COMMISSION DECISION

of 28 July 1978

relating to proceedings under Article 85 of the EEC Treaty (IV/28.859 : Wm. Teacher and Sons Ltd—conditions of sale)

(Only the English text is authentic)

(78/697/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 3 and 4 thereof,

Having regard to the notification made on 17 April 1974 pursuant to Article 4 of Regulation No 17, by Wm. Teacher and Sons Ltd, Glasgow, Scotland, of conditions of sale applied to trade customers established in the United Kingdom,

Having regard to the Commission's decision of 21 June 1977 to initiate proceedings in this case,

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 Wm. Teacher and Sons Ltd applies to sales of Teacher's Highland Cream Scotch Whisky to trade customers established in the United Kingdom since August 1974.

Hereinafter Wm. Teacher and Sons Ltd is referred to as 'Teacher', Teacher's Highland Cream Scotch Whisky as 'Highland Cream', and Teacher's trade customers established in the United Kingdom as 'trade customers'.

1. Wm. Teacher and Sons Limited

(a) Teacher is a United Kingdom company registered in Edinburgh on 30 December 1948. Teacher has several subsidiary companies in the United Kingdom and elsewhere. In November 1976, 96·8 % of Teacher's shares were acquired by Allied Breweries Ltd, a large United Kingdom undertaking engaged in the production and distribution of drinks such as beer, soft drinks, wines and spirits and whose turnover in 1975/76 amounted to £885 million.

(b) Teacher is engaged in the business of distilling malt whisky, blending whisky and distributing blended and malt Scotch whisky. Its best selling brand by far is 'Teacher's Highland Cream Scotch Whisky', a standard blended Scotch whisky, at least three years old, which can be taken as accounting for the entire selling activities of Teacher.

(c) The total turnover represented by sales of Scotch whisky by Teacher was around £56 million for the year 1975/76, including approximately £30 million tax and duty. Teacher's turnover in the United Kingdom in 1975 excluding tax and duty was around £10 500 000 and in the rest of the EEC £ ... [3].

(d) Teacher estimates its market share of total malt whisky production in the United Kingdom to have been ...% in 1975.

(e) Teacher's market share in sales of Scotch whisky in the United Kingdom is estimated to have been ... % in 1973, ... % in 1974 and ... % in 1975. Teacher'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. Teacher is the third biggest seller of Scotch whisky in the United Kingdom and Highland Cream is the best selling Scotch whisky brand in England and the second best in the United Kingdom as a whole. Highland Cream sales represent ... % of total spirits sales in the United Kingdom.

(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.

(f) As to sales of Scotch whisky in EEC countries other than the United Kingdom, Teacher had a market share of around ...% in 1973, ...% in 1974 and ...% in 1975. Highland Cream is among the best selling brands of Scotch whisky in these countries. Teacher's estimated market share for 1975 of total imports of whisky into these countries (from all sources) ranged from ...% in Denmark to ...% in France and, of total spirits consumption in these countries, from ...% in Ireland to ...% in Italy.

(g) Teacher sells in the United Kingdom direct to 3 000 to 4 000 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 Teacher distributes Highland Cream through distributors, except in Germany where Teacher has its own subsidiary. These distributors are one per country.

2. The notified conditions of sale

(a) On 17 April 1974, Teacher notified to the Commission conditions of sale which have applied to its sales of Highland Cream to trade customers since August 1974. Teacher asked for a negative clearance pursuant to Article 2 of Regulation No 17 or alternatively requested an exemption under Article 85 (3) of the EEC Treaty.

(b) These conditions of sale are endorsed on the standard form sales invoices used by Teacher for all sales in the United Kingdom of Highland Cream.

(c) These conditions of sale contain the following two provisions which were introduced in 1974:

(i) trade customers to whom Highland Cream has been sold for delivery in Great Britain may not resell it outside Great Britain. This condition must be incorporated in all sub-sales,

(ii) trade customers who purchase Highland Cream under bond may only resell or otherwise transfer this product out of bond and after payment of all excise (or customs), duties due upon removal of the product from bond.

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 nor for a reimbursement of duty if paid.

(c) Excise duties in the United Kingdom on a case of 12 bottles of Highland Cream at 1 March 1977 amounted to £37·92. This amount represents around four times Teacher'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) Teacher and each of the trade customers who purchase Highland Cream for resale are undertakings within the meaning of Article 85 (1).

(b) The conditions of sale notified on 17 April 1974, endorsed on the standard form sales invoice used by Teacher, are evidence of the essential terms of the standard contracts of sale between Teacher and its trade customers. These contracts, of which the conditions of sale form an essential part, are agreements between undertakings within the meaning of Article 85 (1).

(c) The following provisions of the notified conditions of sale have as their object and effect the restriction of competition within the common market since August 1974:

(i) The prohibition on reselling, outside Great Britain, Highland Cream sold for delivery in Great Britain, such prohibition to be incorporated in all sub-sales, is aimed at preventing and does prevent the trade customers and their subsequent purchasers from reselling Highland Cream and competing in the common market countries other than the United Kingdom.

