market for the products concerned, and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements. Although not necessarily decisive, the existence of similar contracts is a circumstance which, together with others, is capable of being a factor in the economic and legal context within which the contract must be judged.

In Case 99/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arrondissementsrechtbank, Haarlem (First Chamber), for a preliminary ruling in the action pending befor that court between

(1) SA LANCÔME, Paris

(2) COSPARFRANCE NEDERLAND BV, Weesp

and

(1) ETOS BV, Zaandam

(2) ALBERT HEYN SUPERMART BV, Zaandam

on the interpretation of Article 85 of the Treaty and of certain rules issued 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. SA Lancôme in Paris manufactures and markets under the Lancôme trademark perfumery, beauty products and toiletries. Cosparfrance Nederland BV is a subsidiary of Lancôme which markets Lancôme products in the Netherlands.

2. In order to market its products, Lancôme has set up a selective sales organization which covers the whole of the EEC and is based in particular on exclusive distributorship agreements concluded between it and the general agents which it has appointed in the various Member States of the EEC and on sales agreements concluded between Lancôme and retailers established in France. Lancôme notified the Commission on 30 January 1963 of a standard exclusive dealing agreement concluded with its general agents for the Federal Republic of Germany, Italy, the Netherlands, Belgium and Luxembourg. Subsequently, Lancôme also notified the Commission of the agreements which its general agents or subsidiaries were applying to their respective authorized retailers.

3. After initiating the procedure on 27 April 1972, the Commission sent a notice of complaints to Lancôme on 24 July 1972. As a result of that notice of complaints, Lancôme amended its contracts so as to enable trade between Lancôme's authorized retailers established in the various Member States and to prevent Lancôme products thus exported or imported from being made subject to the system of imposed prices applied in certain Member States. The Director-General for Competition therefore sent Lancôme on 16 December 1974 a letter worded as follows:

"Re: Case No IV/19.552 — Lancôme sales organization

Dear Sirs,

Lancôme SA 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 Lancôme with its general agents in the various countries of the EEC and on the uniform distributorship agreements concluded by the latter and by Lancôme with their authorized retailers in their respective territories.

The standard exclusive distributorship agreement and the uniform distributorship 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 Lancôme 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 Lancôme products which they were re-importing or re-exporting in the Common Market. For this reason your company was notified of complaints on 24 July 1972 pursuant to Article 19 (1) of Regulation No 17. As a result of that notice your company 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 Lancôme 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 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 undertaking of comparable size on that market and because the financial links between your company and the Oréal group do not seem in this case likely to influence the volume of your turnover for the products in question, 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"

4. The Ahold NV group to which Etos BV and Albert Heyn Supermart BV, the defendants in the main action, belong, controls a large chain of retail shops in the Netherlands, principally in the sector of foodstuffs and large-scale consumer goods. At present Etos runs 59 chemist shops in the Netherlands based on the discount sales formula and through this means sells a range of products including durgs, pharmaceutical products, beauty products and perfumes.

Before being taken over by the Albert Heyn group (which has since become Ahold), Etos had concluded with Cosparfrance agreements whereby several shops run by Etos were authorized as stockists of Lancôme articles. These agreements came to an end on 20 October 1975.

The defendants in the main action asked Cosparfrance to supply Lancôme products to all their Etos chemist shops and discount drugstores but Cosparfrance refused on the ground that the discount drugstores did not fulfil its qualitative criteria and that moreover it would be contrary to its selective distribution system to supply all the shops in question.

The defendants in the main action however proceeded to sell Lancôme products at prices lower than those which the Netherlands stockists must apply.

5. Lancôme and Cosparfrance, the plaintiffs in the main action, brought proceedings against Albert Heyn Supermart and Etos before the Arrondissementsrechtbank, Haarlem, asking that court to prohibit the defendants from selling Lancôme products in their shops which are not authorized as stockists of Lancôme products and in addition to order them to pay compensation for the damage suffered on account of those sales.

In support of those requests, Lancôme claimed that the defendants are guilty of a wrongful act *vis-à-vis* them by undermining and destroying their sales organization, in particular by provoking breaches of contract by authorized stockists.

6. The defendants claimed in their defence that the plaintiffs' sales organization is partially void because it is incompatible with Article 85 (1) of the EEC Treaty. They also maintained that the above-mentioned letter of 16 December 1974 constituted merely the opinion of a head of department which is not binding on the Commission.

7. In view of the controversy which has arisen between the parties as to the applicability of Article 85 (1) to this case, the court making the reference submitted to the Court of Justice by order of 19 June 1979 a reference for a preliminary ruling worded as follows:

"Whereas

In a situation in which, on the one hand:

(i) an undertaking applies a selective distribution system for marketing its perfumes, beauty products and toilet preparations in the EEC;

(ii) the agreements on which the selective distribution system is based were already in existence at the time of the entry into force of Regulation No 17 of the EEC and were notified to the Commission within the prescribed period by means of Form B pursuant to Article 5 (1) of Regulation No 17;

(iii) changes were made to those agreements as described by the Commission in its Fourth Report on Competition Policy, No 94;

(iv) the Director-General for Competition sent the undertaking a letter on 16 December 1974 for the content of which reference is made to the part of this judgment entitled 'Legal Considerations';

(v) most (if not all) other undertakings in the perfume sector apply selective distribution for selling their 'prestige products' as described by the Commission in its Fifth Report on Competition Policy, Nos 57-59;

(vi) the publication provided for in Article 19 (3) of Regulation No 17 has not been made;

on the other, leaving aside the question whether circumstances referred to under Question 3 (a) and/or (b) exist here,

Asks the Court of Justice of the European Communities to rule on the following questions:

1. What is the nature of the letter referred to under (iv) from the Director-General for Competition in particular from the following aspects:

1.1. Does it constitute a declaration that the Commission is of the opinion that Article 85 (1) of the EEC Treaty is not applicable to

agreements to which the changes referred to under (iii) have been made?

