COMMISSION DECISION

of 23 December 1977

relating to proceedings under Article 85 of the EEC Treaty (IV/171, IV/856, IV/172, IV/117, IV/28.173 — Campari)

(Only the Danish, Dutch, French, German and Italian texts are authentic)

(78/253/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 Articles 4 to 8 thereof,

Having regard to the applications for negative clearance and notifications made on 20 and 27 October 1962 in respect of the trademark licensing agreements entered into by Davide Campari-Milano SpA, with its registered office at Milan, Italy (hereinafter Campari-Milano), on 19 September 1957 with Ognibeni & Co., Amsterdam, Netherlands, on 1 January 1960 with Hans Prang, Hamburg, Germany, on 8 January 1962 with Soval, now called Campari-France SA, Nanterre, France, and on 11 October 1962 with Sovinac SA Brussels, Belgium,

Having regard to the notification on 27 June 1973 of the trademark licensing agreement which Campari-Milano entered into on 14 April 1966 with Johs M. Klein & Co., Copenhagen, Denmark,

Having regard to the amendments made to the agreements by the parties during the proceedings, to comply with the requirements of Article 85 (3),

Having regard to the summary of the notifications published in accordance with Article 19 (3) of Regulation No 17 in Official Journal No C 198 of 19 August 1977,

Having regard to the opinion delivered on 25 November 1977 in accordance with Article 10 of Regulation No 17 by the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. The Facts

Campari-Milano is the holder of the international trademarks, Bitter Campari and Cordial Campari, which are carried by aperitifs in the manufacture of which secret concentrates (special mixtures of crushed herbs) are used.

In order to promote these brands abroad, Campari-Milano set up a network of licensees to manufacture and sell its products. The network covers all the EEC countries with the exception of the United Kingdom and Ireland. Campari-Milano granted F.S. Matta Ltd an exclusive right to import and distribute its aperitifs in these two countries; the present version of the agreement qualifies for the block exemption given by Commission Regulation No 67/67/EEC of 22 March 1967 (2).

A. Within the common market the business of the parties involved is regulated by the licensing agreements mentioned above, which have been notified to the Commission and which contain, in the version in force since 1 November 1977, the provisions described below.

1. Campari-Milano grants to the following firms an exclusive right to use its trademarks for the manufacture of its aperitifs using its secret processes and its concentrates, and for their sale in the following territories :

— Ognibeni & Co.: Netherlands,

— Hans Prang: Germany,

— Campari France SA: France, Monaco and certain French overseas territories,

— Sovinac SA: Belgium and Luxembourg,

— Johs M. Klein & Co.: Denmark.

Campari-Milano undertakes not to manufacture its aperitifs itself in these territories during the validity of the agreements.

2. The licensees undertake that during the currency of the agreements they will not handle competing pro-

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) OJ No 57, 25. 3. 1967, p. 849/67.

ducts, notably certain beverages called Bitter and aerated drinks similar to Campari Soda.

3. The licensees and Campari-Milano undertake not to carry on any active sales policy, not to set up any branches and not to advertise, the licensees outside their respective allotted territories, and Campari-Milano within these territories.

However, the licensees and Campari-Milano will do all they can to meet unsolicited export orders for delivery within the EEC for Campari products manufactured according to the specifications as to alcoholic strength, labelling, bottle content, etc . . . applicable, in the case of a licensee in its allotted territory, and of Campari-Milano in Italy. Such sales will be at the prices and on the conditions obtaining in its own exclusive territory in the case of an exporting licensee, and on the conditions obtaining on the Italian market in the case of Campari-Milano; where Campari-Milano is exporting, its prices will be increased by the royalties and advertising costs normally borne by the licensees.

Where unsolicited orders are received for Bitter manufactured according to the specifications obtaining on the market to which the goods are to be exported, the parties are free to accept or refuse; the primary requirement is that the exclusive territories, or in Campari-Milano's case the Italian market, must not be undersupplied, and in the case of the licensees Campari-Milano must first be asked for the formulae required to manufacture the products. Campari-Milano has the right to meet orders addressed directly to it by members of the diplomatic corps or foreign armed forces.

The licensees and Campari-Milano undertake to do all they can to help buyers of their products who wish to export the products within the EEC to obtain drawback of taxes or duties on alcohol, to the extent permitted by the national fiscal regime in question.

