OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 12 MARCH 1980

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My Lords,

Introductory

This action is brought under Article 173 of the EEC Treaty by the Distillers Company Limited ("DCL") to challenge a Decision of the Commission dated 20 December 1977 (78/163/EEC, OJ L 50 of 22. 2. 1978, p. 16). By that Decision the Commission declared that certain restrictions imposed by DCL on exports of its products (Scotch whisky, gin, vodka and Pimm's) from the United Kingdom to other Member States of the EEC constituted infringements of Article 85 (1) of the Treaty and did not quality for exemption under Article 85 (3).

DCL was incorporated in 1877 as an amalgamation of six Scotch whisky distillers. It now has over 70 subsidiaries and associated companies whose activities extend beyond the spirits industry, but the greater part of the business of the group still consists in the production and distribution of potable spirits.

There are 38 DCL subsidiaries producing spirits in the United Kingdom. Of those, 32 produce Scotch whisky, 4 produce gin, one produces vodka and one produces Pimm's. The total turnover of the DCL group in the year ended 31 March 1977 was £847 172 000 out of which the turnover of potable products was £732 053 000 (net of duty, £507 473 000).

The DCL subsidiaries producing Scotch whisky, own between them more than 50 different brands. There are standard

brands, of which the most important and best known are Johnnie Walker Red Label, Black & White, Haig White Label, Dewars, White Horse and Vat 69; there are luxury brands, in particular Johnnie Walker Black Label, Haig Dimple and the Antiquary; and there are malt whiskies. Of the DCL group's total sales of Scotch whisky about 15% are to the United Kingdom market, about 15% are made in other Member States of the EEC and the balance is represented by exports to the rest of the world.

According to the Commission, DCL's share of the Scotch whisky market in the United Kingdom for the years 1973 to 1977 was between 40 and 50%. That is contested by DCL. A table on page 11 of DCL's reply indicates a downward trend in its market share during that period from some 50% at the beginning to little over 30% at the end. In the other countries of the EEC, DCL had, in 1975, the following shares of the market: 54% in Belgium and Luxembourg, 47% in Denmark, 35% in France, 33% in Italy and in Germany, 32% in Ireland and 29% in the Netherlands.

The main competitors of DCL's brands of Scotch whisky in the United Kingdom, and indeed the largest selling brands there, are Bell's (owned by Arthur Bell & Sons Limited, an independent company) and Teacher's (owned by a subsidiary of Allied Breweries Limited). In the continental EEC the nearest competitors to Johnnie Walker Red Label, the largest selling brand, are Ballantine's (owned by an American/Canadian multinational, Hiram Walker & Co Limited) and J & B (owned by the brewery/hotel group, Grand Metropolitan Hotels Limited).

So far as gin is concerned, the leading brands produced by DCL subsidiaries are Gordon's, Booth's and High and Dry. During the years 1973 to 1975 those subsidiaries' share of the United Kingdom gin market was about 70%. Their estimated market shares in the other EEC countries were: 44% in Belgium and Luxembourg and in Denmark; 30% in the Netherlands; 27% in Germany; 20% in France and in Italy; and 10% in Ireland.

The DCL subsidiary producing vodka owns the Cossack brand which has the second highest sales in the United Kingdom and accounts for about one-quarter of the vodka market there, which is about 2% of the total market for spirits. The brand's sales in other countries of the EEC seem to be confined to Ireland and the Netherlands, where, according to DCL, whose figures are unchallenged by the Commission, it accounts for 0.43% and 0.02% respectively of the total market for spirits.

Pimm's is a unique product which is sold only by Pimm's Limited, a subsidiary of DCL. According to DCL its share of the total United Kingdom spirits market is only 0.133% and it is having considerable difficulty in achieving market penetration elsewhere in the EEC. DCL quotes market shares of 0.077% for France (for which a special formula has had to be evolved, as the kind of lemonade with which Pimm's is normally mixed is not available there), 0.061% for Ireland, 0.031% for Belgium, Luxembourg and the Netherlands, 0.008% for Italy, 0.006% for Germany and 0.005% for Denmark. Here again the Commission does not challenge the

figures, but it has hazarded the view that Pimm's ought possibly not to be regarded as a spirit at all.

Each of the 38 subsidiaries of DCL is responsible for marketing its own brand or brands of spirits. The system of distribution varies as between the United Kingdom and the other Member States of the EEC.

Within the United Kingdom the DCL subsidiaries do not normally appoint distributors but sell directly to the wholesale trade. Sales are made to about 1 000 wholesalers. The wholesale trade is divided between a "tied" sector consisting essentially of brewery groups which own retail outlets (both shops and public houses) and a "free" sector in which the breweries and other wholesalers supply a wide range of retailers including independent shops, supermarkets, hotels and so on. The tied sector and the free sector each represent about half the market.

In the rest of the EEC the normal practice is for each DCL subsidiary to appoint for each country a sole distributor of its brands. The sole distributors, of which there are about 200 in the whole Community, usually resell to wholesalers. Distributors of the different DCL brands compete against each other. Most distributors also handle a wide selection of other wines and spirits.

The method followed by the DCL subsidiaries in fixing prices to their wholesale customers in the United Kingdom dates back to well before the accession of the United Kingdom to the Community in 1973 (see the circular letter on "Home Trade Scotch Whisky Prices" of 31 July 1970 and the similar letter on "Home Trade Gin Prices" of 16 September 1972 annexed to the reply). It consists in fixing a gross price and subtracting therefrom, as appropriate, a series of allowances, rebates and discounts. Those have, from time to time, included:

— a "wholesale allowance", granted to customers who purchase a minimum quantity;

— an "aggregate quantity rebate", granted on the basis of the quantity of spirits purchased by the customer from DCL subsidiaries during a given year;

— a "deferred special allowance" (discontinued as from 31 March 1978) — in effect a loyality rebate;

— a "performance bonus rebate", which was a target bonus, available only in respect of Scotch whisky purchases during the year March 1977 to March 1978, where purchases of DCL brands during the year amounted to at least 95% of the total for the previous year;

— a "cash discount" granted on duty-paid spirits for which customers forward cash with their order;

— "promotional allowances" granted by individual DCL subsidiaries by way of contributions to special promotions of their brands.

A similar method is used for fixing prices to the sole distributors of DCL spirits in other Member States of the EEC. For each brand there is a uniform gross price, from which is deducted a distributor's allowance and, where appropriate, a cash discount. DCL subsidiaries also contribute in some cases to expenditure incurred by their sole distributors on the advertising or promotion of their brands.

Before turning to the events leading to the Decision of the Commission of 20 December 1977 I must mention two further facts about the situation in the United Kingdom.

One is that, until very recently, all prices of spirits supplied to the United Kingdom market were controlled by the Price Commission set up under the *Counter-Inflation Act 1973*. Export prices were not subject to such control.

The other is that United Kingdom excise duty is payable on spirits at the time at which they are removed from bond. Spirits intended for export circulate under bond until they pass through customs. There is no system of reimbursement of the duty paid on them on removal from bond if they are subsequently exported.

The events leading to the Commission's Decision of 20 December 1977

The agreements that the DCL subsidiaries enter into with, respectively, their customers in the United Kingdom and their sole distributors in other Member States have been the object of separate proceedings before the Commission.

The proceedings in relation to the sole distributor's agreements are only of marginal relevance in this case. They have been going on for a long time. A standard form distributor agreement was notified by DCL to the Commission as early as 31 January 1963. Since 1965, it seems, the agreement between White Horse Distillers Limited and its distributor in France (now Corima SA) has been treated as representative of the other agreements. A series of amendments to the agreement have been suggested by the Commission and accepted by DCL. There have been repeated complaints by DCL to the Commission about the failure to conclude the proceedings. Apparently DCL was given to understand in August 1976 that approval of the agreement was dependent on the view that the Commission might take of its United Kingdom price terms, which by then had come under scrutiny. The latest steps in the White Horse/Corima proceedings were the issue by the Commission of a statement of objections on 7 July 1977 and the submission by DCL of a written "reply" to that statement on 2 August 1977.

I turn to the agreements between the DCL subsidiaries and their United Kingdom customers.

On 30 June 1973 a set of standard form "Conditions of sale" was notified to the Commission by DCL on behalf of its subsidiaries with a request for exemption under Article 85 (3). That was a formal notification made on "Form A/B" as prescribed by *Commission Regulation (EEC) No 1133/68.* The conditions included a clause 5 (b) to the effect that the goods, if sold in bottles for delivery in Great Britain, would not be resold for delivery outside Great Britain. The clause was to be incorporated in all sub-sales. That, of course, was an express export ban, applying to the countries of the EEC among others. It was complemented by clause 6 which provided that such of the goods as were sold under bond should not be resold or otherwise transferred by the buyer except out of bond and after duty at the full rate in force in respect of goods intended for consumption in the United Kingdom had been paid by the buyer. The rates of duty in force in the United Kingdom were and are so high that prohibiting the resale of goods under bond made the exportation of them hopelessly unremunerative.