1.2. Does it constitute application of Article 85 (3) of the EEC Treaty?

1.3. Is it effective as against third parties?

1.4. Does it put an end to the provisional validity of old agreements which were notified in good time?

2. Is it possible that the agreements, to which the changes referred to under (iii) have been made, do not fall under the prohibition of Article 85 (1) of the EEC Treaty because of the relatively small share of the market held by the undertaking referred to under (i), in spite of the fact that:

2.1. they contain provisions which entail, on the one hand, a selection of so-called authorized retailers and, on the other, a prohibition on supplies to persons other than consumers or authorized retailers;

2.2. the competitors of the undertaking referred to under (i) also apply a system of selective distribution;

2.3. until now selective distribution appeared to be possible only pursuant to an exemption under Article 85 (3)?

3. If the Commission has granted an undertaking exemption under Article 85 (3) of the EEC Treaty for the application of a selective distribution system is that exemption invalid if it appears that:

(a) the undertaking concerned is not complying with the conditions or obligations to which the Commission has made the exemption subject; and/or

(b) in practice the products in question are offered for sale within the common market by wholesalers and retailers who have not been selected by the undertaking concerned?"

8. The order for reference was entered on the Court Register on 21 June 1979.

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 in the main action, represented by W. Alexander, Advocate at The Hague Bar, the defendants in the main action, represented by D. J. Gijlstra, Advocate at the Amsterdam Bar, and the Commission of the European Communities, represented by its Legal Adviser, J. Temple Lang and by J.-F. Verstrynge, member of the Commission's Legal Service, 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 in the main action

By way of preliminary remarks, the plaintiffs in the main action describe briefly the characteristics of the products

in question. They stress in particular the importance of controlling the conditions in which prestige products, such as the Lancôme products, are offered to the public. It is in particular necessary to ensure that only absolutely fresh products are displayed and offered for sale, that the whole range (including varieties sold less frequently) is always in stock, that customers can be advised by qualified staff, that the shop does not sell goods or advertise in such a way as to compromise the luxury character and the brand image of the product. A manufacturer cannot neglect the factors upon which depends the favour of the special public at which the prestige products are aimed except at the price of a loss of custom. For this reason the plaintiffs in the main action only agree to sell their products through selected retailers who agree to comply with undertakings relating to the sale and presentation of the products in question.

After briefly recalling the facts which form the subject-matter of the dispute in the main action and the administrative procedure followed by the Commission with regard to the Lancôme distribution system, the plaintiffs in the main action submit the following observations on the three questions submitted to the Court by the court making the reference.

The first question

It is necessary first to point out that the letter of 16 December 1974 addressed to Lancôme transmits an opinion of the Commission and not solely that of a head of department; this is shown clearly by the Commission's Fourth Report on Competition Policy, Nos 93 to 97.

The fact that the letter was not published as laid down in Article 19 (3) of Regulation No 17, the absence of the signature of the Director-General for Competition and the fact that the letter was not published (as is customary) within the meaning of Article 21 of Regulation No 17 indicates that the Commission itself did not consider the letter of 16 December 1974 to be a decision under either Article 2 or under Article 6 of Regulation No 17. However, according to the judgment in the *CBR* case [1967] ECR 75, such a letter may nevertheless constitute a decision if it contains a measure which, by bringing about a considerable change in its legal position, has affected the interests of the undertaking. However, it is necessary to point out that the above-mentioned letter has given rise in the case of Lancôme to the legitimate expectation that the agreements in question are compatible with Article 85 and that Lancôme has made every effort to maintain a distribution system in accordance with the principles approved by the Commission. On the question whether the above-mentioned letter constitutes a decision, the plaintiffs in the main action adopt the arguments put forward in this connexion by Parfums Rochas and Estée Lauder in Cases 2/79 and 37/79.

On the basis of the arguments put forward by the two latter companies, the plaintiffs in the main action also consider that the above-mentioned letter constitutes an application of Article 85 (3) of the Treaty. If the Court were to hold otherwise, that letter could then be considered only as an application of Article 2 of Regulation No 17. Legal certainty requires that such a decision should be effective even as against third parties so long as it has not been annulled or declared invalid. Such a decision converts the provisional validity

of the old agreements, which were duly notified, into definitive validity.

In the alternative, if the Court does not share the view that the above-mentioned letter of 16 December 1974 constitutes a decision, the plaintiffs in the main action claim that in that case the procedure for the adoption of a favourable decision with regard to the Lancôme agreements has not yet been completed. As the Commission has not adopted a definitive decision pursuant to Regulation No 17, the above-mentioned letter has not therefore brought to an end the provisional validity of the old agreements duly notified (Case 59/77, *De Bloos* v *Bouyer* [1977] ECR 2372).

