I. INTRODUCTION

Britain's tied-house system is a custom dating back to 1750 whereby breweries both own the public houses (pubs) and either manage or lease them.¹ In the course of its nearly 250 year history the British pub has become a veritable institution in British life and tradition. Virtually unique among denizens of beer drinking countries, Britons drink most of their beer in pubs rather than at home.² In 1989, after three years of inquiry, Britain's Monopolies and Mergers Commission (MMC) published its report on the supply of beer in the United Kingdom market.³ Its findings of the existence of a complex monopoly and proposals for a radical reform of the tied-house system provoked howls of protest from traditionalists and brewery interests sufficient to force the government to retreat and propose a compromise plan.

² Id.
³ Monopolies and Mergers Commission, The Supply of Beer: A Report on the Supply of Beer for Retail Sale in the U.K. [hereinafter MMC Report]. The Monopolies and Restrictive Practices Commission was created in 1948 under the Monopolies and Restrictive Practice (Inquiry and Control) Act. It was renamed the Monopolies and Mergers Commission under the Fair Trading Act 1973. The Commission may not initiate investigations on its own but must wait for a reference from the Minister responsible for monopolies (Secretary of State for Trade) or from the Director General of Fair Trading. The Commission is required to reach definite conclusions as to the matters referred, is restricted to the terms of the reference, and may offer recommendations to be taken by the Minister or the affected parties. Individual members may amend dissents on one or more issues. Provided that the Commission has concluded a monopoly exists and has specified adverse effects to the public interest, and the report has been laid before Parliament, the Minister has discretion to make such orders as he feels requisite to prevent or remedy the specified public interest detriments. The Minister is not bound to the recommendations of the Commission. However, the Minister's remedial powers are restricted to the powers granted under schedule 8 of the Fair Trading Act. V. Korah, Competition Law of Britain and the Common Market (3d rev. ed. 1982).
The European Community (EC) is currently conducting a similar investigation on a European scale.

II. FACTS

The British tied-house system consists of a complex monopoly dominated by the country's brewers.4 It is characterized by a system of vertical integration that permeates every level of the beer trade, from manufacturing to retail.5 Access to the market is thereby limited.

Although the tied-house system is not unique to Britain, the extent of vertical integration is a prominent feature of the United Kingdom's beer industry.6 The majority of British brewing companies not only brew beer but also import, wholesale, and retail the beverage.7 The retail outlets consist of either on-licensed or off-licensed premises. Off-licensed premises are those in which alcoholic beverages may be sold but not consumed on the premises. On-licensed premises are those in which alcoholic beverages may be consumed on the premises, and consist of full on-licenses, primarily public houses, and restricted on-licenses, such as restaurants and hotels. In 1986, an estimated 85 percent of all beer sales were made through on-licensed premises.8 Some 61 percent of all beer was sold through full on-licenses (primarily public houses) while 46 percent of all beer was sold through brewer-owned public houses.9 Thus, the public house constitutes a very important element of the British beer market.

There are four types of relationships which exist between the brewer and the retail outlet. These are the brewer managed house, the tenanted house, the independent public house, and the tied house.10

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4 MMC REPORT, supra note 3, at 66.
5 Id. at 2.
6 Approximately 62 percent of all beer sales are made through the tied-house system in the United Kingdom compared to a maximum 40 percent in other Community countries with tied-house systems. The proportion of beer sales passing through tied-houses in Community countries are: Luxembourg (40%), Belgium (35%), West Germany (25%), France (10%), and the Netherlands (10%). The Financial Times, Business Law Brief, June, 1990.
7 Id.
8 Id. at 10. The figures are based on the estimates supplied by the Brewers Society.
9 MMC REPORT, supra note 3, at 39. The figures are based on the Brewers Society's statistics.
10 Id. at 6. The managed house is owned by the brewer and the licensee is a brewer employee. The tenanted house is characterized by a tenancy agreement which obliges the tenant to buy all his beer from the brewer landlord in return for various
The British brewery industry is comprised of about 220 brewers. The beer market is substantially dominated by the big six national brewers, who alone account for 75 percent of the United Kingdom's beer production, 74 percent of the brewer-owned retail outlets, and 86 percent of all loan ties.

The monopoly of the brewers, and of the big six in particular, is accentuated by their dominant position in the wholesale sector. Since most brewers are also wholesalers, the wholesale market is strongly influenced by brewer ownership of licensed premises and loan agreements. In addition, entry into the United Kingdom's beer market is limited by the brewer's dominant position in the import sector in which they hold a 70 percent share. The brewers have further reinforced their monopoly and limited the market entry for imports by means of licensing agreements with foreign producers.

benefits. The benefits offered include training, technical and marketing support, and catering advise. The tenant is formally independent, but in practice enjoys a very close relationship with the brewer. The third and fourth types constitute the "free trade" outlets, that is, outlets not owned by the brewer. The independent public house is completely free of all ties to the brewer and is free to buy his beer from any source. The loan-tied free house is characterized by an exclusive purchase agreement which obligates the tenant to buy all his beer from the creditor brewer in exchange for a loan offered on very favorable terms. Id. at 6-7.

11 Id. at 13. Sixty-one of the approximately 220 breweries belong to the Brewer's Society and together account for over 99 percent of British beer production. Id. The industry may be classified into several groups: the six national brewers with their 75 percent monopoly share of the market; and the eleven regional brewers together with the forty-one local brewers and three brewers without tied estates (BWTEs). BWTEs are brewers that primarily brew beer for sale to other brewers or wholesalers. Id. at 15. The remaining 160 other brewers together account for less than 1 percent of British beer production. Id. at 2.

12 Id. The big six national brewers, with their respective number of retail outlets and market share are: Bass: 7300 outlets and 22 percent market share; Allied-Lyons: 6600 outlets and 14 percent share; Grand Metropolitan: 6100 outlets and 12 percent share; Whitbread: 6500 outlets; Scottish & Newcastle: 2300 outlets and 10 percent share; Courage: 5000 outlets and 10 percent share. Parkes, Rundown on the Six Top Players in the Brewery and Drinks Retailing Game, Financial Times (London), July 12, 1989, § 1, at 6, col. 1 [hereinafter Financial Times, July 12].

13 MMC REPORT, supra note 3, at 278. The brewers effectively control the distribution and wholesaling of over 90 percent of beer in the United Kingdom.

14 Id. at 22. The dominance of the national brewers in the on-license retail sector inhibits the growth of a strong independent wholesale sector. Id. at 4.

15 Id. at 10. By contrast, imports by independent wholesalers accounted for less than 2 percent of the total beer market.

16 Id. at 10, 12. Although foreign brands of lager represent 17 percent of British consumption, much of this is brewed by British brewers under license in the United Kingdom.
In 1989 Britain’s Monopolies and Mergers Commission found Britain’s tied-house system to be against the public interest and called for substantial reform. In 1986 the Office of Fair Trading asked the MMC to investigate the supply of beer in the United Kingdom. The MMC report, published on March 21, 1989, found that a complex monopoly existed within the United Kingdom’s beer industry. The report recommended: 1) that no brewer own more than 2000 licensed outlets; 2) that tied tenants be permitted to sell “guest beers” and buy beverages, other than beer, from the most competitive supplier; 3) that tied loans be eliminated; 4) that security of tenure be guaranteed for tenants; and 5) that brewers be required to publish and adhere to their wholesale price lists.

Although the report received widespread support from non-brewing quarters, on July 10, 1989, the British government succumbed to the most intense lobbying and political campaign ever mounted against a commission report. The government backed down from accepting the report’s recommendations in full and put forth a compromise plan. The most important changes adopted in the compromise plan are: 1) that brewers need not divest themselves of all outlets over the 2000 ceiling but must maintain at least 50 percent of their outlets over 2000 as free houses; and 2) that the system of tied loans would be retained but with the proviso that publicans of all free houses would be able to obtain loan ties with easy exits from any brewer.


id.

id.

id.

Wood, Young’s Brew Will Speed Changes: Lisa Wood on Reaction to Proposals to Shake up British Pubs, Financial Times (London), July 11, 1989, § 1, at 10, col. 3 [hereinafter Young’s Brew]. A guest beer is a draught beer that a tenant would be permitted to buy from a supplier other than the landlord.

id. Brewery tenants will henceforth be afforded the protection of the Landlord and Tenant Act of 1954, giving them the same protection as other business tenants. Statement by Trade and Industry Secretary Lord Young, Department of Trade and Industry Press Notice (July 10, 1989) [hereinafter Young Statement].

Young’s Brew, supra note 20, at 10.

id. The campaign consisted of lobbying by the brewing industry, the Transport and General Workers Union (fearful of losing jobs), backbench Members of Parliament from the governing Conservative Party, and a £6 million advertising campaign.