There was no mention in the notification of the method of fixing home trade prices. In answer to question III (1) in Form A/B, which reads so far as material "State whether and how far the agreement . . . relates to . . . adherence to certain buying or selling prices, discounts or other trading conditions", DCL stated: "The conditions do not relate to any of these matters except as mentioned in answer to paragraph II 3 (d) above". In answer to question II (3) (d) it had stated:

"The aims of the conditions are to define the terms on which sales of the goods take place in the United Kingdom. Certain of those terms are designed to complement the company arrangements for the distribution of the goods in other markets and thus to enable the distributors to utilize the most economical and effective means of distribution and, at the same time, to meet the requirements of consumers and to compete with the many other brands of potable spirits."

It was explained to us on behalf of DCL that, at the time, the method of fixing home trade prices was not considered to be relevant in the context of Article 85 since it applied only to sales effected in the United Kingdom and the conditions of sale precluded exports from the United Kingdom by customers buying at those prices.

The receipt of the notification by the Commission was followed by some correspondence between DCL and the Commission and by meetings between representatives of each of them. The details do not matter.

On 24 June 1975 DCL sent to the United Kingdom customers of its subsidiaries a circular letter headed "Home trade conditions of sale and price terms". That letter is of such importance that I must read it almost in full. In it DCL said:

"Following the Common Market referendum we are, on behalf of our subsidiary companies, writing to notify you of amendment of the conditions of sale governing sales of spirits by those companies to yourselves and their other

home trade customers and also to clarify and confirm the basis on which the various allowances, rebates and discounts are offered to you and such customers by the companies in this group.

Conditions of sale

The conditions of sale which have been in force for the home trade since before the UK entered the Common Market include a prohibition against export. The conditions, including this prohibition, were notified to the EEC authorities at Brussels . . .

Following the referendum, we are now amending the conditions of sale to permit exports by home trade customers to other Common Market countries. Please note, however, that exports are permitted only for consumption within the Common Market: export outside the Common Market is still prohibited.

Attached (as Appendix I) is a copy of the amended conditions of sale, which will apply, from now and until further notice, to all home trades sales to you . . .

Price terms

We should make it clear that, although the amended conditions of sale permit exports for consumption in other Common Market countries, 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.

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.

It is hoped that all customers will co-operate in order to enable a simple and convenient system to be operated. If, however, 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 customers only at the gross price.

Attached (as Appendix II) is a note of certain contractual provisions which authoritatively state and amplify the foregoing principles: and which, until further notice, will form part of every contract made hereafter between any company in the DCL group and any home trade customer (such as yourselves) for the purchase of spirits by the latter."

As announced in the letter two appendices were attached to it.

Appendix I set out the amended "Conditions of sale". In that amended version the ban in clause 5 (b) was confined to exports outside the EEC and the former clause 6 relating to sales under bond was deleted.

Appendix II was headed "Certain contractual provisions (relating to price) additional to conditions of sale". After recording that DCL itself was not trading in goods, the Appendix defined "seller" as meaning in effect any DCL subsidiary and "purchaser" as meaning any customer of such a subsidiary. It continued:

"(2) All allowances, discounts and rebates whatsoever (whether immediate

or deferred) allowed or paid by or on behalf of seller to purchaser by way of reduction of the gross price of any goods the subject of a contract between purchaser and seller (such allowances, discounts, and rebates being hereinafter collectively referred to as "price allowances") are designed to meet the particular market circumstances of the United Kingdom. If there shall be a reasonable belief on the part of seller that any quantity of such goods has been or will be consumed outside the United Kingdom, seller shall be entitled (without prejudice to any other rights on its part) to charge purchaser in respect of any quantities of goods to be delivered to purchaser by seller (whether pursuant to the contract aforesaid or to a contract subsequent thereto) the gross price thereof without reduction of such price by any price allowances unless, until and to the extent to which purchaser shall produce evidence satisfactory to seller that such quantities will be consumed in the United Kingdom provided that upon such production seller shall ensure that purchaser promptly receives the relative price allowances together with reasonable interest thereon calculated over the respective periods in which purchaser would (but for the foregoing provisions of this paragraph (2)) have enjoyed the benefit of the price allowances in question."

Paragraph (3) defined the evidence constituting, for the purposes of paragraph (2), grounds for "a reasonable belief on the part of the seller" that any quantity of the goods would be consumed outside the United Kingdom.

Finally paragraph (4) stated: "The foregoing provisions are additional to sellers's conditions of sale (the subject of Appendix I)."

The contents of Appendix II have been referred to in these proceedings as the "price terms". As Your Lordships see, they instituted a dual pricing system under which United Kingdom customers were to be charged lower prices if the spirits they bought were destined for consumption in the United Kingdom than if they were destined for export.

The correspondence between DCL and the Commission continued. On 3 July 1975 and again on 8 July 1975 DCL wrote to the Commission in answer to points raised by the Commission. In the later letter DCL referred to the amended conditions of sale. It said:

"The revision of those conditions so as to bring them into conformity with Article 85 of the Rome Treaty has been under consideration for some time. Following the recent referendum on Common Market membership, the UK customers of DCL's subsidiary companies have been notified of revised conditions of sale which will in future apply to all sales to such customers. We enclose as an appendix to this letter a copy of the revised conditions of sale, from which you will see that the prohibition on export from the UK to other countries within the EEC has been removed. We believe that the revised conditions fully conform with Article 85."

The appendix to the letter contained the text of Appendix I to DCL's circular of 24 June 1975. DCL gave the Commission no hint of the existence of the circular itself or of Appendix II thereto.

In the meantime, however, on 27 June 1975, an article had appeared in the Financial Times headed " 'Unofficial' whisky exports scotched", referring to the circular and describing in outline the dual pricing system thereby instituted.

That article alerted the Commission, which wrote to DCL on 4 July 1975 a letter which appears to have crossed in the post DCL's letter of 8 July 1975. The Commission drew DCL's attention to the article and asked for comments, information and documents. The request was expressed to be made under Article 11 of *Regulation No 17.*

DCL responded by a letter dated 11 July 1975 to which it annexed the full text of the circular and of its two appendices. The view put forward by DCL, which it has maintained in these proceedings, was that nothing had changed in relation to the various discounts offered to the United Kingdom customers of its subsidiaries. It wrote:

"What has been done in the letter to such customers of 24 June is to clarify and confirm the basis on which such discounts have previously been offered, namely that they apply to Scotch whisky sold for consumption in the United Kingdom".

In acknowledging DCL's letter of 11 July 1975, which it did by a letter dated 19 August 1975, the Commission said "Would you please use reference IV/ 28.282 for any future correspondence in relation to your conditions of sale". Then, referring to the "new provisions of your conditions of sale of 24 June 1975 relating to the grant of allowances, discounts and rebates," the Commission said that they appeared to be designed to impede parallel exports to other EEC countries and to that extent to be in breach of Article 85 (1) of the Treaty; and the Commission asked for further information pursuant to Article 11 of *Regulation No 17.*

One of the questions that Your Lordships have to decide is whether, in those circumstances, DCL can claim exemption under Article 85 (3) for the price terms, despite the provisions of Articles 4 (1) and 6 (1) of *Regulation No 17* as to notification and those of *Regulation No 1133/68* as to the form of such notification.

On 18 May 1976 the Commission received a complaint under Article 3 (2) (b) of *Regulation No 17* from a group of Scotch whisky dealers in the Glasgow area, consisting of an unincorporated family partnership, A. Bulloch & Co, and four limited companies, A. Bulloch (Agencies) Limited, John Grant (Blenders) Limited, Inland Fisheries Limited and Classic Wines Limited, owned and managed predominantly by members of the same family. (I shall refer to them collectively as "Bulloch". They intervened, Your Lordships remember, in the present action). The complaint alleged that DCL's price terms infringed Articles 85 and 86 of the Treaty and that Bulloch's business had been thereby damaged.

By a letter dated 26 May 1976 the Commission informed DCL of the existence of the complaint.

A change in the price terms was notified by DCL to the United Kingdom customers of its subsidiaries by a letter dated 23 February 1977. The price for whisky destined for consumption in other Member States of the EEC was in future to be the gross price payable by the sole distributors in those States ("the gross EEC export price") rather than the home trade gross price. DCL informed the Commission of the change (among many other things) in a letter dated 25 February 1977.

