subject of a complaint to the Commission and where the undertaking concerned was in a position to know, by virtue both of Commission practice and of the decisions of the courts of the Member States, that the agreement notified contravened the Community competition rules.

5. A selective or exclusive distribution system may constitute an aspect of competition which is in conformity with Article 85(1) of the Treaty if it is established that the characteristics of the products in question necessitate a selective distribution system in order to preserve their quality and ensure their proper use and provided that resellers are chosen on the basis of objective qualitative criteria relating to the professional qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.

A distribution system for cosmetics confined to dispensing chemists does not fulfil those conditions. Firstly, the criterion for admission to the distribution network is quantitative in nature, access to the profession of dispensing chemist being subject to a quantitative ceiling in most of the Member States concerned, so that it is immaterial whether the limitation of the number of sales outlets derives from existing rules or merely the will of the manufacturer, provided that the latter is in some way associated with it. Secondly, the requirement of the status of dispensing chemist is entirely unnecessary for the distribution of cosmetics and is therefore disproportionate: such products cannot be assimilated to medicinal preparations and are interchangeable with equivalent products distributed through other channels.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
27 February 1992 *

In Case T-19/91,

Société d'Hygiène Dermatologique de Vichy, a partnership established in Vichy, France, represented by Robert Collin, Marie-Laure Coignard and Jeanne-Marie

* Language of the case: French.

Henriot-Bellargent, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Decker and Braun, 16 Avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented initially by Bernard Jansen, then by Bernd Langeheine, members of its Legal Service, acting as Agents, assisted by Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Decision 91/153/EEC of the Commission of the European Communities of 11 January 1991 relating to a proceeding under Article 15(6) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty (Official Journal, English Special Edition 1959-1962, p. 17) (IV/31.624 — Vichy),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Second Chamber),

composed of: J. L. Cruz Vilaça, President, D. Barrington, A. Saggio, C. P. Briët and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 12 December 1991,

gives the following

Judgment

The facts

By letter of 26 July 1985, Laboratoires d'Application Dermatologique de Vichy et Compagnie, a French subsidiary of Société d'Hygiène Dermatologique de Vichy (hereinafter referred to as 'Vichy'), itself a wholly owned subsidiary of the L'Oréal group, notified to the Commission a system, limited to France, of exclusive distribution of Vichy cosmetic products through retail pharmacies. The main purpose of that notification was to obtain negative clearance pursuant to Article 2 of Regulation No 17 and the secondary purpose was to obtain a declaration from the Commission that Article 85(1) of the EEC Treaty was not applicable to the standard contract notified in accordance with Article 4(1) of Regulation No 17.

Under the system thus notified, the grant of authorization as a distributor of Vichy products was subject to possession of a qualification as a dispensing chemist ('pharmacien d'officine'). Following a decision of the French Conseil de la Concurrence (Competition Tribunal) (Decision No 87-D-15 of 9 June 1987 on the competitive situation regarding the distribution through pharmacies of certain cosmetics and bodily hygiene products, First Report, 1987, p. 43) and the judgment of the Paris Cour d'Appel (Court of Appeal) of 28 January 1988, which held that the exclusive distribution of dermatological products through pharmacies was contrary to Article 85 of the EEC Treaty (judgment of the Paris Cour d'Appel (Competition Division) of 28 January 1988, *Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes*, 1988, p. 33), Vichy modified its distribution system in France. That modification caused the notification to the Commission of 1985 to lapse.

By letter of 29 August 1989, Vichy notified the Commission of the new distribution system set up in France and of the distribution system for all the other Member States, with the exception of Denmark where Vichy products are not marketed. In the case of France, the agreement notified made the grant of authorization subject to possession of a diploma in pharmacy. In the Member States other than Denmark and France, authorization was subject to the distributors having the status of dispensing chemists.

4 The present case concerns only the notification of the selective distribution system set up by Vichy for the Member States other than France.

5 After sending to Vichy on 22 May 1990 the statement of objections provided for in Article 2 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47) and hearing Vichy on 11 September 1990, the Commission, by Decision 91/153/EEC of 11 January 1991 (Official Journal 1991 L 75, p. 57), stated that 'Following a preliminary examination pursuant to Article 15(6) of Regulation No 17, the Commission is of the opinion that, as regards the provisions of the agreements concluded between Société d'Hygiène Dermatologique de Vichy and wholesaler-distributors and retail pharmacists, in so far as the said agreements provide for the exclusive distribution of Vichy cosmetic products through pharmacies, i. e. by virtue of the fact that the approval of authorized distributors of Vichy products is subject to their having the status of dispensing chemists, Article 85(1) of the EEC Treaty applies and that the application of Article 85(3) is not justified'.

Procedure

6 Vichy brought an action against that decision, which was notified to it on 15 March 1991, by an application which was received at the Registry of the Court of First Instance on 25 March 1991 and was registered as Case T-19/91. The written procedure was completed on 21 October 1991.

7 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory inquiry. However, it asked the Commission to produce two documents before the hearing. They were (a) a copy of the documents notified to the Commission by Vichy on 29 August 1989 and (b) a copy of a study undertaken for the Commission in 1988 by André-Paul Weber on 'Selective distribution systems in the

Community from the standpoint of competition policy: the case of the perfumery and cosmetics industry'.

By a document received at the Registry of the Court of First Instance on 24 April 1991, Vichy applied for suspension of the operation of the contested decision. On 13 May 1991 the Commission submitted its observations on that application. Oral argument relating to the application was presented at the hearing on 30 May 1991. The application was dismissed by order of the President of the Court of First Instance of 7 June 1991.

On 31 July 1991, the company Cosimex sought leave to intervene in support of the Commission and applied for legal aid. The application for legal aid was dismissed by order of the Court of First Instance of 24 September 1991. By order of the same day, the President of the Court of First Instance held that there was no need to give a decision on the application to intervene.

The parties presented oral argument at the hearing on 12 December 1991.

Forms of order sought

Vichy claims that the Court should:

(i) annul the contested decision;

(ii) order the Commission to pay the costs.

12 The Commission contends that the Court should:

(i) dismiss the application for annulment;

(ii) order Vichy to pay the costs.

Substance

13 Vichy maintains that: the contested decision infringes the principles of non-discrimination and legal certainty; it is vitiated by infringement of essential procedural requirements; the standard contract notified is in conformity with Article 85(1) of the Treaty; Article 85(3) is applicable in any event; and, finally, Article 15(6) of Regulation No 17 was misapplied.

14 The Court observes at the outset that Article 15(6) of Regulation No 17, pursuant to which the contested decision was adopted, provides that paragraph 5 of that article 'shall not have effect where the Commission has informed the undertakings concerned that, after preliminary examination, it is of the opinion that Article 85(1) of the Treaty applies and that application of Article 85(3) is not justified'. Article 15(5) provides that 'The fines provided for in paragraph 2 . . . shall not be imposed in respect of acts taking place: (a) after notification to the Commission and before its decision in application of Article 85(3) of the Treaty, provided they fall within the limits of the activity described in the notification . . . '.

15 It should also be remembered that the Court of Justice has held, first, that measures adopted pursuant to Article 15(6) of Regulation No 17 affect 'the interests of the undertakings by bringing about a distinct change in their legal position. It is unequivocally a measure which produces legal effects touching the interests of the undertakings concerned and which is binding on them. It thus

constitutes not a mere opinion but a decision' within the meaning of Article 189 of the Treaty (judgment of the Court of Justice in Joined Cases 8 to 11/66 *Cimenteries Cementbedrijven and Others* v *Commission* [1967] ECR 75). The Court of Justice has also held that stipulations concerning the approval of a distributor, where the manufacturer distributes its products through an exclusive or selective distribution network, constitute an 'agreement between undertakings' within the meaning of Article 85 of the Treaty which may be caught by the prohibition laid down in Article 85(1) of the Treaty (judgment in Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299). The same applies to general sales conditions systematically reproduced on the back of invoices, orders and prices lists (judgment of the Court of Justice in Case C-277/87 *Sandoz* v *Commission* [1990] ECR I-47).

6 It follows from the judgments analysed above that the agreement notified by Vichy is capable of being caught by Article 85(1) of the Treaty and that the applicant is entitled to contest before the Court the decision concerning it adopted under Article 15(6) of Regulation No 17. It is therefore appropriate to consider the pleas in law put forward by Vichy against that decision, as listed above.

The pleas as to breach of the principles of non-discrimination and legal certainty

— *The parties' arguments*

7 According to Vichy, it is the victim of a discriminatory attitude in that it is the only undertaking operating in the cosmetics market to have been the subject of a Commission decision, even though it is the only one to have notified its distribution agreements, thus showing its willingness to cooperate with the Commission. The contested decision creates legal uncertainty for it such as to place it at a disadvantage by comparison with its competitors, in so far as it is compelled by the decision to modify its distribution system, or else run the risk of being fined, but has no knowledge of what solution may finally be adopted by the Commission. Vichy could not, without undermining its competitive position in the market, reorganize its distribution system on several occasions at short intervals.

18 According to the Commission, a decision under Article 15(6) can, by its very nature, relate only to an undertaking that has notified an agreement. Accordingly, Vichy cannot simultaneously maintain that it is the only undertaking to have notified its distribution agreements and that it is the victim of a discriminatory measure. In that regard, the Commission relies on the order of the President of the Court of First Instance of 7 June 1991.

— *The Court's assessment*

19 The Court finds that, far from being a discriminatory measure, the measure adopted under Article 15(6) of Regulation No 17 does no more than restore the undertaking to the position in which it would have been if it had not notified its exclusive distribution system to the Commission. The Court also finds that the measures taken by the Commission under Article 15(6) of Regulation No 17 can, by their very nature, relate only to one or more agreements that have previously been notified to the Commission. Accordingly, Vichy cannot maintain both that it is the only undertaking to have notified its distribution agreements and, at the same time, that it is the only victim of a provisional measure under Article 15(6) of Regulation No 17. The difficulties of an administrative or commercial nature allegedly suffered by the applicant have no bearing on the legality of the contested decision.

20 It should also be noted, as was pointed out in the abovementioned order of 7 June 1991 dismissing Vichy's application for suspension of the operation of the contested decision, that the measures for the implementation of Article 15(6) have the sole effect of depriving economic agents of the benefit of the immunity which normally applies to the notification of agreements and have no other effect than that of placing the economic agent in the situation in which he would have been if he had not notified his distribution agreements.

The applicant's first plea in law must therefore be dismissed.

The plea as to infringement of essential procedural requirements

— *The parties' arguments*

According to Vichy, the Commission infringed essential procedural requirements by failing to consult the Advisory Committee on restrictive practices and dominant positions ('the Advisory Committee'). In its judgment in Joined Cases 8 to 11/66, cited above, the Court of Justice held that where the Commission acts pursuant to Article 15(6) of Regulation No 17, it takes decisions which, although liable to be challenged in legal proceedings, must be adopted in conformity with the legal guarantees which the Treaty provides and with the provisions adopted for its implementation. Decisions taken pursuant to Article 15(6) are consecutive upon the notification procedure provided for in Article 10(1) of Regulation No 17. Consequently, they should be preceded by consultation of the Advisory Committee, a formality laid down in that article.

