

European Commission

**Review of the competition rules
applicable to vertical agreements**



**CAMPAIGN
FOR
REAL ALE**

**A Response from CAMRA,
The Campaign for Real Ale
September 2009**

Introduction

- 1.1. CAMRA, the Campaign for Real Ale, is an independent consumer organisation which campaigns for real ale, pubs and consumer rights. Membership is open to all individuals and our membership is over 100,000. CAMRA is financed through membership subscriptions, sales of products such as books and clothing, from the proceeds of beer festivals and other fundraising activities. CAMRA was established in 1971.
- 1.2. As consumer representatives, we reject the assertion by the Commission in point (2) of the preamble to the proposed regulation that: “In view of the **overall positive experience** with the application of the... regulation... it is appropriate to adopt a new Block Exemption regulation”. The experience of the Block Exemption within the UK pub market has been anything but positive. Application of exclusive purchasing and non-compete agreements have led to inflated prices, reduced competition and reduced amenity. The detriment to consumers particularly applies to UK consumers, but its effect can be felt throughout the EU due to the restriction of trade between member states.
- 1.3. CAMRA therefore cannot support the renewal of the Block Exemption without accompanying action to address anti-competitive practices in the UK pub market.

2. Exclusive purchasing and non-compete agreements

- 2.1. Over half of pubs in the UK are bound by exclusive purchasing and non-compete agreements with their landlords, the pub owning companies. Within the UK pub market these exclusive purchasing and non-compete agreements are referred to as “the tie”.
- 2.2. Competition within the UK pub market is appreciably restricted by exclusive purchasing and non-compete agreements in the following areas:
 - Beer
 - Other alcohol products
 - Technical Services
 - Technical Services Equipment
 - Insurance
 - Games and Prize Machines
- 2.3. The use of exclusive purchasing and non-compete agreements have merit where they are used to ensure access to market for small and medium sized brewers and thus have a net positive impact for consumers in this context.
- 2.4. CAMRA's view is that the large non brewing pub owning companies have exploited exclusive purchasing and non-compete agreements to maximise profits at the expense of consumers.

2.5. Within the UK pub market exclusive purchasing and non-compete agreements are imposed via land agreements. These land agreements are specifically excluded from proper scrutiny under UK competition law as a result of the UK Land Agreements Exclusion and Revocation Order 2004 (UK Exclusion Order). The effect of the UK Exclusion Order combined with the EU Block Exemption has been to allow large non brewing pub owning companies to progressively increase margins at the expense of competition and consumers, secure in the knowledge that they enjoy a considerable degree of protection from competition law.

3. Consumer Detriment

3.1. CAMRA contends that within the UK pub market the imposition of exclusive purchasing and non-compete agreements on tenanted and leasehold pub businesses is causing considerable detriment to consumers.

3.2. The total cost to consumers of above inflation increases in on-trade beer prices between 1990 and 2007 has led to a direct financial detriment to consumers of £2.5 billion annually¹. CAMRA argues that the principal reason for these above inflation increases in beer prices is due to anti-competitive practices in the UK pub market.

3.3. Below is a summary of the consumer detriment identified by CAMRA in its super-complaint² to the UK Office of Fair Trading:

3.3.1. Exclusive purchasing and non-compete agreements imposed on over 50% of UK pubs allow higher prices to be forced upon those pubs for a whole range of products. The Fair Pint campaign estimates that this price can be as high as 70 pence a pint of beer more than free market prices.³ Higher beer prices charged to pub operators are naturally passed on to the consumer. There are multiple sources of evidence that the prices charged to the consumer by pub business bound by exclusive purchasing and non-compete agreements are higher, including the following:

- CAMRA's Annual Prices Survey 2009⁴
- Good Pub Guide⁵
- Numis Securities⁶
- Figures commissioned by the GMB Trade Union by industry research body CGA Strategy⁷

¹ CAMRA, 'UK Pub Market super-complaint – A Fair Deal for the Consumer', submitted to the OFT in July 2009, Appendix 1, p29, available online at <http://www.camra.org.uk/media/attachments/305998/Super%20Complaint.pdf>. Hereon in described as 'the super-complaint'

