

JUDGMENT OF THE COURT
28 April 1998 *

In Case C-306/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Cour d'Appel de Versailles (France) for a preliminary ruling in the proceedings pending before that court between

Javico International and Javico AG

and

Yves Saint Laurent Parfums SA (YSLP)

on the interpretation of Article 85(1) of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann and R. Schintgen (Rapporteur) (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

* Language of the case: French.

Advocate General: G. Tesauro,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Javico International and Javico AG, by Franck Berthault, of the Paris Bar,

- Yves Saint Laurent Parfums SA (YSLP), by Dominique Voillemot and Antoine Choffel, of the Paris Bar,

- the Commission of the European Communities, by Giuliano Marenco, Principal Legal Adviser, and Guy Charrier, a national civil servant on secondment to the Commission's Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Javico International and Javico AG, represented by Franck Berthault, Yves Saint Laurent Parfums SA (YSLP), represented by Dominique Voillemot and Antoine Choffel, the French Government, represented by Régine Loosli-Surrans, Chargé de Mission in the Directorate for Legal Affairs, Ministry of Foreign Affairs, Acting as Agent, and the Commission, represented by Giuliano Marenco and Guy Charrier, at the hearing on 17 September 1997,

after hearing the Opinion of the Advocate General at the sitting on 6 November 1997,

gives the following

Judgment

- 1 By judgment of 8 September 1995, received at the Court Registry on 23 September 1996, the Cour d'Appel (Court of Appeal), Versailles, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 85(1) of the EC Treaty in order to enable it to appraise the validity of a contract containing an obligation to export luxury cosmetics to a non-member country and of a prohibition of reimporting and marketing those products in the Community.

- 2 The questions have been raised in proceedings brought by Yves Saint Laurent Parfums SA (hereinafter 'YSLP') against Javico International and Javico AG (hereinafter together referred to as 'Javico') for a finding that Javico was in breach of its contractual obligations, that the two contracts between the parties had been properly terminated and that YSLP was entitled to contractual compensation and damages.

- 3 YSLP enjoys an individual exemption for the selective distribution of its products within the Community (Commission Decision 92/33/EEC of 16 December 1991 relating to a procedure pursuant to Article 85 of the EEC Treaty (IV33.242 — Yves Saint Laurent Parfums) (OJ 1992 L 12, p. 24)), the legality of the main provisions of which was upheld by judgment of the Court of First Instance in Case T-19/92 *Leclerc v Commission* [1996] ECR II-1851).

4 On 5 February and 6 May 1992 YSLP concluded with Javico International, whose registered office is in Germany but which does not form part of YSLP's distribution network within the Community, two contracts for the distribution of its products, one covering Russia and Ukraine and the other Slovenia.

5 The distribution contract for Russia and Ukraine provides:

'1. Our products are intended for sale solely in the territory of the Republics of Russia and Ukraine.

In no circumstances may they leave the territory of the Republics of Russia and Ukraine.

2. Your company promises and guarantees that the final destination of the products will be in the territory of the Republics of Russia and Ukraine, and that it will sell the products only to traders situated in the territory of the Republics of Russia and Ukraine. Consequently, your company will provide the addresses of the distribution points of the products in the territory of the Republics of Russia and Ukraine and details of the products by distribution point.'

6 The distribution contract for Slovenia provides:

'In order to protect the high quality of the distribution of the products in other countries of the world, the distributor agrees not to sell the products outside the territory or to unauthorised dealers in the territory.'

- 7 Shortly after the conclusion of those contracts, YSLP discovered in the United Kingdom, Belgium and the Netherlands products sold to Javico which should have been distributed in Russia, Ukraine and Slovenia. YSLP therefore terminated the contracts and instituted proceedings before the Tribunal de Commerce, Nanterre, which, by judgment of 21 October 1994, upheld the termination of the two contracts and YSLP's claim for contractual compensation and damages.

- 8 Javico appealed against that decision to the Cour d'Appel, Versailles, which considered that the validity of the provisions in the distribution contracts at issue had to be appraised in the light of Article 85(1) of the Treaty, the appellants having contended that those contractual provisions were void by virtue of Article 85(2) of the Treaty.

- 9 In those circumstances, the Cour d'Appel stayed proceedings pending a ruling from the Court of Justice on the following questions:

'1. Where an undertaking (the supplier) situated in a Member State of the European Union by contract entrusts another undertaking (the distributor) situated in another Member State with the distribution of its products in a territory outside the Union, must Article 85(1) of the Treaty establishing the European Economic Community be interpreted as prohibiting provisions in that contract which preclude the distributor from effecting any sales in a territory other than the contractual territory, and hence any sale in the Union, either by direct marketing or by re-exportation from the contractual territory?

2. In the event that the said Article 85(1) prohibits such contractual provisions, must it be interpreted as not being applicable where the supplier otherwise distributes his products on the territory of the Union by means of a selective distribution network which has been the subject of an exemption decision under Article 85(3)?'