Furthermore, according to Vichy, in practice the Commission consults the Advisory Committee before the adoption of decisions whose scope is less than that of those taken under Article 15(6). Thus, the Commission consulted the Advisory Committee before adopting the provisional measures under Article 3(1) of Regulation No 17 against Ford (decision of 18 August 1982, Ford Werke AG (IV.30.696), Official Journal 1982 L 256, p. 20). In its order of 17 January 1980, the Court of Justice held that when adopting provisional measures the Commission is 'bound to maintain the essential safeguards guaranteed to the parties concerned by Regulation No 17, in particular by Article 19' (order of the Court of Justice in Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119). Similarly, decisions adopted under Article 15(1) of Regulation No 17 imposing fines for supplying incorrect information are also preceded by consultation of the Advisory Committee, as is apparent from the Commission decisions of 17 November 1981 (Comptoir Commercial d'Importation (IV.30.211), Official Journal 1982 L 27, p. 31), of 27 October 1982 (Fédération Nationale de l'Industrie de la Chaussure de France (IV-AF 528), Official Journal 1982 L 319, p. 12) and of 25 September 1986 (Peugeot (IV.31.143), Official Journal 1986 L 295, p. 19). Consultation of the Advisory Committee represents an additional safeguard which, together with the rights of the defence provided for in Article 19, must be observed in connection with measures adopted under Article 15(6) of Regulation No 17.

23 Vichy adds that the consultation of the Advisory Committee in connection with measures adopted under Article 15(6) of Regulation No 17 reflects the very objective of Article 15, from which it may be concluded that any situation affecting the matter of fines inherently entails important consequences and cannot be the subject of a decision without the views of the Advisory Committee having been heard. The opposite view would undermine the fundamental rights of the defence by ignoring the views of experts from the Member States, which make an important contribution to legal certainty for economic agents.

24 Vichy also submits that the Commission's argument that the failure to consult the Advisory Committee before adopting a measure under Article 15(6) is in line with the Commission's practice is irrelevant since it has not been established that that practice is in conformity with the general principles of Community law. Moreover, the views expressed by Mr Advocate General Roemer in his Opinion in Joined Cases 8 to 11/66, cited above, to which the Commission refers, are those of the author alone and form part of reasoning leading to the conclusion that communications under Article 15(6) do not constitute decisions, a view which was not upheld by the Court of Justice.

25 Moreover, in Vichy's view, any reference to urgency that might be made by the Commission in order to release it from the obligation of consultation is entirely out of place in this case in view of the date of the first notification. In that regard, the hearing of Vichy necessarily involved, in its view, more burdensome work than would have been involved in consulting the Advisory Committee.

26 Finally, Vichy observes that the comparison drawn by the Commission between provisional decisions concerning periodic penalty payments and provisional decisions under Article 15(6) is inappropriate since, unlike the former, communications based on Article 15(6) are in themselves definitive. Only the examination carried out by the Commission is provisional. In the case of final decisions, the Advisory Committee must be consulted in advance. The judgment of the Court of Justice in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 55, referred to by the Commission confirms that analysis since it states,

in paragraph 54, that the opinion of the Advisory Committee and a hearing of the undertakings are necessary in the same situations.

27 The Commission considers that this plea should be dismissed. It is clear from the structure of Article 15 of Regulation No 17 that the opinion of the Advisory Committee, provided for in Article 15(3), is not required in cases where Article 15(6) applies. The Commission adds that the course taken in this case is in line with its practice (Commission Decision of 5 March 1975, Sirdar-Phildar (IV-27.879), Official Journal 1975 L 125, p. 7; Commission Decision of 25 July 1975, Bronbemaling/Heidemaatschappij (IV-28.967), Official Journal 1975 L 249, p. 27; and Commission Decision of 12 June 1978, SNPE-LEL (IV-29.453), Official Journal 1978 L 191, p. 41). Therefore, the lack of consultation is the result neither of an involuntary omission nor of a discriminatory attitude towards Vichy.

28 The Commission also states that the course taken by it is in line with the view expressed by Mr Advocate General Roemer who, in his Opinion in Joined Cases 8 to 11/66, cited above, considered that 'by reason of the nature and particular functions of a warning notice under Article 15(6) it is not necessary to insist that the Advisory Committee be consulted before issuing the notice, because this might bring about an intolerable delay in the procedure on account of the formalities and time-limits applicable ... Moreover, (this approach) coincides with a sensible interpretation of Article 10 of Regulation No 17'.

29 The Commission also states that the Advisory Committee is likewise not consulted in relation to decisions taken under Article 16(1) of Regulation No 17. Those decisions, like the contested decision, are provisional since they fix the provisional amount of periodic penalty payments. That interpretation was expressly approved by the Court of Justice in *Hoechst v Commission*, cited above. In both cases, the decisions at issue are provisional decisions preceding a definitive decision and only the latter have to be referred to the Advisory Committee for its opinion (*Hoechst* v *Commission*, paragraph 56). The Commission considers it improper to assimilate to a decision imposing a fine a decision withdrawing immunity. The order of the President of the Court of First Instance of 7 June 1991, cited above, also clearly sets out, in paragraph 17, the limits of the effects of decisions taken under Article 15(6).

30 The examples given by Vichy are, in the Commission's view, irrelevant: the order made in the case of *Camera Care* v *Commission*, referred to above, which is concerned with the application of Article 19, provides no basis for any conclusion relevant to the obligation to consult the Advisory Committee where Article 15(6) is applied; similarly, the obligation to consult the Advisory Committee before the imposition of the penalties provided for in Article 15(2) derives from Article 15(3), which requires consultation in the cases referred to in Article 15(1) and (2).

— *The Court's assessment*

31 Article 10(3) of Regulation No 17 provides that the 'Advisory Committee . . . shall be consulted prior to the taking of any decision following upon a procedure under paragraph 1, and of any decision concerning the renewal, amendment or revocation of a decision pursuant to Article 85(3) of the Treaty'. Paragraphs 4, 5 and 6 of Article 10 concern the composition of that committee and the way it operates.

32 Since the decision at issue in the present case does not concern the 'renewal, amendment or revocation' of a declaration as to the inapplicability of Article 85(1) of the Treaty made pursuant to Article 85(3), it must be decided whether a decision taken by the Commission under Article 15(6) of Regulation No 17 is taken 'following upon a procedure under paragraph 1' of Article 10 of that regulation. According to that paragraph: 'The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Article 85 or 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85(3)'.

33 The applicant states, essentially, that provisional decisions taken by the Commission under Article 15(6) of Regulation No 17 can only follow upon notification of an agreement to the Commission and that, since they have the effect of causing the person making the notification to lose the benefit of the immunity which, in principle, attaches to such notifications, they amount to a finding of an infringement within the meaning of Article 10(1) of Regulation No 17.

34 That interpretation does not stand up to an exegesis of Article 15 of Regulation No 17. That article, which deals with fines, itself comprises six paragraphs. Paragraph 1 concerns the fines that may be imposed on undertakings for providing incorrect information to the Commission or resisting investigative measures. Paragraph 2 concerns fines for infringements of Article 85 or 86. Paragraph 4 makes it clear that the fines imposed under Regulation No 17 are not of a criminal-law nature. Finally, paragraph 5 states that undertakings which have notified an agreement to the Commission are to enjoy immunity and that, in principle, a fine may not be imposed on them in respect of that agreement.

35 Paragraph 3 provides that 'Article 10(3) to (6) shall apply'. That paragraph immediately follows the two paragraphs considered above, which set out the two main categories of fine provided for by Regulation No 17. It thus follows from the very structure of Article 15, as just analysed, that, for the purposes of applying Article 15 of Regulation No 17, the opinion of the Advisory Committee is only required prior to the adoption of a decision imposing a fine. However, the provisional decisions taken under Article 15(6) are not among those referred to in Article 15(1) and (2) and have neither the object nor the effect of imposing a fine on the undertaking to which they are addressed.

36 The argument put forward by Vichy concerning the practice followed by the Commission regarding fines for incorrect information or provisional measures inherently lacks force since that practice has no bearing on the application of legal rules, which derive only from the Treaty and the legislation adopted for its implementation. In any event, even if it were conceded that the Commission's practice is as described, a finding that the Commission consults the Advisory Committee in relation to the imposition of fines for providing incorrect information would provide no basis for any conclusion relevant to the question whether that formality must be completed before a provisional decision is taken under Article 15(6).

37 Moreover, the Court observes that the obligation to obtain the opinion of the Advisory Committee before imposing fines for incorrect information derives, as

stated above (paragraphs 34 and 35) from the very position of that provision (paragraph 3), which applies to the fines provided for in paragraphs 1 and 2, within Article 15 of Regulation No 17. Furthermore, as the Court of Justice held in its order in Case 792/79 R *Camera Care*, cited above, the provisional measures adopted by the Commission have as their legal basis Article 3(1) of Regulation No 17 which, like Article 10(1), concerns findings of infringement. Accordingly, while it is indeed the Commission's practice to obtain the opinion of the Advisory Committee before imposing a fine for the provision of incorrect information or adopting a provisional measure, it is appropriate to infer therefrom only that that practice is in conformity with Article 15(1) and (3), on the one hand, and, on the other, with Article 3 of Regulation No 17. The applicant cannot therefore invoke compliance with those provisions in support of the contention that, by analogy, consultation of the Advisory Committee must also precede a decision adopted on the basis of Article 15(6).

38 The Court considers that the applicant's argument concerning the purpose of that consultation is likewise irrelevant. Admittedly, communications from the Commission under Article 15(6) of Regulation No 17 produce legal effects for their addressees. That is why, as previously pointed out, the Court of Justice recognized, in its judgment in Joined Cases 8 to 11/66, cited above, that the addressees are entitled to contest such communications in accordance with Article 173 of the Treaty. However, although communications from the Commission under Article 15(6) of Regulation No 17 must be issued in observance of the fundamental rights of the undertaking concerned and in particular the rights of the defence guaranteed by Article 19(1) of Regulation No 17, that does not mean that the Commission is required, before sending such a communication, to obtain the opinion of the Advisory Committee, the purpose of which, as is apparent from the very title and content of Article 10 of Regulation No 17, is to provide a 'liaison with the authorities of the Member States' in competition matters. Accordingly, the applicant cannot maintain that it was deprived of a fundamental right simply because the opinion of the national experts was not obtained.