Lastly, each licensee undertakes not to export Campari products directly or indirectly outside the EEC and in the case of Campari-France, outside those non-member countries forming part of its allotted territory.

4. All the contracts contain an obligation on the licensees to supply the original Italian product, rather than their own, to the diplomatic corps, to ships' victuallers, to foreign armed forces and in general to all bodies exempt from payment of duties.

5. The French, Belgian, Danish and Dutch licensees are to manufacture Campari products in their plant at Nanterre, Brussels, Copenhagen and Amsterdam.

Campari-Milano is to be informed of any change in plant location, and may object if the new plant is not such as to ensure that the products will be of the right quality.

6. The licensees must comply exactly with the licensor's instructions for the manufacture of products, must ensure that the quality of the raw materials used meets the licensor's specifications, must purchase certain raw materials (secret mixtures of herbs and colouring matters) from the licensor, must submit for the licensor's approval a sample of each manufacturing run giving the date of filtering and the serial number of the boxes of herbs used, and may not divulge the manufacturing processes.

7. The licensees undertake to promote sales as far as possible and, in particular, to engage in suitable advertising, each spending the same fixed amount per bottle litre of Bitter sold.

8. The licensees are required to inform Campari-Milano of any trademark infringements or passing-off which comes to their knowledge. Campari-Milano may instruct the licensees to take action against the infringers, giving the licensees the necessary power to do this.

9. In no case may the benefit of the contracts be assigned to third parties.

10. All disputes as to the interpretation and performance of the agreements are to be settled by three arbitrators, whose function is to produce an amicable settlement. As a rule arbitration will take place in Milan, but one agreement makes provision for arbitration outside the Community, in Switzerland.

11. Whereas the French agreement requires the licensee to pay royalties per bottle sold in return for use of the trademark, the other agreements provide that royalties be included in the price of raw materials supplied by Campari-Milano.

12. The contracts are automatically renewable from year to year, or every two years, unless one side or the other gives prior notice of termination.

B. In the form originally notified, the agreements contained an obligation on the licensees to manufacture only in certain plants and to purchase certain non-secret

raw materials from the licensor; there was also a ban on exports by the licensees to other EEC countries and on exports by Campari-Milano to the licensees' allotted territories. However, when the Commission informed them in its statement of objections of 27 July 1976 that it considered these obligations incompatible with Article 85 (1) of the EEC Treaty, the parties changed them so that their agreements could qualify for exemption under Article 85 (3). In particular, they replaced the ban on exports within the EEC by the undertaking to do everything possible to meet unsolicited orders inside the EEC, the Commission having stated in its objections that it would impose an obligation to that effect.

C. Other considerations which arose during examination of the case are the following:

1. The exclusive arrangements made by Campari-Milano date from before the war as regards Campari-France, Sovinac and Ognibeni and from between 1949 and 1953 as regards Hans Prang and Klein. There is no financial link between the firms concerned.

Bitter Campari is currently the only Campari product to be manufactured by the licensees. The volume of Bitter manufactured annually at present, according to the licensees, is between one and three million bottles. All the licensees have increased their production capacities considerably over the last few years by the construction of new factories and by plant extensions already carried out or in course of construction. The sale of Bitter Campari is at present the only activity carried on by the French licensee, who until recently regularly imported wine and vermouth, and accounts for the bulk of the business of the Dutch, German and Belgian licensees; these firms and the Danish licensee distribute a whole range of beverages (notably spirituous liquors, gin and wine) manufactured by themselves or imported, in general from France and Italy. Small quantities of Campari Soda and Cordial Campari are imported direct by some licensees.

2. Apart from the secret herbal mixtures, bitter orange essence and albumin, the licensees use locally bought sugar, alcohol and distilled water in manufacturing Bitter. The dosage of each of the ingredients of Bitter varies with the alcoholic strength to be given: at present this stands at 20° for Bitter manufactured and sold in France by the French licensee, 21·5° and 25° for Bitter manufactured by the Belgian licensee for sale in Belgium and Luxembourg respectively, 25° for Bitter manufactured by Dutch and Danish licensees and by Campari-Milano for sale on the Italian and British markets and 30° for bitter sold in Germany. Detailed instructions for manufacture are supplied so that the dosages for the different markets can be achieved while keeping the quality and presentation as close as possible to the original Italian product.

