OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 22 NOVEMBER 1978 [1]

Mr President,
Members of the Court,

The four procedures for obtaining a preliminary ruling in which I must give my opinion today concern selective distribution systems practised by four French perfume manufacturers involved in criminal proceedings before the Tribunal de Grande Instance, Paris, and also apparently practised by most well-known manufacturers in this sector.

The present form of these systems may briefly be described as follows:

In France, the country of manufacture, if the manufacturer has no dealers of its own, the goods are distributed, bypassing wholesalers, through specific retailers, selected by the manufacturer in accordance with qualitative criteria (location and fittings of the shops and qualified staff) and in accordance with quantitative criteria, in which connexion the purchasing power of the population of a specific area is of importance. In other Member States, if there are no subsidiary companies the goods are distributed through exclusive distributors who are in each case appointed for one country. In their turn the exclusive distributors, just like the manufacturers in France and apparently using standard agreements drawn up by the manufacturers, select specific retailers in accordance with qualitative and quantitative criteria and deliver supplies only to them or to retailers who form part of the distribution system in other Member States. The authorized retailers may only deliver supplies to final consumers or other sales points expressly authorized to distribute.

These distribution systems, which originally contained other elements with which it will be necessary to deal below, were notified to the Commission on various dates; as a result the Commission attempted to work out a general solution for the whole sector (see its Fourth Report on Competition Policy, Nos 35 and 97 and its Fifth Report on Competition Policy, Nos 57, 58 and 59).

The following details must be stated as regards the procedure before the Commission:

On 31 January 1963 *Guerlain S.A.* notified a standard agreement applicable to distribution in France and also the agreements entered into with the general representatives in the other Member States at the time; in addition it notified on 20 June 1973 the agreements entered into with the general representatives in the United Kingdom and Denmark.

On 30 January 1963 *Parfums Rochas S.A.* notified to the Commission two standard agreements, one for distribution in France and one for the general representatives in the other Member States at the time; in addition it notified on 29 June 1973 a standard agreement intended for the general representatives in Ireland and Denmark and agreements which the English subsidiary had entered into with authorized retailers, and finally on 14 September 1973 a standard agreement which the Danish general representative had fixed for retailers in that country.

On 30 January 1963 *Lanvin S.A.* notified to the Commission the agreements entered into with the general representatives in the other Member States at the

1 — Translated from the German.

time and on 31 January 1963 it notified a standard agreement intended for distribution in France.

Nina Ricci S.à r.l., finally, notified to the Commission on 31 January 1963 a standard agreement for distribution in France and also the agreements entered into with the Belgian, Netherlands and German general representatives; in addition, on 12 September 1972 it notified an agreement entered into with an Italian undertaking, and, finally, on 3 August 1973 the agreements entered into with the general representatives in the United Kingdom, Ireland and Denmark.

If they were not duly notified, the Commission was informed, during the administrative procedure which it carried out, of the agreements which the general representatives or subsidiaries had entered into in the various Member States with specific retailers.

The majority of the distribution systems practised in the perfume industry, including those of the companies involved in the main actions in these proceedings, contained clauses which the Commission regarded as incompatible with Article 85 (1) of the EEC Treaty. These were on the one hand the undertaking by retailers only to deliver supplies to final consumers, which was, according to the Commission, an indirect export ban, in addition, the undertaking by retailers only to purchase from the general representative in their country, or, in France, only from the manufacturer, which was considered to be an indirect import ban, and finally the undertaking by retailers to abide by imposed prices if the goods were re-imported or re-exported.

For this reason the Commission initiated on 27 April 1972 a procedure against three undertakings which had notified such a distribution system, Rochas, Dior and Lancôme. Within the context of that procedure a notice of complaints was delivered on 24 July 1972, followed by a hearing; an additional notice of complaints was delivered to Rochas on 25 May 1973, followed by another hearing. After this, the Commission reached the view that there was no need for it to take action under Article 85 (1) if all direct or indirect export or import bans and the undertaking by retailers to abide by the imposed prices when the goods were re-imported or re-exported were removed from the distribution system. This was evidently accepted on 17 September 1974 by the Comité de Liaison des Syndicats Européens de la Parfumerie, a federation to which the national associations of perfume manufacturers belong; it was assumed that this solution would apply to all undertakings in that sector. The three undertakings against which a procedure had been initiated therefore stated that they were prepared to alter their distribution systems accordingly. As a result they were informed by the Commission that following this it could no longer see any reason to take action under Article 85 (1). When the procedures against the three above-mentioned perfume undertakings had been terminated the Commission published on 24 December 1974 a press release according to which the principles and criteria which should apply in the appraisal of similar distribution systems in this field could be deduced from the Commission's attitude in the three above-mentioned cases. The Commission's Fourth Report on Competition Policy published in April 1975 contained a corresponding statement. It may be deduced from this that the Commission, in view of the

structure of the market — the large number of competing undertakings and the small market shares held by the individual undertakings — and provided that the restrictions which caused a disturbance of the market were lifted, saw no reason to take action under Article 85 (1) against the selective distribution systems in the perfume industry.