Financial Times, July 11, supra note 17, at 10.

id.

id. The easy exit provision would require all loan times to be capable of termination with a maximum three months notice without penalty; and in the case of national brewers, loans must be confined to beer. Young Statement, supra note 21.
The compromise plan will principally affect the big six national brewers who will now have to keep an arms length relationship with 50 percent of their public houses above the 2,000 ceiling.27 The plan's author, Trade and Industry Secretary Lord Young, estimates that some 11,000 additional pubs will thereby be subjected to increased competition.28

Although opposition to the plan continues to exist, there are indications that the compromise plan will eventually be accepted by the brewing industry.29 Whether the compromise plan will be acceptable to the European Commission is another matter. In March 1989, Sir Leon Brittan, the European Competition Commissioner, began an investigation of the tied-house system in all Community countries except Denmark.30 In June 1989, EC officials indicated that they expected the Commission's review of the beer industry to be more far-reaching than that of the MMC. At the time of writing, the Commission's review was continuing.31

III. EUROPEAN COMMUNITY LAW

By its very nature, an agreement between a publican and a brewery in which the publican is obliged to buy all his drinks from the brewery restrains competition.32 Article 85(1) of the Treaty of Rome prohibits as incompatible with the common market:

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the pre-

27 Financial Times, July 11, supra note 17, at 10.
28 Id.
29 Financial Times, July 12, supra note 12, at 6.
30 Financial Times, July 11, supra note 17, at 10.
31 Since this article was written, the European Commission's review of the EC beer market has come to a completion and its conclusions were announced on June 14, 1990. The report appears to largely validate the premise and conclusion of this article; that despite its faults, Britain's tied-house system is still largely deserving of the block exemption granted under Regulation 1984/83 to exclusive purchase agreements between breweries and their retail outlets, and that Britain's tied-house system requires no radical overhaul in order to maintain a reasonably competitive beer market. The European Commission, however, singled out the United Kingdom's market for possible further review after the British government's reforms have been fully implemented and have had time to take effect. The results of the European Commission's review, together with other recent developments, are discussed in a postscript to this article.
vention, restriction, or distortion of competition within the common
market.\textsuperscript{33}

Such agreements are automatically void under Article 85(2) of the
Treaty.\textsuperscript{34} However, since such agreements are not necessarily without
benefits an exemption may be granted under certain circumstances.\textsuperscript{35}
Article 85(3) of the Treaty lays out the conditions necessary for an
agreement to be exempted from Article 85(1). Four conditions must
be satisfied, two positive and two negative. The agreement must:

a) contribute to improving the production or distribution of goods
or to promoting technical or economic progress; and
b) allow consumers a fair share of the resulting benefit.

The agreement must not:

a) impose restrictions which are not indispensable to the achieve-
ment of these objectives; and
b) afford the possibility of eliminating competition in respect to
a substantial part of the products in question.\textsuperscript{36}

Benefit of Article 85(3) may be obtained either by an individual
exemption granted by the Commission after notification or through
an applicable block exemption.\textsuperscript{37} The general rule is that unless an
applicable stock exemption is available, an exclusive dealing agreement
may not be enforceable unless individually notified to, and approved
by, the Commission.\textsuperscript{38} An agreement that contains restrictions ex-
ceeding those permitted under the block exemption may not benefit
from the exemption and will require individual notification to, and
approval by, the Commission.\textsuperscript{39} The power to grant an exemption is
reserved exclusively for the Commission by virtue of Art. 9(1) of

\textsuperscript{33} Treaty Establishing the European Economic Community, March 25, 1957, 298
\textsuperscript{34} Id. The entire agreement will not necessarily be void. If the offending parts
are severable, they alone will be voided. The issue of severability is a question of
national law. V. KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND
PRACTICE 33 (3d ed. 1986) [hereinafter KORAH].
\textsuperscript{35} See infra note 78 for a summary of the benefits the Commission considers to
derive from exclusive beer purchase agreements.
\textsuperscript{36} EEC Treaty, supra note 33. For a concise but thorough explanation of the
requirements and treatment by the Commission of the four prerequisites for an
exemption under Article 85(3), see generally GLEISS, COMMON MARKET CARTEL LAW
\textsuperscript{37} C. KERSE, EEC ANTITRUST PROCEDURE 14-15 (3d ed. 1988) [hereinafter KERSE].
\textsuperscript{38} Id.
\textsuperscript{39} Id.
Pursuant to the authority granted by Regulation 19/65 the Commission has adopted regulations providing for block exemptions for certain categories of exclusive dealing agreements. To obtain an exemption the Commission must be satisfied that the advantages outweigh the disadvantages that may be posed to competition. Among the advantages considered most important by the Commission are cost savings, broader offers, opening markets, and the creation and preservation of jobs. The most important disadvantages considered by the Commission are the creation of watertight markets and the exclusion of competitors.

Not until 1962 when the Council of Ministers adopted the first implementing regulation (number 17) was there any real attempt to
enforce the competition rules.\textsuperscript{51} Regulation 17 confirmed the basic prohibitions of Articles 85 and 86 and provided for negative clearances,\textsuperscript{52} orders to terminate an infringement,\textsuperscript{53} a system of notifications, requests for information, the power to grant exemptions and comfort letters,\textsuperscript{54} inspections, hearings, confidentiality, and the imposition of fines and penalties.\textsuperscript{55}

The avalanche of notifications of agreements that engulfed the Commission necessitated that a simplified and efficient mechanism be devised to handle the workload.\textsuperscript{56} Consequently, in order to avoid the overbearing workload, the Council of Ministers granted the European Commission the authority to issue block exemption regulations for categories of exclusive dealing agreements.\textsuperscript{57} Pursuant to this authority, the Commission adopted regulation 67/67 which provided a block exemption for exclusive dealing agreements. Since then, the Commission has adopted regulations providing block exemptions for certain other categories of agreements.\textsuperscript{58} Regulation 67/67 failed to draw a distinction between exclusive distribution and exclusive purchase agreements and contained no special provisions for beer supply agreements. It provided that the regulation did "not apply to agreements to which undertakings from one Member State only are a party and which concern the resale of goods within that Member State."\textsuperscript{59}

Prior to 1977, the Commission’s practice was based on a strict interpretation of Regulation 67/67 which held that purely national tying agreements did not violate Article 85(1) of the Treaty.\textsuperscript{60} It was

\textsuperscript{51} Korah, \textit{supra} note 34, at 34.
\textsuperscript{52} Id. at 34-35. A negative clearance is not an exemption but a statement by the Commission that, based on known facts, the agreement poses no problems under Articles 85 or 86. The negative clearance is not binding on national courts or the European Court of Justice and may be withdrawn should new circumstances arise.
\textsuperscript{53} Id. at 38. An order to terminate an infringement is the main way in which the Commission enforces the competition rules.
\textsuperscript{54} Kerse, \textit{supra} note 37, at 73. A substantial number of cases are dealt with by comfort letters. These are statements issued by the Commission following a preliminary examination declaring that the agreement poses no problems to the competition rules and stating its intention to close the file on the case. The Commission may reserve the right to reopen the file for reconsideration.
\textsuperscript{55} 10 O.J. EUR. COMM. (No. L 57) 849 (1967).
\textsuperscript{56} Korah, \textit{supra} note 34, at 73. Soon after the adoption of Regulation 67/67, the Commission was inundated with about 30,000 notifications of distribution agreements.
\textsuperscript{57} Id.
\textsuperscript{58} Council Resolution 19/65, \textit{supra} note 41.
\textsuperscript{59} Regulation 67/67, 10 O.J. EUR. COMM. (No. L 57) 849 (1967), at art. 1(2).
\textsuperscript{60} European Parliamentary Question No. 1764/82, 26 O.J. EUR. COMM. (No. C
only in that year that the European Court of Justice (the Court) held in *Alexis and Martine De Norre v. NV Brouwerij Concordia* that notwithstanding the language of Regulation 67/67, an exclusive purchase agreement restricted to undertakings and activities within a single Member State could fall under Article 85(1) if the cumulative effects were such as to restrict trade between the Member States and did not otherwise qualify for an exemption under Article 85(3).

The Court had previously held, in *Brasserie de Haecht v. Wilkin and Wilkin*, that to determine whether an exclusive purchase agreement falls under the sanctions of Article 85(1), the existence of similar contracts was a factor that had to be considered. Thus, the cumulative effects of similar agreements on trade between Member States should be considered rather than the agreement in isolation.

Regulation 67/67 was considered inadequate because it contained no specific exclusive purchase agreement provision and because it was aimed primarily at cross-border distribution. Recognizing the inadequacies of Regulation 67/67, the European Commission consequently adopted Regulations 1983/8365 and 1984/83 which provided 93) 22, 23 (1983) [hereinafter Question No. 1764/82] (Response by Mr. Adriessen on behalf of the European Commission).

61 *Alexis and Martine de Norre v. NV Braunwerij Concordia*, 1977 E. Comm. Ct. J. Rep. 65, 97, [1977] 19 COMM. MKT. L.R. 378, 406. Concordia, a Belgian brewery, brought suit against the defendants, successors to an exclusive beer purchase of a cafe in Gwent, Belgium, for failure to abide by the agreement. In response to a series of questions referred to it for a preliminary ruling by the Belgian court concerning the interpretation of Article 85 of the Treaty, Council Regulation No. 17, and Commission Regulation No. 67/67, the European Court held that exclusive purchase agreements, in which two undertakings from one Member State only, which do not possess the prohibited features of Regulation 67/67, may qualify for the block exemption of that regulation if, failing exemption, they would otherwise fall within the prohibition of Article 85(1) of the Treaty.