It may be helpful if I pause to indicate what was at this stage the resultant structure of prices for DCL standard brands of Scotch whisky. I take the figures from the findings of the Commission as recorded in its Decision. (Those findings related expressly to Johnnie Walker Red Label but the case was argued on the footing that they were typical). The home trade gross price (excluding excise duty and VAT) was £13.61 per case of 12 bottles. Price allowances applicable on sales to wholesalers for the United Kingdom market were on average £5.41 per case making an average net price of £8.20. The gross EEC export price was £13.51 per case, on which a sole distributor would receive a distributor's allowance of £4.62 and could receive a cash discount of 54 p. If he received both, the net price to him would therefore be £8.35. On average therefore DCL earned 15 p. per case less on its sales for the United Kingdom market than it earned on its sales to sole distributors in other Member States. What matters most, however, for present purposes is that a United Kingdom wholesaler wishing to export to other Member States would have to pay some £5.16 more per case than a sole distributor in any of those States (that is the difference between £8.35 and £13.51).

On 7 March 1977 a further complaint under Article 3 (2) (b) of *Regulation No 17* concerning the difficulty of obtaining DCL Scotch whisky for export was received by the Commission from a London firm called Madison, Benson & Carter Limited.

The voluminous correspondence that had been continuing between DCL and the Commission culminated in the Commission sending DCL a statement of objections relating to its conditions of sale and price terms on 22 April 1977. The statement of objections indicated that the Commission was minded:

(a) to hold that the prohibition on exports and on resales in bond applicable until 24 June 1975 by virtue of clauses 5 (b) and 6 of the conditions of sale infringed Article 85 (1) and did not qualify for exemption under Article 85 (3);

(b) to hold that the prohibition on exports to countries outside the EEC infringed Article 85 (1) and did not qualify for exemption;

(c) to hold that the price terms infringed Article 85 (1) and to require DCL to bring that infringement to an end.

As to DCL's claim for exemption of the price terms under Article 85 (3) the statement of objections recorded the Commission's opinion that it did not need to be examined since the price terms had not been notified in accordance with the provisions of *Regulation No 17*, but that, in any case, the price terms did not fulfil the conditions for exemption under Article 85 (3).

Texts of the complaints received by the Commission from Bulloch and from Madison, Benson & Carter Limited were sent by the Commission to DCL on 13 May 1977. In the case of the Bulloch complaint, nearly 19 pages out of a total of 35 were omitted. DCL, whilst conceding that it was proper for the Commission to excise passages relating to Bulloch's own business secrets, pressed for a fuller text. That request was rejected by the Commission on grounds that it stated as follows in a telex to DCL of 27 May 1977:

"... while the Commission is bound to inform respondents fully of those matters which are likely to be relevant to a Decision, it is under no obligation beyond this to disclose copies of complaints, either wholly or in part. The Commission's assessment of this case is entirely based on information which was provided by DCL and exclusively on the facts which are outlined in the statement of objections. Since the complaints appeared to substantiate the Commission's view that whisky dealers are prejudiced by DCL practices, and to inform you of this, the relevant extracts of the complaints were addressed to you. The omitted pages contain matter which is either confidential or irrelevant to an understanding of the case. All the material on which the Commission relies or which may influence its views has been made known to you ...".

On 16 June 1977 DCL sent to the Commission what it called its "reply" to the statement of objections. In order to avoid confusion with the reply that forms part of the pleadings in this Court (and following the terminology of Article 3 (2) of *Commission Regulation No 99/63/EEC)* I will refer to that document as DCL's "written comments". The document was amplified over the ensuing weeks and months by the submission of six supplements.

DCL did not seek to defend the prohibitions in the erstwhile clauses 5 (b) and 6 of the conditions of sale. In particular it conceded that such prohibitions were not "indispensable" (within the meaning of Article 85 (3) (a) of the Treaty) to the attainment of the objective of the improvement of the distribution of its products. DCL did on the other hand contest the applicability of Article 85 (1) to the prohibition on exports to countries outside the EEC.

DCL conceded that the price terms were caught by Article 85 (1) but contended that they should be exempted under Article 85 (3). It submitted that the lack of formal notification of them did not matter. On the substance, the gist of DCL's case was, as it has been in this Court, that market conditions in the United Kingdom and in the continental

Member States are so different as to call for different methods of distribution. In the United Kingdom, because Scotch whisky is a well-established product and because of the control of the brewers over a large proportion of the outlets, there is intense price competition. In continental countries on the other hand, whisky enjoys a much smaller share of the market for spirits and cannot for various reasons compete on price with local spirits. Sales of it therefore have to be actively promoted. This involves expenditure on the part of sole distributors. Sole distributors could not afford to incur that expenditure if their prices could be undercut by parallel exporters who do not have to incur it. The same brand of Scotch whisky cannot therefore be effectively distributed in the United Kingdom and in continental Member States unless parallel exporters pay an enhanced price reflecting the sole distributors promotion expenditure. DCL stressed that that expenditure was not limited to advertising through the media. It included market research, the employment of a sales force, the supply of "point of sale material" ("optics" and so forth), the education of barmen, dealing with customers' complaints, and of course stockholding. It also included protection of the brand against fraud, which is notoriously rife in the whisky market and takes many forms, such as the refilling of bottles with spurious spirit and the use of counterfeit labels, besides more ordinary kinds of trade-mark infringement.

An oral hearing was held by the Commission on 23 June 1977, at which both DCL and Bulloch were represented. A copy of the first supplement to DCL's written comments, consisting of an "Economic appraisal" by Lady Hall, a distinguished Oxford economist, was handed by DCL to the Commission on that day.

The second supplement followed on 28 June 1977 and the third on 26 July 1977.

It appears that at the oral hearing and again at an informal meeting between representatives of DCL and of the Commission held on 19 July 1977, the question was raised whether the difference in the prices charged by DCL to parallel exporters on the one hand and to its sole distributors on the other in fact reflected the latter's additional costs. DCL thereupon undertook a detailed investigation of its sole distributors' costs. (We were told on behalf of DCL that it almost certainly could not have secured its sole distributors' cooperation in such an investigation earlier, i.e. in the absence of the pressure put on sole distributors by the existence of the Commission's statement of objections.)

On 21 September 1977 DCL wrote to the Commission confirming that the results of its investigation of those costs would be in the hands of the Commission by 21 October.

DCL heard subsequently that its case might be considered by the Advisory Committee under Article 10 of *Regulation No 17* at a meeting on 19/21 October 1977. On 11 October 1977 DCL wrote again to the Commission expressing its distress at the prospect of

the Advisory Committee considering a draft Decision without having the results of the investigation before them, since the distributors' costs not borne by parallel importers were "so crucial to the problem".

The results of the investigation as far as concerned distributors of Scotch whisky were contained in the fourth supplement to DCL's written comments. This showed that their additional costs averaged £5.07 per case.

The fourth and fifth supplements, both dated 20 October 1977, did, in fact, reach the Commission on the morning of 21 October. On the same day the Advisory Committee met and made its report on the case. We were told by the Commission (Defence paras 172-174) that the Committee were informed, in the course of their meeting and prior to reaching any decision, that the fourth supplement did appear to support the figures stated by DCL in its written comments; that the Committee had likewise been told of the receipt of the fifth supplement and of its contents; but that the Committee decided not to adjourn to study those supplements further. (The fifth supplement contained DCL's considered answers to questions raised by Commission officials at or after the oral hearing as to how DCL might alter its pricing system.)

It is also material that, at the date of the meeting of the Advisory Committee, the minutes of the oral hearing were not available, even in draft. Draft minutes were sent to the parties on 25 October 1977 and amendments, described by the Commission as "minor", were received from DCL on 15 November 1977.

On 24 November 1977 the sixth (and last) supplement was submitted by DCL to the Commission. It contained the results of DCL's investigation of the costs of sole distributors of gin.

The Decision of 20 December 1977

Just under a month later, on 20 December 1977, the Commission adopted the Decision that is the subject-matter of the present action. By that Decision the Commission:

(a) declared that the prohibition on exports and on resales in bond that had been contained in DCL's conditions of sale until 24 June 1975 infringed Article 85 (1) and did not qualify for exemption under Article 85 (3);

(b) declared that the price terms infringed Article 85 (1) and did not qualify for exemption under Article 85 (3), both because of the failure to notify them and because they did not satisfy the requirements of Article 85 (3);

and

(c) required DCL and its subsidiaries to abandon the price terms in so far as they restricted exports from the United Kingdom to other EEC countries.

The Commission did not hold that the conditions of sale infringed the Treaty in so far as they forbade exports to non-EEC countries. Nor did it fine DCL.