Accordingly the Commission also requested the other undertakings to remove clauses restricting trade or clauses having a similar effect. When this had been done and the Commission had been informed of it, the undertakings concerned received letters stating that their distribution systems were in harmony with competition law and that there was no reason to initiate a procedure against them under Article 85 (1). Such a letter was sent to the Guerlain company on 28 October 1975. In addition, after it had informed the Commission of a corresponding agreement of 1 September 1976, this company received the information, dated 13 September 1976, that the sales organization existing in Belgium, the Netherlands and Luxembourg could be regarded as satisfactory as regards the competition rules contained in the EEC Treaty. Letters such as that sent to Guerlain on 28 October 1975 were also sent to Rochas on 26 March 1976 and to Lanvin on 23 September 1976. In the case of Nina Ricci it was stated first of all in a letter of 16 March 1976 that the agreements intended for the German retailers should be regarded as satisfactory as regards Community competition law. Similar statements were made on 7 February 1977 in the case of the Italian and Netherlands retail agreements, on 6 April 1977 in the case of the Danish exclusive dealing agreement and the French retail agreements and on 5 August 1977 in the case of the agreements with the general representatives in Belgium, Luxembourg, the United Kingdom and Ireland. Finally, Nina Ricci received a letter on 20 January 1978 the wording of which corresponds *grosso modo* to the letter sent to Guerlain on 28 October 1975.

For the purpose of the main actions the distribution systems thus viewed by the Commission are relevant for the following reasons:

— The plaintiffs claiming damages in the first case, which led to the reference for a preliminary ruling in Case 253/78, own three perfumeries in Aix-en-Provence. They have long been attempting to obtain Guerlain's products for sale. The sales director of Guerlain S.A., the accused in the main action, refused this and in particular refused to fill an order of June 1975, pointing out that a distributorship agreement already existed with another perfumer in Aix-en-Provence. Since this may constitute a refusal to sell (*refus de vente*) which is a criminal offence under Article 37 of the French Order No 1483 of 30 June 1945 in the version of the Decree of 24 June 1958 and according to the provisions of Order No 1484 of 30 June 1945, criminal proceedings were brought against the above-mentioned sales director at the request of the persons who had placed the orders. In an action claiming damages in criminal proceedings in connexion with this it was claimed in addition that the court should order Guerlain S.A. and its sales director, jointly liable, to pay damages.

— One of the plaintiffs claiming damages in the two connected cases which gave rise to the reference for a preliminary ruling in Case 1/79 is the proprietor of a perfumery in Strasbourg. She attempted without success to obtain authorization to distribute Rochas products. Since that company refused in the period between March 1973 and February 1976 to fill orders, pointing out that distribution agreements existed with six other perfumeries in Strasbourg, she laid an information against the sales director of Rochas and in the criminal proceedings brought as a result she claimed in addition that the court should order him and Parfums Rochas, jointly liable, to pay damages.

The plaintiff claiming damages in the other case of interest in this connexion is the proprietor of a perfumery in Toulon. Her orders were also refused, pointing out distributorship agreements entered into by Rochas with five other dealers in Toulon. In this case however criminal proceedings were not brought in the end; the claim for damages put forward at first in the action claiming damages in criminal proceedings was later withdrawn.

— In two further cases pending before the Tribunal de Grande Instance, Paris, the above-mentioned proprietor of a perfumery in Strasbourg is once again the plaintiff claiming damages. In the first case the essential point is that the managing director of Lanvin refused in the period from November 1972 to June 1975 to fill orders from the plaintiff claiming damages on the ground that distributorship agreements had already been entered into with eleven other perfumeries in Strasbourg. In the second case the matter at issue is that in the period from February 1973 to June 1975 the sales director of Nina Ricci rejected orders on the ground that distributorship agreements already existed with eleven other perfumeries in Strasbourg, some of whose shops were in the vicinity of the plaintiff claiming damages. In these two cases also criminal proceedings were brought and claims for damages lodged along the lines of the other cases.

