II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 December 1991

relating to a proceeding under Article 85 of the EEC Treaty

(IV/33.242 — Yves Saint Laurent Parfums)

(Only the French text is authentic)

(92/33/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 Febraury 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 application for negative clearance or, alternatively, exemption submitted by Yves Saint Laurent Parfums SA on 6 July 1989 in respect of the standard-form selective distribution contracts which the company has drawn up for the retail sale of its products in the European Economic Community,

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

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. The undertakings

Yves Saint Laurent Parfums SA, Neuilly-sur-Seine (France), is wholly owned by Yves Saint Laurent SA, whose activities include the manufacture and marketing of luxury cosmetic products (perfumery, skin care and beauty products), through Yves Saint Laurent Parfums, and haute couture and high-quality ready-to-wear clothing, through Yves Saint Laurent Couture. Yves Saint Laurent SA is, in its turn, wholly owned by Groupe Yves Saint Laurent, a partnership limited by shares. The net turnover of Groupe Yves Saint Laurent in 1988 was FF 2 633 million, of which FF 2 261 million derived from the sale of cosmetic products. The retail sale of Yves Saint Laurent Parfums cosmetic products in the Member States is carried out by a network of authorized retailers, whose contractual conditions are laid down in the agreements to which this proceeding relates.

B. Distribution structure and position of Yves Saint Laurent Parfums on the market

Cosmetic products cover a wide variety of articles intended for many different uses and include in particular perfumery, skin care and beauty products and hair-care and toiletry products. A study carried out for the Commission [3] confirms that, within the overall category of cosmetic products, luxury products constitute a specific

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 320, 20. 12. 1990, p. 11.

[3] 'Les systèmes de distribution sélective dans la Communauté du point de vue de la politique de la concurrence : le cas de l'industrie des parfums et des produits cosmétiques', André-Paul Weber 1988.

market segment. Luxury cosmetic products are high-quality articles, sold at a relatively high price and marketed under a prestige brand name. The extent to which they are substitutable for similar products falling within other market segments in generally limited.

The segmentation of the sector is accompanied by differentiation in distribution channels: cosmetic products are marketed, under various brands, either thorugh authorized retailer networks (perfumeries and department stores), or through pharmacies and similar establishments, or through general and mass marketing outlets (supermarkets, 'drogueries' selling household products and toiletries grocery shops, etc.), or through direct sale (mail order, etc.).

Generally speaking, luxury cosmetic products, particularly top-of-the-range perfumery, skin care and beauty products, are sold only through retailer networks. According to the abovementioned study, products marketed in this way accounted, in 1987, for 24,7 % of all cosmetic products sold in the Federal Republic of Germany, 30,3 % in France, 36,2 % in Italy and 22,4 % in the United Kingdom.

On the supply side, the number of both producers and distributors of luxury cosmetic products is fairly large. The structure of the Community industry is marked by the presence of firms of relatively modest size coexisting alongside large firms. In addition, some companies form part of groups which, directly of indirectly, control several firms operating in the sector. By contrast, distribution is relatively homogeneous in structure, with each producer distributing its top-of-the-range articles only through networks of selected retailers whose distribution agreements are based on comparable provisions.

Yves Saint Laurent Parfums is one of the main luxury cosmetic products producers. It is not linked, either directly or indirectly, to any other competing ocmpanies. In 1987, it held 8,7 % of the Community market in luxury perfumery products and less than 5 % of the Community market in luxury skin care and beauty products. Its market shares that year were higher in certain Member States such as France, the United Kingdom, Spain and Belgium. A substantial proportion of the turnover of Yves Saint Laurent Parfums derives from its sales in Member States other than France.

Yves Saint Laurent Parfums distributes its products within the common market through a network of some 8 000 authorized retail outlets, which, in France, are supplied direct by Yves Saint Laurent Parfums and, in the Member States, are supplied through the intermediary of its subsidiaries or independent companies acting as exclusive agents.

C. The network of notified agreements

The distribution network notified by Yves Saint Laurent Parfums is based on:

— the standard-form authorized retailer contract binding Yves Saint Laurent Parfums to its specialized retailers established in France, and on the general conditions of sale attached to it;

— the standard-form authorized retailer contract binding the exclusive agents of Yves Saint Laurent Parfums, either subsidiaries or independent companies, established in a Member State other than France, to their specialized retailers, and on the general conditions of sale attached to it.

These standard-form contracts have undergone certain amendments in response to comments made by the Commission, and they entered into force in their amended form on 1 June 1991. Essentially, the two types of standard-form contract comprise similar provisions, whose content is as follows:

(a) *Selection criteria*

The only retailers admitted into the selective distribution network are those approved by Yves Saint Laurent Parfums or by its exclusive agents on the basis of the selection criteria set out below.

(i) Authorized retailers, or their sales staff, must have a professional qualification in perfumery, in the form of a beauty specialist's diploma or a professional perfumery training certificate issued by a recognized Chamber of Commerce and Industry or at least three years' sales experience in perfumery. In addition, authorized retailers undertake to have their staff attend the training sessions organized by Yves Saint Laurent Parfums and to provide, in their retail outlets, adequate advisory and demonstration service for customers.

