COMMISSION DECISION

of 13 December 1985

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.570 etc. – Sole distribution agreements for whisky and gin)

(Only the English text is authentic)

(85/562/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty [1] as last amended by the Act of Accession of Greece, and in particular Articles 4, 6 and 8 thereof,

Having regard to the notification made by The Distillers Company plc, Edinburgh, United Kingdom, seeking exemption of several sole distribution agreements,

Having published a summary of the notification pursuant to Article 19 (3) of Regulation No 17 [2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

I. FACTS

A. The undertakings and the agreements

1. The Distillers Company plc, Edinburgh, the leading producer of spirits in the EEC, has notified on behalf of several subsidiaries 21 sole distribution agreements concluded between those subsidiaries and various companies in several Member States.

The product concerned is either whisky or gin.

2. The following agreements have been notified:

No.	Manufacturer	Sole Distributor	Territory	Product	Date of Notification	No of file
1	James Buchanan & Company Limited	Frans Verbunt & Co. BV	Netherlands	whisky	15. 2. 1982	IV/30.571
2	James Buchanan & Company Limited	Henkell & Co.	Germany	whisky	15. 2. 1982	IV/30.572
3	Bulloch Lade & Company Limited	Sarma Penney Limited	Belgium	whisky	15. 2. 1982	IV/30.574
4	John Dewar & Sons Limited	BV Im- en Export-maatschappij v/h Wilmerink & Muller	Netherlands	whisky	15. 2. 1982	IV/30.575
5	John Haig & Company Limited	SA Cinzano et Co.	Belgium and Luxembourg	whisky	15. 2. 1982 6. 12. 1982	IV/30.576
6	John Haig & Company Limited	De Danske Sprit-fabrikker	Denmark	whisky	15. 2. 1982	IV/30.577
7	John Haig & Company Limited	Pierre Rivière SA	France	whisky	15. 2. 1982	IV/30.578
8	W. P. Lowrie & Company Limited	J. A. Verbunt BV	Netherlands	whisky	15. 2. 1982	IV/30.579
9	Wm. Sanderson & Son Limited	Ets. Fourcroy SA	Belgium and Luxembourg	whisky	15. 2. 1982	IV/30.580
10	White Horse Distillers Ltd	Söhnlein Rheingold KG	Germany	whisky	22. 3. 1982	IV/30.612

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 190, 30. 7. 1985, p. 8.

No.	Manufacturer	Sole Distributor	Territory	Product	Date of Notification	No of file
11	Wm. Sanderson & Son Limited	Torben Anthon A/S	Denmark	whisky	6. 5. 1982	IV/30.646
12	The Distillers Agency Limited	Hans Just	Denmark	whisky	5. 5. 1982	IV/30.651
13	The Distillers Agency Limited	Taittinger SA	France	whisky	5. 5. 1982	IV/30.652
14	John Haig & Company Limited	Fratelli Averna SpA	Italy	whisky	22. 6. 1982	IV/30.692
15	J. & W. Hardie Limited	Fratelli Rinaldi SpA	Italy	whisky	27. 2. 1985	IV/31.489
16	Wm. Sanderson & Son Limited	Gio Buton & Co. SpA	Italy	whisky	11. 4. 1982	IV/30.933
17	Tanqueray, Gordon & Company Limited	Ets Fourcroy SA	Belgium and Luxembourg	gin	15. 2. 1982	IV/30.581
18	Booth's Distilleries Limited	Martini & Rossi AG	Germany	gin	15. 2. 1982	IV/30.570
19	Tanqueray, Gordon & Company Ltd	Frans Verbunt & Co. BV	Netherlands	gin	15. 2. 1982	IV/30.582
20	White Horse Distillers Ltd	Corima SA	France	whisky	15. 2. 1982	IV/30.585
21	White Horse Distillers Ltd	Gilbeys of Ireland	Ireland	whisky	15. 2. 1982	IV/30.586

3. All agreements are non-reciprocal and similar as to the restrictions they impose on both parties. The brand-owning company invests the respective sole distributor with the exclusive right to market the product concerned in the allocated area and undertakes not to sell the goods for resale to other persons in that territory. The sole distributors are obliged not to act as agent or distributor for other companies as to the product in question and must not solicit orders, advertise the goods or hold stocks of the goods outside the territory.

