JUDGMENT OF THE COURT
OF 10 JULY 1980 [1]

Distillers Company Limited
v Commission of the European Communities

"Competition — spirituous beverages"

Case 30/78

1. *Competition — Agreements — Notification — Lack of formal notification — Exemption — Excluded*
   (Regulation No 17 of the Council, Art. 4; Regulation No 1133/68 of the Commission)

2. *Competition — Agreements — Prohibition — Application — Criteria*
   (EEC Treaty, Art. 85 (1))

1. In the absence of notification in accordance with the requirements of Regulation No 17 and Regulation No 1133/68, an agreement may not have exemption under Article 85 (3) of the EEC Treaty, even if the text of the agreement was communicated to the Commission subsequent to a request for information made by the latter.

2. Although an agreement may escape the prohibition in Article 85 (1) of the EEC Treaty when it affects the market only to an insignificant extent, having regard to the weak position which those concerned have in the market in the products in question, the same considerations do not apply in the case of a product the entire production of which is in the hands of a large undertaking.

In Case 30/78

THE DISTILLERS COMPANY LIMITED, with registered premises at 12 Torphichen Street, Edinburgh, represented by Michel Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 Rue Philippe II,

applicant,

1 — Language of the Case: English

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, R. D. Gilmour, acting as Agent, assisted by John Murray, QC, and Alan Rodger, of the Faculty of Advocates, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

defendant,

and

A. BULLOCH & CO, A. BULLOCH (AGENCIES) LTD, JOHN GRANT BLENDERS LTD, INLAND FISHERIES LTD AND CLASSIC WINES LTD, having their principal centre of activity at 3 Cheapside Street, Eaglesham, Glasgow, represented by Michael D. McMillan, solicitor, of Messrs Sergeants, East Kilbride, assisted by Mario Siragusa, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Jean-Claude Wolter, 2 Rue Goethe,

interveners,

APPLICATION for the annulment of the decision of 20 December 1977 relating to proceedings under Article 85 of the EEC Treaty (IV/28.282: The Distillers Company Ltd, Conditions of Sale and Price Terms),

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the claims of the parties and their submissions and arguments may be summarized as follows:

I — Facts and procedure

1. The Distillers Company Ltd (DCL) and its products

DCL was established in 1877 through the amalgamation of six Scotch whisky distillers, and now has 38 subsidiaries producing spirits in the United Kingdom: 32 of them produce Scotch whisky, four produce gin, one produces vodka and one Pimm's.

DCL's total turnover for the financial year 1976-77 in respect of Scotch whisky, gin, vodka and other spirits may be broken down as follows: sales in Europe amounted to 55.7 % of turnover, of which 14.7 % was obtained in EEC countries other than the United Kingdom and Ireland, sales in North and South America amounted to 27.2 % and sales in Africa, Asia and Australia to 17.1%.

DCL is the world's largest distiller and seller of Scotch whisky. In the EEC countries other than the United Kingdom the DCL market share for whisky was, in 1975, 54% in Belgium and Luxembourg, 47% in Denmark, 35% in France, 33% in Italy and Germany, 32% in Ireland and 29% in the Netherlands. For the United Kingdom its market share was between 50% and 30% for the years 1973 to 1977. DCL markets over 50 brands of Scotch whisky, the most familiar being Johnnie Walker, Haig, Black and White, Vat 69, White Horse and Dewar's.

As regards gin, DCL's share of United Kingdom production was approximately 55% during the years 1973, 1974 and 1975. During this same period DCL's sales amounted to approximately 70 % of the total gin sales in the United Kingdom. DCL exports large quantities of gin: its market share is 20% in France, 27% in Germany, 30% in the Netherlands, 44% in Belgium and Luxembourg, 20% in Italy, 44% in Denmark and 10% in Ireland. Among DCL gin brands are High & Dry, Gordon's Special Dry London Gin and Booth's Finest Dry Gin.

The DCL group accounts for about one quarter of the vodka sales in the United Kingdom. Its "Cossack Vodka" brand has the second highest sales in the market.

As for Pimm's, DCL is the only one to sell this; it consists of an aromatized spirit to which is added (except in France) lemonade. To this mixture is added borage, cucumber or mint.

2. Distribution of DCL spirits

Each of the 38 British subsidiaries of the DCL group is responsible for the distri-

bution and marketing of its spirits, which bear its own brand names.

In the United Kingdom only a few subsidiaries have their own distributors, whilst most of them sell their brands directly to the wholesale trade, which counts in this case approximately one thousand wholesalers. The wholesale trade itself can be divided into two sectors: the "tied trade" and the "free trade". The tied trade consists essentially of brewery groups which own licensed retail outlets through which the products are sold either by the bottle or by the measure. Most of those breweries also act as wholesalers in the free trade sectors. Purchases by those breweries represent about half the total sales of spirits of DCL's subsidiary companies in the United Kingdom. The free trade consists of a wide range of retailers, including individual licensed shops, chains of non-brewery retail outlets (such as some of the supermarket chains) and "multiples" (that is to say, wholesale businesses which also have their own retail outlets, but which are not controlled by the breweries). They all sell generally by the bottle. In addition, licensed hotel chains may sell by the measure on their premises.

In other Common Market countries most of the DCL subsidiary companies each have their own sole distributors. The spirits supplied to the sole distributors are usually resold to wholesalers who sell them in turn to retailers. There are about 200 sole distributors of DCL spirits in the Common Market. Many other alcoholic drinks, notably brandy, sherry and wine, are also sold by those sole distributors.

For the purpose of duty-free consumption only, the DCL subsidiaries sell spirits directly to ships' chandlers. They number about 1 000 in the Common Market.

3. DCL's conditions of sale and price terms

On 30 June 1973 DCL notified the Commission of the "Seller's conditions of sale" applied by each of its subsidiaries for sales of spirits to United Kingdom trade customers only. DCL was seeking an exemption under Article 85 (3). The seller's conditions of sale consisted mainly of:

— provisions relating to terms of delivery and payment;

— a clause (5b) which imposed an export prohibition on those trade customers and their subsequent purchasers;

— a clause (6) prohibiting resale in bond.

On 8 July 1975, in reply to a request of the Commission dated 2 June 1975, DCL submitted a new text of the previously notified "Seller's conditions of sale", revising clause 5b (limiting the export prohibition now to territories outside the Community) and removing clause 6.

On 11 July 1975 DCL submitted to the Commission the text of the circular letter of 24 June 1975 addressed to customers of its subsidiaries, established in the United Kingdom and of two appendices, entitled "Home trade conditions of sale and price terms".

The first section of the latter, entitled "Conditions of sale", states that: "... Following the referendum, we are now amending the Conditions of Sale to permit export by home trade customers to other Common Market countries ... export outside the Common Market is still prohibited". Appendix I to the DCL circular letter contains the new version of the Seller's Conditions of Sale.

The second section of the letter, headed "Price terms", states:

(a) "... the various allowances, rebates and discounts are designed to meet the particular requirements of the home trade and customers are only entitled to them when the goods are in fact consumed within the UK".

(b) "Accordingly, if you wish to buy for export to other Common Market countries you must indicate this on your order and purchase must be made at the gross price."

(c) "... If ... a customer obtains or claims any home trade allowances, rebates or discounts in respect of goods which he has bought and any of those goods turn up in any country outside the UK, the right is reserved for all companies in the DCL group to sell thereafter to such customer only at the gross price".

Appendix II to DCL's circular letter, entitled "Certain Contractual Provisions (relating to price) additional to Conditions of Sale" states that:

— The provisions of that Appendix are to form part of every contract made by a purchaser and a subsidiary company of the DCL group for the purchase of any brands of spirits and are additional to seller's conditions of sale (the subject of Appendix I);

— All allowances, discounts and rebates whatsoever (hereinafter collectively referred to as "price allowances") are designed to meet the particular market circumstances of the United Kingdom;

— Any DCL subsidiary company is entitled to charge the gross price without reduction of such price by any price allowances:

— When a DCL subsidiary has a reasonable belief that any quantity of goods bought by the purchaser from any DCL subsidiary has been or will be consumed outside the United Kingdom;

— even when the exports are made by a subsequent purchaser;

— regardless of the quantity ordered, until and to the extent that the purchaser produces evidence satisfactory to the selling DCL subsidiary company that the goods will be consumed in the United Kingdom.

On 23 February 1977, DCL addressed a letter to their United Kingdom trade customers informing them that the "gross price without any reduction of such price by price allowances" is now expressed as "the gross EEC export

price", which is the price charged to sole distributors in other EEC countries before deduction of any allowances granted to them (the new provisions of Appendix II are hereinafter referred to as "price terms").

4. DCL's prices and price allowances

All prices of spirits supplied to the United Kingdom home market are controlled by the Price Commission which was set up under the Counter-Inflation Act of 1973. The prices may be increased only at minimum intervals of three months, when a producer presents proof that the price increase covers an increase in costs. The export prices applied by DCL to UK trade customers and to sole distributors are not subject to the control of the Price Commission. Spirits intended for export may circulate under bond.