DCL's reaction to the Decision of 20 December 1977

DCL's reaction to the Decision was to announce its immediate abandonment of the dual price system, while taking certain further steps dictated, it explained, by the belief that it would not in future be possible for the same brand of Scotch whisky both to compete effectively in the United Kingdom and to receive the degree of promotion necessary for it to compete effectively in the continental EEC. Those steps consisted in withdrawing from sale in the United Kingdom one standard brand of whisky, Johnnie Walker Red Label, and one luxury brand, Haig Dimple, and in applying to the United Kingdom Price Commission for leave to increase the price of four other standard brands, Black & White, Vat 69, Dewars and White Horse, by £5.94 per case and the price of two luxury brands, the Antiquary and Johnnie Walker Black Label, by £3.00 per case. Haig White Label was to be left on sale in the United Kingdom at its then current price. The Price Commission granted DCL's application, except in relation to Dewars for which the price increase was limited to £3.00 per case, and White Horse for which no increase was allowed at all. One of the DCL subsidiaries has introduced a new standard brand of Scotch whisky called "John Barr", which is sold in the distinctive square bottle associated with Johnnie Walker. DCL did not take any similar steps in relation to any other spirits.

The Commission has stated that it must not be taken as accepting that the steps taken by DCL constituted due and lawful compliance with its Decision. That is a matter that the Commission may take up with DCL, depending on the outcome of these proceedings. It cannot have any bearing on that outcome.

The issues in this action

In this action DCL seeks a declaration that the whole of the Decision of 20 December 1977 is void and, in the alternative, a declaration that the Decision is void in so far as it relates to the application of Article 85 (3) to the price terms.

It was made clear to us, however, on behalf of DCL that the challenge to the whole Decision was based only on infringements of essential procedural requirements that DCL alleged had occurred in the proceedings leading to the Decision. Those were:

(a) That a number of important documents were not adequately considered, or were not considered at all, by the Advisory Committee, namely:

(i) Lady Hall's "Economic Appraisal", which, so it transpired from the Commission's Rejoinder (para. 66), was not among "the most important documents" listed by the Commission when giving notice

of the meeting of the Committee under Article 10 (5) of *Regulation No 17;*

(ii) the fourth and fifth supplements to DCL's written comments, which, Your Lordships remember, arrived only on the morning of the day when the Committee met;

(iii) the sixth supplement and the minutes of the hearing of 23 June 1977, which were not available until after that day.

(b) that the Commission supplied DCL with a copy of the Bulloch complaint that had been censored to an impermissible extent.

(c) that, with regard to Pimm's, the Commission's Decision was based on "insufficient and/or contradictory reasons".

DCL does not contest the correctness in substance of the Commission's Decision in so far as it held that the prohibition on exports and on resales in bond contained in DCL's original conditions of sale infringed Article 85 (1) and did not qualify for exemption under Article 85 (3); or in so far as it held that the dual price system operating as from 24 June 1975 was caught by Article 85 (1). The only substantive point taken by DCL is that the Commission ought not to have refused to exempt the price terms under Article 85 (3).

The main issues in the action are therefore:

(i) whether, and to what extent, the Decision may have been vitiated by defects in the administrative procedure;

(ii) whether the lack of formal notification of the price terms precluded their exemption under Article 85 (3); and

(iii) if not, whether the Commission's finding that the price terms did not satisfy the conditions for exemption under Article 85 (3) can be upheld.

I propose to leave the procedural questions till last and to begin by considering the issue as to notification.

DCL's failure to notify the price terms

DCL accepts that "as a technical matter" the price terms were not notified in accordance with the relevant provisions of *Regulation No 17* and of *Regulation No 1133/68.*

In an endeavour to escape from the consequences of that omission, it put forward what seemed to be essentially four arguments.

The first was that the notification of the conditions of sale covered the price terms, in that the objective of the price terms was the same as the objective of the export prohibition, i.e. the protection of sole distributors in continental Member States against parallel exports at United Kingdom prices. The price terms, DCL submitted, were a less drastic means of achieving that objective.

In my opinion that argument will not stand up to examination. It is for present purposes irrelevant whether or not the price terms were a less drastic means of achieving the objective (a matter on

which DCL and the Commission differed). It is not objectives, but (so far as here in point) "agreements" that have to be notified under Article 4 (1) of *Regulation No 17.* On no fair reading of DCL's notification on Form A/B dated 30 June 1973 can it be regarded as a notification of DCL's method of fixing prices to its United Kingdom customers. On the contrary the answers given in that notification to questions II (3) (d) and III (1), which I have read, were framed in such a way as to avoid disclosing it. DCL may be right in saying that, for the reasons I recorded earlier, it was under no obligation at that time to disclose the method, but it cannot be heard to say now that it did, by that notification, disclose it.

Secondly DCL submitted that separate notification of the price terms in 1975 was unnecessary because they had always applied to United Kingdom sales. That argument too must in my opinion be rejected. Even if DCL is right in saying that the price terms did not need to be notified in 1973, they took on a different significance in 1975 when the export ban was removed and they became DCL's sole means of restricting parallel exports. I would add that, in my opinion, the wording of the circular of 24 June 1975 and of Appendix II thereto shows that DCL was conscious of the change in the role of the price terms. If there was no such change, it was hardly necessary to invite customers to "co-operate in order to enable a simple and convenient system to be operated", or to introduce elaborate new clauses for penalizing customers if there was a "reasonable belief" that goods bought by them at home trade prices had turned up abroad, or to say that those new clauses were additional to the conditions of sale.

Thirdly DCL submitted that, once the Commission had received its letter of 11 July 1975 enclosing the full text of the circular of 24 June and of the appendices thereto, it would have been pointless for DCL to go through the "empty formality" of notifying the price terms on Form A/B; the Commission would have gained nothing thereby. That is at first sight an attractive argument. But the fact remains that the Commission first learnt of the existence of the price terms through a newspaper article and that it obtained the text of them by means of a request for information under Article 11 of *Regulation No 17.* Clearly that is not the sort of "notification" that the authors of *Regulation No 17* had in mind. They included in the preamble to the Regulation recitals in these terms:

"Whereas in establishing the rules for applying Article 85 (3) account must be taken of the need to ensure effective supervision and to simplify administration to the greatest possible extent;

... it is accordingly necessary to make it obligatory, as a general principle, for undertakings which seek application of Article 85 (3) to notify to the

Commission their agreements, decisions and concerted practices;".

It would hardly be consistent with the aims there expressed to hold that an undertaking that had not complied with the Regulation was entitled to the same treatment as one that had. Moreover, apart from disclosing the agreement in question to the Commission, formal notification does three things: it establishes that, in case the agreement should be caught by Article 85 (1), exemption under Article 85 (3) is sought; it identifies the grounds on which such exemption is sought; and it fixes, in accordance with Article 6 (1) of *Regulation No 17,* the earliest date from which the exemption may take effect.

The question has not been argued whether, where the Commission learns about an agreement infringing Article 85 (1) through the newspapers and by means of an exercise of its powers under Article 11 of *Regulation No 17,* a party to the agreement may yet claim exemption under Article 85 (3) by subsequently filling in Form A/B. Nor does that question arise on the facts of this case. So I leave it aside.

There remains DCL's fourth argument: that the Commission here waived formal notification and is estopped from insisting on it. On behalf of the Commission it was submitted that such a waiver was beyond its powers. I do not think it necessary to express a view as to whether that is correct, because I do not think that the Commission could be held to have waived notification in this case. Counsel for DCL pointed to the Commission's letter of 19 August 1975 in which the Commission asked that the same reference should be used in future correspondence relating to the conditions of sale and to the price terms, and he pointed to the fact that thereafter, in the administrative proceedings, the Commission dealt with the conditions of sale and with the price terms together. I do not think that that choice of procedure on the part of the Commission amounted to a waiver of formal notification of the price terms. In the statement of objections, the Commission clearly took the point that the price terms had never been properly notified; and from that objection the Commission has never resiled.

I would therefore hold that DCL fails on the notification issue.

That is enough to dispose of the case. However, lest Your Lordships should take a different view on that issue, I turn to the substance of DCL's claim for exemption under Article 85 (3).

The substance of DCL's claim for exemption under Article 85 (3)

Article 85 (3) of the Treaty lays down, in effect, four conditions, two positive and two negative, for an agreement to qualify for exemption from the prohibition in Article 85 (1):

(i) the agreement must (so far as here relevant) contribute to improving the distribution of goods;

(ii) it must allow consumers a fair share of the resulting benefit;

(iii) it must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives;

(iv) it must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The Commission did not in its Decision in the present case deal with conditions (ii) and (iv). It dealt only with conditions (i) and (iii).