4. The agreements listed above were in force before 1 July 1983. They have been notified by the Distillers Company in view of Articles 3 and 4 of Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements [1], since it fears that the provisions contained in these Articles are likely to disentitle the parties to the benefit of the block exemption after 31 December 1986.

[1] OJ No L 173, 30. 6. 1983, p. 1.

B. The products and the market

5. The spirit industry is characterized by a large number of different product categories. The most important categories are [2]:

(i) Whisk(e)y, made from barley or rye or a mash of cereals and aged for three years or more, contains at least 40 % alcohol.

(ii) Wine spirits and brandies, distilled from grape wine and aged from two to eight years, contain at least 38 % alcohol; this category includes also grape marc or marc spirits [3].

[2] The following product classification is primarily based on the study 'Concentration, Competition and Competitiveness in the Beverages Industries of the European Community' submitted in 1984 by Christian Marfels on behalf of the Commission, p. 45. It also takes account of the classification submitted by the Commission in its proposal for a Council Regulation laying down general rules on the definitive description and preparation of spirituous beverages and of vermouths and other wines of fresh grapes flavoured with plants or other aromatic substances, OJ No C 189, 23. 7. 1982, p. 7.

[3] This category includes the spirituous beverages defined in Article 1 (2) (i), (j), (k), (l), of the proposed Council Regulation.

(iii) Liqueurs (or cordials), made by flavouring brandy and other spirits with fruits and leaves, have alcoholic strengths from 20 to 60 %.

(iv) Grain spirit, corn-brandy ('Korn'), made from grain, not aged and with no colour or particular flavour, contains at least 32 % alcohol. To this category also akvavit and vodka can be added (1).

(v) Juniper-flavoured spirituous beverages such as gin and genever contain at least 30 % alcohol.

(vi) Rum, made from the juice of sugar cane or molasses, contains at least 38 % alcohol.

(vii) Fruit spirits distilled from cherry, plum, mirabelle etc. (2)

6. Within each product category there is a large number of competing brands. This is particularly true for whisk(e)y, the most important category, where numerous leading spirit firms are actively competing on the market (3). Overall concentration in the spirit industry at the Community level can be classified as moderate, the top 10 companies accounting for 58 % of total net sales (4).

(1) See Article 1 (2) (c), (d), (f) and (h) of the proposed Council Regulation.
(2) Other categories exist for aniseed-flavoured spirits, cider or perry spirits, gentian spirits and advocaat, see Article 1 (2) (g), (n), (o) and (q) of the proposed Council Regulation.
(3) Marfels, *op. cit.*, p. 54.
(4) Data from 1980, Marfels, *op. cit.*, p. 54.

C. Facts related to Articles 3 and 4 of Regulation (EEC) No 1983/83

7. As to the application of these Articles, the following facts are of importance:

(a) Each party to the respective sole distribution agreements or the group (in the sense of Article 4 of Regulation (EEC) No 1983/83) to which it belongs attains a total annual turnover of more than 100 million ECU.

(b) In agreements 1 to 17 listed above the sole distributor or a member of the group to which it belongs produces spirituous beverages, but *not* of the same category (either whisk(e)y or juniper-flavoured spirits) as the product covered by the sole distribution agreement.

(c) In agreements 18 to 21 the sole distributor or a member of the group to which it belongs *does* produce a spirit of the category to which the sole distribution agreement refers, i.e. either whisk(e)y or a juniper-flavoured spirit.

8. As regards the agreements mentioned under (c) above, the aggregated market shares in the respective territories for the brands which are the subject of the exclusive agreements ('A') and the brands manufactured by the sole distributors or their groups ('B') (see the table below) are all lower than 5 %.

