II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 December 1986

relating to a proceeding under Article 85 of the EEC Treaty

(IV/31.428 to 31.432 — Yves Rocher)

(Only the French text is authentic)

(87/14/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1] as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to the notification and application for negative clearance submitted on 15 January 1985 by Yves Rocher, La Gacilly, France, concerning a system of standard form franchise contracts for the retailing of cosmetics covering France, Germany, Belgium, Luxembourg, the Netherlands, the United Kingdom and Spain.

Having regard to the summary of the notification published [2] pursuant to Article 19 (3) of Regulation No 17,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. Facts

A. The undertaking

(1) Société d'études de chimie et de thérapie appliquées (SECTA) Laboratoires de Cosmétologie Yves Rocher, whose registered office is in La Gacilly, France, is one of the leading European producers of cosmetics. Its equity capital is held 35 % by the Yves Rocher family and 65 % by Sanofi, a subsidiary of Elf Aquitaine, whose cosmetics production accounts for a quarter of its total turnover.

(2) Yves Rocher markets its products in 50 countries and has 15 wholly-owned marketing subsidiaries abroad. It originally sold its products by mail order but, starting in 1970, has set up in seven Community Member States (France, Germany, Belgium, Luxembourg, the Netherlands, the United Kingdom and Spain) a network of franchised retail outlets known as 'Yves Rocher Beauty Centres'. These Centres sell only Yves Rocher products. The Yves Rocher group now has some 10 million mail-order customers. Its network of shops consists of about a thousand franchise businesses of which a little over 600 are in France. Their average annual turnover is less than 300 000 ECU. Yves Rocher also operates a number of pilot schemes on its own account.

B. The product and the market

(3) Cosmetics in the broad sense, i.e. that of substance used in beauty care, can be broken down into 42 groups comprising some 100 000 different products. This extreme diversity reflects the

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 95, 23. 4. 1986, p. 3.

public's many requirements, the creativity of perfumers and cosmeticians, and the high level of technical expertise attained which makes it possible to satisfy those requirements.

(4) Nevertheless, the general statistics published by the business circles concerned all distinguish between four main categories of products :

— beauty products (make-up and skin-care products),

— alcohol-based perfumes,

— hair-care products,

— toiletries.

(5) In all the Member States in which the Yves Rocher network is established cosmetics are a growth market, albeit to differing degrees for each of the four segments referred to above. Most customers are women (90 % of sales).

(6) On the supply side, the number of both producers and distributors of cosmetics is fairly large. The industry is characterized by the presence of subsidiaries of major industrial groups, being an attractive means of diversification for many groups whose principal line of business is technically similar (pharmaceutical groups in particular). The financial ties between cosmetics manufacturers are therefore global and complex.

(7) The degree of concentration in the industry is comparatively low. The largest European firm holds a 15 % share of the Community market, and none of the others has a share exceeding 5 %.

(8) If one compares the ranking, over a period of time, of producers in terms of market share, a fair amount of movement is apparent, which is itself an indication of the effort made by each firm to promote its image, and of the severity of competition between suppliers.

(9) In the cosmetics sector as a whole, Yves Rocher holds 7,5 % of the French market, 6 % of the Belgian market, and a share of less than 5 % in every other Member State in which the network is established. Unlike some producers who specialize in one or other of the abovementioned four categories of cosmetics, Yves Rocher is active in every segment of the market. Its business is oriented more towards the production of beauty products and alcohol-based perfumes, but even in France, the country in which the Yves Rocher network is most extensive, its sales do not exceed 15 % of total sales in any particular category of products.

(10) The channels through which cosmetics are distributed are many in number and complementary in character in every Member State in which the Yves Rocher chain is established. A distinction may be drawn between general retail outlets and specialist (or selective, exclusive or franchise) retail outlets.

(11) In France, about half the cosmetics sold are marketed through some 100 000 general retail outlets (stores selling household products and cosmetics — *drogueries*), grocers' shops, self-service stores, etc.). A third of all sales are made through some 7 500 specialist retail outlets, including about a thousand franchise shops. Direct selling by the manufacturer (selling by mail order, door-to-door sales or own shops) and sales in chemist's shops each account for about 10 % of the industry's total turnover. The respective share of sales accounted for by various forms of distribution varies, however, according to the market segment, as can be seen from the table below showing the proportion of each category of products sold by each distribution method (1).

