to grant an exemption in respect of such agreements under Article 85 (3).

2. A letter signed by an official of the Commission indicating that there is no reason for the Commission to take action pursuant to Article 85 (1) of the EEC Treaty against a distribution system which has been notified to it, may not be relied upon as against third parties and is not binding on the national courts. It merely constitutes an element of fact of which the national courts may take account in considering the compatibility of the system in question with Community law.

3. Decisions to grant exemption under Articles 85 (3) of the EEC Treaty give rise to rights in the sense that the parties to an agreement which has been the subject of such a decision may rely on that decision as against third parties who claim that the agreement is void on the basis of Article 85 (2).

4. The behaviour of an undertaking may be considered as an abuse of a dominant position within the meaning of Article 86 of the Treaty where the undertaking enjoys in a particular market the power to behave to an appreciable extent independently of its competitors, its customers and the consumers and where its behaviour on that market, through recourse to methods different from those which condition normal competition on the basis of the transactions of traders, hinders the maintenance or development of competition and may effect trade between Member States.

In Case 31/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Rechtbank van Koophandel of the legal district of Antwerp for a preliminary ruling in the proceedings pending before that court between

1. NV L'ORÉAL, Brussels,

2. SA L'ORÉAL, Paris,

and

PVBA DE NIEUWE AMCK, Hoboken,

on the interpretation of Articles 85 and 86 of the Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore and T. Koopmans (Presidents of Chambers), Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

1. The Belgian company L'Oréal NV, Brussels, and the French company L'Oréal SA, Paris, the plaintiffs in the main proceedings, brought before the President of the Rechtbank van Koophandel, Antwerp, in summary proceedings, two actions against De Nieuwe AMCK, Hoboken, the defendant in the main proceedings. These proceedings, which were joined by the President of the Rechtbank van Koophandel, are primarily for a declaration that the defendant's actions in offering for sale or selling a 370 gram aerosol container of Kérastase hair lacquer, a 719 gram aerosol container of Kérastase technical salon lacquer and a 150 millilitre bottle of Kérastase conditioner for fine and delicate hair bearing an express statement to the effect that they may be sold only by Kérastase hairdressing consultants, and, should the occasion arise, in obtaining stocks of those products by being party to a breach of contract, are acts contrary to fair trading practice. The plaintiffs also seek an injunction forbidding the defendant to offer for sale or sell the products referred to above or to obtain stocks thereof.

2. L'Oréal SA, Paris, is a French company manufacturing and marketing perfumery, beauty and toilet products. L'Oréal NV, Brussels, which markets L'Oréal products in Belgium, is a subsidiary company owned 99 % by L'Oréal SA. De Nieuwe AMCK, PVBA, is a wholesaler dealing in perfumery products. De Nieuwe AMCK is not part of the selective distribution network set up by L'Oréal for the sale of Kérastase products.

3. The defendant in the main proceedings claimed before the President of the Rechtbank van Koophandel,

Antwerp, that the selective distribution network set up by L'Oréal is illegal as being contrary to the Community rules on competition. In this respect the plaintiffs have however referred to a letter dated 22 February 1978 addressed to L'Oréal SA by the Commission, according to which, by reason of the small portion of the market for perfumery, beauty and toilet preparations occupied by L'Oréal in the various countries and the large number of competing undertakings of a similar size the Commission took the view that there was no need for it to intervene under Article 85 (1) of the EEC Treaty with regard to L'Oréal's distribution system and that the matter had therefore been allowed to rest.

4. By an order of 17 January 1980 the Rechtbank van Koophandel of the legal district of Antwerp decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

"1. Is the system of '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, for 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?"

5. The order containing the reference was lodged at the Court Registry on 23 January 1980.

In pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the plaintiffs in the main proceedings, represented by W. Alexander of The Hague Bar, by the defendant in the main proceedings, represented by P. Goossens and L. Neels, of the Antwerp Bar, by the French Government, represented by T. Le Roy, by the United Kingdom Government, represented by A. D. Preston, and by the Commission of the European Communities, represented by J. Temple Lang and J.-F. Verstrynge.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