(ii) The location, name and fittings of the retail outlet must reflect the prestige of the Yves Saint Laurent Parfums brand. In particular, the quality of the outlet is assessed by reference to the nature, standing and external appearance of the other shops in the immediate neighbourhood and the facade, shop window size and decoration, sales area, lighting, floor, furniture, fixtures and fittings of the shop. If another activity is carried on in the retail outlet, the eligibility of the application for the opening of an account is also assessed in the light of the scale of such other activity, the external and internal presentation and separation of the two activites and the competence of the staff allocated to the sale of Yves Saint Laurent products.

(iii) The retailers are prohibited from offering for sale on their premises any goods whose proximity might detract from the brand image of Yves Saint Laurent.

(iv) The area set aside for the sale of Yves Saint Laurent products must not be disproportionate to the number of brands sold. In addition, it must allow the authorized retailer to provide, having regard to the other brands represented, a location reflecting the prestige of the Yves Saint Laurent brand and allowing it to be identified by the consumer.

(v) Authorized retailers must display and sell Yves Saint Laurent products only on the premises covered by the contracts and must refrain in particular from selling them by mail order. They also agree to sell the products only in their original packaging and not by weight, capacity or otherwise.

(vi) Authorized retailers agree to hold a stock in hand comprising two thirds of the references of each of the ranges marketed by Yves Saint Laurent Parfums and at least one product of each of these references. They also agree to present customers products which are always in a perfect state of freshness and preservation and to ensure an annual rotation in the stock in hand corresponding to the application of a minimum rotation factor of two.

(vii) Authorized retailers are required to promote the image of the Yves Saint Laurent brand, notably by having available within their shops new products launched by Yves Saint Laurent Parfums, by endeavouring to participate in the various promotion activities and by displaying within their shops and the shop windows the advertising material, display units and products of Yves Saint Laurent.

(viii) Authorized retailers agree to achieve in the retail outlets covered by the contracts a minimum amount of annual purchases either from the exclusive agent for Yves Saint Laurent products in the country in which the retail outlet is situated or directly from Yves Saint Laurent Parfums if the retail outlet is situated in France. This condition applies both to the admission and the maintenance of the retailer in the network. The purchase figure is set annually by Yves Saint Laurent Parfums, or, where appropriate, by its excusive agents, in such a way that its amount does not exceed 40 % of the average purchase figure achieved the previous year by all the retail outlets situated within a Member State.

(b) *Procedure for admission to the distribution network*

In their original version, the general conditions of sale attached to the contract concluded with authorized retailers established in France provided that each application for the opening of an account would, as from its receipt, be entered on a regional (departmental) waiting list. Each application was to be dealt with in the order in which it was entered on the list, but the decision to grant applications was taken only where the opening of a new account was regarded by Yves Saint Laurent Parfums as justified in terms of the economic potential in the area in question. Although the contracts concluded with authorized retailers in Member States other than France did not provide for the establishment of such a system of waiting lists, the opening of a new account was subject in practice to similar considerations of economic opportuneness. In response to comments made by the Commission, Yves Saint Laurent agreed to amend its contracts with effect from 1 June 1991, with the existing waiting lists having to be used up during a transitional period ending on 31 May 1992.

Under the new provisions, which apply to the entire territory of the EEC, receipt of an application for the opening of an account is followed by an inspection of the retail outlet to determine whether it meets the qualitative selection criteria. Yves Saint Laurent Parfums (or, where appropriate, its exclusive agent) undertakes to carry out such an inspection within an average period of three months and a maximum of five months as from the date on which the application is made for the opening of an account. Such average period of three months has to be understood as the mathematic average of the duration relating to inspections carried out within each period of reference. Thereafter, if the application does not come anywhere near meeting the qualitative criteria, Yves Saint Laurent Parfums (or, as the case may be, its exclusive agent) informs the applicant in writing that its application has been rejected, specifying the points that do not comply with the criteria. Conversely, if the application is capable of meeting the qualitative selection criteria subject to certain work being carried out in the retail outlet, the applicant is informed accordingly in writing and, if the work is carried out within a period of three months (which can be extended up to six upon request of the applicant), its account will be opened within a maximum period of nine months from the date of the inspection. Lastly, if the application meets entirely the qualitative selection criteria, the applicant is informed accordingly in writing and its account will be opened within a period of nine months as from the date of inspection.

(c) *Freedom of cross supplies between members of the distribution network*

In respect to the comments made by the Commission, Yves Saint Laurent Parfums amended some of the provisions in the standard-form contract intended for authorized retailers established in Member States other than France, in so far as such provisions restricted the ability of such authorized retailers to resell Yves Saint Laurent products to network members established in the same country as themselves. The new provisions now provide that, as under the standard-form contract applicable in France, each authorized retailer may resell Yves Saint Laurent products to any other authorized retailer established in any Member State, including the country in which he is himself established. The new provisions also stipulate that each authorized retailer is free to obtain supplies from other authorized retailers or exclusive agents of Yves Saint Laurent Parfums established in any Member State.

Exercise of this right is subject to the following conditions :

(i) Before reselling Yves Saint Laurent products to other network members, authorized retailers must ensure that the purchasers are indeed authorized Yves Saint Laurent Parfums retailers. They undertake to check this under their entire responsibility and to consult Yves Saint Laurent Parfums where there is doubt as to the status of the purchaser.

