

**Notice pursuant to Article 19 (3) of Council Regulation No 17 <sup>(1)</sup>**

**Notification No IV/36.456/F3 — Intntrepreneur**

(97/C 374/07)

(Text with EEA relevance)

**I. The application and notification**

1. On 27 March 1997, the Intntrepreneur Pub Company Limited (IPCL) and the Intntrepreneur Beer Supply Company Limited (Tibscot) notified pursuant to Article 4 of Council Regulation No 17, the standard form tenancy agreements (the leases) used for the letting by IPCL and related companies of licensed premises in the United Kingdom. The leases are in the form used as from 1 January 1997.
2. The parties have requested negative clearance of the leases, or confirmation that the agreements could benefit from the application of Regulation (EEC) No 1984/83 <sup>(2)</sup>, or exemption pursuant to Article 85 (3) of the EC Treaty.
3. The leases have been the subject of a previous notification for which a notice pursuant to Article 19 (3) (the previous notice) was published on 30 July 1993 <sup>(3)</sup>. This notification was withdrawn by the then notifying parties.

**II. The parties**

*IPCL*

4. 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 %. At that time, and until 4 December 1995, IPCL was called Intntrepreneur Estates Limited.
5. The main changes since the previous notice in IPCL, its shareholders and its estate which are relevant for this notification are summarized as follows:

— 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 Tibscot. However, Foster's retained its holding in IPCL,

— in May 1996, Spring Inns Limited (Spring), a subsidiary Royal Exchange Trust Company Limited <sup>(4)</sup>, acquired the beneficial interests in the freehold and leasehold properties of 1 406 pubs,

— on 19 February 1997, the Department of Trade and Industry agreed to release IPCL from an existing undertaking which obliged the company to free all of its pubs from the beer tie by 28 March 1998 (the release). Following this decision, IPCL can continue to tie their existing (and new) lessees, is allowed to operate managed houses <sup>(5)</sup>, can own an unlimited number of tied pubs (instead of the maximum of 4 350 imposed by the undertaking) 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),

— on 21 September 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 28 March 1998,

6. the IPCL estate currently comprises, according to the notifying parties, some 2 903 on-licensed premises or pubs. As on 24 May 1997, 2 413 IPCL houses were let on long leases, principally of 20 years' duration, and 490 houses were let on shorter term agreements of less than three years or temporary agreements. At the fiscal year end of 30 September 1996, the net income IPCL was £ 114 million.

<sup>(1)</sup> OJ L 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the EC Treaty to categories of exclusive purchasing agreements (OJ L 173, 30. 6. 1983, p. 5; corrigendum OJ L 281, 13. 10. 1983, p. 24). The Regulation contains in its Title II special provisions for beer-supply agreements.

<sup>(3)</sup> OJ C 206, 30. 7. 1993, p. 2.

<sup>(4)</sup> According to the parties, 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.

<sup>(5)</sup> An on-licensed premise or pub where the operator is an employee of the company, instead of an independent tenant or lessee.

*TIBSCO*

7. Tibsco is the nominated supplier for the purpose of the leases and owns the contract to supply the IPCL estate until 28 March 1998. Scottish Courage, the brewing division of S, 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.

8. Tibsco is also the head lessor of some 20 licensed premises, which are administered on its behalf by IPCL and included in the IPCL estate. Tibsco is a subsidiary of Foster's and in the year ended 30 June 1996 the turnover of Tibsco was £ 273,2 million.

**III. The market**

9. The particular features of the supply of beer for consumption in on-licensed premises market (the on-trade) in the United Kingdom are as follows <sup>(1)</sup>:

- there are approximately 83 100 full licenses in issue, of which around 57 000 were public houses or pubs; in addition there are about 31 500 clubs and 32 300 restaurants and private hotels,
- total beer consumption in the on-trade in 1996 was 43,25 million hl which accounted for 69 % of total beer consumption; overall consumption is decreasing or, at best, static and the off-trade is gradually becoming more important,
- on-trade beer consumption took place in 1995 through the following channels (volume %): brewers tied houses (12,1 %), brewers managed houses (20,2 %), pub chain tied houses, including IPCL (9,4 %), pub chain-managed (4,0 %), loan tied houses (21,2 %) and untied or free houses (33,1 %),
- brewing has become more concentrated with the current four national brewers commanding 77 % of the primary supply market.

10. In the 12 months prior to 24 May 1997, the beer supplied through Tibsco to the IPCL estate accounted for 3,1 % of the UK on-trade beer market. In addition to these supplies, an unknown number of barrels (estimated by the notifying parties as 240 000 <sup>(2)</sup> barrels) were sourced elsewhere, as guest beer purchases or otherwise.

**IV. The agreement**

11. The previous notice dealt only with the 20-year fully repairing and insuring leases; this notice also concerns other standard forms of leases, 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.

