COMMISSION DECISION

of 11 January 1991

relating to a proceeding under Article 85 of the EEC Treaty

(IV/31.624 — Vichy)

(Only the French text is authentic)

(91/153/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard 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 4, 6 and 15 (6) thereof,

Having regard to the notification submitted on 29 August 1989 by Société d'Hygiène Dermatologique de Vichy concerning the agreements forming the basis of the system of selective distribution of Vichy cosmetic products in France and the system of exclusive sale through retail pharmacies employed in the other Member States,

After hearing the undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and the provisions of Commission Regulation No 99/63/EEC on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

Whereas :

I. THE FACTS

A. Subject of the Decision

(1) By letter dated 26 July 1985 Laboratoires d'Application Dermatologique de Vichy et Cie, a French subsidiary of Société d'Hygiène Dermatologique de Vichy (herinafter called Vichy), notified to the Commission a system, limited to France, of exclusive distribution of Vichy cosmetic products through retail pharmacists ('pharmacie d'officine'). Under the system, the grant of authorization as a distributor of Vichy products was subject to possession of a qualification as a dispensing chemist (hereinafter pharmacist). At that time, the French Conseil de la Concurrence was undertaking a review of such exclusive distribution systems employed by laboratories. The notification subsequently lapsed because the distribution system used in France was modified in the light of a decision of the conseil de la concurrence [3], which was upheld by the Paris Court of Appeal [4] and the court of Cassation [5]. The French authorities applied both domestic and European competition law and found that exclusive distribution through retail pharmacies infringed Article 85 (1) of the EEC Treaty. However, in France, producers may require sellers of cosmetic products in sales outlets other than retail pharmacies to have the technical qualification of a diploma in pharmacy.

(2) This modified distribution system for France was notified by Vichy by letter dated 29 August 1989. At the same time, a preliminary notification of the distribution system for the other Member States (with the exception of Denmark, where Vichy products are not distributed) was sent to the Commission. That notification still provides, outside France, for exclusive distribution through retail pharmacies.

(3) This Decision relates only to the system of exclusive distribution through pharmacies, in so far as it requires anything more than the professional qualification of a diploma in pharmacy. The selective distribution system employed in France and other clauses are not the subject of this Decision. They will be examined in the Commission's final Decision. The points covered will include the requirements as to the location of sales outlets, the display of products, the presence of comparable brands, the range that has to be stocked, storage, the production of invoices in the event of cross-supplies and the conditions governing the granting of annual discounts.

B. The parties

(4) Vichy is a wholly owned subisdiary of the L'Oréal group. In 1987 L'Oréal's turnover amounted to approximately ECU 3,4 billion, ECU 116,5 million of which was accounted for by Vichy.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.
[3] Decision No 87-D 15 of the conseil de la Concurrence of 9 June 1987.
[4] Judgment of the Paris Court of Appeal of 28 January 1988.
[5] Judgment of the Court of Cassaton of 25 April 1989.

(5) Vichy's authorized distributors are :

— pharmacists who have entered into a contractual relationship (either by means of written distribution agreements or by the continuing use of general conditions of sale) with Vichy's general agents or wholesaler-distributors ;

— wholesaler-distributors bound either by wholesaler agreements (exchanges of letters) or by the general conditions of sale.

C. The products

(6) Vichy cosmetic products form a full range of face-care and body-care products. The range does not include perfumes.

(7) There is a difference between a cosmetic product and a medicinal product. The marketing of cosmetics does not require any precautions over and above those provided for by domestic and community legislation concerning checks to ensure that such products are not harmful. Such checks cannot be carried out by the pharmacist becasue he does not know the exact composition of the product.

(8) Vichy has not challenged the Commission's finding that the choice of distribution method, namely exclusive distribution through retail pharmacies, is not based on any technical or qualitative superiority of Vichy products compared with cosmetics ditributed by L'Oréal through other distribution channels such as perfumeries or general stores. Despite the fact that, compared with cosmetics sold through general stores, the Vichy range is wider and more varied, it is less so than the ranges of luxury cosmetics sold in perfumeries.

D. Prices

(9) According to figures given by Vichy for 1988, the average selling prices to retailers differ from one Member State to another, ranging from FF [...](6) (Portugal) or FF [...] (United Kingdom) to FF [...] (Germany) or FF [...] (Netherlands). This corresponds to a price differential of approximately 2 : 3 of 100 : 171. Up to the time of notification, Vichy's general agents made selling-price recommendations to pharmacists. Such prices were generally double the average selling price to retailers.