A — By way of preliminary observations the *plaintiffs in the main proceedings* observe that the order containing the reference is based on inaccurate information. The products in question are not perfumery articles; they are not manufactured by L'Oréal SA, Paris, and imported by L'Oréal NV, Brussels; they are not luxury articles. The plaintiffs emphasize in particular that the selection of hairdressers made by L'Oréal for the sale of its hair-care products is based solely on objective qualitative criteria intended to guarantee that the sale and use of the products in question will take place in good conditions; their selection is by no means based on quantitative criteria. The number of "Kérastase hairdressing consultants" accepted for Belgium is at present 2 556. Under the Kérastase contract concluded with these hairdressing consultants L'Oréal undertakes *inter alia* to allow the hairdressing consultants the benefit of the necessary technical assistance to apply and to advise with regard to the application of the products and to supply them with constant information regarding the organization of hair-care in a salon. The hairdressers for their part undertake to attend technical information days organized by L'Oréal or to send their staff, 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 the collection as a whole. Hairdressing consultants also undertake not to supply the products in question otherwise than to other approved Kérastase hairdressing consultants.

(a) First question

The plaintiffs in the main proceedings observe that the question of the applicability of Article 85 (3) can arise only if it is established that the agreements in question are contrary to Article 85 (1). However, it is clear in this case that the conditions for the application of that provision are not fulfilled. A selective distribution system based on qualitative criteria for selection falls outside the sphere of application of Article 85 (1) as the Commission has recognized in its decision of 21 December 1976 *(Junghans,* Official Journal 1977 L 30, paragraphs 21 to 23) and as the Court has accepted in its judgment of 25 October 1977 (Case 26/76, *Metro* v *Commission* [1977] ECR 1875, paragraphs 20 and 27. The small portion of the market occupied by L'Oréal makes it doubly clear that there can be no infringement of Article 85 (1) in this case as the Commission emphasized in its letter of 22 February 1978.

Having regard to the foregoing and in the light of the exclusive power to apply Article 85 (3) conferred upon the Commision by Article 9 (1) of Regulation No 17, the plaintiffs propose that the reply to be given to the first question should be as follows:

"The answer to the question whether certain agreements — on the supposition that they fall within the prohibition contained in Article 85 (1) of the EEC Treaty — qualify for an exemption under Article 85 (3) is a matter exclusively for the Commission subject to a review of any such decision by the Court of Justice."

(b) Second question

In contrast to the proceedings in Cases 253/78, 1 to 3/79, 37/79 and 99/79, the

Commision's letter of 22 February 1978 plays only a very limited part in this case. It is in fact clear that the Kérastase qualitative selection system is not contrary to Article 85 (1). It was therefore a matter of supererogation for that letter to be lodged by the plaintiffs.

The said letter, acquainting L'Oréal with an opinion of the Commission, created for the undertaking the legitimate expectation that its agreements in their present form are compatible with Article 85. The Commission is bound by its declaration unless the circumstances change in a material respect or unless it finds that the information supplied to it was inaccurate. The point of the second question is to determine what is the effect of such a letter as regards the court. In this respect the plaintiffs observe that according to the judgment of 6 February 1973 (Case 48/72, *Brasserie de Haecht* v *Wilkin-Janssen* [1973] ECR 77, the national court must, unless it finds that the agreement is protected by provisional validity, decide whether the proceedings must be stayed so as to allow the parties to obtain the Commission's view. If the national court takes this latter course, it is bound by the Commission's viewpoint. In this case the Commission has already given an opinion on the agreements in question and as the national court has declared that it is not in a position to judge for itself the cumulative effect of distribution networks in the various Member States on the present dispute, it is bound by the Commission's standpoint on this matter. The plaintiffs therefore suggest that the reply to be given to the second question should be as follows:

"When the national court takes the view that it is not in a position to judge for itself whether, in the special circumstances, certain restrictions on competition within the meaning of Article 85 (1) — on the supposition that it has any application in this case — have an appreciable effect on competition and on trade between Member States and when it is in possession of the Commission's opinion on this point the opinion in question must be followed."

(c) Third question

Whilst taking the view that the question is devoid of any relevance in the context of these actions and is so vague that it is difficult to provide a reasonable answer, the plaintiffs suggest that the reply to be given to this question should be as follows:

"Decisions or regulations applying Article 85 (3) — on the supposition that it has any application to this case — may be relied on against any person claiming that an agreement is void on the basis of Article 85 (2) of the EEC Treaty."