The various allowances, rebates and discounts (price allowances) granted by DCL's subsidiaries to their trade customers for sales of spirits destined for consumption in the United Kingdom are as follows:

— the "wholesale allowance" is granted to trade customers who purchase a minimum quantity;

— the "aggregate quantity rebate" is granted on the basis of the quantity of spirits purchased annually;

— the "deferred special allowance", which is a loyalty rebate, is applicable only in respect of purchases of a minimum of 1 000 cases of Scotch whisky per annum when the amounts purchased from DCL's subsidiaries represent at least 60% of the total purchases of Scotch whisky by that purchaser;

— the "performance bonus rebate" is applicable only in respect of purchases of Scotch whisky made between March 1977 and March 1978 and is a target bonus granted when purchases of DCL brands in the course of a given year amount to at least 95% of those attained in the previous year;

— the "cash discount" is granted on duty-paid spirits for which United Kingdom customers forward cash with order;

— promotional allowances are granted from time to time by individual DCL subsidiary companies by way of contributions to special promotions for their brands.

The price mechanism can be illustrated by the example of the prices applicable for Johnnie Walker Red Label Whisky. The gross price is a notional resale price at which wholesalers supposedly sell to their retail customers. The gross price of a case of twelve bottles of Johnnie Walker Red Label (without VAT and customs duties) was £10.65 on 24 June 1975 and £13.51 on 1 March 1977. For whisky bought and consumed in the

United Kingdom the maximum allowances were £5.30 and £6.45 respectively, with an average of £5.41. Thus after deduction of the allowances the minimum net prices paid by the trade customers were £5.35 and £7.06 respectively, with an average of £8.20. In contrast, purchasers of the equivalent amount of Johnnie Walker Red Label destined for consumption in a Member State of the EEC other than the United Kingdom had to pay the gross price. As for the price applied in the case of sole distributors in member countries other than the United Kingdom, this was £5.73 and £8.35 respectively (after deduction of the cash discount and the distributors' allowances).

5. Development of parallel exports

The decision of the Commission states that "According to information supplied by DCL, parallel exports of DCL Scotch whisky from the United Kingdom to other EEC countries amounted approximately to 100 000 cases in 1974, to 400 000 cases in 1974 and to 550 000 cases in 1975 ... From the date of the circular letter, 24 June 1975, up to 12 July 1976, only one customer had indicated to DCL subsidiary companies that it wished to buy for export to other EEC countries and purchased 1 400 cases at the gross price. The aggregate quantity of Scotch whisky forming part of orders in respect of which DCL subsidiary companies obtained evidence that whisky purchased by United Kingdom trade customers was resold to other EEC countries and required further payment, amounted to over 6 000 cases". DCL has put the number of cases purchased at the gross export price between 1 January and 31 December 1977 at 340 000.

6. Complaints

On 18 May 1976 the undertakings A. Bulloch & Co, A. Bulloch (Agencies) Ltd, John Grant Blenders Ltd, Inland Fisheries Ltd and Classic Wines Ltd presented a request to the Commission, pursuant to Article 3 of Regulation No 17, seeking the initiation of the procedure to terminate infringements of Articles 85 and 86 of the EEC Treaty resulting from the DCL price terms contained in the circular letter of 24 June 1975.

These undertakings are related companies all established in the Glasgow area. They purchase large quantities of DCL whisky for resale. Some of the whisky which the complainants had bought in bond at the home trade price and sold to another whisky dealer in the United Kingdom was later found by DCL representatives in supermarkets in France and Belgium. Subsequently DCL asked the complainants for further payment and refused to sell them any in-bond whisky except at the gross price. On 7 March 1977 another request was presented by Madison Benson and Carter Ltd of London, also raising the difficulties of obtaining DCL Scotch whisky for export.

7. Administrative procedure

After the first exchanges of information the Commission amplified its initial assessment in a statement of objections addressed to DCL on 22 April 1977.

DCL submitted its reply in a document dated 16 June 1977 (hereinafter referred to as "the reply"). A hearing was held on 23 June 1977.

The Advisory Committee on Restrictive Practices and Dominant Positions met on 21 October 1977 and issued an opinion pursuant to Article 10 of Regulation No 17. The Commission then adopted its decision on 20 December 1977.

8. The decision of the Commission of 20 December 1977

This decision reads as follows:

"Article 1

The prohibition to export from the United Kingdom to other EEC countries and the prohibition to resell in bond contained in the seller's conditions of sale, which have been notified to the Commission on 30 June 1973, and which are part of the contracts for the sale of spirits entered into by 38 subsidiary companies of The Distillers Company Limited with their trade customers established in the United Kingdom, constituted an infringement of Article 85 (1) of the Treaty establishing the European Economic Community, from 1 January 1973 to or about 24 June 1975.

Article 2

The application for a declaration under Article 85 (3) that Article 85 (1) is inapplicable is refused in respect of the provisions and the period referred to in Article 1 hereof.

Article 3

The price terms, which are part of the contracts referred to in Annex 1 hereof and which are set out in Appendix II of The Distillers Company Limited circular letters of 24 June 1975 and of 23 February 1977, constitute an infringement of Article 85 (1) of the Treaty establishing the European Economic Community and an application of Article 85 (3) is not justified.

Article 4

The Distillers Company Limited to which this Decision is addressed shall ensure that the infringement referred to in Article 3 hereof is brought to an end without delay. In particular The Distillers Company Limited and its subsidiary companies shall refrain from all further action by means of their price terms calculated to restrict the exportation from the United Kingdom into other EEC countries of their spirits bought by trade customers established in the United Kingdom.

Article 5

This Decision is addressed to The Distillers Company Limited, 21 St James's Square, London, United Kingdom, which shall notify it to its subsidiary companies listed in Annex 1 hereto."

9. Steps taken by DCL following the decision of the Commission

When the Commission's Decision was announced DCL withdrew from sale in the United Kingdom Johnnie Walker Red Label and Dimple Haig whiskies. They left the standard brand Haig White Label on sale at its then current price. DCL applied to the Price Commission of the United Kingdom for permission to

increase the price of their other standard brands of whisky, Black and White, Vat 69, Dewar's and White Horse, by £5.94 per case. The Price Commission refused the application in respect of White Horse and limited the increase in the case of Dewar's to £3. Accordingly, DCL put the authorized increases into effect, which later included an increase of £3 in the price of The Antiquary and Johnnie Walker Black Label whiskies.

On 3 April 1978 DCL announced that its subsidiary George Cowie and Son would be marketing a new brand of Scotch whisky to be known as John Barr. The new brand, which is intended to replace Johnnie Walker, is produced at one of the Johnnie Walker factories and is also sold in the distinctive square bottles associated with Johnnie Walker. It sells at the same price as Haig, White Label and White Horse whiskies.

10. Procedure before the Court of Justice

This application was submitted on 6 March 1978 and received at the Court Registry on 8 March.

On 19 July 1978 the Bulloch companies applied under Article 93 of the Rules of Procedure for permission to intervene in support of the defendant.

The request to intervene was granted by the Court by an order dated 27 September 1978.

On 18 October 1978, that is to say, after the rejoinder (dated 10 August 1978) had been lodged, the applicant submitted an addendum to its reply. Under Article 42 of the Rules of Procedure the President of the Court of Justice accorded the defendant and the interveners a period within which to reply to the new arguments submitted by the applicant, whilst a decision as to the admissibility of those arguments was reserved for the final judgment.

In a letter dated 15 February 1979 the applicant submitted a request pursuant to Article 91 of the Rules of Procedure that certain documents be withdrawn from the file on the case.

In an order dated 28 March 1979 the Court authorized withdrawal of the documents listed under points (iii) and (iv) of that request, that is to say, Annexes 1 and 2 to the third supplement to the written reply to the Commission's statement of objections, and the invoices annexed to the document mentioned under (ii), but refused to allow the documents listed under (i) and (ii) to be withdrawn, that is to say, Annex 14 to that written reply (copies of certain letters exchanged between the Commission and DCL between July 1975 and February 1977) and Annex 3 to the second supplement to that written reply (analysis of sales at the gross price on 24 May 1977, memorandum of 28 June 1977 giving details on the projected rate of increase in sales and orders at the gross price) which constitute an essential part of the administrative procedure and which are being relied on in the proceedings before the Court.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

DCL claims that the Court should:

— In principal order:

Annul the Commission's decision of 20 December 1977 in case IV.28.282 — The Distillers Company Ltd Conditions of Sale and Price Terms;

— In subsidiary order:

Annul Article 3 of the aforesaid decision inasmuch as it declares that an application of Article 85 (3) is not justified for the price terms which are part of the contracts for the sale of Scotch whisky, gin, vodka and Pimm's entered into by subsidiary companies of DCL with their trade customers established in the United Kingdom;

As a result, annul Article 4 of the aforesaid Decision;

— In any event:

Declare that the costs of the proceedings shall be borne by the Commission.

The *Commission* contends that the Court should:

— Dismiss the application as concerns the principal order;

— Dismiss the application as concerns the subsidiary order;

— Dismiss the further grounds of appeal contained in the addendum to the reply;

— Declare that the costs of the proceedings shall be borne by the applicant.

The *interveners* contend that the Court should:

— Dismiss the application made by DCL;

— Dismiss the addendum to the reply;

— Order DCL to pay the costs of the proceedings, including the costs of the interveners.