62 *S.A. Brasserie de Haecht v. Wilkin and Wilkin*, 1967 E. Comm. Ct. J. Rep. 407, 416, [1968] 7 COMM. MKT. L.R. 26, 41. The de Haecht brewery, a Belgian company, brought suit before the Tribunal de Commerce de Liège against Wilkins, proprietors of a cafe in Eshaux, Belgium, for violation of an exclusive liquor purchase agreement. In answer to the question referred to it for a preliminary ruling under Article 177 of the Treaty, the European Court held that exclusive purchase agreements are not by their nature violative of Article 85(1). However, they may violate Article 85(1) if, taken either in isolation or together with others, and considered within the economic or legal context in which they are made, they may affect community trade or they have as their objective or effect the restriction, distortion, or prevention of trade. *Id.* at 1967 E. Comm. Ct. J. Rep. 416, 7 COMM. MKT. L.R. at 41.


64 Question No. 1764/82, *supra* note 60, at 23.

block exemptions for certain exclusive distribution and exclusive purchase agreements. Title II of Regulation 1984/83 contains special provisions for beer supply agreements. Under Article 6 of Regulation 1984/83, Article 85(1) is held not to apply to agreements between two enterprises (a pub and a brewery) for the exclusive purchase and sale of certain beers, or certain beers and drinks specified in the agreement.

Article 7 of Regulation 1984/83 lists the other permitted restrictions. The supplier may restrict the reseller from selling beers and drinks of the same type as those specified in the agreement so long as he is able to supply such drinks. The reseller may be obliged to sell those beers obtained from other suppliers that are of a different type than those provided by the supplier only in bottles, cans, or packages unless they are customarily sold in draught form or there is sufficient customer demand.

Article 8 of the Regulation lists certain situations where the exemption will not apply. Products other than drinks or services may not be included in the tie. The reseller's right to obtain non-exclusive goods or services may not be restricted; nor may the reseller be obliged to bind his successor to the agreement for a longer period than he himself would be bound. A total tie may not exceed five years and a partial tie no more than ten years. However, where the supplier is also the landlord, the agreement may last for as long as the reseller occupies the premises. Furthermore, where the supplier is the landlord, the reseller must be permitted to obtain drinks besides beer from others if their terms are more favorable than those of the

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67 Articles 1-5 of Title I contain the general provisions. Articles 6-9 of Title II contain the special provisions for beer supply agreements. Articles 10-13 of Title III contain special provisions for service-station agreements. Articles 14-19 of Title IV contain miscellaneous provisions.


69 Id. This list of restrictions is exhaustive. Sinan, supra note 32, at 1064.

70 Regulation 1984/83, supra note 66, at 9.

71 Id.

72 Id. A total tie is an exclusive purchase agreement covering specific beers and other drinks; a partial tie is one that covers specific beers alone. Sinan, supra note 32, at 1064.
supplier or if the supplier does not offer such drinks at all.\textsuperscript{73} Since these situations would extend the tie beyond the supply of beer, the exemption does not apply.

Finally, Article 14 of Regulation 1984/83 permits the Commission to withdraw the block exemption whenever it finds the agreement incompatible with Article 85(3) of the Treaty, and particularly where: a) the contract goods are not subject to effective competition from identical or equivalent goods; b) access by other suppliers becomes significantly more difficult; or c) the supplier unjustifiably refuses to supply categories of resellers who cannot obtain the goods elsewhere on suitable terms or applies different prices or conditions to them, or applies less favorable conditions to tied resellers.\textsuperscript{74}

The terms of the Treaty of Rome and the regulations issued pursuant to them are directly applicable and binding upon Member States.\textsuperscript{75} In cases of conflict with national law, Community law prevails.\textsuperscript{76} The proposed reforms to the tied-house system must, therefore, comply with Community law.

IV. Analysis

Article 85(3) of the Treaty and Regulation 1984/83 implicitly assume the inherent anti-competitive nature of the tied-house system, but nonetheless grant a block exemption for beer supply agreements on the premise that there are also benefits to be derived from the system.\textsuperscript{77} Compliance will therefore be largely determined by balancing the detriments to free competition caused by the system against the benefits derived therefrom.\textsuperscript{78}

\textsuperscript{73} Regulation 1984/83, supra note 66, at 9.
\textsuperscript{74} Id. at 10, 11.
\textsuperscript{75} EEC Competition Policy, supra note 40, at 11.
\textsuperscript{76} Id. at 12.
\textsuperscript{77} See EEC Treaty, supra note 33; Regulation 1984/83, supra note 66.
\textsuperscript{78} In adopting Regulation 1984/83, the Commission considered the benefits that would accrue to suppliers, resellers, and consumers as sufficient justification for a special block exemption for brewery tying agreements.

The Commission believed that tying agreements would permit suppliers to make long-term planning of sales, encourage cost effective organization of production and distribution, and produce lower distribution costs as a result of the reduced risk of variations in market conditions. In addition, it was believed that tying agreements were often the most effective, and sometimes the only way, for producers to penetrate a market, especially for small and medium sized firms.

The benefits that were deemed to accrue to the resellers were considered to come primarily in the form of commercial and financial advantages conferred by the
A. The MMC and Young Plans Compared

The MMC concluded that the monopoly had enabled the brewers with tied estates to restrict the growth of brewers without tied estates (BWTEs) and independent wholesalers of cider and soft drinks, to keep tenants in an inferior bargaining position, and to prevent the emergence of a strong independent retail sector. In particular, it found the main public policy detriments resulting from the monopoly to be: a) higher than expected beer prices; b) excessive wholesale price variations between regions; c) restricted consumer choices in beer and drinks; d) inability of tenants to participate fully in meeting customer preferences due to the tie and tenants' inferior bargaining position; and e) limited access to the on-license market by independent manufacturers and wholesalers of beer. The MMC believed that since growth in the number of full on-licenses was unlikely in view of the operation of the licensing system, structural changes were required to increase competition in order to remedy the public detriments.

Lord Young essentially accepted the MMC's conclusions but differed on some of the recommendations. Lord Young suggested changes in the two main planks of the recommendations, the enforced divestment by the big six of all outlets owned above 2000 and the total elimination of loan ties. First, rather than force divestment, the compromise plan would permit continued ownership but would require the six national brewers to keep at least 50 percent of their pubs above the 2000 ceiling as free houses. Second, rather than eliminate all loan ties, Lord Young's compromise plan would permit their continuation but would now enable all publicans to obtain loan breweries which would enable the publicans to establish, modernize, operate and maintain their premises. Cooperation between the parties was expected to permit the publican to maintain or improve the quality of goods and services to customers. The consumer was presumed to benefit from all this by the guarantee of an ensured supply of quality beer at fair prices, and a choice between the products of different producers. Regulation 1984/83, supra note 66, at 5-6.

79 MMC REPORT, supra note 3, at 4.
80 Id.
81 Id.
82 Financial Times, July 11, supra note 17, at 22.
83 Id. The divestment provision would only have affected the six national brewers since they alone own more than 2000 on-license premises. MMC REPORT, supra note 3, at 5. This proposed change was originally put forward by the Brewer's Society. Financial Times, July 11, supra note 17, at 10.
ties with easy exits from any brewer.\textsuperscript{84} In addition, although the MMC made no such recommendation, Lord Young proposed a review of the licensing system's role in limiting access to the full on-licensed market.\textsuperscript{85}

The principal difference in the effect that arises between the compromise plan and the MMC recommendations is essentially two-fold. The first relates to ownership. Under the MMC plan, the brewers would be restricted to 2000 on-licenses which would require the divestment of 22,000 outlets.\textsuperscript{86} The compromise plan, however, could not only reduce brewer ownership but could, theoretically, permit an increase in brewer ownership.\textsuperscript{87}

The practical result of this difference in ownership will largely be determined by the second principal difference between the Young and MMC recommendations: the elimination of loan ties. The MMC ownership restriction, coupled with the recommended elimination of all loan ties, would presumably result in the creation of an additional 22,000 independent free houses, thus more than doubling the number of independent free houses in existence.\textsuperscript{88} This should significantly increase competition by creating a strong, independent free house sector in opposition to the tied-house sector.

The compromise plan should likewise result in an appreciable increase in the free house sector, but with a significant difference. The proposed continued existence of tied loans, albeit with significantly less stringent conditions, should result in an additional 11,030 free houses.\textsuperscript{89} Thus, this portion of the Young plan will not result in a significant increase in the number of independent free houses, but will increase the number of tied free houses. This part of the compromise plan will likely enhance competition, especially in the non-beer sector which will be completely freed from loan ties. However, it will do little to aid in the creation of a strong independent free

\textsuperscript{84} Financial Times, July 11, \textit{supra} note 17, at 10. The easy exit provision would require all loan ties to be capable of termination with a maximum of three months notice without penalty, and in the case of national brewers, loans must be confined to beer. Young Statement, \textit{supra} note 21.

\textsuperscript{85} Young Statement, \textit{supra} note 21.

\textsuperscript{86} MMC \textit{REPORT}, \textit{supra} note 3, at 5.

\textsuperscript{87} Any increase in brewer ownership under the compromise plan, especially by the nationals, is likely to be determined by the outcome of the proposed review of the licensing system.

\textsuperscript{88} MMC \textit{REPORT}, \textit{supra} note 3, at 5. There are presently 15,000 free houses. Young Statement, \textit{supra} note 21.

