

Case T-88/92

Groupeement d'Achat Édouard Leclerc **v** **Commission of the European Communities**

(Selective distribution system — Luxury cosmetic products)

Judgment of the Court of First Instance (Second Chamber, Extended Composition), 12 December 1996 II - 1967

Summary of the Judgment

1. *Procedure — Intervention — Objection of inadmissibility not raised by the defendant — Inadmissible*
(EC Statute of the Court of Justice, Art. 37, third para.; Rules of Procedure of the Court of First Instance, Art. 116(3))
2. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Decision of the Commission granting exemption to a selective distribution system — Grouping of traders outside the system having unsuccessfully sought admission to the network and having participated in the administrative procedure before the Commission — Admissibility of the action*
(EC Treaty, Arts 85(1) and (3) and 173, fourth para.; Council Regulation No 17, Art. 19(3))

3. *Competition — Agreements, decisions and concerted practices — Selective distribution system — Whether permissible — Conditions — Objective assessment and consideration of the interests of consumers — Economic sectors in which a selective distribution system may be established — Luxury cosmetics and perfumes*
(EC Treaty, Art. 85(1))
 4. *Competition — Agreements, decisions and concerted practices — Selective distribution system — Whether permissible — Conditions — Objective criteria for selecting retailers — Assessment by the Commission — Review by the Court — Limits — Application of the criteria in specific cases — Competence of the national courts and authorities — Possibility for individuals to submit a complaint to the Commission*
(EC Treaty, Arts 85(1) and 173; Regulation No 17, Art. 3)
 5. *Competition — Agreements, decisions and concerted practices — Selective distribution system — Whether permissible — Conditions — Luxury cosmetics and perfumes — Objective criteria for selecting retailers — Criteria relating to professional ability — Assessment*
(EC Treaty, Art. 85(1))
 6. *Competition — Agreements, decisions and concerted practices — Selective distribution system — Whether permissible — Conditions — Luxury cosmetics and perfumes — Objective criteria for selecting retailers — Criteria relating to the location and fittings of the retail outlet — Assessment*
(EC Treaty, Art. 85(1))
 7. *Competition — Agreements, decisions and concerted practices — Selective distribution system — Whether permissible — Conditions — Luxury cosmetics and perfumes — Objective criteria for selecting retailers — Criterion of the shop-name — Assessment*
(EC Treaty, Art. 85(1))
 8. *Competition — Agreements, decisions and concerted practices — Selective distribution system — 'Simple' systems — Use of such systems by all the manufacturers on the market for marketing the same products — Whether permissible — Conditions — Absence of barriers preventing access to the market by new competitors capable of selling the products — Preservation of workable competition, in particular as regards price*
(EC Treaty, Art. 85(1))
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1. An intervener is not entitled to raise an objection of inadmissibility not set out in the form of order sought by the defendant.
 2. A decision granting exemption to a selective distribution system must be regarded as being of direct and individual concern to a cooperative society grouping

together retailers who are potential competitors of the authorized distributors, which has unsuccessfully requested that at least some of its members be admitted to the network and which has participated in the administrative procedure provided for by Article 19(3) of Regulation No 17.

Selective distribution systems which are justified by the particular nature of the products or the requirements for their distribution may be established in sectors other than that covering production of high-quality and technically advanced consumer durables without infringing Article 85(1) of the Treaty.

3. Selective distribution systems constitute an element of competition which is in conformity with Article 85(1) of the Treaty if four conditions are satisfied: first, that the characteristics of the product in question necessitate a selective distribution system, in the sense that such a system constitutes a legitimate requirement having regard to the nature of the product concerned, in particular its high quality or technical sophistication, in order to preserve its quality and ensure its proper use; secondly, that resellers are chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion; thirdly, that the system in question seeks to achieve a result which enhances competition and thus counterbalances the restriction of competition inherent in selective distribution systems, in particular as regards price; and, fourthly, that the criteria laid down do not go beyond what is necessary. The question whether those conditions are fulfilled must be assessed objectively, taking account of the interests of consumers.

Luxury cosmetics, and in particular luxury perfumes, are sophisticated and high-quality products with a distinctive 'luxury image' which is important in the eyes of consumers. The characteristics of those products cannot be limited to their material characteristics but also encompass the specific perception that consumers have of them, in particular their 'luxury image', which thus arises from their very nature.

It is in the interests of consumers seeking to purchase such products that they are appropriately presented in retail outlets and that their luxury image is preserved in that way.

It follows that, in the luxury cosmetics sector, and in particular in the luxury perfumes sector, qualitative criteria for the selection of retailers which do not go beyond what is necessary to ensure that

those products are suitably presented for sale are in principle not covered by Article 85(1) of the Treaty, in so far as they are objective, laid down uniformly for all potential retailers and not applied in a discriminatory fashion.

detract from their image from gaining admission to the network.