E. Vichy's distribution system

(10) The functioning of the exclusive distribution system is ensured by a kind of 'distribution network safeguard clause' which obliges distributors to sell only to authorized distributors or to distributors who agree in writing to comply with the same obligation. The clause is contained either in individual distribution agreements (Germany) and in agreements based on exchanges of letters with wholesalers (Belgium and Luxembourg) or in the general conditions of sale printed on the back of invoices, on order forms or on price lists (other Member States). As far as cross-supplies within the network are concerned, an 'EEC clause' in the agreements and general conditions permits pharmacists to supply products only to other pharmacists in other Member States.

F. The market in cosmetics

(11) Cosmetic products include beauty products and toiletries, hair-care products and perfumes. The products are sold through four different distribution channels :

— general stores (supermarkets, hardware stores ('drogueries'), department stores),

— selective distribution (perfumeries and large luxury stores),

— retail pharmacies,

— direct sale (notably by mail order).

Cosmetic products are sold under a multitude of brand names. As a rule, each brand is assigned a specific distribution channel. Brands sold in retail pharmacies are not found in perfumeries or general stores. Some producers, namely those which offer a wide variety of products, such as L'Oréal, choose the channel according to the prestige of their brands. Vichy has pointed out that new and innovative products are as a rule distributed first of all through pharmacies. Once consumers have grown accustomed to them, they are distributed on a wider scale (under other names) through general stores and luxury perfumeries. The length of the transitional phase of sale thorugh pharmacies seems to differ considerably from one product to another and appears to be growing shorter.

(6) In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

(12) According to a study ordered by the Commission (7), the segmentation into distribution channels corresponds to a difference between average prices for given products. A product intended for a given use is thus often sold in general stores as brand A at a price of 100, in retail pharmacies as brand B at a price of 150 to 200, and in perfumeries as brand C at a price of 300 to 400.

(13) As a percentage of total cosmetic sales, sales through retail pharmacies accounted in 1987 for 4,8 % in Germany, 9 % in France, 16,5 % in Italy and 44,1 % (of which 33 % Boots) in the United Kingdom. Statistics supplied by Vichy show a slight fall-off in sales thourgh pharmacies in France. In Germany, by contrast, the proportion of sales accounted for by pharmacies has grown more rapidy than the market as a whole.

(14) The share held by Vichy of sales through pharmacies is [...] % in France, [...] % in Germany, [...] % in Italy and [...] % in the United Kingdom.

G. National rules concerning retail pharmacies and parapharmaceutical products

(15) A person is required to have the technical qualification of a diploma in pharmacy in order to set up as a pharmacist. In eight Member States (Belgium, France, Italy, Spain, Greece, Luxembourg, Portugal and Denmark) the right of establishment is limited in that the number of retail pharmacies is linked to a certain number of inhabitants and/or to a certain geographical distance between such shops. In Germany, Ireland, the United Kingdom and the Netherlands, the right of a holder of a registered pharmaceutical chemist's certificate to open a retail pharmacy is not subject to any quantitative restrictions. In the United Kingdom and Ireland there is no absolute monopoly of the distribution of medicinal products. Numerous medicinal products are sold through outlets other than pharmacies (e.g. drugstores).

(16) In all Member States, pharmacists are entitled to sell parapharmaceutical products. In five Member States (Belgium, Germany, Italy, France and Portugal) there is an exhaustive list of permitted parapharmaceutical products, while in the other Member States pharmacists are free to sell products other than medicinal products within the limits of professional ethics.

In most Member States, there are rules of professional ethics which impose restrictions on pharmacists in relation to their competitive behaviour. Certain restrictions, such as the prohibition on advertising outside the pharmacy or announcing special offers or discounts, apply, with slight differences from one Member State to another, also to parapharmaceutical products.

(7) Selective distribution systems in the Community from the point of view of competition policy. The case of perfumes and cosmetic products. André-Paul Weber, CERESSEC 1988 (in French).

II. PRELIMINARY ASSESSMENT UNDER ARTICLE 85 (1) OF THE EEC TREATY

In the light of the facts currently available, the Commission is not carrying out a final assessment of the agreement notified, but has reached the following conclusions following a preliminary assessment.

