

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 May 1991

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/32186 Gosme/Martell — DMP)

(Only the French text is authentic)

(91/335/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas :

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 EEC Treaty⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Article 15 (2) thereof,

Having regard to the application submitted by Vincent Gosme SA on 25 November 1986 pursuant to Article 3 (1) of Regulation No 17,

Having regard to the Commission Decision of 26 April 1989 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17⁽²⁾,

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

I. THE FACTS

A. Introduction

- (1) In its application dated 25 November 1986, Vincent Gosme SA (Gosme) states that it has regularly purchased Martell cognac from Distribution Martell Piper SA (DMP) for a number of years. In 1986 and again in 1987, Gosme ordered bottles of cognac which were not supplied within the time requested. Gosme also complains that DMP has refused to grant it the discounts to which it considers it is entitled as a wholesale distributor.

B. The parties

- (2) Gosme, a company incorporated under French law, is involved in the wholesale distribution of food-stuffs, wines and spirits in the region of Nogent-le-Rotrou in France. When the opportunity arises, Gosme supplies customers outside that region and in other Community countries.
- (3) Martell and Co. (Martell) produces cognac under the Martell trade mark and is the second largest producer of cognac. Martell is a company registered under French law and was taken over by the Canadian group Seagram.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

- (4) DMP, a company governed by French law, is a joint subsidiary of Martell and Piper-Heidsieck. It started operating in 1979 and ceased all commercial activity in September 1988, although it was not dissolved. The object of the company was to market and distribute wines and spirits in France and Monaco. Under Article 6 of its articles of association, each parent company held 50 % of the capital, i.e. 12 375 shares at FF 100 each. Under Article 17 of the articles of association, half of the members of the supervisory board must be drawn from the Martell shareholders and half from the Piper-Heidsieck shareholders. Under Article 21 (4) the chairman of the meeting has a casting vote in the event of a tie. The chairman and the vice-chairman of the supervisory board are elected by the board, and under Article 20 (1) of the articles of association, if the chairman holds shares that form part of Martell's shareholding, then the vice-chairman has to be elected from members of the board holding shares belonging to Piper-Heidsieck and vice versa. Members of the board of directors are appointed by the supervisory board (Article 12 of the articles of association). Profits are distributed in accordance with the decision of the ordinary general shareholders meeting (Article 30).

group rebates. Martell and Piper products were sold on the same invoice and subject to the same conditions of sale.

Piper and Martell retained responsibility for major commercial and advertising policy in respect of their own products and brands. They were also directly responsible for the media and public relations budgets. Article VI (5) of the distribution contract between Martell and DMP provides that :

'... Martell shall define marketing policy for its brand and all means used at consumer level having a direct effect on awareness of the brands ...'

DMP had its own sales force and negotiated sales terms with the buying syndicates. Martell was not involved in DMP's dealings with the latter's French customers.

C. The product

- (5) At the time of the events in question, DMP was marketing Martell cognac, Janneau armagnac, Piper-Heidsieck champagne and certain brands of whisky, port, vodka and rum not owned by the parent companies. DMP had concluded an exclusive distribution contract with Martell. The brands distributed by DMP were the subject of a special supply and invoicing system, tied promotions and
- (6) The product in question is Martell cognac. Martell is the second largest producer of cognac and has a worldwide reputation, selling some 25 million bottles a year, of which 3 % in France and 97 % on the export markets.
- (7) There are significant differences between the prices invoiced to agents and distributors in France and those charged in other Community countries. According to data supplied by Martell, prices in 1987 were as follows :

(box of 12 one-litre bottles)

	France	Germany	Netherlands	Belgium	Italy
1. Cognac Martell VS in FF					
— Gross agent price ⁽¹⁾	[...] ⁽²⁾	[...]	[...]	[...]	[...]
— Net agent price ⁽³⁾	[...]	[...]	[...]	[...]	[...]
2. Cognac Martell VSOP in FF					
— Gross agent price	[...]	[...]	[...]	[...]	[...]
— Net agent price	[...]	[...]	[...]	[...]	[...]

⁽¹⁾ Gross agent price : before deductions, rebates and discounts.

⁽²⁾ In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

⁽³⁾ Net agent price : after deductions, rebates and discounts.

Thus, in 1987, prices charged to distributors in Italy were 25 % higher than those charged to a similar distributor in France.

D. Distribution of Martell cognac

(a) In France

- (8) Martell had concluded an exclusive distribution contract for France with DMP. Article III of the agreement stipulates that:

'The activity of the licensee shall be limited solely to the sector composed of mainland France and the Principality of Monaco which shall be known as the territory.'