(in %)

Channels	Product					
	Alcohol-based perfumes	Beauty products	Toiletries	Hair-care products	Others	Total
General retailers	6,6	7,8	12,3	21,8	—	48,5
Specialist retailers	15,9	14,0	1,7	0,4	0,4	32,4
Direct selling	2,7	5,1	1,4	1,0	0,4	10,6
Sale in chemist's shops	0,1	5,4	1,2	1,7	—	8,4
Miscellaneous	0,1	—	—	—	—	0,1
Total	25,4	32,3	16,6	24,9	0,8	100,0

(1) Taken from a survey by DAFSA entitled 'The world perfume and cosmetics industry'.

(12) The percentage of overall cosmetics sales effected by general retailers is comparable in the other Member States concerned.

(13) Retail selling prices vary considerably from one Member State in which the network is established to another. Compared with the prices charged by its competitors, Yves Rocher, whose marketing method is a combination of selling by mail order and specialist retailing, fixes its prices at a level somewhere between those of specialist retailers and those of general retailers.

Yves Rocher sells its products to its franchisees at an average discount of 30 % on its recommended selling prices as published in its catalogues, excluding VAT.

C. The system of notified agreements

(14) As well as selling by mail order, the Yves Rocher group markets its products in the seven Member States concerned through a thousand or so franchised retailers, supplied, in France, direct from the Yves Rocher company and, in the other Member States, by the marketing subsidiaries wholly owned by the company.

(15) The notified standard from franchise contracts are geared mainly to retailing: the beauty treatments that franchisees undertake to give under the notified contracts account for only a small proportion of their turnover.

The notified contracts all display basically the same features, with the exception of special arrangements for Belgian franchisees, particular provisions based on local commercial practice and the presence in the first few franchise contracts, concluded when the network was originally set up, of clauses prescribing resale prices and prohibiting cross supplies between Yves Rocher franchisees.

Methods of choosing franchisees used by Yves Rocher

(16) Yves Rocher selects its franchisees in the light of their personality, their apparent overall aptitude for running a cosmetics retailing business, and their performance in a training programme.

Contracts are concluded with the franchise personally and may not be assigned or transferred either in whole or in part without Yves Rocher's previous written consent, otherwise the agreement is cancelled without prior notice.

The franchisee undertakes to employ at his Centre a sufficient number of qualified staff.

Legal independence of franchisees

(17) All Yves Rocher franchisees are proprietors of their business, which they carry on at their own risk. They are responsible for the cost of fitting out their premises in accordance with plans and specifications which Yves Rocher causes to be drawn up at its own expense.

All commercial documents issued by the franchisee must carry the franchisee's name and the words 'Yves Rocher Beauty Center'. Yves Rocher have circulated a directive to franchisees requiring them to display an appropriate notice indicating their status of independent franchisees within the Yves Rocher chain.

Franchisees are required to take out insurance covering their civil liability and employer's liability throughout the period of the contract.

Clause concerning the location of the Beauty Centre

(18) Each contract defines the exact location of the franchisee's shop. In practice, Yves Rocher carries out a preliminary market and location study and proposes to the franchisee the most promising shopping district, within which the franchisee determines the exact location of his beauty centre with the franchisor's consent. The contract stipulates that the shop may not be transferred to another place without Yves Rocher's consent and that the use of Yves Rocher identifying marks is not authorized in any other place.

Exclusive territory of the franchisee

(19) Yves Rocher grants the franchisee an exclusive right within an area defined in the contract to use the franchisor's identifying marks and know-how with a view to selling its products through a retail outlet. The franchisor undertakes not to authorize third parties to open another Yves Rocher Beauty Centre in that territory and not to establish such Centres there itself.

Yves Rocher reserves the right to sell its products to consumers by other means (in particular by mail order).

Grant by Yves Rocher of the right to use their identifying marks (shop sign, trademarks, symbols), and their designs and models

(20) Yves Rocher grants the franchisee the right to use the sign, trademarks, symbols, designs and models of which it is the owner, in particular for the bottles, packages and furnishings of the Beauty Centre.

