JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
12 December 1996 *

In Case T-87/92,

BVBA Kruidvat, a company governed by Belgian law, established in Antwerp, Belgium, represented by Onno Willem Brouwer, of the Amsterdam Bar, during the written procedure, by Yves van Gerven, of the Brussels Bar, and, during the oral procedure, by Bernt Hugenholtz, of the Amsterdam Bar, and Frédéric Louis and Peter Wytinck, both of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Berend Jan Drijber, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Dutch.

supported by

Parfums Givenchy SA, a company governed by French law, established in Levallois-Perret, France, represented by François Bizet, of the Paris Bar, and Aloyse May, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of the latter, 31 Grand-Rue,

Comité de Liaison des Syndicats Européens de l'Industrie de la Parfumerie et des Cosmétiques, an international non-profit-making association governed by Belgian law, having its headquarters in Brussels, represented by Stephen Kon, Solicitor, and Francis Herbert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Wylander and Err, 60 Avenue Gaston Diderich,

and

Fédération Européenne des Parfumeurs Détaillants, an association of national federations or unions governed by French law, having its headquarters in Paris, represented by Rolland Verniau, of the Lyon Bar, with an address for service in Luxembourg at the Chambers of Nico Schaeffer, 12 Avenue de la Porte-Neuve,

interveners,

APPLICATION for annulment of Commission Decision 92/428/EEC of 24 July 1992 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/33.542 — Parfums Givenchy system of selective distribution) (OJ 1992 L 236, p. 11),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: H. Kirschner, President, B. Vesterdorf, C. W. Bellamy, A. Kalogeropoulos and A. Potocki, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 28 and 29 February 1996,

gives the following

Judgment

Facts

1 The applicant, BVBA Kruidvat (hereinafter 'Kruidvat'), is the Belgian subsidiary of a Netherlands chain of approximately 300 shops whose operations are based on the 'health and beauty' concept and which trade under the name 'Kruidvat'. Those shops include a cosmetic products counter, a health food counter, and a perfumery counter offering various competing brands of luxury perfume, including Givenchy perfumes, obtained on the parallel market. In the Netherlands, the Kruidvat chain is regarded by consumers as the 'undisputed number one' for the sale of luxury perfumes (see Annexes 18 and 20 to the reply).

2 Parfums Givenchy SA (hereinafter 'Givenchy') is a producer of luxury cosmetic products and forms part of the Louis Vuitton Moët-Hennessy group, which also operates on the same market as Givenchy with its companies Parfums Christian Dior and Parfums Christian Lacroix. Through those three companies, the Louis Vuitton Moët-Hennessy group holds over 10% of the Community market in luxury perfumery products.

3 On 19 March 1990, Givenchy notified the Commission of a network of selective distribution contracts for the marketing of its perfumery, skin care and beauty products in the Member States and applied for negative clearance under Article 2 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87, hereinafter 'Regulation No 17') or, in the alternative, exemption under Article 85(3) of the Treaty.

4 It is clear from 'the Authorized EEC Distributor Contract for Perfumery Products' (hereinafter 'the Contract') and the general conditions of sale attached thereto, as notified, that the Givenchy distribution network is a closed network which prohibits its members from selling or obtaining products bearing the Givenchy brand name outside the network. In return Givenchy guarantees distribution, subject to the laws and regulations in force, and undertakes to withdraw its brand from retail outlets which do not fulfil the conditions of the selective distribution contract.

5 The selection criteria for authorized retailers laid down in the Contract refer essentially to the professional qualifications of staff and the training sessions which they are required to attend, the location and fittings of the retail outlet, the shop name, and also certain other conditions to be fulfilled by the retailer regarding, in particular, product storage, a minimum amount of annual purchases, availability in the retail outlet of a sufficient variety of competing brands to reflect the image of Givenchy products and cooperation on advertising and promotion between the retailer and Givenchy.

6 On 8 October 1991, the Commission published a notice pursuant to Article 19(3) of Regulation No 17 stating that it proposed to adopt a favourable attitude towards the Contract and inviting interested third parties to send any comments they might have within 30 days (OJ 1991 C 262, p. 2).

