In Joined Cases 253/78 and 1 to 3/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance, Paris, (31st Chamber) for a preliminary ruling in the actions pending before that court between

PROCUREUR DE LA RÉPUBLIQUE AND MESSRS FRANCIS PACHOT AND VINCENT RAMON

and

BRUNO GIRY AND GUERLAIN S.A. (Case 253/78)

PROCUREUR DE LA RÉPUBLIQUE AND MRS WINDENBERGER, NÉE ULM

and

MAURICE PIERRE CELICOUT AND PARFUMS ROCHAS S.A. (Case 1/79)

PROCUREUR DE LA RÉPUBLIQUE AND MRS WINDENBERGER, NÉE ULM

and

YVES PIERRE LANVIN AND LANVIN-PARFUMS S.A. (Case 2/79)

PROCUREUR DE LA RÉPUBLIQUE AND MRS WINDENBERGER, NÉE ULM

and

ANDRÉ ALBERT FAVEL AND NINA RICCI S.À R.L. (Case 3/79)

on the interpretation of Article 85 of the EEC Treaty and of certain rules adopted in implementation of that provision,

THE COURT

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

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

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

1. The facts in the main actions may be summarized as follows:

(a) Case 253/78

Mr Giry, Sales Manager of Guerlain S.A., was ordered to appear before the 31st Chamber of the Tribunal de Grande Instance, Paris, charged with having committed an offence treated in the same way as the charging of illegal prices by refusing to fill an order for perfumery from the plaintiffs claiming damages who carry on business in Aix-en-Provence, Guerlain S.A. being jointly liable.

In order to justify his refusal, Mr Giry claimed that his company was connected with a perfumer in Aix-en-Provence by an authorized distributorship agreement and could not have any other distributors in that city without causing harm to the first one: he claimed in addition that in order to maintain the prestige of the trade-mark and to ensure the protection of its customers, Guerlain S.A. practised a sales policy of selective distribution formally approved by the judgment of the Cour d'Appel, Paris, of 26 May 1965 known as the Guerlain judgment.

The plaintiffs claiming damages stated before the Tribunal de Grande Instance, Paris, that the harm which they had suffered was very great and asked that court to order Mr Giry and Guerlain S.A. jointly to pay them damages in the sum of FF 450 000.

Counsel for Mr Giry claimed that Mr Giry should be discharged, laying emphasis in particular on the bad faith of the two plaintiffs claiming damages and on the unfair methods used by them to obtain products from Guerlain S.A. from distributors far distantfrom Aix-en-

Provence but to resell them in that city; in addition he relied on the necessarily selective nature of the distribution systems in the perfume trade, maintaining that Guerlain S.A. had obtained approval from the Commission of the European Communities to set up a system of selective distribution.

(b) Case 1/79

Mr Celicout, Sales Manager of Parfums Rochas S.A., was also ordered to appear before the 31st Chamber of the Tribunal de Grande Instance, Paris, charged with committing a similar offence with regard to the orders for perfumery from the plaintiff claiming damages, Mrs Windenberger, who carried on business in Strasbourg, Parfums Rochas S.A. being jointly liable.

In order to justify his refusal, Mr Celicout claimed that his company was connected by exclusive distributorship agreements with six perfumers in Strasbourg and that therefore the products ordered by the plaintiff claiming damages were legally unavailable according to uniform and well established case-law. With regard to the orders from another plaintiff claiming damages carrying on business in Toulon whom the court found had withdrawn her action, he put forward a similar ground based on such agreements concluded with five perfumers in Toulon.

Mrs Windenberger asked the Tribunal de Grande Instance, Paris, to order Mr Celicout and Parfums Rochas S.A., jointly liable in civil law, to pay her the sum of FF 91 466 as damages.

Counsel for Mr Celicout claimed that Mr Celicout should be discharged, laying emphasis in particular on the fact that the marketing of the products in question is, both in France and in the other Member States, organized by a system of selective distribution based on agreements notified to the Commission of the European Communities; he then claimed that the Commission authorized that selective distribution system by a decision of 26 March 1976 and by that decision on the basis of Article 85 (3) ratified it as regards the Community rules of competition; in addition he claimed that that decision forms an integral part of Community law which cannot be called in question by national legislation, quoted in support of his arguments several judgments of the Court of Justice and in particular claimed that the national authorities are not authorized to prohibit restrictions on competition which the Commission has released from the prohibition pursuant to Article 85 (3).

(c) Case 2/79

Mr Lanvin, Chairman and Managing Director of Lanvin-Parfums S.A., was ordered to appear before the 31st Chamber of the Tribunal de Grande Instance, Paris, also charged with a similar offence with regard to the orders for perfumery from Mrs Windenberger, plaintiff claiming damages, who carries on business in Strasbourg, Lanvin-Parfums S.A. being jointly liable.

er to justify his refusal, Mr Lanvin claimed in particular on the one hand that the premises of the plaintiff claiming damages did not exhibit the characteristics of a luxury business essential for the marketing of Lanvin's prestige

products and on the other that those products were marketed at twelve sales points in Strasbourg and that a further sales point would have harmed its stockists by increasing advertising expenditure.

The plaintiff claiming damages asked the Tribunal de Grande Instance, Paris, to order Mr Lanvin and Lanvin-Parfums S.A. to pay her the sum of FF 70 000 damages.

Counsel for Mr Lanvin claimed that Mr Lanvin should be discharged, laying emphasis in particular on the fact that his company distributes its perfumery products all over the world through a connected network of authorized distributors in order to protect its trade-mark, that this method of distribution is a condition for acquiring the position which Lanvin-Parfums S.A. intended to obtain on the world market and that that choice means that the perfumer retains control of its network as regards both the choice and the number of its retailers.

He also maintained that the refusal to sell was legitimate and lawful pursuant to the Treaty of Rome and that because of the special structure of the market in the field of luxury perfumery the Commission of the European Communities decided to permit the selective distribution system regularly practised by perfumers; the decision adopted forms an integral part of Community law and such law cannot be called in question by national legislation. He claimed that free competition is sufficiently ensured by the number of the company's distributors in Strasbourg, that the selective distribution system was authorized by the decisions of the Commission which take precedence over national law and that in those circumstances it was permissible for it to limit its sales points and to remain in control of the choice and the number of traders with whom it intended to enter into agreements.

(d) Case 3/79

Mr Favel, Sales Director of Nina Ricci S.à r.l., was also ordered to appear before the 31st Chamber of the same court charged with a similar offence with regard to the orders for perfumery from the plaintiff claiming damages, Mrs Windenberger, who carries on business in Strasbourg, Nina Ricci S.à r.l. being jointly liable.

In order to justify his refusal Mr Favel claimed that the premises of the plaintiff claiming damages did not exhibit the conditions of a luxury perfumery shop essential for the marketing of the company's prestige products, adding that those products were already distributed to twelve sales points in Strasbourg situated near the premises of the plaintiff claiming damages and that he was therefore unable to fulfil those orders without causing dissatisfaction to his stockists, with whom he had entered into agreements based upon the principle of selective distribution.

The plaintiff claiming damages asked the court to order Mr Favel and Nina Ricci S.à r.l. to pay her the sum of FF 60 020 as damages.

Counsel for Mr Favel claimed that Mr Favel should be discharged, laying emphasis in particular on the fact that the company has been remarkably successful all over the world, that in France it employs more than 700 persons, that its perfumes are to be found in

130 countries, that in the United States in particular its perfumes are among the leaders and that this expansion would come to an end if it had to popularize its products; in addition he put forward arguments relating in particular to Community law which are virtually identical to those put forward by Mr Lanvin, before claiming that the refusal to sell complained of is lawful.

2. Taking the view that it was not sufficiently informed as regards Community law, the Tribunal de Grande Instance, Paris, ordered by four orders of 5 July 1978 that the exclusive dealing agreements entered into by Guerlain S.A., Parfums Rochas S.A., Lanvin-Parfum S.A. and Nina Ricci S.à r.l. and

'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] so that that Court can decide whether certain luxury products whose brand image is important can benefit from the exemption provisions contained in Article 85 (3) of the Treaty establishing the European Economic Community and whether in the present case [the companies concerned] benefit therefrom in Community law'.

3. The orders for reference were entered on the Court Register on 14 November 1978 as regards Case 253/78 and on 2 January 1979 as regards Cases 1 to 3/79.

By order of 17 January 1979, the Court decided to join those case for the purposes of the written and oral procedure.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiffs claiming damages in Case 253/78, Mr Francis Pachot and Mr Vincent Ramon, represented by Mr Dewynter, Advocate at the Paris Bar, by the defendants in Case 253/78, Mr Bruno Giry and Guerlain S.A., represented by Mr Mollet-Vieville, Bâtonnier, and Mr Robert Collin, Advocates at the Paris Bar, by the plaintiff claiming damages in Cases 1 to 3/79, Mrs Windenberger, née Ulm, represented by S.C.P. Rambaud-Martel, represented by Claudine Maitre-Devallon, Advocate at the Paris Bar, by the defendants in Case 1/79, Mr Pierre Celicout and Parfums Rochas S.A., represented by Mr Bernard Buisson and Mr Robert Collin, Advocates at the Paris Bar, by the defendants in Case 2/79, Mr Yves Lanvin and Lanvin-Parfums S.A., represented by Mr Claude Lebel and Mr Robert Collin, Advocates at the Paris Bar, by the defendants in Case 3/79, Mr Albert Favel and Nina Ricci Parfums S.à r.l., represented by Mr Claude Lebel and Mr Robert Collin, Advocates at the Paris Bar, by the Government of the French Republic, by the Government of the United Kingdom, represented by R. D. Munrow, Treasury Solicitor's Office, and by the Commission of the European Communities, represented by its Legal Adviser John Temple Lang and by Jean-François Vertrynge, member of the Legal Service of the Commission, acting as Agents.

After 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 under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations submitted by the plaintiffs claiming damages, Mr Pachot and Mr Ramon (Case 253/78)

The plaintiffs claiming damages in the main action, Mr Pachot and Mr Ramon, recall that they own in Aix-en-Provence three very luxurious retail perfumery business run by highly qualified sales ladies and demonstrators. Since they were set up in 1967 these perfumery shops have obtained the approval of the major brands of perfumes and beauty products except Guerlain. Since 1968 Mr Pachot and Mr Ramon, convinced of the impact of the Guerlain trade-mark, have continually made overtures to it, but without success. In view of the refusal by Guerlain S.A., Mr Pachot and Mr Ramon therefore sent Guerlain S.A. a formal request to make a declaration *(sommation interpellative)* of 16 June 1975 in which they ordered a certain number of products in exchange for a certified cheque for the sum of FF 38 000. As Guerlain S.A. refused to change its attitude, Mr Pachot and Mr Ramon commenced criminal proceedings with a claim for damages for refusal to sell.

According to Mr Pachot and Mr Ramon, the basic argument of Guerlain S.A. in order to justify its refusal to sell is based upon the improvement in the service given to customers by the limitation by area of the number of distributors and by selective distribution based on the criteria of luxury and of the technical skill of the staff of that distributor. Still according to Mr Pachot and Mr Ramon, Guerlain S.A. also claims to fulfil the requirements laid down in Article 85 (3) of the Treaty by permitting authorized retailers to buy its products from and to resell them to any general agent or authorized retailer established in the Community and to fix their selling price where the products are re-imported from or re-exported to other countries of the Common Market. In fact Guerlain S.A. grants or refuses to grant its approval to a retail perfumer arbitrarily, which enables it to distort competition both within the Common Market and in French territory.

As regards the criteria of selection adopted by Guerlain S.A., it is necessary to observe that the number of distributors authorized by that company has continually increased in the provinces in recent years. Quoting several figures, Mr Pachot and Mr Ramon claim that Guerlain S.A. aims to increase the number of its stockists and that on the other hand it refuses approval to certain retailers on the basis of purely subjective criteria. It is difficult to explain why a town such as Nîmes has four stockists whereas in a town such as Aix-en-Provence, a town of nearly the same size, Guerlain S.A. relies upon an exclusive distributorship agreement so as to refuse its consent. As for the argument put forward by Guerlain S.A. that unsatisfactory and popularized distribution is not sufficient for its products, that argument is not in accordance with the actual facts.