In all these cases the accused or defendants claimed in their defence that the Commission of the European Communities had approved the distribution systems practised by the perfume manufacturers — in some cases decisions under Article 85 (3) of the EEC Treaty were mentioned — and that this should not be called in question by the application of derogating provisions of national law over which Community law takes precedence. In some cases also reference was made to the alleged authorization of selective distribution systems in the case-law of this Court. In addition in some cases the objection was also made that the shops of the plaintiffs claiming damages did not meet the requirements laid down and were therefore not admitted to the sales organizations for good reason. In view of these defences and because the court considered that it did not have sufficient information, it stayed the proceedings by judgments of 5 July 1978. It ordered (according to the judgment at the origin of Case 253/78) that

"Guerlain's exclusive dealing agreements, which are the outcome of a sales organization based not only on qualitative but also on quantitative criteria of selection should be submitted to the Court of Justice of the European Communities in order for the said Court to decide whether certain luxury

products whose brand image is important can benefit from the exemption provisions contained in Article 85 (3) of the EEC Treaty and whether in the present case Guerlain benefits therefrom in Community law."

The operative parts of the judgments initiating the procedures for obtaining preliminary rulings in Cases 1 to 3/79 are worded in similar terms.

I adopt the following viewpoint on these questions:

I — I shall begin with a few *introductory remarks.*

1. Since according to the operative parts of the references to the Court of Justice for preliminary rulings the exclusive dealing agreements entered into by the various perfume manufacturers involved must be submitted to the Court and since it is afterwards asked whether these undertakings benefit from Article 85 (3) of the EEC Treaty, it is appropriate to point out at the beginning the fact that in procedures under Article 177 of the EEC Treaty the Court of Justice may not *apply* Community law to an individual case, as it seems to be requested to do. If the validity of measures of Community law is not involved, it has power only to *interpret* Community law, in other words to construe the contents of that law; naturally, in order to give assistance in reaching a decision which is appropriate and restricted to the essentials, the special features of the main action must be taken into consideration in so doing. Accordingly the questions which have been raised should be reformulated, as the Court of Justice may do and has already done on many occasions. They might accordingly read as follows, as suggested by the Commission:

Must Article 85 (3) of the EEC Treaty be interpreted as meaning that agreements which are the outcome of a sales organization based not only on qualitative but also on quantitative criteria of selection in the sector of certain luxury products whose brand image is important may benefit from a decision of exemption?

2. In addition it is necessary to point out that there is no objection to referring such a question to the Court for a preliminary ruling even if it may be deduced from Article 9 of Regulation No 17 that national courts and national authorities have no jurisdiction to *apply* Article 85 (3) and that the court making the reference therefore could not reach the finding that the conditions for the application of Article 85 (3) were fulfilled in the cases brought before it.

In this connexion reference may in fact be made to the judgment in Case 48/72 *(SA Brasserie de Haecht* v *Oscar and Marie Wilkin,* judgment of 6 February 1973 [1973] ECR 77). It was stated in that judgment on the one hand that a national court is not released from the duty, when, in proceedings pending before that court, a party relies upon Article 85 (1), which is directly applicable, to declare an agreement to be void in consequence thereof. On the other hand the court before which such proceedings are brought must decide whether there is cause to stay the proceedings in order to allow the parties to obtain the Commission's standpoint on Article 85 (3). There is however no cause for this if an agreement does not have any appreciable effect on competition or if there is no doubt that the agreement is incompatible with

Article 85. In the latter case however a reference to the Court for the interpretation of Article 85 (3) may in fact be relevant. Accordingly this may result in the finding that this provision is not applicable to certain cases, which enables the Court to give a clear judgment on Article 85 (1) and provides the opportunity to declare that an agreement is void under Article 85 (2).

Therefore in spite of Article 9 of Regulation No 17 it is necessary to consider that a national court is also justified in raising questions of the interpretation of Article 85 (3).

3. In raising such a question, the Tribunal de Grande Instance, Paris, assumes, and this is a logical condition for the application of Article 85 (3), that Article 85 (1) applies to the case before it. It is necessary however to examine this assumption. In the procedure for obtaining a clear that the Commission takes the view that, after the deletion of several clauses which were initially applicable to the distribution systems, in other words according to the version of the relevant agreements now in force, the prohibition laid down in Article 85 (1) no longer applies. It is necessary to point this out clearly to the court making the reference and in this connexion it is no doubt appropriate also to say a few words in clarification of Article 85 (1). As the Commission has suggested, the following question might be formulated which may be regarded as contained by implication in the request for interpretation: "Must article 85 (1) of the EEC Treaty be interpreted as meaning that agreements which are the outcome of a sales organization based not only on qualitative but also on quantitative criteria of selection in the sector of certain luxury products whose brand image is important are incompatible with the common market and therefore prohibited pursuant to that provision?"