(21) These rights may be exercised only in connection with the operation of the Beauty Centre and its purpose ; the franchisee may not exercise them in any other place or for any other purpose and recognizes moreover that the right to use the present and future trade name, marks and symbols of Yves Rocher belongs exclusively to the company. The contract does not however restrict the right of franchisees to contract the franchisor's industrial property rights.

The grant by Yves Rocher of the above rights ceases on termination of the contract.

Transfer by Yves Rocher to the franchisee of commercial and beauty treatment know-how

(22) The know-how Yves Rocher undertakes to communicate to the franchisee encompasses every aspect of the franchise business, and in particular technical, commercial, promotional, publicity, administrative and financial matters, staff training and general administration.

Before the Centre is opened, Yves Rocher arranges training sessions for the franchisee on the organization and running of a Centre and on the beauty products and treatments available there. It provides further training from time to time during the currency of the contract.

The franchisee undertakes not to divulge any confidential information and instructions to third parties, and not to use Yves Rocher's commercial secrets in any place or for any purpose other than the Beauty Centre.

Provision of technical and commercial assistance to the franchisee by Yves Rocher

(23) When the Centre is opened, Yves Rocher provides the franchise with all the aid it considers appropriate in order that the Centre be established and operated in accordance with its policy and image, and places at the franchisee's disposal all its technical knowledge.

During the currency of the contract, the company advises and assists the franchisee on request in the operation of the Beauty Centre : procedures, purchase of products and supplies, publicity (publicity campaign at the time of launch, and periodical sales support and promotion activities, either in the shop or aimed directly at the consumer).

Financial obligations of the franchisee towards the franchisor

(24) In all countries, the franchisee must pay an initial licence fee. In the Netherlands, in addition to an initial licence fee at a lower amount, he must pay an annual royalty of 1 % of his turnover net of tax, excluding beauty treatment services.

The franchisee also pays Yves Rocher at regular intervals a fixed proportion of publicity costs.

Use by franchisees of uniform trading methods under Yves Rocher's supervision

(25) The method contracts require franchisees to employ uniform trading methods. The franchisee undertakes to operate his Centre in accordance with the procedures laid down by the company in an operating manual. This covers the following aspects of running the business : decor, lighting, fitting-out in accordance wiht plans and specifications which Yves Rocher causes to be drawn up at its own expense, layout and furnishing of Centres, presentation of products, sales techniques, publicity campaigns, nature and quality of beauty treatment services, accounts, insurance, etc.

The franchisee is obliged to submit for the prior approval of Yves Rocher all forms of publicity and promotion which he wishes to undertake on his own account. The control exercised by the franchisor extends only to the nature of the publicity and not to the retail prices quoted therein.

The franchisee also undertakes to operate one or more beauty treatment cabines in which only products and treatments authorized by the company may be used or given.

The franchisor reserves the right to carry out checks on stock levels and obtain from the franchisee a copy of his accounts or balance sheet.

Non-competition covenant

(a) During the lifetime of the contract

(26) The franchisee is expressly forbidden to carry on either directly or indirectly, whether in return for payment or not, any business which competes with an Yves Rocher Beauty Centre. The franchisee is free to acquire financial interests in the capital of a competitor of Yves Rocher, provided this investment does not involve him personally in carrying on competing activities.

He is obliged to sell only products bearing the Yves Rocher trademark, although he may sell accessories (brushes, tweezers, nail scissors, etc.) with Yves Rocher's previous consent.

(b) on termination of the contract

(27) The franchisee is forbidden to compete with Yves Rocher, whether directly or indirectly, even as an employee, for a period of one year within the exclusive territory, whether on his own account or with the help of a rival firm.

Supply arrangements

(28) The franchisee may purchase Yves Rocher products not only from Yves Rocher but also from other franchisees, whether or not the latter are located in the same Member State.

He may buy approved accessories, shop furnishings and products for beauty treatments purposes from any supplier.

Sales promotion obligation

(29) The franchisee undertakes to devote all his energy and as much time as necessary to promoting the sale of Yves Rocher products and beauty treatments and agrees not to carry on any activities incompatible with those of a Beauty Centre.