As to condition (i) the Commission rejected DCL's contention that the existence of the price terms contributed to improving the distribution of DCL products on what can only be described as an artificial ground. This was that the improvement in distribution relied upon by DCL did not result directly from the agreements with the United Kingdom wholesalers, of which the price terms formed part, but from a separate set of agreements, namely those with the sole distributors in other Member States. The point was developed by the Commission in argument before us. In the submission of the Commission the fact that an agreement, admittedly falling within Article 85 (1), might contribute towards implementing another (and arguably beneficial) agreement in the distribution field was insufficient to enable that first agreement to qualify for exemption under Article 85 (3). Another way in which the Commission put the point was to say that here the price terms and the sole distributors' agreements related to different goods.

In my opinion that ground is untenable. There is nothing in Article 85 (3) to say that the benefit to which it refers must flow directly from the terms of the agreement under consideration and may not flow from the operation of that agreement in its economic and legal context. That context is clearly relevant in considering whether the agreement is within Article 85 at all (see Case 23/67, *Brasserie de Haecht* v *Wilkin* [1967] ECR 407) and to hold it irrelevant for the purposes of Article 85 (3) would render Article 85 as a whole a strangely limping provision. Moreover, if in their agreements with sole distributors the subsidiaries of DCL had undertaken expressly to provide protection by means of dual pricing, the validity of that undertaking would have depended on exactly the same considerations as those applicable to the price terms.

So I come to the nub. As to that the Commission expressed itself as follows in its Decision (para. III. 2.2.2.c.):

"Even if the price terms were to be viewed in relation to the exclusive distribution system established by DCL, they could not be exempted.

The Commission recognizes that, frequently, some advantages may result from the appointment of exclusive distributors in EEC countries, with responsibilities for promoting sales for a producer situated in another EEC country. As to the sole distribution agreements concluded by DCL sub-

sidiaries with distributors in EEC Member States other than the United Kingdom the Commission had indicated its intention to take a favourable decision ...

Admitting that the appointment of sole distributors by DCL brings about an improvement of distribution, it can however not be established that the price terms amount to a restriction which is indispensable to the attainment of that objective."

Thus the question is whether the Commission could reasonably take the view that the price terms were not indispensable to the attainment of the improvement in distribution resulting from DCL's sole distributor system. I have, after, I confess, some initial hesitation, come to the conclusion that it could not.

DCL's analysis of the contrast between market conditions in the United Kingdom and in other Member States was on the whole convincing.

Take Scotch whisky. It accounts for more than 50% of the spirits sold in the United Kingdom. The United Kingdom market was therefore, I think, correctly described as having reached the stage of "maturity", when price competition assumes paramount importance. Evidence of the price sensitivity of that market was provided in the fifth supplement to DCL's written comments. It appears, for instance, that when Bell's and Teacher's increased their prices by 60 pence per case (or 5 pence per bottle) in April 1970, DCL experienced an increase in its market share to 73% over the six months to 1 October, when its own prices were increased, as compared with a share of 51% over the 12 months ended 31 March 1970. Similarly, a price increase of 45 pence per case (less than 4 pence per bottle) by DCL on 1 October 1975, which was not immediately matched by Bell's and Teacher's, brought a reduction in its market share to 32% over the six months to 31 March 1976, as compared with 51% over the 12 months ended 30 September 1975. That evidence went unchallenged. If corroboration were needed, it could be found in the almost total loss of market by Black and White and Vat 69 as a result of the price increases that followed the Decision, and the loss of two-thirds of its market by Dewars.

DCL also supplied evidence of the market power of the large brewery undertakings in the United Kingdom, as purchasers of Scotch whisky. That power, resulting from the brewers' control of retail outlets, is well attested by (among other evidence) the report of the United Kingdom Monopolies Commission annexed to DCL's written comments. Pressure from the brewers, who run their own "house brands" of Scotch whisky, helps to account for the low level of wholesale prices on the United Kingdom market.

In all the other Member States except, I think, Belgium Scotch whisky has to compete with traditional and popular local products. It cannot do so on price.

In five of those Member States it has only a modest share of the spirits

market: 3.5% in Germany, 5.3% in Denmark, 5.5% in France, 8.2% in Italy and 8.9% in the Netherlands. There the market is still at the "expansive" stage, when high spending on promotion is normal.

The position is different in Belgium where Scotch whisky holds 36.6% of the market of spirits. The Scotch whisky market in that country may perhaps be regarded as nearing the stage of maturity.

Of the Irish market, we were told little. It probably occupies a position intermediate between that of the markets in the United Kingdom and in the rest of the Community. But Scotch whisky must of course, in Ireland, more so than in other markets, compete with Irish whiskey.

DCL stressed the added difficulties placed in the way of the marketing of Scotch whisky in Germany by the discriminatory practices of the State monopoly which the Court held to be unlawful in Case 91/78, *Hansen* v *HZA Flensburg* [1979] ECR 935, and in Denmark, France and Italy by the discriminatory taxation which the Court recently held to be unlawful in the *"Spirits"* cases (Case 168/78 *Commission* v *France;* Case 169/78, *Commission* v *Italy;* Case 171/78, *Commission* v *Denmark;* and Case 68/79, *Just* v *Minister for Skatter og Afgifter).* This was not in my opinion DCL's best point. The *Hansen* and *Just* cases illustrate the remedies open to traders who find themselves victims of such discrimination.

More convincing was a point made by DCL in its written comments to show that the same brand cannot compete effectively in both the United Kingdom and the rest of the Community except on the basis of a differential pricing system. This point was that whereas the sales of DCL's leading brands were evenly spread over the United Kingdom and the rest of the Community, their chief competitors in the United Kingdom, Bell's and Teacher's, had only small sales in other Member States, whilst their chief competitors in the continental Member States, Ballantines and J&B, had only small sales in the United Kingdom.

DCL summarized its case by saying that there were essentially three questions, each of which it had shown must be answered in the affirmative. The questions were:

"— Is it true that an average of approximately £5 must be spent by sole distributors on each case of Scotch whisky which they sell in order to enable it to compete successfully with other spirits on continental EEC markets?

— Is it true that it is impossible for Scotch whisky to compete successfully in the United Kingdom at a price reflecting the promotional expenditure borne by the continental sole distributors?

— Is it true that, as a result, it is impossible for a brand of Scotch whisky to compete both in the United Kingdom and in the

continental EEC without a dual pricing system?"

The case put forward on behalf of the Commission seemed to me, on the other hand, weak.

In the Decision itself the Commission gave two reasons for its view. The first was that "DCL spirits are not new products to need introduction for which extraordinary promotional efforts are required. The marketing conditions in [EEC countries other than the United Kingdom] are not such as to call for a protection of these markets from competition on the part of traders purchasing DCL spirits in the United Kingdom".

Apart from the reference to DCL spirits not being "new products" that is a statement of a conclusion rather than a statement of a reason. There is nothing in Article 85 (3), nor is there anything in any decision of this Court, to suggest that a restriction cannot be indispensable for improving the distribution of goods except in the case of new products. Nor is there any reason in principle why that should be so. The only relevant question under Article 85 (3) is whether, on the facts, be the goods traditional or new, the restriction in question is indispensable for improving their distribution.

We were referred on behalf of the Commission to a number of authorities in this Court. In some of them no question of interpretation or of application of Article 85 (3) arose and I need not take up Your Lordships' time with a discussion of them. Of the authorities on Article 85 (3) the ones on which the Commission mainly relied were Cases 56 and 58/64, *Consten and Grundig* v *Commission* [1966] ECR 299.

On its facts that authority is distinguishable for two reasons. Firstly the restriction for which exemption was there sought was an absolute ban on parallel exports. Here, although it was contended on behalf of the Commission and of Bulloch that, in practice if not in appearance, the dual price system made parallel imports impossible, that contention was disproved by the fact that in 1977 DCL's subsidiaries sold 340 000 cases of Scotch whisky at the gross EEC export price, a quantity representing, so we were told on behalf of DCL, about 1/10th of the total exports of DCL brands of Scotch whisky to other Member States in that year. Secondly, the grounds on which the exemption was sought in the *Consten and Grundig* case bore no resemblance to those relied upon by DCL in this case.

As to the principles laid down in the *Consten and Grundig* case, two points are, I think, important. The first is that the Court there emphasized the need for the Commission, where exemption under Article 85 (3) is claimed, to make a thorough appraisal of the facts. It is of a failure by the Commission to make such an appraisal in this case that DCL, it seems to me with some justification, largely complains. Secondly, the Commission relies on the *Consten and Grundig* case for the proposition that,

where the Commission is required to make a complex assessment of economic factors, the Court's jurisdiction to interfere with the Commission's judgment is limited. No doubt it is, but the Commission went on to argue as if the Court's jurisdiction in such circumstances was virtually non-existent. The judgment in the *Consten and Grundig* case is clearly not authority for that. Nor are the judgments in the later cases cited by the Commission. So far as relevant, the judgment in Case 17/74, *Transocean Marine Paint* v *Commission* [1974] 2 ECR 1063, merely stated in general terms that the Commission had a wide discretion in placing conditions on the grant of exemption under Article 85 (3); Case 71/74, *Frubo* v *Commission* [1975] 1 ECR 563, was one where it was clear on the facts that it was open to the Commission to decide as it did; and Case 26/76, *Metro* v *Commission* [1977] 2 ECR 1875, illustrates how very far the Court will go in reviewing the exercise by the Commission of its powers.