7 The Commission received a number of comments in response to that notice, including those of the Raad vor het Filiaal-en Grootwinkelbedrijf (Council for the Multiple and Department Store Sector, hereinafter 'the Raad FGB'), lodged on 29 November 1991. At that time, Kruidvat BV, one of Kruidvat's parent companies, was a member of the Raad FGB.

8 The Contract, in the form covered by Commission Decision 92/428/EEC of 24 July 1992 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/33.542 — Parfums Givenchy system of selective distribution) (OJ 1992 L 236, p. 11, hereinafter 'the Decision'), came into force on 1 January 1992 (see the second paragraph of Section I. C of the Decision).

9 On 3 July 1992, Copardis SA (hereinafter 'Copardis'), Givenchy's exclusive agent in Belgium, summoned Kruidvat to appear on 8 July 1992 before the President of the Rechtbank van Koophandel te Dendermonde (Commercial Court, Dendermonde) on a summary application for an order requiring it to discontinue the sale of all Givenchy products in Belgium, primarily on the ground that a retailer who does not form part of Givenchy's selective distribution network but nevertheless sells its products is guilty of unfair competition under the Belgian legislation on business practices. In defending those proceedings, Kruidvat submitted that Givenchy's selective distribution network was unlawful because it infringed Article 85(1) and (2) of the Treaty.

10 The Commission adopted the Decision on 24 July 1992. Article 1 of the operative part reads as follows:

'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 Givenchy or, where appropriate, its exclusive agents, to its specialized retailers established in the Community, and to the general conditions of sale annexed thereto.

This Decision shall apply from 1 January 1992 to 31 May 1997.'

11 It appears from the documents before the Court that on 24 February 1993 the President of the Rechtbank van Koophandel dismissed the application made by Copardis, which, on 28 April 1993, appealed against that decision to the Hof van Beroep te Gent (Court of Appeal, Ghent).

Procedure and forms of order sought

12 By application lodged at the Court Registry on 16 October 1992, Kruidvat brought this action.

13 By a separate document, lodged on 3 March 1993, the Commission raised an objection of inadmissibility. On 14 April 1993, Kruidvat lodged its observations against that objection.

14 By applications lodged, respectively, on 11 March 1993, 18 March 1993 and, in the last two cases, 22 March 1993, Givenchy, the Comité de Liaison des Syndicats Européens de l'Industrie de la Parfumerie et des Cosmétiques (Liaison Committee of European Associations for the Perfumes and Cosmetics Industry, hereinafter 'Colipa'), the Fédération Européenne des Parfumeurs Détaillants (European Federation of Retail Perfumers, hereinafter 'FEPD') and Yves Saint Laurent Parfums SA (hereinafter 'Yves Saint Laurent') sought leave to intervene in support of the form of order sought by the Commission.

15 By documents lodged on 7, 15 and 19 April 1993, Kruidvat asked the Court to dismiss the applications for intervention made by FEPD, Colipa and Yves Saint Laurent. By document lodged on 2 April 1993, the Commission expressed doubts as to Yves Saint Laurent's interest in intervening.

16 By order of 8 November 1993, the objection of inadmissibility was joined to the substance of the case.

17 By orders of 8 December 1993, FEPD, Colipa and Givenchy were granted leave to intervene in support of the form of order sought by the Commission (see the orders in this case at [1993] ECR II-1363, II-1369 and II-1383 respectively). By order made on the same day, Yves Saint Laurent's application to intervene was dismissed ([1993] ECR II-1375).

18 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of measures of organization of procedure, requested the Commission, Givenchy and FEPD to reply in writing to certain questions and to produce certain documents before the hearing. The parties lodged their replies between 12 and 24 January 1996.

19 The parties presented oral argument and answered questions put to them by the Court at the hearing on 28 and 29 February 1996.

20 Kruidvat claims that the Court should:

— declare the action admissible;

— annul the Decision;

— order the Commission to pay the costs.

21 The Commission claims that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss the action;

— order Kruidvat to pay the costs.

22 The intervener Givenchy claims that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss the action as unfounded;

— order Kruidvat to pay the entire costs of the case, including those occasioned by Givenchy's intervention.

23 The intervener Colipa claims that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss the action as unfounded;

— order Kruidvat to pay the costs, including those of Colipa.

24 The intervener FEPD claims that the Court should:

— dismiss the action;

— order Kruidvat to pay all the costs of the case, including those occasioned by FEPD's intervention.