(d) Fourth question

The plaintiffs point out that during the national proceedings there was no finding of the existence in this case of a dominant position. The selection of sellers according to "objective criteria relating to the qualifications of the seller" could not moreover constitute an abuse (judgment of 14 February 1978, in Case 27/76, *United Brands* v *Commission* [1978] ECR 207, paragraph 158). The plaintiffs accordingly propose the following reply:

"Where an undertaking holds a dominant position within the common market or in a substantial part of it —

which must be considered by the court — the selection of buyers/sellers on the basis of objective criteria relating to the qualifications of the seller, his staff and his facilities cannot constitute an abuse within the meaning of Article 86 unless such a practice erects obstacles the effect of which goes further than the objective in view."

B — The *defendant in the main proceedings* prefaces its reply to the first question, which seems to it to be the most important in the context of the main proceedings, by detailed general observations relating in particular to the cumulative effect of the agreements made between L'Oréal and its approved sellers, to the nature of the products at issue, to the Belgian rules for protecting the health of consumers in the field of cosmetics and aerosols, to the Belgian rules relating to access to the occupation of hairdresser and other relevant rules, to the exclusion of the stage of wholesale trading and parallel trading in the Kérastase distribution system, to the other restrictions contained therein and, finally, to the appreciable nature of these restrictions and to the effect on trade between Member States. Apart from these observations relating to the conditions for the applicability of Article 85 (1) the defendant in the main actions also puts forward observations relating to the applicability of Article 85 (3).

It emerges from these observations that the Kérastase distribution system, considered in the context of all the economic and legal circumstances, is contrary to Article 85. The allegedly objective criteria for selection used by L'Oréal in reality constitute hidden quantitative criteria. Having regard to the protection of the consumer provided for by the Belgian rules relating to cosmetic products and the Belgian rules relating to access to the occupation of hairdresser, the Kérastase distribution system, which is not open to all hairdressers practising in Belgium, has the effect of excluding a considerable number of hairdressers who possess all the necessary qualifications. Such exclusion is not indispensable in order to ensure the protection of the health of consumers; it stems solely from a desire to restrict competition. Moreover, if the aim of the selection practised by l'Oréal were to protect the consumer it would be difficult to see why the Kérastase distribution system should totally exclude the wholesale stage. L'Oréal is in fact prohibiting all wholesalers from distributing its products even if they were to limit themselves to the approved hairdressing consultants only. The exclusion of the wholesale stage makes it possible to maintain artificially sizeable differences in prices for L'Oréal products between the Member States (see table on page 58 of the defendant's observations). The Kérastase agreements contain other restrictions on competition: hairdressers are required to promote the sale of Kérastase products; they are also required to promote the whole of the range and L'Oréal reserves the right to check the charges which they make. According to the defendant in the main proceedings, these various restrictions on competition, having regard to the cumulative effect of the contracts at issue in the various Member States, appreciably restrict competition and affect trade between Member States. On the

supposition that notice is given of the contracts at issue, they could not in any event enjoy exemption under Article 85 (3) since it is clear that the restrictions on competition which they involve are not indispensable, having regard in particular to the framework of the rules within which they operate to attain the objectives of consumer protection which L'Oréal claims are intended.

First question

Having regard to the foregoing observations the defendant in the main proceedings suggests that the answer to be given to the first question should be as follows:

"A selective distribution system for hair-care products, in which selection takes place on the basis of qualification having regard to the risks which the use of the product causes the user to run is *contrary*, to Article 85 (1) when both Community rules and national rules already provide completely for the protection of the consumer of such products. To the extent to which the products concerned are intended exclusively to be used by persons providing a service by way of trade or business it is — having regard to the legislation which has been referred to and to national legislation governing access to the occupation in question, which permits the entry only of qualified persons — contrary to Article 85 (1) not to admit into the distribution network all persons providing such a service who carry on their trade or business in conformity with national legislation governing access to the occupation. In such a case it is also contrary to Article 85 (1) to exclude wholesalers from the distribution network.

