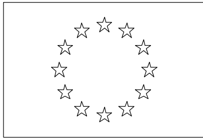

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 05-03-1998
SG(98) D/1981

Registered with advice of delivery

Patricia Boyes, Chairwoman
The National Association of
Inntrepreneur Lessees (NAIL)
[...]

Dear Mrs Boyes,

Subject: Case IV/34.907/F3 - NAIL

I refer to your application of November 11, 1993 pursuant to Article 3(2) of Council Regulation no. 17, regarding alleged infringements of the European competition rules by the Inntrepreneur Pub Company Limited.

By this decision, I inform you that, for the reasons set out in the annex, which annex forms an integral part of the decision, there are insufficient grounds for granting your application. The Commission therefore decides to reject your application.

In reaching its decision, the Commission has taken due account of the comments of 21 January 1998 submitted by your lawyers Ferdinand Kelly on the letter of November 24, 1997 pursuant to Article 6 of Commission Regulation 99/63 indicating the Commission's preliminary view.

Rue de la Loi 200, B-1049 Bruxelles/Wetstraat 200, B-1049 Brussel - Belgium
Telephone: exchange 299.11.11
Telex: COMEU B 21877. Telegraphic address: COMEUR Brussels.

These comments were limited to the statement that "[you] do not see why [your] complaint cannot be pursued, particularly in the light of the withdrawal of Inntrepreneur's application for exemption."

Yours faithfully,

For the Commission,

Karel Van Miert
Member of the Commission

Enclosure: Annex to the Decision of the Commission to reject the complaint

c.c.: Ferdinand Kelly, solicitors

Annex to the Decision of the Commission

to reject the complaint in

Case No IV/34.907/F3 - NAIL

I. THE FACTS

1. The Parties

1.1 The National Association of Inntrepreneur Lessees (NAIL)

1. NAIL is a trade association of former and actual Inntrepreneur tenants. The association held its first meeting on 2.10.1992 and its Chairwoman is Mrs Patricia Boyes, a former Inntrepreneur tenant of The Britannia Inn in the village of Alcombe, Minehead, Somerset.

2. NAIL has not submitted to the Commission mandates signed by individual lessees indicating that they authorise NAIL to act on their behalf. For this reason, the Commission services informed Mrs Boyes for the first time on February 29, 1996, that the complaint would be considered as an individual complaint by Mr and Mrs Boyes.

1.2 The Inntrepreneur Pub Company Limited (IPCL)

3. The formation of IPCL was completed on 28 March 1991 as a joint venture in which the Australian brewing company Foster's Brewing Group (Foster's) and the UK manufacturer and distributor of branded food and alcoholic drinks Grand Metropolitan Plc (GrandMet) each owned 50%. This joint venture was part of a deal whereby GrandMet ceased its brewing activities. At that time, and until 4 December 1995, IPCL was named Inntrepreneur Estates Limited.

4. IPCL owned approximately 8,450 on-licence premises on 28th March 1991. Since 1st November 1992, in compliance with The Supply of Beer (Tied Estate) Order 1989 ('the Order') and with the Undertakings given to the UK Government's Secretary of State for Trade and Industry in March 1991 ('the Undertakings'), IPCL has not held more than 4,331 tied on-licence premises. Pursuant to the Undertakings IPCL had to release by March 28 1998 any beer purchase ties on all on-licence premises which they then owned.

5. In August 1995, Foster's sold its UK brewing interests, grouped in Courage Group Limited (Courage) to Scottish & Newcastle Plc (S&N). Following this sale, Courage was renamed The Inntrepreneur Beer Supply Company (TIBSCO). However, Foster's retained its holding in IPCL. TIBSCO is the nominated supplier for the purpose of the Leases and owns the contract to supply the IPCL estate until March 28, 1998. Scottish Courage, the brewing division of S&N, acts as TIBSCO's agent in the performance of the supply contract. The effect of this is that, until the end of this supply contract, IPCL has no choice in deciding the brands of beer for which its lessees are tied.

6. On February 19, 1997, the Department of Trade and Industry agreed to release IPCL from the Undertaking (the Release). Following this decision, IPCL can continue to tie their existing (and new) lessees, is allowed to operate managed houses[1] can own an unlimited number of pubs and does not need to offer new tenants the right to sell one brand of draught cask-conditioned beer of a specified type purchased other than from the company or its nominees (the guest beer clause).

7. The IPCL estate currently comprises, according to IPCL, some 2,903 on-licensed premises or pubs following the acquisition in May 1996 of the beneficial interests in the freehold and leasehold properties of 1,410 pubs by Spring Inns Limited (Spring), a subsidiary of Royal Exchange Trust Company Limited[2] At 24 May 1997, 2,412 IPCL houses were let on long leases, principally of 20 years duration, and 490 houses were let on shorter term agreements of between 3 and 5 years or on temporary agreements. At the fiscal year end of 30 September 1996, the net income of IPCL was £114 million.