III — Submissions and arguments of the parties

A — The application

DCL comments by way of introduction on the novel character of the case. Few appeals have been made against refusals to grant the benefit of Article 85 (3) since the judgment in Cases 56 and 58/64 *(Consten and Grundig,* [1966] ECR 429). This is the first appeal which concerns the refusal of an exemption for a price structure designed to preserve the ability of distributors to invest in the promotion of the products entrusted to them. The cases concerning the free movement of goods which have been considered by the Court related to either the interpretation of Articles 30 to 36 of the Treaty or the scope of the "group exemption" granted under Regulation No 67/67 of the Commission.

1. The trade in Scotch whisky

DCL emphasizes the special character of the trade in Scotch whisky, which competes against a great variety of spirits which are indigenous to the export markets concerned (aquavit in Denmark, grappa in Italy ...) and the need for substantial promotional activity in order to establish a product with which the consumer is not so familiar.

There is a great difference between market conditions in the United Kingdom and in continental EEC countries. In the former, whisky is a well-established drink, the market having attained the "maturity stage". As a result price competition assumes very great importance. In the latter, on the contrary, the market is still at the "expansive phase". In all the countries except Belgium, there exist nationally produced spirits, and whisky is not the traditional drink. In all of those countries except Belgium (where the share held by whisky is 36.6%), the share of the spirits market enjoyed by Scotch whisky is small: it is 3.5% in the Federal Republic of Germany, 5.3% in Denmark, 5.5% in France, 8.2% in Italy and 8.9% in the Netherlands. DCL's sole distributors invest approximately £5 per case in promotional activity, which sum covers not merely advertising but all promotional expenses including the sales force. Thus it is not possible to authorize parallel exports of a brand of Scotch whisky sold at a price which allows it to compete effectively on the British market.

There are two important distortive factors which tend to reinforce and to perpetuate these differences: the brewers' monopoly in the United Kingdom and the discriminatory provisions in continental EEC countries.

Although DCL subsidiaries sell to over 1 000 customers, the five largest of those customers take over 40% of those sales and three of them are brewers who take, in the aggregate, more than 25% of DCL's entire Scotch whisky sales in the United Kingdom. Through the so-called "tied-house system", brewers are able to control sales of spirits in 80% of the on-licensed retail premises in the United Kingdom, and some 50% of all licensed retail premises. This system gives the brewers a strong advantage over the independent spirits producers and enables them to exact exceedingly low prices which will not be passed on to British consumers. The Monopolies Commission judged this to be contrary to the public interest and considered that it probably amounts to an infringement of the provisions in Article 85 of the Treaty.

The excise duties on Scotch whisky in France are nearly double those on rum. In Italy, the stamp tax on Scotch whisky is six times that on local brandy and 17 times that on local grappa, this discrimination being further magnified by VAT at 35% on Scotch whisky compared with 18% on the two local spirits. In Denmark, tax on Scotch whisky is 50% higher than that on acquavit. Other forms of discrimination are also practised, such as that introduced by the French law prohibiting the advertising of Scotch whisky but allowing the advertising of cognac.

In such conditions the only way in which the Scotch whisky industry can win customers from tax-favoured local spirits and increase their market share is "by energetically reminding the public that Scotch whisky is a high-quality,

distinctive product for which it is worthwhile to pay the extra tax". Originally the DCL subsidiaries announced an export prohibition; then, after the referendum of 1975, they introduced a system of allowances, rebates and discounts (of some £4.72) amounting approximately to the supplementary promotional costs incurred by the sole distributors on the continent. DCL considers that by so doing it has eliminated any incompatibility between its conditions of sale and Article 85 of the Treaty.

The effect of the differential pricing system has not been to render parallel exports entirely unattractive. Investigation of the promotional costs incurred by sole distributors (£5.07 per case on average) shows that these were only costs incurred in fulfilling their special obligations and do not include the ordinary costs of transport and overheads shared by any trader, including parallel importers. A British wholesaler purchasing at £13.51 (the gross export price) and having no promotional obligations could, therefore, compete with a distributor buying at £8.35 but having to invest £5.07 on promotional activity. Parallel export was not "unattractive" except in the sense of being less attractive than the former situation under which British wholesalers purchased whisky at £8 per case and sold it in competition with sole distributors for whom the transaction amounted to £13.42 per case.

DCL objects to the fact that the decision confines itself to comparing the figure of 250 000 cases exported at the gross price from July 1976 to July 1977 with the figure of 550 000 cases which had been exported in the year preceding 24 June 1975 in breach of the no-export clause contained in the conditions of sale. To be valid, a comparison should be based on comparable elements. It is not permissible to take into consideration the number of cases exported in compliance with the wholesalers' contractual obligations and to compare it with the number of cases exported two years earlier in breach of those same obligations. DCL claims that since the export prohibition was lifted it has taken no action to prevent any parallel exports. On the contrary, it actively collaborated to enable traders indicating an intention to export to the EEC to overcome the regulatory obstacles with which they were faced in the importing countries.

2. The part of the decision concerning Scotch whisky

DCL regrets that the decision concerning the prohibition against exporting outside the EEC was based solely on the consideration that "the application of customs duties borne by spirits crossing the external frontiers of the European Economic Community tends to make such re-imports improbable". This consideration should not prejudice DCL's right to bring forward its arguments at a later date, if duties on

spirits imported from third countries were to be removed.

(a) Compliance of the price terms with the substantive requirements of Article 85 (3)

The sole distributor system brings about an improvement in distribution. In fact the appointment of competing sole distributors, each dependent for profit on the success of the particular brands he distributes, ensures effective competition, not only between the various DCL brands themselves but also as against other products.

The price terms are indispensable to the improvement of distribution. At the oral hearing, a Commission official suggested that the net prices applied by the DCL subsidiary companies to British wholesalers be adjusted upwards and the net prices applied to continental distributors be adjusted downwards. In fact, because of the extreme price-sensitivity of the British market, an increase of £2 per case would result in a fall in sales of at least 50% in the United Kingdom. At the same time, such an increase would leave some £3 per case of the price difference to be accounted for by a reduction in the fob price charged to the sole distributors. This would take away the incentive to export. Equally unacceptable is the suggestion made in the decision that DCL could take upon itself the entire burden of promotional costs borne by the sole distributors. In so far as this assertion envisages that DCL could reduce its prices to its sole distributors by the amount of the promotional costs, it flies in the face of commercial reality, as DCL would receive only £3.28 per case and would be better off withdrawing all its brands from sale in the continental EEC. As for the idea that DCL itself could undertake the promotion of sales in other EEC countries, it ignores the fact that the cost of so doing would be substantially higher than under the present system. DCL submits that the solution adopted by it (but forced upon it by the Commission) will lead to undesirable results for consumers. The Commission therefore erred in considering that the dual price structure was not "indispensable" to the effective maintenance of the sole distributor system. As for the suggestion made in the decision that only "new products" can need "extraordinary" promotional efforts the protection of which can be entitled to the benefit of Article 85 (3), DCL submits that there is nothing in the text of that article or in the system of the Treaty to suggest this. On the contrary, the need to devote intensive promotional efforts to allow the products to compete effectively with more traditional, better-established products is equally present in the case of the applicant's products.

The price terms are beneficial to consumers. An investigation of the total distribution margin (which comprises the sole distributors' margin and the gross margins of wholesaler and retailer) for White Horse Fine Old Scotch Whisky on two continental markets which have been relatively unaffected by parallel

imports, namely Italy and Denmark, shows that, in real terms, that margin was reduced, in the period 1961 to 1976, by 62.91 and 88.14% respectively. During that period the price to the consumer (excluding duties and taxes) had gone down in real terms by 57.39% and 82.96% respectively.

Competition was by no means eliminated. In fact there was competition from other alcoholic drinks, other brands of Scotch whisky, including the brands of other DCL subsidiaries, and from parallel imports of the same brand of Scotch whisky purchased from Britsh customers at the gross export price of £13.51.

(b) Compliance of the price terms with procedural requirements under Article 85 (3)

The price terms are related to the sole distributor agreements. Although the former do not form part of the latter "they are economically related thereto", as the decision recognizes. The Treaty does not provide that for an agreement to obtain an exemption under Article 85 (3) the improvement in distribution must result from that same agreement.

DCL accepts that the price terms notified to the Commission on 11 July 1975 in reply to its request for information were not notified in accordance with Article 4 of Regulation No 17. However, it submits that the notification of the conditions of sale covered the price terms. In fact the objective of the price terms was exactly the same as the objective of the export prohibition, although they were less strict. In the circumstances it would have been pointless for DCL to go through the formality of officially notifying the price terms, which would have given the Commission no information which it did not already possess.

3. The part of the decision concerning DCL' other products

Pimm's is a unique product, particularly difficult to promote in export markets. In 1977 it held the following market shares:

0.031% in the Benelux countries, 0.005% in Denmark, 0.077% in France, 0.006% in the Federal Republic of Germany, 0.008% in Italy. There are three reasons, in addition to those relating to Scotch whisky, why Pimm's should have been granted the benefit of Article 85 (3): the *de minimis* rule, the exception available for a "new product" or a product analogous thereto and the fact that it is a product which is generically different in different markets (in France, for example, the kind of lemonade necessary for mixing is not available and Pimm's have developed a special formula so that mineral water can be added).