\textsuperscript{89} Young Statement, \textit{supra} note 21.
house sector which would most effectively maximize competition.

In addition to the two principal changes, the Young plan differs in that it would apply the MMC's guest beer recommendation only to the national brewers rather than to all brewers, and thus result in increased competitiveness for smaller breweries. This modification is altogether appropriate considering the overwhelming dominance of the big six. Indeed, the beer market has recently become even more concentrated as large brewers have taken over smaller ones. Since it is the small brewers that likely will be the chief beneficiaries of this change, it is an appropriate means of bolstering competition.

The significance of this recent concentration by the large brewers should not be overstated and should be considered in the context of the trend towards retail outlets with restricted on-licenses (e.g. restaurants, hotels, clubs, etc.) and off-licenses. The result has been a general reduction in the brewer's share of all liquor licenses from 48 percent in 1967 to 26 percent in 1986. Even in the absence of reform, this trend will likely continue reducing the brewer's market share in the future. The trend will probably accelerate under both plans. In this respect, the MMC recommendations would have the greatest effect, at least in the short term, by virtue of the divestment recommendation since it would quickly add an additional 22,000 independent competitors to the market.

The purpose of the guest beer provision is to increase the consumer's choice in beers by providing him the choice between a competitor's brand and the landlord brewer's brands. In reality, the consumer's

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90 Id.
91 MMC REPORT, supra note 3, at 3. Since 1967, the big six have increased their market share from 68 percent to 75 percent. Id.
92 It is recognized that it is not necessarily inevitable that the small breweries will be the chief beneficiaries. While the tied-houses of the national brewers can be required to offer a guest beer, the consumer cannot be forced to consume it and small brewer's guest beers may fail to achieve a substantial market share. It is possible that tied-house tenants will decide to switch to a nationally advertised and known brand-name beer of a large brewer in order to increase sales. The Daily Telegraph, Oct. 24, 1990, at 35, col. 1. However, the self-interest of the large brewers would act as a disincentive to switch to a nationally known brand-name since it is unlikely that they would want to promote the sales of a major competitor.
93 Id. at 39.
94 Britain's Pubs Are Tops for Choice, Price, and Value for Money, Origin Universal News Services Limited, Jan. 25, 1989 [hereinafter Origin Universal News Service]. The brewers' share of full on-licenses has dropped from 78 percent to 57 percent, and that of the nationals to 42 percent. The brewers' share of off-licenses has shrunk to 8 percent and that of the nationals to 7 percent.
choice is unlikely to be much affected by this provision. The national brewers already offer such a large variety of beers, ranging from various bitters, ales, and lagers to import brands, that the addition of one guest beer will have little practical consequence. The provision, if applied to all brewers as proposed by the MMC, rather than to just the national brewers as proposed by Lord Young, would primarily affect small local brewers with a limited range of beers. Thus, in light of the overwhelming market dominance of the nationals, the effect on most consumers' choice will be negligible at best.

Though the MMC Report was critical of the licensing system, it made no recommendations concerning its reform. The licensing system has generally worked to limit entry into the all-important full on-license sector. The Young plan recognizes and addresses this problem by proposing a review of the licensing system. Depending on the extent of reforms produced by the review, the changes in the licensing system could, like the MMC plan, produce significant improvement in the overall competitiveness of the market and would strengthen the independent free house sector.

Although it may be concluded that the tied-house system does indeed impose certain restrictions on competition, it may nonetheless be argued that it falls within the exemption provisions of Article 85(3) and Regulation 1984/83.

95 MMC REPORT, supra note 3, at 460. A list of the beer brands carried by the national brewers shows the extent of the range of beers. Each of the big six carries at least fifty different brands representing various types of beer such as stouts, light and pale ales, bitters and lagers. Id. Indeed, according to a report published by the Brewer's Society, Leading Leisure in Britain, the choice of beer brands is greater than in any other country except West Germany. The choice of beers in the typical British pub, normally offering more than 16 draught and bottled beers, is, according to the report, more than double that offered in any other country in Europe. Origin Universal News Services, supra note 94.

96 In fact, there appears to be little consumer dissatisfaction with the choice of beers available at public houses. See infra note 130.

97 MMC REPORT, supra note 3, at 2.

98 Local licensing boards generally require not only that the licensee applicant show his fitness but also that there is a demonstrable need for a new public house. Young Statement, supra note 21. This latter requirement can be difficult to meet, especially for a conventional public house, and the issuance of new licenses has consequently been limited. MMC REPORT, supra note 3, at 2. For example, whereas restricted on-licenses have increased from 7000 in 1966 to 28,000 in 1986 and off-licenses from 30,000 to 50,000, full on-licenses have increased only 7 percent between 1966-86. Id. at 1-2.

99 Young Statement, supra note 21.
B. Comparisons With Foreign Markets

An examination of certain foreign beer markets may be instructive for the purposes of determining the degree of competition existing in the United Kingdom's market and the possible consequences that might arise from implementation of the MMC or Young recommendations.

Of the nine countries examined by the MMC, tying agreements between brewers and licensed retail outlets are permitted in West Germany, Belgium, the Netherlands, Italy, France, and Spain. They are prohibited, however, in the United States, Canada, and Australia.\textsuperscript{100} For the sake of analysis, these countries may generally be divided into three categories: 1) countries in which tying agreements are prohibited;\textsuperscript{101} 2) countries wherein significant ownership of outlets and/or tying agreements are prevalent;\textsuperscript{102} and 3) countries wherein ownership of outlets and tying agreements are rare.\textsuperscript{103} Among the European countries, ownership of outlets are common only in the United Kingdom, West Germany, Belgium, and the Netherlands, while tying agreements are rare in France and Spain but prevalent in one form or another in the others.\textsuperscript{104} Despite the differences, several important observations may be noted.

First, substantial market concentration exists in all categories. In all countries, except West Germany, irrespective of the existence of or the pervasiveness of tying agreements in whatever form, the beer market is substantially monopolized by very few brewers.\textsuperscript{105} At 75 percent, the market share of the big six British brewers is comparable with that existing in other countries, and substantially less concentrated than in category one countries where ties are prohibited.

\textsuperscript{100} MMC REPORT, \textit{supra} note 3, app. 2-2 at 311-27.
\textsuperscript{101} \textit{Id.} Exclusive tying agreements are prohibited in Australia, Canada, and the United States. The latter two also prohibit the ownership of retail outlets.
\textsuperscript{102} Category two countries include West Germany, Belgium, the Netherlands, and Italy. Brewer ownership of outlets is rare in Italy. \textit{Id.}
\textsuperscript{103} Brewer ownership and ties are rare in Spain and France. \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} The respective market shares of the dominant brewers for each country are as follows: A. Category one countries: 1) United States: big three equals 73.7 percent, big six equals 94 percent; 2) Canada: big six equals 96 percent; 3) Australia: big two equals over 90 percent. B. Category two countries: 1) Italy: big three equals 65 percent; 2) West Germany: big five equals 28 percent; 3) Belgium: big two equals 70 percent; 4) Netherlands: big one equals 53 percent. C. Category three countries: 1) France: big two equals 73 percent, big three equals 81 percent; 2) Spain: big six equals 76 percent. \textit{Id.}
An important contributing factor in the international trend towards market concentration is the acquisition of and mergers between brewers. Moreover, these mergers have often taken place between market leaders.\textsuperscript{106} A more stringent application of the merger laws might be an equally effective and less radical method of fostering competition and preventing market concentration than the MMC approach.\textsuperscript{107} In this respect, the MMC's recent decision to reject the bid by Australia's Elders IXL, which already owns Britain's sixth-largest brewer, Courage Holdings, to acquire Britain's fifth-largest brewer, Scottish & Newcastle, was a positive and encouraging sign.\textsuperscript{108}

Second, foreign penetration of home markets is minimal in all but two countries. At 11 percent and 16.3 percent respectively, only France and Italy have an import penetration rate higher than the United Kingdom's 5.4 percent.\textsuperscript{109} These two factors, taken together, suggest

\textsuperscript{106} In 1988, Belgium's two largest brewers merged to form Belbrew while the third and fourth-largest brewers merged to form the Maes Kronenbourg Group. The two had a combined 70 percent market share. \textit{Id.} at 312. Similarly, in Italy mergers have recently been concluded between the largest and third-largest brewers and between the second and fourth-largest brewers. The two merged firms hold a combined 59 percent market share. \textit{Id.} at 323. In like fashion, Britain's largest brewers have also grown by mergers and acquisitions. \textit{Id.} at 3.

\textsuperscript{107} In this respect, it should be noted that the concerns about national market concentrations are becoming increasingly less relevant in light of the imminence of 1992 and the creation of an effective single European market. As this process develops, the relevant geographic market for the purposes of competition law will increasingly be evaluated on a Community-wide scale; today's national markets will be tomorrow's regional or local market. Regulation 4064/89, 32 O.J. EUR. COMM. (No. L 395) (1989) concerning the control of concentrations between undertakings, was passed on December 21, 1989, and prohibits the creation of a monopoly by merger and acquisition. The regulation is an important new development in Community competition law since under Article 86 of the Treaty of Rome only the abuse of and not the creation of a monopoly is forbidden by Community competition law. An important limitation is that the regulation applies only to the merged firms that will together have a combined world-wide turnover of five billion ECU or 250 million ECU in Community-wide turnover. \textit{Id.} at art. 1(2).