As regards the conditions of luxury and of great technical skill offered by the plaintiffs, they point out that they own three very luxurious perfumery shops in Aix-en-Provence in the main thoroughfares of the town. The fittings are luxurious and the turnover is sufficiently high for Mr Pachot and Mr Ramon to rank amongst the fifty leading French perfumers. These factors enable the argument that the restriction on the number of stockists is justified by the ineresets of consumers to be dismissed. In fact, the true reason for the refusal by Guerlain S.A. to sell to the plaintiffs is Guerlain's wish to maintain a closed network and not to cause dissatisfaction to its present distributor in Aix-en-Provence. This is clear from the opinion adopted by the Directorate-General for Competition in the main action.

Mr Pachot and Mr Ramon conclude by claiming that agreements which are in accordance with Community law are not automatically in accordance with the French rules and that those rules may be very demanding as far as compliance with the rules of competition is concerned, without infringing the Community provisions. It is necessary to conclude from the viewpoint adopted on 3 June 1976 by the Commission, which considered that it was unnecessary to take action with regard to the selection of sales points, that the Commission intends to leave to each Member State the task of organizing the distribution of luxury products in its territory in harmony with the Community decisions. It is therefore unimportant whether or not Guerlain S.A. benefits from the exemptions laid down in Article 85 (3) of the Treaty of Rome as regards the decision by a French court as to whether or not a French trader has met with a refusal to sell by a French manufacturer. If the Court should decide otherwise it would be necessary to define stricter criteria for the derogations from Article 85 because as formulated at present they can only enable free competition to be distorted both at the national level and between the countries of the Common Market.

B — Observations of Mrs Windenberger, plaintiff claiming damages (Cases 1 to 3/79)

Having recalled briefly the facts which gave rise to the main actions, Mrs Windenberger claims that the strict and precise conditions to which the exemptions granted by the Commission are subject with regard to sales networks based on quantitative and qualitative criteria of selection for certain luxury products are not completely fulfilled by toiletries or perfumes such as those distributed by Parfums Rochas S.A., Lanvin-Parfums S.A. and Nina Ricci S.à r.l. In fact an exemption may only be granted by way of exception to distribution systems based on qualitative criteria and only in so far as the nature of the products (technical complexity, need for a high quality after-sales service or dangerous nature of the products) necessitates such close cooperation between producers and retailers that any other distribution system can reasonably be excluded.

In any case in the present instance no specific positive decision of exemption has been adopted by the Commission. The Commission merely informed the various companies in question that it was no longer necessary for it to take action in respect of the agreements which are the outcome of the sales organizations practised in the field in question, provided that any direct or indirect export ban imposed on general representatives or authorized retailers as well as the obligation imposed on the latter to observe the imposed re-import or re-export prices is abolished. It is a simple administrative decision closing the file.

In these circumstances, contrary to the claims made by the defendants before the Tribunal de Grande Instance, Paris, no decision of the Commission exists in relation to them expressly authorizing under Article 85 (3), which is the only possible basis of such an express authorization, the system of selective distribution of their products, a decision which forms an integral part of Community law and against which a provision of national law which is not in accordance with Community law cannot be set up by a national court.

Although according to the case-law of the Court of Justice and in particular the judgment in the *Walt Wilhelm* case, [1969] ECR 1, the supremacy of the provisions of Community law is binding upon the national authorities which may only take action pursuant to national law provided that that law is not contrary to Community law, this supremacy can obviously follow only from provisions of positive Community law, in other words either from provisions of the Treaty or from implementing measures adopted by the Community authorities.

In fact, the Court held in that judgment that only should it prove that a decision of a national authority regarding an agreement would be incompatible with a decision adopted by the Commission at the culmination of the procedure instituted by it, in other words either a decision of prohibition or a decision of exemption, is the national authority required to take proper account of the effects of the latter decision.

However in the present case no positive decision of exemption and no genuine implementing measure has been adopted by the competent authority of the European Communities, in other words the Commission. The Commission has only adopted a decision of a purely administrative order or nature to close the file since the agreements and practices in question did not have such an effect on trade between Member States and competition that it could have justified positive executive action on the part of the Commission either under Article 85 (1) by way of prohibition or under Article 85 (3) by way of exemption.

Therefore since the defendant companies could not prove the existence of any positive executive provision of Community law authorizing and expressly ratifying their system of selective distribution which is both qualitative and quantitative and which might be capable of hindering the application of the different and more restrictive provisions of national law in this field, the problem of the overlapping of Community

provisions and provisions of national law and that of the supremacy of Community law, which have been raised in the present case by the defendants, do not arise.

Mrs Windenberger therefore concludes that the questions referred to the Court of Justice for a preliminary ruling by the court making the reference in Cases 1 to 3/79 should be answered as follows:

"The Commission of the European Communities may take decisions of exemption pursuant to Article 85 (3) in respect of certain luxury products the distribution of which is based on a selective system which is both qualitative and quantitative where the strict conditions laid down in that article are all fulfilled, in particular where the nature of the product is such that by its technical complexity, the need for high quality after-sales service or its dangerous nature only that distribution system can ensure that the beneficial effects of exclusive distribution agreements are achieved; this is not the case as regards the toiletries or perfumes manufactured by Parfums Rochas S.A./Lanvin-Parfums S.A./Nina Ricci S.à r.l.

Parfums Rochas S.A./Lanvin-Parfums S.A./Nina Ricci S.à r.l. in no way benefit from such a decision of exemption taken by the Commission pursuant to Article 85 (3), in other words from a genuine positive executive decision at the Community level ratifying and expressly authorizing its selective distribution system which is both quantitative and qualitative, and such as to set aside the application of different and more restrictive provisions of national law."

C — Observations submitted by the defendants in Joined Cases 253/78 and 1 to 3/79

(1) Statement of the facts

The observations submitted by the defendants in Joined Cases 253/78 and 1 to 3/79 open with a summary of the facts put before the court making the reference and an analysis of the sales organization set up by the various companies in question. This statement may be summarized as follows.

(a) Case 253/78

Guerlain S.A. states that it has organized the sale of its products in France and in the other countries of the EEC by creating a selective distribution network with the following features:

(1) In Paris, its products are sold in its own retail shops;

(2) In France, outside Paris, Guerlain has entered into distribution agreements with authorized retailers. In all, Guerlain has 682 distributors in France and 800 sales points;

(3) Outside France, Guerlain S.A. has entered into standard exclusive sales agreements with general agents who in their turn enter into agreements with authorized retailers.

The whole of this organization is based on qualitative and quantitative criteria of selection. This policy is justified by the need for Guerlain S.A. to maintain its brand image, to ensure the protection of consumers and to avoid a fall in the value of its products which would be the inevitable result of generalized and uncontrolled distribution. In this respect Guerlain S.A. quotes the following extracts from the judgment, known as

the Guerlain judgment, delivered by the Cour d'Appel, Paris, on 20 March 1965:

"In these circumstances, a reputation which produces substantial sales both in France and abroad could not be maintained if it were necessary for the manufacturer, compelled to multiply its sales points and unable any longer to follow up and keep watch on its products in the interests of the customer, to cease carrying out a strict and attentive check on a means of distribution which has ensured its success.

From an economic point of view therefore, since this is a high quality product intended for a financial and cosmopolitan élite, it seems desirable and in accordance with commercial usage to grant a manufacturer which wishes to maintain its level of production through outlets which it has been able to gain on a limited market the right to ensure in the interests of purchasers perfect marketing of its products and consequently to remain in control of the number and choice of distributors with which it intends to enter into agreements".

Finally, Guerlain S. A. states that it refused to deliver its products to Messrs Pachot and Ramon, the plaintiffs claiming damages, because it already had a distributor in Aix-en-Provence. Guerlain S.A. considers that the plaintiffs claiming damages have shown bad faith by obtaining irregularly and selling Guerlain products although they did not belong to the Guerlain distribution network.

(b) Case 1/79

Before opening a new sales point in a given town, Parfums Rochas S.A. carries out both qualitative selection, the objective of which is to take into account the prestige of a shop, its suitability for selling luxury perfumes, the number and qualifications of the staff employed and the location of the shop, and quantitative selection taking into account also the varying number of retailers who belong to the Rochas network for a given town and the size and wealth of the town, all with the objective of checking whether the applicant is capable of achieving a minimum turnover.

Parfums Rochas S.A. was prompted to refuse the request made by Mrs Windenberger, acting as manager of the Duo company, having regard to those criteria. In fact, although the shop run by the Duo company is moderately luxurious and would intrinsically be acceptable were it not for the large number of fancy goods which have no connexion with luxury perfumery, the other criteria required for the admittance of an authorized distributor to the Rochas network are not fulfilled. In particular, the shop is badly situated and suffers from a lack of qualified staff.

(c) Case 2/79

Lanvin-Parfums S.A. has organized the sale of its products in France and in the other countries of the EEC by creating a selective distribution network. Outside France, Lanvin-Parfums S. A. has entered into standard exclusive sales agreements with general agents who in their turn enter into agreements with authorized retailers. In France, Lanvin-Parfums S.A. has concluded exclusive distribution agreements with authorized retailers. The number of authorized sales

points for the distribution of Lanvin products is 1 726.

Lanvin-Parfums S.A. refused to deliver goods to the Duo company, which runs a perfumery shop in a small street in Strasbourg, because it considered that it was already adequately represented in Strasbourg where it already has eleven retailers.

(d) Case 3/79

Nina Ricci S.à r. l. has also organized the sale of its products by creating a selective distribution network comprising 2 153 sales points. Taking the view that it was adequately represented in Strasbourg, for that reason Nina Ricci S.à. r.l. rejected the order for products from the Duo company.

(2) Legal arguments

The defendants in the main actions then put forward in their respective statements legal arguments in accordance with the following scheme:

(a) Appraisal in relation to Article 85 (3)

There is no doubt that the restrictions produced by the distribution networks in question benefit from Article 85 (3).

Production is improved as a result in particular of the qualifications of the authorized retailers which enable producers to be better informed as to the needs and tastes of their customers as well as to the market situation.

Distribution is improved on account of the occupational qualifications of the authorized retailers and of the prestige which they offers to customers.

Quantitative selection of authorized retailers contributes to that improvement by making it possible to keep a strict control as to the quality of the products made available to consumers.

Consumers derive a fair share of the benefit resulting from this organization by having at their disposal in the desired surroundings qualified sales staff to advise them and products which are constantly improved and original as well as the assurance that those products are absolutely fresh.

In this respect, the defendants in Case 2 and 3/79 emphasize that the agreements binding a manufacturer to its retailers are accompanied by genuine sales assistance given by the manufacturer to its retailers (store of advertisement panels and general materials, display units, free samples and so forth), which is costly. If a manufacturer were compelled to supply its products to any perfumer who ordered them from it this could not fail to involve fresh expenditure which would necessarily be passed on to the selling prices.

The restrictions in question are essential because without them the products would be popularized, which would destroy the trade in luxury perfumes and beauty products.

Finally, competition is not eliminated in respect of a substantial part of the products in question, as the Commission states clearly in the letter which it addressed to the companies in question.

In their statements, the defendants in Cases 2 and 3/79 state moreover that decisions to open new accounts taken by manufacturers are based in particular on the development of what has become

customarily known as *"richesse vive"* [potential wealth]. They annex thereto an extract from a brochure produced by the Indicateur Proscop concerning *"richesse vive"*. The *"richesse vive"* of a region is the quantity of money in a region which is capable of being converted into purchases. Manufacturers open new accounts on the basis of the market potential. It is impossible to accept that they are under a duty to reply to all applications for the opening of an account as soon as they are made.

(b) Bases of the decision making the reference to the Court

The defendants claim that the national authorities cannot exempt an agreement prohibited by the Commission, just as they cannot prohibit an agreement exempted by the Community authorities. The sole power to apply Article 85 (3) which Article 9 of Regulation No 17 conferred upon the Commission enables the Commission to lay down a uniform policy for the Community in the matter of agreements. Within this context the court making the reference seeks guidance as to the interpretation to be given to the letters sent by the Commission to the defendants as a result of the notification of their distribution agreements and of the procedure initiated against them.

(c) Nature of the letters sent by the Commission to the defendants

The defendants in Cases 253/78 and 1 and 2/79 state that they have all received from the Directorate-General for Competition of the Commission a letter worded in almost identical terms. The letter thus sent to Guerlain S.A. dated 28 October 1975 reads as follows:

"Dear Sirs,

Guerlain S.A. has organized in France and in the other countries of the EEC a selective distribution network the main characteristic of which is a limited number of authorized retailers.