39 It is apparent from the combined provisions of Article 10(1) and (3) of Regulation No 17 that that opinion is required only before the adoption of the Commission's final decision in which it finds an infringement of Article 85 of the Treaty or, on

the other hand, issues a negative clearance in the terms requested of it or, on the basis of Article 85(3) of the Treaty, declares Article 85(1) inapplicable to the agreement notified to it. It is thus at the final stage of examination of the request submitted to it by the applicant that the Commission is required, in all cases and regardless of its intended response to the request, to seek the opinion of the Advisory Committee. As the Court of Justice has held 'consultation of the Advisory Committee represents the final stage of the procedure before the adoption of the decision and the opinion is given on the basis of a draft of the decision' (judgment in Joined Cases 100 to 103/80 *Musique Diffusion Française* v *Commission* [1983] ECR 1825, paragraph 35).

40 Finally, it must be remembered, as regards Vichy's argument that the hearing of the undertaking concerned must always be followed by consultation of the Advisory Committee, that, according to Article 1 of Regulation No 99/63: 'Before consulting the Advisory Committee ... the Commission shall hold a hearing (of the undertaking concerned) pursuant to Article 19(1) of Regulation No 17'. The scope of that provision is clarified by the preamble to the regulation, according to which the 'Advisory Committee ... must be consulted concerning a case after the inquiry in respect thereof has been completed'. That provision means that, where it is required, consultation of the Advisory Committee, which must be enabled to issue an informed opinion, can only take place after the undertaking concerned has been heard pursuant to Article 19(1) of Regulation No 17. However, the applicant cannot infer from this that the hearing of the undertaking must necessarily be followed by consultation of the Advisory Committee. In the judgment in *Hoechst* v *Commission*, cited above, the Court of Justice held: 'According to Article 1 of Regulation No 99/63, "before consulting the Advisory Committee, the Commission shall hold a hearing pursuant to Article 19(1) of Regulation No 17". That provision confirms that the hearing of the undertaking concerned and the consultation of the Advisory Committee are necessary in the same situations'; that must, in this Court's view, be interpreted as meaning that, as has just been stated, the opinion of the Advisory Committee can be obtained only if the undertaking concerned has previously been invited to submit its observations in accordance with Article 19(1) of Regulation No 17. No general principle of Community law and likewise no provision of Regulation No 17 or of Regulation No 99/63 requires, conversely, that the hearing of the undertaking, when required, must necessarily be followed by consultation of the Advisory Committee. That is particularly so before the sending of the Commission communication provided for in Article 15(6) of Regulation No 17.

41 It follows from the foregoing that the second plea in law, namely that essential procedural requirements were infringed, must be dismissed.

The plea that the exclusive distribution system notified by Vichy is not in breach of Article 85(1)

— *The parties' arguments*

42 According to Vichy, the Commission did not establish an infringement under Article 85(1) of the Treaty since the factors by reference to which the infringement was ascertained are not conclusive, no account was taken of certain relevant matters and, finally, the criterion adopted by Vichy in setting up its distribution network is in conformity with the Treaty.

43 First, Vichy maintains, in support of its view that the factors on which the Commission's finding of an infringement was based are not conclusive, that the Commission failed to establish that competition and trade between Member States had been appreciably affected, since none of the factors relied on by it for its finding that competition had been affected in the market is apposite. They concern the cumulative effect of the distribution systems observed in the market in question, the market share of dermopharmacy in the cosmetics market as a whole and the appreciable nature of the effect on competition in the market in question.

44 According to Vichy, the Commission's argument as to the cumulative effect of the distribution systems is inapposite in the absence of a clear definition of the relevant market. The relevant market was defined formally, the examination thereof being limited to a brief analysis of its actual functioning, in breach, in particular, of the principles laid down by the Court of Justice in its judgment in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, the first *Metro* case. Vichy submits that it is inappropriate to apply to the present case the principles laid down in that judgment since the market is characterized by a number of competing channels of distribution. Admittedly, it is apparent from the case-law of the Court of Justice, in particular the judgments in Case 56/65 *Société Technique Minière* v *Maschinenbau*

Ulm GmbH [1966] ECR 235, Case 23/67 *Brasserie de Haecht* v *Wilkin and Wilkin* [1967] ECR 407 and Case 31/80 *NV L'Oréal and SA L'Oréal* v *PVBA De Nieuwe AMCK* [1980] ECR 3775 that the appraisal of the effects of a distribution system on competition must take account of any cumulative effect on other distribution systems. But, as the Court of Justice recently held in connection with 'beer supply agreements' (Case C-234/89 *Stergos Delimitis* v *Henninger Bräu AG* [1991] ECR I-935), that can be only one of the factors to be considered. According to Vichy, the Commission cannot have taken account of other factors, in the absence of any examination of the contested agreements in the actual context in which they are put into effect. By contrast with the Commission's finding in the Yves Rocher case (Commission decision of 17 December 1986, Yves Rocher (IV-31.428 to IV-31.432, Official Journal 1987 L 8, p. 49), it is not alleged that the distribution agreements concluded by Vichy prohibit pharmacists from distributing other brands. In fact, the distribution system set up by Vichy is strictly in conformity with the requirements laid down in the abovementioned judgment of the Court of Justice in *Delimitis*. Moreover, Vichy, which challenges some of the figures relied on by the Commission, in particular with regard to the German and United Kingdom markets, maintains that, since the Commission adopted a broad definition of the market, it is difficult to understand what then induced it to concern itself only with the restrictions on competition observed in relation to pharmacies.

45 According to the applicant, the Commission is also wrong, in seeking to substantiate an infringement of Article 85(1), to refer to the market share of dermopharmacy in relation to the distribution of cosmetics as a whole. The Commission's contention that the appropriate market share varies between 5% and 40% cannot be taken seriously. In the administrative procedure, Vichy proposed the approximate figure of 10%, as adopted by the Commission in the Yves Rocher decision mentioned above. Moreover, Vichy states that the Commission took no account of the fact that the market share of products distributed through retail pharmacies is decreasing, this being part of a historical trend in the distribution of products through retail pharmacies.

46 Finally, Vichy alleges that the Commission has not proved, on the basis of reliable information, that the notified distribution system appreciably affected trade between Member States and competition in the Common Market.

47 For those three reasons, the Commission has not, in Vichy's view, established in the grounds of its decision any infringement whatsoever of Article 85(1) of the Treaty.

48 Secondly, Vichy maintains that the Commission failed to take into account certain matters which were relevant to appraisal of the case, for example the competition between brands in the cosmetics market. Vichy considers that the Commission should have taken account of the presence in the market of a number of distribution channels in the market which compete with each other. The cosmetic products sold in retail pharmacies do not constitute a market in themselves and the studies carried out and produced by Vichy in the administrative procedure show that the products sold in supermarkets can easily take the place of those sold in retail pharmacies, since consumers move easily from one distribution channel to another. The pharmacy network likewise does not constitute an isolated segment of the cosmetics market and the market is not divided into segments by the brand policy of producers. All these circumstances show, in Vichy's view, that the Commission took no account of competition between brands, in breach of the principles which, in Vichy's opinion, were laid down by the Court of Justice in the first *Metro* case. In fact, contrary to the conclusion wrongly arrived at by the Commission, the distribution system established by Vichy constitutes a 'new competitive proposition' ('nouvelle proposition dans la concurrence') because, on the one hand, there is an enhancement of supply, and, on the other, consumers are offered more possibilities from which to choose.

49 Thirdly, with regard to the validity of the criterion for approval adopted by it, Vichy maintains that the status of dispensing chemist required for authorization to distribute its products is in conformity with Article 85(1) of the Treaty. That criterion is, in accordance with the principles laid down by the Court of Justice, qualitative: a holder of a diploma in pharmacy cannot be substituted for or assimilated to a dispensing chemist, from which he is distinguished by virtue of professional experience, ethical obligations, the personal nature of his relationship with his customers and the feedback of information of which the company takes the fullest account in constantly improving its products. A dispensing chemist moreover, cannot be isolated from the place where he practises which, as a 'health precinct', constitutes a select point of sale, with none of the 'ordinariness' of supermarket sales.

50 The Commission is thus wrong, in Vichy's view, to claim that that qualitative criterion is quantitative, referring for that purpose to the quantitative ceiling which, in six of the Member States concerned, applies to access to the profession. In that connection, the Commission can draw no support from the judgment of the Court of Justice in Case 243/83 *Binon* v *Agence et Messageries de la Presse* [1985] ECR 2015, which itself forms part of a trend in the case-law whereby any reliance on quantitative criteria is outlawed (the first *Metro* case, cited above; judgments of the Court of Justice in Case 99/79 *Lancôme* v *Etos* [1980] ECR 2511; in *L'Oréal*, cited above; and in Case 75/84 *Metro* v *Commission* [1986] ECR 3021). By contrast with the factual situation found to exist in *Binon*, where the number of sales outlets was limited by a decision of the undertaking itself, the limitation of the number of sales outlets by virtue of a quantitative ceiling is attributable not to Vichy but to national provisions which existed before the choice of distribution channel was made.

51 Finally, the qualitative, not quantitative, requirement of distribution through dispensing chemists is a necessary criterion which is not disproportionate in relation to the objectives which the producer has decided to pursue. It is thus in conformity with the principle laid down by the judgments of the Court of Justice in Case 126/80 *Salonia* v *Poidomani and Baglieri* [1981] ECR 1563 and in *Binon*, cited above, and by the Commission decision of 16 December 1985 made in respect of the distribution of Villeroy & Boch products (Villeroy & Boch (IV-30.665), Official Journal 1985 L 376, p. 15). The requirement of the status of dispensing chemist is closely associated with the brand image of Vichy products. As a criterion for the authorization of distributors, the requirement of the status of dispensing chemist merely implies that the producer is allowed to rely on a 'non-material' element in defining the conditions under which his product is to be marketed, but that possibility was accepted by the Commission in its communication in the Yves Saint-Laurent case (Commission communication concerning case IV-33.242 Yves Saint-Laurent Parfums, Official Journal 1990 C 320, p. 11).

52 The Commission contends that, having analysed the pricing policy and distribution systems for Vichy products, it did in fact produce an adequate description of the cosmetics market. In particular, the decision refers to the share of cosmetics sales through pharmacies and Vichy's market share of sales through pharmacies. The Commission thus adopted a broad definition of the market about which Vichy has no grounds for complaint. There is absolutely no need for a more precise definition of the market since, it claims, the effect on competition is in any event sufficiently appreciable for the relevant market to be taken to be either the market

only in cosmetic products sold in pharmacies or the cosmetics market in general. Since, in fact, the appreciable nature of the restriction of competition is obvious as regards the more limited market in which Vichy is the leader, it is sufficient, for the purposes of the contested decision, to find that competition has been restricted in the market as a whole. In paragraph 19 of the contested decision the Commission sufficiently indicated that it was taking account, on the one hand, of the cumulative effect arising from the fact that there are parallel systems of exclusive distribution through pharmacies for all brands of cosmetics sold through the pharmaceutical channel and, on the other, that the market share of dermo-pharmacy amounts to somewhere between 5% and 40%. The Commission states that Vichy has produced no evidence to indicate that inter-brand competition is sufficiently vigorous to make up for the lack of competition within the brand.