The second reason given by the Commission in the Decision for its view on this part of the case was that DCL "is in a position to ensure, by other means than through the impediment of parallel exports, the efficient performance of their functions by its sole distributors". The Commission then gave two examples of ways in which it considered that DCL could do that:

(a) "DCL could", the Commission said, "as it does in the United Kingdom market, itself assume the responsibility of promoting sales in the other EEC markets"; or

(b) DCL could "allow for the costs resulting from promotion by sole distributors in the prices charged to them".

The Commission went on to say: "It has not been established that the market conditions described by DCL do not permit the application of other pricing arrangements which would not result in a restriction of competition." From the Decision itself it is not clear whether this is a conclusion reached from what has gone before or a third way in which the Commission suggests that DCL might overcome the difficulty. In the light of the arguments presented in this Court on behalf of the Commission it appears that the latter is the correct answer.

As a solution, the assumption by DCL itself of the responsibility of promoting sales in the other EEC markets plainly will not do.

In the first place the suggestion ignores the evidence (contained in Appendix 5 to DCL's written comments) as to the unsuccessful attempts at direct marketing of Scotch whisky on the continent that were made by DCL itself and by Wm Teacher & Sons Limited (the market in the case of Teacher's being Switzerland). The Commission sought to counter that evidence by referring (in its Defence) to Martini & Rossi's method of penetrating the United Kingdom market and to Arthur Guinness Son and Company Limited's method of penetrating markets in "Community countries other than France and Belgium". DCL convincingly demonstrated (see pages 39 to 42 of the

reply) that the reference to Martini & Rossi was, for a number of reasons, inapposite. As to Guinness, DCL mainly said that it knew little about it and, in particular, did not know how successful Guinness had been in the markets in question. The Commission (in its rejoinder) capitulated on the point, confessing that it had not meant to suggest that the operations of Martini & Rossi were "identical to those of DCL", and seeming to confess that all it knew about Arthur Guinness Son and Company Limited was that, from that company's Annual Report for 1977, it appeared to have "recently established subsidiary companies in Germany and Italy".

The main objection, however, to that suggestion is that it amounts to a suggestion that DCL should vertically integrate its distribution system, because "promotion" in the present context does not mean merely advertising. DCL would have to take over its distributors' stockholding and sales organizations, or create its own. To replace some 200 distributors with a single monolithic network run by the producer must be inimical to competition. It would in particular mean the end of competition between DCL brands.

The Commission's second suggestion, that DCL should allow for the costs resulting from promotion by sole distributors in the prices charged to them, was met by DCL with the objection that it would then have to sell to them at a loss. The Commission retorted that that was not necessary because DCL could raise all its prices, including its United Kingdom prices. That, on the evidence, DCL could not do to a sufficient extent without pricing itself out of the United Kingdom market. The Commission's lack of comprehension of the evidence is shown by the fact that, in the Defence, it mentioned the circumstance that DCL had raised some of its United Kingdom prices as a reaction to the Decision, as demonstrating that there was nothing to prevent DCL from raising those prices. The Commission there went on to say:

"It is up to DCL to decide whether they consider that the possible ultimate commercial rewards justify trying to penetrate the continental EEC. If DCL consider that the potential rewards do not justify the risks, then presumably DCL will decide not to sell in the continental EEC. If, on the other hand, the prospective rewards are adequate, then DCL will presumably be willing to make whatever initial expenditure and effort may be necessary to obtain these rewards. What a substantial company like DCL with a long-established product like Scotch whisky is not entitled to do under Community competition policy is to seek, by hindering parallel imports and partitioning the market in the EEC, to cushion itself and thereby to be able to charge high prices while penetrating the market."

In that passage the Commission appears to be saying that it does not care whether or not DCL products are

distributed in continental Member States; that observance of its own policy as to parallel imports is more important. That that was the Commission's approach, an approach which is, in my opinion, incompatible with a proper exercise by the Commission of its discretion under Article 85 (3), seems to be confirmed by the following sentence in the rejoinder:

"If in their commercial judgment, DCL decide that they cannot operate in a sufficiently profitable manner to justify the financial and other outlays involved, then presumably they will withdraw and leave the market to other enterprises."

I turn to the Commission's third point, that DCL had not established that the market conditions it described did not permit the application of other pricing arrangements which would not result in a restriction of competition. Before this Court the Commission relied, in support of that contention, on the figures of distributors' costs given in the fourth and sixth supplements to DCL's written comments. Those figures do not in my opinion demonstrate, as the Commission suggets they do, that DCL's fundamental argument is fallacious. But they do show that the amount of the difference between the prices charged by DCL subsidiaries to their sole distributors and to parallel exporters was not in all cases appropriate. This is particularly so in the case of gin, where the difference averaged £5.25 per case whilst the sole distributors' additional costs averaged only £4.21 per case. In the case of whisky the figures were £5.16 and £5.07 respectively, so that one might perhaps regard the gap as *de minimis* and indeed accept DCL's claim that its knowledge of the market, even before it had investigated its sole distributors' costs in detail, had enabled it to estimate the amount of those costs fairly accurately.

The Commission however pointed out that the figure of £5.07 was only an average and that some distributors' costs were lower, in some cases much lower.

That of course is true. It is equally true that some distributors' costs were higher, in some cases much higher. The real question is whether to take an overall average was to resort to too blunt an instrument. DCL was, I think, right in saying that it could not vary the figure from country to country. Apart from the practical difficulty for DCL of knowing for which country an order at the gross EEC export price was destined, it would have meant partitioning the common market even more. At least under DCL's system the only partition was between the United Kingdom and the rest of the Community. I am not satisfied, on the other hand, that DCL should not have differentiated between brands. The figures seem to show that the average costs of promoting some brands are appreciably higher than those of promoting others.

The fact that those criticisms can be made of DCL's price differentials does not however mean that the Commission's Decision could be upheld, for that Decision was not based on any criticism of the figures but on a condemnation of dual pricing as such. Indeed, when DCL requested a meeting with the Commission to discuss the results of the investigation of sole distributors' costs, the Commission expressed its view in a telex dated 24 October 1977, in which, whilst agreeing to a meeting on or after 15 November 1977, it said that there was "no such link between the detail of your distribution costs and the proceedings under way that would in the least justify a slowing down of the said proceedings" and it added: "It should therefore be clearly understood that our next meeting shall concern only your future pricing policy". It is significant that the Decision, whilst setting out detailed facts and figures on many other points, says nothing about sole distributors' actual costs.

So I come at last to the procedural questions.

The procedural questions

As to them I must first deal with DCL's submission that, if any essential procedural requirement was infringed by the Commission the whole of its Decision must be declared void, without it being necessary for DCL to show that the infringement affected the outcome of the proceedings. The only authority cited on behalf of DCL in support of that proposition was a textbook of French administrative law (Laferrière's *Traité de la juridiction administrative*, 2nd ed., Vol. II, pp. 522-523). As I ventured to point out, however, in Case 90/74, *Deboeck* v *Commission* [1975] 2 ECR 1123, at pp. 1140-1142, Community law is in this respect different from French law. In Community law a person challenging the validity of an administrative decision cannot rely on an irregularity in the procedure leading to that decision unless he can show at least a possibility that, but for the irregularity, the decision would have been different. The rule has been applied both in competition cases and in staff cases (see as to competition cases the *"Quinine"* cases, Case 41/69, *ACF Chemiefarma* v *Commission* [1970] 2 ECR 661, paragraphs 47-53 of the judgment; Case 44/69, *Buchler* v *Commission*, ibid. p. 733, paragraphs 15, 35 and 36; and Case 45/69, *Boehringer Mannheim* v *Commission*, ibid. p. 769, paragraphs 15, 39 and 40; as to staff cases I collected the earlier authorities in *Deboeck* v *Commission*, since when the rule has been reaffirmed in that case itself, paragraphs 11-15 of the judgment; in Case 9/76, *Morello* v *Commission* [1976] 2 ECR 1415, paragraph 11; and in Case 25/77, *De Roubaix* v *Commission* [1978] ECR 1081, paragraph 22). Thus, in my opinion any infringement by the Commission, or by the Advisory Committee, in this case, of an essential procedural requirement could only vitiate so much of the Commission's Decision as relates to the application of Article 85 (3) to the price terms, because DCL did not, in the administrative proceedings, contest the

Commission's view on any other relevant point, so that on no such point could the Decision have been different. It would indeed be very odd if, for instance, the Court were now to hold that the Decision was void in so far as it declared that the price terms were caught by Article 85 (1), when, in the administrative proceedings, DCL (quite rightly in my opinion) accepted that they were.