Campari bottles are manufactured according to Campari-Milano designs and models.

According to the Commission's information, before the manufacture can be profitable, whatever the alcoholic strength, a vat of 28 000 litres at the very least is necessary. Like the alcoholic strength, bottle sizes for Bitter vary from one Member State to another. Bottles are of one litre in Italy and France, 98 cl in Luxembourg, 70 cl in Germany, 72 cl in Denmark and 75 cl in the Netherlands, Belgium and the United Kingdom. Miniatures are also used. Finally, bottles supplied by Campari-Milano for sale to embassies and victuallers are always of 92 cl with an alcoholic strength of 28·5 degrees.

3. Up to now the licensees have sold Campari products in their respective allotted territories only. In these territories and in Italy, Bitter for ordinary consumption (i. e. with payment of duties and taxes) is sold by the manufacturers themselves or through independent distributors subject only to the general terms of sale imposed by the manufacturers. The terms of sale do not now oblige buyers to refrain from exporting. Sales in Luxembourg are carried out by an exclusive importer. The licensees were formerly required to sell a certain minimum quantity each year. This obligation ended in the course of 1977.

Campari-Milano has no say in its licensees' price policies. The prices at which the licensees supply dealers on the domestic or export market are determined on the whole by identical cost factors, notably as regards raw materials, and there are no substantial differences. There is currently no longer any resale price maintenance, retail prices being generally the same in France, Belgium and the Netherlands and somewhat higher in Germany and Denmark, where the tax burden is heavier. In Luxembourg, on the other hand, retail prices are lower in consequence of the lower tax in that country. During recent years these prices have hardly

changed, notwithstanding the considerable increases in salaries and the cost of the raw materials.

Sales of Bitter in the Community have increased steadily over recent years, as a result both of the setting-up of a wide spread distribution network, which has considerably increased the number of retailers, and of the stimulation of demand from major customers and supermarkets; between 1970 and 1977 sales doubled, in some cases trebled, in Benelux and Germany. The average cost of the advertising campaigns carried out each year by the licensees is much the the same for all of them. Campari-Milano's own expenditure on advertising, however, is lower by as much as a half.

Sales for duty- and tax-free consumption, i.e. sales to the diplomatic corps, to foreign armed forces or similar organizations enjoying extraterritorial rights, to ships and aircraft travelling abroad directly and to duty-free shops in ports and airports are for the most part carried out through victuallers. The agreements between the victuallers and the licensees or Campari-Milano have not been notified to the Commission and are not dealt with in this proceeding. Sales of duty-free products represent only a small part of the total sales of most of the licensees.

Over the last few years, Bitter Campari has been imported and sold by parallel importers, notably in Belgium and the Netherlands; these importers have paid the duties and taxes required in those countries. They have been supplied partly by victuallers and partly by wholesalers carrying on duty free sales.

4. In the common market, Bitter Campari is subject to the tax arrangements applying to alcohol and must conform to the regulations concerning the particulars which must appear on bottles, and to public health regulations.

(a) In each Member State duties and taxes are payable on Bitter Campari; these are calculated on the equivalent in pure alcohol of the product, so that the higher the alcoholic content the heavier the duty. The duties and taxes levied on imports are the same as on domestic products; for the most part they amount to slightly less than a half to two-thirds of the ex-works price. Since they are so heavy, it is not profitable to export Bitter manufactured in one Member State to another unless duty exemption or drawback is possible in the Member State of origin.

Under national regulations, if the alcohol used in the manufacture of Bitter is to be exempted from duty and tax, it must be declared for export when the manufacturer buys it. Exports are deemed to include sales for duty- and tax-free consumption.

According to the Commission's information, in all EEC countries except France and the United Kingdom, both of which have a system for suspension of consumer taxes, all duties on Bitter not declared for export are payable when it leaves the place of manufacture or when seals or bands certifying payment of duty are affixed. In general, once duty has been paid, there is no drawback for subsequent export. Only in Italy and France can duties already paid be remitted if the goods are exported, and in the latter country only through the manufacturer, to whom the Directorate-General for Taxation reimburses duty corresponding to declarations supplied by the exporter.