(ii) Authorized retailers must keep copies of the invoices of such resales for one year. Yves Saint Laurent Parfums (or, where appropriate, its exclusive agent) may consult them only where it has grounds for believing that a retailer is reselling Yves Saint Laurent products outside the authorized retail network. Authorized retailers obtaining supplies from other network members are subject to similar provisions. In response to comments made by the Commission, Yves Saint Laurent Parfums deleted provisions under which authorized retailers had to communicate systematically to Yves Saint Laurent Parfums (or, where appropriate, to its exclusive agents) copies of the invoices or vouchers for each resale to or supply from other authorized retailers.

(iii) Only the value of the orders invoiced by Yves Saint Laurent Parfums (or, where appropriate, by its exclusive agent) is taken into account in calculating the authorized retailer's minimum annual purchases figure. So as to maintain the freedom of cross supplies between network members, Yves Saint Laurent Parfums agreed to delete certain provisions in the agreement under which the amount of the price paid by the authorized retailer to Yves Saint Laurent Parfums (or to its exclusive agent) for the purchase of products subsequently resold to another network member was not taken into account in calculating the abovementioned minimum purchases figure.

(iv) Any authorized retailer on whose territory a new Yves Saint Laurent product has not yet been launched undertakes, so as to avoid adversely affecting the campaigns for the launch of the new product, not to engage in the active sale of the new product for a period of one year as from the date when the new product is first launched in a Member State. In this respect, the standard-form contracts notified provided initially for an export ban applicable during the first year of the official launch of the new product in a Member State. Yves Saint Laurent Parfums amended this clause along the above lines in response to comments made by the Commission.

(d) *Closed distribution network*

Authorized retailers agree not to sell to or obtain supplies from any wholesaler or retailer not included within the Yves Saint Laurent Parfums distribution network. For its part, Yves Saint Laurent Parfums undertakes to market products bearing the Yves Saint Laurent brand name only in retail outlets which meet the conditions stipulated in the selective distribution contract.

(e) *No imposed prices*

The standard-form contracts notified provide expressly that authorized retailers are free to set the resale prices of their products.

(f) *No ban on competition*

Authorized retailers may obtain supplies of articles similar to the articles covered by the contract from competing producers.

(g) *Duration of the contracts*

The contracts are concluded for a specific term, normally one year. They may be terminated before the end of their term, with or without notice having been given, where authorized retailers do not abide by their contractual obligations or where they cease to be responsible for the actual running of their businesses, subject to the rights of their directly descendant heirs. However, where the operator or owner of an authorized retail outlet ceases to operate his sales outlet, Yves Saint Laurent Parfums undertakes to inform the new owner or operator, within a maximum period of three months, whether he meets the professional criteria

required for authorization. If such is the case, he will be authorized without delay. The procedure for admission to the distribution network, as described in point C (b) above, does not apply to the periodic renewals of the distribution contract.

D. Comments from third parties

Following publication of a summary of the content of the notified agreements, pursuant to Article 19 (3) of Regulation No 17, the Commission received a large number of comments from interested third parties.

Citing the need to ensure the homogeneity and tightness of the distribution networks, some producers and associations of producers criticized the approach adopted by the Commission, notably as regards the introduction of a system of automatic admission of new resellers into the network and the arrangements governing resales between authorized retailers. On the other hand, while not disputing the need to have selective distribution for the products in question, some distributors and associations of distributors expressed reservations on the following main points :

— the vagueness of the criteria governing determination of the figure for minimum annual purchases, an excessive increase in which could impede the penetration of competing brands, especially if they are new or not well-known on a given market;

— the duration of the periods provided for under the procedure for admission to the distribution network, which were considered to be too long and, in the particular case of the disposal of a business, not justified ;

— the vagueness of certain qualitative criteria, which could result in the selection of retail outlets being discretionary and could hamper the development of new forms of distribution.

Among the undertakings operating in the non-specialized distribution field, some questioned the need for selective distribution of the products in question. Conversly, the consumer associations which submitted comments do not dispute the principle of selective distribution for luxury perfumery products ; however, they stress that, while consumers prefer such products to be sold only in high-quality retail outlets by qualified staff, they do not want such a requirement to result in an undue restriction in the number of retail outlets or in an arbitrary limitation in the number or type of products available to the public.

In the light of all the comments received, the Commission got Yves Saint Laurent Parfums to amend the standard-form contracts with regard to the criteria governing the setting of the figure for minimum annual purchases (see C (a) (viii)), the requirement that the producer should give reasons for any refusal of authorization (see C (b)) and the procedure applicable where are business is transferred (see C (g)). The other points raised by other interested third parties are dealt with in the legal assessment below.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the Treaty

1. Under Article 85 (1), 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 are prohibited as incompatible with the common market.

2. The standard-form contracts notified, which cover relations between Yves Saint Laurent Parfums or, as the case may be, its exclusive agents and the various authorized retailers established within the common market, provide for arrangements for cooperation between legally independent undertakings and constitute agreements between undertakings within the meaning of Article 85 (1).