12. The main changes to the leases compared with the previous notice follow from the introduction of RetailLink. Under this scheme IPCL offered in February to March 1997, following the release, all of its tenants a new discount scheme for their beer purchases on signature of a purchasing agreement and a deed of variation. If these agreements are signed and returned to IPCL before the 1 July 1997, the discounts will be granted retrospective to 1 January 1997. The purchasing agreement sets out the discount structure. The deed of variation (i) incorporates the purchasing agreement in the existing lease, (ii) introduces a new beer tie but allows IPCL to vary the tie so as to tie by brand, (iii) removes the minimum purchasing obligation and the penalty for shortfall, (iv) allows the arrangements of the purchasing agreement to be considered for rent reviews after 31 March 1998, (v) introduces the opportunity for the lessees to have the rent review determined by an expert for a fixed fee, and (vi) allows the lessees to call for a rent review if the purchasing agreement is terminated; such a review could be downwards, but not to a level below the rent previous to the time of entering into the purchasing agreement.

13. Other changes are that there is no longer an obligation to stock or display non-beer drinks <sup>(3)</sup>.

<sup>(1)</sup> All information in this recital stems from the Brewers and Licensed Retailers Association (BLRA). Reference is also made to the market information in the previous notice.

<sup>(2)</sup> 1 barrel equals 1,63659 hl; 1 hl equals 0,611026 barrels.

<sup>(3)</sup> The notifying parties have indicated that this stocking obligation in the fixed-term agreement is in practice not enforced.

Furthermore, in future lease agreements, the company may impose a purchasing agreement for specified ciders and exclude the guest beer clause.

14. The discounts offered to the lessees following the introduction of RetailLink consist of an off-invoice standard discount of £ 30/barrel. In addition, there is a volume-related retrospective discount for purchases of qualifying products above 150 barrels. On the assumption that the average IPCL lessee has an annual beer barrelage throughput of 330 barrels (IPCL estimate) and that all beer purchases are made from IPCL or its nominated supplier, the average lessee would be entitled to a discount of £ 37,53 barrel. This has been compared to the average discounts granted by Scottish Courage in its last fiscal year ending April 1997 to its individual free-house operator-customers<sup>(1)</sup>.
15. The differential between the average discount granted by Scottish Courage to its individual free-house operator customers and that granted to the average IPCL lessee is more than compensated by the value of benefits which are available from IPCL and which are either not readily available to the individual free-house operators, or in addition to the contractual obligations resulting from the lease, i.e. so-called countervailing benefits.
16. The Commission has quantified three such benefits for IPCL lessees: terms of rent payable, training and procurement benefits introduced as part of the RetailLink offer ('Supplyline special terms').
17. The *terms of rent payable* relate to a £ 500 average (on the basis of the average rent paid) cashflow benefit for those IPCL houses on tenancy or long-term leases which now pay their rent monthly in advance as opposed to quarterly in advance as stipulated in the lease. This total number has been divided by the number of barrels bought by all the IPCL tenanted and long-term leased houses from Scottish Courage in the 12-month period ending 24 May 1997 to arrive at the £ 1,35/barrel benefit.
18. A £ 0,67/barrel benefit is attributed to *training*, taking into account both the IPCL expenditure on

external training resources in the last financial year ending 30 September 1996, and an estimate for inhouse resources devoted solely or mainly to training, together with associated location and administration costs.

19. The third benefit for IPCL lessees is the potential savings resulting from the *Supplyline* special business terms compared with individually negotiated terms (IPCL's estimate of list prices, less discounts obtainable on average by individual retailers). The potentially available benefits have an average value of £ 5 650 per pub, which results from the following items: cleaning and catering services equipment, frozen foods, gas, cash-handling services, waste disposal, fire protection services, condom-vending, pest control, toilet services, cellar cooling maintenance, vacuum-cleaner purchase/rental and snacks and crisps supply. In addition, IPCL bears all of the administrative costs which are involved in this initiative.
20. In addition, reference should be made of the possibility of assignment by the lessee of the lease after two years or less, which is a possibility taken up in 82 cases since 1 January 1997, with, in some cases, substantial premiums having been paid by the new to the old lessee.

#### V. The Commission's intentions

21. The Commission intends to take a favourable position in respect of the agreements, a summary of which is published here, by granting an exemption pursuant to Article 85 (3) for the period from the date of introduction of the purchasing agreement and the deed of variation described above until 28 March 1998. Before doing so the Commission invites all interested third parties to submit their observations within one month from the date of this notice, quoting reference IV/36.456/F3 to:

European Commission,  
Directorate-General for Competition,  
Directorate F,  
Rue de la Loi/Wetstraat 200,  
B-1049 Brussels.

<sup>(1)</sup> These discounts are a business secret and cannot be summarized meaningfully in a non-confidential manner.