This sales organization is based on a standard exclusive distributorship agreement concluded by Guerlain S.A. with its general agents in the various countries of the EEC and on the distribution agreements applied by the latter and by Guerlain S. A. to their to their authorized retailers in their respective territories.

These agreements contained provisions considered by the Commission to be incompatible with Article 85 of the Treaty of Rome. They involved in particular provisions aimed to prevent authorized retailers from reselling Guerlain products to or buying them from general agents or authorized retailers in the other countries of the EEC as well as the obligation to abide by the imposed prices, even in the case of Guerlain products which they were re-importing into the Common Market. As a result of the Commission's action your company has amended the agreements which are the outcome of its sales organization in the EEC in such a way that authorized retailers are henceforth free to resell Guerlain products to or to buy them from any general agent or authorized retailer established in the EEC and to fix their selling prices where the products are re-imported from or re-exported to the other countries of the Common Market.

I have the honour to inform you that in these circumstances, in view of the small share in the market in perfumery, beauty

products and toiletries held by your company in each of the countries of the Common Market and in view of the fairly large number of competing undertakings of comparable size on that market, 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.

I would however draw your attention to the fact that the Commission will keep a close watch to ensure that qualified retailers are not admitted to or excluded from your selective distribution network arbitrarily and that such admittance or exclusion does not constitute an indirect means of hindering freedom of trade between authorized distributors.

Yours faithfully,

W. Schlieder."

Similar letters were received by Parfums Rochas S.A. on 26 March 1976, Lanvin-Parfums S.A. on 22 September 1976 and Nina Ricci S.à r.l. on 20 January 1978.

Referring to the judgment of the Court of 15 March 1967 in the case of *Société Anonyme Cimenteries C.B.R. Cementbedrijven N.V. & Others* v *Commission of the EEC*, [1967] ECR 75, the defendants in the main actions claim that the above-mentioned letters from the Commission constitute measures by which the Community institution unequivocally laid down the conditions for the application of the selective distribution system of the companies in question in the common market. It is therefore indeed a decision.

(d) The scope of those letters

In order to determine the exact scope of those letters, it is necessary to examine in turn their content, the viewpoint adopted by the Commission in the complaints and the Commission's communiqué contained in the Fifth Report on Competition Policy.

(i) The content of the letters

The defendants claim that whatever the wording adopted by the Commission, a genuine authorization was issued to them. The defendants draw attention in particular to the passage of the letter in which the Commission mentions that it is monitoring the agreements which it has authorized and that the companies which have the right conferred upon them by the Community authority must not abuse it. According to the defendants, this part of the above-mentioned letters comes within Article 8 of Regulation No 17 relating to the application of Article 85 (3).

(ii) The notice of complaints

The Commission itself acknowledged in the notice of complaints (page 7) which it sent on 24 July 1972 to Parfums Rochas S. A. that:

"The exclusive dealing agreements which are the outcome of a sales organization based not only on qualitative but also on quantitative criteria of selection may, in the case of certain luxury products whose brand image is important, as is the case in this instance, benefit from the provisions of Article 85 (3) of the EEC Treaty."

Although for reasons of internal policy the Commission chose subsequently not to issue a formal decision it nevertheless expressed very clearly its opinion on that subject and it is therefore impossible for it to withdraw from its statement when its decision should become fully effective.

(iii) Fifth Report on Competition Policy (Paragraphs 58—59)

This communiqué reveals two findings:

(a) the distribution agreements are satisfactory from the competition angle

(b) the Commission has applied a uniform general arrangement throughout the perfume industry. This arrangement is applied 'without having to issue formal decisions'.

According to the defendants in the main actions, it follows from that examination that the Commission took informal decisions in favour of each company in the common market which manufactures and sells luxury perfumery products by adopting a selective distribution system which is both qualitative and quantitative. Even if the Commission has adopted a reserved form of wording for reasons which are probably the result of its general competition policy, as regards the wording of the decisions addressed to the undertakings in question it nevertheless acknowledged the validity of the agreements in question in circumstances which come within an application of Article 85 (3).

By very reason of the confidence which may be had in the decisions and communiqués of the Commission and of the concept of legal certainty, it is fundamental for the economic sector of perfumery to be protected from any infringement of the Community arrangements from which it benefits.

The defendants in Joined Cases 253/78 and 1 to 3/79 contend that the following reply should be given to the question referred to the Court of Justice:

"The letter of the Commission of the European Communities (of 28 October 1975/26 March 1976/22 September 1976/20 January 1978) is an informal decision the contents of which constitute an exemption under Article 85 (3) of the EEC Treaty applicable to all agreements relating to the qualitative and quantitative selective distribution by Guerlain S. A./Parfums Rochas S.A./Lanvin-Parfums S.A./Nina Ricci S.à r.l.."

D — Observations submitted by the Government of the French Republic

The Government of the French Republic observes first of all that selective distribution, which particularly affects manufacturers of luxury products such as perfumes, is the subject-matter of action both on the part of the national authorities responsible for applying the national competition legislation and on the part of the Community authorities as regards the Community rules.

The French Government emphasizes that it seems to it to be important for the national authorities and the Community authorities to develop their action harmoniously taking into account the respective powers of each.

In France the problem of selective distribution comes under Article 37 (1) (a) of Order No 45-1483 of 30 June 1945 which prohibits a refusal to sell, subject to certain exceptions which have been commented upon in a circular of 31 March 1960 known as "the Fontanet circular". Amongst those exceptions are, in particular, exclusive dealing agreements. Such an agreement may constitute an exception to the prohibition of a refusal to sell where the agreement fulfils certain conditions, in other words the interests of consumers, the absence of imposed prices, of any idea of fraud

on the rights of third parties and of any intention voluntarily to restrict competition, which is prohibited by economic legislation.

It is for the national courts, if necessary, to give judgment on the application of Article 37 (1) (a) of Order No 45-1483 and of those criteria for the selective distribution of perfumery and beauty products.

In the Community, it is for the Commission to examine whether the systems of selective distribution do not come within the scope of the provisions of Article 85 of the Treaty of Rome.

In the opinion of the French Government, the dispute between Guerlain S.A. and certain distributors in no way affects intra-Community trade and only involves the national competition rules.

The question whether the national court may directly apply Article 85 (1) of the Treaty and automatically declare an agreement null and void under Article 85 (2) raises in addition delicate problems, having regard on the one hand to Article 9 (1) of Regulation No 17 and on the other to the whole body of case-law of the Court of Justice.

The question referred to the Court of Justice exclusively concerns Article 85 (3). In this respect the French Government makes the following two remarks:

(a) The Tribunal de Grande Instance, Paris, seems to ask the Court of Justice to give a ruling on the application of Article 85 (3) to an individual case. This does not seem possible within the context of a procedure for a preliminary ruling in which the Court, under Article 177 of the Treaty, must simply give an interpretation of the Treaty.

(b) In any case, the Court of Justice must reply to the national court to the effect that the national court has no jurisdiction to apply Article 85 (3) of the Treaty. In fact, Regulation No 17 of the Council of 6 February 1962 reserves to the Commission sole power "to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty, subject to review of its decision by the Court of Justice". According to the French Government, those provisions, which are justified in particular by the need of undertakings for legal certainty, imply that both the Court of Justice and the national court have no jurisdiction to apply directly Article 85 (3).

E — Observations submitted by the Government of the United Kingdom

According to the Government of the United Kingdom, the question asked by the court making the reference is two-fold: it asks on the one hand 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 on the other whether in the present case the companies in question benefit therefrom in Community law. The Government of the United kingdom intends to confine its observations to the second part of the question.

That second part in turn implies the three following questions:

(a) Has an individual exemption been granted under Article 85 (3) of the Treaty and Article 9 (1) of Regulation No 17?

(b) If not, is there an applicable block exemption?

(c) If there is neither an individual exemption nor a block exemption, does the agreement in question satisfy the requirements of Article 85 (3) so as to be capable of receiving an individual exemption?

So far as the three questions set out above are questions of fact, the Government of the United Kingdom observes that the jurisdiction of the Court under Article 177 is to give rulings on questions of interpretation of Community law and not to determine issues of fact or to apply Community law to the facts.

So far as the above questions relate to whether Article 85 (3) is applicable, the Government of the United Kingdom observes moreover that under Article 9 (1) of Regulation No 17 the Commission has sole power to grant exemptions, the role of the Court being to review the exercise of that power and that, in relation to block exemptions, it is for the Commission or for national courts to decide whether there is an applicable block exemption.

Having said that, the Government of the United Kingdom would nevertheless make the following observations. In all four cases, the defendants allege that the Commission has authorized the agreements in question under Article 85 (3). This is clearly stated in the judgment making the reference in Case 1/79, where page six of the judgment of the Tribunal de Grande Instance, Paris, says:

"The lawyers claim that the company's selective distribution system was authorized by a decision of the Commission of the European Communities of 26 March 1976 ... Consequently, by the above-mentioned decision the Commission of the European Communities approved, on the basis of Article 85 (3), the selective distribution system practised by Parfums Rochas S.A. as regards the rules of competition in the European Communities."

The United Kingdom expresses very grave doubts in this respect. An individual decision of exemption may only be granted by way of decision (Article 6 (1) of Regulation No 17/62) and the decision must itself be published in the Official Journal (Article 21 (1) of the regulation). The Government of the United Kingdom points out that no decision of the Commission relating to these four cases and in particular of 26 March 1976 relating to the Rochas company has been published in the Official Journal. It is not clear whether there is any applicable block exemption in this field but whether there is or not does not fall to be decided by the Court.

According to the United Kingdom, it seems that in these four cases the Commission, as it had already done in Case 59/77, *Etablissements A. de Bloos S.p.r.l.* v *Bouyer S.C.A.*, [1977] ECR 2359, simply decided to take no action. This is confirmed by the Commission's statements in paragraphs 57 to 59 of the Fifth Report on Competition Policy. The agreements in question have merely been dealt with by a decision to "close the file" in the case.

Referring to the opinion of Mr Advocate General Mayras in the *de Bloos* case quoted above, the United Kingdom claims that a decision to "close the file" is not an exemption under Article 85 (3). As no decision of exemption under Article 85 (3) has been taken by the

Commission in respect of the agreements in question and in view of the exclusive competence given to the Commission by Article 9 (1) of Regulation No 17, the Government of the United Kingdom concludes that the Court should refrain from answering the questions in the four cases before the Court directed as to whether a particular agreement benefits from that provision.

F — Observations submitted by the Commission

1. Admissibility of the questions referred to the Court for a preliminary ruling

The Commission begins by observing that the Court has indicated by an established line of decided cases since the judgment in *Flaminio Costa* v *ENEL*, [1964] ECR 585, that it has no jurisdiction within the context of a procedure based on Article 177 to apply the Treaty to a specific case.

There are two indications in the wording of the questions put by Tribunal de Grande Instance, Paris, which tend to show that the application of Community law to specific cases might be involved.

The first lies in the fact that that court wishes "to submit to the Court of Justice of the European Communities the exclusive dealing agreements of ... [company]"; the second results from the fact that the last phrase of the questions asks "whether *in the present case* ... company" benefits from the exemption contained in Article 85 (3) of the Treaty.

The Commission therefore considers that in so far as the questions raised concern only the application of Community law to specific situations forming the subject-matter of the main actions, the Court should declare that it has no jurisdiction and that the questions are inadmissible.

However, the Commission also considers, as the Court has already indicated in its case-law, that it is possible to reformulate the questions referred to the Court in these cases.

Before making a proposal for the reformulation of the questions referred to the Court by the Tribunal de Grande Instance, Paris, the Commission however wishes to put forward some observations concerning the powers of the national court in view of the sole power to apply Article 85 (3) conferred upon the Commission by Article 9 (1) of Regulation No 17.

The question arises whether this provision limits the right of national courts to refer to the Court of Justice under Article 177 of the Treaty questions for a preliminary ruling on the interpretation of Article 85 (3). Referring to paragraph 12 of the decision in the judgment in *S.A. Brasserie de Haecht* v *Wilkin-Janssen*, [1973] ECR 77, the Commission claims that the national court might have an interest in submitting to the Court of Justice a question for a preliminary ruling relating to Article 85 (3) so as to determine whether the grant of an exemption in a given case may be envisaged. If as a result of the judgment interpreting Article 85 (3) delivered by the Court of Justice the national court is able to ascertain that the interpretation of Article 85 (3) does not permit the grant of an exemption in the case in question it might be able to take the view that there is no doubt as to the incompatibility of the agreement with Article 85 and to give a ruling to that effect.