² CAMRA's super-complaint

³ Fair Pint Campaign, 'Time for action: Time for change: Calling time on the tie' <http://www.fairpint.org.uk/lobbyday.html>

⁴ Super-complaint 8.7, p16

⁵ Business and Enterprise Committee Report 2009 – *Pub Companies*, p86, available online at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmberr/26/2602.htm#evidence>

⁶ Ibid., p86

- 3.3.2. The existence of exclusive purchasing and non-compete agreements has increased wholesale prices for beer in the entire UK pub market. This is because pressure is placed upon brewers to increase wholesale prices, prices upon which the cost of beer to individual pubs is based; so that they can meet the gross profit targets of the pub owning companies who are protected from competition by non-compete obligations.
- 3.3.3. Prices are also higher in the entire UK pub market. Those pub businesses that are free to pay competitive market prices do not face strong and healthy price competition within their local markets and so do not have the impetus to keep prices down, with the result that again the consumer suffers.
- 3.3.4. Consumers are denied greater choice of beers as a result of the barriers to market access faced by small and medium sized brewers.
- 3.3.5. Consumers suffer from reduced levels of customer service. Restricted profits mean pub businesses, subject to unfair and onerous exclusive supply and non-compete obligations, are unable to employ sufficient staff necessary to deliver high standards of customer service and invest sufficiently in property maintenance and refurbishment.
- 3.4. In summary, exclusive purchasing and non-compete agreements operated principally by large non-brewing pub-operating companies within the UK pub market artificially inflate the price of beer and other products sold in pubs through lack of competition, and so the consumer pays more while the licensees subject to these vertical restraints suffer extremely restricted earnings.
- 3.5. In the UK pub market 67% of licensees of leased and tenanted pubs earn less than £15,000.⁸ Most licensees also work hours in excess of the EU Working Time Directive, and earn below the UK Minimum Wage. The combination of long hours and minimal earnings available to many licensees, compared to any other employment option, mean reduced motivation and long term commitment to invest in training for themselves and staff, pub facilities and improving standards of customer service. One licensee gave compelling evidence to the House of Commons Business and Enterprise Committee that they were working “in excess of 65 hours a week at about £1 an hour”.⁹

⁷James Wilmore, 'New GMB figures attempt to highlight price disparity', *The Publican*, accessible online at: <http://www.thepublican.com/story.asp?storycode=65109>

⁸CGA – PubCo Licensee Survey - Business and Enterprise Committee Report 2009 – *Pub Companies*, Ev 296, available online at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmberr/26/2602.htm#evidence>

⁹Business and Enterprise Committee Report 2009 – *Pub Companies*, Ev 261, available online at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmberr/26/2602.htm#evidence>

4. Article 81 (1)

4.1. The parallel networks of exclusive purchasing and non-compete agreements in the UK pub market are appreciably restricting competition by:

- preventing access, and particularly independent access, of small and medium sized brewers from the UK and any other EU member state to a substantial part of the UK pub market
- preventing access, and particularly independent access, of suppliers of technical services and technical service equipment from the UK and any other EU member state to a substantial part of the UK pub market
- hindering access for suppliers of other goods and services to the UK pub market
- hindering access of wholesalers from the UK and any other EU member state to the UK pub market

4.2. CAMRA believes that the network of exclusive supply and non-compete agreements in the UK pub market falls within the EC Treaty Article 81(1) prohibition of agreements which prevent, restrict or distort competition within the Common Market.

5. Barriers to trade between member states

5.1. CAMRA is concerned that the Block Exemption, particularly the presumption of legality that it provides, causes significant barriers to cross-border trade between the UK and other EU member states both in terms of imports and exports and the ability of foreign companies to enter the UK pub market.