As for DCL's vodka, at the same period it held the following shares of the total spirits markets in the EEC: 0% in the Federal Republic of Germany, France, Italy, Denmark, Belgium and Luxembourg, 0.027% in the Netherlands, 0.34% in Ireland and 2.029% in the United Kingdom. In view of these market shares, the price terms for this product should have been entitled to

negative clearance and, *a fortiori*, the benefit of Article 85 (3).

What has been said in connexion with Scotch whisky applies also to gin. The sole distributors' costs of selling gin in the continental countries amount to an average of £4.02 a case.

4. Infringement of essential procedural requirements

DCL alleges that the consultation with the Advisory Committee was defective. According to the decision that consultation took place on 21 October 1977. However, the draft minutes of the oral hearing of 22 June 1977 bear the date of 25 October 1977. It follows that the Advisory Committee did not have at its disposal the text of the draft minutes as prescribed by Regulation No 17.

Both in its written reply and in its statement at the oral hearing, DCL had provisionally assessed the sole distributors' promotion and other obligatory costs at approximately £5. Shortly after the hearing a more detailed investigation was carried out which formed the subject-matter of the fourth supplement to DCL's written reply, which was delivered to the Commission on 21 October 1977. The Commission should have considered this evidence and allowed for consideration of it by the Advisory Committee at least two weeks in advance, as provided for in Regulation No 17.

DCL explained its reasons for opposing the price adjustment proposed at the oral hearing on 22 June 1977 in its fifth supplement which was delivered to the Commission on 21 October 1977. The Commission failed to give the Advisory Committee an opportunity to consider this document at least two weeks in advance.

The Advisory Committee did not have before it the sixth supplement relating to gin distribution costs, which DCL — by arrangement with the Commission — completed after submission of the fourth supplement relating to Scotch whisky distribution costs.

B — The defence

The *Commission* stresses that in its view the case is straightforward and raises no novel questions of principle. It claims that DCL devised a system of dual pricing in order to protect its own profit margins and those of its sole distributors. However, it is a fundamental tenet of Community policy that the impeding of parallel imports tends to lead to the partitioning of the common market and cannot therefore be permitted except in exceptional cases, of which the present case is not one.

1. The principal claim relating to the applicability of Article 85 (1) to the conditions of sale and the price terms

The Commission maintains that the claim put forward by DCL must be rejected inasmuch as it is contrary to the admissions and concessions already made by DCL during the administrative phase of the case. Furthermore, no reasons are adduced in the present application in support of the annulment of those aspects of the decision.

2. Applicability of Article 85 (3) to the price terms and the request that that part of Article 3 and the whole of Article 4 be annulled

(a) The issue of notification

The conditions of sale notified on 30 June 1973 contain no reference to the price terms, and this is in fact borne out by the statements made by DCL on the notification form, and later in the course of the administrative procedure. While the export ban was in operation the price terms applied only to sales within the United Kingdom and could have no impact on exports. It would be difficult to accept that the price terms which were in existence in 1973 and applied only to sales on the domestic market are to be regarded as the same as those used in 1977 to prevent parallel imports, even if the original price terms were to be regarded as covered by the original notification.

The mere sending of documents, in response to a request from the Commission which made it clear that the new arrangements constituted a breach of Article 85 (1), cannot constitute notification of the price terms. If the latter have not been notified, the fact that the Commission has become aware of them is not a ground upon which a decision may be taken in respect of Article 85 (3).

The Commission concludes that if the Court accepts its argument on notification, then the questions raised in the rest of the application do not arise.

(b) The effects of the differential pricing system applied by DCL to exports from the United Kingdom to other Member States of the EEC — The effect of the brewers' alleged monopoly power on the Britsh market

The Commission observes that the average promotional cost for Scotch whisky in Member States of the EEC other than the United Kingdom (£5.07 per case) is merely an average figure and nothing more. Thus the average distributors' costs in the Netherlands are merely £1.98 per case. The fob price of such a case being £8.35, its total cost must therefore be £10.33 on average for the distributor in the Netherlands, as compared with the gross export price (£13.51) for a British buyer. On the other hand, promotional expenditure varies from one distributor to another in view of the standard terms of promotion imposed by DCL subsidiaries on them which are so widely drafted as to leave them great scope for initiative. Moreover, promotion expenditure varies from one brand to another, the greatest being that made in respect of Johnnie Walker.

The price system for gin reveals even more clearly that DCL's purported justification of its dual pricing system is spurious. The gross export price for the British wholesaler was £11.75, and for the sole distributors £6.50. The difference of £5.25 was substantially higher than the average costs borne by them (£4.21).

Since DCL has about 40% of the British market in spirit sales, the existence of powerful purchasing groups merely prevents DCL from exploiting its position and has the benefit of ensuring lower prices for all wholesalers in the United Kingdom, as the same prices are charged to brewers and other wholesalers. The object of the price terms is thus to partition the common market and prevent consumers in the Member States of the Community other than the United Kingdom from enjoying the lower prices reserved for British consumers.

(c) Economic justification for the refusal to grant the price terms the benefit of the exemption under Article 85 (3)

The Commission considers that a system of differential pricing operated in such a way as to ensure "the protection of sole distributors in continental Member States against parallel exports at the United Kingdom price", as stated in the application, operates in such a way as to prevent or at least to hinder the flow of goods from one Member State to another and cannot be regarded as improving the distribution of goods to which the contract relates. Since the decision not to grant exemption to the conditions of sale was accepted by DCL, and since the object of the price terms is stated by them to have been the same as that of the conditions of sale, there are no grounds for contesting the decision adopted by the Commission. Moreover, since the price terms entitled DCL to recover the difference between the price actually paid by a purchaser who exports the goods without paying the gross EEC export price and that gross EEC export price, the effectiveness of that provision prevents the price system which it is protecting from being able to be considered as meeting the first condition for exemption provided for by Article 85 (3).

(d) The price terms, the exclusive dealer contracts and Article 85 (3)

The Commission maintains that DCL has committed a fundamental error in basing its application on the relationship between the price terms and the exclusive distributors system. The existence of such a relationship was examined in the decision merely as a hypothesis. The argument put forward by DCL in its application concerning benefits in the distribution of goods relates exclusively and entirely to the exclusive distributorship agreements entered into between certain DCL subsidiaries and undertakings established in various countries of the common market other than the United Kingdom. Nowhere does DCL maintain that the price terms themselves contribute to the distribution of goods; what it maintains is that the price terms contribute to the implementation of exclusive distributorship agreements which, in their turn, improve distribution. In the submission of the Commission the mere fact that an agreement, which was admitted by DCL in the administrative procedure to be contrary to Article 85 (1), may contribute towards the implementation of another agreement in the distribution field, does not entitle that first agreement to an exemption under Article 85 (3).

(e) The indispensability argument

Since the judgment given in the *Grundig* case, it has been regarded as settled that, except in limited circumstances, no restriction the object of which is to prohibit parallel imports will be sanctioned. The first decision given by the Commission in the *Transocean* case (Journal Officiel L 163 of 20 July 1967, p. 10), cannot be relied on, for there the exemption was granted in relation to a period when the product was being launched on the market and because the members of the association enjoyed a relatively weak position in the market for the products in question. DCL is the world's largest Scotch whisky producer. None of DCL's products is in fact new. DCL has been selling its products in the Member States of the EEC other than the United Kingdom for many years. The agreement between Corima SA and White Horse Distillers Ltd for the sole distribution of White Horse whisky in France, for instance, was concluded 30 years ago.

The first alternative solution indicated by the Commission (that DCL themselves assume the responsibility of promoting sales in other EEC countries) was adopted by Martini & Rossi in attempting to penetrate the British market, and by Guinness in certain Member States of the Community. The Commission points out that under the present system DCL relies on sole distributors to promote its products at the expense of other better-established spirits, when many of them are also distributors of those better-established spirits, which is hardly likely to lead them to undertake vigorous promotional efforts on behalf of DCL's spirits.

The second suggestion (that DCL might allow for the promotional costs incurred by the sole distributors in the prices it charges to them) is perfectly reasonable. Indeed, immediately after the Commission's decision was announced, DCL applied to the British Price Commission for authorization to raise the price per case of its four standard brands by £5.94, and that of a case of two of its luxury brands by £3, whereas DCL claimed in its application that it was unable to impose such increases in excess of £2. As for the reduction of £3 per case in the price charged to sole distributors, it is usual for any company which wishes to penetrate the market to accept a lower return while making the promotional effort.

(f) Improvement in distribution

The figures supplied by DCL show that in 1977 it exacted from United Kingdom wholesalers the gross export price for 340 000 cases and that the British exporters paid them nearly £2 000 000 more than they would have been paid if the cases had been sold at the gross price less allowances. That sum was pure profit to DCL; neither the sole distributors nor consumers received any benefit therefrom. It is for DCL to prove that the removal of the export ban and the substitution of the price terms brought about an improvement in distribution. Since the price terms are a more efficient means of restraining exports from the United Kingdom, they can only

hinder the distribution of DCL's whisky in the Common Market.

