefit.

152 It follows that the three methods of assessment used allowed the conclusion that Whitbread's capital expenditure for the tied lessees constitutes a benefit for them, even if it is accompanied by rent increases.

153 That conclusion rests on two circumstances, shown by the two complementary methods of calculation used by the Commission. First, as follows from the first method, the capital expenditure of Whitbread has the advantage for the tied lessee that he does not himself have to bear the cost of the investment, which, according to the Commission's conclusions, exceeds the increase in rent. Second, as follows from the second method, the expenditure enables the tied tenant to benefit from an extended increase in profits, which, according to the Commission's conclusions, also exceed the increase in rent.

154 The Commission thus took the applicants' criticisms fully into account in the contested decision.

155 The challenge to the Commission's assessment of Whitbread's capital expenditure for its tied lessees must therefore be rejected.

Prospective benefit for a tied lessee on assignment of the lease

156 The Commission stated at point 39 of the contested decision, as part of the general description of the agreements which were the subject of the decision, that the 20-year lease differs from the other two standard leases notified, namely the 5-year lease and the pre-retirement lease, in particular in that the lessee is not

allowed to assign the lease during the first three years of the term and thereafter, if he wishes to assign the lease, he must, if so required by Whitbread, assign on open market terms to a nominee of Whitbread, and may not assign the lease to a brewery. It noted that about 640 assignments had occurred in the period from March 1994 to August 1998, and that in many cases the lessees obtained a premium on the assignment. Out of the 91 assignments in the six months to August 1998, Whitbread was informed in 56 cases of the premium achieved by the lessee, who is not obliged to inform Whitbread of the premium. The average premium for these 56 lessees was GBP 59 000.

— Summary of the arguments of the parties

157 to 158 ...

— Findings of the Court

159 The criticised points of the contested decision form part of the general description of the agreements which are the subject of the decision. They were not repeated in the factual analysis of the restrictive provisions in those agreements (points 42 to 94 of the contested decision), nor above all in the context of the legal considerations by which the Commission justified the grant of an individual exemption in the present case (points 150 to 178 of the contested decision). In those circumstances, even if they were vitiated by a manifest error of assessment, that would not call into question the correctness of the operative part of the contested decision.

160 The applicants' argument must therefore be rejected.

The obligation to verify the existence of countervailing benefits at individual level

— Summary of the arguments of the parties

161 to 162 ...

— Findings of the Court

163 The disputed assessment of the countervailing benefits was made in the context of the examination of the grant of an individual exemption, after the finding that Whitbread's network of agreements makes a substantial contribution to foreclosure of the market in question. That assessment therefore had to be made within the same analytical framework, that of the effect of the notified agreements on the functioning of the market, and hence on the situation of the tied lessees taken as a whole, not on each lessee considered in isolation. From the point of view of the grant of an individual exemption, it is not material that the benefits produced by the notified agreements do not entirely compensate the price differential suffered by a particular tied lessee if the average lessee does enjoy that compensation and it is therefore such as to produce an effect on the market generally.

164 In any event, as the Commission rightly states, this argument of the applicants is of no effect, as neither of them has produced any evidence to show that the assessment of the countervailing benefits in Table 3 of the contested decision does not reflect his own situation.

3. *Existence of other restrictions*

165 The Commission analysed in the contested decision the effect on competition of the exclusive purchasing obligation and the non-competition obligation (in particular in points 102 to 138 and 143 to 178) in the standard leases notified. It also raised the question (points 139 to 142 of the contested decision) whether certain other clauses in the standard leases were capable of having a restrictive effect on competition, and, after a brief analysis, answered in the negative. Among the clauses it analysed was the clause prohibiting the installation of amusement machines without the consent of Whitbread.

Summary of the arguments of the parties

166 to 167 ...