(17) The distribution agreements concluded between Vichy's general agents and the wholesaler-distributors or pharmacist-retailers are agreements between undertakings within the meaning of Article 85 (1). The same applies to the general conditions of sale printed on the back of invoices, on order forms and on price lists. The repeated use of such documents means that Vichy's distributors have implicitly approved and accepted them and that they therefore constitute a prior general agreement applicable to the innumerable individual orders placed (Judgment of the Court of Justice of 11 January 1990 in Case C-277/87 — Sandoz, paragraph (12). The distribution agreements and the general conditions of sale contain a clause stipulating that authorization as a distributor of Vichy products is dependent on being a pharmacist and that, consequently, the distributors are obliged to sell only to pharmacists.

(18) The agreement has the object and effect of restricting competition within the common market:

(a) In the selective distribution system in question, the selection of the reseller on the basis of his being a pharmacist does not comply with the criteria which the Court of Justice has deemed to be in line with Article 85 (1) in numerous cases (8) and, in particular, as regards cosmetic products, in the L'Oréal — De nieuwe Amck case (9). By making authorization of distributors subject to being a pharmacist, Vichy does not use an objective criterion of a qualitative nature to define the professional qualification of the seller or his staff. The diploma in pharmacy attests to the fact that the holder is deemed to

(8) Case 26/76 Metro I [1977] European Court Report 1875; Case 253/78 Giry and Guerlain [1980] European Court Report 2327; Case 99/79 Lancôme Etos [1980] European Court Report 2511; Joined Cases 25 and 26/84 Ford [1985] European Court Report 2736; Case 75/84 Metro II [1986] European Court Report 3021; Case 243/83 Binon [1985] European Court Report 2015.

(9) Case 31/80 [1980] European Court Report 3775.

have all the necessary professional knowledge in pharmacology, biology, toxicology and dermatology to run a pharmacy. However, Vichy does not accept such professional qualifications as being sufficient for the purposes of providing the advice which Vichy is concerned to give its customers.

(b) The requirement to sell only through a pharmacy adds to the professional qualification element an addition a factor that restricts the number of potential sellers in a quantitative and not qualitative manner.

Although the number of pharmacists is fairly high in most of the Member States, eight of the 12 Member States apply a quantitative ceiling to the establishment of pharmacies. In the case of Binon/AMP (cited footnote 7) the Court of Justice held the criterion of the selection of sellers based on a minimum number of inhabitants per point of sale to be quantitative. It would be the same if selection is made indirectly by restricting sale to a certain type of outlet where establishment is restricted.

(c) Contrary to what Vichy claimed at the hearing, the producer's freedom of choice in determining the way in which his products are distributed must remain subject to the principle of proportionality between the properties of the product and the selection criteria imposed by the producer, a condition required by the Court of Justice in L'Oréal ([10]).

Even if the 'sale through pharmacies' criterion were deemed to be an objective criterion of a qualitative nature, it would have to be acknowledged that the criterion imposed goes beyond what is necessary for maintaining quality and ensuring proper use of the product.

The national and Community rules governing cosmetic products ensure that they do not pose any danger to consumers' health and that their marketing does not require any additional precautions such as those applying to pharmaceutical products. According to Vichy, the range of Vichy cosmetic products is wider and more varied than the cosmetics sold in general stores, but otherwise there if no real and objective qualitative or technical difference between them.

Vichy's concern to offer its customers advice identical to that provided for the use of pharmaceutical products cannot thus be regarded as a necessity deriving from the properties of the product, but must be regarded as a marketing strategy intended to create and maintain a brand image that benefits from the good name and reputation of pharmacists in terms of health and safety.

In this respect, it should be noted that L'Oréal's top-range brands sold in luxury perfumeries not by sales staff holding scientific diplomas, but by staff professionally qualified as beauticians, comprise ranges even more wide and varied than the Vichy range.

(d) Vichy has not been able to show plausibly that the professional qualification of pharmacist is superior to that of a person holding a pharmacy diploma in terms of the knowledge required to give qualified advice to purchasers of cosmetics. According to Vichy, a pharmacist is more competent than the holder of a pharmacy diploma because his knowledge in the field of health is being constantly renewed, since his main activity is the sale of pharmaceutical products, he has a scientific approach, and he acquires experience through being in permanent and personal contact with customers. Starting from the same level of professional knowledge based on the diploma, there are no obvious reasons why it would not be in the employed pharmacist's interest to continue to develop the knowledge necessary for providing scientific advice to consumers of cosmetics. An employed pharmacist will, on the contrary, have the advantage of being able to concentrate on and specialize in dermatological and cosmetological problems. Professional experience and contact with customers must be acquired in the same way by a pharmacist starting out in a dispensing chemist's shop as by a diploma holder who begins to sell cosmetics in a shop.

