

European Court of Justice, 11 december 1980,
L'Oreal v AMCK



SELECTIVE DISTRIBUTION

Criteria for admission

- [selective distribution system based on criteria for admission, which go beyond a mere objective selection of a qualitative nature, probably incompatible with article 85 \(1\)](#)

Consequently, the answer to the first question must be that the agreements laying down a selective distribution system based on criteria for admission, which go beyond a mere objective selection of a qualitative nature, exhibit features making them incompatible with article 85 (1) where such agreements, either individually or together with others, may, in the economic and legal context in which they occur and on the basis of a set of objective factors of law or of fact, affect trade between member states and have either as their object or effect the prevention, restriction or distortion of competition. It is for the commission alone, subject to review by the Court, to grant an exemption in respect of such agreements pursuant to article 85 (3).

Commission's letter is not an exemption

- [a decision to grant exemption gives rise to rights in the sense that parties to an agreement which has been the subject of such a decision may rely on that decision against third parties who claim that the agreement is void on the basis of article 85 \(2\)](#)

the answer to the third question must be that decisions to grant exemption under article 85 (3) of the EEC treaty give rise to rights in the sense that the parties to an agreement which has been the subject of such a decision may rely on that decision against third parties who claim that the agreement is void on the basis of article 85 (2), but that, taking into account the reply given to the question concerning the legal nature of the commission's letter, that letter does not constitute such an exemption.

Abuse of a dominant position

- [Abuse where the undertaking enjoys the power to behave to an appreciable extent independently of its competitors, its customers and the consumers](#)

the behaviour of an undertaking may be considered as an abuse of a dominant position within the meaning of article 86 of the treaty where the undertaking enjoys in a particular market the power to behave to an appreciable extent independently of its competitors, its customers and the consumers and where its behaviour on that market, through recourse to methods different

from those which condition normal competition on the basis of the transactions of traders, hinders the maintenance or development of competition and may affect trade between member states.

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Judgment of the Court of 11 december 1980. - NV L'Oréal and SA L'Oréal v PVBA "De nieuwe AMCK". - reference for a preliminary ruling: Rechtbank van Koophandel Antwerpen - Belgium. - competition - hair-care products. - case 31/80.

In case 31/80

Reference to the Court under article 177 of the EEC treaty by the Rechtbank van Koophandel of the legal district of Antwerp for a preliminary ruling in the proceedings pending before that court between

- 1 . NV L'Oréal, Brussels,
- 2 . SA L'Oréal, Paris,

And

PVBA De Nieuwe AMCK, Hoboken,

Subject of the case

On the interpretation of articles 85 and 86 of the treaty,

Grounds

1 By an order of 17 january 1980, which reached the Court on 23 january 1980, the Rechtbank van Koophandel (commercial court) of the legal district of Antwerp, in pursuance of article 177 of the EEC treaty, requested the Court to give a preliminary ruling on questions relating to the interpretation of articles 85 and 86 of the treaty.

2 These questions are referred to the Court in the course of an action brought by the Belgian company L'Oréal NV and the french company L'Oréal SA before the president of the Rechtbank van Koophandel, Antwerp, in summary proceedings, against the company, De Nieuwe AMCK. The L'Oréal companies have established in Belgium for kerastase hair-care products a selective distribution network of which the company De Nieuwe AMCK is not a part. The action is primarily for a declaration that the defendant's actions in offering for sale or selling kerastase products bearing an express statement that they may be sold only by kerastase hairdressing consultants, and should the occasion arise, in obtaining stocks of those products by being party to a breach of contract, are acts contrary to fair trading practice. The plaintiffs also seek an injunction forbidding the defendant to offer for sale or sell the products referred to above or obtain stocks thereof.

3 The defendant in the main proceedings contended before the national court that the selective distribution network set up by L'Oréal was illegal as being contrary to the community rules on competition. In reply, the plaintiffs in the main proceedings referred to a letter dated 22 february 1978 addressed to L'Oréal SA by the commission. By that letter the commission informed the company that by reason of the small portion of the market for perfumery, beauty and toilet preparations

occupied by L'Oréal in the various countries and the large number of competing undertakings of a similar size, the commission took the view that there was no need for it to intervene under article 85 (1) of the treaty with regard to L'Oréal's distribution system and that the matter had therefore been allowed to rest.