Notification No.	Product	Parties to the agreement	Territory	1. Brand(s) A 2. Brand(s) B
18	gin	Booth Martini Rossi	Germany	1. High & Dry 2. a) Bosford b) Fletan
19	gin	Tanqueray, Gordon & Co. Ltd Frans Verbunt & Co. BV	Netherlands	1. Gordon's Gin 2. Verhooven (Genever)
20	whisky	White Horse Corima SA	France	1. White Horse 2. Several brands of the Seagram group
21	whisky	White Horse Gilbeys of Ireland	Ireland	1. White Horse 2. Several brands of the Grand Metropolitan Hotel group

D. Comments from third parties

9. No comments were received from third parties in response to publication of a summary of the notified agreements in accordance with Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

10. The agreements to which this Decision refers have the object and effect of restricting competition in the common market. The manufacturer undertakes to supply the product for resale in the territory only to the sole distributor. The latter undertakes not to distribute goods which compete with the contract goods, to obtain the contract goods for resale only from the other party and to refrain outside the contract territory and in relation to the contract goods from seeking customers, from establishing any branch, and from maintaining any distribution depot. Since the parties to each agreement are located in different Member States, the agreements are likely to affect inter-state trade.

B. Regulation No 67/67/EEC

11. However, Article 85 (1) of the Treaty does not apply to the agreements until 31 December 1986, since they are still covered by Regulation No 67/67/EEC of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreement [1] until that date. Although that Regulation has been replaced by Regulation (EEC) No 1983/83 and (EEC) No 1984/83 [2] with effect from 1 July 1983, Article 7 and 15 (1) respectively of the new Regulations provide that from 1 July 1983 to 31 December 1986, Article 85 (1) of the Treaty shall not apply to agreements which were in force on 1 July 1983 and which satisfy the exemption conditions of Regulation No 67/67/EEC.

12. All the agreements listed above were already in force on 1 July 1983 and none contains any restriction which exceeds the limits set by Regulation No 67/67/EEC.

13. Notwithstanding this transition period, the parties have shown a legitimate legal interest in learning now whether the agreements will also be covered by the new Regulation or can be individually exempted from the application of Article 85 (1) after 31 December 1986.

(1) OJ No 57, 25. 3. 1967, p. 849/67.
(2) OJ No L 173, 30. 6. 1983, p. 5.

C. Regulation (EEC) No 1983/83

14. According to Article 3 (b) of Regulation (EEC) No 1983/83, the benefit of block exemption does not apply where 'manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into a non-reciprocal exclusive distribution agreement between themselves in respect of such goods unless at least one of them has a total annual turnover of no more than 100 million ECU'.

15. Article 4 (1) of that Regulation extends this provision to agreements where the goods in question are manufactured by an undertaking 'connected' (as defined in paragraph 2) with a party to the agreement. Finally, Article 5 (3) provides that for the purpose of calculating total turnover within the meaning of Article 3 (b), there shall be added together the turnovers achieved during the last financial year by the party to the agreement and connected undertakings in respect of all goods and services, excluding all taxes and other duties.

16. All parties to the agreements listed above achieve – alone or together with the undertakings connected with them – an annual turnover which exceeds 100 million ECU.

Agreements Nos 1 to 17

17. In agreements 1 to 17 Regulation (EEC) No 1983/83 applies, since the parties to the agreements are not to be considered as manufacturers of equivalent goods in the sense of Article 3 (b).

18. Article 3 (b) indicates that the question of equivalence between certain goods has to be judged from the point of view of the user and of their characteristics, price and intended use. In certain cases differences as to only one of those features can lead to the formation of separate product markets, especially where consumer preferences have developed [3].

19. Moreover, when defining the relevant market in application of Article 3 (b), account must be taken of the purpose of that provision in the context of the aim of the whole Regulation [4]. It follows in particular that the definition of the relevant market under this

(3) Commission notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements and exclusive purchasing agreements of 13 April 1984, OJ No C 101, p. 4, point 21.
(4) See point 2 of the Commission notice referred to above.

provision need not be the same as that used in other areas of Community law where different goals are to be achieved.