25 In its reply, Kruidvat claims that the Court should:

— if it considers it necessary, order measures of inquiry pursuant to Article 65 et seq. of the Rules of Procedure;

— order the Commission and the three interveners to pay the costs.

Pleas in law and arguments of the parties

26 Kruidvat puts forward three substantive pleas. In its first plea, that the Commission failed to undertake a proper investigation of the facts, it contends that the Commission adopted the Decision on the basis of a 'paper investigation', without having the necessary factual information. Its second plea, that Article 85(1) of the Treaty was infringed and that the statement of reasons was defective in that regard, has two limbs. First, Kruidvat claims, the characteristics of Givenchy products are not such as to require a selective distribution system. Secondly, the criteria in the Contract are in any event subjective in nature and stricter than necessary. Its third and final plea, that Article 85(3) of the Treaty was infringed, also has two limbs. First, the Commission exceeded its powers and infringed Article 85(3) in that Article 1 of the operative part of the Decision also covers selection criteria to which, according to the Commission, Article 85(1) does not apply. Secondly, the Commission infringed Article 85(3) by exempting certain of the requirements referred to in Paragraph II. A.6 of the Decision, namely the obligations to achieve a minimum amount of annual purchases, to hold a specified stock of products, to offer a sufficiently wide range of competing brands and to promote Givenchy products, and also the procedure for admission into the network.

27 The Commission pleads that the action is inadmissible and, in the alternative, disputes Kruidvat's pleas on the substance. Givenchy and Colipa likewise contest the admissibility of the action. All the interveners support the Commission's position on the substance.

Admissibility

Arguments of the parties

28 The arguments of the parties are concerned with the question whether the Decision is of direct and individual concern to Kruidvat within the meaning of the second paragraph of Article 173 of the EEC Treaty (now the fourth paragraph of Article 173 of the EC Treaty, hereinafter 'the Treaty').

29 According to the Commission, the Decision is not of direct concern to Kruidvat because, before it was adopted, Kruidvat was not an authorized Givenchy retailer and did not wish to become one. Moreover, Kruidvat has no difficulty in obtaining the products at issue, as shown by the market studies produced by it in Annexes 18 and 20 to its reply. Therefore the Decision did not cause it harm. The Opinion of Advocate General VerLoren van Themaat in Case 75/84 *Metro* v *Commission* [1986] ECR 3021 (hereinafter '*Metro II*'), at p. 3055, is not relevant here because Metro, unlike Kruidvat, wished to be authorized as a wholesale distributor of SABA products and was not challenging the selective distribution system in force in the sector concerned.

30 As to the question whether the Decision is of 'individual' concern, the Commission, citing the judgments in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, in Joined Cases 10/68 and 18/68 *Eridania and Others* v *Commission* [1969] ECR 459, in *Metro II*, in Case T-465/93 *Murgia Messapica* v *Commission* [1994]

ECR II-361, paragraph 25, and in Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 42, submits that Kruidvat is not affected by it differently from any other retailer — department store, multiple store, individual shop or otherwise — wishing to sell Givenchy products (see also Case 206/87 *Lefebvre Frère et Soeur* v *Commission* [1989] ECR 275, Case 205/87 *Nuova Ceam* v *Commission* [1987] ECR 4427 and Case 191/88 *Co-Frutta* v *Commission* [1989] ECR 793). Nor does the Decision significantly affect Kruidvat's position in the market within the meaning of the judgments in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391 and in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 23. In that respect, the facts which gave rise to Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501 are significantly different.

31 Nor can Kruidvat's position be likened to that of the applicants in Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, in Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, or in Case T-2/93 *Air France* v *Commission* or Case T-465/93 *Murgia Messapica* v *Commission*, both cited above. The judgments in Case T-83/92 *Zunis Holdings and Others* v *Commission* [1993] ECR II-1169 (paragraph 34) and Case C-6/92 *Federmineraria and Others* v *Commission* [1993] ECR I-6357 (paragraphs 14 and 15) demonstrate that, on the contrary, Kruidvat's action is inadmissible.

32 At the hearing, the Commission contended in particular that the Decision did not confer an advantage on any of Kruidvat's competitors, since Kruidvat was still free to obtain supplies on the parallel market (see *Grand Garage Albigeois and Others* v *Garage Massol* [1996] ECR I-651).