4 The Rechtbank van Koophandel consequently decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

"1. Is the system of 'parallel' exclusive selling agreements between a producer and exclusive importers, linked with selective distribution networks between the national importers and the retailers chosen by them, based on alleged qualitative and quantitative selection criteria, in respect of a few perfumery products from a whole range, eligible for exemption as provided for in article 85 (3) of the treaty of Rome and is such the case here, from the point of view of community law, for L'Oréal NV (Brussels) and L'Oréal SA (Paris)?

2. Is a decision to allow a matter to rest, from an official of the commission of the European Communities, such as that contained in the letter of 22 february 1978, signed by J. E. Ferry, director, for the directorate-general for competition, (restrictive practices and abuse of dominant positions directorate), addressed to the first plaintiff in the main action, binding?

3. Are exemptions given in application of article 85 (3) to be regarded as instances of toleration or do they create a right which, from the point of view of community law, may be relied on against third parties, and is that the case for L'Oréal?

4. Can L'Oréal's conduct towards third parties be regarded as an abuse of a dominant position within the meaning of article 86 of the treaty of Rome?"

5 It should first be recalled that the Court is not empowered, as part of the task assigned to it by article 177 of the treaty, to entertain the question of the application of the treaty to a given case. The Court, therefore, has no jurisdiction to reply to the second part of the first question. It is a matter for the national court to decide, during the course of the actions which are brought before it and having regard to the facts of the case and, if appropriate, to replies given to the questions of interpretation, which it may have considered it necessary to refer to the Court of Justice, whether there are grounds to apply articles 85 and 86 of the treaty.

6 Nevertheless, since the jurisdiction of the national courts may be affected by the action of the commission, priority should be given to the examination of the second question relating to the legal nature of and to the consequences to be attached to the letter sent by the commission to L'Oréal SA.

The legal nature of the letter in question

7 As the Court has had occasion to state in its judgments of 10 July 1980 (Lancome, case 99/79; Guerlain and others, joined cases 253/78 and 1 to 3/79; Marty, case 37/79), article 87 (1) of the treaty

empowered the council to adopt any appropriate regulations or directives to give effect to the principles set out in articles 85 and 86. In accordance with this power the council has adopted regulations and in particular regulation no 17 of 6 february 1962 (official journal, english special edition, 1959-1962, p. 87), which empowered the commission to adopt various categories of regulations, decisions and recommendations.

8 The instrument thus placed at the commission's disposal for the accomplishment of its task include decisions granting negative clearance and decisions in application of article 85 (3). So far as decisions granting negative clearance are concerned, article 2 of regulation no 17 of the council provides that, upon application by the undertakings concerned, the commission may certify that, on the basis of the facts in its possession, there are no grounds under article 85 (1) or article 86 of the treaty for action on its part in respect of an agreement, decision or practice. So far as decisions applying article 85 (3) are concerned, article 6 et seq. Of regulation no 17 cited above provide that the commission may adopt decisions declaring the provisions of article 85 (1) to be inapplicable to a given agreement provided that the latter has been notified to it or notification has been dispensed with by virtue of article 4 (2) of the regulation. Those to whom such a decision is addressed thus obtain recognition of their right to adopt, under such conditions, if any, as may be laid down by the commission, an agreement, decision or concerted practice, and they may rely upon that right against any third party who, in an action before the national courts, claims that the agreement, decision or concerted practice concerned is in breach of article 85 (1).

9 Regulation no 17 and the regulations issued in implementation thereof lay down the rules which must be followed by the commission in adopting the aforementioned decisions. Where the commission intends to give negative clearance pursuant to article 2 or take a decision in application of article 85 (3) of the treaty, it is bound, in particular, by virtue of article 19 (3) of regulation no 17, to publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time-limit which it shall fix. Decisions granting negative clearance and exemption must be published, as provided for by article 21 (1) of that regulation.

