normal competition on the basis of the transactions of traders, hinders the maintenance or development of competition and may affect trade between Member States.

Mertens de Wilmars Pescatore Koopmans

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Delivered in open court in Luxembourg on 11 December 1980.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 15 OCTOBER 1980 [1]

Mr President,
Members of the Court,

The case on which I have to deliver an opinion today concerns questions which largely coincide with, or are comparable with, questions which were raised in Joined Cases 253/78 and 1 to 3/79 and Cases 37/79 and 99/79.

The L'Oréal company of Paris, one of the plaintiffs in the main proceedings, manufactures and markets perfumery, beauty and toiletry products. It has a subsidiary company in Belgium, the other plaintiff in the main proceedings, which, like other subsidiaries in other Member States, manufactures and markets L'Oréal products in Belgium on the basis of know-how and licensing contracts concluded with the parent company.

The products involved in the main proceedings (hairspray and hair-care products under the Kérastase brand) are subject to a selective distribution system in Belgium, as in other Member States. Under that system those products may be distributed only by hairdressers (hairdressing consultants), whom L'Oréal supplies with technical assistance enabling them to apply the products and advise on the use thereof, and who undertake to attend technical information sessions organized by L'Oréal, to ensure that a systematic examination is carried out for each customer, to observe the rules for the application of the products and to promote sales of the whole range of products. The number of such hairdressing consultants, who are expressly forbidden to dispose of the products in question to hairdressers who

1 — Translated from the German.

do not belong to the distribution network, seems to be approximately 2 500 in Belgium, out of a total of roughly 18 000 hairdressers.

The agreements concluded with the general representatives in the various Member States were notified to the Commission early in 1963. On request the Commission was also informed of the conditions of sale applied by L'Oréal and its subsidiaries in relation to re-sellers. In accordance with the Commission's wishes the provisions were amended so as to remove a term prohibiting exports and imports, even indirect ones, and clauses which required certain prices to be maintained when disposing of re-imported or re-exported products, and L'Oréal then received a letter on 22 February 1978 signed by a director at the Commission, stating essentially that by reason of L'Oréal's small share in the market for perfumery products in the various Member States and in view of the large number of competing undertakings of comparable size the Commission considered that it did not need to take action against the distribution system under Article 85 (1) of the EEC Treaty.

De Nieuwe AMCK, PVBA, based in Hoboken, the defendant in the main proceedings, is a wholesaler in the perfumery sector and, although it apparently also has a retail shop, it does not belong to the distribution system set up by L'Oréal. The plaintiffs discovered that that undertaking was selling three of their products in Belgium, namely Kérastase hairspray in 370 gram containers, Kérastase technical salon lacquer in 710 gram containers and Kérastase conditioner for fine and delicate hair in 150 millilitre bottles, which it had apparently obtained in the Netherlands where a similar distribution system exists; they thereupon commenced two actions before the President of the Rechtbank van Koophandel [Commercial Court], Antwerp. Those actions are for a declaration pursuant to the Belgian Law on Commercial Practices of 14 July 1971, in the version of 4 August 1978, that the defendant's conduct is contrary to fair trading practice. There is also a claim for an injunction forbidding the defendant to offer for sale or sell the products referred to above or to obtain stocks thereof.

In its defence the defendant contended that the selective distribution system operated by L'Oréal was illegal as being contrary to Community competition law. It further claimed that the plaintiffs' conduct constituted an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty. The plaintiffs vehemently denied that, referring *inter alia* to the above-mentioned letter from the Commission of 22 February 1978.

By order of 17 January 1980 the President of the Rechtbank van Koophandel stayed proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Is the system 'parallel' exclusive selling agreements between a producer and exclusive importers, linked with selective distribution networks between the national importers and the retailers chosen by them, based on alleged qualitative and quantitative selection criteria, in respect of a few perfumery products from a whole range, eligible for

exemption as provided for in Article 85 (3) of the Treaty of Rome and is such the case here, from the point of view of Community law, for L'Oréal NV (Brussels) and L'Oréal SA (Paris)?