33 In addition, Kruidvat did not participate in the administrative procedure. The letter from the Raad FGB of 29 November 1991 (see paragraph 7 above) did not mention Kruidvat at all. There is nothing to indicate that that letter was sent in Kruidvat's name, nor is it established that Kruidvat or its parent company in any

way influenced the Raad FGB's decision to submit observations. Besides, membership of the Raad FGB belongs not to Kruidvat or its shareholders but to the Netherlands parent company. It is fruitless for Kruidvat to rely on *Metro II*, because in that case Metro had lodged a complaint with the Commission and submitted written observations in the administrative procedure. The same applied in Case 26/76 *Metro* v *Commission* [1977] ECR 1875 (hereinafter '*Metro I*') and Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045.

34 According to the Commission, Kruidvat's arguments would allow a practically limitless number of actions from unforeseeable sources to be brought. The purpose of giving notice under Article 19(3) of Regulation No 17 is to ensure that all pertinent matters of fact and law are available to the Commission before it adopts a decision. For reasons of procedural economy, undertakings which have declined to make their point of view known during the administrative procedure cannot be allowed to do so for the first time before the Court.

35 Furthermore, the content of the letter from the Raad FGB is considerably more refined than the view taken by Kruidvat. The complaints set out in the application do not accord with the objections made by the Raad FGB in the administrative procedure, since Kruidvat's argument is essentially that perfumery products do not lend themselves to selective distribution. The Raad FGB was much less categorical.

36 Being a party in civil proceedings before a national court (see paragraph 9 above) is not relevant either. On this question, the Opinion of Advocate General VerLoren van Themaat in *Metro II* is not decisive, since the Court did not attach particular significance to it and the circumstances were different. In this case, the summary application made by Copardis was in unfair competition proceedings and there is

no direct link between the validity of the Decision and the outcome of that action. Also, Kruidvat's argument lends itself to abuse inasmuch as Kruidvat would not have had the possibility of pleading that an action was pending if Copardis had delayed bringing its action before the national court until after expiry of the two-month time-limit for bringing proceedings under Article 173 of the Treaty.

37 In any event, the validity of Givenchy's distribution system is not an issue in the proceedings between Copardis and Kruidvat pending before the national court, since that court is bound by the Decision and would have to make a reference to the Court of Justice in the event of doubt (Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199). Similarly, the letter of 17 July 1992 from Belluco, the trade committee of an association of Belgian and Luxembourg producers and distributors of hygiene and toiletry products, belatedly relied on by Kruidvat (see paragraph 57 below), has nothing to do with this case.

38 In addition, the Court of Justice held in *Lefebvre Frère et Soeur* that the applicant in that case was not individually concerned because it had brought the matter before the French courts and the Commission. Kruidvat's view, if accepted, would give rise to the objection that judicial review of acts of the Commission would result from a circumstance falling entirely outside its sphere of influence.

39 The Commission adds that the effect of the judgment in Case C-188/92 *TWD Textilwerke Deggendorf* v *Germany* [1994] ECR I-833 is that a person who is directly and individually concerned by a decision may challenge its validity only by bringing proceedings under Article 173 of the Treaty. Thus, if Kruidvat's argument were accepted, it would mean that third parties in the same position as Kruidvat would henceforth be forced systematically to bring proceedings before the Court whenever there was a possibility of their being involved in litigation with the addressee of the decision at issue.

40 Finally, the Court of First Instance held in Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 33, that recourse to a national court and Article 177 of the Treaty could constitute an acceptable alternative to a direct action for annulment.

41 Givenchy adds to those arguments that the Raad FGB could not legitimately represent Kruidvat in the administrative procedure. It points out, first, that the Raad FGB is a body governed by Netherlands law while Kruidvat holds itself out as a company governed by Belgian law, secondly, that the former's observations make no mention of Kruidvat and, thirdly, that the points raised in those observations do not correspond to those raised in the action brought by Kruidvat.

42 Furthermore, the existence of proceedings before the national court cannot replace participation by Kruidvat in the administrative procedure. They were merely summary proceedings in which the President of the Rechtbank van Koophandel did not examine the validity of the selective distribution system for Givenchy perfumes, other than to find that the fact that they were sold by Kruidvat did not appear to affect the prestige of the Givenchy brand. Nor is there any proof that Givenchy authorized Belluco's letter of 17 July 1992.