The second question

The facts indicated by the court in its question may constitute indications of the applicability of Article 85 (1). If the letter of 16 December 1974 were not considered to be a decision of exemption, it would be necessary to conclude that the Commission, having regard to the large number of competing undertakings of comparable size on the market and to the amendments made to the agreements, considered that the conditions for the applicability of Article 85 (1) were not fulfilled. If that assessment of the agreements and of the economic context should prove wrong, the Lancôme sales system would in any case fulfil the conditions necessary for the grant of an exemption under Article 85 (3). In any case, until the Commission adopts such a decision, the Lancôme sales system continues to benefit from the provisional validity.

The third question

The third question is based on the allegations made by the defendants in the main action, the accuracy of which was not established by the court making the reference itself. In this connexion, the plaintiffs in the main action observe that it is inevitable that amongst the 10 000 authorized Lancôme retailers in the Community there are some who are tempted to infringe their contracts. As soon as they are discovered, supplies cease to be delivered to them. As regards third parties who benefit from such breaches of contract, Lancôme is obliged to establish priorities before deciding against whom proceedings should be brought. Etos differs from the other traders outside the network by the fact that it has progressively undermined Lancôme's selective sales organization by selling Lancôme products outside the Etos shops which had been authorized by Lancôme at the outset. In addition, Etos differs by its systematic and aggressive attacks carried out on a large scale against the Lancôme sales organization. There is nothing to indicate that the exemption granted to an undertaking would be null and void if it appeared that the products in question were offered for sale by wholesalers and retailers not authorized by the undertaking concerned. Such an allegation is hypocritical coming from an undertaking which takes pains to create breaches in the sales network in question.

In any event, the consequences of any failure to observe the conditions attaching to the exemption are governed by Article 8 (3) (b) of Regulation No 17,

which authorizes the Commission to revoke or amend its decision.

In conclusion, the plaintiffs in the main action suggest that the following reply should be given to the first question referred to the Court for a preliminary ruling:

"1. The above-mentioned letter of 16 December 1974 from the Director-General for Competition constitutes a decision by which the Commission:

1.1. applied Article 85 (3) of the EEC Treaty to the agreements to which the changes which it indicated have been made;

1.2. (in the alternative) declared that Article 85 (1) of the EEC Treaty is not applicable to the agreements to which the changes which it indicated have been made;

1.3. this decision is fully effective as against third parties as long as it has not been annulled or declared null and void;

1.4. this decision converted the provisional validity of the old agreements duly notified into definitive validity".

If the argument that the above-mentioned letter from the Director-General for Competition constitutes a decision is not accepted, the plaintiffs in the main action suggest that the following reply should be given to the first question referred to the Court by the Arrondissementsrechtbank, Haarlem:

"1. The above-mentioned letter of 16 December 1974 from the Director-General for Competition does not constitute a decision by which the Commission:

1.1. declared definitively that Article 85 (1) of the EEC Treaty is not applicable to the agreements to which the changes which it indicated have been made;

1.2. applied Article 85 (3) of the EEC Treaty;

1.3. deprived third parties of the possibility of drawing the attention of the Commission to factors which prevent the adoption of a favourable decision in relation to those agreements,

or

1.4. put to an end the duty of the courts before which proceedings are brought relating to an old agreement duly notified or exempted from notification to 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) of the EEC Treaty".

If a reply to Questions 2 and/or 3 submitted by the Arrondissementsrechtbank, Haarlem, is still necessary, the plaintiffs in the main action suggest they should be answered as follows:

"2. If they are not exempted on the basis of Article 85 (3) of the EEC Treaty, agreements by which an undertaking selects authorized retailers with a view to selling its products and prohibits the delivery of supplies to persons other than consumers or authorized retailers may nevertheless not fall under the prohibition laid down in Article 85 (1) of the EEC Treaty even if the competitors of

that undertaking also apply a system of selective distribution if it proves that the undertakings in competition on the market are fairly numerous and of comparable size and that those agreements do not prevent re-exportation and importation by authorized dealers within the Common Market.

3. Neither the failure to comply with the conditions or obligations to which the Commission has made an exemption under Article 85 (3) of the EEC Treaty subject nor the fact that the products in question are offered for sale within the Common Market by wholesalers and retailers who have not been selected by the undertaking concerned is capable of making such an exemption relating to selective distribution agreements invalid".

B — Observations submitted by the defendants in the main action

After a description of the facts which gave rise to the main action and of the characteristics of the market in question, the defendants in the main action put forward the following observations on the questions submitted to the Court by the court making the reference.

The first question

Referring to the judgments given by the Court in Joined Cases 23, 24 and 52/63 [1963] ECR 217, Joined Cases 53 and 54/63 [1963] ECR 239, Case 54/65 [1966] ECR 185 and Joined Cases 8 to 11/66 [1967] ECR 75, the defendants in the main action maintain that the letter of 16 December 1974 did not exhibit any of the characteristics which, according to the case-law of the Court, are those of a decision. That letter cannot moreover *a fortiori* be considered as negative clearance or an exemption; in this connexion, it is necessary to observe that in any case the conditions as to publication laid down by Regulation No 17 with regard to the adoption of such measures have not been fulfilled in this case. The letter of 16 December 1974 is therefore no more than the expression of the opinion of a head of department which is not binding upon the Commission. Lancôme cannot rely upon that letter as against third parties for the purpose of alleging that its selective distribution system has been accepted by the Commission.