2. Is a decision to allow a matter to rest, from an official of the Commission of the European Communities, such as that contained in the letter of 22 February 1978, signed by J. E Ferry, Director in the Directorate-General for Competition, Restrictive practices and abuse of dominant positions Directorate, addressed to the first plaintiff in the main action, binding?

3. Are exemptions given in application of Article 85 (3) to be regarded as instances of toleration or do they create a right which, from the point of view of Community law, may be relied on against third parties, and is that the case for L'Oréal?

4. Can L'Oréal's conduct towards third parties be regarded as an abuse of a dominant position within the meaning of Article 86 of the Treaty of Rome?"

My opinion on these questions is as follows:

I — The first question

1. The first question consists of two parts, the second of which — asking whether the agreements concluded by the plaintiffs in the main proceedings are eligible for exemption under Article 85 (3) of the EEC Treaty — is not admissible, since it would entail the *application* of Community law to a specific case, which the Court of Justice is not empowered to do in proceedings under Article 177 of the EEC Treaty.

Therefore, we may deal only with the first part of the first question and, taking into account certain elements of the second part, throw some light on the question whether a system of agreements of the *type* which is at issue in the main proceedings may conceivably be granted an exemption. In this regard it will be necessary to bear in mind that a system of parallel exclusive distribution agreements between a producer and an exclusive importer is said to be involved and that that system is linked with selective distribution networks existing between the national importers and certain retailers, further that those networks are allegedly based on qualitative and quantitative criteria for selection and cover only a few articles from a whole range.

2. Such a question on the interpretation of Article 85 (3) is not in principle inadmissible, although Article 9 (1) of Regulation No 17 provides:

"Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty."

That means that national courts have no jurisdiction to apply the said provision.

In this regard I may refer to my first opinion in Joined Cases 253/78 and 1 to 3/79, which in turn cited the judgment of 6 February 1973 in Case 48/72 *SA Brasserie de Haecht* v *Wilkin-Janssen* [1973] ECR 77. From that case it is clear that the national courts are obliged to

apply Article 85 (1), which has direct effect, and that in this regard it may be appropriate in certain circumstances to stay proceedings in order to allow the parties to obtain the Commission's view under Article 85 (3). On the other hand, the courts may, as was also said in that judgment, refrain from so doing if there is no doubt that the agreement is incompatible with Article 85 (1). But for this question it may indeed be important to obtain an interpretation of Article 85 (3) because only then will it be possible to establish that the agreement is not eligible for exemption with the result that it will without doubt be void under Article 85 (2).

3. Before the national court can give consideration to Article 85 (3), it must as a matter of logic first ask itself whether Article 85 (1) is applicable at all. It is not absolutely clear whether in the present case the Rechtbank van Koophandel has formed a conclusive opinion on that question yet; at any rate it was submitted to us that this point has not yet been fully argued and sharply conflicting views were expressed on the question in the present proceedings. We should therefore, as the Commission urged, proceed on the basis that the first question also contains *by implication* a question on the interpretation of Article 85 (1) with regard to agreements such as the ones at issue.

(a) I have already stated, when setting out the facts, that the Commission came to the conclusion that, for the reasons given, Article 85 (1) did not apply. That (informal) finding by the Commission is, as was emphasized in the judgment in Joined Cases 253/78 and 1 to 3/79, a factor which national courts may take into account in their assessment and which is doubtless of some weight. On the other hand, in the same judgment it was also stressed that national courts are not thereby prevented from reaching a different finding which may seem plausible to them on the basis of the information available to them.

(b) For the interpretation of Article 85 (1) of the EEC Treaty with regard to selective distribution systems of the type in question reference may also be made to the judgments concerning the perfumery sector which have already been delivered and which I mentioned at the beginning.

Those judgments established, as was already clear from the judgment of 25 October 1977 in Case 26/76 *Metro SB-Großmärkte GmbH & Co KG* v *Commission* [1977] ECR 1875, at p. 1904, that selective distribution is compatible with Article 85 (1), provided that re-sellers are chosen on the basis of objective criteria of a *qualitative* nature relating to the professional qualifications of the re-seller or his staff and the suitability of his trading premises and that conditions for admission to the distribution network are laid down uniformly and are not applied in a discriminatory fashion.