The first question

- 10 By its first question, the national court asks whether Article 85(1) of the Treaty precludes a supplier established in a Member State from prohibiting a distributor established in another Member State to which it entrusts the distribution of its products in a territory outside the Community from making any sales in a territory other than the contractual territory, including the territory of the Community, either by means of direct sales or by means of re-exportation from the contractual territory.
- 11 According to settled case-law (see, in particular, Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235 and Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299), agreements between economic operators at different levels of the economic process may be caught by the prohibition contained in Article 85(1) of the Treaty.
- 12 In order to determine whether agreements such as those concluded by YSLP with Javico fall within the prohibition laid down by that provision it is necessary to consider whether the purpose or effect of the ban on supplies which they entail is to restrict to an appreciable extent competition within the common market and whether the ban may affect trade between Member States.
- 13 As far as agreements intended to apply within the Community are concerned, the Court has already held that an agreement intended to deprive a reseller of his commercial freedom to choose his customers by requiring him to sell only to customers established in the contractual territory is restrictive of competition within the meaning of Article 85(1) of the Treaty (see, to that effect, Case 86/82 *Hasselblad v Commission* [1984] ECR I-883, paragraph 46, and Case C-70/93 *BMW v ALD* [1995] ECR I-3439, paragraphs 19 and 21).

- 14 Similarly, the Court has held that an agreement which requires a reseller not to resell contractual products outside the contractual territory has as its object the exclusion of parallel imports within the Community and consequently restriction of competition in the common market (see, to that effect, Case C-279/87 *Tipp-Ex v Commission* [1990] ECR I-261, paragraph 22 (summary publication)). Such provisions, in contracts for the distribution of products within the Community, therefore constitute by their very nature a restriction of competition (see Case 19/77 *Miller v Commission* [1978] ECR 131, paragraph 7)
- 15 However, anti-competitive conduct may not be struck down under Article 85(1) of the Treaty unless it is capable of affecting trade between Member States.
- 16 If an agreement, decision or practice is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (Case 5/69 *Völk v Vervaecke* [1969] ECR 295, paragraph 5).
- 17 The effect which an agreement might have on trade between Member States is to be appraised in particular by reference to the position and the importance of the parties on the market for the products concerned (Case 99/79 *Lancôme and Cosparfrance Nederland v Etos* [1980] ECR I-2511, paragraph 24). Thus, even an agreement imposing absolute territorial protection may escape the prohibition laid down in Article 85 if it affects the market only insignificantly, regard being had to the weak position of the persons concerned on the market in the products in question (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others v Commission* [1983] ECR 1825, paragraph 85).

18 It is therefore necessary to determine to what extent the foregoing considerations also apply to agreements, like those at issue in this case, which are intended to apply in a territory outside the Community.

19 In the case of agreements of this kind, stipulations of the type mentioned in the question must be construed not as being intended to exclude parallel imports and marketing of the contractual product within the Community but as being designed to enable the producer to penetrate a market outside the Community by supplying a sufficient quantity of contractual products to that market. That interpretation is supported by the fact that, in the agreements at issue, the prohibition of selling outside the contractual territory also covers all other non-member countries.

20 It follows that an agreement in which the reseller gives to the producer an undertaking that he will sell the contractual products on a market outside the Community cannot be regarded as having the object of appreciably restricting competition within the common market or as being capable of affecting, as such, trade between Member States.

21 Consequently, the agreements at issue, in that they prohibit the reseller Javico from selling the contractual product outside the contractual territory assigned to it, do not constitute agreements which, by their very nature, are prohibited by Article 85(1) of the Treaty. Similarly, the provisions of the agreements in question, in that they prohibit direct sales within the Community and re-exports of the contractual product to the Community, cannot be contrary, by their very nature, to Article 85(1) of the Treaty.

22 Although the contested provisions of those agreements do not, by their very nature, have as their object the prevention, restriction or distortion of competition

within the common market within the meaning of Article 85(1), it is, however, for the national court to determine whether they have that effect. Appraisal of the effects of those agreements necessarily implies taking account of their economic and legal context (Case C-393/92 *Almelo and Others v Energiebedrijf Ijsselmij* [1994] ECR I-1477, paragraph 37) and, in particular, of the fact that YSLP has established in the Community a selective distribution system enjoying an exemption.

- 23 In that regard, it is first necessary to determine whether the structure of the Community market in the relevant products is oligopolistic, allowing only limited competition within the Community network for the distribution of those products.
- 24 It must then be established whether there is an appreciable difference between the prices of the contractual products charged in the Community and those charged outside the Community. Such a difference is not, however, liable to affect competition if it is eroded by the level of customs duties and transport costs resulting from the export of the product to a non-member country followed by its re-import into the Community.
- 25 If that examination were to disclose that the contested provisions of the agreements concerned had the effect of undermining competition within the meaning of Article 85(1) of the Treaty, it would also be necessary to determine whether, having regard to YSLP's position on the Community market and the extent of its production and its sales in the Member States, the contested provisions designed to prevent direct sales of the contractual products in the Community and re-exports of them to the Community entail any risk of an appreciable effect on the pattern of trade between the Member States such as to undermine attainment of the objectives of the common market.
- 26 In that regard, intra-Community trade cannot be appreciably affected if the products intended for markets outside the Community account for only a very small percentage of the total market for those products in the territory of the common market.