\textsuperscript{108} N.Y. Times, March 22, 1989, at 22, col. 5. The combined group, with a 21 percent market share, would have created the second-largest brewer behind Bass, which has a 25 percent market share.

\textsuperscript{109} MMC REPORT, \textit{supra} note 3, at 312. It should be noted that Italy and France share the lowest per capita beer consumption rate, whereas among the countries with a reasonably high per capita consumption rate, only the United States, at 4.7 percent, has an import penetration rate that approaches the 5.4 percent import share existing in the United Kingdom. By contrast, in West Germany, which has the highest per capita consumption rate, imports account for only 1 percent of beer consumption. \textit{Id.} at 311-12. Only approximately 4 percent of all beer consumed in the Community has crossed a national boundary. Only three European brewers, BSN (France),
that the tied-house system as it exists in Britain today is not the
dispositive factor in partitioning the United Kingdom market from
foreign competition.\textsuperscript{110}

Foreign brewers have long chafed at the problems of penetrating
Britain's beer market.\textsuperscript{111} Presently, most foreign beers are brewed in
the United Kingdom under license agreements by the big six.\textsuperscript{112} Under
the MMC proposals the large brewers are left with four options: 1) to
maintain their present structure, albeit at a much reduced level;
2) to divest themselves of their breweries and retain their public
houses; 3) to divest themselves of their licensed retailing outlets and
to concentrate their operations on manufacturing; and 4) to split
their operations into separate retailing and manufacturing entities.\textsuperscript{113}
The option chosen will depend on whether the brewer makes most
of its money from brewing or retailing.

It is widely believed that the chief beneficiaries of any break-up
of the tied-house system would be foreign brewers.\textsuperscript{114} Some would
be expected to buy the breweries divested by British brewers electing
to concentrate on retailing while others might be expected to buy the
divested pubs from British brewers electing to concentrate on brewing.\textsuperscript{115}
Although the smaller British brewers could also buy the divested
properties, it is believed that most would be purchased by foreign
brewers, probably due to their greater financial resources.\textsuperscript{116}

\textsuperscript{110} It is conceivable that other factors peculiar to the national market such as
local taste, customs, traditions, and self-reinforcing social habits more readily explain
the substantial preference for domestic beers that is apparent, as indicated by the
import penetration figures, in almost all the surveyed countries. See MMC REPORT,
\textit{supra} note 3, at 311-27.

\textsuperscript{111} \textit{Chicago Tribune}, \textit{supra} note 1, § 7, at 1, col. 2.

\textsuperscript{112} \textit{Id.} For instance, Grand Metropolitan brews Budweiser and Whitbread brews
Heineken under license.

\textsuperscript{113} It is widely believed that Allied, Grand Metropolitan, and Whitbread would
be most likely to take the second option and concentrate on retailing. Courage is
expected to take the third option and concentrate on brewing, while Britain's largest
brewer is expected to take option four and split into two. \textit{Id.} The recent restructuring
plan announced by Bass aimed at separating its retailing and brewing operations
into separate divisions was widely interpreted as supporting this view. The Daily
Telegraph, June 24, 1989, at 19, col. 1.

\textsuperscript{114} \textit{Chicago Tribune}, \textit{supra} note 1, § 7, at 1, col. 2.

\textsuperscript{115} \textit{The Daily Telegraph}, March 23, 1989, at 29.

\textsuperscript{116} \textit{Chicago Tribune}, \textit{supra} note 1, § 7, at 1, col. 2.
Under this scenario, it has been argued that the probable result would be an increasingly concentrated beer market.\textsuperscript{117} The few remaining national brewers, together with the invading foreign brewers, would grow without restraint to monopolize the beer market, while those companies choosing to concentrate on the retail end would grow to monopolize the pub trade.\textsuperscript{118} However, it should be noted that the MMC is not without power under national law to restrict the growth of the brewers by mergers and acquisitions. Until December 1989, the European Commission was largely impotent to prevent the acquisition of a monopoly, since Article 86 prohibited only the abuse of, and not the acquisition of, a dominant position.\textsuperscript{119} It is unclear how effective Regulation 4064/89 on the control of concentrations between undertakings will be in this situation since its prohibition against the acquisition of market domination by mergers or acquisitions is restricted to very large firms that have a certain high turnover.\textsuperscript{120}

Third, the average price of beer in Britain is not expensive by continental standards. In a survey, the average price of a pint of beer in the United Kingdom was found to be substantially less than the price paid in selected European countries and required less worktime from the British worker than his European counterpart.\textsuperscript{121}

Finally, the total number of beer brands, in both draught and packaged form, far surpasses the number offered in other European countries.\textsuperscript{122} Furthermore, Ireland excepted, the average number of beer brands offered in British public houses exceeds those offered in comparable European bars.\textsuperscript{123} The average British public house offers about six draught beers of various types.\textsuperscript{124} Divestment would be unlikely to increase the product mix of draught beer offered beyond that which the guest beer proposal would accomplish because of the physical constraints imposed by the structure of the average public house.\textsuperscript{125}

\begin{itemize}
  \item \textsuperscript{117} The Sunday Telegraph, March 26, 1989, at 35.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} EEC Treaty, supra note 33, at art. 81.
  \item \textsuperscript{120} Regulation 4064/89, supra note 107, at art. 1(2).
  \item \textsuperscript{121} MMC REPORT, supra note 3, at 440-41. The countries surveyed were West Germany, France, Denmark, Ireland, and the United Kingdom.
  \item \textsuperscript{122} Id. at 439, table 12.
  \item \textsuperscript{123} Id. at 439, table 10.
  \item \textsuperscript{124} Id. at 299.
  \item \textsuperscript{125} Id. at 299 (dissenting view of L.A. Mills).
\end{itemize}
The real issue concerning consumer choice, however, is not the choice of beer types but the choice of beer brands. Intuitively, the MMC proposals of forced divestment and the abolition of all loan ties would have a greater effect on brand competition than the Young plan. However, it is far from certain that the MMC proposals would result in a substantial increase in the selection of beer brands offered in the average British public house, for there are compelling business and physical constraints on the number of brands any public house is likely to be able to stock.  

In addition to the above, other factors bear upon consumer choice. First, even in the absence of tying agreements and brewer ownership of public houses, it is uncertain that consumer choice would expand. Independent publicans would probably continue to sell the most highly-profitable and highly-advertised brands. Under these circumstances, the national brewers, due to advantages in economies of scale and overwhelming financial strength, can be expected to dominate the market. The nearly universal trend towards market concentration by a few manufacturers in each country supports this conclusion. Furthermore, only minimal differences exist between managed, tenanted, and independent free houses in the number of brands offered. Although independent free houses offer a somewhat wider choice of draught beer, managed and tenanted houses offer a wider selection of bottled beers. In any event, most consumers find little difficulty getting whatever beer they want in public houses.  

Second, the degree of competition is more likely to be affected by the location of one pub relative to another than by any other factor. Consumers will frequently have a choice between competing managed, public houses.

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126 It is highly improbable that more than a very few public houses would have the financial and physical resources to stock anything near the more than four hundred beer brands currently available from the brewers. MMC REPORT, supra note 3, at 299. It is instructive that independent public houses, possessing complete freedom to sell as many brands from whatever available source, on average sell no more than the average number of brands sold in managed or tenanted houses. Id. at 60.

127 Id. at 299 (dissenting view of L.A. Mills).

128 See supra note 103.

129 MMC REPORT, supra note 3, at 60.

130 Id. at 51. A survey conducted by the Consumer's Association revealed that choice of beer brands in public houses were of little concern to the British public. Only 6 percent mentioned availability of beer brands as a reason for choosing a particular pub, and 59 percent indicated that they could get whatever they wanted in public houses.

131 Id.
tenanted, or independent public houses in their neighborhoods. Where one brewer has a monopoly of public houses in any given locality, a less radical and equally effective solution would be to reform the licensing system so as to require proof of diversity before the issuance or renewal of licenses.

Currently, some 75 percent of all public houses are owned by brewers while half of the remainder are tied to them by loans. While growth in the restricted on-license and off-license market has been robust over the years, the growth of on-licenses has been anemic. Since public houses require full on-licenses, their growth has been minimal. Consequently, entry into the pub trade by opening a new public house is difficult. Since the brewers own or control most public houses, the scarcity and difficulty of obtaining new full on-licenses is tantamount to a de facto conspiracy between the licensing boards and the brewers to perpetuate the brewer's stranglehold on the pub trade.

Various solutions short of the sledgehammer approach of the MMC are conceivable. Consumers will frequently have a choice between competing managed, tenanted, tied, or independent public houses in the neighborhood. Licensing authorities might prohibit the transfer of licenses upon sale of a public house to another brewer that already owns the maximum permitted number of pubs, and permit the transfer only upon a strong showing that there are no willing buyers of a preferred class. Alternatively, the authorities might institute a blanket ban on the issuance of new licenses to brewers that have reached a given threshold of pub ownership, subject to strictly circumscribed exceptions. Another possible solution would be to rely on natural attrition. The number of independent public houses could be increased by the natural attrition of the market combined with a competition-oriented licensing policy. For instance, Grand Metropolitan alone has

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132 Id. The great majority of on-licenses (90 percent) have another on-licensed outlet within five minutes walk, and 34 percent have at least ten nearby outlets.