A distribution system for hair-care products the existence of which is justified on the basis of the distribution required by reason of the nature of the products is contrary to Article 85 (1):

(a) Where it has not been shown that the nature of the products requires such a selective distribution, in particular when the products concerned are marketed under a particular trade-mark by an undertaking marketing similar products under other marks and which does not show that the first-mentioned products differ objectively from the second-mentioned products, if and so long as a selective distribution system must be organized for them whilst such a system is not necessary for the others, or at least is not subject to such restrictions;

(b) Where it is set up on the basis of the fact that it is desirable that the consumer should be informed by qualified specialists at the time of choosing hair-care products, and where all those providing services who must be considered as objectively qualified in accordance with national legislation are not admitted to it; where, in addition, criteria are applied which cannot be described as objective since it does not take account of the differences between those providing services in the sector in question; where supplementary obligations are imposed on those who are qualified to dispense hair-care, which cannot be justified by the aims pursued but on the contrary constitute serious restrictions on competition, such as the obligation to contribute to the promotion of sales which is imposed on those providing services whose function is to assist the consumer with expert knowledge and consequently in an objective manner in the choice of products available on the market; and, finally, when wholesale trade in such products is

excluded without its being possible for such exclusion to be justified from the point of view of the aim above referred to.

A selective distribution system which is applied simultaneously and systematically in several Member States constitutes an appreciable restriction on competition and appreciably influences trade between the states when parallel patterns of trade within the network are prevented and in particular where supply to sellers in other Member States is limited by the joint effect of the prohibition on exclusive importers to carry out an active sales policy outside the territory which is conceded to them, of the practical limitation of the opportunity for approved sellers to obtain supplies in other Member States and of the exclusion of wholesale trade in the products in question.

It is impossible for an exemption to be obtained under Article 85 (3) for a selective distribution system which, like that which is before the court making the order for reference, does more than limit the sale of the products in question to the specialized trades alone — which would be sufficient to realize the aim pursued — which does not apply objective criteria of a qualitative nature and furthermore imposes on approved sellers obligations which are not necessary in order to ensure a proper distribution of the products, and which, finally, has the result of excluding parallel trade within the distribution network or, at least, of seriously hampering it."

Second and third questions

As regards the binding nature of the letter of 22 February 1978, the defendant in the main actions refers to the opinion delivered by Mr Advocate General Reischl in Joined Cases 253/78, 1 to 3/79, 37/79 and 99/79. The letter is neither an exemption nor a negative clearance. It cannot be relied upon as against third parties and is not binding on a national court which thus retains jurisdiction to consider the legality of the agreements in question in the light of Article 85 (1).

Having regard to that answer, the third question is purposeless.

C — The *French Government* states that in its view a selective distribution system cannot be considered as compatible with the rules of competition except to the extent to which it is based on qualitative and not quantitative criteria. However, it is for the Community authorities, subject to review by the Court of Justice, to determine the applicability of Article 85 (3) to the distribution systems at issue.

As regards the second question, the letter of 22 February 1978 is neither a negative clearance nor an exemption. It is simply an expression of view by a representative of the Commission which might possibly involve the liability of the Community for "erroneous information".

The exemptions referred to in Question 3 may be relied on against third parties but in this case there has been no exemption. A mere letter stating that the matter is being allowed to rest may not be relied on against third parties.

Finally the French Government takes the view that Question 4 lies outside the scope of Article 177 in as much as it asks the Court to give a decision on an actual case. It is for the Commission to make

a finding that there have been infringements of Article 86.

D — The *Government of the United Kingdom* observes that Question 1 is in two parts. First, it inquires whether a system of distribution as described in the question is eligible for exemption under Article 85 (3). In this respect the Government of the United Kingdom refers to Joined Cases 253/78 and 1 to 3/79 and more particularly to the opinion of the Advocate General in those cases. Secondly the question asks whether L'Oréal's distribution system is exempt. However, that question falls outside the scope of Article 177 since it is asking the Court to give a decision on the applicability of Article 85 to a given case. Furthermore, under Article 9 (1) of Regulation No 17 the Commission has sole power to apply Article 85 (3).

The letter of 22 February 1978 is merely an expression of opinion as the Advocate General stated in his opinion with regard to similar letters which were the subject of Joined Cases 253/78 and 1 to 3/79.

Question 3 has no relevance in the context of the main proceedings. According to the Government of the United Kingdom the only effect with regard to third parties of an exemption is that they will be unable to invoke the prohibition in Article 85 (1) against the agreement in question. The exemption gives no rights which may be relied on against third parties. The question whether the parties to the agreements referred to have any such rights in this case is a matter for Belgian law alone.