Conversely, it might then decide to stay the proceedings and to leave the decision

to the Commission which has sole power to apply Article 85 (3). The Commission therefore considers that the fact that the national court cannot grant an exemption under Article 85 (3) is not such as to prevent the national court from referring to the Court of Justice questions for a preliminary ruling for the purpose of obtaining an interpretation of Article 85 (3).

2. The administrative procedures

The Commission states that in the perfumery sector it has chosen to take general action by attempting to liberalize the European market in perfumery as quickly as possible and in acceptable conditions.

(a) Notifications

As regards the four companies in question, the Commission specifies that they all notified their standard distribution agreements in France, their exclusive dealing agreements with their general agents in the other Member States and certain agreements entered into by those general agents with their authorized national retailers.

(b) Investigation

A very large number of notifications concerning the perfumery sector (approximately 260 concerning a total of approximately seventy undertakings) have been submitted to the Commission. It has been found by examination of them that most manufacturers in this sector organize their distribution network in the EEC in a similar manner.

It has become apparent moreover that a characteristic feature of the market in perfumery, beauty products and toiletries in the EEC is the presence of a fairly large number of competing undertakings none of which plays a leading role. In fact they hold a relatively small share of that market in each of the Member States of the EEC. Thus even the largest undertakings in the sector have a market share of no more than 5% whilst many other undertakings have shares of only 0.5 to 2%. Even if a very large cumulated turnover is attributed to certain of those undertakings which are integrated in groups of undertakings, this turnover has however, according to the Commission's findings, no practical effect on the market in question which can be ascertained.

As the Commission then explains, most of the agreements notified contained clauses which the Commission considered were in conflict with Article 85 of the Treaty, in particular provisions which obliged retailers authorized by the selective distribution systems to

— sell solely to final consumers, which constituted an indirect export ban,

— obtain supplies only from the general agent (or from the manufacturer) in their country, which constituted an indirect import ban, and

— abide by the imposed prices even in the case of re-imported or re-exported products.

According to the Commission, the effect of those provisions was to prevent all possibility of international trade between authorized retailers, the result of which was to partition the markets in the EEC at the distribution stage; this helped to maintain differences in the retail price which were sometimes considerable in the case of the same products within the common market.

(c) Action by the Commission

For this reason the Commission initiated on 28 April 1972 a procedure against three undertakings which had notified such agreements, in other words Dior,

Lancôme and Rochas, these three cases having been adopted as test cases for the whole of the sector in question.

On 24 July 1972 the Commission then sent to each of those three undertakings a notice of complaints with a view in particular to refusing exemption from Article 85 (3) for the selective distribution systems as they existed at that date. As a result of those notices of complaints those undertakings were heard and in particular had the opportunity to put forward their viewpoint orally on 22 September 1972.

On 25 May 1973 the Commission sent an additional notice of complaints to Rochas who subsequently had once more the opportunity to put forward its point of view orally on 17 July 1973.

The problems raised by the selective distribution systems practised in the perfumery sector in relation to competition law were fully discussed with the sectors concerned. They also formed the subject-matter of discussions at the two conferences of governmental experts on cartels held on 9 November 1973 and 26 September 1974.

On those occasions the Commission stated its viewpoint on the matter and indicated the solution which it envisaged providing for the whole of the sector in question. In fact it considered that there was no longer any need for it to take action under Article 85 (1) of the EEC Treaty with regard to agreements which were the outcome of the sales organizations applied in the perfumery sector provided that all direct or indirect export or import bans imposed in particular on authorized retailers as well as the obligation on them to abide by the imposed re-import or re-export prices were abolished.

The governmental experts, who were not indifferent to the problem as a whole raised by the large number of notifications submitted in that sector, in principle raised no objections to such a solution.

That solution was also accepted by the Comité de Liaison des Syndicats Européens de la Parfumerie, which brings together the national associations of manufacturers, at the meeting held in Brussels on 17 September 1974. During that meeting it was also agreed that the solution would be applied to all the undertakings in the sector.

On the basis of that approach, the Commission first of all took action in the Dior, Lancôme and Rochas cases against which the procedure had already been initiated.

Dior and Lancôme at first and afterwards Rochas agreed to delete the contested provisions from their agreements, thus restoring to authorized retailers the freedom, within their respective networks, to resell to or to buy from any general agent or other authorized retailer in the other Member States of the EEC products which formed the subject-matter of agreements and themselves to fix the selling prices where the products were re-imported from or re-exported to other Member States.

Because of the amendments made, the Commission considered that there was no longer any reason for it to take action under Article 85 (1) with regard to the selection of sales points practised by those three undertakings and informed them of that position. When the

procedure was terminated in the Dior and Lancôme cases, the Commission released to the press on 20 December 1974 information from which it was clear that by the attitude adopted in the present case it "indicates the principles and criteria on which it will base its decisions in similar cases in the perfumery sector". The Commission then requested the other undertakings to delete the restrictive clauses contested by the Commission or any other clause having a similar effect which might exist in the agreements governing their sales organization. With this aim in mind the Commission also sent letters to Guerlain (23 December 1974), Lanvin (13 January 1975) and Nina Ricci (4 March 1975).

All the undertakings contacted (including Guerlain, Lanvin and Nina Ricci) subsequently declared that they were ready to make the amendments to their sales organization suggested by the Commission and amended their agreements to that effect. As the undertakings concerned informed the Commission that the new agreements had come into force, the Commission wrote them a letter informing them that the file on their case could be closed (the text of that letter is reproduced above under C).

3. Proposal for the reformulation of the questions

The Commission considers that the Court of Justice might, having regard to the case-law which has already been recalled above, deduce the questions for interpretation from the questions referred to it by the Tribunal de Grande Instance, Paris.

The questions raised by the Tribunal de Grande Instance, Paris, broach the problem of the appraisal of the agreements concerned under Community law in relation to Article 85 (3). Such an approach enables the assumption to be made that that court considers that those agreements fulfil the conditions for the application of Article 85 (1).

However, the Commission considers that it is necessary first of all to check whether this is in fact the case, as the problem of a possible exemption under Article 85 (3) arises only where the conditions for the application of Article 85 (1) are fulfilled. However the Commission has already indicated in its statement on the administrative procedures that in its opinion this is no longer the case as a result of the deletion from their agreements by the undertakings concerned of the contested clauses.

Thus the Commission proposes to reformulate the first question as follows:

(a) 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 prohibited pursuant to that provision?

The Commission then proposes to reply to the question of the interpretation of Article 85 (3) reformulated as follows:

(b) 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 if such exclusive dealing agreements come within the prohibition laid down in Article 85 (1) of the EEC Treaty?

Having regard to the information which the Commission supplied concerning the action which it took in the administrative procedures, a third question might then be reformulated as follows:

(c) May the action taken by the Commission in the administrative procedures be considered, by virtue of Community law, to have resulted in exempting, under Article 85 (3) of the EEC Treaty, the agreements which are the outcome of the sales organization of Guerlain S.A., Parfums Rochas S.A., Lanvin-Parfums S.A. and Nina Ricci S.à r.l.?

Since it is clear from the questions referred to the Court for a preliminary ruling that certain of the parties concerned have called in aid the supremacy of Community law against a possible application of the French legislation on refusal to sell, a question should probably be reformulated in this connexion. Such a question however presupposes that the exact situation of the agreements concerned from the point of view of Community law should be clarified first of all.

For this reason the Commission proposes that a fourth question should be reformulated as follows:

(d) What is the exact situation of the agreements from the point of view of Community law, on the basis of the replies to the previous questions?

A fifth question could then be formulated as follows:

(e) What scope, on the basis of the replies to the previous questions and having regard to the provisions of Community law, do national courts have to apply more severe national legislation against sales organizations which are the outcome of such agreements?

4. Article 85 (1)

Question (a):

"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 prohibited pursuant to that provision?"

As regards the field of application of Article 85 (1), it is necessary to recall first of all that all undertakings are free to determine their production volume, to define the customers which they intend to reach (mass market or specific customers) and to choose the distribution procedures which they consider the most appropriate (subsidiaries, exclusive distributors, authorized distributors) in so far as the measures which they adopt are not in breach of the provisions of Articles 85 and 86 of the EEC Treaty.

As regards the selective distribution systems, the retailers who are permitted to belong to such a network may be selected on the basis of various criteria. As the Tribunal de Grande Instance, Paris, has moreover pointed out, retailers are selected by the manufacturers in the luxury perfumery sector on the basis not only of qualitative but also of quantitative criteria.

It is necessary first of all to explain those terms. The Commission has already on several occasions made its views in this respect clear in its reports on competition policy.

Qualitative selection of retailers is that based on certain objective uniform requirements relating to the business qualifications of the retailer or of his

staff and to the sales arrangements of the retailers in relation for example to the facilities for keeping and presentation of the products or the prestige and favourable location of the shop.

Where selection is also based on *quantitative* criteria the number of retailers through which the manufacturer (or its general representatives) undertakes to market its products is moreover limited by geographical area, for example on the basis of the potential purchasing power of the local customers, as determined by the manufacturer (or by its general representatives).

The Commission considers in this respect that where the manufacturers (or their general representatives) undertake, by means of agreements entered into with the authorized retailers, not to supply their products to other distributors who, although sufficiently qualified, do not belong to the network by reason of the numerical limitation of those retailers, this is in principle a restriction on competition. The fact that the reason for such a restriction is the extent of the presumed purchasing power of the customers for specific products in specific regions is not capable of altering that finding.

(a) Qualitative selection

Referring to paragraph 20 of the decision in the *Metro* case, [1977] ECR 1875, the Commission considers that in the perfumery sector too the selection of distributors on the basis of purely qualitative criteria may escape the prohibition laid down in Article 85 (1) if those criteria are applied uniformly and without discrimination to all potential distributors so as to determine their ability to belong to the network.

Such a conclusion is also suggested by the above-mentioned paragraph 20 of the decision in the *Metro* case in which the Court took the view that selection of retailers on the basis of objective qualitative criteria must be carried out uniformly and without discrimination. However, where the selection of retailers is also based on quantitative criteria a certain number of retailers who fulfil the qualitative criteria are not admitted to the network for the sole reason of the numerical limitation and are thus treated differently and excluded from the network although they have equal qualifications.

(b) Quantitative selection

Qualitative selection is not however the main problem raised by the selective distribution systems applied in the luxury perfumery sector. In fact, most of the undertakings in that sector couple qualitative selection of their retailers with quantitative selection, as confirmed by the arguments put forward by the defendants in the main actions so as to justify their refusal to supply.

The provision inserted in such agreements limiting the opportunities for the retailers who belong to the network to resell the products concerned to distributors who do not belong to the network also constitutes in principle a restriction on competition. In fact in the Commission's opinion it enables the markets of the authorized retailers to be limited or controlled within the meaning of Article 85 (1) (b).

(c) The appreciable nature of the restriction

As a general rule, the Commission is prompted to take action in such cases, in particular as regards sales systems applied concurrently and uniformly in several Member States, except in cases in which the restriction is manifestly not appreciable. Nor, obviously, is the Commission prompted to take action where the restriction is not likely appreciably to affect trade between the Member States.

After examination of the criteria laid down by the Court in paragraph 18 of its decision in the *Beguelin* case, [1971] ECR 943, the Commission reached the conclusion, *on the basis of the facts known to it,* that the restrictions on competition which might still exist in the selective distribution systems practised in the sector concerned were no longer appreciable *taking into account the special characteristics* of that sector and were in any case no longer likely appreciably to affect trade between Member States in a way which might prejudice the attainment of the objectives of the EEC Treaty.

5. Article 85 (3)

Question (b):

"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 if such exclusive dealing agreements come within the prohibition laid down in Article 85 (1) of the EEC Treaty?"

If however the agreements which are the outcome of such a selective distribution system based on quantitative criteria fulfil all the conditions for the application of Article 85 (1), the question of the grant of an exemption under Article 85 (3) by an individual decision arises, since the exemption is not already granted by a regulation prividing for a block exemption, such as Regulation No 67/67.

It is impossible for the Commission to indicate exhaustively the viewpoint which it would adopt in such a case, since the appraisal of such selective distribution systems varies considerably from one case to another on the basis of the economic and business data characteristic of each system. At most, the Commission might be able to indicate below some general considerations on that subject.