The defendants in the main action criticize next the informal solution adopted by the Commission for the perfumery sector. There is a specific means by which the Commission can draw up a uniform solution for a sector of the economy within the Community system of competition. This is the block exemption granted by regulation which contains guarantees for third parties (preliminary publication and the opportunity of submitting observations). The Commission is acting in conflict with the Community legal order when it reacts to a request for negative clearance or exemption by an unofficial letter which is not binding upon it. The Commission must in all cases adopt a formal decision so as to comply with the rules laid down by Regulation No 17.

If the letter of 16 December 1974 was not a decision the question of provisional validity would then arise. The defendants however consider that the Lancôme distribution system cannot be covered by the provisional validity for the following reasons:

1. Lancôme concluded in October 1977 an agreement with a distributor in the United Kingdom containing provisions not covered by the notification of 1963 (the duty of the distributor to consult Lancôme beforehand on export prices). In the same way, the standard agreement between the British distributor and retailers contains provisions which are not covered by that notification (the duty to adhere to the list prices both for sale and for resale and the price discrimination clause). The existence of those provisions affects the provisional validity of the whole distribution system.

2. Lancôme's sales system was amended on important points after notification.

3. It is unjust that the validity of the distribution system cannot be contested so long as no formal decision has been adopted by the Commission. The adoption of such a decision is unlikely since the Commission has stated that the informal letters which it sent to the undertakings enabled it to find a general solution for the whole sector.

4. Lancôme's distribution system is not "closed": Etos had no difficulty in obtaining ample supplies of Lancôme products outside the official network of that company.

In the opinion of the defendants, if the Court held that the agreements notified by Lancôme are still provisionally valid, it would be necessary to consider that the correspondence exchanged between that company and the Commission must be regarded as equivalent to the initiation of a procedure under Article 3 of Regulation No 17. Because of the complexity of the facts in the case, the national court should then stay the proceedings pending a decision from the Commission.

The second question

This question is based on an analysis of the letter of 16 December 1974.

According to the defendants, this letter contains a fundamental contradiction. If in fact the undertakings in question were unable to trade and compete within the Community, they would not come within the scope of Article 85 and the fact that the fact that the agreements entered into by the undertakings contain elements (import and export ban) which might be incompatible with Article 85 (1) would be irrelevant. Moreover, it is incorrect that the agreements in question are agreements of minor importance whereas Lancôme's turnover and that of the 'Oréal group to which that undertaking belongs is well above the criteria indicated by the Commission in its notice of 19 December 1977. It is also necessary to take into account the cumulative effect of the sales systems of the various perfumery undertakings which all apply a form of qualitative and quantitative selection of sales points.

Finally, the defendants contest the argument that selection of sales points on the basis of qualitative creiteria is necessary in this case. The products in question are not of great technical complexity, do not require after-sales service and may be sold by unskilled staff. The extent of Etos' sales of

perfumery products shows that the public willingly buys those luxury products in a less sophisticated environment at reasonable prices.

The third question

The defendants state that plaintiffs discriminate against them. In 1974 Etos took pains, unsuccessfully, to obtain from the plaintiffs a list of the objective conditions which the perfumery sales points should fulfil in order to be authorized: these criteria are non-existent. Relying on photographs in support of their argument, the defendants maintain that the "luxury" atmosphere is hardly perceptible at the premises of a large number of authorized stockists. In particular, the duty-free shops at airports, ports and on board ship operate in an atmosphere which is that of discount shops, do not offer qualified assistance or after-sales service and do not sell the complete range of products. When an undertaking which has obtained an exemption from the Commission does not comply with the conditions attached thereto, that exemption becomes invalid.

The same applies if it proves, as it appears in this case, that the distribution system exempted is not "closed".

In conclusion, the defendants in the main action suggest that the following replies should be given to the questions referred to the Court:

"The first question

The letter of 16 December 1974 from the Director-General for Competition is not a decision within the meaning of the fourth paragraph of Article 189 of the EEC Treaty and it is therefore certain that it does not constitute either negative clearance within the meaning of Article 2 of Regulation No 17/62 or an exemption under Article 85 (3) of the EEC Treaty.

The letter is not effective as regards third parties.

For reasons of legal certainty, the letter puts an end to the provisional validity of old agreements duly notified.

If the letter has not put an end to the provisional validity, the national court would be advised to stay the proceedings in the main action and to prompt a decision by the Commission of the European Communities, since the latter initiated against Lancôme by letter of 24 July 1972 a procedure under Article 3 of Regulation No 17.

The second question

An agreement which does not appreciably affect trade between Member States and competition within the Common Market does not in any case fall within the scope of Article 85 (1) of the EEC Treaty.

The cumulative effect of certain practices in the field of competition which, taken individually, do not appreciably affect competition and trade between Member States, may nevertheless bring those parctices within the scope of Article 85 (1) of the EEC Treaty.

Selective distribution accompanied by selection of sales points according to qualitative criteria cannot be authorized within the Community system of competition except on the basis of an exemption under Article 85 (3) of the EEC Treaty unless the undertaking concerned is unable appreciably to affect competition within the Community and

trade between Member States. Selective distribution which, in addition to selection based on qualitative criteria, also includes selection based on quantitative criteria, cannot in any case be authorized within the context of the Community system of competition unless the undertaking in question is unable appreciably to affect trade between Member States and competition within the Community.