Findings of the Court

168 First, as regards the alleged failure to take into consideration that the standard agreements impose a tie by beer type, it suffices to observe that the Commission expressly took a position on the specification of the tie by beer type by considering, at point 153 of the contested decision, that it enabled a more practical operation of exclusive beer supply agreements in the United Kingdom than a specification by brand of beer. Moreover, the applicants challenged precisely that assessment at point 4.11 of their application, a challenge which the Court has already rejected.

169 The argument is therefore unfounded.

170 Second, as regards the alleged insurance tie, the applicants confine themselves in their application to the following statement:

'The Commission has failed to consider supplementary or additional restrictions in the lease such as:

...

(2) the insurance tie;...'

171 Under the first paragraph of Article 19 of the Statute of the Court of Justice, applicable to the procedure before the Court of First Instance by virtue of the first paragraph of Article 46 of the Statute, and Article 44(1)(c) and (d) of the Rules of Procedure of the Court of First Instance, an application must, in particular, state the subject-matter of the proceedings, the form of order sought and a summary of the pleas in law on which the application is based. Irrespective of any question of terminology, those particulars must be sufficiently clear and precise to enable the defendant to prepare his defence and to enable the Court to give judgment in the action, if appropriate, without having to seek further information. In order to guarantee legal certainty and the sound administration of justice it is necessary, 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 (Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraphs 65 and 66). Similar requirements are called for where a submission is made in support of a plea in law (Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraphs 333 and 334).

172 In view of the extremely laconic and summary nature of the way the complaint in question is presented, which does not make it possible to identify the relevant clause in the lease and the reasons of fact and law for which the applicants consider that the clause is restrictive, the complaint is inadmissible.

173 That conclusion is not called into question by the fact that the applicants state in their reply that the restriction concerned is that 'the insurance of the building is to be carried out by the landlord at the cost of the tenant (Clause 3(iv)), as such it is an indirect tie of insurance services'.

174 The articulation of the complaint in the reply cannot remedy the failure to comply with the above provisions. Moreover, the clause mentioned, clause 3(iv) of the standard lease, does not have the content alleged by the applicants. In any event, the applicants' supplementary observations quoted above, because of their incomplete and summary nature, do not disclose the reasons of fact and law for which the clause in question is said to be restrictive.

175 Third, as regards the alleged effect of the tie outside the premises, the applicants confine themselves in their application to the following statement:

'The Commission has failed to consider supplementary or additional restrictions in the lease such as:

...

(3) the operation of the tie outside the premises;...'

176 Since this complaint is also presented in an extremely laconic and summary way, so that it is not possible to identify the relevant clause in the lease and the reasons of fact and law for which the applicants consider that the clause is restrictive, it too is inadmissible.

177 Fourth, the applicants state as follows in their application:

'The Commission has failed to consider supplementary or additional restrictions in the lease such as:

...

(4) the prohibition of the operation of other businesses within the premises (see, for example, paragraph 5.2 above).'

178 The applicants thus refer to the restriction on the installation of amusement machines, and submit that this must be regarded as having the purpose or effect of restricting competition, since it operates as an 'unlawful tie of ancillary rights'.

179 On this point, it must be observed to begin with that, apart from a reference to the rule on installing amusement machines, the applicants do not indicate which clauses of the lease they refer to in raising the prohibition of operating other businesses in the leased premises. Subject to the reference to the rule on installing amusement machines, the formulation of the complaint does not comply with the requirements of Article 44(1)(c) of the Rules of Procedure. It is therefore to that extent partially inadmissible.

180 At point 38 of the contested decision, the Commission stated that a lessee was not allowed to place amusement machines in the premises without the consent of Whitbread, which could not, however, be unreasonably withheld in the case of a 20-year lease.

181 The Commission said, at point 140 of the contested decision, that that clause is not restrictive in view of the influence of amusement machines on the character of the premises. It supported that statement by reference to point 52 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 distribution and exclusive purchasing agreements (OJ 1984 C 101, p. 2).

182 Consequently, according to the Commission, the block exemption provided for by Regulation No 1984/93 is not called into question by the fact that the installation of amusement machines in the leased public houses is subject to the consent of the lessor. The lessor could legitimately refuse consent on grounds relating to the character of the premises or limit his consent to certain kinds of machines.