Franchisees selling prices

(30) Yves Rocher circulates to its franchisees a list of recommended resale prices. All franchisees, including those in Belgium, are free to fix their retail selling prices at a lower or higher level, it being understood that it is recommended to them not to sell at a higher price than that given in the catalogue.

As a result of observations made by the Commission, Yves Rocher has expressly deleted with effect from 1 December 1986 the resale price maintenance provisions — which were not applied in practice — contained in the first contracts concluded when the network was originally set up.

Cross supplies between Yves Rocher franchisees

(31) The franchisee is prohibited from selling, whether directly or indirectly, Yves Rocher products to resellers other than Yves Rocher franchisees.

The first contracts forbade the franchisee to sell products even to other Yves Rocher franchisees. This provision has been deleted with effect from 1 December 1986 as a result of observations made by the Commission. Yves Rocher now authorizes in all its contracts cross supplies, both national and transnational, between its franchisees.

Duration of contracts

(32) All Yves Rocher contracts are normally concluded and renewed for not more than five years.

Legal status of the Belgian franchisees

(33) Yves Rocher franchisees resell Yves Rocher products and approved accessories (cf. point 26) and give beauty treatments entirely in their own name and for their own account.

However, under the terms of their contracts, the Belgian franchisees sell, in Yves Rocher's name and for its account, Yves Rocher products supplied by the franchisor or by the other Belgian franchisees by way of cross supplies (cf. point 31) and receive a commission.

In each case, Belgian franchisees are free to fix their selling price to consumers (cf. point 30), it being understood that the amount of the 30 % commission owed to them by the franchisor when they sell in its name and on its account, varies accordingly.

Third parties' observations

(34) In response to publication of a notice pursuant to Article 19 (3) of Regulation No 17, the Commission received comments from several third parties. Some approved in substance the exemption of the notified standard form contracts, subject to certain objections of principle to the practice of recommending maximum resale prices, the effect of which could be to bring consumer prices to a uniform level. For the purpose of clarification, Yves Rocher has, at the request of the Commission, issued a circular to franchisees stressing that the recommended prices are purely guidelines and has undertaken to avoid any reference in its circulars to the notion of a maximum price. From now on the catalogues circulated by Yves Rocher will mention that the prices are recommended prices.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(35) Article 85 (1) prohibits as incompatible with the common market all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Characteristics of the franchise contracts at issue

(36) By the notified standard form retail franchise contracts, Yves Rocher grants to its frachisees the exclusive right within an area defined in the contract, to use in a retail shop Yves Rocher identifying marks (sign, trademark and trade name) and its designs and models for the sale of its products.

Yves Rocher transfers to them know-how, consisting in a body of technical and commercial knowledge, previously tested by the franchisor itself, which is not divulged to third parties and therefore constitutes a competitive advantage. This know-how, which is set out in an operating manual and backed up by continuing technical and commercial assistance, is constantly updated in the light of experience gained by the franchisor through its mail-order business and pilot schemes.

The close association between these two forms of support provided by the franchisor helps create an original formula for the retailing of a range of cosmetics based on the theme of natural beauty from plants and sold under a single brand, which franchisees agree to promote exclusively.

(37) These rights of user are not granted unconditionally. Franchisees may exploit the industrial property rights granted and the knowledge communicated only in strict accordance with their subject matter: the original and constantly evolving formula for the retailing of Yves Rocher products using the franchisor's proven trading methods.

(38) Inasmuch as the members of the Yves Rocher network are thus bound together by close *de facto* commercial ties, the franchise contracts at issue are the expression of a closely integrated form of distribution. They nonetheless constitute agreements between undertakings within the meaning of Article 85 (1), since the franchisees are the proprietors of their businesses, of which they bear the start-up costs and which they operate at their own risk.

Contractual obligations not restrictive of competition

(39) The original distribution formula translated into action by the contracts at issue does not in itself interfere with competition having regard to existing structures of production and supply in the relevant market (1). It enables Yves Rocher to establish a uniform distribution network without investing its own capital in the fitting-out of retail shops and at the same time gives non-specialists access to the use of well-known identifying marks and proven trading methods.