By granting such an exemption, the Commission must take into account the cumulative effect of the existence of a large number of sales systems organized in an identical manner within a single sector of the economy.

The third question

If the Commission has granted an undertaking exemption under Article 85 (3) for the purposes of the application of a selective distribution system and if the undertaking concerned does not comply with the conditions or obligations to which the Commission has made the exemption subject, the exemption granted by the Commission is in that case invalid.

It is certain that the system is no longer effective against third parties before the courts.

If the Commission has granted an undertaking exemption under Article 85 (3) of the EEC Treaty for the purposes of the application of a selective distribution system, that exemption becomes invalid if it appears that in practice the products in question are sold on the Community market by wholesalers and retailers who have not been selected by the undertaking concerned. For that selective distribution system to be effective as against third parties within the Common Market it must be closed both in law and in fact".

C — Observations submitted by the Commission

The Commission first of all submits observations on the admissibility of the questions referred to the Court for a preliminary ruling and on the question whether Article 9 (1) of Regulation No 17 limits the right of national courts to refer to the Court of Justice questions for a preliminary ruling on the interpretation of Article 85 (3) which are similar *grosso modo* to the observations which it submitted in Joined Cases 253/78 and 1 to 3/79. The Commission then describes, as it did in its observations in Joined Cases 253/78 and 1 to 3/79, the action which it took as regards distributorship agreements in the perfumery sector.

The first question

Following the scheme used in its observations in Case 37/79, the Commission takes pains to show that the letter of 16 December 1974 to which the court making the reference refers does not fulfil several of the conditions required so as to be regarded as a decision within the meaning of the fourth paragraph of Article 189 of the Treaty. As regards the subject-matter of the letter, the Commission considers that the reasoning followed there is similar to the reasoning followed by the Commission when it takes a negative clearance decision. Consequently, the Commission suggests that point 1.1. of the questions referred for a preliminary ruling should be answered in the affirmative and point 1.2. of those questions in the negative.

As it has already indicated in its observations in Case 37/79, the Commission considers that such letters are not effective as against third parties and are moreover not binding on the courts of the Member States.

As regards the effects of the letter in question on the provisional validity, the Comission refers to its written observations on this subject in Joined Cases 253/78 and 1 to 3/79. It emphasizes in particular that it took no action during the administrative procedures likely to deprive those contracts which were provisionally valid of that provisional validity. The sub-question asked in point 1.4. is therefore irrelevant. The Commission adds that in this case the question of provisional validity does not arise since, following the amendment of the agreements by Lancôme at the Commission's request, those agreements no longer come within the scope of Article 85 of the Treaty. The agreements concluded by Lancôme are therefore completely and definitively valid from the point of view of Community law.

The second question

Referring in particular to the judgment in Case 5/69, *Franz Völk* v *Établissements J. Vervaecke* [1969] ECR 295, the Commission considers that it is perfectly justified in taking into account "the small share in the market in perfumery, beauty products and toiletries held by (Lancôme) in each of the countries of the Common Market" as mentioned in the letter sent to Lancôme on 16 December 1974, all the more since, as mentioned by the court making the reference, that market share is "relatively small".

The Commission also observes that in the present case it took into consideration, in addition to the small size of the market share, the following factors:

— the fairly large number of competing undertakings of comparable size,

— the fact that the financial links between Lancôme and the Oréal group do not seem, in this case, likely to influence the volume of the turnover of the products in question,

— the type of selective distribution system concerned,

— the nature of the (luxury) products concerned,

— the fact that the restrictions the aim or effect of which was to partition the markets have been abolished,

— the fact that the distributorship agreements concluded with retailers are uniform and that qualified retailers are not admitted to the selective distribution system arbitrarily and that such admission does not constitute an indirect means of hindering freedom of trade between authorized distributors, and

— the fact that such selective distribution systems are applied by all undertakings in the sector.

According to the Commission, it is impossible to rely upon its notices concerning agreements of minor importance (Journal Officiel 1970, C 64, p. 1 and Official Journal 1977, C 313, p. 3) in support of an argument seeking to prove that where the thresholds indicated by those notices are exceeded, the agreements in question are necessarily prohibited by Article 85 (1). In fact, the Commission has indeed specified in those notices that "the quantitative definition of 'appreciable' given by the Commission is, however, no absolute yardstick".

The fact mentioned by the national court in point 2.3. of the questions referred to the Court of Justice for a preliminary ruling is irrelevant to the present case and to the agreements concerned. As each agreement is appraised in relation to Article 85 on the basis of its own economic effects, it is impossible to interpret the Commission's decisions as establishing any prejudice whatever against a category of agreements determined by its legal nature. In addition, it is possible to call in question the accuracy of the statement made in point 2.3. of the question referred to the Court for a preliminary ruling since it follows already from paragraph 20 of the decision in the judgment in the *Metro* case, [1977] ECR 1875, that certain selective distribution systems may not fall within the prohibition laid down in Article 85 (1) with regard to certain sectors and in certain circumstances.

The third question

In view of the preceding observations, the Commission considers that this question is purposeless.

In conclusion the Commission proposes that the following replies should be given to the questions submitted by the court making the reference:

"1. It is impossible under Community law to consider a letter such as that sent to Lancôme on 16 December 1974 to be a Commission decision. Since it is an administrative letter informing Lancôme that the Commission considers that there is no longer any need for it to take action in respect of the contracts concerned under the provisions of Article 85 (1), on the basis of the facts known to it, that letter cannot be considered under Community law to be an application of Article 85 (3). Such a letter is not effective as against third parties.

