

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 28 July 1978

relating to proceedings under Article 85 of the EEC Treaty (IV/29.440 : Arthur Bell and Sons Ltd — conditions of sale)

(Only the English text is authentic)

(78/696/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962⁽¹⁾, and in particular Article 3 thereof,

Having regard to the Commission's decision of 21 September 1977 to open, on its own initiative, proceedings in respect of Bell's conditions of sale, pursuant to Article 3 (1) of Council Regulation No 17,

Having heard the undertakings and persons concerned in accordance with Article 19 of Regulation No 17 and with Regulation No 99/63/EEC of 25 July 1963⁽²⁾,

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions delivered on 17 January 1978 pursuant to Article 10 of Regulation No 17,

Whereas :

I. THE FACTS

The present proceedings concern conditions of sale which Arthur Bell and Sons Ltd applied to sales of its Scotch whisky to trade customers established in the United Kingdom from at least 1 January 1973 to 14 October 1977.

Hereinafter Arthur Bell and Sons Ltd is referred to as 'Bell', Bell's trade customers established in the United Kingdom as 'trade customers' and the conditions of sale which are the subject of these proceedings as 'old conditions of sale'.

1. Arthur Bell and Sons Limited

- (a) Bell is a United Kingdom company registered in Edinburgh on 19 December 1921 and established since 1825. Bell has several subsidiary companies in the United Kingdom. In 1974 Bell acquired Canning Town Glass Works, a United Kingdom undertaking engaged in the production of glass bottles.
- (b) Bell is mainly engaged in the business of distilling malt whisky, blending whisky and distributing blended and malt Scotch whisky. Its best selling brand by far is 'Bell's Extra Special Scotch Whisky', a standard blended Scotch whisky, at least three years old.
- (c) The total turnover represented by sales of Scotch whisky by Bell was around £117 million for the year 1976, including approximately £75 million tax and duty. Bell's turnover in the United Kingdom in 1976, excluding tax and duty, was around £20 000 000 and in the rest of the EEC £ ...⁽³⁾.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

⁽³⁾ In the published version of this Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

- (d) Bell estimates its market share of total malt whisky production in the United Kingdom to have been ...% in 1976.
- (e) Bell's market share in sales of Scotch whisky in the United Kingdom is estimated to have been ...% over the past three years, while it was ...% 10 years ago. Bell's position on the market of whiskies from all sources in the United Kingdom would be of similar importance since, compared with Scotch whisky, the quantities of other whiskies sold there are insignificant. Bell is the second biggest seller of Scotch whisky in the United Kingdom and Bell's Extra Special Scotch Whisky is the best selling Scotch whisky brand in the United Kingdom.
- (f) As to sales of Scotch whisky in EEC countries other than the United Kingdom, Bell had a market share of around ...% in 1974, ...% in 1975 and ...% in 1976.
- (g) Bell sells in the United Kingdom direct to around 2 400 customers who are either independent wholesalers (and supermarkets) or brewers. Some of them are of considerable economic importance. These customers are undertakings which buy for resale. They are in this text referred to as 'trade customers'. In the other EEC countries, Bell distributes its brands of Scotch whisky through distributors, supplied with under-bond whisky; distributors of Bell's Extra Special Scotch Whisky, who are one per country, had been supplied since 1975 at prices somewhat lower than those charged to trade customers.

2. The old conditions of sale

- (a) On 5 March 1976, Bell submitted to the Commission in reply to a request for information made on 4 February 1976 in accordance with Article 11 of Regulation No 17, the text of the old conditions of sale which Bell was applying to its sales of Scotch whisky to trade customers for a number of years.
- (b) These conditions of sale were endorsed on the standard form sales invoices used by Bell for all sales in the United Kingdom.
- (c) These conditions of sale contained a provision stating that :

"The acceptance of the invoice by the purchaser binds him that whisky supplied in bond shall not be offered directly or indirectly by sub-sale or otherwise for exportation outside Great Britain".

- (d) Bell submitted that this provision did not appreciably restrict competition within the common market, in particular since Bell's under bond sales, amounting to ...% of its total sales in volume, represent on average less than ..% of the total volume of Scotch whisky sold in the United Kingdom.
- (e) On 14 October 1977, Bell put into use new conditions of sale which limit the prohibition to export only to countries outside the European Economic Community.