8. On September 21, 1997, The Grand Pub Company Limited, a company set up by the Japanese investment bank Nomura, entered into an agreement to acquire IPCL and Spring. The sale is due to be completed by March 28, 1998.

2. The Inntrepreneur Lease

9. The Inntrepreneur Lease is essentially a standard lease which is entered into between IPCL and most of its tenants (hereafter “the Tenant”). Most of the clauses in the Lease deal with the terms upon which the property ("the Premises") is let to the Tenant and include numerous covenants in respect of the Premises.

2.1 The “original” 20 year Lease

10. The first kind of agreement IPCL (or, before its creation, one of its parent companies) introduced in 1989 was a long-term (20 years) Lease, on a Landlord non-repairing basis; with provision for investment by the Tenant; with the possibility of assignment by the tenant of the lease after 2 years or less, and the possibility for the Tenant to charge the lease in order to borrow. Rent reviews are every five years and upwards only, and the tenant has 100% retainment of slot/amusement machine income.

11. Under the Lease, the company makes on-licence premises available to the Tenant for the period of the agreement. In return for this, the Tenant not only pays rent, insurance premiums, and is responsible for the repairs and upkeep of the Premises, but also accepts exclusive purchasing obligations in relation to certain specified beers. The relevant provisions of this agreement are as follows:

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[1] An on-licensed premise or pub where the operator is an employee of the company, instead of an independent tenant or lessee

[2] According to IPCL, Spring has the right at any time to give notice to the relevant IPCL subsidiary that it wishes to complete the transfer of the legal title to any person Spring may nominate.

Beer

12. The Tenant agrees, subject to the specific exceptions mentioned below, to purchase all his requirements of the following types of beer only from the company or its nominee[3]: light, pale or bitter ale, export or premium ale, mild ale, brown ale, strong ale (including Barley wine), bitter stout or porter, sweet stout, lager, export or premium lager, also known as malt lager or malt liquor, strong lager, 'diat pils' (or premium low carbohydrate beer), low carbohydrate (or 'lite' beer), in leases concluded until 30.04.90 also low alcohol ale, and low alcohol lager; however, these types have been waived as from 01.05.90 as a consequence of the Order, in leases concluded after 30.04.90, another type was added: dry lager (these beers are henceforward referred to as 'specified types' of beers).

13. The actual beers supplied to the Tenant by the company's nominated supplier (currently TIBSCO who has appointed Scottish & Newcastle as an agent) are specified in the company's price list which is an integral part of the agreement. This price list specifies not only the brand or denomination of each beer supplied, but also its type. The Tenant is obliged to purchase these brands or denominations of beer exclusively from the company or its nominated supplier.

14. The company reserves the right to add to, delete or substitute the brands of beer that it supplies to the Tenant by amending the contents of its price list from time to time.

15. Should the company wish to introduce a brand of beer on to the price list which is not of a 'specified type', a new agreement is required in order that the Tenant be obliged to purchase that beer exclusively from the company.

16. The Tenant may sell any type of beer other than 'specified types'[4] if:
    (i) it is packaged in bottles, cans or other small containers; or

    (ii) it is in draught form and the sale of that beer in draught form is customary or is necessary to satisfy a sufficient demand from the tenant's customers.

Stocking Obligations

17. The Tenant takes on an obligation to stock and expose for sale certain listed brands of wines, spirits and other drinks (non-beer drinks). This list may be varied by the company. There is however no obligation to buy any such non-beer drinks from or through the company and the Tenant may stock other brands as well.

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3. Subject to the right of the [existing - see paragraph 6 as to the situation for new tenants] Tenant, pursuant to Article 7 of the Order, to sell one brand of draught cask-conditioned beer of a specified type purchased other than from the company or its nominee (Guest Beer clause).

4. This right is subject to compliance with the more detailed provisions of the lease which set out the precise circumstances in which the tenant may sell types of beer other than 'specified types'.

Minimum purchasing obligation (mpo)

18. The Tenant is set a minimum beer barrelage purchasing obligation, generally agreed at 80% to 90% of the estimated barrelage, in each twelve month period, with such mpo to apply pro-rata for any shorter period of the term. If the company reasonably believes that the overall UK sales of beers in licensed premises has proved to be less than the average UK sales of beers in licensed premises during the corresponding period last occurring before the date of an individual Lease, the mpo shall for the following year be adjusted by this percentage.