183 On this point, it must be observed that the clause in the lease, which does not prohibit the installation of amusement machines altogether but merely subjects this to the prior consent of Whitbread, comes under the lessor's right to control the use of the premises leased. It cannot be disputed that the operation of amusement machines can change the style of a pub and thereby influence its value, perhaps substantially, so having a significant effect on the lessor's property.

184 It appears, moreover, from point 38 of the contested decision, which is not criticised by the applicants, that Whitbread will give consent as a matter of course to the installation of amusement machines in the leased premises on condition that the amusement machine supplier is selected from an approved list, and that qualification for inclusion on that list is in accordance with objective qualitative criteria such as standards of service and financial strength.

185 The clause in question is thus applied in such a way that it does not prevent a tied lessee from installing such machines, the lessee merely being obliged to choose a supplier on the basis of objective qualitative criteria.

186 In those circumstances, the clause may not be regarded as an 'unlawful tie of ancillary rights' or, more generally, as having the object or effect of restricting competition.

187 The complaint must therefore be rejected.

4. *The plea that the Commission lacks competence to grant an individual exemption under Article 85(3) of the Treaty where the conditions for the exemption are complied with only after the conclusion of the exempted agreement*

188 In the contested decision the Commission stated, at point 182, that the standard leases are agreements within the meaning of Article 4(2)(1) of Regulation No 17 in that 'the only parties thereto are undertakings from one Member State and the agreements... do not relate either to imports or to exports between Member States'. It concluded that Article 6 of Regulation No 17 could be applied, under which the rule that an exemption may take effect only from the date of notification does not apply to such agreements.

189 It observed, at point 167 of the contested decision, that in its assessment of the conditions of Article 85(3), and in particular where a retroactive exemption is requested, the Commission cannot make an overall assessment for the whole retroactive period, but should evaluate whether at all times those conditions are fulfilled. In view of the standard nature of the notified agreements, which cover several hundreds of individual agreements, the complexity of the data and the limited availability of data on bases other than annual, it considered that it was reasonable to limit its assessment of whether the conditions of Article 85(3) were fulfilled to a year-by-year assessment.

190 It noted, at point 168 of the contested decision, that it was apparent from Table 3 at point 93 of the decision that for the years 1994/95 onwards the price differential was more than offset by quantifiable countervailing benefits. It acknowledged, however, that for the years 1990/91, 1991/92, 1992/93 and 1993/94 the price differential was not totally compensated, the shortfall being between GBP 3 and GBP 6 per barrel.

191 It observed, however, still at point 168, that those figures were not sufficient in themselves to warrant the conclusion that the average tied lessee faced significant disadvantages in his capacity to compete during each of these years in which the price differential was not compensated. The figures only represented 1% to 3% of the beer price and there existed 'unquantifiable' countervailing benefits, such as the different risks faced by a tied lessee as compared to a free house operator.

192 In this respect the Commission refers to point 94 of the contested decision, in which it said that, in addition to the quantifiable 'countervailing benefits', Whitbread had, in circumstances relating to the lessee's personal as well as business conditions, agreed to several hundreds of cases in which the lessee has surrendered the lease. In a limited number of cases Whitbread had agreed to reduce the rent. These 'partnership' elements and the payment of a rent lower than a free-of-tie rent supported the claim that tied lessees face a risk situation differing from that of free house operators.

193 The Commission considered, at point 169 of the contested decision, that, for the whole duration of the standard leases, there were no arguments to support the conclusion that the improvements in distribution described produced by the standard leases had not been obtained. That conclusion was supported by the fact that during the period from 1991 to 1997, which included the longest recession in the United Kingdom economy, the percentage of bad debt among Whitbread lessees had, on average, been three times less than for Whitbread's individual free trade clients.