53 The Commission also considers that its legal classification of the circumstances was in conformity with the principles laid down in the case-law of the Court of Justice, in that it established successively the existence of agreements between undertakings, then restrictions of competition resulting from those agreements and finally an appreciable effect on trade between Member States. The Commission thus submits that it followed the reasoning adopted by the Court of Justice when examining systems of selective distribution in the first *Metro* judgment and subsequent decisions.

54 According to the Commission, the criterion adopted by Vichy, namely the requirement of a 'holder of a diploma in pharmacy practising his profession in a retail pharmacy' is indeed quantitative and not qualitative. In the context of the contested decision, the Commission does not call in question the possibility that Vichy may reserve the distribution of Vichy products to holders of a diploma in pharmacy: all that is involved therefore is the distinction between a holder of a diploma in pharmacy and a holder of a diploma in pharmacy practising in a retail pharmacy. From the point of view of his qualifications, there is nothing to distinguish a holder of a diploma in pharmacy from a holder of a diploma in pharmacy practising in a retail pharmacy. The issue is thus indeed whether a retail pharmacy necessarily meets qualitative criteria which no other sales outlet can satisfy. Vichy's assertion that a retail pharmacy is the place most conducive to reliable and high-quality advice is based on an unproven assumption. On the contrary, an approach consisting in laying down objective criteria based on quality

would involve defining those criteria and then ensuring that each potential distributor satisfied them. That approach would then result in the elimination of certain retail pharmacies which did not meet the prescribed criteria and the acceptance of distributors outside the pharmacy network which did meet them. As regards the quantitative nature of the criterion adopted, which is the result of a *numerus clausus*, it is of scant importance whether it is attributable to action by Vichy or to a set of rules. What is important is that in choosing that distribution system Vichy deliberately opted for a network comprising a limited number of sales outlets. The fact that there are numerous retail pharmacies in no way detracts from the quantitative nature of the criterion, as the Court of Justice held in is judgment in *Binon*, cited above. The quantitative limitation of the number of sales outlets is the result of the distribution method chosen. Thus, a producer who decided to distribute his products only at airports could not claim that he had no control over the number of sales outlets on the ground that it was the competent authorities that limited the number of airports. According to the Commission, neither it nor the Court of Justice has recognized the principle that a producer is free to choose a qualified distributor; they have merely observed the need for producers to choose their re-sellers according to objective criteria of a qualitative nature.

55 The Commission adds that it is apparent from paragraph 19 of the contested decision that the requirement of sales of Vichy products exclusively through pharmacies gives rise to an appreciable restriction of competition, having regard in particular to Vichy's market shares and the cumulative effect of selective distribution systems which are characteristic of the market concerned. In that connection, the Court of Justice has made it clear that in order to determine whether a selective distribution system must be regarded as prohibited by reason of the changes in competition which are the object or effect thereof, account must be taken, in particular, of the nature and the quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the parties in the relevant market, the isolated nature of the agreement in question or, alternatively, its position in a series of agreements (see the *L'Oréal* judgment, cited above). The Court of Justice has also held that in order to decide whether an agreement may appreciably affect trade between Member States, it is necessary to show that it is possible to foresee with a sufficient degree of probability that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (*ibid.*, paragraph 18). The Commission adds that, unlike the method adopted in the *Delimitis* case, on which the applicant wrongly relies and in which the Court of Justice drew a distinction between, on the one hand, the distribution of beer sold in hotels, bars and restaurants and, on the other, beer sold in retail food outlets, it adopted a broad definition of the market which takes account of the various channels of distribution.

56 Finally, the Commission states that, on the basis of the figures in its possession, it showed, in paragraph 19 of the contested decision, that if Vichy's distribution network were to admit sales outlets other than retail pharmacies there would be an increase in the number of sales outlets, and re-sellers other than dispensing chemists would take advantage of the differences in sale prices as between the Member States in order to carry out parallel imports. The Commission also observes that the appreciable nature of the effect on trade derives from the cumulative effect arising from the existence of parallel systems of exclusive distribution through pharmacies.

— *The Court's assessment*

57 It must first be noted that, in its judgment in Joined Cases 8 to 11/66, cited above, the Court of Justice held: 'To exclude an agreement from the benefit of the exemption under Article 15(5) of Regulation No 17, the Commission must, according to Article 15(6), first be of the opinion that Article 85(1) of the Treaty applies'.

58 Secondly, it must be emphasized that the Court of Justice also held, on the one hand, that 'the structure of the market does not preclude the existence of a variety of channels of distribution adapted to the peculiar characteristics of the various producers and to the requirements of the various categories of consumers' (the first *Metro* judgment, cited above) and, on the other, that 'in order to decide whether a (distribution) agreement is to be considered as prohibited by reason of the distortion of competition which is its object or effect, it is necessary to consider the competition within the actual context in which it would occur in the absence of the agreements 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 in the market for the products concerned, and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements' (*L'Oréal*, cited above, paragraph 19).

59 In the third place, it should be noted that the Court of Justice has also held: 'Where admission to a selective distribution network is made subject to conditions which go beyond the simple objective selection of a qualitative nature and, in

particular, when it is based on quantitative criteria, the distribution system falls in principle within the prohibition in Article 85(1), provided that ... the agreement fulfils certain conditions depending less on its legal nature than on its effects first on "trade between Member States" and secondly on "competition" (*L'Oréal*, cited above, paragraph 17). In that connection, it must also be borne in mind that whilst any adverse effect on competition within the Common Market resulting from such a distribution system must be sufficiently appreciable (judgment of the Court of Justice in Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295), it is certainly not necessary for it to be effective. The adverse effect on competition in the Common Market may be merely potential (judgments of the Court of Justice in Case 56/65, cited above; Case 42/84 *Remia* v *Commission* [1985] ECR 2545; and Joined Cases 142/84 and 156/84 *BAT* v *Commission* [1987] ECR 4487).

60 It is in the light of those principles that it is necessary to examine the present plea in law whereby it is alleged that the Commission did not sufficiently establish for legal purposes that the notified agreement falls within the prohibition laid down in Article 85(1) of the Treaty. To that end, the Court considers that it is necessary to consider successively the definition of the relevant market, the lawfulness of the criterion for the authorization of distributors and the effect of the standard agreement notified on competition within the Common Market.

The definition of the relevant market

61 As is apparent both from the grounds of the contested decision and from the Commission's defence, the market to be considered in appraising the effect, if any, on competition in the Common Market of the standard agreement notified by the applicant is, according to the Commission, the market in cosmetics. According to the Commission, the relevant market comprises, for the purposes of analysis according to the products distributed, beauty products and toiletries, hair-care products and perfumes. Vichy has a full range of face-care and body-care products, but no perfumes. According to the Commission, the market includes all the existing distribution channels for products of that type. According to the contested decision, there are four such channels, namely: distribution through general stores, comprising hypermarkets, supermarkets and drugstores; selective distribution through perfumeries and luxury department stores; distribution

through retail pharmacies — the only channel used by the applicant — and direct sales, particularly by mail order. Finally, from the geographical point of view, it is undisputed that the relevant market extends to the whole Common Market, although it should be borne in mind that Vichy products are not distributed in Denmark. The Court finds that this definition of the market is exactly the same as that appearing in Vichy's notification.

62 Cosmetic products are sold under a multitude of brand names. As a rule each brand is assigned a specific distribution channel. Brands sold in pharmacies, such as those of the applicant, are not distributed through luxury outlets or general stores. Certain producers offer a wide variety of products. That applies to the L'Oréal group, which chooses the channel according to the prestige of its brands. Vichy admits that new and innovative products are as a rule distributed first of all through pharmacies. Once consumers are accustomed to them, they are distributed on a wider scale, under other names, through general stores and luxury perfumeries. According to a study carried out for the Commission by André-Paul Weber, referred to above, the segmentation into distribution channels reflects a wish to vary the prices of interchangeable products according to the networks through which they are marketed.

63 According to the information supplied to the Commission by the applicant itself, the total turnover achieved in the relevant market amounted to DM 7 300 million in Germany, FF 30 300 million in France, LIT 4 000 million in Italy and UK £ 1.1 million in the United Kingdom. In those four Member States, the respective turnover represented by cosmetics distributed through retail pharmacies, according to the same information, is 4.8%, 9%, 16.5% and 44% respectively. In each of those Member States, the turnover achieved by Vichy accounts respectively for 1.5%, 2.2%, 3.5% and 1% of the market in cosmetics and 32%, 25%, 21.4% and 2.2% of the cosmetics distributed through pharmacies. According to Vichy once again, the market share of the L'Oréal group, assessed this time in relation to the whole of Western Europe, was 14% in 1986, the figure ranging from 25% for hair-care products to 7% for toiletries. In the same year, the most direct competitor of the L'Oréal group, was Lever, which accounted for 6% of the market. The L'Oréal group, of which Vichy is a wholly owned subsidiary, is the market leader in France and Italy. It ranks fourth in Germany and the United Kingdom. In 1987, its turnover amounted to ECU 3 400 million, ECU 116.5 million of which was accounted for by the applicant. Again according to Vichy,

the market is developing towards distribution through general stores, at the expense of distribution through retail pharmacies. The market share corresponding to distribution through retail pharmacies, although stable in certain areas, is falling in many others, in particular in baby-care products, make-up removers and shampoos. The contested decision indicates, however, that in Germany the proportion of sales accounted for by pharmacies has grown more rapidly than the market as a whole.

64 It is therefore with reference to the market thus defined, the structure of which is agreed upon by the parties, that it must be decided whether the Commission sufficiently established for legal purposes that there had been an appreciable distortion of competition which, as such, may be caught by the prohibition contained in Article 85(1) of the Treaty. At that preliminary stage of the examination of the standard agreement notified by the applicant, the only issue, according to the contested decision, is the criterion for admission to its network, as adopted by the producer for all the Member States of the Community in which its products are distributed, except France. According to the contested decision, the requirement of the status of dispensing chemist must be seen as a quantitative criterion, contrary to the case-law of the Court of Justice (*L'Oréal*, cited above), and in any event is not necessary for appropriate distribution of the products. The Court must therefore consider the legality of the criterion for authorization adopted by Vichy and, if appropriate, the effects which it is likely to have on competition and intra-Community trade.

The legality of the criterion for authorization

65 As the Court of Justice held in its judgment in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, at paragraph 33, agreements constituting a selective or exclusive distribution system in principle influence competition. However, the characteristics of certain products are such that there is no point offering them to the public without the intervention of specialized distributors. Thus, a selective or exclusive distribution system may constitute an aspect of competition which accords with Article 85(1) of the Treaty if it is established that the characteristics of the products in question necessitate a selective distribution system in order to preserve their quality and ensure their proper use (judgment in *L'Oréal*, cited above,

paragraph 16) and provided that resellers are chosen on the basis of objective qualitative criteria relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (the first *Metro* judgment, cited above, paragraph 20). Finally, in *Binon*, cited above, the Court held that 'a selective distribution system for newspapers and periodicals which affects trade between Member States is prohibited by Article 85(1) of the Treaty if resellers are chosen on the basis of quantitative criteria'.