3. The selective distribution contracts notified by Yves Saint Laurent Parfums impose on the authorized retailers the requirement that they must resell the products covered by the contract only to final consumers or to other members of the Yves Saint Laurent Parfums network. For their part, Yves Saint Laurent Parfums and its exclusive agents undertake not to supply products bearing the Yves Saint Laurent brand name to distribution undertakings not forming part of such network. These obligations constitute restrictions of competition, since access to the Yves Saint Laurent Parfums distribution system is granted exclusively to traders who not only fulfil certain general professional and technical conditions, but are in addition willing to enter into subsequent commitments and to provide special services.

4. As the Court of Justice has pointed out (Case 107/82 AEG v. Commission (1983) ECR 3151, ground 33), agreements constituting a selective distribution system necessarily affect competition in the common market. However, it has always been recognized that certain products which are not ordinary products or services have properties such that they cannot be properly supplied to the public without the intervention of specialized distributors. A system of selective distribution may thus constitute an element of competition which is in conformity with Article 85 (1), if it is es-

tablished that the properties of the products in question necessitate the establishment of such a system in order to preserve their quality and ensure their proper use (Case 31/80 L'Oréal v. De Nieuwe [1980] ECR 3775, ground 16) and provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (Case 26/76 Metro v. Commission [1977] ECR 1875, ground 20).

5. In this instance, the contracts underlying the network for the selective distribution of Yves Saint Laurent Parfums products are not covered by Article 85 (1) in so far as they are limited to establishing, for access to distribution, qualitative criteria of a technical and professional nature laid down in a uniform manner for all potential resellers and in so far as such criteria are not applied in a discriminatory manner.

The articles in question are high-quality articles based on specific research, which is reflected in the originality of their creation, the sophistication of the ranges marketed and the qualitative level of the materials used, including their packaging. Their nature as luxury products ultimately derives from the aura of exclusivity and prestige that distinguishes them from similar products falling within other segments of the market and meeting other consumer requirements. This characteristic is, on the one hand, closely linked to the producer's capacity to develop and maintain an up-market brand image and, on the other, depends on appropriate marketing that brings out the specific aesthetic or function quality of each individual product or line of products. This is all the more necessary as there exists, on the luxury cosmetic products market, a considerable number of competing brands and since, as a general rule, each retailer sells a wide range of brands. In this respect, it should be noted that, far from aiming at ensuring exclusive representation of Yves Saint Laurent products, the selective distribution system notified is on the contrary based on Yves Saint Laurent Parfums articles being sold alongside other competing high-quality brands.

Accordingly, having specialized technical advice available in the retail outlet is a legitimate requirement in so far as the knowledge specifically required is necessary in order to help consumers select the products best suited to their tastes and requirements and to provide them with the best information on their use and indeed the preservation of such products.

In addition, the requirement that the authorized retailer undertake to have his staff attend the training sessions organized by Yves Saint Laurent Parfums is intended merely to ensure that they have adequate knowledge of Yves Saint Laurent Parfums products and is not such as to restrict the authorized retailer's freedom to sell or promote competing brands.

Since the maintenance of a prestige brand image is, on the luxury cosmetic products market, an essential factor in competition, no producer can maintain its position on the market without constant promotion activities. Clearly, such promotion activities would be thwarted if, at the retail stage, Yves Saint Laurent products were marketed in a manner that was liable to affect the way consumers perceived them. Thus, the criteria governing the location and esthetic and functional qualities of the retail outlet constitute legitimate requirements by the producer, since they are aimed at providing the consumer with a setting that is in line with the luxurious and exclusive nature of the products and a presentation which reflects the Yves Saint Laurent brand image. In addition, the criterion relating to the shop-name is designed to ensure that the name of the perfumery or shop or area within which the perfumery counter or perfumery is situated is compatible with the principles governing the distribution of the products in question and thus to exclude any name whose image would be associated with an absence of or restriction in customer service and in standing and with a lack of attention to decoration. It should be stressed in this respect that the down-market nature of a retail outlet or of its name cannot be deduced from the retailer's habitual policy on prices.

The ban on selling goods which, through their proximity, are liable to detract from the Yves Saint Laurent brand image is intended merely to safeguard, in the public's mind, the aura of prestige and exclusivity inherent in the products in question, thus preventing any association with lower-quality goods. A similar objective is also pursued by the selection criteria designed to ensure that, in the retail outlets where a variety of activities are carried out, the area set aside for the sale of perfumery products is proportionate and sufficiently separate from the area intended for the sale of other products. It should be stressed in this respect that, since the Yves Saint Laurent Parfums distribution system is open to shops having a specialized counter, and given the various forms of distribution which Yves Saint Laurent Parfums has authorized at Community level, these criteria are not in themselves such as to exclude certain modern forms of distribution such as department stores.

The requirement that the authorized retailer should set aside for Yves Saint Laurent Parfums products a location which, having regard to the other brands represented, corresponds to the standing of the Yves Saint Laurent brand and allows it to be identified by the consumer is intended to meet the objective of ensuring that the products covered by the contract are presented in an enhancing manner. In addition, since this requirement does not involve either binding contractual specifications as to the identity or number of the brands sold alongside Yves Saint Laurent Parfums products or minimum quantitative requirements regarding the allocation of the space set aside for the sale of the contract products, such a selection criterion is not in itself liable to limit the retailer's freedom to sell and promote competing brands or liable to impede the development of new forms of distribution.