The Commission has already emphasized in its reports on competition policy that an exemption under Article 85 (3) can only be granted by way of exception in cases of quantitative selection. The following question must be asked: does the nature of the product (technical complexity, need for after-sales service of a special quality or dangerous nature of the product) necessitate close co-operation between manufacturers and retailers which a different distribution system would not be able to guarantee?

Before taking a decision of exemption, it is necessary to assess the advantages which are likely to be derived therefrom for consumers, having regard to the scope of the special restrictions which they involve and taking into account the market position of the parties to the agreements and their products. In certain cases, the approval of selective distribution systems may form an obstacle to profitable sales for consumers.

It is also necessary to examine whether the provisions of the agreements prohibiting the resale of the products to distributors who do not belong to the network, the basis of the 'closed' nature of the network, are essential so as to attain the favourable objectives of the first two conditions for the application of Article 85 (3).

As regards more particularly the selective distribution systems practised in the *luxury perfumery sector*, the Commission has reached the conclusion that the mere fact that a luxury product is involved cannot be considered as sufficient by itself for the purpose of exempting the quantitative selection system from the prohibition on agreements under Article 85 (3).

The exclusivity of a product may be guaranteed adequately by the level of selling prices to the retailer charged by the manufacturer (or its general agents), supplemented if necessary by qualitative selection. Quantitative limitation of the number of traders at the distribution level goes beyond the objective requirements for the maintenance of a product as a luxury product.

Moreover there are less restrictive means of avoiding excessive dispersion of sales points, for example by the fixing of minimum quantities to be sold.

In any case, the Commission has considered until now that the arguments put forward by the undertakings concerned are not such as to justify the grant of an exemption to agreements which are the outcome of such selective distribution systems in that sector. The Commission in particular considered that the problems raised by the taking back of old stock in that sector are not capable of justifying the grant of such an exemption.

It is however necessary to observe that the Commission must in each individual case use its discretion in order to weigh the advantages and disadvantages of a possible exemption by individual decision.

6. Non-existence of the grant of an exemption by the Commission

Question (c):

"May the actions of the Commission in the administrative procedures be considered, by virtue of Community law, to have resulted in exempting, under Article 85 (3) of the EEC Treaty, the agreements which are the outcome of the sales organization of Guerlain S.A., Parfums Rochas S.A., Lanvin-Parfums S.A. and Nina Ricci S.à r.l.?"

The Commission considers that that question raised first of all a problem of cooperation between the national court, which has jurisdiction under Community law to apply the provisions of Article 85 (1) and (2), and the Commission which has under the same Community law sole power to grant exemptions under Article 85 (3).

If in particular agreements have been notified and are or have been the subject-matter of an administrative procedure with a view to the possible grant of an exemption under Article 85 (3), the Commission considers that it is preferable for the national authorities which have jurisdiction to apply Article 85 (1) and (2) to make inquiries at the Commission in cases of doubt as to whether the agreements have been the subject-matter of a decision of exemption under Article 85 (3).

If the Tribunal de Grande Instance, Paris, had sent a letter to that effect to the Commission, the Commission would

have replied that it had not taken any decision granting the exemption laid down in Article 85 (3) to the agreements in question and did not consider that those agreements could be exempted.

The national court could also have relied upon the fact that the Commission did not publish pursuant to Article 21 of Regulation No 17 any notice of such a decision granting the agreements concluded by the companies in question exemption from Article 85 (3) in taking the view for that reason that those agreements did not benefit from such an exemption.

As it has already indicated above, in the case of the agreements concluded by Guerlain, Rochas, Lanvin and Nina Ricci, the Commission excluded the grant by individual decision of an exemption under Article 85 (3) during the administrative procedures. It is therefore impossible, by virtue of Community law, to consider that the effect of the action taken by the Commission was to exempt the agreements in question under Article 85 (3).

7. The present situation of the agreements

Question (d):

"What is the present situation of the agreements from the point of view of Community law, on the basis of the replies to the previous questions?"

In the opinion of the Commission these agreements should in any case be considered as valid from the point of view of Community law in so far as they do not fulfil the conditions for the application of Article 85 (1). The Commission has already indicated that that was the conclusion which it reached on the basis of the facts known to it.

In its judgment in the *de Bloos* case, [1977] ECR 2369, the Court of Justice moreover confirmed that old agreements duly notified or exempted from notification are provisionally valid and held that during the period between notification and the date on which the Commission takes a decision, courts before which proceedings are brought relating to an old agreement duly notified or exempted from notification must give such an agreement the legal effects attributed thereto under the law applicable to the contract, and those effects cannot be called in question by any objection which may be raised concerning its compatibility with Article 85 (1).

However, it follows from the description of the administrative procedures that in any case *the Commission did nothing likely to deprive those contracts which were provisionally valid of that provisional validity.* On the contrary, the actions of the Commission led to the deletion by the undertakings of the provisions in their agreements which the Commission considered to be contrary to Article 85 (1).

Supposing that the national court could find that agreements are not provisionally valid, assuming that they fulfil the conditions for the application of Article 85 (1), it should nevertheless still examine whether those agreements benefit from an exemption under a regulation providing for a block exemption, provided that they do not benefit from an exemption under an individual decision of exemption taken by the Commission.

Regulation No 67/67/EEC of the Commission on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements is the only regulation providing for a block exemption which might be relevant to the problem at issue in this case.

The Commission however considers that the distribution agreements concluded between the manufacturers (or their general agents) and their retailers, which are the outcome of a sales organization through a network of retailers selected in limited numbers, do not normally benefit from the exemption granted by that regulation for several reasons [1].

The first reason is the fact that the agreements concluded by the manufacturers (or their general agents) and the retailers do not correspond to the description contained in Article 1 (1) (a) of that regulation according to which agreements whereby one undertaking agrees with the other "to supply only to that other certain goods for resale within a defined area of the Common Market" are exempted. In the case of authorized retailers there is no exclusive dealing agreement or territorial concession.

The main reason is however that such agreements normally contain provisions prohibiting the resale of the products concerned by authorized retailers to other distributors which do not belong to the network. Such a prohibition prevents, pursuant to the provisions of Articles 2 and 3 of Regulation No 67/67/EEC, the application of the block exemption to agreements which are the outcome of a sales organization through a closed network of retailers selected in limited numbers.

1 — The Commission however specifies that such an appraisal does not affect the agreements concluded between the manufacturers and their general agents which might fulfil the requirements of Regulation No 67/67/EEC.

In conclusion, the Commission considers that the national court will only be able to consider the agreements to be null and void from the point of view of Community law if:

— all the conditions for the application of Article 85 (1) are fulfilled,

— the agreements are not exempted under a regulation providing for a block exemption,

— the agreements have not been exempted by an individual decision of the Commission and

— it is able to ascertain that the agreements are not provisionally valid.

Even in such a case, it is for the national court to decide whether it might be necessary to stay the proceedings so as to enable the parties to obtain a reply from the Commission, as the Court indicated in its judgment in the *Brasserie de Haecht II* case, quoted above, in paragraph 12 of the decision.

8. Application of the national legislation

Question (e):

"What scope, on the basis of the replies to the previous questions and having regard to the provisions of Community law, do national courts have to apply more severe national legislation against sales organizations which are the outcome of such agreements?"

Having regard to the previous questions, the Commission observes that since it follows from those replies that those

agreements do not benefit from an exemption under Article 85 (3) the problem of the supremacy of Community law does not arise for national courts except within the context of Article 85 (1).

The judgment in the *Walt Wilhelm* case, [1969] ECR 1, established the principle that the implementation of national law cannot adversely affect the full and uniform application of Community law. In this respect the Commission makes a distinction between the two following cases:

(a) Where the conditions for the application of Article 85 (1) are not fulfilled

According to the Commission, where it is established that an agreement is not covered by the prohibition laid down in Article 85 (1) because it is not likely appreciably to affect trade between Member States, a Member State, and consequently the courts and tribunals of that State, is free to apply its more severe legislation thereon.

This finding is in harmony with the case-law of the Court, which considered that that condition for the application of Article 85 (1) and Article 86 is intended to determine the scope of Community law in relation to that of the Member States in the field of rules relating to agreements.

The Commission considers that similar reasoning may as a general rule be followed in cases in which Article 85 (1) does not apply because another condition for its application is not fulfilled.

It may however be asked whether the full and uniform application of Article 85 might not be jeopardized where the application of the more severe national law of a Member State prohibits conduct by an undertaking which, although it is not covered by the prohibition laid down in Article 85 (1), nevertheless contributes to the attainment of the objectives of the EEC Treaty.

In the above-mentioned judgment in the *Walt Wilhelm* case, the Court considered that while the Treaty's primary object is to eliminate by the application of Article 85 the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Article 2 of the Treaty.

It may be in fact that this was the reason for the favourable attitude of the Commission which took the form, in a specific case, of the grant of negative clearance. This is not however the case as regards the attitude of the Commission towards the selective distribution systems practised by the perfumers concerned in the present cases.

The Commission therefore considers that the provisions of the EEC Treaty do not prohibit the Tribunal de Grande Instance, Paris, from applying the French legislation relating to refusal to sell to a refusal on the ground of the existence of selective distribution systems which are the outcome of agreements which are not covered by the prohibition laid down in Article 85 (1) because one or several conditions for the application of that provision are not fulfilled.

(b) Where the conditions for the application of Article 85 (1) are fulfilled

If, on the other hand, the national court found that the conditions for the

application of Article 85 (1) are fulfilled, it should find that that agreement is prohibited by Article 85 (1) and automatically null and void pursuant to Article 85 (2) where it can ascertain that that agreement does not benefit from a block exemption, has not been the subject-matter of a decision by the Commission granting an individual exemption and is not provisionally valid. The national court may then consider that there is no doubt as to the incompatibility of the agreement with Article 85 and that the agreement is in this case null and void.

In such a case, the supremacy of Community law implies that the national court should first find that the agreement is automatically null and void before possibly applying its national law in this field.

The question whether, having found that the agreement is automatically void, the national court may possibly still apply its national law, depends on the nature of the dispute before it and of the national provisions relied upon. An agreement which is automatically void cannot in any case be relied upon for the purpose of justifying a refusal to sell prohibited by a national law. It therefore falls to the national judge to deduce the consequences of that invalidity.

The question of the relationship between Community law and national law where an agreement has been exempted by the Commission does not arise in the present cases. Nor does the question of that relationship where an agreement benefits from a block exemption granted by regulation arise in the present cases because Regulation No 67/67/EEC does not apply to the agreements in question for the reasons already indicated.

Where however the national court can determine that the agreement is provisionally valid, it cannot apply its more severe national law except provided that the application of that law does not prejudice the full and unifom application of Article 85 and the effectiveness of that provision.

However, in the above-mentioned *de Bloos* case, the Court ruled that the national court must in such a case give such an agreement the legal effects attributed thereto under the law applicable to the contract, and those effects cannot be called in question by any objection which may be raised concerning its compatibility with Article 85 (1). The national court must therefore consider such an agreement as valid and cannot deprive that agreement of its provisional validity by the application of its domestic law.

Moreover, in the judgment in the *Walt Wilhelm* case also cited above, the Court considered that in cases in which, during national proceedings, it appears possible that the decision to be taken by the Commission at the culmination of a procedure still in progress concerning the same agreement may conflict with the effects of the decision of the national authorities, it is for the latter to take the appropriate measures.

The question then arises whether the application to French perfumers of French legislation on refusal to sell is likely to have such an effect. If so, the national court cannot apply it. If not, then the national court may apply it. The reply to that question lies however in the

facts of the case which are a matter for the appraisal of the national court.

It is however necessary to point out that *systematic* application to perfume *manufacturers* (or French general agents for foreign manufacturers) of the French legislation on refusal to sell will have the effect of depriving the selective distribution system, which is the outcome of the agreements entered into by those undertakings, of its essential selection factor.

In this respect, the Commission considers that, although it is permissible for the national authorities to apply their national law to the same effect as Community law, in particular to prohibit an agreement which is already prohibited by Community law, the same does not apply where the application of their national legislation has the opposite effect.

The national court must therefore in such a case refrain from applying the national legislation in so far as it would have such an effect. However, to apply national law the result of which is to compel a manufacturer completely to abandon selection of its sales points would in fact deprive the agreements which are the outcome of such a sales organization of their essential effect.

In the view of the Commission, however, only the questions discussed above which assume that Article 85 (1) does not apply are relevant in the present cases.