4. Review by the Court under Article 173 of the Treaty of a decision whereby the Commission determines that the selection criteria used in a selective distribution system fulfil the conditions necessary for them to be regarded as lawful under Article 85(1) of the Treaty is limited to establishing whether the Commission's findings are vitiated by a defective statement of reasons, a manifest error of fact or of law, a manifest error of assessment or a misuse of powers. It is not for the Community judicature to rule on the application of those criteria in specific cases.

In addition, an applicant refused admission to the network may submit a complaint to the Commission under Article 3 of Regulation No 17, in particular if the conditions for admission are systematically used in a manner incompatible with Community law.

5. In the context of a selective distribution system in the luxury cosmetics sector, having a person in the retail outlet capable of giving consumers appropriate advice or information is in principle a legitimate requirement for the sale of those products and an integral element in their proper presentation.

On the other hand, it is for the competent national courts or authorities to which the case of an applicant refused admission to the network is referred to decide, in the light of the case-law of the Court of Justice and the Court of First Instance where relevant, whether in a specific case the selection criteria at issue have been applied in a discriminatory or disproportionate fashion, thus infringing Article 85(1) of the Treaty. They are responsible in particular for ensuring that the criteria at issue are not used to prevent new operators capable of selling the products in question in conditions which do not

6. In the context of a selective distribution system in the luxury cosmetics sector, a criterion relating to the surroundings of an outlet selling those products is not inherently covered by Article 85(1) of the Treaty inasmuch as its purpose is to ensure that such products are not sold in premises which are totally unsuitable for such sales.

On the other hand, conditions relating to the external appearance of the retail outlet, such as the façade, the shop windows and the decoration of those windows, lend themselves to being applied in a discriminatory fashion against a retail outlet — such as a hypermarket — which does not have the same façade as a traditional business, in particular a façade including shop windows, but has fitted out a space or area inside a shop in a manner appropriate to the sale of luxury cosmetics. Furthermore, external shop windows do not appear to be necessary for good product presentation in the context of a space or area fitted out inside a ‘multiple-product’ shop.

Conditions relating to interior aspects of the retail outlet such as the sale of other goods cannot be sufficient grounds for excluding a hypermarket from the network, the sale of goods typically found in a hypermarket not being in itself capable of harming the ‘luxury image’ of the products at issue, provided that the place or area devoted to the sale of luxury cosmetics is laid out in such a way that those products are presented in enhancing conditions.

Criteria relating to the scale of shops’ other activities are disproportionate inasmuch as they have no inherent connection with the legitimate requirement of preserving the luxury image of the prod-

ucts in question. Furthermore, they are discriminatory inasmuch as they tend to favour applications by specialist perfumeries at the expense of those by ‘multiple-product’ shops with a specialized area laid out in such a way as to meet the qualitative criteria appropriate to the sale of luxury cosmetics.

7. In the context of a selective distribution system in the luxury cosmetics sector, a criterion whose sole purpose is to ensure that a retailer’s shop-name does not detract from the luxury image of those products is in principle a legitimate requirement for the distribution of such products and thus is not necessarily caught by Article 85(1) of the Treaty. It is to be feared that, in the absence of such a criterion, the luxury image of luxury cosmetics, and thus their very character, may be prejudiced by their sale by a retailer whose shop-name is manifestly down-market in consumers’ eyes. However, the criterion may not be applied in an unjustified or disproportionate fashion.
8. Although ‘simple’ selective distribution systems are capable of constituting an aspect of competition compatible with Article 85(1) of the Treaty, there may nevertheless be a restriction or elimination of competition where the existence

of a certain number of such systems does not leave any room for other forms of distribution based on a different way of competing or results in a rigidity in price structure which is not counterbalanced by other aspects of competition between products of the same brand and by the existence of effective competition between different brands. Therefore, the existence of a large number of such selective distribution systems for a particular product does not in itself permit the conclusion that competition is restricted or distorted within the meaning of Article 85(1) of the Treaty: the relevant market must also be so rigid and structured that there is no longer any workable competition as regards price.

Article 85(1) of the Treaty cannot be automatically applicable merely because all the manufacturers in the sector concerned have chosen the same distribution methods. If some of a manufacturer's selection criteria, taken individually, are not caught by Article 85(1), the cumulative effect of other networks does not alter that conclusion unless it is established either that there are barriers preventing access to the market by new competitors capable of selling the products in question, so that the selective distribution systems at issue have the effect of constraining distribution to the advantage of certain existing channels, or that there is no workable competition, in particular as regards price, taking account of the nature of the products at issue.