Although the ban on selling Yves Saint Laurent Parfums products by mail order is in itself liable to limit the commercial autonomy of the authorized retailer, it cannot be deemed to be an appreciable restriction of competition. On the one hand, supplying the products under optimum conditions presupposes direct contact between customers and a sales staff that is capable of suggesting a choice between the various products and various brands, taking account of the personal requirements of each consumer. On the other, the requirement in question is a necessary corollary to the criteria designed to ensure that the contract products are presented in as homogeneous a way as possible and that the producer can continuously supervise the qualitative level of its distribution network.

6. However, the selective distribution contracts must be assessed from another angle where they contain authorization requirements and criteria that go beyond the limits indicated above. They are then caught by Article 85 (1), although they may, where appropriate, be exempted under Article 85 (3) (Case 99/79 Lancôme v. Etos [1980] ECR 2511). The contracts notified do contain such specific obligations.

(a) The procedure for dealing with applications for the opening of an account requires Yves Saint Laurent Parfums to take a decision, within precise deadlines, on any request for authorization sent to it by interested resellers, admitting into its network all qualified retailers or, where appropriate, informing the applicant expressly of the grounds on which its request has been rejected. In this measure, the procedure in question eliminates the risk of arbitrariness that was inherent in the admission system initially provided for in the contracts notified, where the producer had been given an exclusive and discretionary right to decide, as the final arbiter, on whether or not a new reseller should be integrated into its network. Nevertheless, the procedure has the effect of restricting access to the distribution network to resellers who are able and willing to carry out work on their retail outlets, while not being able to sell the contract products until the end of a period whose relative length is likely to discourage certain potentially qualified retailers. Thus, the duration of the periods provided for in this context is liable to affect competition between retailers of Yves Saint Laurent Parfums products.

(b) The authorized retailers are required to achieve, in their retail outlets, a minimum annual purchases figure set periodically by Yves Saint Laurent Parfums or, where appropriate, by the exclusive agent of the country in which the retail outlet is situated. This requirement goes beyond the requirements regarding the technical qualification of retailers or their sales staff and the appropriate location and fitting-out of the retail outlet that are necessary for proper distribution of luxury cosmetic products. It restricts competition, both within the Yves Saint Laurent brand and between it and other competing brands, since it has the effect, on the one hand, of restricting access to the Yves Saint Laurent Parfums distribution network to resellers who are able to enter into such a commitment and, on the other, of obliging authorized retailers to devote a significant proportion of their activities to selling the contract products. The requirement in question is in addition liable to affect the freedom of the members of the distribution network to obtain supplies, since only the value of the orders invoiced by Yves Saint Laurent Parfums (or, where appropriate, by its exclusive agent) is taken into account in calculating the minimum purchases figure.

(c) The notified contracts also impose on the retailer specific obligations regarding stocks, stock rotation and cooperation in advertising and promotion activities. These requirements constitute restrictions of competition, since they result, on the one hand, in firms which, while meeting the qualitative conditions for authorization, are not able to assume such additional commitments being significantly excluded from the distribution of Yves Saint Laurent products and, on the other, in the autonomy of authorized retailers to determine their commercial policy being restricted.

(d) The distribution contracts require authorized retailers on whose territory a new Yves Saint Laurent product has not yet been launched to refrain from engaging in active sale of it for one year as from the date on which the product was first launched in a Member State.

Though the non-export clause initially provided for here has been removed, this requirement nevertheless constitutes a restriction of competition, since it has the effect of limiting authorized retailers' freedom of commercial initiative and of impeding cross supplies between members of the distribution network.

7. The verification requirements imposed on authorized retailers where they buy from or sell to members of the distribution network (checking of the invoices by Yves Saint Laurent Parfums, checking that the customer belongs to the official distribution network) are designed to allow Yves Saint Laurent Parfums to supervise the distribution system. Provided that they do not exceed what is necessary for appropriate verification, such requirements are the corollary of the principal obligation whose fulfilment they must ensure, and must be viewed in legal terms in the same way as such principal obligation (Case 26/76 Metro v. Commission [1977] ECR 1875, ground 27). Since the ban on authorized retailers obtaining supplies from non-authorized traders must in this instance be deemed to be a restriction of competition, the same also applies to the verification requirements designed to ensure application and supervision of such ban. However, the verification requirements are not in themselves a restriction of competition in so far as they are confined to what is strictly necessary in order to ensure the cohesiveness of the distribution system. In particular:

(i) following the incorporation into the contracts of the amendments requested by the Commission, the checking by Yves Saint Laurent Parfums of the authorized retailer's invoices relating to the resale or purchase of Yves Saint Laurent products to or from other members of the distribution network is expressly limited to cases where the producer has concrete evidence that the retailer has been involved in reselling the contract products outside the authorized distribution network. For the manufacturer, such monitoring is an indispensable means of taking action against possible breaches of the selective distribution contract and of ensuring the homogeneity and tightness of the system.