It also emerges from those decisions (cf. the judgment in Case 99/79) that Article 85 (1) applies in principle when conditions going beyond those limits are laid down, in particular when *quantitative* selection criteria are used. But according to those decisions the necessary inquiry as to whether competition is *appreciably* affected and whether trade between Member States is *appreciably* affected depends on still

further considerations. Thus it is necessary to determine on the basis of a set of objective factors of law or of fact whether it may be said with a sufficient degree of probability that an agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Further, with regard to the question of the effect on the conditions of competition, it is necessary to ask what the state of competition would be without the agreement. In this regard, it is necessary to consider the nature of the products covered by the agreement and to ask whether a limited quantity is involved or not; it depends on the position and importance of those concerned on the market in question and on whether an isolated agreement is involved or whether it belongs to a series of agreements, in particular whether similar agreements have been concluded by the same manufacturer or his competitors.

(c) The plaintiffs have also stressed that it is not possible to speak fo sole importers in the various Member States. It is important to bear in mind that subsidiaries of L'Oréal Paris are involved and that the products distributed by them are in each case manufactured in the Member State in which the subsidiary is based.

That may indeed be of importance in assessing the possibility of maintaining parallel trade. Moreover, as regards the agreements which L'Oréal Paris concluded with its subsidiaries, it is appropriate to recall the judgment in Case 15/74 *Centrafarm BV and Adriaan de Peijper* v *Sterling Drug Inc.* [1974] ECR 1147. In fact it was held there that Article 85 does not apply to agreements between undertakings belonging to the same group and having the status of parent company and subsidiary, provided that the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and that the agreements are concerned merely with the internal allocation of tasks as between the undertakings.

The defendant in the main proceedings argued in particular that it was not a question of a genuine selection according to qualitative criteria, but of a disguised quantitatives selection. A proper handling of the products is within the capabilities of all hairdressers; therefore a term restricting sales to the specialized trade would be sufficient, at least as regards qualified hairdressers because under Belgian law admission to that trade is governed by sufficiently strict provisions which ensure the necessary knowledge. But in so far as the aim is to protect the consumer from dangers which might arise through inexpert use of the products, that is ensured by provisions of Community and national law on the marketing of such products, thus making a special selection from the ranks of hairdressers appear unnecessary. Under Belgian provisions relating to cosmetic products and sprays, adopted in 1978 in implementation of Directives 75/324 (Official Journal L 147, p. 40, of 9 June 1975) and 76/68 (Official Journal L 262, P 169, of 27 September 1976), the sale of dangerous products is not permitted at all, misleading advertising is forbidden and certain information must appear on labelling, in particular, instructions for use.

It is the task of the court requesting a preliminary ruling to explore all those matters. It must ascertain the exact purpose of the obligation placed upon distributors; in addition, it has to determine, according to the nature of the products in question, whether their proper and effective application really requires special technical knowledge in need of constant bringing up to date, whether such knowledge is supplied by L'Oréal in a manner going beyond the instructions for use and whether all those factors are equally valid in respect of products which are not used in the hairdressing salon itself, but are sold to customers so that they may continue the treatment privately. Thus it will be revealed whether the plaintiffs are indeed operating a genuine qualitative selection or whether it is a question of a concealed quantitative selection which the Commission, as we have heard, did not think it could detect.

(d) The defendant in the main proceedings also takes the view that the obligation imposed upon the approved hairdressing consultants to promote the sale of Kérastase products, their obligation to hold a certain stock and to achieve a certain turnover should also be regarded as restrictions on competition, as should the exclusion of the wholesale trade from the distribution system and the requirement that the hairdressing consultants should observe fixed charges for their services in applying the plaintiffs' products. It should also be noted, the defendant says, with reference to the cumulative effect of such agreements, that such distribution systems also exist in other Member States and apply to alternative products in the same way. Also of importance, as regards L'Oréal's position on the market, is the fact that hair-care products are not manufactured by all perfume producers, whereas L'Oréal specializes in that field, achieves a huge turnover and may be regarded as the fourth largest manufacturer in the world. Finally, it must not be overlooked that there is an absence of parallel trade, which is made possible above all by wholesalers. For under the distribution system sole importers are forbidden to attempt an expansion outside their distribution area, whilst for the approved hairdressing consultants it is practically impossible for various reasons connected with the structure of their occupation, as well as being economically unattractive, to obtain Kérastase products in other Member States with price levels which in some cases vary considerably.