As regards Question 4 the United Kingdom Government takes the view that the provisions of Article 86 are unlikely to be applicable to this case having regard to the small share held by L'Oréal in the market, as referred to in the letter of 22 February 1978.

E — The *Commission* first recalls the administrative action which it took in the sector of perfumery and toilet preparations, which is also described in its observations in Joined Cases 253/78 and 1 to 3/79. The letter of 22 February 1978 which was sent by Mr Ferry to L'Oréal after the latter had agreed to abolish the indirect prohibition on export which the distribution agreements at issue had previously contained forms part of that action as a whole.

First question

The Commission observes that the question of any exemption under Article 85 (3) arises only when the conditions for the applicability of Article 85 (1) are present.

In this respect the Commission, referring in particular to paragraph 20 of the judgment in the *Metro* case, to which reference has already been made, emphasizes that the selection of distributors on the basis of purely qualitative criteria escapes the prohibition contained in Article 85 (1) if the said criteria are applied uniformly and without discrimination to all potential distributors. On the contrary, when the selection introduces quantitative criteria there is, in principle, a restriction on competition.

However, to be caught by the prohibition set out in Article 85 (1) such a restriction must affect trade between Member States and the free play of competition to an appreciable extent having regard to the actual conditions in which it operates (judgment of 25 November 1971, in Case 22/71, *Béguelin* [1971] ECR 949, paragraph 18). In this case the Commision took the view, having regard to factors of which it was aware, that the restrictions on competition which might still exist in the sector concerned were no longer appreciable and were in any event no longer capable of appreciably affecting trade between Member States.

If the agreements in question were nevertheless to be considered as falling within the prohibition contained in Article 85 (1) the Commission takes the view that the arguments hitherto advanced by the undertakings in the luxury perfumery sector are not of such a nature as to justify the grant of an exemption under Article 85 (3) to such agreements.

Finally the Commission observes that it cannot be considered that the action which it took had the effect of exempting under Article 85 (3) the agreements on which the L'Oréal sales organization is based. The Commission simply considered that there were not grounds for intervening under Article 85 (1). The Commission emphasizes that, so far as it is aware, L'Oréal is simply applying a qualitative selection which therefore escapes *ipso facto* from the sphere of application of Article 85 (1).

Second question

On the basis of considerations similar to those which it put forward in Cases 253/78, 1 to 3/79, 37/79 and 99/79, the Commission suggests that the reply to this question should be as follows:

"Community law does not allow a letter such as that sent to L'Oréal on 22 February 1978 to be considered as a decision by the Commission. Since it is an administrative letter bringing to the knowledge of L'Oréal the fact that the Commission thinks that there are no longer any grounds, having regard to factors of which it is aware, for it to intervene with regard to the agreements concerned under the provisions of Article 85 (1), it is not possible under Community law to regard such a letter as capable of being relied on against third parties."

Third question

The Commission feels that it is not necessary to reply to this question as no exemption has been granted in this case; further, it refers to the answers to the written questions put by the Court in Cases 253/78, 1 to 3/79, 37/79 and 99/79.

Fourth question

Independently of the question whether L'Oréal's conduct constitutes an abuse, the Commission does not see how such conduct could fall within the application of Article 86 by reason of the small share of the market held by the undertaking in question. The Commission therefore proposes that the question should be answered as follows:

"L'Oréal's conduct cannot be prohibited by the provisions of Article 86 of the Treaty of Rome as long as L'Oréal does not occupy a dominant position in a substantial part of the common market."

III — Oral procedure

The plaintiff in the main proceedings, represented by Mr Alexander of The Hague Bar, the defendant in the main proceedings, represented by Mr Neels of the Antwerp Bar, and the Commission of the European Communities, represented by Mr Kuyper, a member of its Legal Department, presented oral argument at the sitting on 23 September 1980.

The Advocate General delivered his opinion at the sitting on 15 October 1980.

Decision

1 By an order of 17 January 1980, which reached the Court on 23 January 1980, the Rechtbank van Koophandel [Commercial Court] of the legal district of Antwerp, in pursuance of Article 177 of the EEC Treaty, requested the Court to give a preliminary ruling on questions relating to the interpretation of Articles 85 and 86 of the Treaty.