I must also deal with a question that arises as to the interpretation of Article 42 (2) of the Court's own Rules of Procedure. It arises because two of DCL's contentions were advanced neither in the application nor in the reply, but for the first time in a document headed "Addendum to reply" which DCL lodged after the rejoinder. Those were DCL's contentions relating to Lady Hall's "Economic appraisal" and to the Bulloch complaint. The reason why DCL had not advanced the first of them earlier was that it was only from the rejoinder that DCL learned that Lady Hall's report had not been among "the most important documents" listed by the Commission for the Advisory Committee. The reason why DCL had not advanced the second contention earlier is that it only became aware of the full contents of the Bulloch complaint when it was served with Bulloch's application to intervene, to which the complete text of the complaint was annexed. That application was lodged after the reply. Only then, says DCL, did it find out that the copy of the complaint that had been supplied to it by the Commission had been censored to an impermissible extent. DCL relies on the first paragraph of Article 42 (2) which, by implication, enables a "fresh issue" to be raised in the course of proceedings if "it is based on matters of law or of fact which come to light in the course of the written procedure". Those words seem to me to fit this case, but the Commission objected to the admissibility of the addendum. Under the second and third paragraphs of Article 42 (2), my Lord the President gave the other parties an opportunity to answer on the issues raised by the addendum, and the decision as to their admissibility is reserved for Your Lordships' final judgment.

Two recent cases in which Article 42 (2) was unsuccessfully invoked were rightly distinguished by Counsel for DCL: Case 232/78, *Commission* v *France* (25 September 1979, not yet reported), and Case 125/78, *GEMA* v *Commission* (18 October 1979, not yet reported). In both those cases it was sought to use Article 42 (2) as a means of widening the scope of the action.

I respectfully agree with the opinion expressed by Mr Advocate General Capotorti in Case 112/78, *Kobor* v *Commission* [1979] ECR 1573 at page 1581, an opinion that was implicitly accepted by the Court in that case. He said that "too rigid an interpretation of Article 42 (2) does not seem justified; the important point is to establish whether the party against whom the new complaint has

been raised has been handicapped in resisting it as a result of the other party's conduct of the procedure". Here the Commission and Bulloch were both able to comment in writing and at the hearing on the addendum. Moreover the arguments put forward by the Commission against the admissibility of the addendum (in a long letter to the Registrar dated 23 November 1978) all seem to me misconceived, even on a strict construction of Article 42 (2). I would therefore hold the addendum to be admissible.

I turn to the first of the procedural irregularities alleged by DCL, namely that a number of important documents were not adequately considered, or were not considered at all, by the Advisory Committee.

In the *"Quinine"* cases Mr Advocate General Gand said, with the Advisory Committee specifically in mind, that "if a procedural requirement to consult a body is laid down by a provision prior to taking a decision, the omission or the improper completion of that formality may in certain cases constitute an infringement of an essential procedural requirement invalidating the decision" (see [1970] 2 ECR at p. 710). I would add that I, for my part, view the Advisory Committee procedure with some unease, because of the secrecy that surrounds it. The undertakings concerned are left in the dark as to what the Committee is told or not told by the Commission and as to the content of the Committee's report. They have no opportunity of addressing the Committee. The question whether such a procedure is compatible with the fundamental principles of Community law, of which this Court is under a duty to ensure the observance, has not been raised or argued in this case. Assuming however that the provisions of Article 10 of *Regulation No 17* prescribing that procedure are valid, the risks of injustice that it entails make it, in my opinion, imperative that the procedure should be carried out with scrupulous care.

I would not however hold it against the Commission that it failed to include Lady Hall's report among "the most important documents". It does not seem to me that that report added substantially to DCL's written comments and I think that the decision to exclude it fell well within the scope of the Commission's discretion under paragraph 5 of Article 10.

As to the fourth and fifth supplements to DCL's written comments I feel more doubt. They were manifestly regarded by DCL as important, and I think they were. The fourth supplement, Your Lordships remember, contained the results of DCL's investigation of the costs of its sole distributors of Scotch whisky, whilst the fifth contained DCL's considered answers to two points made by Commission officials at the oral hearing, firstly the point that a solution to DCL's problem might lie in its increasing its prices to United Kingdom wholesalers and reducing its prices to continental sole distributors, and secondly the point that DCL ought perhaps to charge different prices to sole distributors in different countries in the light of their different costs. The

Commission admits of course that the Advisory Committee did not have the 14 days' notice of the existence of those documents required by Article 10 (5). Nor does the Commission say that it did not regard the documents as important. Its defence is that the Committee was told of their contents at its meeting and decided not to adjourn to study them further. "This", says the Commission, "was a decision which lay entirely within the Committee's discretion and it was not a matter with which the Commission had any right or duty to interfere: by informing the Committee of the existence of the documents, the Commission had fully discharged its obligations. The subsequent action of the Advisory Committee provides no ground for annulling the Commission's Decision." (Defence, para. 174). But, to my mind, disregard of procedural requirements by the Committee is just as capable of vitiating the Commission's Decision as disregard of them by the Commission itself.

DCL suggested that the Court, if it should entertain any doubt on the point, should order the Commission to make available to it "the minutes of the meeting of the Advisory Committee". In the event the Court asked to be supplied with a copy of the report made under Article 10 (6) of *Regulation No 17*. The Commission complied with the request but asked to be heard further on the question of the confidentiality of that report if the Court envisaged disclosing it to DCL. The Commission no doubt had in mind the procedure adopted in Case 110/75, *Mills* v *EIB* [1976] 2 ECR 1613 (see in particular at pp. 1634-1635). If I had thought the present point capable of being decisive of this case, I would have urged Your Lordships to hear the parties on that question. But, since I did not and do not, I leave the point there.

As to the sixth supplement, containing the results of DCL's investigation of the costs of its sole distributors of gin, the Commission's defence was, in effect if not in so many words, that it was not one of "the most important documents". That was not disputed by DCL.

So I turn to the question of the minutes of the oral hearing.

DCL's complaint here was that the minutes were not only missing from the list of the most important documents sent by the Commission to the Advisory Committee but did not exist even in draft on 21 October 1977 when the meeting of the Committee took place. Your Lordships will have it in mind that Article 9 (4) of *Commission Regulation No 99/63/EEC* required such minutes to be drawn up and to be approved by the persons participating in the hearing. One may wonder why, nearly four months after the hearing, no step had been taken to comply with that requirement.

It was contended on behalf of DCL that the Advisory Committee cannot

deliberate validly unless the minutes of the oral hearing are available to it. The Commission pointed out that there is no express requirement in any of the relevant Regulations that the minutes should be available to the Committee.

In the *Buchler* case the point was taken that both the Advisory Committee and the Commission had acted on the basis of a draft of the minutes which did not take into account amendments suggested by the applicant. The Court held that the validity of the decision there in question would only have been affected if that version of the minutes had been misleading in some material respect. That was not so, since the suggested amendments all related to inessential matters. The draft was, therefore, "able to provide the Advisory Committee and the Commission with complete information on the essential content of the statements made at the hearing" (see paragraphs 16 and 17 of the judgment). A similar objection in Case 48/69, *ICI* v *Commission* [1972] ECR 619, met with a similar answer (see paragraphs 27 to 33 of the judgment). Those cases are authority for the proposition that there may be an infringement of an essential procedural requirement if the Advisory Committee is presented with draft minutes that are so incomplete or inaccurate as to be liable to mislead it. They do not touch a situation where there are no draft minutes at all.

It seems to me implicit, however, in *Regulation No 99/63* read as a whole, and in the light of Article 10 of *Regulation No 17*, that the minutes must be available for the Advisory Committee. I have in mind in particular Article 1 of *Regulation No 99/63* which requires the Commission to hold the hearing before consulting the Advisory Committee. It can hardly have been envisaged that members of the Committee could then be compelled to ascertain what had been said at the hearing by means other than the minutes prescribed by Article 9 (4) of the same Regulation. Nor do I see how the Commission could properly draw up the documents required by Article 10 (5) of *Regulation No 17*, namely the summary of the case, the list of the most important documents and its preliminary draft decision without having a draft of those minutes, at least, to hand.