10 It is plain that a letter such as that sent to the L'Oréal company by the directorate-general for competition, which was despatched without publication as laid down in article 19 (3) of regulation no 17 and which was not published pursuant to article 21 (1) of that regulation, constitutes neither a decision granting negative clearance nor a decision in application of article 85 (3) within the meaning of articles 2 and 6 of regulation no 17. As is stressed by the commission itself it is merely an administrative letter informing the undertaking concerned of the commission's opinion that there is no need for it to take action in respect of the contracts in

question under the provisions of article 85 (1) of the treaty and that the file on the case may therefore be closed.

11 Such a letter, which is based only upon the facts in the commission's possession, and which reflects the commission's assessment and brings to an end the procedure of examination by the department of the commission responsible for this, does not have the effect of preventing national courts, before which the agreements in question are alleged to be incompatible with article 85, from reaching a different finding as regards the agreements concerned on the basis of the information available to them. Whilst it does not bind the national courts, the opinion transmitted in such a letter nevertheless constitutes a factor which the national courts may take into account in considering whether the agreements or conduct in question are in accordance with the provisions of article 85.

12 Consequently, it must be stated in reply to the second question that a letter signed by an official of the commission indicating that there is no reason for the commission to take action pursuant to article 85 (1) of the EEC treaty against a distribution system which has been notified to it, may not be relied upon against third parties and is not binding on the national courts. It merely constitutes an element of fact of which the national courts may take account in considering the compatibility of the system in question with community law.

The application of article 85 to the distribution system in question

13 With regard to the first question referred to the Court by the national court concerning the possibility that the distribution system in question may receive an exemption under article 85 (3), it should be recalled that under article 9 (1) of regulation no 17 cited above the commission has sole power, subject to review by the Court, to declare the provisions of article 85 (1) of the treaty inapplicable pursuant to article 85 (3) of the treaty. The jurisdiction of the national courts is restricted to determining whether the agreement, decision or concerted practice which is the subject of the action before them is in accordance with article 85 (1) and, if appropriate, to declaring the agreement, decision or practice in question void under article 85 (2).

14 It is therefore in relation to those provisions that the national court will have to examine the validity of L'Oréal's distribution system. It is for the Court of Justice to provide it for this purpose with the points of interpretation of community law, which will enable it to reach a decision.

15 As the Court observed in its judgment of 25 october 1977 (case 26/76, Metro v Commission (1977) ECR 1875), selective distribution systems constitute an aspect of competition which accords with article 85 (1) provided that re-sellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the re-seller and his staff and the suitability of his trading premises and that such

conditions are laid down uniformly for all potential re-sellers and are not applied in a discriminatory fashion.

16 In order to determine the exact nature of such "qualitative" criteria for the selection of re-sellers, it is also necessary to consider whether the characteristics of the product in question necessitate a selective distribution system in order to preserve its quality and ensure its proper use, and whether those objectives are not already satisfied by national rules governing admission to the re-sale trade or the conditions of sale of the product in question. Finally, inquiry should be made as to whether the criteria laid down do not go beyond what is necessary. In that regard it should be recalled that in case 26/76, Metro v Commission cited above, the Court considered that the obligation to participate in the setting up of a distribution system, commitments relating to the achievement of turnovers and obligations relating to minimum supply and to stocks exceeded the requirements of a selective distribution system based on qualitative requirements.

17 When admission to a selective distribution network is made subject to conditions which go beyond 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, as the Court observed in its judgment of 30 june 1966 (Societe Technique Miniere v Maschinenbau ULM GMBH, case 56/65, (1966) ECR 235), 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".

18 To decide, on the one hand, whether an agreement may affect trade between member states it is necessary to decide on the basis of a set of objective factors of law or of fact and in particular with regard to the consequences of the agreement in question on the possibilities of parallel importation whether 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.

19 On the other hand, in order to decide whether an agreement is to be considered as prohibited by reason of the distortion of competition which is its object or its effect, it is necessary to consider the competition within the actual context in which it would occur in the absence of the agreement in dispute. To that end, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and the importance of the parties on the market for the products concerned, and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements. In that regard the Court stated in its judgment of 12 december 1967 (in case 23/67 Brasserie De Haecht (1967) ECR 407) that, although not necessarily decisive, the existence of similar contracts is a circumstance which, together with others, is capable of constituting an economic and legal context within which the contract must be judged.