(40) The obligations imposed by the franchisor on its franchisees to ensure that they exploit its proprietary industrial property rights and know-how in a manner in keeping with their subject matter are inherent in the very existence of its right in its intellectual creations and fall outside the scope of the contractual and concerted practice of Article 85 (1). Consequently, the restrictions on the commercial freedom of franchisees, without which the transfer of the distribution formula concerned could not be envisaged, do not constitute restrictions of competition within the meaning of Article 85 (1).

(41) The absence of any contractual obligation on the part of Yves Rocher to apply selection criteria in the choice of its franchisees is explained by the fact that Yves Rocher itself trains franchisees during an induction course with a view to setting up new franchise shops. It is logically entitled to choose its partners freely and turn down applicants who do not, in its view, have the personal qualities and business qualifications which it requires for the application of the formula it has developed.

(42) The franchisor must also be able to participate in determining the location of the Beauty Centre with the franchisee, in their mutual interest: a bad choice might cause the franchisee to fail in business and indirectly damage the network's reputation. In practice, Yves Rocher carries out a preliminary market and location survey, and proposes to the franchisee the most promising area. The exact location of the shop is determined by the franchisee with the franchisor's consent. In any event, the shop's location is agreed upon in the general interest of all members of the chain. For the same reasons, any change in the Beauty Centre's location is subject to Yves Rocher's consent. Article 85 (1) is not applicable to this clause to the extent that the relocation of a Beauty Centre may only be refused for reasons of the network's reputation.

(43) The obligation on the part of the franchisee to sell Yves Rocher products only in a Beauty Centre fitted out and decorated in accordance with plans and specifications which Yves Rocher causes to be drawn up at its own expense is also intended to ensure compliance with the original distribution formula communicated by the franchisor. The exterior appearance and interior lay-out of a Beauty Centre and the presentation of products are not factors which can be divorced from the methods and procedures transmitted by Yves Rocher or from the network's brand image.

(1) See Court of Justice of the European Communities, 28. 1. 1986, Case 161/84 (Pronuptia), point 15 not yet reported.

The same is true of the franchisee's obligation to use know-how transferred by the franchisor and to apply the trading methods developed by the franchisor.

(44) The clause whereby any local publicity undertaken by the licensee on his own account must be submitted for the previous approval of Yves Rocher is, so far as it concerns only the nature of the publicity to the exclusion of selling prices, intended to ensure a qualitative control by the franchisor over individual publicity measures in order to avoid any possible deviation from the theme of natural beauty from plants, on which the network's image is based.

(45) The obligation on the franchisee to sell only products bearing the Yves Rocher trademark — except in the case of accessories previously approved by the franchisor — is inherent in the very nature of the Yves Rocher distribution formula, the purpose of which is to enable independent traders to sell the complete range of Yves Rocher products using a sign, a trademark and symbols, as well as trading methods which have proved effective. The retailing of products bearing trademarks other than that of the franchisor exposes Yves Rocher to the risk of the use of their know-how for the benefit of competing producers and would detract from the identity of the network, which is symbolized by the Yves Rocher sign.

This implies that the franchisee may obtain supplies only from Yves Rocher or from other franchisees.

(46) The prohibition on the resale by franchisees of Yves Rocher products to resellers who do not belong to the Yves Rocher network is in this case inherent in franchisees' obligations to comply with the frachisor's procedures and methods and to offer products for sale under the Yves Rocher sign. These obligations would be made meaningless if Yves Rocher franchisees could freely pass over the goods covered by the contract to resellers who by definition have no access to the Yves Rocher know-how and are not bound by the same obligations, which are necessary in order to establish and maintain the originality and reputation of the network and its identifying marks.

(47) The provision under which the franchisee agrees not to carry on competing activities for the duration of the contract, in the same way as the prohibition on the assignment or transfer in whole or in part of the franchise contract, without the prior written consent of the franchisor, and on the divulgence of the know-how made available, is indispensable to protect the know-how and assistance provided by the franchisor. By their nature, the know-how and assistance provided are of a kind which could be used for the benefit of other beauty products or services, which would, even if only indirectly, enable competitors to benefit from the trading methods employed. Other means to avoid the same risks might not be as effective.

The clause which requires that the acquisition of a financial interest in the capital of an undertaking competing with Yves Rocher should not involve the franchisee in personally taking part in competing activities pursues the same aim and is considered in the same way.