- (9) Martell agreed not to distribute directly itself within the territory (Article III (2)). According to Article VI:

'The licensor shall undertake to:

1. forward immediately to the licensee all orders received or requests for prices.'

- (10) DMP negotiates terms of sale with buying syndicates acting on behalf of wholesalers. Thus DMP concluded agreements with Socadip, a buying syndicate in France. Gosme is indirectly a member of Socadip since it is a member of the Copauquest syndicate which is in turn a member of the Hyper-gros syndicate. The latter is a member of the Socadip syndicate. Socadip thus negotiated with DMP on behalf of wholesalers such as Gosme through these commercial channels, these commercial relationships not forming part of the present decision.

- (11) Socadip negotiated a number of rebates and discounts, as follows:

1. automatic discount [...] % : because Gosme is a member of Socadip, it receives a [...] % discount on all orders placed with DMP. The discount is deducted from the invoice;
2. warehouse discount [...] % : a further discount which is deducted from the invoice. It is given if wholesalers order [...] bottles, take delivery of [...] bottles at a time and store them on their premises;
3. quantity discount : this discount is additional to the two preceding ones and is calculated on the basis of x francs a bottle and not as a percentage;
4. removal discount : if the wholesaler removes the goods from Martell's premises, a further discount of [...] centimes a bottle is given;

5. promotional discount : in addition to the permanent discounts described above, wholesalers may from time to time be granted a 'promotional' discount; if they order or take delivery between two predetermined dates, they receive a discount of x francs a bottle;

6. display discount : this is a specific action arranged by the wholesaler with a retailer. The product is displayed to attract the attention of customers. This facility is sold by the shop to the wholesaler. The latter subsequently invoices the supplier for the cost of the operation. This discount is not therefore included on the invoice but is billed separately;

7. catalogue : each year Gosme produces a catalogue of its products. DMP pays a certain lump sum in order to be included in the catalogue;

8. rebates : in addition to these discounts, DMP gives Socadip four types of rebates a year :

- a [...] % rebate if the buying syndicate achieves a certain turnover;
- a [...] % rebate if orders are grouped;
- a graduated rebate on turnover showing an increase;
- a rebate on product ranges : the more a wholesaler purchases of a specific brand, the larger the rebate.

The amount of these rebates is calculated at the end of the year and is paid to the syndicate which in turn distributes it to the various wholesalers.

(b) In Italy

- (12) The Italian company Wax e Vitale was the sole distributor for Martell in Italy at the relevant time. Article 7 of the distribution contract — which does not fall under the present Decision — provided that Martell could sell direct in Italy on a passive basis with the prior agreement of Wax e Vitale and provided it paid the distributor a 10 % commission.

E. Parallel trade

- (13) The difference in price of over 25 % described in recital (7) explains the existence of parallel trading, which is particularly prevalent in Italy. Martell monitors the Italian market by sending employees on the spot to report on commercial trends in all the regions visited. The reports show that Martell employees make every effort to identify the sources of goods arriving on the market. In most cases bottles are shipped through San Marino. In the

minutes of a meeting held in Genoa on 7 July 1986 between Wax e Vitale and Martell representatives, the latter state that they had found cartons in Italy coming from San Marino and resold in Italy at prices which were Lit 2 000 to 3 000 a bottle cheaper than the usual market price. It is clear that Martell was concerned by the existence of this parallel trade and the difference between prices in France and in other Community countries. Its concern was also shared by all the cognac producers.

F. Barriers to export

- (14) Gosme occasionally exported Martell cognac to Italy. The following orders in particular are relevant:

Date	Quantity of bottles	Delivery
April to June 1986	3 900	11 July 1986 late
4 September 1986	4 896	late
January to February 1987	3 360	
November 1987	1 800	

(a) Discounts

- (15) On 11 September 1986, DMP sent a telex to Gosme querying the destination of the consignments. Gosme replied on the same day by telex that the goods were intended for a Community country. On 15 September 1986, DMP sent a telex to Martell stating that:

'Consequently, any deliveries we may make to them will not benefit from any of the discounts provided for in the Socadip and Hypergros agreements. Furthermore, no promotions will be applied.'

An undated internal memo by DMP also suggests withdrawing from Gosme the benefit of discounts and invoicing it strictly on the basis of the '[...]' bottles rate.

- (16) These proposals were put into practice. The following table summarizes the measures taken.

Date	Quantity of bottles	Discount granted
March 1986	4 200	None ⁽¹⁾
April to June 1986	3 900	None ⁽¹⁾
4 September 1986	4 896	None ⁽¹⁾
January to February 1987	3 360	None ⁽¹⁾
November 1987	1 800	discounts given ⁽²⁾

⁽¹⁾ Gosme was not given:

1. the [...] % invoice discount — membership discount;
2. the [...] % warehouse discount;
3. the [...] centimes discount corresponding to the quantity ordered.