(ii) Although the contract requires the authorized retailer, before supplying another member of the network, to ensure that the latter is indeed an authorized Yves Saint Laurent Parfums retailer, the choice of appropriate means of fulfilling this requirement is left to the discretion of the authorized retailer. Yves Saint Laurent does not have to be consulted on this matter unless the authorized retailer has been able, by his own means, to establish the status of the purchaser. This does not prejudice the authorized retailer's ability to supply another retailer without the knowledge of Yves Saint Laurent.

8. The Yves Saint Laurent Parfums distribution system covers the whole of the Community. Since it restricts competition, it is liable to affect trade between Member States. As to whether or not the restriction is appreciable, the Court of Justice has ruled that an undertaking which supplies some 5 % of a market is in a position to influence intra-Community trade through its conduct (Case 19/77 Miller v. Commission [1978] ECR 131). It should be recalled in this respect that, given the low degree of substitutability in the consumer's mind between luxury cosmetic products and similar products falling within other segments of the sector, the relevant market is that for luxury cosmetic products. On that market, Yves Saint Laurent Parfums has, in several Member States, market shares well in excess of the abovementioned threshold. Consequently, the view must be taken that the barriers to competition encountered constitute an appreciable restriction of intra-Community trade. It should also be added that the agreements modified form part of an economic context in which selective distribution systems comprising restrictions of competition similar to those described above are the rule and that, consequently, the appreciable nature of the restrictions noted may be said to derive from the cumulative effect inherent in such a distribution structure.

B. Article 85 (3) of the Treaty

1. The contracts underlying the Yves Saint Laurent Parfums system of selective distribution in the Community meet the conditions provided for in Article 85 (3).

2. *Improving production and distribution*

Luxury cosmetic products differ from similar products that meet other consumer requirements, *inter alia*, through the image of exclusivity and prestige which, in the consumer's mind, is associated with the brand under which they are sold. The manufacturer's capacity to create and maintain an original and prestigious brand image is thus a key factor in competition. It follows that a luxury cosmetics brand must be distributed on an exclusive basis. Experience shows that generalized distribution of a luxury cosmetic product can affect the consumer's perception of it and in the long term reduce demand for it.

Against this background, the procedure for dealing with applications for the opening of an account, as provided for under the amendments to the contract requested by the Commission, is intended to ensure flexible integration of new retailers into the Yves Saint Laurent Parfums selective distribution network. The periods laid down take account, on the one hand, of the organizational requirements of Yves Saint Laurent as regards in particular the inspection visits to retail outlets, the training sessions for sales staff, the adjustment of its own production programmes and the manufacture, usually by other undertakings, of the various advertising and presentation material for the new retail outlets. On the other hand, the procedure allows the retailer to carry out in a proper manner any refitting of the retail outlet that may be required to meet the qualitative criteria for authorization.

The minimum annual purchase requirement is intended to maintain continuous supplies and allows Yves Saint Laurent Parfums (or, where appropriate, its exclusive agents) to concentrate distribution on the cost effective retail outlets, thus rationalizing the spread of the costs associated with the distribution of its products and with the provision of assistance to retail outlets. In particular, this obligation is a means of ensuring, on the one hand, that the costs borne by the manufacturer will be covered by an adequate volume of business and, on the other, that the authorized retailer will contribute actively to enhancing the brand through customer service that is in line with the reputation of the contract products. The rationalization function inherent in the minimum annual purchase requirement also derives from the limits imposed on its implementation, with the minimum purchases figure being set annually by Yves Saint Laurent Parfums (or by each of its exclusive agents) in such a way that its amount does not exceed 40 % of the average purchases, during the previous year, of all the retail outlets operating in the territory of a Member State. Furthermore, given the level of this threshold, the view may be taken that the requirement in question is not such as to restrict unduly the retailer's freedom to sell or promote competing brands.

The requirements on the holding of stocks have the effect of extending the range of Yves Saint Laurent products available through authorized retailers, so that consumers can always find, at each retail outlet, the main products in each of the ranges marketed by Yves Saint Laurent Parfums and rely on the products which they desire being rapidly available. In addition, the requirements relating to stock rotation make it possible to ensure that the products sold are always in a perfect state of freshness and preservation. Proper stock rotation is also necessary in order to ensure that products such as articles of make-up are frequently renewed in line with fashion trends.

The provisions on cooperation in advertising and promotional activities, which are generic obligations to support the Yves Saint Laurent brand, are a necessary corollary, in each retail outlet, to the various advertising measures carried out at national or local level by Yves Saint Laurent Parfums or, where appropriate, by its exclusive agents. The provisions make it possible in particular to coordinate, in the common interest of the contracting parties, the promotional measures taken by the manufacturer and its authorized retailers and thus to plan as rationally as possible coordinated advertising campaigns. Furthermore, the constraints imposed by such requirements are not such as to prevent Yves Saint Laurent retailers from taking advantage of inter-brand competition.

The requirement imposed on authorized retailers on whose territory a new product has not yet been launched to refrain from engaging in active sale of such product for one year enables the manufacturer to test a new product on a given market and to reserve the right, in the light of the results obtained on that market, to extend or stop the marketing of the product.

The launching of a new luxury cosmetic product is a complex industrial and commercial operation entailing large-scale investment and sophisticated advertising promotion. The success of such an operation presupposes close cooperation between the manufacturer and its authorized retailers, who, for their part, require specific training in order to provide final customers with the professional advice they expect.