(48) The same is true of the clause forbidding former Yves Rocher franchisees from carrying on a retail cosmetics business in their former exclusive territories for one year after the contract's termination. This is simply intended to prevent Yves Rocher's competitors from benefiting from the know-how which has been communicated by Yves Rocher to the former franchisee, and from the clientele acquired as a result of that know-how and Yves Rocher's identifying marks at a time when, owing to the exclusivity of the territory allotted to the franchisee during the currency of the contract, Yves Rocher has no retail outlet in that territory after the contract's expiry and must therefore be allowed a reasonable period in which to establish a new Beauty Centre.

In the present case, the clause does not go beyond what is strictly necessary to achieve its purpose, since a former franchisee can compete with Yves Rocher as soon as the contract expires by setting up in business outside his former exclusive territory, possibly in the territory of other Yves Rocher franchisees. Under the circumstances, this provision cannot be considered as restrictive of competition under Article 85 (1).

This assessment is without prejudice to the rights of franchisees under national law on termination of contract.

(49) The general sales promotion obligation imposed on franchisees, in that they undertake to devote all their energy and as much time as necessary to promoting the sale of Yves Rocher products and beauty treatments, and agree in consequence not to carry on any activities incompatible with those of their Centre does not in this case amount to a restriction of competition. The success of the distribution formula adopted by Yves Rocher depends on the presence and the personal commitment of the franchisee in the operation of the business, the franchisee being selected on the basis of his/her

personal qualities after having undergone appropriate training by Yves Rocher. Subject to this reservation, the clause does not prohibit the franchisee from carrying on a non-competing business provided the franchisee's personal commitment to the distribution of the Yves Rocher products is ensured.

(50) The right which the franchisee reserves to inspect franchisees' stock levels, accounts and balance sheets, is to enable the franchisor to verify, if the need arises, whether franchisees are discharging their obligations. Insofar as this right serves only to enable checks to be carried out on franchisees' compliance with obligations not covered by Article 85 (1), it likewise cannot be considered restrictive of competition without prejudice to any legal consequences under national law of interference by the franchisor.

In particular, the franchisor's right to inspect stock levels allows him to avoid the unduly long stocking of products which could affect their quality.

The Commission reserves its right to intervene in case these controls would be used by the franchisor to affect the freedom of the franchisees to fix their selling prices.

(51) The recommended prices shown on the catalogues issued by Yves Rocher to franchisees are legitimate, since franchisees remain entirely free to determine their own prices and since, during the procedure, no evidence has been found of any concerted practice between the franchisor and franchisees, or among franchisees, to the effect that the recommended prices should be applied [1].

No anti-competitive effects from the point of view of competing producers and distributors

(52) From the point of view of competing producers and distributors, the Yves Rocher network cannot have appreciable horizontal anti-competitive effects as against other brands in view of the large number of both producers and distributors of cosmetics.

(53) Although it is one of the leading European producers, Yves Rocher holds just over 5 % of the entire cosmetics market in only two Member States, and in its principal geographical market it controls no more than 15 % of one of the four market segments. Its 600 or so franchised retail outlets in France cannot, with the approximately 7 000 specialist retailers in that country, have the effect of freezing the structures of distribution and rendering access to the market appreciably more difficult for competing producers compared with the 100 000 general retail outlets in that country and the relatively large volume of their sales in each of the four categories of cosmetics. The same holds true for the other Member States, where the total number of Yves Rocher sales outlets is less than 500 and non-specialist retailers account for a similar proportion of the industry's sales.

Contractual obligations restrictive of competition

(54) On the other hand, Yves Rocher's selection of only one franchisee for a given territory within which the franchisee has an exclusive right to use the franchisor's identifying marks and know-how for the sale of Yves Rocher products in a Beauty Centre, the franchisor's undertaking not to establish a shop itself in the territory of each of its franchisees, combined with the prohibition on the opening by franchisees of a second shop stemming from the prohibition on using Yves Rocher's identifying marks in a location other than that specified in the contract, results in a degree of sharing of markets between the franchisor and the franchisees or between franchisees, thereby restricting competition within the distribution network.