As regards these observations, it was held in the judgment in Case 26/76 that obligations placed upon re-sellers to maintain stocks and to participate in the creation and consolidation of the sales network exceed the requirements of a selective distribution system based on qualitative criteria and therefore in principle fall within the terms of Article 85 (1). Moreover, the relevance of the factors alleged, in so far as they actually exist, which was disputed as regards the obligation to achieve a certain turnover and to observe fixed charges for services, cannot be denied in the context of Article 85. It is for the national court to go into those matters in detail in the context of the examination of all the circumstances to which I have already referred and in doing so one of the questions which it will have to ask is whether the exclusion of the wholesale trade is justified by the need for close cooperation between L'Oréal and the hairdressing consultants. Such an investigation, which we are debarred from undertaking in these proceedings, will reveal whether it is indeed possible to speak of an appreciable restriction of

competition on the market in hair-care products and for an appreciable effect upon trade between Member States.

4. If after all that the national court comes to the conclusion that Article 85 (1) is in principle applicable, the question which then arises is whether an exemption under Article 85 (3) is out of the question, with the result that the case may be dealt with on the basis that the agreements are void under Article 85 (2).

As regards the interpretation of Article 85 (3) in this context little can be said in the abstract. The Commission rightly pointed out that the application of that provision requires, as it were, an economic balance to be drawn (a comparison between the benefits attached to the agreement as regards production, distribution and the interests of consumers on the one hand and the restrictions which it proposes upon competition on the other) and in this regard everything depends on the circumstances of each case. Of course the partitioning of national markets must be avoided; therefore parallel trade, which may influence price formation, must not be totally excluded. Further, there is no doubt that a quantitative restriction on admission to a distribution system is eligible for exemption only in exceptional cases, namely when owing to the nature of the products in question — for example in the case of complicated technical equipment — close cooperation between manufacturers and distributors appears essential.

Therefore, should the court which submitted the reference decide on the facts that parallel trade between Member States is not, as L'Oréal vehemently asserted, excluded and that it is not possible either to speak of the existence of genuine *quantitative* selection criteria, then it would be difficult to say that, assuming Article 85 (1) to be applicable, the agreement is *undoubtedly not* eligible for exemption, which in view of the cases cited is the only question which the national court is permitted to raise in this context. In that event it would be best to stay proceedings, as was suggested in the judgment in Case 48/72, and give the parties an opportunity to obtain the Commission's views on the application of Article 85 (3).

II — The second question

The issue in the second question is whether a communication emanating from an official of the Commission to the effect that a matter pending before the Commission is being allowed to rest is binding. That is a reference to the letter of 22 February 1978 addressed to L'Oréal, which in content is essentially the same as the letters which have already had to be dealt with in the cases mentioned at the beginning.

In this regard the Court of Justice's most recent decisions, which I mentioned at the outset, may be cited. In the proceedings which led to those decisions I came to the opinion that communications such as the letter of 22 February 1978 may not for several reasons, in particular because their author lacked any power to issue decisions, be treated as *decisions* of the Commission at all. Subsequently, the Court of Justice ruled quite clearly that such communications are not binding on national courts, which no doubt means that they may not be relied upon against third parties either. The courts are therefore perfectly free to reach a different decision in this regard, precisely because the

Commission does not have exclusive power to apply Article 85 (1); that provision must, as I have already stated, be directly applied by national courts if as a result of their knowledge of the facts they arrive at the conviction that the requirements of Article 85 (1) are satisfied.

To that it is possible to add, if necessary — although one has the impression that that is not the problem at all in the main proceedings — that such communications doubtless have some sort of binding effect on the *Commission.* Indeed, it must be accepted — in this regard L'Oréal is certainly right — that, having regard to the principle that legitimate expectation must be upheld, the Commission may depart from the judgment arrived at by its officers only if the factual circumstances change or if its finding was reached on the basis of incorrect information.

III — The third question

Here the issue is what effects are produced by exemptions under Article 85 (3), in particular whether they create rights which may be relied on against third parties.