3. The part of the decision relating to Pimm's

No question of the *de minimis* rule arises, for Pimm's is a unique drink, the whole market in which belongs to DCL. Since DCL sought to apply the price terms to this product, it is clear that it considered that parallel exports were sufficiently important to justify recourse to those terms. Pimm's is not a new drink and its small share of the market is due to its unique nature.

4. Procedural matters

There is no requirement in Regulation No 17 that the Advisory Committee should be given the minutes of the oral proceedings. In the present case, at the date of the calling of the meeting, and at the date of the meeting itself, no draft minutes, far less final minutes, of the oral hearing yet existed. It must in any event be borne in mind that the function of the Advisory Committee is not to investigate the entire case but to advise the Commission. All that the latter has to do is to provide a draft decision, and a summary of the case with an indication of the most important documents. In view of the lack of new material at the hearing, the minutes of the latter would not in any event be one of the most important documents. Moreover, a formal defect could only found a complaint if it had materially prejudiced DCL. The Commission notes that it is not suggested that the Committee was misled in any way by the absence of the minutes, for DCL's witnesses and advisers at the hearing merely repeated arguments which were essentially contained in earlier documents, an indication of which had been given to the Committee. DCL cannot deny that the Commission had an accurate record before it at the time it made its decision.

The fourth and fifth supplements to DCL's reply were received on the morning of the meeting of the Committee. The latter was informed of their content and decided not to adjourn its meeting in order to study them before delivering its opinion. This was a decision which lay entirely within its discretion and with which the Commission had neither the right nor the duty to interfere. By informing the Committee of the existence of the documents, the Commission fully discharged its obligations.

The sixth supplement to DCL's reply, sent to the Commission on 24 November 1977, merely confirms what was already known and gives no reasons for recalling the Advisory Committee.

C — The reply

1. Notification

DCL observes that the price terms antedated the accession of the United Kingdom to the EEC. Moreover, the Commission has treated them at all times as an integral part of the procedure relating to the conditions of sale, which had been notified.

DCL refutes the argument that the price terms were a more efficient way of discouraging parallel imports than the export prohibition. The exports which were effected in 1975 in breach of the export prohibition can be explained by the fact that, at the time, DCL had decided not to enforce that prohibition any longer. On the contrary, it enforced the price terms at all times, which did not prevent parallel exports, in compliance with the price terms, from amounting in 1977 to 340 000 cases.

2. Compliance with substantive requirements

DCL is of the opinion that investment in promotion helps not only the transactions it is intended to encourage but also helps all those who sell the brand on the same market. DCL's intention was not to try to "cushion" itself (or its sole distributors) from the competition nor to enable it to maintain higher prices on the continent than in the United Kingdom by partitioning the market, but merely to take into account existing market differences. This being the purpose and effect of the price terms, DCL submits that the granting of an exemption would not have been contrary to a "fundamental tenet of Community policy" but would have been in accordance with the case-law of the Court of Justice in other areas and with the practice of the Commission in other cases relating to competition. Shortly after the adoption of the contested decision, the Commission in fact adopted a decision in the *Campari* case which authorized a dual pricing system analogous to the one in the present case (Official Journal L 70 of 13 March 1978, p. 69).

The purpose of DCL's dual pricing system was not to take into account the individual positions of each of the sole distributors but to provide for an average measure of protection. In its view it was justified in considering the continental EEC as an entity. If, owing to lower promotional costs in a Member State, a brand is sold at a lower price than that at which it is sold in another Member State, the possibility of parallel exports between the continental EEC countries should normally result in a levelling of such differences.

DCL's price terms represented an effort to find a lawful method of ensuring that parallel exports — whilst remaining possible — would not be on terms such as to threaten the existence of the sole distributor system. The United Kingdom price structure and the average promotional costs borne by sole distributors (approximately £5 per case) led DCL to conclude that the gross national price represented, by coincidence, perhaps, a fair and reasonable price to charge British wholesalers for products destined for export to other countries in the EEC. Consequently it adopted the gross export price as the basic price, but the experience gained subsequently has confirmed that the amount of the differential was correct. That differential was in no way intended as a penalty designed to make parallel imports impossible. DCL recalls, moreover, that the amount of Scotch whisky represented by parallel imports at the gross price into

the continental EEC from the United Kingdom amounted in 1977 to 340 000 cases.

As to the suggestion that DCL should itself assume responsibility for promoting sales in other EEC countries, the applicant claims that the extra distribution costs which would result cannot amount to "an improvement in distribution" within the meaning of Article 85 (3). In the case of Martini & Rossi, the subsidiaries of that group distributing its products are also producers of vermouth in a number of EEC countries, including the United Kingdom. In their case, the cost of maintaining a sales force brings about only a minimal increase of total overheads. The vast majority of their products are sold under the trademark of Martini, which is responsible in the United Kingdom for distributing a large number of products (other than vermouth) manufactured by other producers, thus enabling it to spread the cost of maintaining a sales force over all those products. The expenditure of the Martini & Rossi group on media advertising in the United Kingdom alone has been estimated at some £2.5 million per year, a sum which DCL has not the resources to be able to cover in respect of each of the Member States and for each of its main brands, nor, *a fortiori,* for all its 50 brands. DCL accuses the Commission of throwing into the arena well-known names without providing any evidence in support, and of ignoring the fact that a multi-national operation will be less advantageous than a sole distributor system as long as parallel exports are made from the United Kingdom at low prices. The continental subsidiaries of DCL would meet the same marketing problems as the sole distributors; they would have to spend equally great amounts on promotional activity and would find it no easier to make that investment, in the face of cheap parallel imports.

As for the suggestion that DCL might allow for the costs resulting from promotion by sole distributors in the prices charged to them, it would bring about higher resale prices in countries where promotional expenses are lower, without any resulting decrease of the prices in the countries where such expenses are higher (unless DCL was to reduce its prices to distributors in countries where promotion expenses are higher).

In its application DCL predicted that an increase of £2 per case would result in a fall in sales in the United Kingdom of at least 50%. This prophecy is in the process of being confirmed. Present indications are that sales of VAT 69 and Black & White (the price of which was raised by £5.94) have fallen to totally insignificant amounts and that sales of Dewar's (which was increased by only £3) are less than 28% of their level during the corresponding period in 1977. DCL is convinced that no other viable system can replace the dual pricing system, and that is why it has withdrawn its leading brand from the British market and has priced others out of the market, at a cost to itself of many millions of pounds.

The difference between the price charged to British wholesalers exporting from the United Kingdom to other

member countries does not represent "pure profit". DCL's intention is to use this sum to assist the sole distributors' promotional efforts, after the price terms have been reinstated by judgment of the Court of Justice.

3. Pimm's

For the vast majority of consumers Pimm's is an interchangeable product. The fact that it is handled by DCL, "a very substantial concern", does not have any bearing on its position in the market. Although it is true that it is not, strictly speaking, "a new drink", its share of the total market justifies treating it as a new product.

4. Vodka

The fact that DCL controls the subsidiary which owns the brand does not preclude the application of the *de minimis* rule, since Cossack vodka is marketed in the continental countries of the EEC by independent distributors.

5. Infringement of essential procedural requirements

The adoption of the minutes is not a mere formality without practical usefulness, which can be delayed indefinitely. On the contrary, the minutes are designed to constitute a record of an important administrative step, representing an essential safeguard in the administrative procedure. To the argument put forward by the Commission that the absence of minutes did not prejudice the opinion of the Advisory Committee, DCL replies that its representatives and their lawyer presented a certain number of arguments at the hearing which they had not elaborated on in the written reply. The procedure under Article 173 involves an objective control by the Court of Justice over the legality of Community decisions. It is entirely different from proceedings in which the Court has "unlimited juridisdiction", as contemplated by Article 172 in regard to penalties. Infringement of an essential procedural requirement is one of the grounds of illegality mentioned in Article 173. It follows that if such a requirement is infringed, the act must be annulled without its being necessary to show that the infringement affected the outcome of the case.

D — The rejoinder

The *Commission* points out that DCL did not deny in its reply that the price terms constituted an infringement of Article 85 (1). Thus the proceedings are now quite limited in scope: the only remaining question of substance is whether in making its assessment in relation to Article 85 (3), the Commission exceeded its margin of discretion.

1. Notification

The Commission observes that the price terms to which the decision relates did not exist before June 1975. Prior to that date the price terms were crucially different in that they applied to the "home trade" only. Those which were introduced in June 1975 on the withdrawal of the export ban contained for the first time the provisions relating to United Kingdom wholesalers who were exporting the product.

2. The sole distribution contracts

DCL attempts to find the improvement in distribution required for an exemption under Article 85 (3), not in the agreement under consideration, but in other separate sole distribution agreements. In the *White Horse/Corima* case, however, the Commission was applying the terms of Article 85 (3) to the White Horse agreement, which was the agreement under consideration.

obligations which it has imposed on them. In the *Campari* case, the purpose and effect of the dual pricing system permitted in the limited area where it applies is to prevent Campari's licensees from being unfairly prejudiced. In DCL's case the purpose and effect of the dual pricing was to prevent parallel exports from the United Kingdom not by DCL but by United Kingdom wholesalers, and that dual pricing was introduced not to protect licensees but to protect the profitability of DCL and of sole distributors who had undertaken none of the obligations to DCL which Camnpari's licensees had undertaken towards that company.