(55) By virtue of such clauses, Yves Rocher's franchise contracts prevent franchisees from setting up in business in another Member State and may thus affect trade between Member States to an appreciable extent in view of the size of the Yves Rocher group, its market share — greater than 5 % in two of the Member States concerned — the reputation of its products, the expansion of the Yves Rocher chain of shops throughout a substantial part of the common market and the existence alongside that chain of a highly developed mail-order business. The notified contracts therefore fall within Article 85 (1).

B. Article 85 (3)

(56) Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eleminating competition in respect of a substantial part of the products in question.

[1] see Court of Justice of the European Communities 28. 1. 1986, Case 161/84 (Pronuptia), point 25.

(57) Commission Regulations No 67/67/EEC [1] and (EEC) No 1983/83 [2], as last amended by the Act of Accession of Spain and Portugal, on the block exemption of exclusive dealing and exclusive distribution agreements are not applicable to the standard form franchise at issue, the legal nature of which is different [3]. The franchise contracts go beyond mere distribution agreements, for the franchisor undertakes to grant rights to use its identifying marks and its proven trading methods with a view to the application of an original and changing distribution formula. It must therefore be decided whether the contracts at issue qualify for an individual exemption unter Article 85 (3).

(58) Yves Rocher's franchise contracts contribute to improving the distribution of the goods in question, since they help the producer to penetrate new markets by enabling him to expand his network without having to undertake any investment in the fitting-out of new shops. Moreover, the development of a chain of identical retail outlets strengthens competition *vis-à-vis* large retail organizations with a branch network. By its policy of selection and training, directed mainly at prospective franchisees with no experience of running a retail establishment selling beauty products, whose sales outlets thus supplement existing specialist sales outlets, Yves Rocher increases interbrand competition and accordingly improves the structure of cosmetics distribution.

(59) The close integration of independent traders within the Yves Rocher network leads to a rationalization of distribution through a standardization of trading methods covering every aspect of retailing. The direct nature — there being no wholesalers — of the relationship between franchisor and franchisees facilitates consumer feedback and the adjustment of supply to a constantly changing demand, the fickleness of which is a feature of the market concerned.

(60) The grant to franchisees of an exclusive territory, combined with the prohibition on setting up outside this territory, enables them to pursue a more intensive policy of selling Yves Rocher products by concentrating on their allotted territory, helped in this by the fact that the Yves Rocher retailing formula is based on a single brand. Territorial exclusivity also simplifies planning and ensures the continuity of supplies.

(61) The agreements at issue allow consumers a fair share of the benefit resulting from these improvements in distribution, as a wide range of the same cosmetics is more readily available in a number of Member States. Moreover, because they are running their own business and are therefore motivated by the desire for maximum efficiency, franchisees make dynamic and hard-working retailers, which is to the consumer's advantage. The homogeneity of the network, the standardization of trading methods and the direct link between franchisor and franchisee all ensure that the consumer benefits in full from the know-how passed on by the franchisor and ensure the quality and freshness of the products, which are liable to deteriorate rapidly with time. Lastly, Yves Rocher's policy of charging prices mid-way between those of specialist and non-specialist retailers helps to widen the circle of cosmetics users.

(62) Finally, the commercial practice of the Yves Rocher network and the civil liability insurance taken out by the Yves Rocher group and by franchisees ensure that any product which may be defective is replaced and that any damage which might be sustained as a result of using an Yves Rocher product or undergoing beauty treatment by a franchisee will be covered. Further, consumers will be in a position to know that they are dealing with independent traders whose individual liability may be called upon.

(63) Yves Rocher's contracts have not imposed any restrictions which are not indispensable to the attainment of the abovementioned objective since the resale-price-maintenance clauses and the prohibition on cross supplies between franchisees, which prevented the machinery for correcting price differences within the network from operating, were deleted from old contracts. The remaining obligations caught by Article 85 (1) are indispensable to the establishment of the network : none of the Yves Rocher franchisees would, in all probability, have agreed to undertake the investment needed to set up an independent business had he not been certain of receiving a degree of protection against competition from another Centre set up in his territory by the franchisor or another franchisee.

[1] OJ No 57, 25. 3. 1967, p. 849/67.
[2] OJ No L 173, 30. 6. 1983, p. 1.
[3] Case 161/84 (Pronuptia), points 15 and 33.