27 It is for the national court, on the basis of all the information available to it, to determine whether the conditions are in fact fulfilled for the agreements at issue to be caught by the prohibition laid down in Article 85(1) of the Treaty.

28 Accordingly, the answer to the first question must be that Article 85(1) of the Treaty precludes a supplier established in a Member State of the Community from imposing on a distributor established in another Member State to which the supplier entrusts the distribution of his products in a territory outside the Community a prohibition of making any sales in any territory other than the contractual territory, including the territory of the Community, either by direct marketing or by re-exportation from the contractual territory, if that prohibition has the effect of preventing, restricting or distorting competition within the Community and is liable to affect the pattern of trade between Member States. This might be the case where the Community market in the products in question is characterised by an oligopolistic structure or by an appreciable difference between the prices charged for the contractual product within the Community and those charged outside the Community and where, in view of the position occupied by the supplier of the products at issue and the extent of the supplier's production and sales in the Member States, the prohibition entails a risk that it might have an appreciable effect on the pattern of trade between Member States such as to undermine attainment of the objectives of the common market.

The second question

29 By its second question, the national court asks whether provisions intended to prevent a distributor from selling directly in, and exporting back to, the Community contractual products which he has undertaken to sell in non-member countries can escape the prohibition laid down in Article 85(1) of the Treaty on the ground that the Community supplier of the products concerned distributes them within the Community through a selective distribution network covered by an exemption decision under Article 85(3) of the Treaty.

- 30 It must be explained here that the individual exemption decision issued by the Commission to YSLP relates only to standard selective distribution contracts drawn up by YSLP for the retail sale of its products in the Community. The provisions at issue concern the distribution of such products outside Community territory and cannot therefore be affected by the exemption granted in respect of the selective distribution system within the Community.
- 31 For the same reasons, those contracts cannot enjoy an exemption under Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1) on which YSLP purports to rely. That regulation relates, by virtue of Article 1 thereof, only to agreements in which 'one party agrees with the other to supply certain goods for resale within the whole or a defined area of the common market only to that other'.
- 32 As to whether the provisions at issue are capable of escaping the prohibition in Article 85(1) of the Treaty owing to the existence within the Community of a selective distribution system enjoying an exemption which those provisions are designed to protect, it need only be observed that, by adopting an exemption decision under Article 85(3), the Commission allows an exception to the prohibition laid down by Article 85(1). Consequently, exemption decisions must be interpreted restrictively so as to ensure that their effects are not extended to situations which they are not intended to cover (see, to that effect, *BMW v ALD*, cited above, paragraph 28).
- 33 In view of the foregoing considerations, the answer to the second question must be that provisions intended to prevent a distributor from selling directly in the Community and re-exporting to the Community contractual products which the distributor has undertaken to sell in non-member countries do not escape the prohibition laid down in Article 85(1) of the Treaty on the ground that the Community supplier of the products concerned distributes those products within the Community through a selective distribution network covered by an exemption decision under Article 85(3) of the Treaty.

Costs

- 34 The costs incurred by the French Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Cour d'Appel, Versailles, by judgment of 8 September 1995, hereby rules:

1. Article 85(1) of the EC Treaty precludes a supplier established in a Member State of the Community from imposing on a distributor established in another Member State to which the supplier entrusts the distribution of his products in a territory outside the Community a prohibition of making any sales in any territory other than the contractual territory, including the territory of the Community, either by direct marketing or by re-exportation from the contractual territory, if that prohibition has the effect of preventing, restricting or distorting competition within the Community and is liable to affect the pattern of trade between Member States. This might be the case where the Community market in the products in question is characterised by an oligopolistic structure or by an appreciable difference between the prices charged for the contractual product within the Community and those charged outside the Community and where, in view of the

position occupied by the supplier of the products at issue and the extent of the supplier's production and sales in the Member States, the prohibition entails a risk that it might have an appreciable effect on the pattern of trade between Member States such as to undermine attainment of the objectives of the common market.

2. Provisions intended to prevent a distributor from selling directly in the Community and re-exporting to the Community contractual products which the distributor has undertaken to sell in non-member countries do not escape the prohibition laid down in Article 85(1) of the Treaty on the ground that the Community supplier of the products concerned distributes those products within the Community through a selective distribution network covered by an exemption decision under Article 85(3) of the Treaty.

Rodríguez Iglesias		Gulmann		Schintgen
Mancini	Moitinho de Almeida	Kapteyn		Edward
Puissochet	Hirsch	Jann		Sevón

Delivered in open court in Luxembourg on 28 April 1998.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President