It is to be noted that, with a view to the elimination of obstacles to the free circulation of alcoholic products between Member States under undistorted competitive conditions, the Commission has made a proposal to the Council for a Directive to harmonize excise duties on alcohol, and notably the terms on which dealers may stock spirituous liquors [1]. According to the proposal dealers could in certain circumstances stock spirituous liquors without paying excise duties and engage in parallel exports.

(b) National regulations on public health and on the marketing of beverages subject to duties and taxes on alcohol require a number of particulars to appear on bottles when sold. These generally include the name of the product, the name and address of the manufacturer or importer, and the alcoholic strength (certain Member States further require the words 'spirituous liquor' to appear, and a statement as to the content, ingredients and added products).

(c) In certain Member States the Law requires beverages such as Bitter Campari to have an alcoholic strength of not less than a specified minimum (17° in France, 20° in Denmark and 30° in Germany).

As the alcoholic strength required by German regulations is greater than that of Bitter Campari in the other Member States, there is in effect a ban on

[1] OJ No C 43, 29. 4. 1972, p. 25.

imports to Germany, unless of course a consignment has been specially manufactured for the German market.

However, it is worth noting that following complaints from importers the Commission addressed a reasoned opinion to the Federal Republic of Germany under Article 169 of the EEC Treaty, and Germany then cancelled the provisions applying to certain imported alcoholic products with an alcoholic strength of less than 30°; the products did not include Bitter.

(d) Other national legal provisions govern advertising of alcoholic drinks, restrict the number of licensed premises, prohibit the sale of aperitifs and bitters exceeding a specified alcoholic strength (e. g. in Belgium) or specify the actual content of bottles (in France, for instance, the authorized units are 35 cl, 50 cl, 70 cl and 1 litre, the 75 cl bottles used by the Belgian and Dutch licensees not being allowed there).

5. According to the explanations provided by Campari-Milano, the obligation on licensees to inform Campari-Milano of trademark infrigements coming to their knowledge does not apply to imports into each allotted territory of the original Italian product or of products manufactured under licence in another Member State.

6. In the allotted territories, Bitter Campari is in competition with a number of substitute products, including Punt e Mes Carpano, Bitter Cinzano, Bitter Gambarotta, Bitter Negroni, Bitter Moroni, Bitter San Pellegrino, Bitter Rossi, Amer Picon, Suze, Amer Khuri, Cynar and Amer Claquesin.

It has not been possible to establish Bitter Campari's exact market share. What is clear, however, is that the brand has acquired an international reputation and that the turnover attained by Campari-Milano and its licensees is a substantial one.

7. Following publication of summaries of the notifications, no observations from third parties have been received by the Commission.

II. Applicability of Article 85 (1) of the EEC Treaty

Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

A. The agreements in question are between undertakings and include provisions (see points 1 to 4 under I A above) which have as their object and their effect an appreciable restriction of competition within the common market.

1. The exclusive rights given to the licensees prevent Campari-Milano from granting trademark licences for its products to other parties in the Netherlands, Germany, France, Belgium, Luxembourg and Denmark and also from itself manufacturing those products in these countries.

The proprietor of a trademark has the exclusive right to use the distinctive mark on first sale and to protect the product against infringement of the mark. The proprietor of the trademark may by licence authorize the use of the protected mark, by third parties. However, if he undertakes only to allow one single undertaking to use his trademark in a particular territory and to refrain himself from manufacturing products bearing his trademark there, he loses his freedom to respond to other requests for licences and the competitive advantage to be gained from manufacture by himself in this territory.

In the case in point, the exclusive nature of the licence entails a restriction upon Campari-Milano's freedom to use its marks as well as preventing third parties, particularly manufacturers of alcoholic beverages from using them as licensees, however much they may find it in their interests to do so.

2. The non-competition clause (Point I. A 2 above) prevents the licensees from manufacturing or selling products for the whole duration of the agreements. They may not buy such products, nor acquire licences to manufacture or sell them. The effect of the restriction is appreciable, since at present all the licensees, except the French one, are already distributing a whole range of beverages other than Bitter Campari and all have a substantial turnover on their total business.