4. Finally, I still have the impression that the main problem in the main action is the question whether after the Commission's appraisal of the distribution systems it is still possible to apply the above-mentioned stricter French provisions on refusal to sell, according to which it is evidently impossible to rely upon such selective distribution systems.

In this connexion it is necessary to examine whether in fact under Community law (Article 85 (3)) there was actually an exemption which, as a positive measure of Community law, may not be deprived of its effects by national law derogating from it. In addition, it is necessary to consider whether even if such an exemption was not granted considerations of Community law tell against the application of national law. It is probably, but not only, necessary in this connexion to consider the application of Regulation No 67/67/EEC (Official Journal, English Special Edition 1967, p. 10), the regulation on block exemption, or the legal effects of agreements duly notified to the Commission.

II — Following these preliminary observations I shall now deal with the *individual questions* the examination of which is suggested by the references for a preliminary ruling.

1. The problem whether *Article 85 (1)* is applicable to distribution systems according to which not every interested retailer is supplied but a selection is made according to qualitative and quantitative criteria logically takes first place.

In this respect reference my be made to the judgment in Case 26/76 *(Metro SB-Großmärkte GmbH & Co. KG* v *Commission,* judgment of 25 October 1977 [1977] ECR 1875) so far as *qualitative* selection criteria are concerned. In that judgment it was emphasized in general that it is necessary to take into consideration as regards the application of Article 85 (1) the fact that the nature and intensity of competition may vary according to the products in question and the structure of the relevant market sector. Selective distribution systems might therefore be compatible with Article 85 (1) — which then also applies to the measures of control connected therewith — if the re-sellers are selected on the basis of *objective* criteria of a *qualitative* nature. It is certainly readily conceivable that this may also be correct as regards the perfume sector, a field in which the producers are indeed at liberty to define their clientele and in which well-known brands to which the image of exclusivity is linked play a part. If in this connexion a certain standard of re-seller is regarded as important this should, according to the nature of the products, whose value and freshness must be guaranteed and with regard to which specialist advice must be provided, be just as justified as in the case of the superior technical products which were at issue in the *Metro* case and with regard to which the reputation of the brand was also a decisive factor.

If in addition to qualitative criteria of selection *quantitative* criteria are also added — the admission of a limited number of re-sellers in a certain area according to purchasing power, so that each re-seller is guaranteed a certain earning power — it certainly cannot be contested that this leads, within the category of dealers who fulfil the qualitative conditions, to a restriction on competition. It is also possible to speak of a restriction on competition under Article 85 (1) (b) because the sales outlets of the authorized retailers are restricted by the prohibition on supplying dealers outside the distribution network.

This still does not however necessarily give rise to the finding that Article 85 (1) actually applies. According to the case-law (judgments in *Case 56/65, Société Technique Minière* v *Maschinenbau Ulm GmbH,* judgment of 30 June 1966 [1966] ECR 281 and in *Case 22/71, Béguelin Import Co and Others* v *S.A.G.L. Import Export and Others,* judgment of 25 November 1971 [1971] ECR 949) the important factor is in fact whether trade between the Member States and competition is *appreciably* affected. For the purpose of this decision the economic and legal context of an agreement is important *(Case 23/67, S.A. Brasserie de Haecht* v *Oscar and Marie Wilkin,* judgment of 12 December 1967 [1967] ECR 407 and *Case 22/71 — Béguelin).* In so doing it is necessary to take into consideration all the objective factors of law or of fact and the accompanying economic circumstances surrounding the performance of an agreement *(Case 56/65,* quoted above, and Case *1/71 S.A. Cadillon* v *Firma Höss Maschinenbau KG,* judgment of 6 May 1971 [1971] ECR 351). In this connexion the existence of similar agreements between the same manufacturer and concessionnaires in other Member States is relevant (Cases 23/67 and 22/71). A decisive factor is also the fact that other competing manufacturers have a similar practice. In addition the position of those concerned on the market must be taken into consideration *(Case 5/69, Franz Völk* v *Etablissements J. Vervaecke S.p.r.l.,* judgment of 9 July 1969 [1969] ECR 295

and *Case 1/71*, quoted above). Finally it is also of importance whether obstacles to trade are set up for the products in question (Case 56/65).

As a result of what has become known in the proceedings in particular through the Commission's statements as regards the small size of the market shares held by individual perfume manufacturers, the size of the network of each authorized retailer, the considerable number of competing manufacturers, and also the fact that authorized dealers may deliver supplies across the frontiers of the Member States and may determine the selling prices freely, it is totally conceivable that the distribution systems of interest in the main actions have no *appreciable* effects within the meaning of the above-mentioned case-law. In any case this is the decision reached, as was expressly stated, by the departments of the Commission. Nevertheless this decision is not binding on the court making the reference. In this respect it must rather, because Article 85 (1) of the EEC Treaty is directly applicable and no exclusive power in this connexion has been laid down for the Community institutions in this respect, form its own decision and in so doing it is naturally possible, although unlikely, that having examined in detail all the facts which have perhaps changed in the meantime, for it to reach a different evaluation.