5.2. The anti-competitive nature of the UK pub market is restricting the ability of UK small and medium-sized brewers in reaching the 'critical mass' necessary in order to be in a stable position to begin exporting beer to other EU countries. They have independent access to less than half of the UK market and so face enormous barriers in growing their volumes and profitability to a level that is sufficient to allow them to trade in other EU countries.

5.3. In 2007 the UK exported 3014.8 thousand barrels of beer, of which 2145.3 thousand barrels (71%) were exported to the EU¹⁰. If the barriers to trade caused by the artificial cap on growth of small and medium-sized brewers through exclusive purchasing and non-compete agreements were relaxed, then exports to other EU countries could burgeon, enhancing the diversity of beer available to consumers throughout the EU.

5.4. The Block Exemption also affects imports into the UK beer and pub market. The barriers to entry for the supply of beer to UK pubs subject to non-compete agreements are such that it is virtually impossible for small and medium sized brewers outside the UK to gain access to the majority of the UK pub market. This is despite growing consumer demand for imported beers in the UK. In 1990

¹⁰ British Beer and Pub Association, *Statistical Handbook 2008*, p9

imports represented only 7.8% of UK beer consumption compared with an increase to 14.6% by 2006.¹¹

5.5. We further contend that the unusual, peculiar and opaque practices within the UK pub market, which are linked to the exploitation of exclusive purchasing and non-compete agreements, deter companies from other member states expanding into the UK pub market.

6. The Unique Nature of the UK Pub Market

6.1. The pub and the concept of a distinct pub market are unique to the United Kingdom. The key economic activity in a UK pub is provision of food and/or drink combined with a unique social experience which wholly differs from that offered by other licensed on-trade premises in the UK and elsewhere.

6.2. When considering merger cases the UK Office of Fair Trading has taken pubs as the appropriate frame of reference against which to assess the competitive effects of this merger¹². CAMRA's super-complaint clearly sets out the case for recognising the UK pub market as distinct.

7. "Sufficient Certainty"

7.1. Point (5) of the preamble to the regulation asserts that: "The benefit of the Block Exemption should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81 (3)."

7.2. Although CAMRA agrees with this principle, we must dispute that there can be any such certainty on this issue within the UK pub market. CAMRA therefore asks the Commission to specifically acknowledge concerns about anti-competitive practices in the UK pub market in the preamble to the regulation.

8. Recommendations

8.1. The current Block Exemption Regulation has allowed considerable consumer detriment to develop as a result of the presumption of legality granted by the Block Exemption. CAMRA therefore opposes the renewal of the Block Exemption unless the following three conditions are met:

8.1.1. The preamble to the regulation is amended to highlight concerns relating to vertical restraints within the UK pub market

8.1.2. The regulation guidelines are revised to acknowledge that in markets with several unique features, such as the UK pub market, clear anti-competitive effects are likely to arise even where no individual company has a market share of above 30%. CAMRA would suggest the following as unique features of the UK pub market which mean standard competition and economic assumptions do not apply:

¹¹ British Beer and Pub Association, *Statistical Handbook 2008*, p.83

¹² OFT - The OFT's decision on reference under section 22 given on 9 August 2004

- the localised nature of competition between pubs
- a market in long term decline
- where market participants are focused on increasing profit margins at the expense of increasing volume of sales
- where companies imposing vertical restraints engage in direct competition with companies they have imposed non-compete obligations upon

8.1.3. That the European Commission begin preparatory work on a regulation under Article 7 which would have the effect of removing the benefit of the Block Exemption from any company which owns or controls more than 5% of the pubs in the UK pub market (around 2,700 pubs). Given the current structure of the UK pub market this would have the effect of ensuring full application of Article 81 (1) and 81 (3) on Punch Taverns and Enterprise Inns.

9. Conclusion

9.1. CAMRA cannot support the renewal of the Block Exemption as it currently stands, as it fails to address abuses in the UK pub market. We require the Commission to take account of the recommendations detailed above and commence work on a regulation, under Article 7, to address anti-competitive practices within the UK pub market. If the Commission is unable to take action on these factors, then we regret that we will be unable to support the renewal of the regulation.

Need more information?

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