In a final remark, the Commission states that in view of the difficulty raised by the reformulation of the questions referred to the Court and the uncertainty as to the content of those questions which the Court will consider to be relevant, it refrains, contrary to its normal practice, from suggesting an exact wording for the replies to the questions which have been referred to the Court, but is at the Court's disposal to elaborate or supplement its observations.

III — Oral procedure

The plaintiffs claiming damages in Case 253/78, represented by Mr Dewynter, Advocate, the plaintiff claiming damages in Cases 1 to 3/79, represented by Mr Devallon, Advocate, the defendants in Case 253/78, represented by Mr Collin and Mr Mollet-Vieville, Advocates, the defendants in Case 2/79, represented by Mr Buisson, Advocate, the defendants in Cases 2 and 3/79, represented by Mr Lebel, Advocate, and the Commission, represented by Mr Verstrynge, presented oral argument at the hearing on 16 October 1979.

In the course of the hearing the *plaintiffs claiming damages* in the main actions stressed in particular that, according to the decisions customarily adopted by the Commission, a decision granting exemption in favour of a selective distribution system based on quantitative criteria could only be envisaged in the case of very technical products in specific situations. In the present cases the Commission did not grant any exemption. The Commission merely reached the conclusion that trade between Member States was no longer affected and therefore closed the files on the cases.

As there is no longer any ground for applying Community law, the only matter remaining is a question of national law in each of the countries concerned.

The *defendants in the main action in Case 253/78* gave details of the reasons which led them to regard the letters sent by the Commission officials to the various perfume manufacturers as informal decisions granting exemption. On that matter they maintained that account must be taken of the fact that in the course of the infringement procedure initiated by the Commission in 1972 against Dior, Lancôme and Rochas, assurances were given by Commission officials that an exemption corresponding to that granted to Omega (Journal Officiel 1970, L 242, p. 22) would be accorded to the companies concerned if they amended their distribution agreements in the manner required by the Commission. Even if, for reasons of its own and perhaps for fear of creating an awkward precedent for other cases, the Commission subsequently ceased issuing formal decisions, the letters in question are none the less the reflection of an agreement entered into with the Commission officials and must be construed in the light of that context. It is difficult to reconcile the argument at present adopted by the Commissions that those letters merely express the point of view that Article 85 (1) did not apply with the passage in those letters in which the manufacturers' attention is drawn to the fact "that the Commission will keep a close watch to ensure that qualified retailers are not admitted to ... your selective distribution network arbitrarily ...". If the distribution networks in question did not in fact affect trade between Member States and therefore escaped the application of Community law it is hard to see upon what legal basis the Commission's keeping close watch is founded. The Commission's argument is equally irreconcilable with its own decisions as expressed in the *Omega* case. Finally, the measures taken in regard to perfume manufacturers were the subject of considerable publicity by the Commission and were described in the Commission's Fourth and Fifth Reports on Competition Policy; accordingly it may not be alleged that those letters do not constitute informal decisions binding on the Commission.

The *defendants in the main action in Case 1/79* disputed the argument advanced by the Commission in its written observations to the effect that, since it may be replaced by less restrictive means such as the fixing of minimum quantities to be sold, quantitative selection of retailers is not necessary in order to avoid harmful dispersal of sales points. The defendants question whether it is wise and desirable to oblige a manufacturer temporarily to accept a large number of retailers into his network only to find out later that the majority of them are incapable of achieving the goals laid down and to retain only a small number of new retailers who are able to achieve those goals and who in all likelihood would have been admitted to the distribution network in any case. Moreover, the "turnover" criterion is only seemingly "objective" since its implementation necessarily implied subjective choices and assessments by the manufacturer.

The *defendants in the main actions in Cases 2 and 3/79* drew particular attention to the fact that the French

domestic legislation was a source of distortion of competition and therefore an obstacle to the functioning of the Community system. In these cases the application of domestic law runs counter to the solutions enshrined in Community law, which authorized the quantitative selection of retailers.

The *Commission* recalled that it did not grant the benefit of an exemption to the selective distribution systems in question but merely found that Article 85 (1) did not apply. The Commission argued that it considers that its primary task is to see that the objectives of the Treaty are attained and that the taking of decisions constitutes only a means of accomplishing that. When the undertakings in question agreed to modify their distribution systems in the way in which the Commission wished, the Commission considered that it had no longer any duty to adopt a formal negative clearance decision since the objectives of the Treaty had been achieved. The letters in dispute do not bind national courts, to which it falls to decide whether Article 85 (1) applies, any more than a formal negative clearance. In reply to a question from the Court the Commission indicated that the decision to close the file in the cases was taken by Mr Borschette, the Commissioner in charge of the matter, who has power to adopt, in the name of the Commission, any preparatory measures of inquiry and, in particular, to decide upon the initiation of a procedure. In reply to another question the Commission observed that a negative clearance and not only a decision granting exemption could prevent the application of stricter national law if the agreement covered by that negative clearance was regarded by the Commission as being necessary for the attainment of the objectives of the Treaty. Such is the case, for example, with an agreement to which negative clearance has been granted on the ground that it is necessary for the implementation of the common agricultural policy. In the present cases, however, the Commission did not consider that the quantitative selection of retailers in the perfume trade was necessary for the attainment of the objectives of the Treaty.

The Advocate General delivered his opinion at the sitting on 22 November 1979.

IV — Re-opening of the oral procedure

1. By order of 16 January 1980 the Court decided to re-open the oral procedure in the present cases as well as in Cases 37/79 and 99/79 and requested the parties in the main action, the Member States, the Council and the Commission to state their views on the following questions:

"If:

(a) the national court considers that the agreements concerned come within the scope of Article 85 (1);

(b) the agreements at issue in Joined Cases 253/78 and 1 to 3/79 and in Case 99/79 must be regarded as 'old agreements' protected by 'provisional validity';

(c) the letters sent by the Commission to the various manufacturers to inform them that the files on their cases had been closed are not to be regarded as

decisions of exemption under Article 8 of Regulation No 17 or negative clearance certificates within the meaning of Article 2 of that regulation;

(d) it is improbable that such decisions will be adopted by the Commission in the foreseeable future;

1. Does the protection given to 'old agreements' duly notified or exempted from notification prevent the application to such agreements of provisions of the national law of a Member State which may in certain respects be more rigorous than Community law?

2. Do the grounds put forward hitherto in favour of the provisional protection given to 'old agreements' justify, in the circumstances mentioned above, maintaining indefinitely that protection against the application by a national court of the provisions of Article 85 (1) and (2) of the Treaty?

3. How is the case of 'new agreements' notified or exempted from notification in the situations envisaged in Questions 1 and 2 above to be resolved?"

Written answers were lodged by the defendants in the main actions in Cases 253/78 and 1 to 3/79 and by the plaintiff in the main action in Cases 1 to 3/79, represented by their respective legal advisers, by the United Kingdom, represented by A. D. Preston of the Treasury Solicitor's Office, by the Danish Government, represented by Per Lachmann, Adviser to the Ministry for Foreign Affairs, by the French Government, represented by François Bessani, Assistant Secretary-General to the Inter-Departmental Committee for Matters of European Economic Co-operation, by the Belgian Government, by the Federal Republic of Germany, represented by Martin Seidel, by the Netherlands Government, represented by F. Italianer, and by the Commission of the European Communities, represented by its Legal Adviser, John Temple Lang, and Jean-François Verstrynge, a member of its Legal Department, acting as Agents.

2. The written answers submitted in reply to the questions may be summarized as follows:

Question 1

A — According to the *defendants in the main actions in Cases 253/78 and 1 to 3/79,* the provisional protection given to "old agreements" prevents the application to such agreements of provisions of the national law of a Member State which may in certain respects be more rigorous than Community competition law. The justification for that protection lies in the fact that the Commission may decide, with retroactive effect, that the agreement is compatible with Article 85 (1) or (3). National authorities are accordingly bound to avoid applying their national law in a manner incompatible with the pre-eminent effect of a decision which the Commission may take. That protection is all the more justified in a situation such as that in these cases where, following action by the Commission, the parties altered their agreements in the manner indicated by it.

B — According to the *plaintiffs in the main actions in Cases 1 to 3/79, the*

Government of the Federal Republic of Germany and the Commission, the first question calls for a reply in the negative in so far as the agreements with which the main actions are concerned formed the subject-matter of a decision by the Commission to "close the file on the cases".

The *plaintiffs in Cases 1 to 3/79* refer to the judgment of the Court in the case of *De Bloos* v *Bouyer* [1977] ECR 2359. It is clear from that judgment that provisional validity takes effect only "during the period between notification and the date on which the Commission takes a decision". In these cases, however, the Commission took a decision to close the file on the cases. The implementation of national law does not adversely affect the full and uniform application of Community law or the effect of measures taken in implementation of it since the Commission has not adopted in regard to the perfume manufacturers any positive decision applying Community law but has been content to adopt a decision to close the file on the cases.

The *Government of the Federal Republic of Germany* also considers that a negative answer must be given to the first question. To the extent to which — as is the case in the present instance — it is certain that the Commission will not adopt any decision under Article 85 (3) or to which there is no likelihood of its adopting one it is not necessary to protect the parties concerned against the possibility of an agreement's being prohibited pursuant to national law for a specific period only and being later authorized by the Commission. In the present cases the Commission took no decision in a formal sense but let it be understood by letter that it saw no ground for taking measures under Article 85. So long as the facts remain unchanged that opinion restricts the Commission's discretion to act and it is no longer necessary to accord provisional validity.

According to the *Commission,* old agreements which have been notified [1] ought to be distinguished according to whether or not they have been the subject-matter of a decision to close the file on the case. So long as the agreements concerned have not been the subject-matter of such a decision it is not possible to exclude exemption under Article 85 (3) being granted to that agreement by a future decision or a block regulation. That possibility alone must suffice to prevent the application of more rigorous national law. Agreements covered by an exemption measure, which, according to the Commission, constitutes a "positive action ... making

1 — According to the Commission, old agreements exempted from notification cannot benefit from the protection of provisional validity unless they have actually been notified.

In its written statement the Commission gave statistical data concerning old agreements which had been notified. The Commission states that within the time-limits laid down in Article 5 (1) of Regulation No 17 it received 32 017 notifications, 30 840 of which were the subject-matter of a decision to close the file on the case. The Commission's examination has not been completed as regards 1 177 notifications which may be broken down as follows:

— 899 notifications concern licensing agreements, the majority of which concern patent licensing agreements;

— 214 notifications concern distribution agreements, the majority of which concern selective distribution systems in the motor car sector (approximately 150);

— 74 notifications concern horizontal and sundry agreements.

If patent licensing agreements and selective distribution agreements in the motor car sector, for which block exemption regulations are in preparation, are excepted from that group there remain less than 250 notified agreements which have not been the subject-matter of a decision to close the file on the case.

their interest specific from a Community point of view", may not, in fact, be prohibited by the application of more rigorous national law. On the other hand, where the agreement involved has been the subject-matter of a decision to close the file on the case the problem of provisional validity no longer arises and the application of national law is not liable to jeopardize the attainment of the objectives of the Treaty. This is, in fact, a case in which the Commission did not consider itself bound to grant an exemption under Article 85 (3). So far as the present cases are concerned, the Commission considers that quantitative selection of perfume retailers is not necessary in order to attain the objectives of the EEC Treaty and that prohibition of such selection by national law, which may be more rigorous, is not liable to jeopardize the attainment of those objectives.

C — According to the *British, Danish, French, Belgian and Netherlands Governments,* in no case may the mere existence of provisional validity prevent the application of national competition law which may be more rigorous than Community law, for the following reasons:

(a) The mere fact that an agreement is protected for the purposes of Article 85 by provisional validity [1] cannot mean that a national court must be bound to hold it to be valid under national or Community law for reasons not connected with the infringement of Article 85. The agreement may be declared unlawful for numerous reasons (for example, for lack of capacity or fraud). It is not possible to see why a distinction should be drawn between "more rigorous" national competition law and other branches of the law (commercial law, tax law, criminal law and so forth). In no case does the grant of provisional protection have the result of authorizing the parties to disregard or infringe other rules of national or Community law. Since no rule of Community competition law obliges the parties to an agreement protected by provisional validity to perform it, there is no obligation upon Member States not to apply their national law in order to permit such performance *(British Government).*

(b) Following upon the judgment in the case of *Walt Wilhelm* [1969] ECR 1 it is accepted that national authorities are bound not to apply to an agreement benefiting from an exemption decision under Article 85 (3) provisions of national competition law which are adverse to it. In any other case, for example, where the agreement benefits from a decision giving negative clearance, nothing prevents the very rigorous application of national law. That rule should also be adhered to where agreements protected only be provisional validity are involved *(Danish Government).*

(c) It follows from the aforementioned judgment in the *De Bloos* v *Bouyer* case that old agreements which have been notified are valid only "in so far as the national law governing the contract permits". There is therefore a limit to the provisional validity recognized by the

1 — According to the United Kingdom the "old agreements" system also applies, on any view, to agreements in force in the new Member States at the date of accession.