Viewed as a whole, these benefits clearly outweigh the disadvantage that, amongst qualified traders, the only ones authorized are those who declare that they are willing to assume the additional obligations described above. These restrictions have the effect of ensuring that Yves Saint Laurent products are distributed only under conditions that can preserve the high quality image and exclusivity associated with the fact that they are luxury cosmetic products.

3. *Benefits to consumers*

Consumers derive direct advantage from the benefits inherent in the Yves Saint Laurent Parfums selective distribution system.

The distribution system notified allows the exlusive character of the contract products to be safeguarded,

such exclusive character being the main reason why consumers choose them. The consumer is thus assured that the luxury product will not become an everyday product as a result of a downgrading of its image and a decrease in the level of creation.

In addition, the establishment of such a system has the effect of focusing on factors of competition other than the price, such as the provision of an advisory service for customers and the constant availability of the essential products in the ranges, including new products, marketed by Yves Saint Laurent Parfums. Furthermore, if customers regard as secondary the brand image or the services associated with sale within the selective distribution system, they can choose similar articles falling within an adjacent market and distributed without the use of selective distribution systems, thus penalizing the commercial strategy pursued by the producer. In addition, since the Yves Saint Laurent Parfums distribution system is based on the products being sold alongside other prestige brands, consumers can always decide not to buy the Yves Saint Laurent brand, if the level of its prices are considered no longer to correspond to the quality of its products.

Lastly, in view of the number of authorized retailers currently included in the Yves Saint Laurent Parfums network and in view of the fact that the producer cannot refuse the inclusion of new retailrs on the basis of purely quantitative criteria, the view may be taken that the system is not such as to restrict unduly intra-brand competition. Accordingly, consumers are allowed a fair share of the benefits resulting from the rationalization of distribution, particularly since the contracts notified provide for complete freedom in the setting of retail prices by authorized retailers.

4. *Indispensable nature of the restriction of competition*

The Yves Saint Laurent Parfums distribution system does not contain any restrictive obligation that is not indispensable to the attainment of the above-mentioned benefits.

Prohibiting authorized retailers from obtaining supplies of contract products from traders not previously authorized by Yves Saint Laurent or by one of its exclusive agents is a necessary condition for ensuring the cohesiveness and tightness of the selective distribution system. In this context, the requirement incumbent on Yves Saint Laurent Parfums or, where appropriate, its exclusive agents to market the products bearing the Yves Saint Laurent brand name only in retail outlets that meet the conditions specified in the selective distribution contract is complementary to the specialization requirement imposed on authorized retailers and makes it possible to ensure uniform conditions of competition between resellers of the brand. Otherwise, competition would be distorted if Yves Saint Laurent Parfums supplied traders which, not being subject to the same obligations, had to bear financial charges that were appreciably smaller than those borne by the members of the selective distribution network. In such a situation, it would no longer be possible to require authorized Yves Saint Laurent retailers to continue to carry out their own obligations, with the result that the selective distribution system could no longer be maintained.

As a corollary to the requirements intended to ensure that the distribution network is closed, the verification by Yves Saint Laurent Parfums of the authorized retailer's invoices for the resale or purchase of Yves Saint Laurent products to or from other network members is an indispensable means of taking action against any breaches of the selective distribution contract, provided that such monitoring does not go beyond the limits expressly provided in the contract.

The authorization procedure does not go beyond the limits of what is necessary in order to ensure flexible integration of new resellers into the distribution network. It should be pointed out, in particular, that the procedure is applicable only in the case of requests from new candidates or from former authorized retailers whose distribution contracts have been terminated as a result of a breach of contract which they have committed. Consequently, the procedure cannot give rise to abuses during the periodical renewals of contracts. Furthermore, such a procedure is not liable to affect the retailer's freedom to dispose of his business, notably by selling it to third parties, since the extension of the distribution contract in the name of a new operator is subject only to verification of the latter's professional qualifications, within a maximum period of three months. Lastly, since Yves Saint Laurent is required to inform the retailer of the reasons for any rejection of his application, the retailer will always be able to challenge the implementation of the admission procedure with respect to him, notably where the selection criteria have been applied in a discriminatory manner. In addition, it should be observed that, while the periods presently provided for in the context of the aforesaid procedure are relatively long, they have nevertheless been regarded as acceptable in order to facilitate the transition from a closed distribution system, based on the application of quantitative criteria, to a system subject only to the application of certain qualitative criteria. In the light of this, the Commission considers necessary to re-examine the question of the duration of the admission procedure, at the end of the period of validity of this Decision.

The requirements regarding minimum annual purchases, the holding of stocks and cooperation in advertising and promotional activities are also indispensable to the attainment of the abovementioned benefits. If there were no provisions specifying minimum purchases of supplies, the authorization given to all the retailers having the professional and technical qualifications required by Yves Saint Laurent Parfums would result in a considerable extension in the distribution network which, however, given the relative stability of the market in question, would not result in a proportionate increase in sales. The producer would then be confronted not only with higher distribution costs, but also with a gradual deterioration in the image of the products. Moreover, the minimum annual purchases requirement may be considered reasonable, in that the amount of purchases which Yves Saint Laurent Parfums has undertaken to require from its retailers cannot exceed 40 % of the average purchases figure, during the previous year, of all the retail outlets concerned. Consequently, it may be considered that such limitation of the amount relating to the minimum annual purchases requirement is likely to safeguard the retailer's capacity to market a sufficiently broad range of competing brands as well as the access of new retailers to the network. However, the Commission considers necessary to re-examine this aspect of the distribution system, at the end of the period of validity of this Decision.