3. Excise duty system in the United Kingdom

- (a) United Kingdom excise duty is payable at the time at which the spirits are removed from bond. Spirits may circulate under bond.
- (b) The system of excise duty does not provide for the payment of duty on spirits for export or for a reimbursement of duty if paid. Exports are therefore made under bond.
- (c) Excise duties in the United Kingdom on a case of 12 bottles of Bell's Extra Special Scotch Whisky at 1 March 1977 amounted to £37.92. This amount represents around four times Bell's selling price to trade customers.

II. APPLICABILITY OF ARTICLE 85 OF THE EEC TREATY

1. Applicability of Article 85 (1)

Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market any agreement between undertakings which is likely to affect trade between the Member States and which has as its object or effect the prevention, restriction or distortion of competition within the common market.

- (a) Bell and each of the trade customers who purchase Bell's Scotch whisky for resale are undertakings within the meaning of Article 85 (1).
- (b) The old conditions of sale, endorsed on the standard form sales invoice used by Bell, were evidence of the essential terms of the standard contracts of sale between Bell and its trade customers. These contracts, of which the old conditions of sale formed an essential part, are agreements between undertakings within the meaning of Article 85 (1).

- (c) The old conditions of sale contained a provision which had as its object and effect the restriction of competition within the common market from at least 1 January 1973 to 14 October 1977.

The provision prevented trade customers from reselling directly or indirectly, by sub-sale or otherwise, outside the United Kingdom, Bell's Scotch whisky bought under bond. Excise duties in the United Kingdom are very high (about four times Bell's prices to trade customers) and are not reimbursable once paid. Accordingly, only Scotch whisky bought under bond, and on which United Kingdom duties have not yet been paid, is capable of being exported and resold in another EEC country at a competitive price.

This provision therefore was aimed at preventing altogether the trade customers and their subsequent purchasers from exporting Bell's Scotch whisky and competing in the common market countries other than the United Kingdom.

Since this provision had clearly as its object to restrict competition within the common market, it is not necessary for the Commission to establish that it had also this effect, for the purpose of finding an infringement of Article 85 (1).

Bell had submitted, without however detailed supporting evidence, that there was little likelihood of exports by trade customers and therefore little effect on competition within the common market. Since prices to trade customers were higher than prices to EEC distributors from 1975 to 1977, there would have been practically no possibility for a dealer buying at the United Kingdom home price to resell profitably in another Member State and to compete with EEC distributors even making allowances for their 'mark-up' (distribution costs, profit margin, etc.).

It may indeed have been difficult at certain periods for parallel importers of Bell's Scotch whisky bought in the United Kingdom to undercut Bell's distributors in other EEC countries. Since distributors are said to have higher distribution costs than parallel importers, these difficulties would have depended in particular on the extent to which such higher costs of the distributors were below the time-to-time differences between the two Bell price levels.

The prohibition under consideration, however, prevented all trade customers and their purchasers from exercising any actual or potential competition with dealers in Bell's Scotch whisky in other

EEC countries. In particular, they were prevented even from potentially exercising pressure on distributors so that the latter would have been induced to minimize their distribution costs and confine themselves to reasonable margins. Further, the provision had also the actual effect of preventing trade customers from competing in the other EEC countries with dealers in other brands of Scotch whisky. Finally, the prohibition to export affected the structure of competition on the Scotch whisky or non-Scotch whisky market in other common market countries by excluding, in relation to Bell's Scotch whisky, the source of important supplies, namely, dealers in the country of the producer.

- (d) The provision of the old conditions of sale under consideration appreciably restricted competition within the common market.

The creation of obstacles to trade between Member States on the basis of export prohibition of the type under consideration hinders the establishment of a single market among Member States and prevents actual and potential competition on the part of dealers affected by such prohibition. Although the quantities of Bell's whisky which were being sold by Bell itself or through distributors in EEC countries other than the United Kingdom are currently relatively small, the provision in question impeded potential exports of large quantities of the product in question on the part of numerous trade customers and subsequent purchasers.

In this respect the share of the market in Scotch whisky or whisky from all sources held by Bell in the United Kingdom is of direct relevance. Bell holds around ...% of these markets and therefore the export prohibition under consideration restricted to an appreciable extent otherwise available supplies of whisky for dealers and consumers in other EEC countries.

That the prohibition applied only to sales of under bond Bell's Scotch whisky, which has represented only ...% of total sales of Scotch whisky in the United Kingdom, is not a relevant consideration. The prohibition to export affected potentially all Bell's sales in the United Kingdom which, if intended for export, would have to be made under bond.

