

Case C-234/89 Delimitis [1991]

Facts: The brewery Henninger let to Mr Delimitis a pub, requiring him to obtain a minimum amount of beer from Henninger and soft drinks from their subsidiaries, otherwise requiring him to pay a penalty. The contract was terminated, for health reasons. Mr Delimitis challenged the amount deducted for the penalty from the deposit when the contract was terminated, on the basis that the contract was automatically void by virtue of Article 85(2) of the EEC Treaty. On appeal, and in connection with these proceedings, the Higher Regional Court of Frankfurt referred for a preliminary ruling several questions on the interpretation of Article 85 of the EEC Treaty.

Held: Beer supply agreements entail advantages for the supplier (guaranteed outlets), and for the reseller (favourable conditions and guarantees of supplies). If such agreements do not have the object of restricting competition within the meaning of Article 85(1), it is still necessary to ascertain whether they have the effect of preventing, restricting or distorting competition. Their effects have to be assessed in the context in which they occur and where they might combine with others to have a cumulative effect on competition. Consequently, it is necessary to analyse the effects of the agreement, together with other contracts of the same type, on the opportunities of national or other Member States competitors to gain access to the market or to increase their market share. To assess whether the existence of several beer supply agreements impedes access to the market, it is necessary to examine the percentage of outlets tied to national producers, the duration of the commitments, and the proportion of beer committed. But the existence of a bundle of similar contracts with a considerable effect on the opportunities for gaining access to the market is not sufficient to consider the market as inaccessible: it is also necessary to examine any real concrete possibilities for a new competitor to penetrate the bundle of contracts (acquiring a brewery already established on the market or opening new public houses). Account must be taken of the conditions under which competitive forces operate on the market, attending to the number and the size of producers present, the degree of saturation and customer fidelity to existing brands. If this examination shows that those agreements do not have the cumulative effect of denying access to new national and foreign competitors, the agreements cannot be held to restrict competition; if it reveals that it is difficult to gain access to the market, it is necessary to assess the extent to which the agreement contributes to the cumulative effect produced on that market, taking into account the market position of the contracting parties, including the market share and the number of outlets tied to it.