OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 22 NOVEMBER 1979 [1]

Mr President,
Members of the Court,

The last case on which I am giving my opinion today also concerns a selective distribution system in the perfume industry which was a factor in Joined Cases 253/78 and 1 to 3/79 as well as in Case 37/79.

SA Lancôme of Paris manufactures and markets under the Lancôme trade-mark perfumery, beauty products and toiletries. The second plaintiff in the main action, Cosparfrance Nederland BV is a subsidiary of Lancôme which markets Lancôme products in the Netherlands.

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 upon exclusive distributorship agreements concluded between it and the general representatives 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 representatives for Germany, Italy, the Netherlands, Belgium and Luxembourg. Subsequently Lancôme also notified the Commission of the agreements which were entered into between its general representatives or subsidiaries and the respective authorized retailers.

After the Commission had initiated a procedure on 27 April 1972 it sent a notice of complaints to Lancôme on 24 July 1972. In response to that notice Lancôme amended its agreements in order to facilitate dealings between the authorized Lancôme retailers in the various Member States and to prevent Lancôme products imported or exported through these channels from being subject to the system of imposed prices applied in some Member States. The Director-General for Competition then sent a letter to Lancôme on 16 December 1974, the last two paragraphs of which read as follows:

"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 L'Oréal group do not in this case seem 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

1 — Translated from the German

retailers are not admitted to or excluded from your selective distribution system arbitrarily and that such admittance or exclusion does not constitute an indirect means of hindering freedom of trade between authorized distributors."

The Ahold group to which Etos BV and Albert Heyn Supermart BV the defendants in the main action, belong, controls an extensive chain of retail outlets in the Netherlands, mainly in the food and consumer goods sector. At the moment Etos has 59 chemists' shops in the Netherlands and sells a range of products, such as drugs, pharmaceuticals, cosmetics and perfumes, at intermediate prices.

Before becoming part of the Albert Heyn group (now Ahold), Etos had concluded agreements with Cosparfrance by which several of the shops run by Etos were authorized as agents for Lancôme products. These agreements came to an end on 20 October 1975.

The defendants in the main action demanded that Cosparfrance should supply Lancôme products to all their Etos chemists' shops and Etos discount drug stores. However, Cosparfrance refused on the ground that the discount drug stores did not meet their standards of quality and furthermore that supplying all the outlets concerned was contrary to their selective distribution system.

The defendants in the main action nevertheless sold Lancôme products at prices lower than the authorized Netherlands agents charged.

Thereupon Lancôme and Cosparfrance brought proceedings against Albert Heyn Supermart and Etos before the Arrondissementsrechtbank [District Court], Haarlem, to prohibit them from selling Lancôme products in the shops run by them but not authorized as agents for Lancôme products and to order the defendants to pay compensation to the plaintiffs for the damage caused by these sales. As grounds for their case the plaintiffs submitted that the defendants, by disrupting and undermining their sales organization, particularly by causing the authorized agents to be in breach of their contractual obligations, were guilty of a wrongful act.

The defendants contended that the sales organization of the plaintiffs was partially void since it infringed Article 85 (1) of the Treaty. They further contended that the letter of 16 December 1974 referred to above only reflected the opinion of a head of department and did not bind the Commission.

In view of the differences of opinion between the parties about the applicability of Article 85 (1) to the present case, the court making the reference, by judgment of 19 June 1979, referred the following question to the Court for a preliminary ruling:

"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 agreeements 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 recognized retail traders and, on the other, a prohibition on supplies to persons other than consumers or recognized retail traders;

   2.2. the competitions 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 coupled by the Commissions with the exemption; and/or

   (b) In practice the products in question are offered for sale within the common market by wholesalers and retail traders who

have not been selected by the undertaking concerned?"

In weighing up these questions I can refer extensively to my two opinions delivered just now in Joined Cases 253/78 and 1 to 3/79 as well as in Case 37/79. In particular it is necessary to state the following:

1. The first question

The wording of the letter of 16 December 1974 written by the Director-General for Competition coincides with the letters sent to the perfume manufacturers which were parties to Joined Cases 253/78 and 1 to 3/79. In order to assess the letter's effect I can therefore refer in full to my opinion in the joined cases I have mentioned. From these opinions it is clear that the letter was intended to express the view of the competent department that Article 85 (1) of the EEC Treaty was not applicable to the agreements notified by Lancôme and amended as the Commission wished and that it was by no means intended to constitute an exemption under Article 85 (3). Since the letter cannot be regarded as a formal decision of the Commission at all, as I demonstrated in detail in my opinion in Case 37/79, to which I now expressly refer, it cannot have any effect as against third parties. Nor for the same reason could it, according to the case-law of this Court (cf. judgment of 14 December 1977 in Case 59/77, *De Bloos* v *Bouyer*, [1977] ECR 2359), put an end to the provisional validity of old agreements duly notified. Nothing is altered by the fact that these agreements were amended in the administrative procedure at the instigation of the Commission with the aim of nullifying the effect of certain clauses. On this point I refer again to my statements in the opinion in Joined Cases 253/78 and 1 to 3/79, at point 2 (c) (aa). It is evident that the notice of complaints issued by the Commission is not a decision which could end the provisional validity of the so-called old agreements.

2. The second question

As far as the two subsidiary questions 2.1. and 2.2. are concerned, I can again refer in full to my statements in the opinion in Joined Cases 253/78 and 1 to 3/79, in particular to point 1. As regards subsidiary question 2.3., it is necessary to point out that different factual circumstances were involved in the case of the selective distribution systems on which the Commission and the Court have already made decisions. Furthermore I wish to point out that in a case such as this one, in which the distribution system does not in the Commission's view fall within Article 85 (1), an exemption pursuant to Article 85 (3) would not be possible in any event.

3. The third question

I do not need to give any opinion on this question since it is clear beyond all doubt that the letter of 16 December 1974 does not constitute an exemption by the Commission in accordance with Article 85 (3) of the Treaty.

4. I therefore suggest that the questions referred to the Court be answered as follows:

(a) 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.

(b) 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.

SUPPLEMENTARY OPINION OF MR ADVOCATE GENERAL REISCHL

(see Joined Cases 253/78 and 1 to 3/79, p. 2392)