133 Id. at 2.

134 MMC REPORT, supra note 3, at 2. The percentage of full on-licenses to restrictive on-licenses has declined significantly over the years. In the period 1966-1986 there was an overall 40 percent increase in licensed premises. Growth has been uneven. The restricted on-license sector (e.g. restaurants) grew by 400 percent, off-licenses grew by two-thirds, and licenses issued to clubs by 30 percent. But in the same period, full on-licenses (necessary for a public house) grew by a meager 7 percent. Id. at 1-2.

135 Id. at 2.
recently disposed of more than 700 public houses. In any event, the licensing authorities should give strong preference to applications for new licenses from entrepreneurs, independents, and small local brewers.

Third, most brewers exchange beers with each other. This is especially true of bottled beers, both domestic and foreign, where consumer choice is both varied and extensive. This practice goes some way to offset the restrictive effects of exclusive tying agreements on consumer choice.

The recent experience of Australia, which has abolished the beer tie, holds special significance. It may be an indication of the possible consequences of the abolition or radical alteration of the tied-house system. In less than ten years following the abolition of the beer tie, two brewers, Elders and Bond, had acquired over 90 percent of the Australian beer market. The proportion of beer sold by public houses plummeted from 75 percent to 35 percent of sales as pubs closed and off-license sales increased dramatically. Between 1974 and 1986, wholesale and retail prices of draught beer rose 70 percent and 30 percent in real terms. Far from increasing competition and providing greater consumer choice and value for money (the major concerns of the MMC), the reforms resulted in fewer public houses, higher prices, less consumer choice, and less competition!

In summary, in the major areas of concern to the MMC—competition between brewers, consumer choice and prices—the comparison with other countries generally favors the competition system of the United Kingdom. Prices are typically cheaper, the consumer's choice more extensive, import penetration greater, and market concentration less than in most comparable countries. This conclusion is buttressed by the perception of British and foreign consumers who generally consider British public houses to offer greater consumer

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136 Id. at 272. There is some discrepancy here. The MMC REPORT covers the period of its inquiry (1986-1989). The Chicago Tribune, supra note 1, § 7, at 1, col. 2, however, reported that Grand Metropolitan sold over 800 outlets in the last year alone. In any event, a very substantial number of pubs change hands each year.

137 MMC REPORT, supra note 3, at 275.

138 Id.

139 The Sunday Telegraph, March 26, 1989, at 35.

140 Id.

141 Id. By contrast, in Britain, retail pub prices rose 20 percent between 1973 and 1987, and draught beer rose 15 percent between 1980 and 1986 at the wholesale level. MMC REPORT, supra note 3, at 67.
choice and value for money than that offered in foreign countries.\textsuperscript{142} In short, when viewed in comparison with the market conditions prevailing in foreign countries, the British market fares quite favorably.

Both the MMC and Lord Young maintain that they have carefully considered the requirements of EC law, particularly Regulation 1984/83, in formulating their respective recommendations.\textsuperscript{143} The MMC Report concedes that the tenancy agreements submitted to them for inspection by the brewers generally conformed with Regulation 1984/83.\textsuperscript{144} The same was also true of the loan tie agreements submitted for inspection.\textsuperscript{145} Clearly, these vertical agreements are covered by the beer supply block exemption of 1984/83.\textsuperscript{146} The MMC, however, believed that at least some of the enumerated public interest detriments fell within the terms of Article 14 of Regulation 1984/83 and were inconsistent with Article 85(3) of the Treaty.\textsuperscript{147} Both the MMC and Lord Young evidently believed that their respective recommendations would remedy the detriments and thus rectify the perceived conflict with EC rules.

Although the MMC recommendations are, on the surface, more far-reaching than the compromise plan, the overall effect on competition in the beer trade will likely differ little between the two. Both will dramatically increase the number of free houses: independents under the MMC plan and tied free houses under the compromise plan. Consumer choice would increase with the addition of 22,000 new independent pubs under the MMC plan, and also with the addition of some 11,000 free houses under the compromise plan.\textsuperscript{148} The overall effect, however, will be minimal considering the wide

\textsuperscript{142} MMC Report, supra note 3, at 433-36. Among the major findings of a study of British and foreign travellers' perceptions of British pubs and foreign bars conducted by Nielsen Consumer Research on behalf of the Brewer's Society are the following: 1) All groups preferred British pubs to foreign bars; 2) Most of the Britons and foreigners felt British pubs offered greater value for the money than foreign bars; 3) Foreign bars, however, were seen as cheaper for drinks than British pubs; 4) British pubs were perceived as better for draught beer range, atmosphere, comfort, and friendliness. The MMC, however, considered the study to be far from perfect.

\textsuperscript{143} Id. at 284; Young Statement, supra note 21.

\textsuperscript{144} MMC Report, supra note 3, at 23.

\textsuperscript{145} Id. at 26.

\textsuperscript{146} Regulation 1984/83, supra note 66.

\textsuperscript{147} MMC Report, supra note 3, at 286.

\textsuperscript{148} Id. at 5; Young Statement, supra note 21.
range of beers already available in pubs, especially those of the national brewers.149

In the long-term, competition may improve to approximately the same extent under either plan. Depending on the outcome of Lord Young's proposed review of the licensing system, as many new independent pubs may be produced in the long-term under the Young plan as would be created as a result of the divestment recommendation of the MMC Report.

C. The European Community's Response to Brewery Tying Agreements

The European Commission has recognized that while tying agreements are inherently anti-competitive, since they tend to close off markets to outsiders, they also provide benefits.150 The inherent tension is reflected in Article 85 of the Treaty, Regulation 1984/83, various Community decisions and notices, and the decisions of the European Court of Justice.

The conflict is explicitly reflected in Article 85 which prohibits exclusive dealing agreements in paragraph (1) and yet grants an exemption in paragraph (3) where accrued benefits may be shown.151 The tension is further reflected by the special block exemption provisions for beer agreements in Regulation 1984/83.152

The European Court of Justice has yet to confront fully the issue of brewery tying agreements. One reason is that the Court has never had to rule directly on the validity of a brewery tying agreement under Article 85(3) since the two brewery agreement cases that have come to the Court have arrived by way of requests for preliminary rulings under Article 177.153 Although the effect of de Haecht and

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149 See MMC Report, supra note 3, at 460; Origin Universal News Services, supra note 46.
150 Question 1764/82, supra note 60, at 23-24.
151 Regulation 1984/83, supra note 66.
152 EEC Treaty, supra note 33, at art. 85.

Because Community law confers individual rights on Community nationals, it may be invoked by individuals in national courts. Preliminary rulings are intended to avoid differing and conflicting interpretations by national courts. There are two types of preliminary rulings: rulings on interpretation and rulings on the validity of Community acts. National lower courts may request a preliminary ruling. The
Concordia was to permit Regulation 67/67 to encompass national tying agreements where the cumulative effects restricted interstate trade, the general view of the Court appears to have been that such agreements in the brewing sector were to be expected and not to be automatically considered violations of Article 85(1). In fact, the Court has yet to find, based on the facts before it, that a brewery tie violates Article 85(1).

With regard to enforcement, the Commission has been none too consistent. In the view of the Commission, the fundamental objectives of its competition policy is first and foremost to create an open and integrated common market; secondly, to ensure the correct amount of competition to meet the Treaty’s aims; and thirdly, to protect the consumer. Likewise, the underlying premise of block exemptions is to permit restrictive agreements where they improve distribution and provide other benefits so long as they do not isolate markets and prevent parallel imports. Furthermore, the stated purpose behind the adoption of Regulation 1984/83 was to overcome the inadequacies of Regulation 67/67 which had made it difficult to control national brewery agreements. Indeed, the aim of Regulation 1984/83 was to enable the Commission “to gradually abolish restrictive practices which affect intra-community trade in beer and other beverages, to prevent distortion of competition and to increase consumer choice.” The Commission is prepared to countenance re-

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European Court may only give a ruling on Community law, not national law.

Opinions differ on the authority of preliminary rulings on interpretation. However, it is generally accepted that: 1) the ruling is binding as to the requesting court or other court of the Member State in which the case is to be decided; 2) it serves as a basis for applying the relevant law in subsequent cases; and 3) the court may always ask the European Court for another interpretation.

Preliminary rulings on the validity of Community acts, however, are universally binding on all courts of Member States. The preliminary ruling procedure accounts for most of the cases reaching the European Court. Office for Official Publications of the European Communities, The Court of Justice of the European Community 22-25 (4th ed. 1986).

154 Goyder, supra note 153, at 210.
156 V. Korah, EEC Competition Policy - Legal Form or Economic Efficiency, 39 Current Legal Problems 85, 91 (R. Rideout & J. Jowell eds. 1986) [hereinafter Current Legal Problems].
158 Question No. 1764/82, supra note 60, at 23.
159 European Parliamentary Question No. 2326/82, 26 O.J. EUR. Comm. (No. C 266) 4, 5 (1983) (response by Mr. Andriesen on behalf of the European Commission).
strictive beer agreements, at least in the short term, so long as they do not completely destroy competition and the resulting benefits are extended to the consumer.