I would therefore hold that the absence of the minutes was prima facie a breach of an essential procedural requirement. I say *prima facie* because the Commission submitted that, even if that were so, DCL suffered no prejudice in that "at the hearing DCL's witnesses and advisers merely repeated matters which were essentially contained in earlier documents". I do not think that what they said amounted to mere repetition. On the other hand I am inclined to think that it was not so novel or different from what had been said in DCL's written comments and in the second and third supplements thereto that it could have altered the outcome of the case. The new material recorded in the minutes consisted mainly of a powerful submission on behalf of Bulloch. Here

again, however, it is not in my opinion possible to form a concluded view without taking into account the contents of the Advisory Committee's report, which has been withheld from DCL. So again, if I had thought the point likely to be decisive of the case, I would have urged Your Lordships to hear argument on the question whether that report was privileged from disclosure in these proceedings.

I turn to the second main procedural irregularity alleged by DCL, that concerning the Commission's censorship of the Bulloch complaint.

Here the question is as to the extent of the Commission's power to make excision from a complaint received from a "natural or legal person" under Article 3 of *Regulation No 17* when forwarding the complaint to an undertaking against which it is made. (That Article in fact uses the term "application" but I will continue to refer to a "complaint", since that is the term that has been used throughout these proceedings.) I have no doubt, and DCL does not dispute, that the Commission has power, indeed is under a duty, to excise from such a complaint passages revealing the complainant's business secrets. There are, in my opinion, probably also cases where the Commission must avoid disclosing the complainant's identity — which may even necessitate suppressing the complaint altogether — in order to safeguard the complainant from possible reprisals; but no question as to that arises in this case. The question is whether the Commission's powers go beyond that, and in particular whether, and if so to what extent, they enable the Commission to excise what it considers to be irrelevant.

The general principle is not in doubt. Anyone who may be adversely affected by an administrative decision specifically concerning him is entitled to be heard before the decision is taken and, for that purpose, to be told what the case against him is. Here again in Community law the principle applies both in competition cases and in staff cases (as to competition cases see the *"Quinine"* cases (already cited), the *Transocean* case (already cited) and Case 85/76, *Hoffmann-La Roche* v *Commission* [1979] ECR 461; as to staff cases see Case 34/77, *Oslislok* v *Commission* [1978] ECR 1099, and the earlier authorities that I collected in my opinion in that case, at pp. 1124-1125.

We were told on behalf of the Commission that the complaints it receives often contain "wholly extraneous and irrelevant matter including material referring to other companies not dealt with in the statement of objections". No doubt the Commission may properly excise such matter. But what it excised from the Bulloch complaint does not fall within that description. Leaving aside passages that DCL conceded had properly been omitted (because they revealed Bulloch's business secrets) it included chapters about the production and sale of Scotch whisky generally, about the position of DCL in the industry, about the retail and wholesale markets for whisky, about DCL's distri-

bution policy, and about the "dominant position" enjoyed, so Bulloch alleged, by DCL. The Commission said that those chapters were irrelevant because the only case DCL had to meet was the case made by the Commission in the statement of objections, which rested only on facts supplied by DCL itself, and because that case was not based in any way on Article 86 of the Treaty. That, in my opinion, is to interpret "relevance" in an excessively narrow sense. Nor did the Commission explain why, if it thought those omitted passages irrelevant, it did not excise them also from the version of the Bulloch complaint that it made available to the Advisory Committee as one of the "most important documents" in the case.

DCL pointed to ways in which it was handicapped, in the presentation of its case to the Commission, and through the Commission to the Advisory Committee, by the circumstance that those passages had been concealed from it. I need not take up Your Lordships' time in discussing them all. I refer only to two.

One was that DCL had been denied any opportunity to refute facts erroneously stated by Bulloch that conveyed the impression that DCL was a multinational, owning or controlling "subsidiary or affiliated companies in nearly 100 countries", and enjoying a dominant position in the Scotch whisky market. True the Commission did not accept that DCL enjoyed any dominant position. But one cannot be sure what impression those unrefuted facts left, be it consciously or unconsciously, on the minds of Commission officials concerned with the case, thereby colouring their approach to it. As to that DCL pointed to a straw in the wind. The minutes of the oral hearing record (at p. 63) that Dr Sauter, the chief representative of the *Bundekartellamt*, made four observations, of which one was that "DCL is making rather a big demand in requesting an exemption for its system of quantitative distribution when it enjoys a monopoly position". That impression cannot, so far as I can see, have been gained by Dr Sauter from any source other than the unexpurgated version of the Bulloch complaint. Nor could he have gained it if DCL had been afforded an opportunity of refuting Bulloch's allegations in good time.

Secondly DCL made the point that if it had been sent the full text of the Bulloch complaint (omitting only Bulloch's business secrets) it could have pointed to statements by Bulloch that supported DCL's own case. Prominent among these was Bulloch's explanation of its reasons for wanting to export DCL brands of Scotch whisky, Bulloch stated that it had for many years produced its own blends of Scotch whisky, "Glen Catrine" and "Scots Earl", which were 'standard whiskies of good quality" but not "well-recognized brands". Bulloch said that it had sold some Glen Catrine and Scots Earl in continental Europe, but that buyers there were relucant to deal with a distributor who could not offer "the major brands". It concluded: "In

the case of Bulloch, since the only alternative way of exporting its own brands of whisky would be for it to embark on an advertising campaign that is beyond its resources, Bulloch's export activities cannot continue unless Bulloch can obtain a supply of DCL's brands of whisky". That, said DCL, showed that, according to Bulloch itself, a brand of whisky could not successfully be distributed in continental Member States unless money was spent on its promotion. The Commission pooh-poohed the point, on the ground that what Bulloch had said added nothing to "the argument" that DCL had "advanced constantly throughout these proceedings". In so doing the Commission was, in my opinion, wrong. An argument gains strength from being supported by evidence supplied by an opponent.

I find it is impossible to say that, if the Commission had sent to DCL the full text of the Bulloch complaint, omitting only the passages in which Bulloch revealed its business secrets, the Decision of the Commission would inevitably have been the same. The Commission seems to me moreover to have overlooked that "justice must not only be done but must manifestly be seen to be done". Justice is not seen to be done if there is concealed from an undertaking, for no imperative reason, part of the text of a complaint made against it.

Counsel for DCL expressed at the hearing apprehension lest the Court, whilst reaching the conclusion that the Commission behaved unlawfully in censoring as it did the text of the Bulloch complaint, should hold, on the strength of its judgment in the *Hoffmann-La Roche* case (already cited), that the irregularity had been cured by the proceedings before the Court itself, in which the full text of the complaint had been revealed to DCL (consider paragraphs 15 to 19 of that judgment). Counsel submitted that the material part of the judgment in the *Hoffmann-La Roche* case was irreconcilable with what the Court had said the previous week in Cases 15 and 16/76, *France* v *Commission* [1979] ECR 321, and that, of the two authorities, the latter was to be preferred. I agree.

In *France* v *Commission* the Court held that:

"... in the context of an application for annulment under Article 173 of the Treaty, the legality of the contested measure must be assessed upon the basis of the elements of fact and of law existing at the time when the measure was adopted.

Rectification subsequent to that date cannot therefore be taken into account for the purposes of such an assessment."

(Paragraphs 7 and 8 of the judgment.)

That must in my opinion be right, if only because the Court's jurisdiction under Article 173 is to "review the legality of acts of the Council and the Commission", which must mean their legality at the time they were adopted. The ruling in the *Hoffmann-La Roche* case has been criticized by learned writers, and I think with good reason. To hold that, in a case like the present, the

Commission's infringement of an undertaking's right to be heard does not vitiate the Commission's decision if that undertaking is subsequently given a fair hearing in this Court, would, it seems to me, amount to saying that the Commission may neglect essential procedural requirements with impunity because either the undertaking concerned will not appeal to this Court or, if it does, the irregularity can be put right in the course of the appeal.

I would therefore hold that DCL's point relating to the censoring of the Bulloch complaint was well taken.

DCL's third procedural point was that, with regard to Pimm's, the Commission's Decision was based on "insufficient and/or contradictory reasons". The point here, which was not much developed, was that one of the main reasons given for the Decision was that "DCL spirits are not new products", whereas the evidence had shown that Pimm's at least was, in the continental EEC, a new product. To my mind that is a point going to the substance of the Decision rather than to procedure. If I am right in what I have said about the substance of the case, it is superfluous.

Conclusion

In the result, although I think that the Commission infringed at least one essential procedural requirement, and although I think that its Decision could not be upheld in its substance, I am of the opinion that, because DCL failed to notify the price terms as it should have done, this action should be dismissed and that DCL should be ordered to pay the costs, including Bulloch's costs.