3. The indispensability argument

As for the three possible ways of tackling DCL's problem suggested by the Commission, the Commission has the following comments to make:

To accept DCL's proposition would be tantamount to saying that the profitability of a company must take precedence over the competition rules of the Community as a whole. On the contrary, however, it is for DCL to adjust its business to conform with the law of the Community. The *Campari* decision applies only in the case of direct exports by Campari-Milano. Contrary to what is said by DCL, it does not apply in the case of a sale to an Italian customer who intends to export the product. It is of course true that under the licence agreements, in relation to its own direct exports, Campari-Milano is obliged to add to the price on the Italian market the amount of the royalties and advertising costs normally borne by the licensees. The object of that provision is to guarantee to the licensees, who must pay such royalties to Campari and are bound to spend on advertising the same fixed amount per bottle-litre of Bitter sold, that Campari will not undercut them and take unfair advantage of the

In the first case, the Commission was careful to keep separate questions of promotion and questions of distribution: its suggestion was that DCL could assume the cost of *promotion* themselves. The arguments put forward by DCL in its reply are confined to asserting that it would not be practicable for it to assume responsibility for *distribution.*

As for the second possibility, the Commission asserts that the sole distributors, who are expected to hold large stocks, to distribute and to promote sales of the product, occupy a higher position in the distribution chain than the British wholesalers. According to normal commercial practice, that fact would usually be reflected in the pricing structure, commonly by a reduction in

price to the sole distributor who is undertaking functions carried out by the manufacturer in the country of origin and manufacture. This was not the case with DCL. The gross price of whisky sold to British wholesalers on 1 March 1977 was £13.51 per case, while the average net price after various discounts was £8.20. The corresponding prices to sole distributors in the rest of the Community were £13.51 and £8.35.

As to the third suggestion, the Commission is of the opinion that DCL could raise prices charged to British wholesalers because it not only raised the prices of a number of brands by substantial amounts shortly after the publication of the decision, but has even raised the price of practically all its other brands by 90 pence per case (cf. article published in *The Scotsman* dated 22 July 1978).

4. DCL's suggestion that the price terms put all dealers on an equal footing

The figures submitted by DCL concerning the promotional costs for brands on continental markets are quite inadequate as a basis for obtaining the average figure of £5.07 per case. The application of the price terms would lead to an exclusion of parallel imports from markets where costs were lowest, but leave open to parallel imports those markets where promotional costs were highest. Yet according to DCL's arguments it would be in the countries with high costs that protection for the sole distributors would be particularly required. The price terms were therefore not designed efficiently to achieve their supposed objectives.

5. Characteristics of the United Kingdom market

Since DCL charges the same price to breweries as to all other purchasers, the Commission considers that if the commercial power of the brewers holds down prices in the United Kingdom, consumers in ordinary retail outlets benefit from those lower prices. The United Kingdom Monopolies Commission has declared that the brewers do not pass on to the consumers in their public houses the benefit of the low prices they pay, but it said nothing about the benefit to consumers buying from other retail outlets. It is nowhere suggested by DCL that at the time of the decision it could not or did not sell its whisky at a profit in the United Kingdom despite market pressures.

6. DCL's analysis of the common market

In summarily dividing the common market into the United Kingdom and the other Member States, DCL has committed an error. For instance, it considers that Belgium is totally different from the United Kingdom, although as regards the share (52%) of the spirits market and the absence of discrimination against Scotch whisky, the markets are very similar. That the object of the price terms was "to partition the common

market and prevent consumers in the continental EEC from enjoying the benefit of the same lower prices as consumers in the United Kingdom" is confirmed by the fact that DCL is not truly interested in sales to consumers. The fact is that it considers the parallel exports which might flood on to the European market as a threat. The Commission shows that the effect of DCL's price terms was to impose on British wholesalers who exported a surcharge up to the level of the export price without discounts. Since the export price was under the control of DCL, it was always possible for it to increase the price to the continental EEC at will and, by enforcing its price terms, to maintain a differential between the price charged in the continental EEC and that charged in the United Kingdom.

7. Procedural matters

The Commission recapitulates the arguments in its statement of defence on this subject and submits that the Advisory Committee could have adjourned its meeting if it had felt that it could not perform its functions adequately without the minutes. Moreover, DCL has failed to show that as a result of the alleged irregularity in the procedure it suffered harmful consequences which could vitiate the procedure.

On reading the list of the documents supplied to the Advisory Committee, which are listed in the rejoinder, DCL notes that those documents did not include DCL's first supplement to the written reply consisting in the economic appraisal of an expert, and which formed the cornerstone of the defence of the dual pricing system. On the other hand, the Committee did receive the complaint submitted by the Bulloch companies, whereas DCL received a "censored" version on 18 May 1977, nearly two-thirds of the way through the period originally allocated for replying to the Commission's statement of objections. The missing passages included in particular the chapters on the production and sale of Scotch whisky, the position of DCL, the position of the interveners, the market in the United Kingdom, the distribution policy of DCL, and so on. DCL's request for a complete copy of the complaint was refused by the Commission. That refusal is, according to DCL, contrary to the Commission's normal practice and to what the law requires. DCL also points out certain errors of fact and shows that the chapter containing the accusation that DCL had abused an alleged dominant position contrary to Article 86 was also missing. DCL appreciates that the Commission did not accept the complainants' invitation to institute proceedings under that article. Nevertheless, it is possible that the Commission — and the Advisory Commitee — may have their views in relation to Article 85 coloured by the allegations as to DCL's size, its "dominant" position and its conduct.

E — Addendum to the reply

DCL alleges that the investigation of the case showed other procedural defects. DCL was prevented from submitting arguments helpful to its case, in

particular in relation to the circumstances that it did not enforce its ban on exports and that its parallel export sales are effected "on the back of" the reputation for Scotch whisky created by the sole distributors of the DCL brands.

F — Observations of the Commission and the interveners on the addendum

The *Commission* notes, first, that there is no indication in the addendum of the legal basis upon which it is submited. If, as DCL announced later in the course of a meeting held at the Court, that basis is Article 42 (2) of the Rules of Procedure, the Commission considers that the addendum is inadmissible. The Commission is of the opinion that DCL is seeking to invoke "new grounds of action" and not merely, as provided for in Article 42 (2), new arguments in support of a ground of action already invoked.

The Commission reiterates the point that its only duty was to give the Advisory Committtee an indication of the most important documents, that it considered DCL's first supplement as falling outside that category, and that in any case reference was made to it in the written reply itself, as well as in the second supplement.

In any event the Commission did not submit the Bulloch complaint to the Advisory Committee. It merely listed it among the most important documents. It was not bound to communicate the entire complaint to DCL, but only that part containing arguments to the effect that application of the price terms would make parallel exports economically prohibitive, which was dealt with in the Commission's statement of objections.

The Commission claims that in the administrative procedure DCL was not required to present its defence against the complaint submitted by the Bulloch companies as such, but against the statement of objections, which relates solely to the infringements of Article 85.

As to the arguments which DCL claims it was prevented from submitting, it has had an opportunity of doing so at other stages in the application and during the whole course of the present proceedings.

The *interveners* support the arguments of the Commission.

G — Observations of the interveners

The first observation made by the *interveners* is that DCL exaggerates the impact upon it of the power of the brewers on the United Kingdom market. The wholesale price of DCL whisky has increased steadily over recent years, from £3.90 to £7.06 per case between 1973 and 1977. The current price is approximately £9.69 for one of the lower-priced standard brands and over £12 for one of the higher-priced standard brands. These increases are greater than the variations in the retail price index. In any event, the interveners do not consider it relevant in the present case whether or not the United Kingdom price for whisky is unreasonably low and whether or not the brewers are responsible for this phenomenon.

Scotch whisky is already a well-established product on the continent. The allegation that it enjoys only 3% of the market in the Federal Republic of Germany may be misleading. It assumes

that the market in question is the market for all alcohol, whereas a much narrower definition may be appropriate. In 1977, 26.4. million bottles of whisky were shipped to that country, which follows the United States, Japan, France and Italy at fifth place in the table of the world's largest importers of Scotch whisky. Sales in France (5.5% of the whole spirits market according to DCL) represent nearly 38% of total exports to the continental EEC. Exports of whisky to those countries rose in volume by about 10 times between 1947 and 1977. The interveners ask how long DCL would like its sole distributors to be kept immune from the rules of competition. As to governmental discrimination against whisky in Denmark, France and Italy, this cannot justify private anti-competitive practices.