66 The Court observes, on the one hand, that approval for admission to Vichy's distribution network is, in the Member States other than France and Denmark, subject to possession of the status of dispensing chemist and, on the other, that it is apparent from the documents before the Court that, in six of the other Member States, access to the profession of dispensing chemist is subject to a quantitative ceiling.

67 The Court considers that, as the Commission contends, it is of little importance whether or not the limitation on the number of sales outlets is the direct result of the way in which the producer's distribution network is organized. It is true that, in principle, any exclusive or selective distribution system inherently affects competition (judgment of the Court of Justice in *AEG*, cited above). However, a criterion for admission to an exclusive or selective distribution system must be regarded as being quantitative in character within the meaning of the *Binon* judgment where its object or effect is, beyond the sphere of normal supply and demand, to impose a quantitative limitation on the number of sales outlets. If the limitation on the number of sales outlets is not a result of the normal functioning of the market, the criterion for admission to the distribution network adopted by the producer must be regarded as being quantitative in nature. It is therefore of little importance, in that regard, whether the limitation of the number of distribution outlets derives from a pre-existing situation created by legislation or solely from the intention of the producer, provided that the latter is, at least, in some way associated with that limitation.

68 In the present case, it need merely be pointed out that, as a result of national rules of which the producer could not have been unaware and which, on the contrary, it

seeks to exploit to the full, the criterion for the approval of distributors is necessarily of a quantitative character. It is true that, in the case of retail pharmacists, the number of potential sales outlets is fairly high but that finding in no way alters the quantitative character of the criterion for authorization adopted by Vichy. As the Commission correctly pointed out in its rejoinder, a producer who chooses to distribute his products only through airports cannot claim that the limitation of the number of sales outlets has nothing to do with him.

9 Furthermore, even if it were accepted that the criterion for approval adopted by Vichy could be regarded as a qualitative criterion — which, in the Court's view, cannot be the case, as indicated above — the fact would still remain that, in any event, the requirement of the status of dispensing chemist, which is a pre-condition for admission to the distribution network for Vichy products, is certainly not necessary for the proper distribution of those products. Indeed, since Vichy, on the one hand, concedes that those products cannot be assimilated to medicinal products and, on the other, claims that they are interchangeable with equivalent products distributed through one or more of the other three abovementioned channels of distribution existing in the cosmetics market, such a criterion is entirely unnecessary for the proper distribution of the products in question and is as a result disproportionate. If the availability at the point of sale of specialized professional advice is a legitimate requirement, in so far as certain specific knowledge is necessary to help the consumer find the product best suited to his taste and needs and to provide him with the best information as to how the product should be used or stored, that advisory function is, as submitted by the Commission, discharged, under conditions which provide the consumer with every safeguard, where a holder of a diploma in pharmacy is present at the point of sale. It is therefore clear that, as submitted by the Commission, the characteristics of the products in question certainly do not require, for consumer protection, a criterion of authorization as disproportionate as the requirement of a pharmacist practising in a retail pharmacy.

10 In that connection, it must be observed that, as the Commission points out, there is a fundamental difference between cosmetics and medicinal preparations. By contrast with the marketing of medicinal preparations, the distribution of cosmetics does not call for any precautions other than those prescribed by national and Community legislation designed to ensure that cosmetic products are not harmful, in particular those provided for in Council Directive 76/768/EEC of 27

July 1976 on the approximation of the laws of the Member States relating to cosmetic products (Official Journal 1976 L 262, p. 169), as amended. Those rules ensure that cosmetics offered for sale present no danger to the health of consumers and that no additional precautions of the kind laid down for medicinal preparations are required for their marketing.

71 Finally, as the Commission rightly emphasized in paragraph 18 of the contested decision, the diploma in pharmacy attests to the fact that the holder is deemed to have all the necessary professional knowledge in pharmacology, biology, toxicology and dermatology to run a retail pharmacy. By not accepting that professional qualification for the provision of advice to its customers, the applicant thus adds to the qualitative criteria of a diploma in pharmacy an additional requirement likely to restrict, without objective justification, the number of sales outlets and to change the nature thereof. Accordingly, Vichy's concern to offer its customers the same advice as that prescribed for the use of medicinal preparations cannot be regarded as a necessity deriving from the characteristics of the products in question but must be seen as a marketing strategy intended to create and maintain a brand image benefiting from the reputation of the pharmaceutical profession. Moreover, the applicant has not challenged the Commission's claim that the top-of-the-range products of the L'Oréal group, which include even wider and more sophisticated selections of products than the Vichy range, are distributed in luxury perfumeries not by sales staff with scientific diplomas but by professionally qualified beauticians.

72 It is apparent from the foregoing that, in its preliminary examination, the Commission was correct in concluding that the criterion for approval adopted by Vichy is quantitative and disproportionate.

73 Accordingly, as the Court held in *L'Oréal*, cited above, a criterion for authorization of that kind is caught, in principle, by Article 85(1) of the Treaty, in so far as the standard agreement 'fulfils certain conditions depending less on its legal nature than on its effects first on "trade between Member States" and secondly on "competition"'.

The effect on competition and intra-Community trade

74 In order to assess, in the light of the prohibition laid down by Article 85(1) of the Treaty, any restrictive effect on competition deriving from the criteria for authorization adopted by Vichy, it is necessary to decide whether it gives rise to a sufficiently appreciable distortion of intra-Community competition, and, in particular, to decide whether 'the agreement, decision or practice, when viewed in the light of a combination of objective, factual or legal circumstances.. appear[s] to be capable of having some influence, direct or indirect, on trade between Member States' 'in a manner which might harm the attainment of the objectives of a single market between States' (judgments of the Court of Justice in Case 23/67 and Joined Cases 56 and 58/64, both cited above).

75 It is apparent from examination of the standard agreement notified to the Commission that, except in Greece, Vichy's distribution network is organized on the basis of nine general agents with exclusive rights for the sale of Vichy products in the territory of the Member State where they are established. Seven of them are wholly owned subsidiaries of the L'Oréal group. In Spain and Ireland, the general agents are subsidiaries which are owned by the L'Oréal group as to 70% and 50% respectively. The general agents enter into contracts either with wholesaler-distributors or with retailers who, to qualify for approval, must have the status of dispensing chemists. The dispensing chemists themselves resell to consumers the products covered by the contracts. All in all, in the territory of each of the Member States concerned the Vichy distribution network is made up of, on the one hand, wholesaler-distributors bound by contracts based on exchanges of letters ('letter agreements') or by general conditions of sale and, on the other, dispensing chemists, bound to a wholesaler distributor or a general agent by individual contracts or by the general conditions of sale.

76 By virtue of what is known as the 'EEC clause' included in the individual distribution agreements, the 'letter agreements' or the general conditions of sale, as the case may be, sales within the distribution network are allowed, whether the buyer is established in the territory of the Member State where the seller is established or in the territory of any other Member State. However, intermediate sales, that is to say those which do not involve the final consumer, are prohibited where the buyer is extraneous to the distribution network. A particular result of this prohibition is that, except in France, a dispensing chemist established in the territory of any of the Member States concerned can dispose of products covered by the agreement only to another dispensing chemist or to a consumer. Sales in breach of that

prohibition are penalized by withdrawal of authorization. Vichy ensures compliance with this stipulation by imposing an obligation on resellers to retain for at least one year invoices in respect of intermediate sales.

77 The Court considers that, whilst it is in principle open to a producer to ensure that no intermediate sale is made to a reseller extraneous to the distribution network, the criterion for approval adopted by Vichy is capable, despite the existence of the 'EEC clause' examined above, of affecting intra-Community trade. The stipulation requiring the status of dispensing chemist has the object and effect of prohibiting a dispensing chemist established in the territory of any of the Member States concerned from selling products covered by the agreement to a reseller other than a dispensing chemist or a consumer. Consequently, the prohibition is capable of reducing trade between the Member States concerned by eliminating any 'parallel imports' which might be made by other traders in order to exploit the price differences found to exist. Moreover, if, in order to be approved, a reseller established in France is required only to prove knowledge of 'cosmetology, biology, dermatology and pharmacy, evidenced by a university scientific diploma', the criterion for authorization adopted in the other Member States has the effect of limiting solely to imports from pharmaceutical channels in those States the imports effected, at the same stage of distribution, by retailers established in French territory. It also means that an approved reseller established in the territory of the other Member States concerned, when acquiring products covered by the agreement from a reseller other than a wholesaler or a dispensing chemist, is confined to imports from French territory. In those circumstances, the criterion for authorization adopted by Vichy in the Member States other than France affects intra-Community trade.

78 The contested criterion for authorization not only affects trade between Member States but is also inherently restrictive of competition. In view of the ethical obligations to which dispensing chemists are subject, competition, and in particular price competition, is, for a given product, severely reduced as far as distribution through pharmacies is concerned. Consequently, for a given product, price competition operates mainly through competition between the pharmaceutical distribution channel and the other distribution channels. In principle, it is capable of

being triggered by differences in average retail prices found to exist, for the same product, between the various Member States. But since, on the one hand, the authorization criterion prohibits competition with other distribution channels and, on the other, within the pharmaceutical channel, products covered by agreements which are capable of competing with the products distributed through that channel can come only from French territory, the requirement of the status of dispensing chemist adopted by Vichy restricts intra-Community competition.

9 Furthermore, as the Commission maintains, the effect on intra-Community trade resulting from Vichy's authorization criterion is all the more appreciable, on the one hand, because of the quantitative ceiling and, on the other, because of the ethical obligations which, in most of the Member States concerned, are imposed on dispensing chemists, it is well known that competition between pharmacies is limited. The Court observes, in that regard, that, according to the terms of the contested decision, which has not been challenged on this point, the differences in average selling prices charged by general agents or wholesalers to retailers vary by as much as 30% from one Member State to another. It follows that, as is correctly pointed out in paragraph 19 of the contested decision, effective competition between the pharmaceutical distribution network and the other distribution channels which, in the present case, would be particularly propitious to the development of inter-State trade by activating, for the same product, competition between the distribution channels — in particular price competition — is restricted to a sufficiently appreciable extent for the purposes of Article 85(1) of the Treaty.

0 *Inter alia*, the effect of the contract concerned must be assessed having regard to its 'economic and legal context' (judgment of the Court in *Delimitis*, cited above). From the latter point of view: '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' (judgment of the Court of Justice in Case 23/67, cited above). Even if 'The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing' the functioning of the market (judgment of the Court in *Delimitis*, cited above), the Commission correctly pointed out in paragraph 19 of the contested decision that, in the present case: 'In assessing the extent to which the restriction of competition and the effect on trade between Member States is appreciable, account must be

taken of the cumulative effect arising from the fact that there are parallel systems of exclusive distribution through pharmacies for all brands of cosmetics sold through the pharmaceutical channel. The market share of dermopharmacy amounts to somewhere between 5% and 40% of the total cosmetics market. The restriction of competition and the effect on trade between Member States are therefore appreciable, however the relevant market is defined'.

