PRICE VARIATIONS: THE DISTILLERS CASE AND ARTICLE 85 EEC

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SHOR TER ARTI CLES, COMMENT S AND NOTES

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Few cases have attracted so much interest in the tabloid press as the recent decision of the EEC Commission concerning The Distillers Company.1 The Commission refused to grant an exemption under Article 85 (5) of the Treaty of Rome to the "Conditions of Sale and Price Terms" which Distillers imposed on its customers in contravention of Article 85 (1). As an immediate result of the decision, Distillers no longer offers for sale in the U.K. the Red Label and Dimple Haig brands of Scotch whisky.2 It would seem that British Scotch whisky drinkers are now worse off as a result of the decision. As Continental prices of the Distillers' whiskies have not changed as a result of the decision, it would also seem that Continental devotees are no better off. Distillers asserts that a drop in sales and profits has occurred. It is doubtful whether many, if any, have benefited as yet from this decision. The case deserves careful attention from those involved in selling consumer products which require substantial advertising or promotion throughout the EEC.

I. THE FACTS

In the U.K. Scotch whisky accounts for more than one-half of spirits sales and in Belgium for perhaps one-third, but on the rest of the Continent its share is less than 5 per cent.3 Distillers has a very substantial share of the U.K. and Continental Scotch whisky market, but its share of the EEC spirit market is probably quite small, notwithstanding its sales of gin, vodka and Pimm's.

Until this decision, Distillers marketed the same brands of Scotch in the U.K. as on the Continent. Red Label, its leading brand, was very popular throughout the EEC. In contrast, Distillers has not enjoyed such broadly based success in any one brand. Rather, some brands such as Teachers and Bells are very popular in the U.K. (selling Red Label); whereas others, such as J. & B., are popular on the Continent.

If one compares the prices, net of duty and tax, of Distillers' whisky between countries, it appears that whisky is more expensive on the Continent than in the U.K. These higher prices appear to be the result mainly of higher costs but, to a small extent, of higher profit margins. According to Distillers, most of the higher costs were the greater advertising expenditures directed at consumers and the larger promotional expenditures directed at the retailers.

The Continental distributors paid for local promotional and other

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2 Red Label and Dimple Haig are available to the U.K. trade for those wishing to order from the Continental distributors.
3 According to Distillers.
4 The Commission says they have 49-50 per cent. of the U.K. market for Scotch whisky, 70 per cent. of the U.K. gin market and 25 per cent. of the U.K. market for vodka.
5 The price difference between transportation costs, local VAT and duty was between £3 and £9 in a case of 12 standardised bottles.
6 This may not be illegal; see, for instance, Centrafarm B.V. v. American Home Products Corp. [1978] 2 C.M.L.R. 65.
greater than the costs of persuading them to stock one brand, then the
two brand strategy is clearly preferable. People from A will find brand X
everywhere and likewise people from B will find brand Y everywhere.
People from A will buy X because it is the only brand which is advertised
to them, even though it is more expensive than Y. People from B will
buy Y because they know it and because it is cheaper. However, if, as
is likely, the costs of persuading the retailers to stock both brands in
both countries is greater than the costs of persuading them to stock one
brand then the firm would prefer to offer only one brand in both
countries. To offer only one brand would be a "second best", for under
such an arrangement when travellers from A visit B they do not pay
for the cost of the advertising which induced them to buy the brand.
Likewise, travellers from B when in A pay much more for the advertising
(and so buy too little). The higher price pays for advertising which they
never see nor care about.

Should the decision of the Commission on the illegality of dual
pricing structures and export bans be upheld by the Court, then the
choice of strategies available to businessmen in the future will be
seriously limited in certain cases to their detriment. Moreover, firms
who have unfortunately chosen the single brand option may now have
to change to the two brand option. In doing this they will, like Distillers,
suffer from a substantial loss of market share and profits from with-
drawing a brand from one of the markets and replacing it with another.
Moreover, when changing brand strategies, if they cut off supplies to
a distributor they could be in danger of infringing Article 86 of the
Treaty of Rome. 8

