

Beer Ties

are not what they used to be

Has the EU just preserved the pub
companies' licence to make money?



JOELSON WILSON LLP
Solicitors
30 Portland Place
London W1B 1LZ

T: (+44) (0)20 7580 5721
F: (+44) (0)20 7580 2251
E: info@joelsonwilson.com
W: www.joelsonwilson.com

JOELSON WILSON

The European Union announced in April 2010 that the Block Exemption Regulations in relation to competition law would be renewed until June 2022.

This means that all existing 'vertical' agreements are, subject to certain new guidelines which I will not go into here, confirmed as valid for the foreseeable future. Such agreements include the beer ties which appear in leases of public houses.

Pub companies and regional brewers alike welcomed the news.

Bearing in mind that this means that those companies' tied leases are now certain not to be declared illegal for another twelve years, it might be worth looking back to the origins of the tie. I cannot help thinking that all the lawyers, accountants and civil servants embroiled in the beer tie wrangles over the past 20 years have lost sight of the basic issue.

Traditionally, the tenanted public house was the model for beer sales. The brewery owned the premises and the purpose of the beer tie was to maximise the brewery's beer sales through its own pubs. To that end it nurtured its tied tenants – with differing degrees of success and fairness from one brewer to another. The brewery took responsibility for repairs and decorations to the pub premises (in its own livery, naturally), encouraged their tenants with promotions and generally treated them like employees – some might have said serfs - in every way except in law. They had all an employee's duties without the benefits.

“A Vertical Agreement” is an agreement between companies at different levels in the production and supply chain. Examples include agreements between a Manufacturer and a Wholesaler, or between a Wholesaler and a Retailer. These types of agreements may have the effect of restricting competition but can be allowed if it is in the best interests of the parties and the consumer.

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The other side of the coin was that tenants had no security of tenure. With some backward breweries a tenant might run a pub for several years, but depart without any pension, compensation or capital other than the price of the inventory.

In the 1970s and 1980s, the period leading up to the introduction of the Beer Orders in 1989, the main concern of politicians and beer drinkers alike was the growing monopoly of 'the big brewers'. While brewing companies were small local enterprises which supplied their products to the public houses which they themselves owned and let out to tenants, no-one much worried about the brewery requiring the tenant to sell its products exclusively. Its pubs were confined to an area which could be supplied daily by the brewery's drays or lorries. The public's choice depended on the number of brewers in the district.

As some breweries began to expand by the acquisition of competitors, the issue of local monopolies arose. Some brewers grew so large that they dominated whole regions, such as Watneys in Norfolk and Courage in North Kent, so swaps were enforced in the regions worst affected.

There were, at the time when monopoly investigations began, six major breweries: Grand Metropolitan (Watneys), Courage, Bass Charrington, Allied Breweries, Whitbread and Guinness – although Guinness was not a property owner, relying almost totally on its free trade. Grand Met and Courage merged in 1988, forming separate brewing and property-owning arms.

When the Beer Orders were introduced in 1989, some of the relevant measures were:-

1. Preventing premises being let on the basis that the landlord would carry out or pay for repairs. The idea was to put tenants fully in control of their businesses and not be slaves to their brewery.
2. Big brewers, as defined by the Orders, were to divest themselves of, or let free of tie, all pubs which they owned in excess of 2,000.

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3. Public house tenancies were to become business tenancies within the provisions of Part II of the Landlord and Tenant Act 1954.

Brewers, at least 'big brewers', were no longer to be property owners.

Some members of the commission which investigated the tie and drafted the Beer Orders were sceptical about their likely effect. The expression 'The Law of Unintended Consequences' had not been coined then, but it correctly describes the results of the Orders.

Firstly, beer production and the number of producers controlling the market have remained virtually the same.

Secondly, in the field of property, big brewers were in time replaced by the pubcos – Inntrepreneur, Vanguard, Enterprise, Punch and later Laurel. Enterprise and Punch between them came to dominate the scene, owning between them about 17,000 pubs out of a total of 60,000 in the UK.

As everyone knows, the pubco 'ties' its tenants by requiring them to buy drinks and other products from a list. The drinks are not produced by the pubco; there is no Enterprise Ale or Punch Porter. Unlike a franchise selling a particular make of doughnuts, pizzas or beauty products, there is nothing exclusive to identify the goods sold over the counter with the owners of the premises or the overriding business.

Imagine the outcry if tenants of office premises were to be required by their landlords to buy all their notepaper, photocopiers or coffee machines from a prescribed list, prescribed suppliers and at a prescribed price!

The pubco reaches a deal with a drinks supplier whereby, because of the bulk purchasing power of the pubco estate, discounts can be negotiated. The products are then sold to the pub tenants at the pubco's nominated price and the pubco makes money from the margin.

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Bear in mind here the Competition Commission's right to grant block exemptions for agreements which "contribute to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit..."

Think here about the pre-1989 beer tie. Although a regional brewer may argue that it is improving the distribution of its own products, it is stretching the imagination that a pubco is doing the same, "while allowing consumers a fair share of the resulting benefit." That must be a question which the EU has decided in the pubcos' favour only because their tying arrangements are being viewed in the context of a range of other industries.

For some time after 1989, companies imposing beer ties looked to a case in the European Court of Justice known as *Delimitis v Henninger Brau AG* [1991] for guidelines to judge whether their arrangements were within the law. The *Delimitis* decision should be seen in its context. It concerned a local brewery in Frankfurt supplying a bar in premises which the brewery owned, so this was an 'old-style' beer tie. Gradually the importance of the case diminished because the EU, having during the 1990s considered piecemeal the legality a number of individual tie arrangements, issued block exemptions for agreements in a range of industries. Brewing was just one of these.

That brings us back to April 2010. General rules now apply, so that where a company has less than 30% of a relevant market its 'vertical agreements' are deemed acceptable unless they contain unusually unfair restrictions. This protects and benefits not only British regional brewers but also pubcos.

As we have seen, the case for regional brewers looks fair in the context of the traditional tie. Whether that for pubcos has the same virtues is in my view questionable, but they have succeeded in getting for another twelve years their '*imprimatur*' – shall we call it a licence to make money?

If you would like any further information regarding this topic, please contact Keith Miller on the details below.

JOELSON WILSON

Need to know more? Ask us.

Contact Keith Miller
Joelson Wilson LLP
30 Portland Place, London W1B 1LZ
Telephone: + 44 (0) 20 7580 5721
Fax: + 44 (0) 20 7580 2251
E-mail: km@joelsonwilson.com
Web: www.joelsonwilson.com

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