⁽²⁾ Gosme was given:

1. the [...] % invoice discount — membership discount;
2. the [...] % warehouse discount;
3. the promotional discount of FF [...] a bottle;
4. the quantity discount of [...] centimes.

- (17) According to the information in the Commission's possession, it is clear that DMP's policy concerning discounts changed in November 1987, which was when the Commission first approached Martell. From that time onwards, Gosme was given the discounts it had been refused until then, and it can be concluded that the infringements ceased as from that date.

- (18) In the course of the administrative procedure, DMP claimed that its refusal to grant discounts for exports was justified because exports by Gosme were not covered by the agreement with the buying syndicates and did not provide any real or identifiable service justifying remuneration in the form of discounts. At the hearing which took place subsequently, DMP stated that the agreement with the syndicates prohibited deliveries to persons not members of the buying syndicate. However, there are no provisions in the agreements which support this statement. Furthermore, DMP acknowledged at the hearings that deliveries to non-member customers had taken place in France. In any event, the conclusions reached by the Commission are borne out by the fact that, as from November 1987, following the first intervention by the Commission, DMP began to grant the discounts refused until then.

- (19) In the course of the procedure, DMP and Martell also maintained that their discount policy should be analysed in the context of the price freeze and price controls in force in France at that time. It seemed that prices in France were kept at abnormally high levels. Yet there was no question in the relationship between Gosme and DMP at the time

of raising prices. The only differences of opinion concerned the granting of discounts, i.e. a reduction in purchase prices compared with the prices indicated in DMP's list prices. In any case, the price freeze was no longer in force in 1987.

'Arguments which led Martell to request its distributor in France, DMP, to increase all its distribution prices :

1. the surge in the number of orders from major French distributors intended for export, in the VSOP or superior quality ranges. Martell has distributors under contract in nearly all the common market countries. The contracts provide for exclusive distribution, they were notified to the Commission and Martell is under an obligation to observe the terms of the contracts...

2. Martell has therefore asked DMP to increase its tariffs on the French market.'

The memo makes it clear that Martell is concerned at the increase in parallel trading due to the more favourable prices in France than elsewhere. Martell sought in particular to protect the territorial exclusivity of its distributors by requesting DMP to increase prices. The collaboration between Martell and DMP extended to the coding of bottles.

(25) A note from Martell to DMP dated 31 March 1987 also reflects their collusion :

'As regards the Cognac Martell invoices of 13 February and 10 March 1987 relating to large quantities for export to which only the quantity discount for [...] bottles must be applied, the whole of the credit note drawn up by Vincent Gosme must be refused.'

The note also shows that DMP and Martell colluded on the measures to be taken in respect of Gosme in order to discourage parallel exports.

(26) In the course of the administrative procedure, DMP and Martell claimed that the exchanges which took place between them were simply the result of normal relations between a parent company and its subsidiary, the latter also sharing certain services with the parent company. On the other hand, in its correspondence with the Commission, DMP has always emphasized its independence from Martell and stressed the danger of treating the two companies as one. According to the information available to the Commission, the collusion went further than an exchange of notes between common services. This is true in particular of the telex message dated 15 September 1986 referred to in recital (15) which relates to a telephone conversation between DMP and a director-general of Martell who had no connection with DMP.

(20) Lastly, DMP and Martell claimed in the course of the administrative procedure that Gosme could have sold Martell products in Italy at a profit without the benefit of discounts in view of the considerable difference in prices in France and Italy. In any event, the refusal to grant discounts for exports makes the operation less attractive for the exporter. Gosme itself claimed that exports were not viable without discounts.

(21) Gosme, however, paid the invoices in different ways. Gosme paid for its March 1986 order for 4 200 bottles in full, reserving its rights, and sent an invoice for the discounts stating that they could be deducted from subsequent invoices. The other orders were paid by promissory note after deduction of the amounts representing the discounts withdrawn. On each occasion, however, Gosme issued a credit note in DMP's favour for the amount in question. Thus Gosme did not refuse to pay the sums due in the form of the abolished discounts, but disputed whether they could be claimed.

(22) The dispute was taken to the French commercial courts, first for an interim order, then on the merits of the case. The parties reached a compromise on 31 March 1989 after submission of an expert's report complying with the requirements of French law. Under the settlement, Gosme withdrew its complaint before the Tribunal de Commerce of Paris and DMP abandoned any counterclaims and paid a sum of money to Gosme in settlement of the dispute. In addition, Gosme submitted an application to the Commission on 25 November 1986.