Court, namely, conformity with the national law of the Member States. The aims of Community law and those of national competition law are different: the former protects free competition and free movement in trade between Member States whereas the latter seeks transparency and the raising of standards of probity in trade within the Member State in which that law applies *(French Government).*

(d) Provisional validity is only Community in scope: it merely restricts the power of a national court to apply Article 85 (1) and (2) to agreements for so long as the Commission has not initiated a procedure. Provisional validity accordingly does not prevent the application of national competition law. In any event, there is no conflict between Community decisions and national decisions since Community law and national law pursue different objectives. Thus it may not be claimed that an exemption decision adopted pursuant to Article 85 (3) as a matter of law prevents national authorities from prohibiting the agreements concerned in accordance with national law. In fact, the Commission merely has power to prohibit certain agreements restricting competition; it does not have power to encourage undertakings to conclude such agreements. That point of view is not in conflict with the fifth paragraph of the decision in the aforementioned judgment in the *Walt Wilhelm* case in which the Court stated that "While the Treaty's primary object is to eliminate by this means the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Article 2 of the Treaty". The "positive action" in question in that paragraph consists in refraining from any purely negative attitude. The Commission may refrain from applying the prohibition provided for in Article 85 (1) to certain agreements. However, the Commission is in no way bound actively to intervene in support of particular agreements and Article 85 (3) provides for the *possibility* of granting an exemption and not a duty to do so. A decision taken in virtue of Article 85 (3) that Article 85 (1) is not applicable may only be understood as meaning that the Commission allows agreements which ought to be prohibited to exist and to be performed subject to certain conditions and only for a limited period (Article 8 of Regulation No 17). It must accordingly be accepted that it is open to national authorities to prohibit the agreements in question on the basis of national provisions because in so doing they rely more closely on the main founding principle of the incompatibility of those agreements with the common market. In that case the Commission cannot entertain any objection to the bringing to an end of the special situation produced by the exemption or to its being declared invalid, at least in part, namely, at national level. Finally, it must be noted that it is generally accepted that national authorities have power on a national basis to impose a prohibition on agreements in respect of which the Commission has issued a negative clearance certificate pursuant to

Regulation No 17. It would be illogical and also unfair were those authorities not to have the same powers as regards agreements which are, in principle, contrary to Article 85 (1) but are nevertheless allowed by the Commission in application of Article 85 (3). It is, in fact, likely that agreements of that kind have a more unfavourable effect on competition, not only at Community level but also, sometimes even to a still greater extent, at national level, than agreements for which a negative clearance certificate has been issued. In all cases, therefore, national authorities should be regarded as having power to apply their national law which may be more rigorous than Community competition law to any practice irrespective of the status of that practice under Community law *(Belgian Government).*

(e) There is no reason to depart from the legal delimitation of jurisdiction made by the Court in the aforementioned judgment in the *Walt Wilhelm* case *(Netherlands Government).*

Question 2

A — According to the *defendants in the main actions in Joined Cases 253/78 and 1 to 3/79 and the British and French Governments,* the second question calls for an affirmative answer on the following grounds:

(a) Provisional validity of old agreements is, in particular, the direct consequence of Article 7 of Regulation No 17 of the Council which permits duly notified old agreements which are contrary to Article 85 (1) or do not satisfy the requirements of Article 85 (3) which the parties alter so as to make them conform to the requirements of those provisions to be retroactively validated. An agreement may not be declared void for a specific period and thereafter declared valid for the same period of time. Provisional validity is therefore always justified even in the situation referred to by the Court in the second question. The duration of provisional validity depends entirely upon the diligence of the Commission, which is bound to exempt under Article 85 (3) agreements which satisfy the necessary conditions *(defendants in Joined Cases 253/78 and 1 to 3/79).*

(b) Even if the validity of the argument based on Article 7 of Regulation No 17 may be doubtful, the fact that the Treaty contains no transitional provision relating to the effect of Article 85 (2) on agreements prior to the date of application of the Treaty or Regulation No 17 and the often considerable delay on the part of the Commission in investigating the cases brought before it justify the maintenance of provisional protection *(British Government).*

(c) Since paragraphs (1) and (3) of Article 85 are indivisible parts of the same provision the validity of the agreements involved may only be assessed in the light of an economic balance-sheet the data for which may only be collected by the Commission. It follows that, as regards old agreements which have been notified, Article 85 does not produce direct rights for individuals who may not therefore rely upon those provisions in order to dispute before a

national court the validity of an agreement so long as the agreement has not formed the subject-matter of a decision by the Commission *(French Government).*

B — On the other hand, the *Danish, Belgian and German Governments* and the *Commission* consider, on various grounds and subject to different detailed rules, that the continuance of provisional validity is no longer justified. The solutions advocated by those governments and that institution and the grounds upon which they base their arguments are as follows:

(a) The *Danish Government* considers that it is no longer possible to justify continuing any longer the maintenance of provisional validity of "old agreements" by relying upon the considerations of legal certainty which gave rise to that doctrine. The Danish Government attaches particular importance to the fact that the maintenance of the provisional validity of old agreements which have been held by a court to fall within the field of application of Article 85 and which therefore infringe the Treaty, carries with it what may be described as a *denial of justice* to the third parties adversely affected by the agreement and thus prevents the legal certainty of the third parties being taken into account. That "denial of justice" is becoming increasingly pronounced with the passage of time. The Danish Government stresses that the sphere of application of "old agreements" may constantly be enlarged by the conclusion of later agreements making reference to old standard form contracts which have already been notified and that review of their compatibility with Community law would be more satisfactorily carried out by simultaneous review by the Community authorities and the national courts. In that regard, it is appropriate also to bear in mind the fact that, according to the case-law of the Court, Article 85 (1) is directly applicable and that the procedure for obtaining a preliminary ruling provided for by Article 177 ensures uniform application of Community law as well as the fact that the parties to an agreement have had the opportunity to adapt the agreement to the requirements of Community law during the long interval which has passed since the coming into force of the prohibition in question.

(b) According to the *Belgian Government,* the special system of provisional validity was introduced in order to allow parties to adapt their agreements to the Community rules and to allow the Commission to obtain a general view of the various links existing between undertakings and to seek a solution for the "bulk" of the cases to be considered during the "running-in period". So far as the parties are concerned the initial period may be regarded as having expired long ago. An adjustment period of a few months or even years may suffice. By way of comparison, reference is made to the adjustment period provided for by Regulation No 67/67 which is less than five months. So far as the Commission is concerned, the "running-in period" undoubtedly ended long ago as well. It is permissible to assume, *a priori* that, in general, the problem of the "bulk" no longer exists as it did in the past in regard to all the old agreements in question.

The rules applicable to old agreements which have been notified but which have not formed the subject-matter of a

decision prohibiting them or granting them individual or block exemption may be regarded as equivalent to that applying to agreements which have formed the subject-matter of a negative clearance decision. Indeed, the Commission has a duty to take action as quickly as possible against agreements which are contrary to the Treaty and of which it is aware. Prolonged failure to adopt a decision amounts to tacit negative clearance. That means that those agreements must be regarded by the national court as valid, and no more. However, since the Commission may always review, for the future, a decision granting negative clearance, owing to the development of economic and even legal circumstances, a national court ought also to be authorized, subject to the same conditions, to apply Article 85 (1). The Belgian Government accordingly suggests that the following answer be given to the second question:

"National authorities have power to apply Article 85 (1) *ex nunc* to old agreements which have been notified only where economic or legal circumstances have developed to such an extent that similar action by the Commission would be justified."

(c) The *Government of the Federal Republic of Germany,* under reference to the considerations given in its answer to the first question, is of the view that, for the same reasons, the indefinite maintenance of the protection afforded by provisional validity is not warranted in the circumstances set forth by the Court under heads (a) to (d). Provisional validity is no longer justified in so far as the Commission will not take a decision pursuant to Article 85 (3).

(d) The *Commission* observes that provisional validity applies during the period between notification and the Commission's decision, that is to say, for so long as the old agreements await a decision by the Commission granting exemption. As from the date on which it is clear that the Commission will not adopt a decision granting exemption, which is the case with agreements which form the subject-matter of a decision to close the file on the case, the maintenance of provisional validity is no longer justified. Old agreements which have formed the subject-matter of a decision to close the file on the case may accordingly be made subject to a system similar to that applying to new agreements provided for in paragraphs 11 and 12 of the decision in the judgment in the *Brasserie de Haecht II* case [1973] ECR 77. That means that a national court may declare such agreements to be automatically void under Article 85 (2) where that court is in a position to hold that there is no doubt as to the incompatibility of the agreement with Article 85.

The development of Community competition law allows the parties to those old agreements to amend them in such manner that either they no longer fall within the prohibition laid down by Article 85 (1) or they satisfy the requirements for the application of Article 85 (3). In principle, the problem of provisional validity ought no longer to arise where such an agreement has formed the subject-matter of a decision to close the file on the case since, in the Commission's opinion, that agreement does not satisfy, or no longer satisfies, the requirements for the application of Article 85 (1). If, however, the national court considers that the conditions for the application of Article 85 (1) are satisfied it is preferable for it to proceed in such a case in the manner indicated by the Court of Justice with regard to new agreements in paragraphs 11 and 12 of

the decision in the aforementioned judgment in the *Brasserie de Haecht II* case.

C — In its observations the *Netherlands Government* devotes its attention essentially to examining the possibilities of approximating the system applying to old agreements to that applying to new agreements which have been notified. The Netherlands Government states that it is prepared to concede that a national court may prohibit an old agreement by virtue of Article 85 (1) provided that that prohibition only takes effect in the future *(ex nunc)*. The protective effect of provisional validity ought in any event to continue to benefit third parties for the period prior to the date of the judgment of the Court in the present cases. The Netherlands Government considers it important that in every case the national court retains the power to stay the proceedings in order to enable the Commission to decide whether the agreement falls within Article 85 (1) and, if so, whether it may benefit from the provisions of Article 85 (3). According to the Netherlands Government, it is advisable to suggest to national courts that they avail themselves of the power to stay the proceedings, especially in cases in which the agreement presents similarities to agreements in favour of which the Commission has already applied Article 85 (3).

Question 3

A — According to *defendants in the main actions in Joined Cases 253/78 and 1 to 3/79* it is desirable, within the context of the case-law relating to new agreements, to find a solution which links up with that adopted in regard to old agreements. New agreements which have been notified are always capable of benefiting, with retroactive effect, from a formal decision granting exemption. Where previous decisions (which may be informal) demonstrate that the Commission may be prompted to adopt a favourable decision in regard to a new agreement the national court is bound, pending a ruling by the Commission, to refrain from applying to such agreements provisions of the national law of a Member State which may in certain respects be more rigorous than Community law.

B — The *British, Danish, French, Belgian and German Governments* consider that, so far as the application of national law is concerned, the solution which they advocate in their answer to Question 1 in relation to old agreements ought to apply to new agreements. Nothing in Community competition law prevents the application to those agreements of provisions of national competition law which may be more rigorous than Community law.

So far as the application of Article 85 (1) and (2) is concerned, the aforementioned Member States advocate the following solutions:

(a) According to the *British, Danish and German Governments,* as the Court held in its aforementioned judgment in the *Brasserie de Haecht II* case, new agreements do not enjoy any special protection. The Danish Government considers that that solution must be maintained. For its part, the Government of the Federal Republic of Germany stresses that national courts are not

bound by a formal negative clearance decision by the Commission and that the same must apply, *a fortiori,* where the Commission has merely sent informal letters to the parties concerned.

(b) According to the *French Government,* the considerations of legal certainty upon which the theory of provisional validity is based also justify the grant of some protection, less than the provisional validity of old agreements but nevertheless effective, for new agreements. According to the French Government, a new agreement ought to have the benefit of an interim "presumption of validity" *vis-à-vis* Community law during the period between the initiation of a procedure and the Commission's decision. Before that period begins the new agreements enjoys no protection.