43 Finally, according to Kruidvat's articles of association, its main object is the marketing of foodstuffs which are unrelated to luxury perfumes, so the Decision does not give rise to particular consequences for it.

44 According to Colipa, the Decision is not of 'individual' concern to Kruidvat since, first, it was not adopted following a complaint by Kruidvat, secondly, Kruidvat did not participate in the administrative procedure and, thirdly, Kruidvat did not make an unsuccessful application for authorized status. The applicant is concerned solely by reason of a commercial activity which can be carried out at any time by any

economic operator (see the order in Case T-585/93 *Greenpeace* v *Commission* [1995] ECR II-2205).

45 Furthermore, the subject-matter of the proceedings before the Belgian courts is not refusal of admission, as it was in *Metro I* and *Demo-Studio Schmidt*, but a problem of 'parasitic' activity. Kruidvat cannot invoke proceedings that relate solely to its acting as a 'free rider' in order to claim that it is directly and individually concerned by the Decision.

46 To establish 'direct' concern, Kruidvat relies in particular on the Opinion of Advocate General VerLoren van Themaat in *Metro II* and on the Commission's arguments in the same case. It submits that the Decision directly denies it the individual rights which it possesses by virtue of the prohibition in Article 85(1) and (2) of the Treaty. Also, but for the exemption, exclusive agents and retailers would have been free to supply Kruidvat and, in the absence of quantitative obligations (such as having to offer a full range of competing products, hold a certain quantity of stock and achieve a specified minimum annual turnover), Kruidvat could apply for admission to the selective network without giving up its own marketing methods. Obtaining supplies on the 'grey market' — to which it resorts lawfully — has obvious disadvantages compared with obtaining supplies from perfume manufacturers or their distributors.

47 To establish that the Decision is of 'individual' concern, Kruidvat relies in particular on *Metro I*, *Metro II*, *Demo-Studio Schmidt* and *Extramet Industrie*, cited above, and on Case 43/85 *Ancides* v *Commission* [1987] ECR 3131, putting forward three main arguments.

48 In its first argument, it submits that it in fact participated in the administrative procedure through the Raad FGB, which submitted observations to the Commission under Article 19(3) of Regulation No 17 by letter of 29 November 1991. That letter from the Raad FGB was sent at the request and in the name of Kruidvat, among others. Under Article 3 of its statutes, the Raad FGB has as object the defence of the economic and social interests of the multiple and department store sector in the Netherlands. At least one of Kruidvat's parent companies, namely Kruidvat BV, is affiliated to the Raad FGB. When the Raad FGB sends observations by letter to the Commission, therefore, it does so in the name of Kruidvat BV and accordingly in the name of Kruidvat.

49 In that letter, produced in Annex 8 to the application, the Raad FGB criticized a number of aspects of the Commission's position as set out in its notice of 8 October 1991. The Commission responded by implication to those criticisms in the Decision. Also, it is apparent from its letter of 20 December 1991 that it took account of the observations made by the Raad FGB. Thus, Kruidvat in fact participated in the administrative procedure.

50 As to the Commission's assertion that to admit the action would allow a limitless number of actions to be brought by members of sector-based organizations which participated in the administrative procedure, that is a consequence which must be accepted. In any event, that 'danger' must be put in perspective, because in many cases a notice under Article 19(3) does not trigger a large number of reactions. Moreover, if an undertaking which relied on an organization defending trade interests, such as the Raad FGB, were itself no longer able to bring an action for annulment, it would have to make its point of view known to the Commission individually each time. Such a result would be absurd and excessively formalistic.

51 It is also incorrect to say that the letter from the Raad FGB does not correspond to Kruidvat's position. The Raad FGB stated in its letter that it disagreed with the Commission's view that selective distribution in the perfumery sector was neces-

sary, but was prepared to accept such a system provided that the selection criteria were clear, objective and non-discriminatory. In its view, however, that was not the case here and it expressly objected to the obligations to obtain supplies from Givenchy and achieve a minimum amount of purchases, the training requirements and the purely subjective criteria concerning the location and fittings of retail outlets, matters which were also called into question by Kruidvat in its action.