(b) *Agreements and collusion between DMP and Martell in connection with parallel trading*

(23) The telex message dated 15 September 1986 referred to in recital (15) shows that DMP and Martell colluded on the measures to be taken in the event of parallel export.

(24) An internal memo from Martell to DMP sent by telefax on 28 March 1984 concerning the French market states :

(c) Coding of bottles

- (27) An internal memo from DMP to its president dated 20 March 1987 indicates that DMP was considering coding its bottles. Only Martell could undertake this operation during the manufacturing and delivery procedures. DMP considered asking Martell to code the bottles. The Commission cannot, however, provide any conclusive proof that the bottles sold to Gosme were actually coded.

(d) Export ban clause

- (28) The invoices issued by DMP contained an export prohibition clause :

'All persons directly or indirectly purchasing goods forming the subject of this delivery shall refrain from exporting such goods.'

This clause was included on all invoices from the creation of DMP in 1979 to the end of 1987, when DMP effectively removed it.

- DMP also distributed brands not belonging to its parent companies,
- Martell and Piper-Heidsieck products were invoiced to wholesalers on the same document,
- DMP had its own sales force and it alone concluded the conditions of sale with the buying syndicates in France.

Moreover, neither DMP nor Martell have contested the view that they constitute independent companies. In fact, quite the contrary as they wrote to the Commission to underline this independence.

- (31) The agreement between DMP and Martell which is prohibited by Article 85 (1) consisted in the cooperation established between the two companies in order to identify and prevent parallel exports. The cooperation took the form described in recitals 23 to 26 above, in particular :

- requesting price increases to prevent parallel exports,
- eliminating discounts in the event of export.

- (32) It is clear that an agreement between two undertakings which makes exports more expensive and less profitable is contrary to Article 85 (1) since the object and effect of such an agreement is to protect a higher price level in the countries of destination. The same is true of agreements between two parties which discourage a third party from exporting since the agreement has the same object or effect. It is not relevant that the exports are not formally prohibited by the agreement but are simply made less profitable.

II. LEGAL ASSESSMENT

A. Article 85 (1)

- (29) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices 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.

1. Restrictive agreements between undertakings

(a) Agreement between Martell and DMP

- (30) DMP and Martell are independent undertakings within the meaning of Article 85 (1). At the relevant time, Martell was not in a position to control the commercial activity of DMP because :

- the parent companies each held 50 % of the capital of DMP and the voting rights,
- half the supervisory board members represented Martell shareholders and half Piper-Heidsieck shareholders,

(b) The participation of Gosme

- (33) Gosme paid the invoices, either in full accompanied by a bill for the abolished discounts, or by promissory note accompanied by a credit note in favour of DMP. To this extent, Gosme, even whilst reserving its rights, participated in the agreement within the meaning of Article 85 (1) even though it may seem to be against its own interests.
- (34) It would be contrary to Article 85 (1) to abolish discounts and rebates only if they were withheld because no service was provided in exchange in cases of export.

The withholding of the following automatic discounts deducted from the invoices may be deemed contrary to Article 85 (1) :

1. automatic discount of [...] %;
2. warehouse discount of [...] % if the wholesaler takes delivery of the goods prior to reconsignment;
3. quantity discount;
4. removal discount when wholesalers fetch the goods themselves;
5. promotion discount when wholesalers order goods within a stipulated period.

The abolition of discounts for turnover showing a gradual increase for grouped orders and 'product range' orders also appear to be contrary to Article 85 (1). On the other hand, the abolition of the 'display' discount is justified as it constitutes payment for a specific promotional act. The abolition of the discounts and rebates described above has the object and effect of restricting competition in the common market. The restriction of competition clearly derives from the efforts made by Martell and DMP to discover the sources and networks of parallel trading in Italy and had the object and effect of protecting a higher price level than in the country of origin of the goods. The parallel trade in question was in direct competition with the exclusive distributor for the Italian market, Wax e Vitale, a market on which prices were higher than those in France.

(c) The clause banning exports

- (35) Up to December 1987, the invoices issued by DMP contained a clause banning exports in the Community. It prohibited direct and indirect sales to other Member States. In its judgment of 11 January 1990 ⁽¹⁾, the Court of Justice ruled that a clause prohibiting exports, systematically included on all invoices, had the object or effect of preventing, restricting and distorting competition within the common market. The Court added that the fact that a party had taken no steps to enforce observance of the clause by its customers was not sufficient to exempt the invoice clause prohibiting exports from the prohibition in Article 85 (1) of the EEC Treaty.