Some of the Commission's positions, however, have belied its commitment to the goal of abolishing restrictive practices which affect intra-community trade in beer. In Concordia, the Commission proposed that the Court draw a distinction between major and minor contributions to the cumulative restrictive effect of national brewery agreements on intra-community trade, suggesting that only major contributions fall within the grasp of Article 85(1). The Court rejected this relative contribution proposal. However, the fact that the Commission was seriously considering the adoption of a special provision for small and medium size breweries and drink wholesalers, up to the period immediately preceding the adoption of Regulation 1984/83, makes it apparent that the minor/major contribution distinction was not of a purely transitory interest to the Commission.

The positions taken by the Commission suggest that it is inclined to have a permissive attitude towards the implementation of its fundamental objectives of an open and integrated common market and towards the abolition of restrictive practices which affect intra-community trade in beer. However, the Commission's actions may also be seen as an indication of the Commission's predilection to punish only the major players in the industry.

Like the Court, the Commission has yet to deny an exemption or to find a brewery tying agreement to violate Article 85(1). Prior to the adoption of Regulation 1984/83, this might have been explained by the Commission's narrow interpretation of Regulation 67/67 as inapplicable to national brewery agreements. However, since the

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160 Concordia, 1977 E. Comm. Ct. J. Rep. at 70, 19 COMM. MKT. L.R. at 391. The Advocate General asserted that the correct inquiry was "whether the market is, in fact, open or closed and whether the situation represents the combined result of all the impediments, both great and small, considered as a whole."

161 The distinction was explicitly rejected by the Advocate General. Id. Although the Court's judgment did not explicitly refer to the distinction, the general import of the judgment indicated substantial agreement with the Advocate General's opinion. Id. at 80, 19 COMM. MKT. L.R. at 401-06.

162 Question No. 1764/82, supra note 60, at 24.
163 BELLAMY, supra note 155, at 278.
164 Question No. 1764/82, supra note 60, at 23. The Commission's narrow interpretation of Regulation 67/67 is reflected in its decision in Goodyear Italiana-Euram, 18 O.J. EUR. COMM. (No. L 38) 10, 12 (1975) where the Commission held that Regulation 67/67 was not applicable to the exclusive dealing agreement which is confined to activities within a Member State and which is only concerned with resale of goods within the Member State.
adoption of Regulation 1984/83, the Commission has continued to approve tying agreements. In the *Carlsberg* decision, the Commission held that an agreement between Carlsberg brewery of Denmark and Grand Metropolitan of Britain, whereby the latter was given exclusive rights to produce, market, and sell Carlsberg beer in the United Kingdom in exchange for royalty payments, was eligible for an exemption because the benefits to be derived therefrom outweighed the detriments.  

Emphasizing the peculiar nature of the British beer market, the Commission held that the agreement deserved an exemption because otherwise it was unlikely that Carlsberg would be able to penetrate the United Kingdom’s market as quickly and as easily without access to Grand Metropolitan’s network of tied outlets.

Similarly, in July 1989, the Commission published a notice stating its intention not to proceed against an agreement between Moosehead Breweries of Canada and Whitbread of Britain in which Whitbread was granted the exclusive right to produce, market, and sell Moosehead beer in exchange for royalty payments. As in the *Carlsberg* decision, the determining factor behind the approval was the nature of the British market which makes it essential that a foreign brewer wishing to enter the market gain the assistance of a large national brewery.

Moreover, in November 1988, the Commission announced its intention to approve the standard form tenancy agreement submitted by Bass breweries for approval. The agreement, containing a typical tying clause whereby the tenant would obligate itself to purchase beer from Bass exclusively in return for certain benefits, was held to conform to the requirements of Regulation 1984/83.

The Commission’s apparent aversion to finding exclusive purchase agreements illegal appears to be restricted to the beer industry. In other areas of trade, such agreements have routinely been held to

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166 Id. at 34.
168 Id.
170 Id. at 8.
infringe upon Article 85(1). Indeed, though it has the exclusive power to grant exemptions, it has granted few—no more than three a year prior to 1983, and only slightly more since then.\footnote{Current Legal Problems, supra note 156, at 95.}

One such instance was the Spices decision, in which the Commission held that an exclusive purchase agreement between Brook Bond Liebig, a spice producer holding 39 percent of the Belgian market, and the three largest supermarket chains, constituting 30 percent of the retail spice market, whereby the latter obligated itself to sell only Liebig spices apart from its own brands, constituted a violation of Article 85(1).\footnote{21 O.J. EUR. COMM. (No. L 53) 20, 22-23 (1978) [hereinafter Spices decision].} The Commission held that though Liebig and the supermarkets benefitted from the arrangement, an 85(3) exemption could not be granted because the benefits did not accrue to the consumers since the agreement tended to reduce their choice and resulted in higher prices.\footnote{Id. at 25.}

The decision is also of interest since it was announced in 1977 when Regulation 67/67 was in force, illustrating that exclusive purchase agreements could be found illegal even though restricted to a single national market.\footnote{The case concerned an exclusive purchase agreement for the distribution and sale of spices through supermarkets in Belgium. Spices decision, supra note 172, at 22.} In addition, the fact that an agreement largely identical in its essential aspects to a brewery tying agreement was found to violate Article 85(1) indicates the special deference the Commission grants to breweries.

The existence of an entrenched and long-established system of tied-houses in much of the Community is also an important factor underlying Commission policy on brewery agreements.\footnote{The degree of compartmentalization varies but it is substantial in most Member States. According to Commission estimates, in 1983 between 50 percent and 60 percent of publicans were tied to breweries in West Germany, France, and the Benelux countries, and 80 percent in Britain. Tied houses were of only minor economic importance in other Member States. The Commission also estimated that about 250,000 exclusive purchase agreements were in existence in the Community in 1983. Question No. 1764/82, supra note 60, at 23.} In formulating Regulation 1984/83, the Commission was made aware of the substantial opposition that would arise in certain countries to prevent any substantial interference in the adoption of the special block exemption for beer agreements.\footnote{Goyder, supra note 153, at 210.} This recognition is reflected in the
use of tying agreements. The recognition of the economic importance of the tied-house system was crucial to the Commission’s approval of the tying agreements in the Carlsberg and Moosehead decisions. No doubt the Commission took note of the political strength the tied-house system recently exhibited in forcing the British government to retreat from the MMC’s major recommendations.

V. Conclusion

On the surface, change is likely to be more spectacular and far-reaching under the MMC’s recommendations than under the Young plan, at least in the short-term, since twice as many free houses are projected to arise from under the MMC’s proposals than under the government’s plan. The overall effect on the consumer’s choice, however, will be minimal considering the wide choices already available to him or her in British pubs. Assuming a liberal review of the licensing system proposed by Lord Young occurs, as many independent pubs may arise in the long-term under the Young plan as under the MMC’s. Thus, in the long-term, improvements in competition may be roughly equivalent under either plan.

The European Commission asserts that its primary competition objective is the abolition of restrictive practices and the attainment of an open and integrated common market. Press reports strongly indicate that the outcome of the Commission’s investigation will be more far-reaching and radical than either the MMC’s or Lord Young’s plan. However, the Commission has in the past indicated its willingness to condone at least minor violations. In marked contrast to its apparent aversion to grant exemptions for exclusive purchase agreements in other areas of trade, the Commission has yet to hold a brewery tying agreement ineligible for an exemption.

Any prediction on the outcome of the current Commission investigation of the tied-house system would be highly speculative at best. No adverse rulings on point, either by the European Court of Justice or the Commission, have been handed down to justify such a prediction. Whether either plan will satisfy the European Commission

177 The only other specific provision granting a block exemption for exclusive purchase agreements in Regulation 1984/83 is for service-station agreements. The provision is covered in Title III, Articles 10-17. Regulation 1984/83, supra note 66, at 10-11.

178 See Carlsberg decision, supra note 165 and Moosehead decision, supra note 167.
is impossible to say. However, based on past practices, an affirmative answer is the more likely outcome. The tied-house system is by its very nature restrictive of competition to some extent. Community law accepts this as a given but nonetheless recognizes that there are also benefits to be derived from the system. Consequently, the Commission’s review will probably revolve around the balancing of the anti-competitive nature of the system with the benefits to be derived therefrom.

Notwithstanding the conclusions of the MMC Report, the evidence suggests that despite the dominance of the United Kingdom market by the big six and the competition restraints imposed by the tied-house system upon which it rests, the United Kingdom’s beer market: is relatively competitive in comparison with comparable industrial beer consuming countries, especially vis-a-vis open systems such as Australia and the United States; is comparatively fragmented; provides reasonable service, prices, and choice of beers; provides considerable benefits to small regional, local, and specialty brewers; and has generally satisfied British consumer desires. In short, there is little imperative for a radical overhaul of the tied-house system.