52 In reply to questions put by the Court relating, in particular, to the fact that, according to its articles of association, Kruidvat was not formed in Belgium until 23 March 1992, Kruidvat has indicated that it is a wholly-owned subsidiary of the Netherlands group Evora which was controlled at that time by Profimarkt BV and Kruidvat BV. It was solely for tax and administrative reasons that the Evora group had to create a separate legal person — Kruidvat — in order to have a branch in Belgium. Since Kruidvat and its parent companies form a single economic unit (see Case 170/83 *Hydrotherm* v *Compact* [1984] ECR 2999, paragraph 11, Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 311, and Case T-102/92 *Viho* v *Commission* [1995] II-17, paragraph 50), the participation of one of the parent companies, namely Kruidvat NV, in the administrative procedure, through the Raad FGB, applies for the whole of the Evora group including Kruidvat. Whether the Raad FGB may represent Belgian undertakings is therefore irrelevant. In any event, it cannot be disputed that the 'economic interests' of the Netherlands group Evora, within the meaning of Article 3 of the statutes of the Raad FGB, also encompass those of its Belgian subsidiary.

53 In its second argument, Kruidvat submits that, when the Decision was adopted, specific proceedings between it and Copardis relating to the validity of Givenchy's distribution system were already pending before a Belgian court (see paragraph 9 above). It takes the view that, since the effect of the Decision is to deny it the right to plead infringement of Article 85(1) of the Treaty in defending those proceedings, it must be regarded as being individually concerned. It refers in that regard to

the judgments in *Metro I*, at paragraph 13, and *Metro II*, at paragraph 23, as well as to the Opinion of Advocate General VerLoren van Themaat in the latter case (at p. 3056), from which it appears that the Commission had expressly adopted that view.

54 That approach is not inconsistent with the judgment in *Lefebvre Frère et Soeur* referred to by the Commission. In that case, the Court of Justice held that the action was inadmissible because there was no proof that a procedure was under way in the Member State when the decision at issue was adopted. In this case, the Decision took effect retroactively from 1 January 1992, before Copardis brought proceedings against Kruidvat on 3 July 1992.

55 Furthermore, contrary to what the Commission asserts, there is a direct link between the legal validity of the Decision and the outcome of the proceedings before the national court. In the national proceedings, Copardis claims principally that the mere fact of selling Givenchy products without being a member of the selective distribution system exempted by the Decision infringes the Belgian law on unfair competition. If the Decision were annulled, however, Givenchy's distribution network would have to be regarded as incompatible with Article 85(1) and Copardis would in that case be deprived of all legal grounds for preventing the sale of Givenchy products by Kruidvat. The same would apply if Copardis were to base its action on inducement of breach of contract or on the fact that it is stated on Givenchy products that they may be sold only by an authorized distributor.

56 In reply to the Commission's argument that national proceedings can be relevant only if they concern refusal to grant authorization as a distributor, Kruidvat states that the link required by the Commission is too strict (Case C-376/92 *Metro SB-Großmärkte* v *Cartier* [1994] ECR I-15, paragraph 24).

57 Kruidvat also relies on a letter of 17 July 1992, produced in response to the Court's questions, sent to it by Belluco, which represents all the authorized general distributors for Belgium and Luxembourg in the luxury cosmetics sector,

including Givenchy products. Belluco stated in that letter, following a meeting with Kruidvat on 8 July 1992, that Kruidvat was not eligible for authorization as a distributor, in particular because the name 'Kruidvat' was not such as to be associated with the image of luxury cosmetics, and that the sale of branded goods by an unauthorized distributor was unlawful. In addition, Belluco gave Kruidvat notice to discontinue sales of the cosmetic goods concerned in the whole of Belgium within two weeks, failing which Belluco would take such legal action as was available to it.

58 Finally, as regards the judgment in *TWD Deggendorf* relied on by the Commission, Kruidvat contends that only third parties who, like itself, were already involved before the Decision was adopted in an action relating to the validity of an agreement subsequently granted exemption by the Commission are individually concerned under Article 173 of the Treaty.

59 In its third argument, Kruidvat submits that its action must be declared admissible for it to enjoy complete and effective legal protection of the rights conferred on it by Article 85 of the Treaty. In this case, proceedings before a national court in conjunction with a reference for a preliminary ruling under Article 177 of the Treaty provide manifestly inadequate legal protection compared with a direct action for annulment under Article 173 of the Treaty (see the Opinion of Advocate General Jacobs in *Extramet Industrie*, cited above, at p. I-2523).