(64) The agreement between Yves Rocher and each of its franchisees does not afford them the possibility of eliminating competition in respect of a substantial part of cosmetics, as competition between franchisees is sufficiently ensured by the smallness of the exclusive territory allotted and the possibility for each franchisee to sell to any customer, from whatever area, entering his shop.

The loosening-up of the system, adjusted by Yves Rocher at the Commission's request, has brought about a degree of price competition within the network in that franchisees can now freely obtain supplies from any other franchisee and profit from any difference between the selling prices which Yves Rocher fixes in each Member State at a level somewhere between those charged by its major local competitors. Yves Rocher will be unable to prevent or hinder, on pain of revocation of the exemption pursuant to Article 8 (3) of Regulation No 17, recourse by franchisees to the transnational cross supplies which the price differences between certain Member States are likely to encourage, especially in the case of franchisees operating near national frontiers.

(65) Even the combined effect of all Yves Rocher franchise contracts is not enough to afford the network the possibility of eliminating competition between brands, in view of the breadth and competitive structure of the supply side and the modest share of the cosmetics market held by Yves Rocher.

(66) The provisions of Article 85 (1) may therefore be declared not applicable to the standard form Yves Rocher franchise contracts, under the terms of Article 85 (3). Accordingly it is not necessary to examine further the legal status of the Belgian franchisees. Assuming that they fall within the scope of Article 85 (1) they benefit from the exemption in any event.

C. Articles 6 and 8 of Regulation No 17

(67) The first franchise contracts concluded by Yves Rocher when its network was originally set up did not satisfy the requirements of Article 85 (3) in the form in which they were notified, in that they contained resale-price-maintenance clauses and a prohibition on cross supplies between Yves Rocher franchisees. These obligations have been deleted with effect from 1 December 1986 at the Commission's request. It is therefore possible, by virtue of Article 6 (1) of Regulation No 17, to make the date on which the exemption takes effect with regard to the old, amended contracts coincide with the date of coming into force of the amendments, namely 1 December 1986.

(68) The other contracts fulfilled the exemption conditions from the date on which they were notified, namely 15 January 1985. In accordance with the second sentence of Article 6 (1) of Regulation No 17, the exemption may take effect on that date with regard to these contracts.

(69) In view of the novel character of the notified standard form contracts and the speed at which the structure and methods of cosmetics distribution are liable to change, it is desirable to limit the period of validity of this Decision to 14 January 1992.

(70) Furthermore, it is appropriate that an obligation should be attached to the decision under Article 8 (1) of Regulation No 17, requiring Yves Rocher to communicate to the Commission each year the recommended sales prices and prices charged to franchisees for Yves Rocher products on the date of such communication in each Member State where the network is established. This obligation will permit the Commission to assess the economic interest of franchisees in making transnational cross sales which should in the normal course of things be brought about by price differences between Member States, and thus contribute, allowing a reduction in these differences, to allowing consumers a fair share of the benefit resulting from the improvement in distribution. The obligation imposed should also permit the Commission to evaluate the risk of direct or indirect obstacles, whether concerted or unilateral, to transnational cross deliveries, with a view to the possible application of Article 8 (3) of Regulation No 17,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable to the standard-form franchise contracts concluded by the Yves Rocher group for the retailing of its cosmetics within the Community.

Article 2

This Decision shall apply with effect from 15 January 1985. However, it shall apply only with effect from 1 December 1986 in the case of those standard-form

contracts which, until that date, contained resale-price-maintenance clauses and clauses prohibiting cross supplies between franchisees. It shall be valid until 14 January 1992.

Article 3

Société d'études de chimie et de thérapie appliquées (SECTA) laboratoires de Cosmétologie Yves Rocher shall send the Commission on 1 September each year its current recommended retail prices and prices payable by franchisees in the Member States in which the network is established.

Article 4

This Decision is addressed to Société d'études de chimie et de thérapie appliquées (SECTA) Laboratoires de Cosmétologie Yves Rocher, F-56201 La Gacilly.

Done at Brussels, 17 December 1986.

For the Commission

Peter SUTHERLAND

Member of the Commission