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CASE CARD | 4 October 2021

Vichy v. Commission (T-19/91)

Selective distribution

1. CASE SUMMARY

A. Summary of facts

Vichy, a French subsidiary of the L'Oréal group, distributes face and body care products in all (then 12) Member States except Denmark. In these Member States, Vichy operates a selective distribution system, allowing only 'dispensing chemists' to its network. Distributors must have more than a diploma in pharmacy as only a pharmacist practicing in retail pharmacy is allowed. In France, Vichy does not use the same criterion. Hence the proceedings only relate to the other Member States. Vichy notifies its agreement to the European Commission ('Commission') that refuses an exemption. Vichy then initiates an appeal before the Court of First Instance ('CFI').

B. Legal analysis

B.1 - Article 101(1) TFEU – illegality of the authorization criterion

- The CFI first outlines the framework of analysis which includes references to the *Metro* and *L'Oréal* cases. (§56-60)

- The relevant market is undisputed. (§61-64) The relevant product market is the market of cosmetics. The relevant geographic market is the Common Market. Noteworthy is that "*Vichy admits that new and innovative products are as a rule distributed first of all through pharmacies. Once consumers are accustomed to them, they are distributed on a wider scale, under other names, through general stores and luxury perfumeries*". (§62)

- For the analysis of the authorization criterion, the CFI first observes that (i) only dispensing chemists are admitted and (ii) access to that profession is subject to a quantitative ceiling. (§66) The CFI emphasizes that there is no objective difference in terms of the service to be provided to customers between a dispensing chemist active in a pharmacy and a holder of a diploma in pharmacy active outside of a pharmacy. The CFI qualifies the admission criterion as quantitative in nature.(§67-68) In subsidiary order, the CFI deems the criterion disproportionate as Vichy admits that its products (i) cannot be assimilated to medicinal products and (ii) are interchangeable with equivalent products distributed via other distribution channels in the cosmetics market. (§69-70) Lastly, the CFI finds the criterion cannot be regarded as a necessity deriving from the

characteristics of the product in question. (§71-73)

B.2 - Article 101(3) TFEU – Vichy

- The CFI first examines and rejects the arguments put forward by Vichy in support of its view that exclusive distribution through pharmacies contributes to economic progress, notably (§90-96) availability of stocks, profitability of investment and assistance from pharmacists.
- Subsequently, the CFI establishes that the criterion does not grant the consumers a fair share of the benefits (§97-99).

2. QUOTES

"Finally, as the Commission rightly emphasized in paragraph 18 of the contested decision, the diploma in pharmacy attests to the fact that the holder is deemed to have all the necessary professional knowledge in pharmacology, biology, toxicology and dermatology to run a retail pharmacy. By not accepting that professional qualification for the provision of advice to its customers, the applicant thus adds to the qualitative criteria of a diploma in pharmacy an additional requirement likely to restrict, without objective justification, the number of sales outlets and to change the nature thereof. Accordingly, Vichy' s concern to offer its customers the same advice as that prescribed for the use of medicinal preparations cannot be regarded as a necessity deriving from the characteristics of the products in question but must be seen as a marketing strategy intended to create and maintain a brand image benefiting from the reputation of the pharmaceutical profession. Moreover, the applicant has not challenged the Commission's claim that the top-of-the-range products of the L'Oréal group, which include even wider and more sophisticated selections of products than the Vichy range, are distributed in luxury perfumeries not by sales staff with scientific diplomas but by professionally qualified beauticians." (§71)

"*The Court observes that, as stated earlier, the discussion must be limited to appraisal of the share of the advantages accruing to the consumer which is directly and strictly attributable to the pharmaceutical distribution network. The applicant has certainly not established that the advisory and explanatory function is peculiar to distribution through pharmacies or that an equivalent service could not be provided to customers by the holder of a diploma practising in a non-pharmaceutical outlet. Thus, the applicant has not proved that the opening of its distribution network to resellers who, although not dispensing chemists, are the holders of diplomas in pharmacy would not permit the introduction of innovative products onto the market or the enhancement of their brand image. Nor has Vichy established that the holders of diplomas in pharmacy practising in a commercial network and not in a pharmacy cannot have equivalent professional experience or establish a personal relationship with customers. Furthermore, in any event, the argument concerning ethical obligations imposed on dispensing chemists must be*

disregarded, since the marketing of the products in question in no way involves the need for any particular ethical code, even if it were accepted that the ethical obligations of dispensing chemists are stricter than those incumbent on the holders of diplomas in pharmacy. The Court observes, furthermore, that, as correctly indicated in the contested decision, the applicant cannot genuinely claim that a distribution system whose effect is to facilitate the distribution through non-pharmaceutical channels of products which are comparable to and interchangeable with those which are distributed under other brand names in retail pharmacies, thus depriving the consumer of the possibility of making an informed choice, offers the consumer a fair share of the benefits. Accordingly, as correctly pointed out in paragraph 29 of the contested decision, Vichy would not, by opening its distribution network to the holders of diplomas in pharmacy not practising in retail pharmacies, be deprived of any of the supposed advantages." (§98)

3. RELEVANT LEGISLATION

- Article 101 TFEU

4. RELEVANT LITERATURE

On the relevance of specified criteria in the context of traditional case law on purely qualitative selective distribution and in the context of Regulation 330/2010, see F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018, §9.14 – 9.26.

5. PRACTICAL SIGNIFICANCE

This case is of limited practical significance. Indeed, as quantitative selective distribution is now exempted under Regulation 330/2010, the analysis in this case can only become relevant if an agreement does not benefit from the exemption, for example in case of market shares that exceed the market share limit.

With regard to distribution systems falling outside Regulation 330/2010, the case provides a good example of the application of the standards of necessity and the nature of the products.