(c) According to the *Belgian Government,* a national court has power to apply Article 85 (1) to new agreements as long as the Commission has not initiated any procedure against them. However, since, as was stated in the aforementioned judgment in the *Walt Wilhelm* case, a national court must avoid any conflict with decisions which may be taken by the Commission and which take precedence, the national court accordingly may not delcare Article 85 (1) to be applicable unless it is satisfied that the Commission would have adopted a similar decision.

C — The Commission's observations in reply to Question 3 are presented in accordance with the following arrangement:

(a) *In regard to the application of Article 85 (1) and (2)* the Commission considers that there is no ground for altering the law as laid down by the Court in paragraphs 10 to 12 of the aforementioned judgment in the *Brasserie de Haecht II* case which allows a national court freely to apply the provisions of Article 85 (1) and (2), which are directly applicable. In fact, it ensures the cooperation of national courts in enforcing the Community provisions in question.

However, where, as indicated in the first assumption upon which the questions asked by the Court are based, the national court regards the agreements in question as falling within the sphere of application of Article 85 (1), the Commission wishes the courses of action open to the national court to be defined with greater precision. In such a case, the Commission considers that the first duty of the national court is to check whether the agreement in question does not benefit from an exemption under Article 85 (3) granted to it either by a regulation granting a block exemption or by an individual Commission decision. If it does, the national court may not make a finding of nullity under Article 85 (2) and must accordingly regard the agreement as being conclusively valid from the point of view of Community law. If it does not, the national court may hold the agreement to be null and void if there can be no doubt as to its incompatibility with Article 85. In the opinion of the Commission, a national court may only reach the conclusion that there can be no doubt as to the agreement's incompatibility with Article 85 if:

— The case-law of the Court or the settled practice of the Commission in taking decisions has indicated that it is impossible to consider that the

requirements of Article 85 (3) have been satisfied in regard to agreements of the kind in question; or

— It is abundantly clear that such an agreement does not satisfy the conditions laid down in Article 85 (3).

Where, on the other hand, the national court cannot thus establish that there can be no doubt as to the incompatibility of the agreement with Article 85, the Commission considers that it is still open to the national court to apply Article 85 without being bound to stay the proceedings. Indeed, as it has already observed in the course of the oral procedure in the *Concordia* case [1977] ECR 65 at 89 (fifth Question), the Commission considers that where in the light of Community practice and case-law there is no reasonable doubt that a particular agreement is entitled to benefit from an exemption under Article 85 (3) the national court has power to dismiss an objection of nullity raised by one of the parties. It may, in such a case, regard the agreement as conclusively valid from the point of view of Community law, the provisions of Article 9 (1) of Regulation No 17 notwithstanding.

Where the national court has not been able by these various means to rid itself of doubts as to the incompatibility or compatibility of the agreement with Article 85 it remains open to it to stay the proceedings in order to enable the parties to obtain the Commission's view-point. The Commission considers that where it is presented with such a request it has a duty to inform the national court:

— Either of the view-point already adopted by it in the case (where the agreement has already formed the subject-matter of a decision to close the file in the case);

— Or of the view-point adopted following that request.

The adoption of such a view-point by the Commission, being such as to remove the national court's doubts, would accordingly permit the national court either to make a finding of nullity under Article 85 (2) or to regard the agreement as conclusively valid from the point of view of Community law.

(b) The application of national law

The problem of the application of provisions of the national law of a Member State which may be more rigorous than Community law must, in the Commission's opinion, be examined having regard to the result reached by the national court pursuant to Community law.

If the national court finds that the agreement is void by virtue of Community law nothing prevents it from also applying its national law to the agreement in question.

Where, on the other hand, the national court is led to conclude that the agreement is conclusively valid from a Community point of view either because it already enjoys an exemption under Article 85 (3) (granted by regulation or by decision) or because in the light of Community practice and case-law there is no reasonable doubt that it is capable of benefiting from such an exemption, the national court must be prevented from applying its national law in so far as it is more rigorous.

Although the issue of the pre-eminence of exemptions is not actually raised by the questions put by the Court, the Commission adds that the principal argument in favour of that pre-eminence is that to the effect that an exemption is granted to an agreement which contributes to the attainment of the objectives of the Treaty. It should be recalled, indeed, that under the third condition laid down in Article 85 (3) an exemption may only be granted if the restrictions agreed upon by the undertakings concerned are indispensable to the attainment of the objectives of the improvement of production or distribution of goods or of the promotion of technical or economic progress to which the agreement in question relates.

The Commission accordingly considers that the application of national law, which may be more rigorous, may not result in calling in question the substance of the exemption granted by decision (or by block regulation). The exemption must not, however, prevent the application of national law which adapts its application to national level whilst not calling in question the substance of the exemption which has been granted. The specific detailed rules for such application are to be decided upon in each individual case. An application of national law which prohibits the same restriction as that exempted by virtue of the provisions of Community law may not, however, be permitted.

3. The defendants in the main proceedings, represented by Mr Collin and Mr Lebel, Advocates, the Government of the United Kingdom, represented by Mr Scott, and the Commission, represented by Mr Verstrynge, presented oral argument at the hearing on 29 April 1980.

The Advocate General delivered his supplementary opinion at the sitting on 24 June 1980.

Decision

1 By orders of 5 July 1978, which were received at the Court Registry on 14 November 1978 (Case 253/78) and 2 January 1979 (Cases 1 to 3/79), the Tribunal de Grande Instance, Paris, (31st Chamber), submitted to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty questions on the interpretation of Article 85 of the Treaty.

2 Those questions were raised in the course of criminal proceedings brought against the managing directors of Guerlain S.A. (Case 253/78), Parfums Rochas S.A. (Case 1/79), Lanvins-Parfums S.A. (Case 2/79) and Nina Ricci

S.à r.l. (Case 3/79), charging them with infringing Article 37 (1) (a) of the French Order No 45-1483 of 30 June 1945 on prices, which makes it an offence for any producer, trader, industrialist or craftsman, "to refuse to fill to the best of his ability and on terms complying with the customs of the trade, orders by purchasers for products or requests for the performance of services where those orders or requests are in no way irregular, come from purchasers in good faith and the sale of the products or the performance of the services is not prohibited by law or by any regulation of any public authority." Those criminal proceedings were commenced following complaints with claims for damages lodged by retailers of perfumery products to whom the companies in question had refused to sell.

3 The accused maintained before the court making the reference that the refusals to sell giving rise to the dispute were justified in particular by the existence of selective distribution systems for the products in question. They claimed furthermore that, as was shown by letters dated 28 October 1975 (Guerlain), 26 March 1976 (Parfums Rochas), 22 September 1976 (Lanvin-Parfums) and 20 January 1978 (Nina Ricci) sent to them by the Directorate-General for Competition, the agreements upon which those selective distribution systems were based had been authorized by the Commission of the European Communities. Those letters, which were worded in almost identical terms, informed the companies concerned that, in view of the small share held by each company in the market in perfumery, beauty products and toiletries and the presence in that market of a fairly large number of competing enterprises of comparable size, "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."

4 Stating that those letters must be regarded as decisions applying Article 85 (3), the accused maintained that by reason of the pre-eminence of Community rules the national authorities could not prohibit, by applying national law, restrictions on competition which had been recognized by the Commission as lawful from the point of view of Community law.

5 Considering that it did not have sufficient information regarding Community law, the Tribunal de Grande Instance ordered that there be submitted to the Court the exclusive dealing agreements entered into by the companies in question:

"which are the outcome of a sales organization based not only on qualitative but also on quantitative criteria of selection so that the Court can decide whether certain luxury products whose brand image is important can benefit from the exemption provisions contained in Article 85 (3) of the Treaty establishing the European Economic Community and whether in the present case [the companies concerned] benefit therefrom in Community law."

6 Within the framework of the task given it by Article 177 of the Treaty, the Court of Justice has no jurisdiction to decide the application of the Treaty to a given case but the need to reach a useful interpretation of Community law enables it to extract from the facts of the main dispute the details necessary for the understanding of the questions submitted and the formulation of an appropriate reply.

7 It appears from the orders making the references that the purpose of the questions submitted to this Court for a preliminary ruling is to allow the national court to decide whether, as the accused maintain, the view-point expressed in the letters sent to the companies concerned by the Directorate-General for Competition of the Commission prevents the application of the provisions of French legislation which prohibit a refusal to sell. The only explanation for the reference to Article 85 (3) in the question put by the Tribunal de Grande Instance is the statement by the accused that the said letters constitute decisions granting exemption adopted in application of Article 85 (3). In these circumstances the Court will confine itself to a consideration of the question of the extent to which, in circumstances such as these, Community law prevents the application of provisions of national competition law by national authorities.

8 Before embarking upon that question it is necessary to determine the legal nature of the aforementioned letters.

The legal nature of the letters in question

9 Article 87 (1) of the Treaty authorized 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 that authorization the Council has adopted regulations, in particular Regulation No 17 of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87), which gave the Commission power to adopt various categories of regulation, decision and recommendation.

10 The instruments thus placed at the Commission's disposal for the accomplishment of its task include decisions granting negative clearance and decisions applying 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 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.

11 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 must be published, as provided for by Article 21 (1) of that regulation.

12 It is plain that letters such as those sent to the companies in question by the Directorate-General for Competition, which were despatched without publication as laid down in Article 19 (3) of Regulation No 17 and which were

not published pursuant to Article 21 (1) of that regulation, constitute neither decisions granting negative clearance nor decisions 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, they are merely administrative letters 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.

13 Such letters, which are based only upon the facts in the Commission's posession, and which reflect the Commission's assessment and bring to an end the procedure of examination by the department of the Commission responsible for this, do 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 letters nevertheless constitutes a factor which the national courts may take into account in examining whether the agreements or conduct in question are in accordance with the provisions of Article 85.

The application of national competition law

14 The central issue in these cases consists in determining the effect which such letters may have, on the assumption the national authorities apply not Articles 85 and 86 of the Treaty but their national law alone.

15 As the Court held in its judgment of 13 February 1969 in Case 14/68 *Walt Wilhelm and Others* v *Bundeskartellamt* [1969] ECR 1, Community law and national law on competition consider restrictive practices from different points of view. Whereas Articles 85 and 86 regard them in the light of the obstacles which may result from trade between Member States, national law proceeds on the basis of the considerations peculiar to it and considers restrictive practices only in that context. It follows that national authorities may also take action in regard to situations which are capable of forming the subject-matter of a decision by the Commission.

16 However, in the above-mentioned judgment the Court stressed that parallel application of national competition law can only be permitted in so far as it does not prejudice the uniform application, throughout the common market, of the Community rules on cartels or the full effects of the measures adopted in implementation of those rules.

17 In that regard, it has been claimed that the application of national competition law may not be permitted where it would result in an exemption granted by a decision or a block exemption being called in question. It follows, however, from the observations set forth above that the agreements which form the subject-matter of the present cases do not benefit from any decision in application of Article 85 (3). Moreover, it is not in dispute that the agreements concerned do not come within the scope of any regulation granting block exemption.

18 The contracts in question merely formed the subject-matter of a decision to close the file on the case taken by the Commission, which gave the opinion that there was no need for it to take action in respect of the contracts in question under the provisions of Article 85 (1). That fact cannot by itself have the result of preventing the national authorities from applying to those agreements provisions of national competition law which may be more rigorous than Community law in this respect. The fact that a practice has been held by the Commission not to fall within the ambit of the prohibition contained Article 85 (1) and (2), the scope of which is limited to agreements capable of affecting trade between Member States, in no way prevents that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally.

19 Accordingly, the answer to the questions submitted must be that Community law does not prevent that application of national provisions prohibiting a refusal to sell even where the agreements relied upon for the purpose of justifying that refusal have formed the subject-matter of a decision by the Commission to close the file on the case.

Costs

20 The costs incurred by the Belgian Government, the Danish Government, the Netherlands Government, the French Government, the Government of the Federal Republic of Germany, 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 actions are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal de Grande Instance, Paris, by orders of 5 July 1978, hereby rules:

Community law does not prevent the application of national provisions prohibiting a refusal to sell even where the agreements relied upon for the purpose of justifying that refusal have formed the subject-matter of a decision by the Commission to close the file on the case.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 10 July 1980.

A. Van Houtte
Registrar

H. Kutscher
President