2. Effect on trade between Member States

- (36) Any prohibition on exports is inherently liable to affect trade between Member States. The object of

such a stipulation is to prevent trade between Member States or to restrict it to the channels chosen by the undertaking imposing the ban.

- (37) Furthermore, any practice or agreement directly or indirectly discouraging exports or making them less profitable is liable to affect trade between Member States. This applies, in the case in point, to trade between France and Italy.

- (38) In view of the fact that Martell is a relatively large undertaking, and in the light of its reputation both in Italy and in all the Member States and the volume of its transactions, the restrictions of competition are substantial. The extent of the parallel trade is demonstrated by the efforts of Martell and DMP to put a stop to it.

B. Article 85 (3)

- (39) The exclusive distribution agreement concluded between DMP and Martell does not qualify for the block exemption provided for in Commission Regulation No 1983/83 ⁽²⁾. Pursuant to Article 3 (d), agreements may not be exempted where:

'one or both of the parties makes it difficult for intermediaries or users to obtain the contract goods from other dealers inside the common market'.

- (40) The agreements examined above cannot qualify for individual exemption pursuant to Article 85 (3) since they were not notified to the Commission and do not, as regards agreements preventing exports, form part of the category of agreements which need not be notified to the Commission pursuant to Article 4 (2) of Regulation No 17. Furthermore, the agreements do not satisfy the conditions for exemption set out in Article 85 (3). In particular, the export bans in question are not likely to contribute to improving distribution.

C. Fines

- (41) Pursuant to Article 15 of Regulation No 17, infringements of Article 85 may be sanctioned by fines of up to ECU 1 million or 10 % of the turnover of the undertakings in the preceding business year, whichever is the greater. It is necessary to take all the relevant factors into account in assessing the

⁽¹⁾ Case C-277/87, *Sandoz Prodotti Farmaceutici SpA v. Commission*, [1990] ECR 45.

⁽²⁾ OJ No L 173, 30. 6. 1983, p. 1.

gravity of the infringements, their duration and the behaviour of the undertakings during the administrative procedure. The information in the Commission's possession shows that DMP and Martell acted jointly to withhold discounts, thus erecting a barrier to exports which lasted from April 1986 to the end of 1987. All the infringements ceased at the end of 1987.

- (42) A fine should be imposed on Martell since the collusion with DMP primarily benefited Martell. By partitioning the markets of various Member States, Martell can sell the same products in certain countries such as Italy at higher prices than those charged in other countries such as France. The amount of the fine should also take account of the fact that this type of partitioning is particularly serious and liable to jeopardize the achievement of the single market.
- (43) A fine should be imposed on DMP for having printed a clause prohibiting exports on its invoices issued in France. In its defence, however, it is acknowledged that as soon as DMP's attention was drawn to the clause, it took the necessary steps to remove it from the invoices issued. Another fact in favour of DMP is that the benefits of the market-partitioning policy did not fall to it but rather to Martell.
- (44) A fine should also be imposed on DMP in respect of the agreements concluded with Gosme on sales without certain discounts. The fine should be imposed on DMP alone as the agreements which were contrary to the interests of Gosme were concluded on its own initiative. In its favour, however, is the fact that it put an end to the infringements in 1987 following the Commission's first intervention, whilst the advantages of the market-partitioning policy were not enjoyed by it but by Martell,

HAS ADOPTED THIS DECISION:

Article 1

DMP and Martell have infringed Article 85 (1) of the EEC Treaty by pursuing practices which consisted in:

1. the concluding of an agreement between DMP and Martell to discourage parallel exports by refusing to grant discounts in the event of export;
2. the withholding, within the framework of agreements between DMP and Gosme, and with the approval of

Martell, of discounts and rebates in the event of export;

3. the incorporation by DMP of a clause prohibiting exports in its invoices issued to wholesalers.

Article 2

A fine of ECU 300 000 is hereby imposed on Martell for the infringements described in Article 1 (1) and (2).

Article 3

A fine of ECU 50 000 is hereby imposed on DMP for the infringements described in Article 1.

Article 4

The fines shall be paid to account:

No 310-0933000-43,
Banque Bruxelles Lambert,
Agence Européenne,
Rond Point Schuman 5,
B-1040 Bruxelles,

within three months from the date of notification of this Decision.

On expiry of that period interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 13,5 %.

Article 5

This Decision is addressed to Distribution Martell Piper SA, BP 21, F-16101 Cognac Cedex and to Martell et Cie SA, BP 21, F-16101 Cognac Cedex.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 15 May 1991.

For the Commission

Leon BRITTAN

Vice-President