3. The ban preventing Campari-Milano and its licensees from engaging in an active sales policy outside their respective territories prevents the licensees and the licensor from seeking custom in the territories of the other parties. They are therefore excluded from actively competing on those territories, while benefiting from a degree of protection within their own territory, where the only imports made must be in response to unsolicited orders. This ban must be considered as having an appreciable effect, since not only Campari-Milano but also all the licensees have considerable production capacity, which would enable them to supply other

markets in the EEC. While such deliveries would primarily be of products manufactured according to the specifications in respect of alcoholic strength, bottle content, and labelling required on the manufacturer's home market, they could also be for Bitter manufactured according to other specifications required on the export market, for manufacturers can buy the alcohol without being taxed, in order to export the finished product. Furthermore, they may change the alcoholic strength or presentation of the product where they judge that the size of an order or at any rate the possibility of steady sales makes the manufacture of such a product and the use of new labels or bottles profitable.

4. The obligation to supply the original Italian product to diplomatic corps, ship's victuallers, foreign armed forces and generally speaking all organizations with duty-free facilities prevents the licensees from supplying Bitter which they have manufactured themselves to these consumers. In view of the licensees' production capacities, this restriction also has an appreciable effect.

B. The exclusive rights granted by Campari-Milano prevent Campari-Milano from granting other licences which would enable other parties to use its trademarks in the allotted territories and to export from these territories to other parts of the common market. They also prevent Campari-Milano itself from manufacturing Bitter in these territories and consequently from exporting from such territories. The exclusion of competing products prevents the licensees from marketing such products across borders between Member States, or from making licence agreements in relation to such products with undertakings in other Member States. The ban on engaging in an active sales policy outside their respective territories prevents Campari-Milano and its licensees from freely disposing throughout the common market of the Bitter they have manufactured, restricting them to their exclusive territories, and thus affects international trade in the product. The obligation to supply certain consumers with the original Italian product rather than that which they themselves manufacture means that the licensees have to obtain supplies of Bitter Campari from Italy and thus affects international trade in the product.

These restrictions must be regarded as liable to affect trade between Member States inasmuch as their effect is that trade between Member States develops otherwise than it would have done without them, until at the same time they have a substantial degree of influence on market conditions.

The agreements are therefore caught by Article 85 (1) of the Treaty.

C. The other provisions of the agreements entered into by Campari-Milano and its licensees are not in this case covered by Article 85 (1), because they have neither the object nor the effect of appreciably restricting competition within the common market. This is so for the following provisions, in particular,

— the obligation upon each licensee to refrain from exporting Bitter Campari directly or indirectly outside the common market. It is true that this obligation not only eliminates the freedom of the licensees and their trade customers to do business in the relevant product outside the EEC, but also prevents any distributor in a non-member country from buying the product from the licensees or from a previous purchaser for resale in the common market. However, any purchaser within the Community may obtain supplies of the products covered by the agreements not only directly from the licensee on his own territory but also, directly or indirectly, from other licensees or from Campari-Milano itself. Given these possibilities, reimportation into the common market of Bitter previously exported outside the Community by licensees or their trade customers would seem unlikely, in view of supplementary economic factors such as the accumulation of trade margins and of excise duties and taxes on alcohol levied by importing countries as well as the duties charged on crossing the European Economic Community borders. This assessment also applies to States with which the EEC has entered into free trade agreements, particularly as trade between the Community and these States in alcoholic beverages such as Bitter Campari is still subject to customs duties,

— restrictions of the licence to those plants which are capable of guaranteeing the quality of the product. The effect of this restriction on the licensees' freedom of choice does not go beyond a legitimate concern for quality control; further, this obligation upon the licensees does not constitute an absolute limitation of production to any particular place, since it only gives Campari-Milano the right to oppose a change in the place of manufacture in cases where the new establishment proposed might adversely affect the quality of the products; this type of agreement as to quality control is very important for the licensor, since the maintenance of quality is referable to the existence of the trademark right,