2. If the court making the reference should reach the view with the help of such considerations that the distribution systems are covered by Article 85 (1), then the questions further arise whether for example the regulation on block exemption, Regulation No 67/67/EEC, is applicable, whether it is not necessary in fact to assume that the Commission took a decision of exemption under Article 85 (3), and finally whether the application of Article 85 (3) comes into consideration at all or whether it may no doubt be excluded in such cases.

(a) The first of these questions presents the least difficulties. In fact the application of the *regulation on block exemption* nevertheless well come into consideration as regards the agreements concluded between the manufacturers and the general representatives in the various Member States, which are obviously not involved in the main actions. On the other hand the agreements with the authorized retailers do not on the one hand comply with the condition contained in Article 1 of Regulation No 67/67/EEC, according to which one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market; in addition, the prohibition on sale to re-sellers outside the distribution network applicable to retailers seems questionable in the light of Articles 2 and 3 of Regulation No 67/67/EEC. Therefore it would be difficult to accomplish anything in the main actions by means of the regulation on block exemptions.

(b) The question whether it is not necessary to assume that the Commission granted an *exemption under Article 85 (3)* for the distribution systems is hotly contested — at the hearing too opinions were still very divided.

In the view of the perfume manufacturers the final letters mentioned at the outset which they received from the Commission must be regarded as such an

exemption even if the Commission now no longer acknowledges this. It is necessary to interpret these letters in fact in the light of the *whole* procedure which applied to the distribution systems of the perfume manufacturers. In particular it was stated expressly in the notices of complaints received by three perfume manufacturers, which however applied in fact to the whole industry, that exclusive distributorship agreements for luxury products which provided for selection according not only to qualitative but also to quantitative criteria, might, as already practised in the case of other products in the decision in the *Omega* case (Journal Officiel 1970, No L 242, p. 22), come within Article 85 (3) if specific amendments were made to them, which were then in fact actually made. In addition, reference was made in a final paragraph of the above-mentioned letters to the fact that the Commission would keep a close watch to ensure that qualified retailers were not admitted to the distribution network arbitrarily and that such admission "ne constitue pas un moyen détourné de faire échec à la liberté d'échange entre distributeurs agréés" (does not constitute an indirect means of hindering freedom of trade between authorized distributors). Such conditions and obligations are provided for in Article 8 of Regulation No 17 for decisions under Article 85 (3); on the other hand they would be meaningless in the case of negative clearance certificates. In addition, it would only be possible to speak of the infringement of a right, a concern which is suggested in the above-mentioned last paragraph of the letter, in cases such as these if such a right was previously acknowledged by the competent authorities. In contrast to this it is impossible to refer to the failure to comply with certain formalities applicable to decisions of exemption (publication of the contents of the application relating thereto under Article 19 of Regulation No 17 inviting interested parties to submit their observations to the Commission and publication of the decision itself in accordance with Article 21 of Regulation No 17). Nevertheless the Commission made public the solution provided for initially in the case of Dior and Lancôme in press releases, in the monthly bulletin of the Community and in its report on competition policy so that interested third parties could still have submitted observations to the Commission before the procedures against the perfume manufacturers involved in these cases were terminated.

If I may say so at once, it is however impossible to concur in this view; the view put forward by the Commission at the hearing must be shared. In this connexion, the question whether letters signed by a Director-General or a Director may be regarded as decisions of the Commission at all can be left undecided since the above-mentioned letters differ very considerably from decisions which were in fact adopted pursuant to Article 85 (3). In addition it is of importance that, even if the duty of publication under Article 19 of Regulation No 17 were regarded as having been complied with having regard to the documents put forward by the perfume manufacturers, the measures regarded by them as decisions of exemption were in any case not published nor was a date given therein, as provided for by Article 6 of Regulation No 17, from which the decision was to take effect. Above all however the fact that it is impossible to conclude from the *contents* of the letters sent to the perfume manufacturers that Article 85 (3) was being applied is decisive. Those letters state in fact clearly:

"La Commission estime qu'il n'y a plus lieu pour elle, en fonction des éléments dont elle a connaissance, d'intervenir à

l'égard des contrats précités en vertu des dispositions de l'article 85 paragraphe 1 du Traité de Rome. Cette affaire peut dès lors être classée."