81 Vichy cannot therefore rely on the judgment in *Delimitis*, cited above, in which the Court of Justice held in particular, with respect to the 'access clause' contained in an exclusive beer supply contract, that 'a beer supply agreement which permits the reseller to buy beer from other Member States is not such as to affect trade between States provided that the permission corresponds to a real possibility for a national or foreign supplier to supply the reseller with beers from other Member States'. In the present case, the restrictions on trade between States derive from the authorization criterion itself, which limits trade by excluding certain forms of trade without lawful justification, as shown above.

82 In those circumstances, having regard, on the one hand, to the very wide range of products distributed and the position of the applicant in the market, as described above, and, on the other, to the fact that the standard agreement notified affects 10 of the 12 Member States, the applicant has no grounds for maintaining either that the Commission did not establish the existence of a sufficiently appreciable distortion of competition within the Common Market or that the restrictions of competition brought about by its distribution network are offset by competition from the brands distributed through other distribution channels in view of the fact that, in the circumstances, such competition remains very limited.

83 It follows from all the foregoing considerations that the Commission was correct, in its preliminary investigation, in concluding that the authorization criterion adopted by Vichy in the standard agreement notified, which is inherently unlawful and capable of affecting intra-Community competition and trade to a sufficiently appreciable extent, is in breach of Article 85(1). Accordingly, the third plea must be dismissed.

The plea in law concerning the applicability of Article 85(3)

— *The parties' arguments*

Vichy maintains that, in any event, the Commission was wrong to deny it the benefit of the exemption provided for in Article 85(3). In its view, the requirement of the status of dispensing chemist is entirely in conformity with that provision, whereas the Commission's position is unfounded and the restriction of competition inherent in the criterion adopted is wholly necessary. Contrary to the Commission's contention, the distribution system helps to enhance production and distribution and to promote technical and economic progress, whilst at the same time affording consumers a fair share of the resultant benefit. Moreover, whilst the conformity of Vichy's distribution system with Article 85(1) of the Treaty could properly be examined by the French national courts, the applicability of Article 85(3), on the other hand, is a matter reserved exclusively to the Commission. According to Vichy, the contested decision should therefore be annulled since the Commission failed to examine the distribution system in relation to Article 85(3), even though an application for negative clearance and an application for a declaration of inapplicability had been submitted to it. Finally, the Commission's argument that dispensing chemists offer no particular advantage over the holders of diplomas in pharmacy practising elsewhere than in pharmacies shifts the focus of the discussion, reducing it to the characteristics of sales outlets, namely pharmacies.

Vichy considers that the contribution to economic progress deriving from the system of exclusive distribution through pharmacies derives from three advantages associated with it:

(a) Guarantee of stocks

According to Vichy, which perceives a contradiction in the Commission's reasoning, in that it attributes to the producer the disadvantages of distribution through pharmacies whilst refusing to recognize the advantages thereof, the issue is not whether the advantages resulting from the choice of distribution channel are attributable to the producer. It is sufficient, according to Vichy, to establish that distribution through pharmacies affords the consumer advantages

which would disappear if the network were opened to other channels. Moreover, Vichy claims essentially that the distribution system adopted by it for its products gives the consumer a guarantee of rapid replenishment of stocks which, for reasons connected with the need to protect public health, is a feature of the system of distribution through pharmacies.

(b) The recovery of investments

According to Vichy, it is incumbent on the Commission, by virtue of the principles laid down by the Court of Justice in its judgment in Joined Cases 56 and 58/64 *Consten and Grundig*, cited above, to judge 'effectiveness by reference to an objectively ascertainable improvement in the production and distribution of the goods', a condition which is satisfied in the present case since the producer's interest in minimizing risks coincides with the interest of the consumer.

(c) The involvement of the pharmacist

The Commission's appraisal, according to which products are first distributed through pharmacies and then, under different brands, through other channels, is misconceived, in so far as it is the 'generalization of innovative concepts' that facilitates subsequent distribution outside pharmaceutical channels; but such generalization in no way affects the brand itself.

86 According to the plaintiff, the same product cannot be distributed through pharmacies and through non-pharmaceutical channels at the same time. It adds that the Commission's analysis to the effect that competition within the pharmaceutical network is necessarily limited by reason of the ethical obligations to which pharmacists are subject is reductive and outmoded. It maintains, finally, that the consumer benefits from the service provided by the pharmacist, who is under a duty to advise and explain. That service is a matter going beyond mere price competition, to which the concept of competition cannot be reduced, and is not affected by price considerations.

According to the Commission, it is unnecessary, in the context of the contested decision, to consider whether the advantages deriving from the pharmacist's professional qualifications do actually satisfy the conditions for an exemption since the decision relates only to the exclusion from the distribution network of sales outlets where there are holders of diplomas in pharmacy. Since the sales outlets where there are holders of diplomas in pharmacy display the same advantages as regards the technical qualifications of the reseller, it is logical to take the view that dispensing chemists offer no special additional advantage. Vichy's assertion that dispensing chemists display qualities relating to their experience, their ethical obligations, their ability to personalize relations with customers and to provide feedback of information, qualities not offered by holders of diplomas in pharmacy not practising in pharmacies, is merely a statement of principle unsupported by any evidence.

As regards the other advantages of distribution through pharmacies claimed by Vichy, the Commission states that, at the present stage of the procedure, Vichy has not added to the arguments developed in the administrative proceedings. The guarantee of availability of stocks does not derive from the distribution system. Vichy cannot, in the name of economic progress, invoke the individual interest of an undertaking in recovering investment expenses incurred by it. The granting of access to the Vichy distribution network for sales outlets other than retail pharmacies would not deprive the producer of assistance from pharmacists in launching new products. The argument that innovative products are initially sold in retail pharmacies is contradicted by the fact that sales are subsequently made outside the pharmacy network under different brand names. Vichy maintains both that its products are innovative cosmetic products the sale of which must necessarily be accompanied by special advice intended to educate the consumer and that consumers may exercise their freedom of choice by buying, if they wish, a comparable product in large stores, but that argument is contradictory.

The Commission observes, finally, that the consumer's choice would be enhanced if he were able to obtain the same product through other distribution channels. It adds that consumers are unable to exercise their freedom of choice in full knowledge of the facts, since one and the same product is offered under different brand names, depending on the distribution network used. Finally, the

Commission observes, referring to the judgment of the Cour d'Appel, Paris, of 28 January 1988, referred to above, that price competition is necessarily limited by the ethical obligations to which pharmacists practising in retail pharmacies are subject. For all those reasons, it cannot, in the Commission's view, be contended that consumers enjoy a fair share of the benefits of any technical or economic progress. In reality, Vichy's main concern, in using the distribution system at issue, is to endow its products with a particular brand image and not to favour the interests of consumers.

— *The Court's assessment*

The contribution to economic progress

90 The Court observes, by way of preliminary, that in its judgment in Joined Cases 8 to 11/66, cited above, the Court of Justice held: 'Under Article 15(6) the Commission must also inform the parties that it is of opinion that application of Article 85(3) of the Treaty is not justified .... Although the Commission has some discretion in this matter, this only reinforces its obligation, when acting in the particular context of Article 15(6) of the regulation (No 17), to take a decision declaring that application of Article 85 (3) is not justified'.

91 The Court will examine successively the three arguments put forward by Vichy in support of its view that exclusive distribution through pharmacies contributes to economic progress. According to the applicant, the distribution method adopted ensures availability of stocks, guarantees profitability of investment and secures assistance from pharmacists.

92 It should be noted that the first argument, concerning availability of stocks, is indeed a factor which, according to the circumstances specific to the product distributed, may be taken into account in assessing a distribution system. Thus, in the first *Metro* case, the cooperation agreement between the producer and the wholesaler-distributors imposed on the latter the obligation to conclude, at least six months in advance, delivery contracts which took account of the probable

evolution of the market. The judgment of the Court of Justice in that case held that 'the conclusion of supply contracts for six months taking account of the probable growth of the market should make it possible to ensure both a certain stability in the supply of the relevant products, which should allow the requirements of persons obtaining supplies from the wholesaler to be more fully satisfied . . . thus a more regular distribution is ensured, to the benefit both of the producer . . . , of the wholesaler . . . and, finally, of the undertakings' (paragraph 43).

In the present case, however, even if it were admitted that the guarantees of availability applicable to the distribution of pharmaceutical products could, in each of the Member States concerned, also apply to the distribution through pharmacies of products other than pharmaceutical products, the applicant's allegations do not establish that an appropriate stock management policy could not, in whatever distribution channel other than the pharmacy network, guarantee to the consumer availability of stocks equivalent to the availability assured by pharmacies. In that regard, the Court finds that, as the contested decision correctly points out in paragraph 25, the requirement that a complete range should be offered is not a condition for authorization of the distributor and does not even appear in the general conditions of sale. In those circumstances, the applicant cannot claim that there is a causal link between the criterion for authorization adopted and the alleged contribution to economic progress. In that regard, the contested decision also correctly points out that in sales outlets other than retail pharmacies equivalent advantages may be achieved by means of contractual obligations.

As regards the applicant's second argument, it must also be pointed out that the profitability of an investment made by a producer in connection with the launch of a product or range of new products may also, depending on the specific circumstances of the case in question, be one of the advantages which may be taken into account as regards the contribution made to economic progress. Although the Commission maintained that that could not be the case, that approach forms part of its practice (see, for example, the Commission decision of 12 January 1990, IV-32.006-Alcatel Espace/Nachrichtentechnik, (Official Journal 1990 L 32, p. 19), in which the Commission expressly takes account of the optimization of investment expenses in exempting a research and development agreement in the sphere of space communication techniques). But, in the present case, the applicant has not in any event produced any evidence to show that the profitability of the

investment involved in the launching of a product or range of products is greater, in the case of retail pharmacies, than that which might be achieved through another distribution channel. Moreover, the contested decision correctly emphasizes, in paragraph 26, that, by opening its distribution network to holders of diplomas in pharmacy, Vichy would in no way be deprived of the assistance of pharmacists in ensuring the successful launch of innovative products.

95 Finally, the applicant's third and last argument to the effect that it benefits from the assistance of pharmacists practising in retail pharmacies — taking account of their advice to the fullest extent in improving its products — is misconceived, since it has not been established that such assistance is substantially different from that which might be provided by the holder of a diploma in pharmacy not practising in a retail pharmacy. Moreover, paragraph 27 of the contested decision correctly points out that that argument is contradicted by the fact that products are subsequently marketed through non-pharmaceutical channels under other brand names. As already stated, that situation reflects the producer's desire to create an enduring brand image in retail pharmacies rather than a desire to prepare the ground for marketing the products on the general market. The Court also observes that, in the case of France, the abandonment of the contested authorization criterion was offset by the inclusion, in the distribution contracts, of a 'brand setting' clause under which the distributor is obliged, on penalty of withdrawal of his authorization, to present its products in a setting which includes at least five brands enjoying a comparable image.