III. PUBLIC POLICY AND THE CONSUMER INTEREST

Some people claim that advertising is purely wasteful. But anyone
attempting to buy a new or used car can testify to the saving of
time and effort and money caused by some advertising. 4 Adam Smith,
the greatest advocate of consumer welfare, spent much time defending
the middleman and justifying distribution expenses: low prices are of
little use to the consumer if the goods come in the wrong form, to
the wrong place or if their availability is not easily ascertainable.
This is not to say that all advertising or promotional expense is necessary any
more than all production expense. It is necessary, but rather I wish to
point out that society will not be better off by needless criticism and
rejection of the potential benefits from distribution expenses such as
advertising and salesmen. In its decision, the Commission seems to
have ignored the case put forward by Distillers that advertising and
other middleman expenses were necessarily greater on the Continent
than in the U.K. There is very strong evidence in support of the
Commission's finding that the result of its decision would be a uniform
price of Scotch whisky (in bond) throughout Europe. 9 The price in
the U.K. was thought to be too low and that on the Continent too high.
It is not difficult to see that a uniform price for whisky might have


10 According to Distillers, this is what the Commission appeared to expect them to do.

11 See, for instance, Re National Salphatic Acid Association’s Agreement (1963) L.R.R. 4 R.P. 169. There the court found that the restrictions in an agreement were not contrary to the public interest as it was required to counteract the U.S. export cartel “Sulox.”
12 A concept used to include a normal return on capital employed.

13 The five largest customers took 40 per cent. of the U.K. sales. The power of these customers is described in the U.K. Monopolies Commission: A Report on the Supply of Scotch Whisky (1969).
in the consumer interest, and even harder to justify to public policy makers as being good in practice.\textsuperscript{18}

VI. CONCLUSIONS

The decision is another example of the Commission's attempts to integrate the European market and to promote the consumer interest which in practice has created few benefits for the consumer in either the short or long run. In the light of the outcome of the case one is led to conclude that the Commission was misguided. Moreover the absence of reasoned argument has only served to increase the confusion among businessmen and increase the hostility between the business community and the Commission.

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THE REALISTIC APPROACH TO THE RECOGNITION OF FOREIGN DIVORCES

Newmarch v. Newmarch\textsuperscript{1} is an interesting decision by Rees J. on recognition of a foreign divorce decree and on the power of an English court to award maintenance. It raises points of law connected with two recent statutes, the Recognition of Divorces and Legal Separations Act 1971 and the Maintenance Orders (Reciprocal Enforcement) Act 1972. As yet these important statutes have provoked little reported case law; such as there has been is either uncontroversial or so briefly reported as to be practically valueless as precedent.\textsuperscript{12}

Mr. and Mrs. Newmarch were married in England in 1947. In 1968 they bought a house in Cardiff. Early in 1969 they went to live in Malaya, where the husband had acquired a job as a university lecturer. They did not sell their house in Cardiff. The wife did not like Malaya, so later in 1969 they moved to Australia. Being no happier there the wife got her husband to agree to her returning to England in June 1970. In December 1971 she returned to Australia to live with her husband, but by that time he was living with another woman and he refused to resume cohabitation with his wife. She returned to England and in March 1974 she applied to the Bournemouth County Court for maintenance under section 27(1)(a)(6) of the Matrimonial Causes Act 1973.\textsuperscript{2}

On July 16, 1974, a county court judge awarded her maintenance of £125 per month. On July 30, 1974, the husband began divorce proceedings in New South Wales. The wife was personally served with the petition and the form of notice on October 14, 1974, but despite repeated


\textsuperscript{18} I am grateful to Dr. V. Karsh for encouragement and helpful comments, and to The Distillers Company for supplying information. All opinions are the author's and all errors are his responsibility.

\textsuperscript{1} [1971] 1 A.E.R. 1; [1977] 4 Fam. Law 143; [1977] 3 W.L.R. 832. The fullest account of the facts is to be found in the W.L.R.


\textsuperscript{4} s. 27(1)(a)(6) provides: "Either party to a marriage may apply to the court for an order under this section on the ground that the other party to the marriage . . . being the husband, has wilfully neglected . . . to provide reasonable maintenance for the applicant."