On this question also the judgment in Joined Cases 253/78 and 1 to 3/79 may be cited. There it was settled that communications such as the letter of 22 February 1978 to L'Oréal cannot be regarded as decisions to grant exemption because the formalities laid down by Regulation No 17 and the regulations adopted in implementation thereof (publication of the application for exemption and publication of the letter from the Commission) were not observed. It may also be inferred from that judgment that, as I pointed out in my opinion, it is not possible to accept that distribution systems of the type in question are covered by a regulation on exemptions. Thus it is clear that the third question submitted is in fact of no relevance to the main proceedings; it is a purely hypothetical problem which does not actually need to be dealt with.

However, if it is felt that it would be undesirable to refrain completely from commenting on that question, it may suffice to point out that a decision granting exemption is doubtless a measure which is capable of creating a legal right; it has the consequence that the prohibition contained in Article 85 (1) does not apply and the legal effects of Article 85 (2) are excluded. In that sense it is certainly correct to speak of the creation of a legal right and not merely of a tolerance; the person to whom a decision granting an exemption is addressed may therefore rely on that decision against third parties who invoke Article 85 (1) with regard to an agreement.

IV — The fourth question

Finally, it is necessary to clarify whether L'Oréal's conduct may be regarded as an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

In this regard it must be noted at the outset that a condition precedent for the application of Article 86 is the existence of a dominant position on the market, which does not of course fall to be determined in the proceedings before this Court (since that would amount to *applying* the law), but solely in the proceedings before the national court.

An important factor in this connexion, as may once again be gathered from the judgment in Case 26/76, is the share of the relevant market occupied by the undertaking in question. If that share is small, if the goods in question are readily interchangeable and if in addition keen competition may be shown to exist between producers, then it is certainly not possible to speak of a dominant position on the market. In this regard it is interesting that in its investigation of the market in toiletry products the Commission came to the conclusion that many undertakings were active on the market and that each had only a small market share (the majority between 0.5 and 2 %, the largest no more than 5 %). Also of significance is its finding that the fact that an undertaking belongs to a large group and thus achieves a considerable turnover is of no practical effect as regards the position on the market in question.

In view of these considerations there is probably no cause to think that Article 86 should come into operation in the present case, unless the court which made the reference were to come to an entirely different finding as regards L'Oréal's position on the market. For that reason, and also because the question submitted does not seem very precise, we may refrain from establishing what types of conduct which might be relevant with reference to the present case should be regarded as abusive within the meaning of Article 86.

V — All these considerations persuade me to propose the following answers to the questions submitted by the Rechtbank van Koophandel:

1. A selective distribution system is compatible with Article 85 (1) of the EEC Treaty if the choice of dealers is made according to objective criteria of a qualitative nature which are laid down in a uniform manner and are not applied in a discriminatory fashion. If the distribution system is based on criteria for admission which exceed those limits or if it imposes obligations which go beyond those requirements, Article 85 (1) is applicable if those criteria and obligations, alone or in conjunction with others in the economic and legal circumstances in which they were adopted, having regard to all objectively determined legal and factual circumstances, may have an appreciable effect on trade between Member States and have as their object or effect an appreciable restriction of competition.

   Such distribution systems are not eligible for exemption under Article 85 (3) if their effect is to partition national markets and if admission is governed by quantitative criteria, unless they are found to be essential by reason of the nature of the products in question.

2. A letter signed by an official of the Commission stating that the Commission saw no reason to intervene under Article 85 (1) of the EEC Treaty with regard to a distribution system submitted to it, may not be relied on against third parties and is not binding upon national courts. It should merely be treated as an actual fact which a national court which is required to consider whether the distribution system is compatible with Article 85 of the EEC Treaty may take into account.

3. Decisions granting exemption under Article 85 (3) of the EEC Treaty create rights in the sense that the parties to an agreement on which such a finding has been reached may rely on those decisions against third parties who claim that the agreement is void under Article 85 (2).

4. Article 86 of the EEC Treaty is applicable only if an undertaking occupies a dominant position on the market. That cannot be the case when a manufacturer of readily interchangeable products has a very small market share and keen competition exists between a number of manufacturers.