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

21 Consequently, the answer to the first question must be that the agreements laying down a selective distribution system based on criteria for admission, which go beyond a mere objective selection of a qualitative nature, exhibit features making them incompatible with article 85 (1) where such agreements, either individually or together with others, may, in the economic and legal context in which they occur and on the basis of a set of objective factors of law or of fact, affect trade between member states and have either as their object or effect the prevention, restriction or distortion of competition. It is for the commission alone, subject to review by the Court, to grant an exemption in respect of such agreements pursuant to article 85 (3).

Reliance on an exemption under article 85 (3) against third parties

22 It has already been emphasized, when the nature of the letter referred to in the second question was considered, that when an exemption under article 85 (3) is granted by the commission, it confers a right on the recipient, upon which he may rely against third parties.

23 Consequently, the answer to the third question must be that decisions to grant exemption under article 85 (3) of the EEC treaty give rise to rights in the sense that the parties to an agreement which has been the subject of such a decision may rely on that decision against third parties who claim that the agreement is void on the basis of article 85 (2), but that, taking into account the reply given to the question concerning the legal nature of the commission's letter, that letter does not constitute such an exemption.

The application of article 86

24 Article 86 of the treaty prohibits any abuse by one or more undertakings of a dominant position within the common market or within a substantial part of it in so far as it may affect trade between member states.

25 As the Court emphasized in its judgment of 21 february 1973 in case 6/72, Europemballage and Continental Can v Commission (1973) ECR 215, when considering the possibly dominant position of an undertaking, the definition of the market is of fundamental significance. Indeed, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.

26 A dominant position exists within the market thus defined when, as the Court last stated in its judgment of 13 february 1979 in case 85/76, Hoffmann-La Roche v Commission (1979) ECR 461, an undertaking enjoys a position of economic strength which enables it to prevent effective competition from being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its

competitors, its customers and ultimately of the consumers.

27 As far as the concept of abuse is concerned, that was defined by the Court in case 85/76, Hoffmann-La Roche, cited above, as an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of traders, has the effect of hindering the maintenance of the degree of competition, still existing in the market or the growth of that competition.

28 The affecting of trade between member states is a concept common to both articles 85 and 86 of the treaty and has been clarified above.

29 Just as in the case of article 85, it is for the national court to decide, on the basis of the whole of the facts concerning the behaviour in question, whether article 86 applies.

30 Consequently, the answer to the fourth question must be that the behaviour of an undertaking may be considered as an abuse of a dominant position within the meaning of article 86 of the treaty where the undertaking enjoys in a particular market the power to behave to an appreciable extent independently of its competitors, its customers and the consumers and where its behaviour on that market, through recourse to methods different from those which condition normal competition on the basis of the transactions of traders, hinders the maintenance or development of competition and may affect trade between member states.

Decision on costs

31 The costs incurred by the French government, the government of the United Kingdom and the commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

Operative part

On those grounds,

The Court,

In answer to the questions referred to it by the Rechtbank van Koophandel, Antwerp, by order of 17 january 1980, hereby rules:

1. The agreements laying down a selective distribution system based on criteria for admission which go beyond a mere objective selection of a qualitative nature exhibit features making them incompatible with article 85 (1) where such agreements, either individually or together with others, may, in the economic and legal context in which they occur and on the basis of a set of objective factors of law or of fact, affect trade between member states and have either as their objective or effect the prevention, restriction or distortion of competition. It is for the commission alone, subject to review by the Court, to grant an

exemption in respect of such agreements under article 85 (3).

2. Since a letter signed by an official of the commission indicating that there is no reason for the latter to take action under article 85 (1) of the EEC treaty against a distribution system which has been notified to it is not an exemption within the meaning of article 85 (3), it may not be relied upon against third parties and is not binding on the national courts. It merely constitutes an element of fact of which the national courts may take account, in considering the compatibility of the system in question with community law.

3. The behaviour of an undertaking may be considered as an abuse of a dominant position within the meaning of article 86 of the treaty, where the undertaking enjoys in a particular market the power to behave to an appreciable extent independently of its competitors, its customers and the consumers and where its behaviour on that market, through recourse to methods different from those which condition normal competition on the basis of the transactions of traders, hinders the maintenance or development of competition and may affect trade between member states.