2. It can be considered, by virtue of Community law, that the agreements concerned in this case may not fall within the prohibition laid down in Article 85 (1) in spite of the facts mentioned by the national court where, taking into account all the economic and legal factors involved in these agreements, and in particular the relatively small market share, it is necessary to conclude that these agreements do not have an appreciable effect on competition".

III — Oral procedure

The plaintiffs in the main action, represented by W. Alexander, the defendants in the main action, represented by D. J. Gijlstra, and the Commission of the European Communities, represented by J.-F. Verstrynge, submitted oral argument at the sitting on 8 November 1979.

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 case, as also in Joined Cases 253/78 and 1 to 3/79 and in Case 37/79, and requested the parties

to the main actions, the Member States, the Council and the Commission to state their views on three questions. [1]

2. Written observations in reply to those questions were lodged by the parties to the main actions as well as the British, Danish, French, Belgian, German and Netherlands Governments and the Commission. [2]

Question 1

According to the *defendants in the main action,* the protection enjoyed by "old agreements" which were duly notified or exempted from notification does not 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, provided that the application of that national law does not adversely affect the application of Community law and is confined to the field of action proper to national law on cartels.

Question 2

According to the *defendants in the main action,* it was undoubtedly appropriate to protect agreements existing since before the introduction of the Community system during the first few years after the adoption of Regulation No 17 when it was still uncertain in which direction the interpretation of Community law on cartels would develop. The great number of agreements involved only reinforced that need.

In the course of the 18 years which have passed the Commission, in a large number of decisions, has settled its policy in regard to many of the problems arising in the law of cartels. With many agreements it has thus become possible to predict whether such an agreement will ever be allowed by the Commission and whether it is likely to be granted an exemption. Moreover, the decisions which have been taken and the block exemptions have greatly reduced the problem of the number of agreements involved.

Is is accordingly opportune to reconsider the theory of "provisional validity". By examining old agreements in the light of the policy developed by the Commission during the past 18 years, a national court may determine in any case whether an exemption under Article 85 (3) of the Treaty is possible. Likewise, should doubts be entertained in such cases there is nothing to prevent the national court from staying the proceedings before it and calling for a decision from the Commission or submitting a question to the Court on the interpretation of Article 85 (3).

The different status of "old" and "new" agreements leads to discrimination in the perfume sector. Some "old" undertakings take advantage of the provisional validity of their sales organization and may apply a selective distribution system whereas new undertakings which have new agreements do not enjoy the protection and may not apply a selective distribution system until an exemption is granted.

1 — The text of the order is reproduced in the judgment of the Court in Joined Cases 253/78 and 1 to 3/79.

2 — The observations submitted by those Member States and the Commission are summarized in the judgment of the Court in Joined Cases 253/78 and 1 to 3/79. The observations submitted by the plaintiffs in the main action in the present case correspond to those submitted by the defendants in the main actions in the above-mentioned joined cases and are summarized in the judgment of the Court in Joined Cases 253/78 and 1 to 3/79.

According to the defendants in the main action, the second question put by the Court ought accordingly to be given the following answer:

"The rules of natural justice and legal certainty imply that the grounds hitherto relied upon in favour of the provisional validity accorded to 'old agreements' no longer justify the indefinite maintenance of that protection against the application by a national court of the provisions of Article 85 (1) and (2) of the Treaty."

Question 3

The *defendants in the main action* consider that the same rules as those which they advocate in regard to old agreements should be applied to new agreements. In the case of "new agreements" which have been notified or exempted from notification there is no question of applying the theory of provisional validity. In those cases the national court may apply Article 85 (1) and (2) of the EEC Treaty straight away if it is satisfied that Article 85 (3) of the EEC Treaty may not apply. If doubts are entertained, the national court may stay the proceedings before it and request the Commission to take a speedy decision or refer a question on interpretation to the Court of Justice. In the same way, the national court may apply its national competition law, which may be more rigorous, provided that it does not thereby put in jeopardy the effect of Community law.

3. The plaintiffs in the main action, represented by Mr Alexander, the defendants in the main action, represented by Mr Gijlstra, 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 order of 19 June 1979, which was received at the Registry of the Court on 21 June 1979, the Arrondissementsrechtbank, Haarlem, submitted to the Court of Justice for a preliminary ruling under Article 177 of the Treaty questions on the interpretation of Article 85 and certain provisions of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87).

2 Those questions are put in the context of a dispute between Lancôme and its subsidiary in the Netherlands, Cosparfrance Nederland, the plaintiffs in the main action, and two companies, Etos and Albert Heyn Supermart, the defendants in the main action, which operate a chain of retail shops in the

Netherlands. The plaintiffs brought proceedings against the latter before the Arrondissementsrechtbank, Haarlem, asking that court to order the defendants to cease selling Lancôme products in their shops which are not authorized to sell those products. The plaintiffs in the main action, who maintain that the defendants are guilty of an act of unfair competition by undermining their selective distribution system, in particular by provoking breaches of contract by authorized stockists, also claim compensation for the damage suffered by reason of that conduct.