19. The Tenant must compensate the brewer for any shortfall in the level of purchases below the mpo. However, no shortfall is deemed to occur to the extent that it is caused by purchases of Guest Beer(s). IPCL undertook, by a unilateral partial waiver of 16 July 1993, to permit unspecified beers purchased from brewers other than Courage to be credited towards the achievement of the mpo. Furthermore, Inntrepreneur informed the Commission that it had suspended the mpo provisions in or around November 1994. However, evidence in the possession of the Commission shows that this was not consistently put into practice by the company.

Advertising

20. The Tenant may only advertise goods supplied by undertakings other than the company in proportion to the share of those goods in the total turnover of the premises.

Amusement machines

21. The agreement allows the Tenant freedom in the selection, installation and use of machines (subject only to UK statutory requirements). It also permits the Tenant to retain 100% of the resulting revenue.

Rent

22. On the signing of the tenancy agreement, the parties set a particular level of rent to be paid by the Tenant to the company. Where an existing tenant switches from some other form of agreement to an Inntrepreneur Lease, the initial rent may be subject to arbitration. Alternatively the Tenant could, where applicable, seek a determination of the level of the initial rent in accordance with the provisions of the Landlord and Tenant Act 1954, which has applied to all tenancies since 11 July 1992, following the enactment of the Landlord and Tenant (Licensed Premises) Act 1990. Thereafter, the company has the right to review the rent every five years.

23. The agreement provides that the reviewed rent payable shall be the higher of the rent payable in the preceding period and the 'open-market' rent, meaning 'the best annual rental obtainable by a willing landlord from a willing tenant', having regard to the terms of the agreement (i.e. including the tie). In the event of a dispute, a procedure is undertaken whereby a surveyor or valuer acting as an arbitrator is appointed jointly by Tenant and company to settle the matter. If the company and the Tenant fail to agree on such an appointment, the agreement

provides for the dispute to be resolved by a person appointed by the President of the Royal Institution of Chartered Surveyors.

24. If a Tenant is released from the beer tie, the parties have to agree on an appropriate increase in the rent.

2.2 The new standard forms and the RetailLink changes

25. Since the introduction in 1989 of the 20 year Lease, other standard forms of Leases have been introduced, notably the Fixed Term Agreement which is for a term of three years, the Turnover Related Agreement which is for a period of 10 years and long fully repairing and insuring leases for terms between 10 and 30 years.

26. Following the introduction of RetailLink in February - March 1997, some changes have been introduced to the Inntrepreneur Lease by way of a Purchasing Agreement and a Deed of Variation. However, the "new" Lease is the subject of different proceedings[5] and is thus not considered by the present decision.

3. Procedural developments

27. On 14 October 1997, IPCL withdrew all its notifications prior to 1st January 1997. This includes the notification of July 17, 1992 (Case IV/34.387/F3 - Inntrepreneur/GrandMet/Courage), for which a Notice pursuant to Article 19(3) was published[6], by which the then notifying parties requested, if the Commission would find Article 85(1) to be applicable and Regulation No 1984/83 to be inapplicable, a retroactive exemption pursuant to the date of introduction of the Inntrepreneur Lease.

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[5] See OJ C 374, 10.12.1997, p. 11.

[6] OJ C 206, 30.7.1993, p. 2.

II. APPRECIATION

1. Lack of Community interest

1.1 Concept

28. The purpose of this section is to indicate the powers of the European Commission, the way these powers are exercised, the application of Articles 85 and 86 by national courts and the cooperation between national courts and the Commission. In doing so, explicit reference is made to the Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty[7] (the Notice). The Notice refers to case law of the European Courts, and, with respect to the concept of "lack of Community interest", particular reference is made to the Automec II judgment[8] This case law has been confirmed in later cases.[9]

29. "The Commission is the administrative authority responsible for the implementation and for the thrust of competition policy in the Community and for this purpose has to act in the public interest. National courts, on the other hand, have the task of safeguarding the subjective rights of private individuals in their relations with one another." (paragraph 4 of the Notice) "In performing these different tasks, national courts and the Commission possess concurrent powers for the application of Article 85(1) and Article 86 of the Treaty." (paragraph 5 of the Notice) However, "Article 85(2) enables national courts to determine, in accordance with the national procedural law applicable, the civil law effects of the prohibition set out in Article 85." (paragraph 6 of the Notice) The Commission is in no position to determine such civil law effects. On the other hand, "the Commission has sole power to exempt certain agreements pursuant to Article 85(3)" (paragraph 7 of the Notice).

30. "As the administrative authority responsible for the Community's competition policy, the Commission must serve the Community's general interest." (paragraph 13 of the Notice). The Notice made clear (paragraph 14) that "the Commission intends to concentrate on notifications, complaints and own-initiative proceedings having particular political, economic or legal significance for the Community. Where these features are absent in a particular case, complaints should, as a rule, be handled by national courts or authorities." In paragraph 15 the Commission indicated that "there is not normally a sufficient Community interest in examining a case when the plaintiff is able to secure adequate protection of his rights before the national courts and that in such circumstances the complaint will normally be filed."