The cornerstone of DCL's system of pricing is the contractual surcharge of £5.20 which its United Kingdom clients had to pay if they exported to the continent. Even after being adjusted as the result of the investigation carried out by DCL amongst its sole distributors in October 1977, that figure cannot be accepted as it stands. First, there are large discrepancies between the costs claimed by the various distributors, yet each distributor enjoyed the same margin of protection against competition from parallel exports. Secondly, the larger part of the distributors' costs consists not in advertising or direct promotion, but in general overhead expenses (freight, delivery, selling costs, "liaison", customer complaints, prevention of fraud, stock financing, bad debts and administration) such as any commercial enterprise (and thus also the interveners) must bear. Advertising costs of between £0.28 and £2.31 are in any case much lower than the margin of protection which is enjoyed. Moreover, there is no logical connexion between the export deterrent imposed by DCL and its alleged object, that is to say, the restoration of "fair competition" between DCL's customers in the United Kingdom and its distributors in the continental EEC.

The interveners submit that the conditions for the applicability of Article 85 (3) are not met.

(a) There was no improvement in distribution

The interveners submit that DCL's assertion that an increase in parallel trade would ultimately lead to the disappearance of products from the market, because it would be pointless for anyone to advertise them, is unfounded. One of DCL's representatives at the oral hearing spoke in detail, for example, of the "damage done" to the market in the Netherlands for Scotch whisky as a result of parallel trading. However, customer demand in the Netherlands has not declined as a result of the fact that the product is offered at lower prices. It is inconsistent to express, on the one hand, fears that "floods" of parallel imports will "swamp" the market while claiming, on the other hand, that parallel trading ultimately works to the consumer's disadvantage because no one will advertise it any more. DCL also, according to the interveners, exaggerates

the weakness of the sold distributors in the face of parallel imports. If the latter are effected with whisky which is not labelled in accordance with local regulations, sole distributors can always draw the attention of wholesalers to this point. They are, moreover, in a better position than the parallel exporters to maintain a steady turnover.

(b) Consumers do not share the benefit

The interveners assert that the surcharge of £5.20 represents pure profit for DCL. Not one penny was allocated for advertising expenses on the continent or towards an elimination of the various difficulties under which Scotch whisky is alleged to labour in various EEC markets. The consumer in the United Kingdom and the consumer in the continental EEC derived no benefit whatsoever. As for the sole distributors, they were merely cushioned against competition. In a free and competitive market it should be up to the consumer to indicate whether he prefers to buy his whisky cheaply in a supermarket or to buy in a more traditional way at a higher price, for instance at his regular wine merchant, and whether he prefers to regard brands as fungible or to select the heavily-advertised brand.

(c) The restrictions imposed are not indispensable

DCL could have conceived a system where the price varied by brand and by country and where the extra payment demanded of United Kingdom customers was transferred directly to the sole distributor on whose territory the parallel export occurred.

The interveners are of the opinion that the present case does not present difficult issues, and that the reason why in recent years no case has reached the Court concerning an export restriction designed to protect sole distributors with promotion obligations is because the case-law on the matter has been clearly established.

They stress that DCL's reaction contravened the spirit of the Commission's decision, if not its actual text. The device of making British consumers pay more so as to prevent continental consumers from being able to buy at lower prices is labelled by the interveners as "ironic". This reaction illustrates DCL's strength and independence in marketing matters. It is unthinkable for any company not in a dominant position to act in such a fashion. That is why the Commission was justified in declaring under Article 86 that DCL's conduct as a dominant company in seeking to restrict exports to the continental EEC was in abuse of its dominant position.

In conclusion, the interveners request that if the Court annuls the Commission's decision it should modify that annulment to the extent that DCL should not be entitled to pursue civil remedies against them as a result of the annulment. In fact, in a letter dated 5 June 1978 DCL notified the Bulloch companies that, on conclusion of a successful application to the Court, it would ask them for payment of the difference between the net price and the export

gross price, namely £4.90 per case of Scotch whisky. The potential liability flowing from that letter would be, the interveners claim, £49 000.

As for the distribution costs for sole distributors, the amount of £5.07 per case of Scotch whisky represents, according to DCL, the cost of a special promotion, which has to be made over and above normal operating expenses.

H — DCL's comments on the observations of the interveners

DCL notes that the interveners have no arrangements for exporting their brands to the continental EEC. The reason is that it is not possible for a brand of Scotch whisky to compete effectively there without substantial expenditure on promotional activities. In the circumstances the interveners preferred to export DCL's brands, thus reaping where others have sown.

There is nothing inconsistent in stating that a "flood" of parallel exports may at first result in an increase in sales but leads inevitably to a situation in which neither the producer nor the sole distributor can afford adequate promotional activity, and that this absence of promotional activity leads in the long term to a decline in sales. The dual pricing system, by encouraging lively competition between different brands, enables the consumer to share in the benefit because a given brand can compete effectively in the United Kingdom at a price which will support the promotional activity necessary for its success in the continental EEC.

DCL uses fresh statistics to demonstrate the price-sensitivity of the United Kingdom market. Taking all the other markets of the EEC, the ill effect on Haig and White Horse of being available at a competitive price in the United Kingdom is conclusively demonstrated by a comparison of the performance of those brands with the industry as a whole and in particular with the brands withdrawn from or sold at a prohibitive price on the United Kingdom market. The percentage of increase or decrease in shipments to the continental EEC (excluding Belgium and Luxembourg) for the year ending 31 March 1979, compared with the previous year, is + 29% for Johnnie Walker Red Label, VAT 69 and Black & White, + 16% for all Scotch whiskies together and — 7% for Haig and White Horse.

As for the alleged dominant position of DCL, the latter submits that it would be neither relevant nor appropriate to invite the Court to find against DCL on the basis of Article 86, which has not been invoked by the Commission.

Finally, DCL considers it significant that the interveners made no complaint to the Commission for as long as they were able to enjoy substantial profits by dealing in DCL whisky in breach of their contractual obligations. A trader who believed the export prohibition and the dual price structure to be unlawful

should have notified the Commission immediately. The interveners, on the contrary, continued to reap substantial benefits: for example, between 1 February and 31 August 1978 they acquired 15 000 cases of Johnnie Walker and 15 000 cases of White Horse in bond, on condition that the whisky would not be offered for consumption outside the EEC. More than half of that quantity was discovered in Japan.

Oral argument was presented at the sitting on 29 January 1980 by DCL, represented by Michel Waelbroeck, of the Brussels Bar, the Commission of the European Communities, represented by John Murray, QC, and the interveners, represented by Mario Siragusa, of the Rome Bar.

The Advocate General delivered his opinion at the sitting on 12 March 1980.

Decision

1 By application dated 6 March 1978 the Distillers Company Limited (DCL) sought annulment of the Commission Decision of 20 December 1977 relating to proceedings under Article 85 of the EEC Treaty (IV/28.282: The Distillers Company Limited, Conditions of Sale and Price Terms. Official Journal L 50 of 22 February 1978, p. 16).

2 The applicant produces spirits and is the world's largest distiller and seller of Scotch whisky. It now has 38 subsidiaries producing spirits in the United Kingdom: 32 of them produce Scotch whisky, 4 produce gin, 1 produces vodka and 1 Pimm's, a drink consisting of aromatized spirits.

3 The applicant has a large share of the markets in Scotch whisky and gin in the Kingdom and in the other Member States. It has a large share of the market in vodka in the United Kingdom and a very small share in the other Member States; as for Pimm's, DCL alone sells it and the sales in the Member States other than the United Kingdom are very small in relation to the sales of other spirits.

4 Prior to the accession of the United Kingdom to the Community the subsidiaries of DCL entered into an agreement with the United Kingdom trade customers according to which the latter and subsequent purchasers from them were prohibited from exporting and reselling in bond. DCL notified those conditions of sale to the Commission on 30 June 1973 and asked for exemption under Article 85 (3).

5 Without informing the Commission, DCL, by circular letter dated 24 June 1975 sent to the customers of its subsidiaries in the United Kingdom, put into force new conditions of sale. Those conditions no longer contained any prohibition on exporting but provided for a different price system according as the products were intended for resale on the home market or were intended for export. The Commission was alerted by a report in the press and on 4 July 1975 wrote seeking clarification from the applicant who replied by letter dated 8 July 1975 and on 11 July 1975 sent to the Commission a copy of the aforementioned circular letter.

6 The first section of the circular letter headed "Conditions of sale" states "Following the referendum, we are now amending the conditions of sale to permit exports by home trade customers to other Common Market countries ... export outside the Common Market is still prohibited". Appendix I to the DCL circular letter contains the new version of the sellers' conditions of sale.

The second section of the circular letter headed "Price terms" states:

(a) "... the various allowances, rebates and discounts are designed to meet the particular requirements of the home trade and customers are only entitled to them when the goods are in fact consumed within the UK.

(b) Accordingly, if you wish to buy for export to other Common Market countries you must indicate this on your order and purchase must be made at the gross price.

(c) If ... a customer obtains or claims any home trade allowances, rebates or discounts in respect of goods which he has bought and any of those goods turn up in any country outside the UK, the right is reserved for all

companies in the DCL group to sell thereafter to such customer only at the gross price".

Appendix II to the circular letter from DCL headed "Certain contractual provisions (relating to price) additional to conditions of sale" states:

— "The following provisions will ... form part of every contract between a purchaser ... ('Purchaser') and a subsidiary company of the Distillers Company Limited ('DCL') for the purchase from such a subsidiary company ('Seller') of any of the brands of spirits and are additional to seller's conditions of sale (the subject of Appendix I)".