Even absent the government reforms, social trends and market forces, together with liberal licensing reforms, should alone have been sufficient to accomplish the objectives of the MMC. The trend towards lager beer, the demand for which is substantially met by foreign brewers either through direct sales or through licensing agreements, will inevitably challenge the dominance of the big six. Similarly, the spectacular growth of restricted on-license premises such as hotels and restaurants, coupled with the relatively anemic growth of full on-licenses, has and will continue to decrease the market share of the tied-house sector vis-á-vis the independent sector. The same will likely result from the substantial growth in off-licenses during the last quarter century. Furthermore, reform of the unduly restrictive licensing system, coupled with a pro-independent sector bias and a pro-competition application of those rules could, in conjunction with the natural attrition of pubs by the big six, substantially meet the major concerns of the MMC.

179 The MMC Report concedes as much. MMC REPORT, supra note 3, at 284.
180 Foreign brewers account for approximately 36 percent of United Kingdom lager sales, which constitute 18 percent of all beer sales. Rawstorne, A Change of Pace to Restructuring, Financial Times, Sept. 19, 1990, at 17, col. 3.
181 See supra note 99.
Finally, the advent of 1992 and the creation of a single European market diminishes the relevance and importance of the national market. Competition among brewers will increasingly take place on a Community-wide scale and competition policy and rules will have to adapt to this new emerging reality. The growth of European and international brands is inevitable; in such circumstances, consolidation among brewers in order to achieve economies of scale necessary to compete on the European and international level is also inevitable. In short, market concentration will increasingly be a matter of Community, and not national, evaluation.

Postscript

On June 14, 1990, after fifteen months of investigation, European Competition Commissioner Sir Leon Brittan announced the completion of the Community beer market. The main conclusions were: 1) no general changes were required to Community rules governing agreements between brewers and their retail outlets; 2) the Commission may evaluate whether further measures are required in the United Kingdom's market once the newly implemented government reforms have had time to take effect; 3) exclusive purchase agreements for small regional brewers should be governed by national law, and not Community rules; and 4) licensing agreements between the major brewers will be examined to determine whether they are being used to divide markets or control imports. The review noted that countries operating a tied-house system, including Germany, the United Kingdom, and Belgium, were serviced by a "proliferation of small and medium-sized breweries" and offered their consumers the most choices. In contrast, countries with fully open systems, such as Denmark, Ireland, Australia, and the United States, are dominated by one or two breweries benefitting from economies of scale. Although it found the beer markets in the reviewed countries to be static, the Commission found insufficient

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182 Rawstorne, supra note 180, at 17.
184 Id.
185 Id. For example, Denmark is dominated by Carlsberg, Ireland by Guiness, the United States by Anheuser Bush and Miller, and Australia by Bond and Elders. Id.
186 The countries reviewed by the Commission included the United Kingdom, West Germany, France, Luxembourg, the Netherlands, and Belgium.
evidence to either conclude that the tied-house system was to blame or to justify any major changes to Regulation 1984/83 governing tying agreements between brewers and their outlets.\(^\text{187}\)

Although the Commission singled out the United Kingdom for possible further action, it has decided to delay any further evaluation until after the government reforms have been fully implemented and have had time to take full effect.\(^\text{188}\) Concerned by the uniquely pervasive nature of the United Kingdom's tied-house system, which it found to be aggravated by the restrictive licensing system that limits the number of new retailers,\(^\text{189}\) the Commission has decreed that the proportion of beer sales passing through tied-houses be reduced from the current 62 percent level to the maximum European level of 40 percent.\(^\text{190}\) The reduction in tied-house sales should occur naturally as the national brewers free the approximately 10,000 outlets from the tie in conformance with the government reforms.\(^\text{191}\)

The most significant substantive change is the Commission's decision to exempt small brewers from the EC rules on exclusive purchase agreements and to leave such agreements to control by national laws. This change is consistent with the de minimis rule and with Regulation 4064/89 on the control of concentrations between undertakings\(^\text{192}\) and the new looming realities of a single European market.

Potentially more significant is the Commission's decision to closely scrutinize licensing agreements between major brewers to determine whether they are being used to divide markets or control imports. The number of licensing agreements by major brewers is on the increase.\(^\text{193}\) Although the Commission accepts that "[m]any such agreements benefit consumers by enabling a small specialist brewer to make its product available outside its home market, or by acting as a stepping stone for the full, independent entry of a large mul-

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\(^{187}\) Id.

\(^{188}\) Since the three-year implementation period of the reforms does not expire until October 1990, in all practicality, no further evaluation will take place until 1993 at the earliest.


\(^{190}\) The Independent, June 15, 1990, at 23.

\(^{191}\) Id.

\(^{192}\) See Regulation 4064/84, 32 O.J. EUR. COMM. (No. L 395) (1989), \textit{supra} note 107. The Commission presently is evaluating the level at which this de minimis exception should take place. 58 Antitrust & Trade Reg. Rep. (BNA) No. 1472, at 1024 (June 28, 1990).

tainational brewer into other geographical areas," it is concerned that
they "can also serve as vehicles for market-sharing, enabling large
breweries to control imports in order to ossify existing market struc-
tures . . . ."194

The Commission also found that few European brewers had a
significant presence outside their home markets.195 The Commission
also discovered evidence of increasing internationalism among major
European brewers, noting, however, that they remain relatively small
on an international level and lack the economies of scale enjoyed by
the United States and Japanese "mega-breweries."196 In light of these
observations, the consistent approval of brewer licensing agreements
by the Commission, and the emergence of a single European market,
the Commission is unlikely to, nor should it, deny approval absent
clear and convincing evidence of anti-competitive motives and illegal
collusive conduct designed to restrain Community trade.

Significant recent developments have also occurred in the United
Kingdom's beer market in response to the implementation of the
MMC-inspired reforms. Among the big six, Scottish & Newcastle,
closest to the 2000 tied-house limit when it was announced, has already
reduced its 2300 pubs to below the 2000 ceiling.197 Whitbread, with
6250 pubs is replacing its tenancies with leases and will convert the
surplus into free houses. Allied-Lyons is similarly converting tenancies
into leases.198

Grand Metropolitan and Courage have proposed a radical and
innovative solution: a pubs-for-breweries swap. Under the original
proposal, Grand Metropolitan would sell its breweries to Courage,
controlled by Elders of Australia; a fifty-fifty joint venture, to be
called Entrepreneur Estates Ltd. (IEL), would be created between
Grand Metropolitan and Courage with some 7000 pubs-composed of
Courage pubs and all but 1700 of Grand Metropolitan's over 5000
pubs; IEL would be tied to Courage by a renewable ten-year exclusive
purchase agreement; and the joint venture would be managed on a
day-to-day basis by Grand Metropolitan.199

194 Id.
195 Id. The Commission observed that "only approximately [4%] of all beer
consumed in the EC has crossed a national border—this is a reflection not only of
significantly different demand patterns in Member States but also the high unit costs
involved in transporting beer." Id.
196 Id.
198 Id.
In October 1990, the MMC rejected the proposal as submitted and proposed amendments to the deal which would have to be accepted before its approval would be forthcoming. The recommendations are: that the merged brewing interests of Courage be reduced from 20 percent to no more than 15 percent of the United Kingdom's beer market; that the period of the exclusive purchase agreement be reduced to five years; that the proportion of full on-licensed premises tied to Courage in any Petty Sessional division be reduced to 25 percent; and that Courage take measures to ensure that it does not control its 50 percent voting rights in IEL in order to avoid the pressure being exerted on IEL tenants to show preference for Courage beer.\textsuperscript{200} Indications suggest that the recommendations will be accepted and the pubs-for-breweries deal will gain final approval.\textsuperscript{201} The European Commission, which has been studying the proposed pubs-for-breweries deal and reserves the right to open its own formal investigation,\textsuperscript{202} has been able to exert its influence on the pub swap negotiations\textsuperscript{203} and can thus be expected to approve the deal should it be accepted by the British government.

There is presently some expectation that Bass, the market leader with over 7000 public houses, will sell in order to meet the 2000 ceiling.\textsuperscript{204} However, should the Grand Metropolitan/Courage pubs-for-breweries deal gain final approval, it is likely that Bass will devise a similarly innovative scheme in order to avoid the full impact of the Tied Estate Order.

These recent developments bear out the predictions that the reforms would have, as their inevitable consequence, the effect of forcing the national brewers to choose between brewing or retailing, with the concomitant result that the system of large-scale vertical integration would give way to a system of horizontal integration and consolidation in the separate areas of brewing and retailing.\textsuperscript{205} The immediate result of the pubs-for-breweries swap deal is the creation of one mega-size retailing group and a reduction from six to five national breweries

\textsuperscript{200} The Times (London), Oct. 17, 1990, at 25, col. 2.
\textsuperscript{201} Id. Negotiations between the brewers and Sir Gordan Borrie, the Director General of the Office of Fair Trading, to rework the scheme are currently underway and due to be completed by November 16. Id.
\textsuperscript{202} Id.
\textsuperscript{204} The Daily Telegraph, Oct. 24, 1990, at 35.
\textsuperscript{205} See supra note 113 and accompanying text.
in control of the United Kingdom beer market. This can hardly have been the result intended by the authors of the MMC Report. This consequence illustrates the frequent folly of those in charge of competition policy to concentrate on the theoretical constructs of a competitive market model rather than on the practical and actual effects of economic activities and arrangements on the economy. Sometimes the wisest course is to respect the old adage—if it ain't broke, don’t fix it.

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