It is also to be feared that, if there were no requirements regarding the holding of stocks and stock rotation, authorized retailers would decide to concentrate their promotion activities only on the brand leader products of each of the lines marketed by Yves Saint Laurent Parfums. In addition, the retailer's cooperation in advertising and promotional activities is indispensable in ensuring maximum effectiveness in promotional campaigns, the cost of which represents a substantial proportion of the producer's investment. Lastly, the clause prohibiting active sale of new products while they are still being launched by Yves Saint Laurent Parfums is necessary in order to allow the producer to limit the territory within which a new product is launched so as to gauge consumer reaction and decide, in the light of the results obtained, whether larger-scale production may be envisaged.

5. *Elimination of competition*

The contracts on which the Yves Saint Laurent Parfums selective distribution system is based do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Since, on the hand, the contracts do not contain any no-competition clauses and since, on the other, the Community market comprises a large number of undertakings manufacturing or marketing luxury cosmetic products, authorized Yves Saint Laurent Parfums retailers are able to take advantage of inter-brand competition.

In addition, authorized Yves Saint Laurent Parfums retailers may compete with one another throughout the Community. As a result of the amendments made to the standard-form selective distribution contracts, they have the right to obtain their supplies wherever it is most advantageous to them, since they can procure Yves Saint Laurent products from any exclusive agent within the EEC, and supplies between authorized retailers are now allowed without any restriction within the Community distribution network. The Yves Saint Laurent contracts no longer contain either the clause which prohibited resale between retailers established within one and the same Member State or the clause which provided that amounts relating to products resold by a retailer to other network members had to be deducted in calculating the annual purchases of such retailer. It may thus be hoped that such changes will help to prevent any rigidity in the structure of prices in the common market.

Similarly, the Commission has not been able to establish that the spread of selective distribution systems in the field of luxury cosmetic products impedes in principle certain modern forms of distribution, such as department stores. The selection criteria applied by Yves Saint Laurent Parfums are not such that they cannot also be met by such forms of distribution, even if this requires some change in their particular marketing methods.

All the conditions for exemption under Article 85 (3) are thus met.

C. Articles 6 and 8 of Regulation No 17

All the amendments made by Yves Saint Laurent Parfums to its standard-form authorized retailer contracts entered into force on 1 June 1991. It therefore seems appropriate, pursuant to Article 6 of Regulation No 17, to give effect to the exemption granted under Article 85 (3) of the Treaty as from that date.

So as to be able, at the end of a relatively short period, to reexamine the effects of the Yves Saint Laurent Parfums distribution system on competition, the Commission considers it appropriate, pursuant to Article 8 (1) of Regulation No 17, to make this Decision applicable until 31 May 1997.

Lastly, the Decision should be accompanied by conditions and obligations so as to enable the Commission to check whether the amounts imposed on authorized Yves Saint Laurent Parfums retailers under the minimum annual purchases requirement continue to meet the conditions for exemption laid down Article 85 (3) of the Treaty. Accordingly, Yves Saint Laurent Parfums is required to submit, every two years, detailed reports specifying, for each Member State of the Community, the amount set annually by Yves Saint Laurent Parfums and by its exclusive agents in implementation of the above-mentioned requirement and the average purchases of Yves Saint Laurent products achieved by all the retail outlets concerned during each of the previous years. The Decision is based in this respect on Article 8 (1) of Regulation No 17,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of Article 85 (1) of the EEC Treaty are hereby declared inapplicable, pursuant to Article 85 (3):

— to the standard-form authorized retailer contract binding Yves Saint Laurent Parfums to its specialized retailers established in France, and to the general conditions of sale annexed thereto;

and

— to the standard-form authorized retailer contract binding the exclusive agents of Yves Saint Laurent Parfums established in a Member State other than France to their specialized retailers, and to the general conditions of sale annexed thereto.

This Decision shall apply from 1 June 1991 to 31 May 1997.

Article 2

Yves Saint Laurent Parfums SA shall present to the Commission reports every two years, starting on 1 June 1993, reports specifying:

— the total amount of purchases of Yves Saint Laurent Parfums achieved, during each of the previous years, by all the authorized retail outlets in each Member State of the Community, the increases made in prices and the launching of new products or the withdrawal from the market of old products;

— the number of authorized retail outlets in each Member State as at 31 December of each of the previous years

and

— the amounts set annually by Yves Saint Laurent Parfums or, where appropriate, by its exclusive agents pursuant to the minimum purchases requirement incumbent on authorized retailers.

Article 3

This Decision is addressed to:

Yves Saint Laurent Parfums SA,
28-34 boulevard du Parc,
F-92521 Neuilly sur Seine.

Done at Brussels, 16 December 1991.

For the Commission

Leon BRITTAN

Vice-President