20. It is the purpose of Article 3 (b) to refuse the benefit of group exemption to agreements under which a manufacturer entrusts the distribution of his goods to another manufacturer of competing goods, because the requirements of Article 85 (3) of the Treaty might not then be fulfilled (1). It may be doubted whether a sole distributor would be sufficiently prepared to promote the sale of a certain product if he produces a competing product the market position of which might be weakened by such an effort. This conflict of interests could impede the stimulation of competition between products of different manufacturers which Regulation (EEC) No 1983/83 assumes normally to result from exclusive distributorship (see recital 6 of the preamble). It may also be imagined that such an agreement could involve an arrangement between the two manufacturers to maintain their respective market shares and not to intensify competition between them.

21. As has been shown above (see point 6), the overall market of spirituous beverages comprises a multitude of different product categories. The beverages in these categories differ as to their primary products, distillation and manufacturing process as well as in their typical flavour and intended use (aperitif, digestif, long drink basis, etc.), although certain categories might overlap to some extent in one or other of the above features.

22. As regards in particular the two sorts of spirits the above agreements refer to, one can define the relevant market in the sense of Article 3 (b) as follows:

23. Gin is derived from maize and flavoured with certain aromatics and spices, in particular with juniper. It usually serves as a basis for cocktails and long drinks. Gin belongs to the category of juniper-flavoured spirits which also includes 'Genever', 'Wacholder' and the like. Although spirits from that category and in particular gin might have some similarities with other 'clear spirits' like corn, akvavit and vodka, such as the clear colour and the degree of alcohol, the latter can not be regarded as interchangeable with the juniper-flavoured spirits, since they do not have such a typical and distinct flavour as gin and other juniper-flavoured spirits. Consequently, for the purpose of Article 3 (b) of Regulation (EEC) No 1983/83 the juniper-flavoured spirits form a separate sub-market within the overall spirit market.

24. Whisk(e)y is usually distilled from maize, barley or rye. The most important types of whisk(e)y, Scotch, Irish, Bourbon and Canadian, vary in certain respects but they have in common a cereal as primary product and the very typical flavour, irrespective of all differences arising from the type, specialities of the brands and the age of the whisk(e)y. These characteristics distinguish whisk(e)y from all other spirit categories, in particular from all kinds of wine spirits or brandies such as Cognac, Armagnac, Weinbrand etc., most of which are derived from wine and have themselves a very typical trend of flavour which can be clearly distinguished from the whisk(e)y flavour. As a result, for the purpose of Article 3 (b) of Regulation (EEC) No 1983/83 whisk(e)y, in all its varieties, forms a market of its own.

25. For these reasons, a consumer looking for whisk(e)y or gin will not readily buy a spirit from another category, if no product belonging to the desired category is available. Furthermore it is in particular in view of the above-described purpose of Article 3 (b) of Regulation (EEC) No 1983/83 that the definition of separate sub-markets within the overall spirits market in the EEC is justified, since the latter has a very fragmented character with a multitude of manufacturers competing on it. Individual brands have only minimal shares of this overall market. Therefore, it is not likely that a sole distributor which manufactures only spirits belonging to other categories would on that account lessen its endeavours to promote the product in question, nor is there any danger of market-sharing arrangements. Finally, the prohibition clause concerning the resale of competing products in each of the agreements in question only refers to the respective product, i.e. whisky or gin. This demonstrates that in the view of the parties themselves there is no competitive relationship to other categories of spirit.

26. It follows that the parties to the agreements listed under Nos 1 to 17 above are not to be considered as manufacturers of equivalent goods under Article 3 (b) of Regulation (EEC) No 1983/83. The Commission can therefore declare that this Regulation applies to those agreements after 31 December 1986. In view of the importance which, it is believed, the industry concerned will attach to the interpretation of Article 3 (b) of the said Regulation, the Commission has found it appropriate to make this declaration in Article 1 of the operative part hereunder in spite of the absence of any legal obligation to do so.