The influence of rules of professional ethics, to which Vichy referred during the hearing, is of little or no relevance in terms of professional knowledge.

(e) Vichy put forward a whole series of arguments on the advantages of chemists' shops as compared with other distribution channels, such as the setting, which ensures an atmosphere of seriousness and confidentiality, the practical organization of pharmacies (complete range in stock or rapid delivery), the lack of scope for tampering with products, the possibility of immediate withdrawal of products if necessary and the nature of the pharmacy as a place of dialogue rather than of transit.

([10]) Ibid.

However, these advantages do not derive from the professional qualification of the pharmacist, but from the characteristics of pharmacies as an institution and a trade. These arguments are therefore based on criteria of a quantitative nature.

(f) The distinction between the professional qualification certified by the diploma in pharmacy and the position of pharmacist, which comprises additional elements, is not an artifical assessment criterion, as Vichy claims. On the contrary, it is fundamental to the distribution system which Vichy and other cosmetics producers apply in France.

Since the selection criterion applied by Vichy is not in line with the criteria specified by the Court of Justice, the agreements, which exclude any form of marketing other than through pharmacies, have the object and effect of restricting competition.

(19) The agreement restricts competition and affects trade between Member States to an appreciable extent.

Without a restriction of this type, it must be expected that there would be a substantial increase in trade between Member States as a result of the increase in the number of sales outlets and the differences in average selling prices to retailers, which vary by up to 30 % from one Member State to another. Sellers other than pharmacists would have greater resources and expertise in using price differentials between Member States in order to carry out parallel imports, particularly where they specialize in the sale of cosmetics.

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 thourgh 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.

(20) Following a preliminary examination, it must therefore be concluded that the agreements infringe Article 85 (1) of the EEC Treaty in that they provide for exclusive distribution through pharmacies. This conclusion is in line with the result of the examination of Article 85 (1) carried out by the Paris Court of Appeal ([11]) and with the view taken by the Commission in Decision 90/33/EEC (APB) ([12]).

III. PRELIMINARY ASSESSMENT UNDER ARTICLE 85 (3) OF THE EEC TREATY

(21) Examination of Article 85 (3) must include the advantages which Vichy says are specific to the distribution channel through pharmacies and which may be summarized as follows:

(a) pharmacists guarantee the availability of a complete set of products from the range, if not through a complete stock, then at least through the rapid supplying of pharmacies by a service for distributing pharmaceutical products operated by the pharmaceutical wholesalers and through assistance provided by one pharmacist to another;

(b) the role of the pharmacist allows the manufacturer, who takes the risk of investing large sums in the development of new products, to be sure of the support of the pharmacist in successfully launching such new products;

(c) the transitional phase of sale of innovative products through pharmacies, where use is made of the educative role of the pharmacist, makes it possible, once consumer habits have been established, to market similar products under other brand names through other distribution channels, notably through general stores;

(d) the consumer benefits from having a choice between the pharmaceutical channel and other channels, each of which has different advantages;

(e) the distribution of innovative cosmetic products in such a way as to ensure both industrial and commercial success would not be possible unless advice were available to customers when making their choice. The sale of Vichy products is therefore inextricably linked with the advice provided by the pharmacist.

([11]) See footnote 4.
([12]) OJ No L 18, 23. 1. 1990, p. 35.

(22) At the present stage of proceedings, the question whether the advantages deriving from the professional qualification of the pharmacist, (e.g. advice for the customer, information feedback to the producer) meet the conditions for exemption does not yet have to be decided on, given the limited scope of this Decision.

(23) The appraisal of Vichy's arguments has to take account of the fact that there is no question of prohibiting the distribution of Vichy products through retail pharmacies. As long as the proceedings are confined to the system of exclusive distribution through pharmacies, the least radical alternative from Vichy's point of view would be to allow a limited opening- up of access to the distribution network. Retail pharmacists would then not in any way be prevented from continuing to sell Vichy products on a non-exclusive basis, and Vichy would remain free to impose qualitative selection criteria, such as a diploma in pharmacy, for sales outlets other than retail pharmacies.

(24) Advantages (a) to (e) referred to in recital (21) are not such as to be able to improve production.