194 After noting that Whitbread's standard leases fulfilled the conditions of Article 85(3) of the Treaty from the date of first introduction of one of the notified agreements on the market, 1 January 1990, it concluded that the contested decision should apply from 1 January 1990.

Summary of the arguments of the parties

195 to 199 ...

Findings of the Court

200 In their application, the applicants state that Table 3 in the contested decision shows that during the years 1990/91, 1991/92, 1992/93 and 1993/94, which corresponded, according to the applicants, to the period in which most of the leases in the category of the standard leases notified were concluded, the price differential was not compensated by the benefits given by Whitbread to tied lessees, and only from 1994/95 did the trend change. They also note that the Commission granted the individual exemption on the basis that the countervailing benefits, once quantified, are greater than the price differential. They conclude that the Commission exempted the leases on the ground of a fact which did not exist at the time when most of the notified leases were concluded.

201 According to the applicants, the possibility of granting an individual exemption under Article 85(3) of the Treaty is to be assessed on the date of conclusion of the agreement. If the agreement does not comply with the conditions of Article 85 on the date of conclusion, it is void under Article 81(2) of the Treaty. That nullity is definitive and cannot be called into question by the subsequent intervention of circumstances which, had they existed on the date of conclusion of the agreement, would have enabled an individual exemption to be granted.

202 It follows that the applicants are criticising the Commission for exempting the agreements by taking circumstances into account which did not exist when the agreements were concluded, and say that there was a 'retroactive' exemption. The 'retroactive' effect thus criticised by the applicants must not be confused with that referred to in the contested decision, namely the fact that the decision pursuant to Article 85(3) of the Treaty took effect, in accordance with Articles 4(2)(1) and 6(2) of Regulation No 17, at a date earlier than the notification of the agreements in question, which is not in dispute.

203 This complaint of the applicants rests on the premiss that the Commission considered that the conditions of application of Article 85(3) of the Treaty were satisfied only from 1994/95, and in particular that the Commission's assessment was based exclusively on the figures in Table 3 at point 93 of the contested decision, and thus on the relationship between the price differential and the countervailing benefits mentioned there, that table showing that the figure for the price differential fell below that for the benefits only from 1994/95.

204 In fact, the Commission did not rely solely on that table, but developed an argument to show that the conditions of Article 85(3) of the Treaty, more particularly the condition of an improvement of distribution, were complied with even in the 1990/91, 1991/92, 1992/93 and 1993/94 trading years, during which the price differential was not completely compensated by the benefits given by Whitbread to its tied lessees, the shortfall being about GBP 3 to GBP 6 per barrel.

205 It stated, as pointed out above, at point 168 of the contested decision, that the above figures do not in themselves warrant the conclusion that tied lessees faced significant disadvantages compared to their competitors during each of these years. That conclusion was based on the argument that the figures represented only 1% to 3% of the beer price and that there existed 'unquantifiable'

countervailing benefits, such as the fact that a tied lessee and a free house operator face different risks.

206 With respect to the latter assertion, the Commission referred, at point 168 of the contested decision, to point 94 of the decision. At point 94 it set out two factors which supported that assertion. First, Whitbread had in several hundreds of cases agreed to the lessee surrendering his lease, for reasons concerning his personal as well as business conditions, and had in a small number of cases agreed to a reduction of the rent. Second, the Commission noted that the rent paid for tied houses was lower than for houses free of tie.

207 The existence of that argument renders immaterial the applicants' reasoning, as formulated in their application, based on the fact that the Commission itself considered in the contested decision that the benefits produced by the notified agreements which justified the grant of an individual exemption did not exist throughout the period covered by the exemption.

208 In their reply, the applicants for the first time challenged the Commission's argument. They questioned the assertion that a tied lessee runs less risk than the owner of a free house.

209 It must be observed, first, that that challenge relates only to one of the two arguments on which the Commission based its assessment that the standard leases satisfied the conditions of Article 85(3) of the Treaty throughout the period covered by the contested decision, including the period from 1 January 1990, the date from which the exemption was granted, to 28 February 1994, the last day of

the 1993/94 trading year (see Table 3 at point 93 of the contested decision), and, second, that the fact that during the latter period the price differential was not completely compensated did not in itself warrant the conclusion that the average tied lessee faced significant disadvantages compared to his competitors throughout that period (points 168 and 184 of the contested decision).