Agreements Nos 18 to 21

27. In cases 18 to 21 listed above, the parties to each sole distribution agreement are mutual competitors, since both manufacture alcoholic beverages in the category to which the sole distribution agreement refers.

(1) See recital 10 of the Regulation.

According to Article 3 (b), read together with Article 4, Regulation (EEC) No 1983/83 therefore does not apply.

D. Article 85 (3)

28. However, the sole distribution agreements listed above in Nos 18 to 21 can benefit from individual exemptions pursuant to Article 85 (3), since the requirements of that provision are fulfilled.

29. In view of the competitive situation on the markets for whisk(e)y and gin, a case-by-case examination as provided for in recital 10 of Regulation (EEC) No 1983/83 permits the conclusion that the sole distribution agreements in question will lead to adequate improvements in distribution, even taking into account the fact that a competing spirit is being produced by the sole distributor or another company of the group to which it belongs. The respective manufacturers are able to concentrate their sales efforts on one dealer, who is familiar with the economic and legal situation in his territory. This leads to a more intensive marketing of the products and to a rationalization in distribution, since the manufacturers are not compelled to maintain business relations with a large number of dealers. It can also be expected that the consumers in the territories concerned obtain a fair share of the resulting benefit in that their supply position is improved, as they can obtain products manufactured in other countries more quickly and more easily. As the restrictions do not exceed the limits set up by Regulation (EEC) No 1983/83 they can be regarded as indispensable to the attainment of the above improvements of distribution as explained in detail in recital 8 of that Regulation. Finally there is no risk of 'eliminating competition . . .', given the small size of the aggregated market shares of the undertakings in question, so that all the requirements of Article 85 (3) are fulfilled.

30. The Commission can therefore grant individual exemptions for the sole distribution agreements listed above under Nos 18 to 21.

E. Duration of the exemption

31. Pursuant to Article 8 (1) of Regulation No 17, a Commission Decision in application of Article 85 (3) of the Treaty shall be issued for a specified period. Since the agreements in question were in force on 1 July 1983 and satisfy the conditions of exemption of Regulation No 67/67/EEC, Article 85 (1) of the Treaty shall not apply to them until 31 December 1986 (Article 7 of Regulation (EEC) No 1983/83). Consequently, the individual exemptions granted by this Decision shall come into force only upon expiry of that period, namely on 1 January 1987. The restrictions contained in the agreements in question are not far-reaching. Furthermore, a significant change in the structure of the markets concerned is unlikely to occur in the near future. It therefore appears justified to grant individual exemptions for a period of 10 years, beginning on 1 January 1987,

HAS ADOPTED THIS DECISION:

Article 1

It is hereby declared that the agreements listed under Nos 1 to 17 above comply with Regulation (EEC) No 1983/83.

Article 2

Pursuant to Article 85 (3) the provisions of Article 85 (1) of the EEC Treaty are hereby declared inapplicable for the period 1 January 1987 to 31 December 1996 to the following sole distribution agreements (name of the parties, territory, date of agreement, product concerned):

1. Booth's Distilleries Ltd and Martini & Rossi AG, Germany, 19 August 1980, 'High & Dry' gin.

2. Tanqueray, Gordon & Company Ltd and Frans Verbunt & Co. BV, The Netherlands, 27 October 1981, six versions of 'Gordon's, gin.

3. White Horse Distillers Ltd and Corima SA, France, 3 March 1970, 'White Horse' and 'Logan' whiskies.

4. White Horse Distillers Ltd and Gilbeys of Ireland, Ireland, 29 April 1980, 'White Horse', 'Logan de Luxe', 'Glen Elgin' and 'Lagavulin' whiskies.

Article 3

This Decision is addressed to the following undertaking:

The Distillers Company plc
12, Torphichen Street
UK-Edinburgh EH3 84T
Scotland

Done at Brussels, 13 December 1985.

For the Commission
Peter SUTHERLAND
Member of the Commission