2 These questions are referred to the Court in the course of an action brought by the Belgian company L'Oréal NV and the French company L'Oréal SA before the President of the Rechtbank van Koophandel, Antwerp, in summary proceedings, against the company, De Nieuwe AMCK. The L'Oréal companies have established in Belgium for Kérastase hair-care products a selective distribution network of which the company De Nieuwe AMCK is not a part. The action is primarily for a declaration that the defendant's actions in offering for sale or selling Kérastase products bearing an express statement that they may be sold only by Kérastase hairdressing consultants, and should the occasion arise, in obtaining stocks of those products by being party to a breach of contract, are acts contrary to fair trading practice. The plaintiffs also seek an injunction forbidding the defendant to offer for sale or sell the products referred to above or obtain stocks thereof.

3 The defendant in the main proceedings contended before the national court that the selective distribution network set up by L'Oréal was illegal as being contrary to the Community rules on competition. In reply, the plaintiffs in the main proceedings referred to a letter dated 22 February 1978 addressed

to L'Oréal SA by the Commission. By that letter the Commission informed the company that by reason of the small portion of the market for perfumery, beauty and toilet preparations occupied by L'Oréal in the various countries and the large number of competing undertakings of a similar size, the Commission took the view that there was no need for it to intervene under Article 85 (1) of the Treaty with regard to L'Oréal's distribution system and that the matter had therefore been allowed to rest.

4 The Rechtbank van Koophandel consequently decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

"1. Is the system of '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, for 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?"

5 It should first be recalled that the Court is not empowered, as part of the task assigned to it by Article 177 of the Treaty, to entertain the question of the application of the Treaty to a given case. The Court, therefore, has no

jurisdiction to reply to the second part of the first question. It is a matter for the national court to decide, during the course of the actions which are brought before it and having regard to the facts of the case and, if appropriate, to replies given to the questions of interpretation, which it may have considered it necessary to refer to the Court of Justice, whether there are grounds to apply Articles 85 and 86 of the Treaty.

6 Nevertheless, since the jurisdiction of the national courts may be affected by the action of the Commission, priority should be given to the examination of the second question relating to the legal nature of and to the consequences to be attached to the letter sent by the Commission to L'Oréal SA.

The legal nature of the letter in question

7 As the Court has had occasion to state in its judgments of 10 July 1980 *(Lancôme,* Case 99/79; *Guerlain and Others,* Joined Cases 253/78 and 1 to 3/79; *Marty,* Case 37/79), Article 87 (1) of the Treaty empowered the Council to adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. In accordance with this power the Council has adopted regulations and in particular Regulation No 17 of 6 February 1962 (Official Journal, English Special Edition, 1959-1962, p. 87), which empowered the Commission to adopt various categories of regulations, decisions and recommendations.

8 The instrument thus placed at the Commission's disposal for the accomplishment of its task include decisions granting negative clearance and decisions in application of Article 85 (3). So far as decisions granting negative clearance are concerned, Article 2 of Regulation No 17 of the Council provides that, upon application by the undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice. So far as decisions applying Article 85 (3) are concerned, Article 6 et seq. of Regulation No 17 cited above provide that the Commission may adopt decisions declaring the provisions of Article 85 (1) to be inapplicable to a given agreement provided that the latter has been notified to it or notification has been dispensed with by virtue of Article 4 (2) of the regulation. Those to whom such a decision is

addressed thus obtain recognition of their right to adopt, under such conditions, if any, as may be laid down by the Commission, an agreement, decision or concerted practice, and they may rely upon that right against any third party who, in an action before the national courts, claims that the agreement, decision or concerted practice concerned is in breach of Article 85 (1).

9 Regulation No 17 and the regulations issued in implementation thereof lay down the rules which must be followed by the Commission in adopting the aforementioned decisions. Where the Commission intends to give negative clearance pursuant to Article 2 or take a decision in application of Article 85 (3) of the Treaty, it is bound, in particular, by virtue of Article 19 (3) of Regulation No 17, to publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time-limit which it shall fix. Decisions granting negative clearance and exemption mus be published, as provided for by Article 21 (1) of that regulation.

10 It is plain that a letter such as that sent to the L'Oréal company by the Directorate-General for Competition, which was despatched without publication as laid down in Article 19 (3) of Regulation No 17 and which was not published pursuant to Article 21 (1) of that regulation, constitutes neither a decision granting negative clearance nor a decision in application of Article 85 (3) within the meaning of Articles 2 and 6 of Regulation No 17. As is stressed by the Commission itself it is merely an administrative letter informing the undertaking concerned of the Commission's opinion that there is no need for it to take action in respect of the contracts in question under the provisions of Article 85 (1) of the Treaty and that the file on the case may therefore be closed.