[The Commission considers that there is no longer any need, on the basis of the facts known to it, for it to take action in respect of the above-mentioned agreements under the provisions of Article 85 (1) of the Treaty of Rome. The file on this case may therefore be closed.]

Thus a form of words is used which might at most be suitable for negative clearance certificates under Article 2 of Regulation No 17. Accordingly I have no doubt that this is only an opinion on the application of Article 85 (1) which may have seemed appropriate after the deletion of certain clauses from the distributorship agreements but that they are in no way decisions of exemption. The references of the perfume manufacturers to the contents of the notices of complaints which three undertakings received and to the final paragraph of the letters can in no way alter this. In this connexion it is sufficient that the notices of complaints relate to the agreements before the deletion of certain clauses which affected trade between the Member States and that they represent merely a provisional assessment of the Commissioner responsible for competition which naturally cannot prejudice a final judgment which would have to be made by the Commission with regard to Article 85 (3). In addition it is necessary to point out that these final paragraphs may also be interpreted as meaning that the Commission, which at that time saw no reason to take action pursuant to Article 85 (1), reserved to itself the right to observe the situation further and if a change occurred, and a specific application of the system by the perfume manufacturers may also be regarded as such, possibly to take action under Article 85 (1) after all.

(c) Although it therefore follows that the court making the reference cannot assume either that the regulation on block exemptions has been applied or that individual decisions of exemption exist, it must however, before it can draw the consequence of invalidity under Article 85 (2) from the possible application of Article 85 (1), consider two further matters which were also spoken of in the procedure.

(aa) The first relates to the *legal effects of the notification to the Commission of the distributorship agreements.*

If they are what are known as *old agreements* which were already in existence when Regulation No 17 came into force (13 March 1962) and if they were duly notified or the exemption from the duty of notification applied, which is the case as regards the agreements concluded with the retailers under Articles 4 and 5 of Regulation No 17, it is necessary on the one hand to take into account the judgment in Case 59/77 *(De Bloos* v *Bouyer,* judgment of 14 December 1977 [1977] ECR 2359). According to that judgment such agreements are fully effective, in other words they produce the legal effects provided for in accordance with the national law applicable to them; a national court may only make a decision as to their invalidity under Article 85 (1) when the Commission has reached a decision on the basis of Regulation No 17. The latter evidently did not happen in this case even though notices of complaints were delivered. In this connexion it would also be irrelevant that during the administrative procedure at the Commission the agreements were amended, since that took place at the instigation of the Commission and was limited to moderating certain clauses.

On the other it is necessary to recall that following the judgment in Case 1/70

(Parfums Marcel Rochas-Vertriebs GmbH v *Helmut Bitsch,* judgment of 30 June 1970 [1970] ECR 515) the notification of a standard agreement for agreements concluded by the same undertaking which are identical in content is sufficient. Even if in such a case the standard agreement was concluded before Regulation No 17 came into force and the agreements which are identical in content were concluded afterwards, the latter, as was expressly pointed out, also benefit from the legal effects of the notification, where the standard agreement has been correctly notified, in other words they must be regarded equally as valid as the standard agreement itself.

(bb) The other consideration relates to the *possible application of Article 85 (3).* It is true, as I have already said, that national courts may not apply it since according to Article 9 of Regulation No 17 the Commission has exclusive jurisdiction in that respect. National courts may however, as follows from the case-law quoted above, in relation to the consideration of staying the proceedings so that if necessary an opinion of the Commission on Article 85 (3) may be obtained, consider whether an exemption under Article 85 (3) is not obviously impossible, which then entitles them to apply Article 85 (1) and to declare that an agreement is null and void.

As far as the application of Article 85 (3) to selective distribution systems of the kind practised by the perfume manufacturers is concerned it is certain that no observations are required on the question dealt with exhaustively by the perfume manufacturers, that whether the conditions laid down in Article 85 (3) may be considered to exist if an improvement in production and distribution is involved which benefits consumers. In fact that question was not further contested but only the question whether the restrictions following from the application of *quantitative* criteria in the selective distribution systems may in fact be regarded as *indispensable.*