60 A national court has no jurisdiction to annul the Decision and a request for a preliminary ruling as to its validity does not always give the Court of Justice the opportunity to investigate the case as thoroughly as in a direct action. A case such as this raises complex questions of both fact and law and requires a full written procedure.

Findings of the Court

61 Under Article 173 of the Treaty, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him. Since the Decision was addressed to Givenchy, it is necessary first to examine whether it is of individual concern to Kruidvat.

62 It is settled law that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of these factors, distinguishes them individually just as in the case of the person addressed (see, for example, *Plaumann* v *Commission*, p. 107, and Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 34).

63 First of all, it is clear that there was no complaint to the Commission under Article 3 of Regulation No 17, no individual participation in the administrative procedure under Article 19(3) thereof and no application to Givenchy for admission to its selective distribution network by Kruidvat, by its parent companies Profimarkt BV and Kruidvat BV or by the Evora group. This case can accordingly be distinguished from *Metro I*, *Metro II* and *Demo-Studio Schmidt*, upon which Kruidvat relies.

64 As regards the participation of the Raad FGB in the procedure under Article 19(3) of Regulation No 17 by virtue of its letter of 29 November 1991, although it has been established that one of Kruidvat's parent companies, namely Kruidvat NV, was a member of the Raad FGB at the time, there is nothing in the file to suggest that that letter was sent at the request of Kruidvat NV or that Kruidvat NV was involved in its preparation or authorized, or even had an influence on, its content.

65 Furthermore, there is at least one significant difference between the view expressed by the Raad FGB in its letter of 29 November 1991 and that taken by Kruidvat in these proceedings, in that the latter disputes, *inter alia*, the very principle of selective distribution in the luxury cosmetics sector, whereas the Raad FGB declared in its letter that it was prepared to accept that principle, provided that the selection criteria were objective and non-discriminatory ('... Nevertheless, in principle the Raad FGB does not object to the concept of selective distribution, provided, however, that the admission criteria are clear, objective, non-discretionary and non-discriminating ...').

66 Accordingly, the link between the participation of the Raad FGB in the administrative procedure by its letter of 29 November 1991 and the individual situation of Kruidvat NV is not sufficient for the latter to be individually distinguished for the purpose of Article 173 of the Treaty in the context of an individual decision granting exemption under Article 85(3) of the Treaty. If the letter from the Raad FGB of 29 November 1991 is not sufficient for Kruidvat NV to be individually distinguished, the same applies *a fortiori* to Kruidvat.

67 However, the fact that Kruidvat did not participate in the administrative procedure does not *per se* enable the Court to hold that it is not individually concerned by the Decision (see Case T-96/92 *CCE de la Société Générale des Grandes Sources and Others* v *Commission* [1995] ECR II-1213, paragraphs 35 and 36 and Case T-12/93 *CCE de Vittel and Others* v *Commission* [1995] ECR II-1247, paragraphs 46 and 47).

68 It is therefore necessary to examine whether there are other circumstances which may distinguish Kruidvat individually.

69 Kruidvat has indeed made it clear that it wishes to distribute Givenchy products and is therefore a competitor of the authorized Givenchy distributors who benefit from the exemption under Article 85(3) granted by the Decision. In addition, it cannot be ruled out that Kruidvat does not fulfil Givenchy's selection criteria and that, in consequence of the Decision, it is unable to obtain supplies of Givenchy products in the Community directly from Givenchy, its exclusive agents or authorized distributors.

70 However, those circumstances are not sufficient to distinguish Kruidvat individually for the purpose of Article 173 of the Treaty. Its situation cannot be distinguished from that of numerous other economic operators on the parallel market.

71 Furthermore, Kruidvat has not established that it, an economic operator selling luxury cosmetics obtained on the parallel market, would be prevented by the Decision from using the sources of supply of Givenchy products on which it has legitimately relied until now. In an analogous context, the Court of Justice has held that a block exemption of certain selective distribution networks does not serve to regulate the activities of third parties who may operate on the market outside the distribution network at issue (see *Grand Garage Albigeois*, cited above, paragraphs 16 to 19, and Case C-309/94 *Nissan France and Others* v *Dupasquier and Others* [1996] ECR I-677, paragraphs 18 and 19).