— the licensees are obliged to follow the licensor's instructions relating to the manufacture of the product and the quality of the ingredients, and to buy certain secret raw materials from the licensor itself. Here again, control over the quality of the products manufactured under licence and over their similarity to the original Italian product is in the present case very important for the licensor, in the sense that it is again bound up with its interest in the maintenance of quality, which is referable to the existence of the trademark right. According to information provided by the parties, the standards enforced do not oblige the licensees to obtain supplies of albumin or bitter

orange essence from any particular source, but only to choose between different products on the basis of objective quality considerations. This does not, however, apply to the colouring matter and the herbal mixtures, where the licensor's legitimate concern to ensure that the product manufactured under licence has the same quality as the original product can be protected only if the licensees obtain all their supplies from it. The composition of the products in question which is the factor that determines the particular characteristics of Bitter Campari is a trade secret which the licensor cannot be required under Community law to reveal to its licensees,

— the licensees are required to refrain from divulging the manufacturing processes to third parties. This obligation is essential if secret techniques or recipes are to be passed on for use by other undertakings,

— the licensees are obliged to maintain continuous contact with customers and to spend a standard minimum sum on advertising Bitter Campari. In the present case there is nothing to suggest that the amount of the sum in question would prevent the licensees from engaging in other activities or carrying on their own advertising also,

— the licensees are prohibited from assigning the benefit of the agreement. By banning assignments, the licensor is simply safeguarding its freedom to select its licensees. When it enters into an agreement the identity of the other party is highly material to it and it must remain free to decide with whom it will deal.

III. Applicability of Article 85 (3) of the EEC Treaty

Under Article 85 (3) the provisions of Article 85 (1) may be declared inapplicable to agreements between undertakings which contribute to improving the production and distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

A. The restrictions on competition mentioned at points 1 to 4 of item II A satisfy the tests of Article 85 (3).

1. The exclusivity granted by Campari-Milano contributes to improving the production and distribution of the products. By giving each licensee a guarantee that no other undertaking will obtain a licence within its allocated territory, and that in this territory neither Campari-Milano nor any other licensee may manufacture products bearing the licensor's trademark this commitment confers upon each licensee an advantage in its allotted territory. This territorial advantage is such as to permit a sufficient return on the investment made by each licensee for the purpose of manufacturing the product bearing the trademark under conditions acceptable to the licensor and holder of the trademark, and it enables the licensee to increase its production capacity and constantly to improve the already long established distribution network.

In practice the exclusivity granted has allowed each licensee to improve its existing plant and to build new plant. It has also enabled each licensee to strengthen its efforts to promote the brand, doubling the total volume of sales in the Benelux countries and Germany over the last six years, and, by establishing a multistage distribution network, to secure a constantly increasing number of customers and thus to ensure supplies throughout the allotted territory.

2. The ban on dealing in competing products also contributes to improving distribution of the licensed products by concentrating sales efforts, encouraging the build-up of stocks and shortening delivery times.

The restriction on the licensees' freedom to deal in other products at the same time as the products here in question prevents the licensees from neglecting Campari in the event of conflict between the promotion of Campari sales and possible interest in another product. Although a non-competition clause in a licensing agreement concerning industrial property rights based on the result of a creative activity, such as a patent, would constitute a barrier to technical and economic progress by preventing the licensees from taking an interest in other techniques and products, this is not the case with the licensing agreements under consideration here. The aim pursued by the parties, as is clear from the agreements taken as a whole, is to decentralize manufacture within

the EEC and to rationalize the distribution system linked to it, and thus to promote the sale of Campari-Milano's Bitter, manufactured from the same concentrates provided by Campari-Milano, according to the same mixing process and using the same ingredients, and bearing the same trademark, as that of the licensor.

The prohibition on dealing in competing products, therefore, makes for improved distribution of the relevant product in the same way as do exclusive dealing agreements containing a similar clause, which are automatically exempted by Regulation No 67/67/EEC (1); a declaration that the prohibition in Article 85(1) is inapplicable to this clause is accordingly justified.

3. Distribution will also be improved by the prohibition against the parties engaging in an active sales policy outside their respective territories. This restriction on the licensees will help to concentrate their sales efforts, and provide a better supply to consumers in their territories for which they have particular responsibility, without preventing buyers elsewhere in the Community from securing supplies freely from any of the licensees. Application of the same restriction to Campari-Milano encourages the efforts made by the each territory allotted; the licensees thus have the benefit of a certain protection relative to Campari-Milano's strong market position.