3 The selective distribution system set up by Lancôme is based in particular on exclusive distributorship agreements concluded with the general agents which it appointed in the various Member States and also on sales agreements concluded with retailers in France. The standard-form contract concluded with the general agents was notified to the Commission on 30 January 1963. The contracts concluded between the general agents or Lancôme's subsidiaries and the various authorized retailers were subsequently notified to the Commission.

4 Upon the defendants' in the main action contending in their defence that the plaintiffs' sales organization was partially void because it was incompatible with Article 85 (1), the latter referred to a letter of a 16 December 1974 from the Director-General for Competition of the Commission of the European Communities. That letter, which is addressed to Lancôme, recalls that, as a result of a notice of complaints of 24 July 1972, Lancôme amended the agreements of which its sales organization in the EEC is the outcome in such a way that authorized retailers are henceforth free to re-sell Lancôme products to, or to buy them from, any general agent or authorized retailer estblished in the EEC and to fix their selling prices where the products are re-imported from or re-exported to other countries of the common market. The letter concludes in these terms:

"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 and because the financial links between your company and the Oréal group do not seem in this case likely to influence the volume of your turnover for the products in question, the Commission considers that there is no longer any need, on the basis of the facts known to it, for it to take actions in respect of the above-mentioned agreements under the provisons of Article 85 (1) of the Treaty of Rome. The file on this case may therefore be closed."

5 The Arrondissementsrechtbank decided to stay the proceedings before it and to address to the Court of Justice a request for a preliminary ruling worded as follows:

"Whereas

In a situation in which, on the one hand:

(i) an undertaking applies a selective distribution system for marketing its perfumes, beauty products and toilet preparations in the EEC;

(ii) the agreements on which the selective distribution system is based were already in existence at the time of the entry into force of Regulation No 17 of the EEC and were notified to the Commission within the prescribed period by means of Form B pursuant to Article 5 (1) of Regulation No 17;

(iii) changes were made to those agreements as described by the Commission in its Fourth Report on Competition Policy, No 94;

(iv) the Director-General for Competition sent the undertaking a letter on 16 December 1974 for the content of which reference is made to the part of this judgment entitled 'Legal Considerations';

(v) most (if not all) other undertakings in the perfume sector apply selective distribution for selling their 'prestige products' as described by the Commission in its Fifth Report on Competition Policy, Nos 57-59;

(vi) the publication provided for in Article 19 (3) of Regulation No 17 has not been made;

on the other, leaving aside the question whether circumstances referred to under Question 3 (a) and/or (b) exist here,

Asks the Court of Justice of the European Communities to rule on the following questions:

1. What is the nature of the letter referred to under (iv) from the Director-General for Competition in particular from the following aspects:

   1.1. Does it constitute a declaration that the Commission is of the opinion that Article 85 (1) of the EEC Treaty is not applicable to agreements to which the changes referred to under (iii) have been made?

   1.2. Does it constitute application of Article 85 (3) of the EEC Treaty?

   1.3. Is it effective as against third parties?

   1.4. Does it put an end to the provisional validity of old agreements which were notified in good time?

2. Is it possible that the agreements, to which the changes referred to under (iii) have been made, do not fall under the prohibition of Article 85 (1) of the EEC Treaty because of the relatively small share of the market held by the undertaking referred to under (i), in spite of the fact that:

   2.1. they contain provisions which entail, on the one hand, a selection of so-called authorized retailers and, on the other, a prohibition on supplies to persons other than consumers or authorized retailers;

   2.2. the competitors of the undertaking referred to under (i) also apply a system of selective distribution;

   2.3. until now selective distribution appeared to be possible only pursuant to an exemption under Article 85 (3)?

3. If the Commission has granted an undertaking exemption under Article 85 (3) of the EEC Treaty for the application of a selective distribution system is that exemption invalid if it appears that:

   (a) The undertaking concerned is not complying with the conditions or obligations to which the Commission has made the exemption subject; and/or

(b) In practice the products in question are offered for sale within the common market by wholesalers and retailers who have not been selected by the undertaking concerned?"

The first question

6 In the first question the Court is asked, first, to specify the legal nature of letters such as that which was sent to Lancôme by the Directorate-General for Competition and to state the effects which such letters produce as regards third parties. Secondly, it is asked whether such a letter puts an end to the "provisional validity" of old agreements which were notified in good time.

The legal nature of the letters in question

7 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.

8 The instruments thus placed at the Comission'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.

9 Regulation No 17 and the regulations issued in implementation thereof lay down the rules which must be followed by the Commission in adopting the

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

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

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

Provisional validity

12 As the Court ruled most recently in its judgment of 14 December 1977 in Case 59/77 *De Bloss* v *Bouyer* [1977] ECR 2359, 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 atributed thereto under the law applicable to the contract, and those effects cannot be called in question by any objections which may be raised concerning its compatibility with Article 85 (1)."

13 The court making the reference asks whether a letter such as that of 16 December 1974 sent to Lancôme by the relevant departments of the Commission has the result of putting an end to the provisional protection which, by virtue of the case-law of the Court, is enjoyed, as from the date of notification, by old agreements which were notified within the time-limit provided for by Article 5 (1) of Regulation No 17 or which are exempted from notification.

14 With a view to answering that question the considerations which form the basis of the case-law of the Court on "provisional validity" should be recalled.