(25) In the first place, the improvement in distribution referred to in point (a) of recital (21) cannot be regarded as valid, since the efficient organization of supplies through the pharmaceutical channel is not a result of the agreement. The service is operated in order to ensure that the population at large is supplied with pharmaceutical products. In addition, the requirement that the complete range should be sold is not a condition for authorization and does not even appear in the general conditions of sale. Even in sales outlets other than retail pharmacies, these distribution advantages may be achieved by means of contractual obligations.

(26) A promotion of technical or economic progress, such as is implied by point (b) of recital (21), cannot be claimed on the basis of the fact that exclusive sale is in the particular economic interest of Vichy with a view to recovering investment costs. Furthermore, Vichy is in no way deprived of the support of pharmacists in ensuring the successful launch of innovative products.

(27) Point (c) of recital (21) put forward by Vichy, which also relates to the promotion of technical and economic progress, is contradicted by the fact that products are subsequently marketed through non-pharmaceutical channels under other brand names. *Prima facie,* this 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 on the general market.

(28) Vichy's arguments relating to the improvement of distribution and the promotion of technical or economic progress cannot be regarded as allowing consumers a fair share of the benefits. The fact that products of the same nature are marketed under different brand names through different channels does not allow the consumer to make an objective choice. If the products were not distributed exclusively through retail pharmacies, the consumer would have a wider choice, without being deprived of the possibility of purchasing products through pharmacies should he wish to have the advice of a pharmacist.

(29) Furthermore, it should be pointed out that exclusive distribution through retail pharmacies does not appear to be essential in order to achieve the advantages referred to above (points (a) to (e) of recital (21)). There is nothing to prevent Vichy from continuing to sell its products on a non-exclusive basis through pharmacies and thus to achieve such advantages.

(30) Because of the influence of pharmacist's ethical and professional rules, the role of intra-brand competition within the pharmaceutical distribution channel remains limited. Vichy has not been able to show that inter-brand competition, either within the pharmaceutical network or from one distribution channel to another, would be sufficiently strong to counterbalance the lack of any intra-brand competition.

(31) After preliminary examination of the conditions of Article 85 (3), it must therefore be concluded that the provisions of Article 85 (1) cannot be declared inapplicable to the agreement.

IV. APPLICATION OF ARTICLE 15 (6) OF REGULATION No 17

(32) In its judgement of 28 January 1988 ([13]), the Paris Court of Appeal held that the Conseil de la Concurrence had rightly taken the view that the agreements in question, namely the exclusion of any form of marketing other than through pharmacies, were caught by Article 85 of the Treaty of Rome. The judgement was upheld by the French Cour de Cassation.

As from December 1988, Vichy was aware that a complaint, lodged on 13 May 1988 by the German company Cosimex against its system of exclusive distribution through pharmacies, was under examination.

([13]) See footnote 4.

In Decision 90/33/EEC (APB) [14], the Commission pointed out in recitals (28) and (29) that exclusive sale in pharmacies restricted competition in respect of the distribution of parapharmaceutical products in Belgium and in addition prevented the agreement as notified from being exempted under Article 85 (3).

After having, in France, come into line with Community law by extending distributor authorization to holders of a diploma in pharmacy, Vichy notified the new distribution system for France in August 1989. At the same time, by contrast, in respect of the other Member States (except Denmark), Vichy notified the system of exclusive distribution through pharmacies unchanged. However, Vichy has not put forward any arguments justifying, under Article 85, the coexistence of two different distribution systems within the common market.

Given this situation, the Commission considers that maintaining exclusive distribution through pharmacies in 10 Member States constitutes a clear and serious infringement of Article 85. A final Commission decision could subsequently be adopted after detailed examination of the whole of the two systems notified by Vichy.

Accordingly, a Commission communication within the meaning of Article 15 (6) is called for. In accordance with Article 15 (6) of Regulation No 17, this Decision suspends, in respect of exclusive distribution through pharmacies, the immunity against the imposition of fines which is normally granted by the notification of an agreement,

HAS ADOPTED THIS DECISION:

Article 1

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 chemist, Article 85 (1) of the EEC Treaty applies and that application of Article 85 (3) is not justified.

Article 2

This Decision is addressed to Société d'Hygiène Dermatologique de Vichy, 28 Rue du Président Wilson, F-03201 Vichy, France.

Done at Brussels, 11 January 1991.

For the Commission

Leon BRITTAN

Vice-President

[14] See footnote 12.