96 More generally, the Court observes that — as the Commission has also emphasized — consideration of the applicant's last two arguments makes it apparent that Vichy's views must be set in context. It must be observed that the Commission does not deny the applicant the right to distribute its products through sales outlets where a holder of a diploma in pharmacy is in attendance. Accordingly, the discussion must be limited to a comparison of the advantages deriving from distribution through pharmacies with distribution through a commercial network in which the customers are able to obtain advice from the holder of a diploma in pharmacy. From that standpoint, it is apparent that only the first of the three arguments put forward by the applicant specifically concerns distribution through pharmacies.

The fair share of the benefits granted to consumers

According to the applicant, the professional experience, the ethical obligations and the personal nature of the relationship with customers distinguish a holder of a diploma in pharmacy practising in a retail pharmacy from the holder of such a diploma practising elsewhere and thus help to improve the quality of service offered to the consumer.

The Court observes that, as stated earlier, the discussion must be limited to appraisal of the share of the advantages accruing to the consumer which is directly and strictly attributable to the pharmaceutical distribution network. The applicant has certainly not established that the advisory and explanatory function is peculiar to distribution through pharmacies or that an equivalent service could not be provided to customers by the holder of a diploma practising in a non-pharmaceutical outlet. Thus, the applicant has not proved that the opening of its distribution network to resellers who, although not dispensing chemists, are the holders of diplomas in pharmacy would not permit the introduction of innovative products onto the market or the enhancement of their brand image. Nor has Vichy established that the holders of diplomas in pharmacy practising in a commercial network and not in a pharmacy cannot have equivalent professional experience or establish a personal relationship with customers. Furthermore, in any event, the argument concerning ethical obligations imposed on dispensing chemists must be disregarded, since the marketing of the products in question in no way involves the need for any particular ethical code, even if it were accepted that the ethical obligations of dispensing chemists are stricter than those incumbent on the holders of diplomas in pharmacy. The Court observes, furthermore, that, as correctly indicated in the contested decision, the applicant cannot genuinely claim that a distribution system whose effect is to facilitate the distribution through non-pharmaceutical channels of products which are comparable to and interchangeable with those which are distributed under other brand names in retail pharmacies, thus depriving the consumer of the possibility of making an informed choice, offers the consumer a fair share of the benefits. Accordingly, as correctly pointed out in paragraph 29 of the contested decision, Vichy would not, by opening its distribution network to the holders of diplomas in pharmacy not practising in retail pharmacies, be deprived of any of the supposed advantages.

99 It is apparent from the foregoing that, by taking the view that the application of Article 85(3) was not justified in the present case, the Commission, in the preliminary examination carried out by it, did not rely on a materially incorrect appreciation of the facts or commit any error of law or any manifest error of assessment. Accordingly, the fourth plea in law must be dismissed.

The plea in law as to the inapplicability of Article 15(6) of Regulation No 17

— *The parties' arguments*

100 Vichy maintains that the Commission infringed Article 15(6) of Regulation No 17 since the exceptional conditions to which, according to the case-law of the Court of Justice, the implementation of those provisions is subject are not satisfied in the present case. According to Vichy, those conditions are three in number: a serious and manifest infringement, bad faith on the part of the undertaking concerned and urgency.

101 As regards the last two conditions, Vichy admitted, in its reply, that they are not really inherent in Article 15(6) of Regulation No 17. By invoking urgency and bad faith, the applicant merely wished to draw attention to the factual circumstances of which account must be taken, namely the attitude of the Commission which, on the one hand, shows a tendency to consider that the company is not acting in good faith and, on the other, adopted a provisional decision even though it had, since August 1989, had all the information needed for a full and in-depth examination of the distribution system notified by Vichy.

102 According to Vichy, as far as the requirement of a serious and manifest infringement is concerned, the Court of Justice held, in its judgment in Joined Cases 8 to 11/66, cited above, that Article 15(6) decisions infringe the Treaty 'in cases where the requirements for applying this provision (are) not clearly met'. In

its view, the contested decision does not in any way satisfy the requirements laid down in the case-law: the considerations put forward by the Commission to justify the application of Article 15(6) are alien to the discussion since no distortion of competition on a previously defined relevant market was established. By confining its examination to the requirement of the status of dispensing chemist, to which the approval of distributors is subject, and by disregarding the other terms on which the Vichy distribution contract is put into effect, the Commission contravened the principles of legal certainty and proportionality, and did not justify its decision.

According to Vichy, none of the explanations given by the Commission as reasons for its decision is well founded. Neither the references made by the Commission to French case-law, to the complaint lodged by Cosimex or its decision of 14 December 1989 (Association Pharmaceutique Belge, known as 'APB', IV-32.202, Official Journal 1990 L 18, p. 35), nor the existence of two different distribution systems in the Common Market can justify the contested decision. According to Vichy, the abovementioned judgment of the Cour d'Appel, Paris, did not impose on it any obligation to modify its distribution system in the Member States other than France, with the result that that precedent is not decisive. Similarly, the existence of a complaint lodged by Cosimex does not provide sufficient reason to conclude that the infringement was serious and manifest. In particular, that complaint did not come from a trader who had been excluded from the distribution network. Finally, the Commission wrongly relies on the APB decision of 14 December 1989, mentioned above, which does not have the scope attributed to it by the Commission. In that decision, which related to agreements for distribution through pharmacies of pharmaceutical products in Belgium, the Commission accepted that producers were entitled to determine freely the manner in which their products were to be marketed. That decision is without prejudice to the freedom of a producer to distribute his products selectively through pharmacies. It does not involve any assessment of a distribution system established by the producer. Moreover, it is confined to an examination of inter-brand competition within one and the same distribution system, whereas in the case of cosmetics account must be taken of the strong competition existing between the different distribution systems.

Vichy emphasizes that the coexistence of two distribution systems in the Common Market is not of its doing but derives from courses of action taken under French law, that is to say injunctions issued by the Conseil de la Concurrence to modify the distribution system in the French market. Vichy, for its part, took all the

measures necessary to ensure the free movement of its products within the Common Market. The applicant states that the Commission provided no factual support for its assertion that resellers outside the pharmaceutical network are better able than pharmacists to ensure that price competition operates. Vichy also observes that that complaint was not set out, as such, in the statement of objections. The contested decision should therefore be annulled on that ground alone.

105 According to the Commission, Vichy is wrong to consider that there are four preconditions for the application of Article 15(6) of Regulation No 17: the obviousness of the infringement, its seriousness, bad faith on the part of the undertaking and urgency surrounding the envisaged measure. The Commission contends that the latter two conditions are never required prior to the application of Article 15(6) of Regulation No 17. The only two conditions necessary for such application, as laid down by the Court in its judgment in Joined Cases 8 to 11/66, cited above, are the manifest nature and seriousness of the infringement.

106 The Commission justifies the contested decision by reference, on the one hand, to the precedents mentioned by it and, on the other, to the fact that the applicant produced no justification for the coexistence of two different distribution systems within the Common Market. The Commission contends that it gave sufficient reasons for its decision regarding both those conditions: it considers, having regard to the factors relied upon, that the maintenance of an exclusive distribution system through pharmacies in 10 Member States constitutes a serious and manifest infringement. It did not take account of those factors separately but, on the contrary, considered their combined effect, from which the serious and manifest nature of the infringement is apparent.

107 According to the Commission, the fact that the French Conseil de la Concurrence, then the Cour d'Appel, Paris, and then the French Cour de Cassation, decided that the exclusive distribution system through pharmacies for cosmetic products

was contrary not only to the provisions of national competition law but also to Article 85 of the Treaty entitles it to consider that the maintenance of such a system in the remainder of the Community renders the infringement manifest.

8 The Commission also states that it was appropriate to take into consideration the complaint made by Cosimex since it shows that the infringement is not purely theoretical. Together with all the other factors taken into consideration, that complaint shows the serious and manifest nature of the infringement.

9 The Commission also maintains that, in its APB decision, mentioned above, it clearly indicated that it considered that the producer's obligation not to sell the product concerned through distribution networks other than the pharmaceutical retail network restricted competition and deprived the consumer of his possibility of choosing between the different distribution networks, without any improvement in distribution accruing to the consumer. The fact that, in the APB decision, the contract notified required the producer not to distribute products otherwise than through the pharmaceutical network, whereas in Vichy's case it is the producer itself which chooses not to distribute its products outside that network, does not appreciably change the assessment under Article 85(1) of the Treaty, since the effect on competition is the same in both cases.

0 Finally, the Commission considers that it was right to advance the argument based on the coexistence, throughout the Common Market, of two different distribution systems, since that juxtaposition leads to partitioning and fragmentation of the market, contrary to the objectives of the Treaty. As regards the argument that that complaint was not notified to Vichy, it is factually incorrect, as shown by paragraph 85 of the statement of objections. Similarly, the Commission cannot be criticized for including in its defence a new consideration concerning partitioning and fragmentation of the market, as is apparent from paragraph 32 of the contested decision, according to which 'Vichy has not put forward any arguments justifying, under Article 85, the coexistence of two different distribution systems within the Common Market'.

— *The Court's assessment*

111 It must first be observed that, in its judgment in Joined Cases 8 to 11/66, cited above, the Court of Justice held that the procedure established by Article 15(6) of Regulation No 17 'leads in practice to the question whether there clearly exists such a serious infringement of the prohibition laid down by Article 85(1) that an exemption under Article 85(3) appears to be out of the question'. It is therefore necessary to decide whether, in the present case, the infringement of Article 85(1) found during the preliminary investigation carried out by the Commission preparatory to adoption of the contested decision under Article 15(6) of Regulation No 17 is a manifestly serious infringement, within the meaning of that judgment.

112 In concluding that such an infringement had been committed, the Commission relies, *inter alia*, on the one hand on three factors and, on the other, on the partitioning of the Common Market as a result of the establishment of two different distribution systems.

The factors relied on

113 In the contested decision, the Commission relies on three factors: the complaint lodged by Cosimex; its own decision concerning the Association Pharmaceutique Belge (APB), referred to above, and the decisions taken under French law. In the written procedure, it stated that its intention was to rely on those three factors in conjunction, not separately.

114 With regard, first, to the complaint lodged with the Commission by Cosimex in 1988 concerning the refusal of access to the Vichy distribution network, which came to Vichy's notice at the end of 1988, it must be stated that it is true that the applicant is right to say that that circumstance does not, with sufficient certainty, justify the conclusion that Vichy's distribution system contravened the Treaty. However, the Court considers that that complaint proves that at least one economic agent was excluded from the Vichy distribution system on the ground that it did not satisfy the criterion for authorization based on the status of dispensing chemist. Even though the Commission, before adopting the contested

decision, decided to shelve that complaint, the fact nevertheless remains that the complaint shows that the effect on competition resulting from the distribution system established by Vichy is not merely theoretical and that the Commission was entitled to take account of that fact in the preliminary examination carried out in the contested decision.