11 Such a letter, which is based only upon the facts in the Commission's possession, and which reflects the Commission's assessment and brings to an end the procedure of examination by the department of the Commission responsible for this, does not have the effect of preventing national courts, before which the agreements in question are alleged to be incompatible with Article 85, from reaching a different finding as regards the agreements concerned on the basis of the information available to them. Whilst it does

not bind the national courts, the opinion transmitted in such a letter nevertheless constitutes a factor which the national courts may take into account in considering whether the agreements or conduct in question are in accordance with the provisions of Article 85.

12 Consequently, it must be stated in reply to the second question that a letter signed by an official of the Commission indicating that there is no reason for the Commission to take action pursuant to Article 85 (1) of the EEC Treaty against a distribution system which has has been notified to it, may not be relied upon against third parties and is not binding on the national courts. It merely constitutes an element of fact of which the national courts may take account in considering the compatibility of the system in question with Community law.

The application of Article 85 to the distribution system in question

13 With regard to the first question referred to the Court by the national court concerning the possibility that the distribution system in question may receive an exemption under Article 85 (3), it should be recalled that under Article 9 (1) of Regulation No 17 cited above the Commission has sole power, subject to review by the Court, to declare the provisions of Article 85 (1) of the Treaty inapplicable pursuant to Article 85 (3) of the Treaty. The jurisdiction of the national courts is restricted to determining whether the agreement, decision or concerted practice which is the subject of the action before them is in accordance with Article 85 (1) and, if appropriate, to declaring the agreement, decision or practice in question void under Article 85 (2).

14 It is therefore in relation to those provisions that the national court will have to examine the validity of L'Oréal's distribution system. It is for the Court of Justice to provide it for this purpose with the points of interpretation of Community law, which will enable it to reach a decision.

15 As the Court observed in its judgment of 25 October 1977 (Case 26/76, *Metro* v *Commission* [1977] ECR 1875), selective distribution systems constitute an aspect of competition which accords with Article 85 (1)

provided that re-sellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the re-seller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential re-sellers and are not applied in a discriminatory fashion.

16 In order to determine the exact nature of such "qualitative" criteria for the selection of re-sellers, it is also necessary to consider whether the characteristics of the product in question necessitate a selective distribution system in order to preserve its quality and ensure its proper use, and whether those objectives are not already satisfied by national rules governing admission to the re-sale trade or the conditions of sale of the product in question. Finally, inquiry should be made as to whether the criteria laid down do not go beyond what is necessary. In that regard it should be recalled that in Case 26/76, *Metro* v *Commission* cited above, the Court considered that the obligation to participate in the setting up of a distibution system, commitments relating to the achievement of turnovers and obligations relating to minimum supply and to stocks exceeded the requirements of a selective distribution system based on qualitative requirements.

17 When admission to a selective distribution network is made subject to conditions which go beyond simple objective selection of a qualitative nature and, in particular, when it is based on quantitative criteria, the distribution system falls in principle within the prohibition in Article 85 (1), provided that, as the Court observed in its judgment of 30 June 1966 *(Société Technique Minière* v *Maschinenbau Ulm GmbH,* Case 56/65, [1966] ECR 235), the agreement fulfils certain conditions depending less on its legal nature than on its effects first on "trade between Member States" and secondly on "competition".

18 To decide, on the one hand, whether an agreement may affect trade between Member States it is necessary to decide on the basis of a set of objective factors of law or of fact and in particular with regard to the consequences of the agreement in question on the possibilities of parallel importation whether it is possible to foresee with a sufficient degree of probability that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.

19 On the other hand, in order to decide whether an agreement is to be considered as prohibited by reason of the distortion of competition which is its object or its effect, it is necessary to consider the competition within the actual context in which it would occur in the absence of the agreement in dispute. To that end, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and the importance of the parties on the market for the products concerned, and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements. In that regard the Court stated in its judgment of 12 December 1967 (in Case 23/67 *Brasserie de Haecht* [1967] ECR 407) that, although not necessarily decisive, the existence of similar contracts is a circumstance which, together with others, is capable of constituting an economic and legal context within which the contract must be judged.