Concerning the position of the parties who were affected by Bell's restrictive conditions, the export prohibition prevented all 2 400 trade customers from exporting and competing with the numerous

dealers in whisky in other EEC countries. Many of these trade customers are of considerable importance and were willing and able to engage in export activities and also numerous dealers in other EEC countries were potential buyers of Scotch whisky resold by United Kingdom trade customers.

Also relevant is the importance of the commercial position held by Bell, whose turnover has been substantial.

The non-exportation provision contained in the old conditions of sale cannot therefore be considered as having had such insignificant effect on competition within the common market as to leave it outside the prohibition of Article 85 (1).

- (e) The direct export prohibition contained in the old conditions of sale was likely to affect trade between Member States.

The restriction by its nature was likely to affect trade between Member States, since it prevented trade by trade customers from the United Kingdom to other EEC Member States. It caused an artificial partitioning of the common market and hindered the establishment of a single market among Member States. In this case, it had a direct, actual and potential influence on the pattern of trade between Member States since it prevented exports by trade customers and their subsequent purchasers of a product which is already distributed and established in EEC countries other than the United Kingdom. Furthermore, in the light of the considerations set out under (d) above, the provision in question was capable of affecting trade within Member States to an appreciable extent.

The provision referred to above and contained in the conditions of sale applied by Bell until 14 October 1977 therefore amounted to an infringement of Article 85 (1) from at least 1 January 1973 to 14 October 1977.

2. Inapplicability of Article 85 (3) of the EEC Treaty

Under the terms of Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement between undertakings which contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equi-

table share in the profit resulting therefrom, and which :

- neither imposes on the undertakings concerned any restrictions not indispensable to the attainment of the above objectives,
- nor enables such undertakings to eliminate competition in respect of a substantial proportion of the goods concerned.

Pursuant to Articles 4 and 25 of Regulation No 17, agreements should be notified in order to qualify for the application of an exemption under Article 85 (3), unless they fall within the categories of agreements described under Article 4 (2), in particular agreements where the only parties thereto are undertakings from one Member State and which do not relate to exports between Member States (Article 4 (2) (1)).

The old conditions of sale were not exempt from notification pursuant to Article 4 (2) (1) of Regulation No 17 because, although they were contained in a series of agreements between undertakings from one Member State, namely the United Kingdom, they did relate to exports between Member States.

Further, the old conditions of sale have not been formally notified in accordance with the provisions of Commission Regulation No 27 ⁽¹⁾, but merely communicated to the Commission at its request.

The old conditions of sale cannot therefore benefit from an exemption under Article 85 (3).

III. APPLICABILITY OF ARTICLE 3 (1) OF COUNCIL REGULATION No 17

Under the terms of Article 3 (1) of Council Regulation No 17, where the Commission, upon application or upon its own initiative, finds that there is an infringement of Article 85 of the Treaty, it may by decision require the undertakings concerned to bring such infringement to an end.

The Commission has noted that Bell has withdrawn the explicit export prohibition towards EEC countries which was contained in the old conditions of sale applied by Bell until 14 October 1977. The Commission requires that Bell should refrain from any further action by means of their sales conditions calculated to restrict the exportation from the United Kingdom to other EEC countries of their Scotch whisky bought by trade customers. This applies, in particular, to any action on Bell's part to restrict under bond sales of Scotch whisky,

⁽¹⁾ OJ No 35, 10. 5. 1962, p. 1118/62.

HAS ADOPTED THIS DECISION :

Article 1

The explicit prohibition to export from the United Kingdom to other EEC countries contained in conditions of sale, which were part of the contracts for the sale of Scotch whisky entered into by Arthur Bell and Sons Ltd with its trade customers established in the United Kingdom until 14 October 1977, amounted to an infringement of Article 85 (1) of the Treaty establishing the European Economic Community from at least 1 January 1973 until 14 October 1977.

Article 2

Arthur Bell and Sons Ltd shall refrain from further action by means of their sales conditions calculated to

restrict the exportation from the United Kingdom to other EEC countries of Scotch whisky bought by trade customers established in the United Kingdom.

Article 3

This Decision is addressed to Arthur Bell and Sons Ltd, Cherrybank, Perth PH2 0NG, Scotland.

Done at Brussels, 28 July 1978.

For the Commission

Raymond VOUEL

Member of the Commission