With regard, secondly, to the abovementioned APB decision of 14 December 1989, the Court considers that that Commission decision, adopted under Article 85(3), could properly be taken into account by the Commission in assessing the serious and manifest nature of the infringement, even if the factual circumstances are not strictly identical to those of the present case, since it concerned the distribution of pharmaceutical products through the pharmaceutical network. In paragraphs 28 and 29 of that decision, the Commission found that, in the case of the Belgian market, the exclusive sale in pharmacies of parapharmaceutical products restricted competition between retail pharmacists, on the one hand, and other distribution channels, on the other hand, with the result that the agreement, in the version notified, could not benefit from a declaration of inapplicability of Article 85(1) issued on the basis of Article 85(3). The decision noted that the distribution system notified had the effect of depriving the consumer of the possibility of choosing between the different marketing channels. The Court also considers that the Commission, which must take account of all the factors known at the date on which it adopts a decision under Article 15(6) of Regulation No 17, was fully entitled to refer to the APB decision, despite the fact that the latter was adopted after Vichy notified the standard agreement. Accordingly, the Commission was entitled to rely on that decision in forming its judgment as to the serious and manifest nature of the infringement ascertained, in the context of the preliminary appraisal made by it.

As regards, thirdly, the reference to decisions made under French national law, the Court finds that Vichy's notification, which is based on a distinction between, on the one hand, a distribution system applicable in France and, on the other, a distribution system applicable in all the other Member States, in fact post-dated the judgment of the French Cour de Cassation of 25 April 1989 which rejected the appeal against the judgment of the Cour d'Appel, Paris, of 28 January 1988, in which the latter had dismissed the appeal brought against the decision of the Conseil de la Concurrence of 9 June 1987. Those three decisions, delivered

between June 1987 and April 1989, successively found an infringement, both of Article 7 of the French Order of 1 December 1986 on freedom of pricing and competition and of Article 85 of the Treaty, resulting from the exclusive distribution through retail pharmacies of certain cosmetic products, including those of the applicant. In that connection, the Court observes that, as far as the applicant's distribution agreements are concerned, the Conseil de la Concurrence, by its above-mentioned decision of 9 June 1987, required Vichy, first, to modify its agreements by removing the clause under which resellers were prohibited from selling products to another reseller and, secondly, to discontinue the requirement that its distributors should have the status of dispensing chemists.

117 It is true, as Vichy points out, that the decision of the Conseil de la Concurrence and the judgments of the Cour d'Appel, Paris, and the Cour de Cassation imposed on the applicant no obligation other than that of amending its distribution agreement in France, which it did. However, the applicant was not unaware, when notifying the standard agreement applicable to the Member States other than France, of the fact that, in view of the similarity of the rules concerning exclusive or selective distribution systems, as applied by the Community authorities and the competent French authorities, it could reasonably expect that the system notified might, in so far as it related to the Member States other than France, be declared contrary to Article 85.

118 It is also apparent from the documents before the Court that the applicant could not be unaware that the standard agreements notified to the Commission, concerning the Member States other than France, might in all probability be declared contrary to Article 85 of the Treaty in particular because, by contrast with the order concerning the criterion for the authorization of distributors, the order concerning the removal of the prohibition of selling to other resellers made by the Conseil de la Concurrence was complied with for all the contracts notified, whether they were applicable in France or in the other Member States. The Court concludes from this that it was deliberately and in full knowledge of the facts that the second of the two orders issued by the Conseil de la Concurrence was complied with only with respect to the distribution agreements applicable in France. Consequently, the Commission committed no error of law or of appraisal by taking account of the decisions adopted under French national law in assessing the serious and manifest nature of the infringement ascertained in the preliminary investigation carried out by it.

The partitioning of the market

Essentially, the Commission accuses Vichy, which notified two different distribution systems within the Common Market, of contributing to the partitioning of that market. Paragraph 32 of the contested decision states that Vichy, after coming into line with Community law as regards France, notified, in respect of the Member States other than France, an exclusive distribution system through pharmacies without putting forward any arguments justifying, under Article 85, the coexistence of two different distribution systems. The contested decision infers from this that 'maintaining exclusive distribution through pharmacies in ten Member States constitutes a clear and serious infringement of Article 85'. That accusation is contested by Vichy on both procedural and substantive grounds.

From the procedural point of view, Vichy contends that the decision should be annulled since that complaint, which appears in the grounds of the decision, was not notified to it — an allegation which the Commission rejects, relying on paragraph 85 of the statement of objections according to which: 'The infringement of Article 85(1) commenced about thirty years ago with the introduction in France of the exclusive distribution system through retail pharmacies. In the 1970s, the system was extended to the remainder of the Member States (except Denmark). The system was notified in 1985 (for France), and in 1989 the modification made in France in 1988 was not extended to the other Member States. In those circumstances, a communication from the Commission within the meaning of Article 15(6) is required'.

The Court observes that, according to the case-law of the Court of Justice (judgment in Joined Cases 209 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125 and the judgment in Joined Cases 100 to 103/80 *Musique Diffusion Française*, cited above), for the statement of objections against the undertaking to be in due form, it is sufficient for it to indicate, even summarily, but clearly, the essential information on which it is based provided, however, that, during the administrative procedure, the undertaking is provided with the information necessary for its defence. Consequently, no penalty can be legally imposed on the basis of a complaint which has not been communicated to the undertaking concerned and in respect of which the latter has not been given due opportunity to express its views on the facts or documents relied on by the Commission or the inferences drawn by it (see the judgment of the Court of Justice in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461). The

Court considers that, in view of the effects associated with the communications provided for in Article 15(6) of Regulation No 17, such communications are properly made only if, pursuant to Article 19(1) of Regulation No 17 and the practice of the Commission observed in the present case, the undertaking concerned was given a proper opportunity to express its views on the objections raised against it by the Commission. Whilst, in fact, the circumstances and documents on which the Commission relies are known to the undertaking, since it previously notified them to the Commission, observance of the rights of the defence requires that, before the communication provided for in Article 15(6) of Regulation No 17 is made, the Commission should inform the undertaking of the conclusions which it intends drawing from the notification made by the undertaking and the reasoning on which those conclusions are based.

122 In dealing with the limb of the applicant's plea in law concerning the inapplicability, by reason of the infringement of essential procedural requirements, of Article 15(6) of Regulation No 17, it must be decided whether the principles just described were, in the particular case of the allegation of partitioning of the market, precisely complied with by the Commission. The Court finds, upon reading paragraph 85 of the statement of objections referred to above, that the wording of paragraph 32 of the contested decision does not differ substantially from that of the objection as set out in the statement of objections. Accordingly, the applicant has no reason to claim that it was not enabled to give its views on the reasoning underlying the Commission's decision. That limb of the plea must therefore be dismissed.

123 As regards the merits of the grounds relied on by the Commission, the Court observes that, in the case of France, the Cour de Cassation, by dismissing the appeal brought against the judgment of the Cour d'Appel, Paris, of 28 January 1988, clearly held — as, moreover, had previously been decided by the Conseil de la Concurrence — that Vichy's agreement for distribution exclusively through pharmacies was contrary, in particular, to Article 85 of the Treaty; and that, nevertheless, the applicant notified to the Commission in respect of ten Member States a standard agreement whose provisions concerning the criterion for authorization of distributors were exactly the same as those which had been the subject of the abovementioned decisions and judgments of the French authorities. It followed, therefore, that the applicant had to expect that the Commission might, with respect to the notified standard agreement, adopt the same approach as that

of the French authorities and courts. The applicant could not have been unaware of the fact that the course taken by the French authorities and courts — which expressly referred to Community competition law and took the view that the question raised was so clear as to obviate the need for a reference for a preliminary ruling under Article 177 of the Treaty — even though the latter imposes the requirement of such a reference, at least on the Cour de Cassation, in the circumstances defined in the judgment of the Court of Justice in Case 283/81 *CILFIT and Lanificio di Gavardo* [1982] ECR 3415 — was in conformity with the case-law of the Court of Justice regarding exclusive or selective distribution. That case-law, referred to in paragraph 18 of the contested decision and examined in detail in the present judgment, being particularly abundant with respect to the distribution of cosmetics, is an integral part of Community law and accordingly is deemed to be known, in particular, to an economic agent which, in that sector, operates in 11 of the 12 Member States and belongs to a group which holds a strong position in the relevant market. Accordingly, Vichy was not unaware of the fact that the distribution system notified to the Commission, which incorporated a quantitative and disproportionate criterion for authorization, was manifestly contrary to Article 85.

Finally, in any event Vichy cannot, in the present case, which is concerned with preliminary examination of the standard agreement applicable in the Member States other than France and notified to the Commission on 29 August 1989, invoke any breach of the principle of the protection of legitimate expectations deriving from the silence of the Commission following the notification in 1985 of the standard distribution agreement relating exclusively to France, when, in particular, on the one hand the Commission did not give any response at all to that initial request for negative clearance or a declaration of inapplicability and, on the other, between 1985 and 1989 the three abovementioned decisions of the Conseil de la Concurrence, the Cour d'Appel, Paris, and the French Cour de Cassation were adopted, casting doubt on the validity of the distribution system for France initially notified by Vichy to the Commission.

Consequently, it is sufficiently established that the applicant notified the standard agreement which gave rise to the contested decision in full knowledge of the facts.

If each of the grounds of the contested decision, taken in isolation, is insufficient to establish the serious and manifest nature of the infringement of Article 85 and recourse to Article 15(6) of Regulation No 17, that aspect is sufficiently apparent from those grounds taken together.

126 It follows from the foregoing that by considering, in the preliminary investigation which it carried out on the basis of the views exchanged and the information in its possession, and having regard, on the one hand, to all the grounds of the contested decision finding an infringement of Article 85(1) and precluding an exemption under Article 85(3), and, on the other, to the specific paragraphs of that same decision concerning recourse to the procedure under Article 15(6) of Regulation No 17, the Commission did not rely on a materially incorrect appreciation of the facts, did not commit any error of law and did not commit any error of appraisal in considering that, in the circumstances of the present case, the infringement of Article 85(1) ascertained by it was of a sufficiently serious and manifest nature for the possibility of an exemption under Article 85(3) to be excluded and that, accordingly, a decision under Article 15(6) of Regulation No 17 was justified.

127 Accordingly, the fifth plea in law, to the effect that the infringement of Article 85 was not serious or manifest, must be dismissed.

128 In view of all the foregoing considerations, the application must be dismissed.

Costs

129 Pursuant to Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Cruz Vilaça Barrington

Saggio Briët Biancarelli

Delivered in open court in Luxembourg on 27 February 1992.

H. Jung
Registrar

J. L. Cruz Vilaça
President