(ii) The prohibition on reselling under bond has as its object and effect the prevention of competition from trade customers with dealers in common market countries other than the United Kingdom. This arrangement indeed obliges trade customers to pay United

Kingdom excise duty before reselling Highland Cream. The resale price of this product in another common market country would thus include a high amount of United Kingdom excise duty, around four times the purchase price, which is not reimbursable. Excise duty has also to be paid in the particular EEC country where the product is consumed. Possibilities of any resale outside the United Kingdom are therefore ruled out. This prohibition amounts to an indirect export prohibition.

These direct and indirect export prohibitions are intended to protect distributors in Highland Cream in EEC countries other than the United Kingdom, who are supplied in bond directly by Teacher, from competition on the part of dealers purchasing this product in the United Kingdom.

(d) The two provisions of the notified conditions of sale appreciably restrict competition within the common market, contrary to Teacher's submissions based on its small market share on the whisky and spirits markets in EEC countries other than the United Kingdom.

The creation of obstacles to trade between Member States on the basis of export prohibitions of the type under consideration hinder the establishment of a single market among Member States and prevent actual and potential competition on the part of dealers affected by such prohibitions. Although the quantities of Highland Cream which are currently being sold in EEC countries other than the United Kingdom are small, the provisions in question impede potential exports of large quantities of the product in question on the part of numerous dealers in the United Kingdom.

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

These restrictions are also the more significant in view of the following considerations. In EEC countries other than the United Kingdom, Highland Cream is among the best selling brands of Scotch whisky with a market share which has continuously grown over the past few years. In addition, the provisions restrict the export trade of a branded product for which the primary level of competition is that among dealers in that brand and eliminate the main usual source of parallel imports and competition, namely, dealers in the country of the producer.

Concerning the position of the parties who are affected by Teacher's restrictive conditions, the export prohibitions prevent all 3 000 to 4 000 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 are willing and able to engage in export activities.

Also relevant is the importance of the commercial and financial position held by Teacher, whose turnover until 1976 was substantial. In 1976 Teacher was acquired by Allied Breweries Ltd, and is therefore now part of a group of considerable importance which is widely established also in Community countries other than the United Kingdom and accordingly could benefit from Allied Breweries' retail outlets, both in the United Kingdom and in other EEC countries.

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

(e) The direct and indirect export prohibitions contained in the conditions of sale are likely to affect trade between Member States.

The restrictions by their nature are likely to affect trade between Member States, since they prevent trade by trade customers from the United Kingdom to other EEC Member States. They cause an artificial partition of the common market and hinder the establishment of a single market among Member States. In this case, they have a direct and actual influence on the pattern of trade between Member States since they prevent exports by trade customers and their 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 provisions in question are capable of affecting trade within Member States to an appreciable extent.

The two provisions referred to above and contained in the notified conditions of sale applied by Teacher therefore amount to infringements of Article 85 (1) since August 1974.

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 equitable 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.

(a) In the notification of the conditions of sale on 17 April 1974, and in reply by letter of 29 August 1977 to the Commission's statement of objections of 12 July 1977, Teacher submitted that in order that consumers' interests are served by the availability of Highland Cream as an alternative product of quality, it is indispensable that Teacher should provide for orderly and rational marketing of its whisky in the United Kingdom and in the other EEC countries. Distributors in these countries, who with Teacher material and financial collaboration promote sales of that product, would refuse to deal with Teacher's whisky in the absence of a reasonable degree of security.

(b) However, the sales contracts, of which the provisions in question are an essential part, are not capable in themselves of directly achieving an improvement of distribution in the United Kingdom or in the other EEC countries. They simply concern sales to trade customers and conditions on which such sales are made, mainly that trade customers and subsequent purchasers may not resell outside the United Kingdom and trade in the other EEC countries.

The non-exportation provisions further deprive consumers in EEC countries other than the United Kingdom of an important source of supply of Scotch whisky, while the nature of the goods in question and their distribution requirements do not justify a complete isolation of the United Kingdom from the rest of the common market.

The notified conditions of sale do not therefore fulfil the conditions set out in Article 85 (3).

Accordingly, the request made by Teacher for an exemption under Article 85 (3) of the conditions of sale notified on 17 April 1974 is rejected.

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.

In view of the serious effect on competition within the common market resulting from the conditions of sale, Teacher should be required to terminate without delay the infringement constituted by the prohibitions to export and to resale in bond contained in these conditions of sale unless it has already done so. It should also be required to refrain from any further action by means of sales conditions calculated to restrict the exportation from the United Kingdom to other EEC countries of Highland Cream bought by trade customers,

HAS ADOPTED THIS DECISION :

Article 1

The prohibition to export from the United Kingdom to other EEC countries and the prohibition to resell in bond contained in the conditions of sale notified on 17 April 1974, which are part of the contracts for the sale of Highland Cream entered into by Wm. Teacher and Sons Ltd with its trade customers established in the United Kingdom, amount to infringements of Article 85 (1) of the Treaty establishing the European Economic Community since August 1974.

Article 2

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

Article 3

Wm. Teacher and Sons Ltd shall bring the infringement referred to in Article 1 hereof to an end without delay unless it has already done so and shall refrain from further action by means of sales conditions calculated to restrict the exportation from the United Kingdom to other EEC countries of Highland Cream bought by trade customers in the United Kingdom.

Article 4

This Decision is addressed to Wm. Teacher and Sons Ltd, St Enoch Square, Glasgow GL 4BZ, Scotland.

Done at Brussels, 28 July 1978.

For the Commission

Raymond VOUEL

Member of the Commission