20 It is for the national court to decide, on the basis of all the relevant information, whether the agreement in fact satisfies the requirements necessary for it to fall under the prohibition laid down in Article 85 (1).

21 Consequently, the answer to the first question must be that the agreements laying down a selective distribution system based on criteria for admission, which go beyond a mere objective selection of a qualitative nature, exhibit features making them incompatible with Article 85 (1) where such agreements, either individually or together with other, may, in the economic and legal context in which they occur and on the basis of a set of objective factors of law or of fact, affect trade between Member States and have either as their object or effect the prevention, restriction or distortion of competition. It is for the Commission alone, subject to review by the Court, to grant an exemption in respect of such agreements pursuant to Article 85 (3).

Reliance on an exemption under Article 85 (3) against third parties

22 It has already been emphasized, when the nature of the letter referred to in the second question was considered, that when an exemption under Article

85 (3) is granted by the Commission, it confers a right on the recipient, upon which he may rely against third parties.

23 Consequently, the answer to the third question must be that decisions to grant exemption under Article 85 (3) of the EEC Treaty give rise to rights in the sense that the parties to an agreement which has been the subject of such a decision may rely on that decision against third parties who claim that the agreement is void on the basis of Article 85 (2), but that, taking into account the reply given to the question concerning the legal nature of the Commission's letter, that letter does not constitute such an exemption.

The application of Article 86

24 Article 86 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the common market or within a substantial part of it in so far as it may affect trade between Member States.

25 As the Court emphasized in its judgment of 21 February 1973 in Case 6/72, *Europemballage and Continental Can* v *Commission* [1973] ECR 215, when considering the possibly dominant position of an undertaking, the definition of the market is of fundamental significance. Indeed, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to ther characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.

26 A dominant position exists within the market thus defined when, as the Court last stated in its judgment of 13 February 1979 in Case 85/76, *Hoffmann-La Roche* v *Commission* [1979] ECR 461, an undertaking enjoys a position of economic strength which enables it to prevent effective competition from being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

27 As far as the concept of abuse is concerned, that was defined by the Court in Case 85/76, *Hoffmann-La Roche*, cited above, as an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of traders, has the effect of hindering the maintenance of the degree of competition, still existing in the market or the growth of that competition.

28 The affecting of trade between Member States is a concept common to both Articles 85 and 86 of the Treaty and has been clarified above.

29 Just as in the case of Article 85, it is for the national court to decide, on the basis of the whole of the facts concerning the behaviour in question, whether Article 86 applies.

30 Consequently, the answer to the fourth question must be that the behaviour of an undertaking may be considered as an abuse of a dominant position within the meaning of Article 86 of the Treaty where the undertaking enjoys in a particular market the power to behave to an appreciable extent independently of its competitors, its customers and the consumers and where its behaviour on that market, through recourse to methods different from those which condition normal competition on the basis of the transactions of traders, hinders the maintenance or development of competition and may affect trade between Member States.

Costs

31 The costs incurred by the French Government, the Government of the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Rechtbank van Koophandel, Antwerp, by order of 17 January 1980, hereby rules:

1. **The agreements laying down a selective distribution system based on criteria for admission which go beyond a mere objective selection of a qualitative nature exhibit features making them incompatible with Article 85 (1) where such agreements, either individually or together with others, may, in the economic and legal context in which they occur and on the basis of a set of objective factors of law or of fact, affect trade between Member States and have either as their objective or effect the prevention, restriction or distortion of competition. It is for the Commission alone, subject to review by the Court, to grant an exemption in respect of such agreements under Article 85 (3).**

2. **Since a letter signed by an official of the Commission indicating that there is no reason for the latter to take action under Article 85 (1) of the EEC Treaty against a distribution system which has been notified to it is not an exemption within the meaning of Article 85 (3), it may not be relied upon against third parties and is not binding on the national courts. It merely constitutes an element of fact of which the national courts may take account, in considering the compatibility of the system in question with Community law.**

3. **The behaviour of an undertaking may be considered as an abuse of a dominant position within the meaning of Article 86 of the Treaty, where the undertaking enjoys in a particular market the power to behave to an appreciable extent independently of its competitors, its customers and the consumers and where its behaviour on that market, through recourse to methods different from those which condition**

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

Mackenzie Stuart　　O'Keeffe　　Bosco　　Touffait

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.