15 As the Court has observed in particular in its judgment of 9 July 1969 in Case 10/69 *Portelange* v *Smith Corona Marchant International* [1969] ECR 309, Article 85 of the Treaty is arranged in the form of a rule imposing a prohibition (paragraph (1)) with a statement of its effects (paragraph (2)) mitigated by the exercise of a power to grant exceptions to that rule (paragraph (3)). To treat a given agreement, or certain of its clauses, as automatically void presupposes that that agreement falls within the prohibition of paragraph (1) of the said article and that it may not benefit from the provisions of paragraph (3).

16 The exclusive power to apply Article 85 (3) which is conferred on the Commission by Article 9 (1) of Regulation No 17, considered in conjunction with the provisions laid down in favour of old agreements by Article 6 (2) and 7 of that regulation, has led the Court to conclude that, in the case of those old agreements, the principle of legal certainty in contractual matters requires that, where the agreement has been notified in accordance with the provisions of Regulation No 17, a court may only declare it to be automatically void after the Commission has taken a decision by virtue of that regulation.

17 In the light of those considerations, it appears that the maintenance of the provisional protection from which notified old agreements benefit is no longer justified from the date on which the Commission informs the parties concerned that it has decided to close the file on the case concerning them. After the adoption of such an attitude, which indicates that the Commission does not contemplate taking an individual decision on the notified agreements in question, it is unlikely that the Commission would subsequently exercise in favour of those agreements its power to apply Article 85 (3) with, where appropriate, retroactive effect for the period prior to their notification, as permitted by Article 6 (2) of Regulation No 17. There is, therefore, no longer any reason to release national courts, before which the direct effect of the prohibition in Article 85 (1) is relied upon, from the duty of giving judgment.

18 The answer to the first question should therefore be that an administrative letter informing the person concerned that the Commission is of the opinion that there are no grounds for it to take action with regard to agreements which have been notified pursuant to the provisions of Article 85 (1) has the effect of terminating the period of provisional validity accorded from the date of notification to agreements made prior to 13 March 1962 notified within the period laid down in Article 5 (1) of Regulation No 17 or exempted from notification. The opinions expressed in such a letter are not binding on the national courts but constitute a factor which the latter may take into account in examining whether the agreements are in accordance with the provisions of Article 85.

The second question

19 The second question put by the national court seeks to determine whether the agreements upon which a selective distribution system is based may escape the prohibition laid down in Article 85 (1) of the Treaty because of the relatively small market share held by the undertaking in question. In that regard the court making the reference draws attention to the fact that the competitors of the undertaking concerned also apply a system of selective distribution. That court also makes mention of its opinion that until now selective distribution appeared to be possible only pursuant to an exemption under Article 85 (3).

20 As the Court observed in its judgment of 25 October 1977 in Case 26/76, *Metro* v *Commission* [1977] ECR 1875, selective distribution systems constitute an aspect of competition which accords with Article 85 (1) provided that re-sellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the re-seller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential re-sellers and are not applied in a discriminatory fashion.

21 It follows that, in principle, a selective distribution network admission to which is made subject to conditions going beyond simple, objective qualitative selection falls within the prohibition laid down in Article 85 (1) especially when it is based on quantitative selection criteria.

22 However, as the Court observed in its judgment of 30 June 1966 in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm GmbH* [1966] ECR 235, in order to be prohibited as being incompatible with the common market under Article 85 (1) of the Treaty an agreement between undertakings must fulfil certain conditions depending less on the legal nature of the agreement than on its effects on "trade between Member States" and its effects on competition.

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

24 On the other hand, in order to decide whether an agreement is to be considered as prohibited by reason of the distortion of competition which is its object or its effect, it is necessary to examine the competition within the actual context in which it would occur in the absence of the agreement in dispute. To that end, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and the importance of the parties on the market for the products concerned, and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements. In that regard, the

Court stated in its judgment of 12 December 1967 in Case 23/67 *Brasserie de Haecht I* [1967] ECR 407 that, although not necessarily decisive, the existence of similar contracts is a circumstance which, together with others, is capable of being a factor in the economic and legal context within which the contract must be judged.

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

26 The answer to the second question should accordingly be that agreements on which a selective distribution system is based which relies on tests for admission which go beyond simple objective qualitative selection possess all the constituents making them incompatible with Article 85 (1) when those agreements, either individually or with others, in the economic and legal circumstances in which they are made and on the basis of a number of objective elements of law or of fact, may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition.

The third question

27 Having regard to the answer given to the first question, the third question put by the court making the reference is purposeless.

Costs

28 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 action 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 submitted to it by the Arrondissementsrechtbank, Haarlem, by order of 19 June 1979, hereby rules:

1. **An administrative letter informing the party concerned that the Commission is of the opinion that there are no grounds for it to take action with regard to agreements which have been notified pursuant to the provisions of Article 85 (1) has the effect of terminating the period of provisional validity accorded from the date of notification to agreements made prior to 13 March 1962 notified within the period laid down in Article 5 (1) of Regulation No 17 or exempted from notification. The opinions expressed in such a letter are not binding on the national courts but constitute a factor which the latter may take into account in examining whether the agreements are in accordance with the provisions of Article 85.**

2. **Agreements on which a selective distribution system is based which relies on tests for admission which go beyond simple objective qualitative selection possess all the constituents making them incompatible with Article 85 (1) when those agreements, either individually or with others, in the economic and legal circumstances in which they are made and on the basis of a set of objective elements of law or of fact, may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition.**

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