210 The applicants' challenge does not, therefore, relate to the other argument put forward by the Commission, namely that the price differential remaining after taking into consideration the quantifiable countervailing benefits represented only 1% to 3% of the beer price in the period from 1 January 1990 to 28 February 1994.

211 That argument is based on the Commission's reasoning at point 159 of the contested decision, which the applicants do not contest either, namely that unjustified price discrimination has an appreciable negative impact on the competitiveness of the lessee only if it is significant and lasts for a long time.

212 That that is correct is shown by the Commission's finding at point 169 of the contested decision, not criticised by the applicants, that during the period from 1991 to 1997, which includes the longest recession in the United Kingdom economy, the percentage of bad debt was on average three times less for Whitbread's tied lessees than for Whitbread's individual free house customers.

213 It must be observed, second, that the applicants' challenge relating to the Commission's second argument concerns only an example illustrating it. The

contested affirmation that there is less risk for a tied tenant than for a free house operator is formulated, at point 168 of the contested decision, only as an example of an 'unquantifiable' benefit.

214 Moreover, the Commission is careful to cite other examples of 'unquantifiable' benefits, whose existence is not contested by the applicants. Thus it refers, at point 94 of the contested decision, to the fact that Whitbread has in several hundred cases agreed to the lessee surrendering the lease for personal and business reasons, and in a smaller number of cases has agreed to reduce the rent. Similarly, at point 150 of the contested decision, it observed that the lease of a public house at an agreed rent as in the Whitbread standard leases, having regard in particular to the restrictive licensing system in force in the United Kingdom, allows a tied lessee to operate a pub and hence enter at low cost the on-trade beer market.

215 It must be observed, third, that the Commission's contested assessment, and hence the existence of a lower commercial risk for tied lessees, is based on two findings, namely, first, the existence of 'partnership' elements, the flexible approach of Whitbread to surrenders of the lease and reductions in the rent, and, second, the existence, to the advantage of tied lessees, of a lower rent than that of non-tied houses.

216 The first factor, the presence of 'partnership' elements, has not been specifically criticised by the applicants.

217 The second factor, the existence of a rent subsidy to the advantage of tied lessees, was indeed disputed. However, the challenge has been found by the Court to be unfounded.

218 In those circumstances, on the basis of those premisses, one of which is uncontested and the other uncontestable, the Commission was able to conclude without making a manifest error of assessment that tied lessees bear less risk than non-tied operators.

219 That conclusion is not called into question by the applicants' assertion that a free house operator is able to make a capital gain over time, whereas a tied lessee is locked into a long-term lease with upward-only rent reviews and a beer purchasing obligation and has to bear the risk of losing without compensation the improvements made to the premises.

220 That assertion, which casts doubt on the profitability or even the viability of tied houses, is contradicted by the finding at point 169 of the contested decision, which is not challenged by the applicants, that during the period from 1991 to 1997, and hence for most of the 1990/91, 1991/92, 1992/93 and 1993/94 trading years, which corresponded to the longest recession the United Kingdom economy has known, the percentage of bad debt among Whitbread tied lessees was three times less than for Whitbread's individual free trade customers.

221 It follows that the applicants have not shown that the Commission made a manifest error of assessment by considering, at points 168 and 184 of the

contested decision, that the standard leases satisfied the conditions of Article 85(3) of the Treaty from 1 January 1990, a period which covers the 1990/91, 1991/92, 1992/93 and 1993/94 trading years.

222 The plea in law must therefore be rejected.

223 Accordingly, the application must be dismissed in its entirety.

Costs

224 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 applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the defendant.

225 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the intervener is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. **Dismisses the application;**

2. **Orders the applicants to bear their 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

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