— "All allowances, discounts and rebates whatsoever ... (... hereinafter collectively referred to as 'Price allowances') are designed to meet the particular market circumstances of the United Kingdom".

— Any subsidiary company of DCL is entitled to charge the gross price "without reduction of such price by any price allowances":

  — If there shall be a reasonable belief on the part of the seller that any quantity of such goods has been or will be consumed outside the United Kingdom;

  — even when the exports are made by a subsequent purchaser;

  — regardless of the quantity ordered, until and to the extent to which purchaser shall produce evidence satisfactory to seller that such quantities will be consumed in the United Kingdom ....

7 In acknowledging receipt of the letter from DCL the Commission observed that new provisions of the conditions of sale relating to the grant of allowances, discounts and rebates appeared to be designed to impede parallel exports to EEC countries and to that extent to be in breach of Article 85 (1) of the Treaty. The Commission asked for further information pursuant to Article 11 of Regulation No 17.

8 On 23 February 1977 the applicant made minor amendments to Appendix II and forwarded a copy of it to the Commission on 25 February 1977.

9 A complaint was sent to the Commission on 18 May 1976 pursuant to Article 3 of Regulation No 17 by the interveners in the present proceedings. They asked that an end should be put to the infringements of the provisions of Articles 85 and 86 of the Treaty resulting from the price terms of DCL contained in the circular letter of 24 June 1975.

10 By letter dated 22 April 1977 the Commission, in accordance with the provisions of Article 19 (1) of Regulation No 17, sent the applicant a statement of objections. The Commission said that it was not obliged to examine the possible application of Article 85 (3) of the Treaty to the price terms, since they had not been notified in accordance with Article 4 (1) or Article 25 of Regulation No 17.

11 On 16 June 1977 the applicant sent two documents (with appendices) in reply to the objections contained in the Commission's letter of 22 April 1977. There followed six supplements to those documents.

12 The hearing by the Commission took place on 22 June 1977. The Commission Decision was adopted on 20 December 1977.

13 That decision found that the prohibition to export from the United Kingdom to other EEC countries and the prohibition to resell in bond constituted an infringement of Article 85 (1) of the Treaty from 1 January 1973 to or to about 24 June 1975 and refused the application under Article 85 (3) in respect of the provisions and the period referred to above. It further found that the price terms, which are set out in Appendix II to the circular letters dated 24 June 1975 and 23 February 1977, constituted an infringement of Article 85 (1) and that application of Article 85 (3) was not justified. The applicant was required to ensure that the infringement should be brought to an end without delay.

14 The applicant seeks annulment of the decision in question, and alternatively of Article 3 thereof inasmuch as it declares that an application of Article 85 (3) is not justified for the price terms which are part of the contracts for the

sale of Scotch whisky, gin, vodka and Pimm's entered into by subsidiary companies of DCL with their trade customers established in the United Kingdom.

15 It recognizes that the conditions of sale as drafted in 1973 infringed Article 85 of the Treaty and could not be exempted under Article 85 (3); but maintains that the Commission Decision must be annulled as a whole because of certain procedural irregularities which are such as to infringe the applicant's right of defence.

16 As regards the price terms drafted in 1975 and 1977, the applicant also recognizes that they fall under the prohibition of Article 85 (1) of the Treaty. It maintains however that those terms are capable of enjoying the exemption under Article 85 (3) and that the Commission wrongly refused to grant such exemption.

17 As for Pimm's the applicant further maintains that the sales of that product in the member countries other than the United Kingdom are minimal in relation to the sales of other spirits. The price terms therefore do not fall within the prohibition of Article 85 (1) as regards that product.

18 The Commission joins issue with the applicant. It denies that there were any procedural irregularities and adds that even if there had been they would not have been such as to infringe the applicant's rights of defence. It further maintains, as it told the applicant in the statement of objections, that in the absence of notification in accordance with the provisions of Regulation No 17 the price terms could not be exempted under Article 85 (3) of the Treaty.

Failure to notify the price terms

19 It is well to consider in the first place the legal effect of failure to notify the price terms in accordance with the provisions of Regulation No 17 of the Council and the implementing regulation of the Commission.

20 Article 4 (1) of Regulation No 17 provides:

"Agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty ... and in respect of which the parties seek application of Article 85 (3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85 (3) may be taken".

21 Article 6 (1) of the same regulation states in this respect that:

"Whenever the Commission takes a decision pursuant to Article 85 (3) of the Treaty, it shall specify therein the date from which the decision shall take effect. Such date shall not be earlier than the date of notification".

22 Article 24 of the same regulation authorizes the Commission to adopt implementing provisions concerning *inter alia* the form, content and other details of notifications pursuant to Article 4. Under the powers conferred by that provision the Commission adopted Regulation (EEC) No 1133/68 of 26 July 1968 (Official Journal, English Special Edition 1968 (II), p. 400) which provides that notifications under Article 4 of Regulation No 17 shall be submitted on form A/B, as shown in the annex to Regulation (EEC) No 1133/68 which requires the parties to answer a number of specific questions, the answers to which are necessary to put the Commission in a position to take a decision.

23 It is agreed that the applicant never notified the price terms in accordance with the aforesaid provisions. Even when the Commission asserted in the statement of objections that the applicant had never notified the price terms in accordance with the provisions of Regulation No 17 and Regulation No 1133/68 with the result that they could not be exempted under Aricle 85 (3), the applicant did not proceed to give notification but confined itself to maintaining that refusal to grant exemption under Article 85 (3) for that sole reason would be too formal an application of the provisions in question. It adds that the Commission had not insisted on formal notification, for it had used, and had asked the applicant to use, the same reference number for the price terms and the conditions of sale notified in 1973 with a view to exemption, and that that could have led the applicant to believe that the price

terms would be considered together with the conditions of sale for the purpose of any exemption.

24 As the Commission rightly maintains, in the absence of notification in accordance with the requirements of the regulation the price terms may not have exemption under Article 85 (3). The simple fact that for administrative reasons the same reference number may have been used for the correspondence in relation to the conditions of sale which were duly notified and the correspondence relating to the price terms which were not is irrelevant.

Procedural irregularities alleged by the applicant

25 The procedural irregularities alleged by the applicant are in particular the following:

(1) The consultation with the Advisory Committee referred to in Article 10 of Regulation No 17 took place on 21 October 1977 whereas the minutes of the hearing before the Commission on 22 June 1977 were not drawn up even as an unrevised draft until 25 October 1977 so that the Committee was not in a position to appreciate the arguments put forward by the applicant at the hearing;

(2) Several supplements to the applicant's answer to the Commission's statement of objections, supplements which the applicant considers were important in judging its case, were not forwarded to the Advisory Committee;

(3) The Commission supplied the applicant with a copy of the intervener's complaint, a large part of which had been excised, and refused to supply the part excised (in so far as that part did not involve business secrets) maintainig that that part of the complaint was irrelevant; on the other hand the whole complaint was forwarded to the Advisory Committee as being one of the most important documents.

26 In view of what is said above it is unnecessary to consider the procedural irregularities alleged by the applicant. The position would be different only if in the absence of those irregularities the administrative proceedings could have led to a different result. Subject to what the applicant says with regard to the product Pimm's the action is in effect confined to challenging the legality of the Commission's refusal to grant exemption to the price terms

under Article 85 (3) from the prohibition in Article 85 (1). The applicant does not deny that the price terms infringe Article 85 (1). Since however it omitted to notify the said terms to the Commission the applicant has deprived itself by its own act of any possibility of obtaining in the proceedings to which the present application relates a decision granting exemption under Article 85 (3). Even in the absence of the procedural irregularities alleged by the applicant the Commission Decision based on the absence of notification could therefore not have been different.

27 Regarding Pimm's, as stated above, the applicant maintains that the price terms do not fall within the prohibition of Article 85 (1) of the Treaty solely because its sales in the member countries other than the United Kingdom are minimal in relation to the sales of other spirits.

28 The applicant's case cannot be accepted. Although an agreement may escape the prohibition in Article 85 (1) when it affects the market only to an insignificant extent, having regard to the weak position which those concerned have in the market in the products in question, the same considerations do not apply in the case of a product of a large undertaking responsible for the entire production. In those circumstances there is no reason for the purposes of the action to distinguish between Pimm's and the other drinks produced by the applicant.

29 After the rejoinder and the application by Bulloch to intervene the applicant sent the Court under Article 42 of the Rules of Procedure of the Court an addendum to the reply, putting forward certain fresh issues regarding the alleged irregularities in the administrative procedure. The Commission and the intervener lodged their answers within the time-limit laid down by the President of the Court in accordance with Article 42. The last paragraph of Article 42 provides that the decision on the admissibility of the issue shall be reserved for the final judgment. In view of what has been said regarding the relevance of the irregularities alleged it is unnecessary to give a ruling on the admissibility of the fresh issues.

30 The action must therefore be dismissed.

Costs

31 Pursuant to Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs and since the applicant has been unsuccessful it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the action.**

2. **Orders the applicant to pay the costs including the costs of the interveners.**

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 10 July 1980.

A. Van Houtte
Registrar

H. Kutscher
President