31. "In this respect the Commission would like to make it clear that the application of Community competition law by the national courts has considerable advantages

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[7] OJ C 39, 13.2.1993, p. 6.

[8] Case T-24/90, *Automec* v *Commission*, judgment of 17 September 1992, ECR 1992, II-2223.

[9] Case C-91/95 P, *Tremblay and Others* v *Commission*, judgment of 24 October 1996, ECR 1996, I-5547, confirmation of Case T-5/93, judgment of 24 January 1995, ECR 1995, II-0185.

for individuals and companies:
- the Commission cannot award compensation for loss suffered as a result of an infringement of Article 85 or Article 86. Such claims may be brought only before the national courts. Companies are more likely to avoid infringements of the Community competition rules if they risk having to pay damages or interest in such an event, [...]
- before national courts, it is possible to combine a claim under Community law with a claim under national law. This is not possible in a procedure before the Commission. [...]" (paragraph 16 of the Notice)

32. It follows from the rationale of the Notice, as can be seen from the citations quoted above, that it is in the Community's general interest to avoid a duplication of procedures based on Community competition law between the Commission and the national courts. However, it is self-evident that the avoidance of duplication of procedures can only go so far as Community law would permit.

33. For instance, when a request for an exemption is lodged at the Commission, there remains, in view of the sole power of the Commission to grant such a request, a Community interest for the Commission to deal with the case. In such a factual situation, a duplication of procedures cannot be excluded. In such circumstances, a cooperation between the national courts and the Commission is essential and the Notice offers some indications to deal with such situations.

1.2 Community interest in this particular case

34. The factual situation so far with regard to the Inntrepreneur Leases which do not incorporate the Purchasing Agreement and the Deed of Variation (the "old" Lease) was that Inntrepreneur, by way of its notification of July 17, 1992, requested the Commission, inter alea, to grant a retroactive exemption pursuant to Article 85(3). Furthermore, the Commission has published a notice pursuant to Article 19(3) of Regulation No 17 indicating the Commission's intention to grant a retroactive exemption (see paragraph 27 above). In line with the guidance offered in paragraph 30 of the Notice, national judges could suspend their proceedings while awaiting the Commission's decision. This has been done, inter alia, by Mr. Justice Morris in the High Court of Justice - Chancery Division - on February 8, 1994 in the case of Inntrepreneur Estates (CPC) Ltd. and Courage Ltd versus Mr and Mrs Bayliss. In such a factual situation, and as long as the request for exemption for the "old" Lease was pending, there was, as stated in the above paragraph, a Community interest for the Commission to deal with the case.

35. This factual situation has changed in view of Inntrepreneur's decision of October 14, 1997 to withdraw its notification of 1992 (paragraph 27 above). There is, therefore, no longer a request for exemption pending for the "old" Lease. This means that the only remaining question with regard to the application of Community competition law to the "old" Lease, is whether or not Article 85(1) is applicable.

36. This is a question which the national court is in a position to decide. It can be added that the national court can take into account some factual and legal elements which the Commission has made public on earlier occasions. With

regard to a general market description, reference can be made to the earlier mentioned 19(3) notice and to similar such notices in the Bass[10] and Whitbread[11] cases. As to the legal point of the applicability of Article 85(1), indirect guidance can be taken from the Commission's intention indicated in the earlier mentioned Inntrepreneur 19(3) notice for the "new" Lease to grant an exemption to the "new" Lease.

37. Furthermore, in the event that the national judge finds that Article 85(1) is applicable, he is in a position to determine the civil law effects following from the prohibition set out in Article 85(2). The national judge, and he alone, can decide such issues as the severability or not of a particular clause found to be falling foul of Article 85(1) from the rest of the agreement. Furthermore, he can distinguish, as to the civil law effects resulting from the applicability of Article 85(1), between those Tenants who have entered into the Purchasing Agreement and Deed of Variation and those who have not. The judge can also award compensation for loss suffered as a result of an infringement of Article 85. Furthermore, the national court could deal at the same time with claims under national law, such as "misrepresentation" claims which, according to information in the possession of the Commission, have already been made by several Inntrepreneur tenants before the national courts.

1.3 Conclusion

38. The Commission considers that there are insufficient grounds for granting the complainant's application as, in the absence of a request for exemption pursuant to Article 85(3), it would lead to a duplication of procedures and is therefore not in the Community interest for the Commission to rule upon the complainant's request that the "old" Lease has infringed Article 85(1) since the date of its introduction.

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[10] OJ C 285, 9.11.1988, p. 5 and its corrigendum OJ C 324, 17.12.1988, p. 16.

[11] OJ C 294, 27.9.1997, p. 2.