4. The obligation on licensees to supply the original Italian product rather than that which they themselves manufacture, when selling to diplomatic corps, ships' victuallers, foreign armed forces and generally speaking all organizations with duty-free facilities also helps to promote sales of Campari-Milano's Bitter. By restricting licensees' freedom to supply the products they manufacture themselves it makes sure that particular categories of consumers, who are deemed to be outside the licensee's territory and are usually required to move frequently from one territory to another, can always purchase the same original product with all its traditional features as regards both composition and outward appearance. Even though quality standards are observed, it is impossible in particular to avoid differences in taste between the products of the various manufacturers. This obligation is thus designed to prevent these consumers from turning to other competing products and to ensure that they continue to buy Bitter Campari, with the facility of being able to obtain stocks from their local dealer. Further, such consumers are not prevented from freely obtaining the licensees' own products even though any such purchases would be on the normal trading conditions applicable to non-duty-free purchasers.

B. The licensing agreements have increased the quantities of Bitter Campari available to consumers and improved distribution, so that consumers benefit directly. There are other producers of bitter on the market, and effective competition will be strengthened by the growing quantities produced by Campari-Milano's licensees, so that it can be assumed that the improvements resulting from the agreements and the benefits which the licensees obtain from them are shared by consumers.

As buyers may secure supplies of Bitter from other territories through unsolicited orders, they are in a position to exert pressure on the prices charged by the exclusive licensee in their territory if these should be too high.

C. The restrictions of competition imposed on the parties involved must be considered indispensable to the attainment of the benefits set out above. None of the restrictions could be omitted without endangering the parties' object of promoting sales of Bitter Campari by concentrating the activities of the licensees on this product and offering the same original product to certain customers. In particular, none of the licensees and in all probability no other undertaking in the spirituous liquors industry would have been prepared to make the investment necessary for a significant increase in sales of Bitter if it were not sure of being protected from competition from other licensees or Campari-Milano itself.

D. The licensing agreements which are the subject of this Decision do not give Campari-Milano or its licensees the possibility of eliminating competition in respect of a substantial part of the Bitter products in question. In the EEC there exists a fairly large number of other well-known brands of bitter, which are all able to compete against Bitter Campari. Campari-Milano's licensees and Campari-Milano itself are also free to sell the Campari products in question within the common market but outside their territory for which they have particular responsibility.

As things stand at present, all the tests for a Decision applying Article 85 (3) to the licensing agreements entered into by Campari-Milano with Ognibeni & Co., Hans Prang, Campari-France SA, Sovinac SA and Johs. M. Klein and Co. are satisfied.

(1) OJ No 57, 25. 3. 1967, p. 849/67.

IV. Application of Articles 6, 7 and 8 of Regulation No 17

1. In the form in which they were originally notified to the Commission and which prompted the statement of objections (see item I. B above), the five licensing agreements entered into by Campari-Milano did not satisfy the tests of Article 85 (3). The clauses listed above, contained in the agreement then in force, significantly restricted competition, and the restrictions could not be considered as being referable to the existence of the licensed trademarks, or as contributing to the production or distribution of the products or to promoting technical or economic progress. The clauses which prevented application of Article 85 (3) were deleted on 1 November 1977 at the Commission's request. It is therefore possible, under Article 6 (1) of Regulation No 17, for the Decision applying Article 85 (3) to take effect from the date on which the agreements were amended, which is to say 1 November 1977.

In determining the period of validity of the Decision, as required by Article 8 (1) of Regulation No 17, account should be taken of the fact that the restrictions on competition covered by this Decision do not prevent the free movement of the goods in question between EEC Member States, and in particular that the parties have undertaken, as from 1 November 1977, to do everything possible to meet unsolicited orders from within the EEC. The period allowed must be sufficient to permit the amended agreements to produce the effects intended; a period of nine years would seem reasonable.

2. The exclusive licensing agreements entered into by Campari-Milano with Ognibeni & Co., Hans Prang, Campari France SA, and Sovinac SA satisfy the tests of Article 7 (1) of Regulation No 17.

The agreements were in existence at the date of entry into force of Regulation No 17 on 13 March 1962, although the agreement with Sovinac SA existed in a previous version to that which was notified. The agreements were notified within the periods provided for under Article 5 (1) of Regulation No 17. They did not at that time satisfy the tests of Article 85 (3), but have since been amended so that they do satisfy those requirements, as has been explained above.