In this respect the perfume manufacturers consider that it is impossible to dispense with quantitative selection on the one hand in view of the need to guarantee the earning power of authorized sales points, which have advertising obligations and must provide a customer advisory service and also because if this were not the case the costs of distribution and therefore the selling prices would rise as a result of the duty to supply all sales points with advertising material without discrimination and because the brand image would suffer if the group of authorized dealers were greatly increased and they could no longer be adequately controlled. The Commission on the other hand, which is not in principle set against such considerations, considers that quantitative selection can only be exempted by way of exception, for example if close collaboration is necessary between the manufacturer and the dealers according to the nature of the product. To this extent the Commission considers that the reference to the luxury character of the perfumery and the duty of manufacturers to take back unsold products is not sufficient. In any case it considers that the application of less restrictive criteria than those applied at present is conceivable, for example the fixing of a specific minimum turnover as the condition for admission to the distribution network. In contrast to this the perfume manufacturers in their turn refer to the dangers to which this would give

rise for their business. Thus they claim that it is necessary to take into account the fact that at the end of a trial period the majority of dealers newly authorized in that way would have to leave the distribution network again, which would produce unrest and disorder in the distribution system. Such dealers would no doubt not return unsold products to the manufacturer but would attempt to sell them outside the distribution network despite possible deterioration in quality and with only a restricted range, to the detriment of the brand. They might also be tempted, in order to remain in the distribution network, to achieve the stipulated minimum turnover by sales to unauthorized dealers, which would necessarily lead to the destruction of the selective distribution system. In addition in the case of the criterion taken into consideration by the Commission there would also arise the question of the appraisal, which must certainly be left to the manufacturer and in the case of which, as already happens, it is necessary and appropriate to make a distinction according to the actual sales prospects which exist for the particular dealers.

In my opinion it is difficult to say more or less in the abstract with regard to this difference of opinion that Article 85 (3) does not come into consideration on any account in the case of a selective distribution system such as that practised by the perfume manufacturers. In fact the Commission also did no more than state that the arguments *hitherto* put forward by the undertakings are insufficient for the purpose of an exemption and it correctly stressed in addition that a precise judgment is only possible when the circumstances of each individual case have been thoroughly appraised as was also done in the *Omega* and *Junghans* cases quoted in the procedure. For this reason it is impossible to reply to the court making the reference in the present procedures for obtaining preliminary rulings that, assuming that Article 85 (1) is applicable, there is no doubt that the applicability of Article 85 (3) is unconceivable and that therefore there is certainly no reason for the proceedings for example to be stayed and for this question to be put before the Commission.

3. Following this I now reach a final series of questions in the request for a preliminary ruling, those which are surely the most important from the point of view of the court making the reference. According to that court what is involved is the applicability of the Fench provisions on "refus de vente" (refusal to sell) which, together with the penalties laid down by the provisions, is under consideration, although the selective distribution systems which are supposed to justify the refusal to sell are appraised by the Commission from the point of view of Community law.

Following all the preceding statements, the main question is whether the application of the stricter national law may be envisaged if Community law does not apply in the absence of the conditions laid down in Article 85 (1). Secondly, I should still in addition deal with the problem of what happens if Article 85 (1) is after all applicable. In this connexion it is necessary to consider not only the results in Community law of invalidity under Article 85 (2) but also the legal effects of old agreements duly notified and any need which might exist to stay national proceedings if it can be seen that there is an opportunity for the Commission to adopt a decision of exemption.

(a) It is necessary to start from the statements made by the Court of Justice in the judgment in Case 14/68 *(Walt Wilhelm and Others* v *Bundeskartellamt,* judgment of 13 February 1969 [1969]

ECR 1) on the relationship between Community law and national law. According to that judgment the application of national competition law is only permissible "in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and the full effect of the measures adopted in implementation of those rules". In addition, it stated that it would be contrary to the nature of Community law "to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty". Where, during national proceedings it appeared possible that the decision to be taken by the Commission at the culmination of a procedure still in progress concerning the same agreement might conflict with the effects of the decision of the national authorities, it was for the latter to take " the apropriate measures". This also applies of course regardless of whether national law is applied by courts or administrative authorities because the rule as to jurisdiction laid down in Article 9 of Regulation No 17, with regard to which the problem whether courts are also "authorities" is relevant, relates solely to the application of Community law and not to that of national law.

(b) If it proves, and this seems to be the case in the main actions, that Article 85 (1) must not be applied to the distribution systems in question because the conditions for the application of the prohibition laid down in Article 85 (1) *(appreciable* restrictions on competition and an *appreciable* effect on trade between Member States) are not fulfilled, there is, as the Commission correctly stated, no objection in principle to the application of stricter national law to such a sales organization.

It would however be possible to take a different view, and in my opinion the Commission is also right in this respect, if such conduct on the part of undertakings, in other words the practice of a selective distribution system, contributed to the attainment of the objectives laid down in the Treaty, since Community interests would obviously then be involved. However in the case of the sales organizations involved in these cases it is impossible to speak of such a situation.

On the other hand it cannot be stated, as the perfume manufacturers attempt to do, that the departments of the Commission were concerned to reach a general solution for this economic sector in a comprehensive procedure, as they claim may be deduced from the relevant reports on competition policy, and that this solution is consequently also binding on the national courts. In this connexion it is precisely necessary to bear in mind that the Commission succeeded in this procedure in using its influence to bring about an amendment of the distribution systems in such a way that there is no need at all for the application of the prohibition laid down in Article 85 (1).