72 In the proceedings between Copardis and Kruidvat in the national court, Copardis's principal plea is that Articles 93 and 94 of the Belgian Law on Trading Practices have been infringed by the mere fact that Kruidvat has sold Givenchy

products without being an authorized distributor. Kruidvat has pleaded in its defence to those proceedings that the distribution network put in place by Givenchy infringes Article 85(1) of the Treaty and that the action brought by Copardis is therefore unfounded. Copardis has submitted by way of reply that Givenchy's network is lawful under Article 85 of the Treaty.

73 Even assuming that there is some link between the outcome of those proceedings and the validity of the Decision (see *Metro SB-Großmärkte* v *Cartier*, paragraph 24), the proceedings before the national court are principally concerned with the application of the Belgian law on unfair competition. They do not relate, therefore, to refusal of admission to the Givenchy network, for which Kruidvat has never applied, or to a claim for damages based on an alleged infringement of Article 85(1) of the Treaty.

74 Kruidvat contends that, since the Decision has the effect of denying it the right to allege infringement of Article 85(1) of the Treaty as a defence to those proceedings, it is individually concerned inasmuch as it must challenge the lawfulness of the Decision before the Court of First Instance in order to be able to plead any finding of unlawfulness before the national court. It cannot, however, claim to be distinguished individually to a degree sufficient for the purpose of the fourth paragraph of Article 173 of the Treaty merely because the lawfulness of the Decision is relevant to the outcome of the proceedings pending before the national court, since any distributor of perfumes may in appropriate circumstances have an interest in questioning the lawfulness of Givenchy's distribution system in proceedings before a national court. Furthermore, it is purely by chance that such proceedings were pending when the Decision was adopted. If Copardis had not brought its

action before the national court before the two-month time-limit laid down in the fifth paragraph of Article 173 of the Treaty had expired, Kruidvat would have been unable to claim that when it brought the action it was individually concerned on the basis of proceedings pending before a national court. Accordingly, any indirect link between the national proceedings and the validity of the Decision is not in itself sufficient to distinguish Kruidvat individually for the purpose of Article 173 of the Treaty.

75 In addition, even if the question of the validity of the Decision were liable to affect the outcome of the proceedings before the national court, that court could still, if it considered it necessary to do so, have recourse to the preliminary ruling procedure under subparagraph (b) of the first paragraph of Article 177 of the EC Treaty and refer a question on the validity or interpretation of the Decision to the Court of Justice. Kruidvat's argument that that procedure does not confer adequate legal protection upon it therefore cannot be accepted.

76 As to Belluco's letter of 17 July 1992, which was not relied on in the written procedure but produced belatedly by Kruidvat in response to the Court's questions, there is no adequate proof that Givenchy or Copardis gave authority for it to be sent. Nor is it a reply to an application by Kruidvat for admission to the Givenchy network. It is therefore not pertinent to an assessment of the admissibility of this action.

77 Accordingly, the Decision is not of individual concern to Kruidvat.

78 It follows that the action must be dismissed as inadmissible without it being necessary to establish whether the Decision was of direct concern to Kruidvat.

Costs

79 Under the first subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the third subparagraph of Article 87(4) thereof, the Court may order an intervener other than a Member State or an institution to bear its own costs.

80 Since the applicant has been unsuccessful, it must be ordered to pay the Commission's costs. It must also pay the costs of the intervener Givenchy, to which the Decision was addressed.

81 The interveners Colipa and FEPD had a less direct interest than Givenchy in the outcome of the action. Since this is a case in which those two other interveners made general points in the interest of their members without adding any decisive elements to the Commission's arguments, the Court considers that it is equitable under the third subparagraph of Article 87(4) of the Rules of Procedure for them to be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders the applicant to pay the costs of the Commission and of the intervener Parfums Givenchy SA, and to bear its own costs;**

3. **Orders each of the other interveners, the Comité de Liaison des Syndicats Européens de l'Industrie de la Parfumerie et des Cosmétiques and the Fédération Européenne des Parfumeurs Détaillants, to bear its own costs.**

Kirschner Vesterdorf Bellamy

Kalogeropoulos Potocki

Delivered in open court in Luxembourg on 12 December 1996.

H. Jung H. Kirschner

Registrar President