As regards the agreements in their version before amendment, the prohibition contained in Article 85 (1) applies only for a period fixed by the Commission. The Commission must take into account the fact that the parties spontaneously amended the agreements, or agreed to amend them, in accordance with suggestions made by the Commission. These circumstances justify exemption from the prohibition of Article 85 (1) for the whole of the period preceding the effective date of the Decision declaring Article 85 (1) inapplicable to all of the agreements.

The preceding observations apply also in the case of the agreement of 14 April 1966 with Johs. M. Klein and Co. An export ban imposed on a firm established in a country outside the EEC and aimed against deliveries into the EEC can constitute a restriction of competition capable of affecting trade between Member States. However, in the present case such a ban was not an appreciable restriction before Denmark joined the EEC because the difficulties of importation arising from customs and tax regulations in practice prevented exports of Bitter Campari to the Community. Accordingly, pursuant to Article 25 of Regulation 17, the agreement made between Campari-Milano and Johs. M. Klein and Co. and duly notified on 27 June 1973 also satisfies the conditions for application of Article 7 (1) of that Regulation.

3. In view of the importance and international reputation of the Campari brand, of the restrictive effects on the circulation of Bitter Campari between Member States resulting from existing national legislation, and lastly the fact that exports by manufacturers of Bitter Campari or by their customers depend ultimately on the willingness of the manufacturers themselves, the Commission should have the opportunity to assess in good time the situation resulting from the amended agreements on the relevant market. Consequently, in accordance with Article 8 (1) of Regulation No 17, Campari-Milano and each of its licensees should be required to send to the Commission annually, beginning on 15 December 1978, a report containing all information necessary for an assessment of developments resulting from the application of the agreements, especially from the point of view of the free movement of Bitter within the EEC. This applies in particular to exports within the Community.

Arrangements should also be made to ensure that the Commission is informed of any awards made under the arbitration clause, as there is a risk that the agreements might be interpreted without regard for this Decision, so that the Commission might have to amend it. There is a greater risk at arbitration than in the ordinary courts that interpretation of the agreement may go beyond the limits imposed by the exemption, particularly where the arbitrators, whose function, as in this case, is to produce an amicable settlement, are not bound by the substantive law. Furthermore, review of

arbitral awards for their compatibility with Articles 85 and 86, inasmuch as these fail to be regarded as part of EEC public policy is not necessarily available in non-Member States,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of Article 85 (1) of the Treaty establishing the European Economic Community are, pursuant to Article 85 (3), declared inapplicable to the trademark licensing agreements, as amended on 1 November 1977, entered into by Davide Campari-Milano SpA, Milan, on 19 September 1957 with Ognibeni & Co., Amsterdam, on 1 January 1960 with Hans Prang, Hamburg, on 8 January 1962 with Soval, now Campari-France SA, Nanterre, on 11 October 1962 with Sovinac SA, Brussels, and on 14 April 1966 with Johs. M. Klein & Co., Copenhagen.

Article 2

This Decision shall have effect from 1 November 1977, and shall apply until 1 November 1986.

Article 3

The abovementioned undertakings shall inform the Commission immediately of all awards made under the arbitration clause. Every year, beginning on 15 December 1978, they shall notify to the Commission:

1. the volume of their exports of Bitter Campari within the EEC;
2. the cases where they have refused:
   (a) to meet export orders for delivery of Bitter Campari within the EEC;
   (b) to seek a refund of the taxes corresponding to declarations made by customers who have exported Campari products within the EEC.

Article 4

The prohibition in Article 85 (1) does not apply to the licensing agreements entered into by Davide Campari-Milano with Ognibeni & Co., Hans Prang, Soval (now Campari-France SA), Sovinac SA and Johs. M. Klein in their versions which were in force before the date, as indicated in Article 2 thereof, on which this Decision takes effect.

Article 5

This Decision is addressed to:

— Davide Campari-Milano SpA, Milan, Italy,

— Ognibeni & Co., Amsterdam, Netherlands,

— Hans Prang, Hamburg, Germany,

— Campari-France SA, Nanterre, France,

— Sovinac SA, Brussels, Belgium,

— Johs. M. Klein & Co., Copenhagen, Denmark.

Done at Brussels, 23 December 1977.

For the Commission

Raymond VOUEL

Member of the Commission