In the same way I consider irrelevant the reference of the perfume manufacturers to the fact that only French law contains such strict provisions on unlawful refusal to sell whilst under German, Netherlands, British and Luxembourg law such a prohibition only applies under special conditions. If the application of the French provisions were permitted this would lead, the perfume manufacturers consider, to distortions of competition in relation to manufacturers in other Member States because only the French producers — this would be ensured by

an increase in the distribution costs if selection were abolished — would be prevented from harmoniously developing their activities. In this connexion the Commission correctly recalled that such consequences cannot be prevented by reliance upon the principle contained in Article 3 (f) of the EEC Treaty and that in this connexion a solution should on the contrary be sought by means of the harmonization of the relevant national legislation. It also seems to me to be of interest that in the above-mentioned judgment in Case 14/68 the Court of Justice stated with regard to a similar problem (infringement of the prohibition on discrimination laid down in Article 7 of the EEC Treaty) that the above-mentioned provision does not cover differences in treatment and distortions which follow from differences between the legal systems of the various Member States with regard to persons and undertakings subject to Community law so long as those legal systems are applicable to all persons subject thereto in accordance with objective criteria and without regard to the nationality of those concerned.

(c) If on the other hand a national court reaches the conclusion that Article 85 (1) is applicable after all, it is necessary first to recall the statement made in the case-law with regard to the effects of duly notified agreements. This may necessitate treating the agreements in question as effective with the result that an application of the national law which leads to the opposite result would not be compatible with the requirement that national law must only be applied in such a way that the effects of Community law are not compromised.

In addition it is necessary to take into consideration the fact that, even apart from such circumstances, it is necessary to take into account the possibility that the Commission, if it should later share the view of the national court as to the applicability of Article 85 (1), might deliver a decision under Article 85 (3). In this case the national court, as was stressed in the judgment in Case 14/68, must take "appropriate measures", for example stay the proceedings, in order to prevent its own decision from conflicting with a possible decision of the Commission.

Finally, the Commission referred also in addition, in case the national court should draw the consequence of invalidity from Article 85 (2), to the need to ensure that the effects arising from this provision are not prejudiced. In fact in applying the provisions on the "refus de vente" such prejudice is possible if the invalidity resulting from the national provisions goes beyond the legal consequences of Community law which, as has been shown, no doubt does not preclude *qualitative* selection in the case of perfumery. The requirements of Community law and of its uniform application would therefore in any case necessarily result in refraining from systematic application of the provisions on "refus de vente" if they would entail fully abandoning selection contrary to the requirements of Community law.

There is nothing further to say from the point of view of Community law with regard to the problem of the relationship between Community law and national law which the court making the reference still has to examine.

III — All in all, I therefore conclude that the questions referred to the Court of Justice by the Tribunal de Grande Instance, Paris, should be answered as follows:

1. The letters sent to the perfume manufacturers involved in the criminal proceedings before the Tribunal de Grande Instance, Paris, dated 28 October 1975, 26 March 1976, 22 September 1976 and 20 January 1978 and signed by the Director-General for Competition or a Director in that Directorate-General do not contain any decisions of exemption under Article 85 (3) of the EEC Treaty but only express the view that on the basis of the factors known at that time there was no reason to take action under Article 85 (1) of the EEC Treaty.

2. It is necessary to appraise the question whether Article 85 (1) must be applied to a sales organization based not only on qualitative but also on quantitative criteria of selection according to all the accompanying legal and economic circumstances (type of product, market share of the manufacturer, number and market position of competitors, existence of similar distributorship agreements and the existence of clauses which affect trade between Member States and exclude the free fixing of prices); it is necessary to ascertain accordingly whether it is possible to speak of an appreciable effect on competition and an appreciable effect on trade between Member States.

3. If the conditions for the application of Article 85 (1) are fulfilled, such a sales organization may only be treated by national courts as invalid on the basis of Community law if Regulation No 67/67/EEC of 22 March 1967 is not applicable, if they are old agreements which are provisionally valid and if there is no doubt that Article 85 (3) cannot be applied, in other words there is no reasonable cause to request the Commission to give an opinion.

4. If the conditions for the application of Article 85 (1) to a selective sales organization are not fulfilled in that case there is nothing to prevent the application of national law.

If the conditions for the application of Article 85 (1) are fulfilled, national law may only be applied to such agreements on the condition that and the extent to which it does not result in any jeopardization of the uniform application of Community law and the effectiveness of any measures issued in implementation thereof are not endangered.