JUDGMENT OF THE COURT
17 November 1998 *

In Case C-70/97 P,

Kruidvat BVBA, a company incorporated under Belgian law, established in Antwerp, Belgium, represented by O. W. Brouwer, of the Amsterdam Bar, and F. P. Louis and P. Wytinck, both of the Brussels Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 12 December 1996 in Case T-87/92 *Kruidvat* v *Commission* [1996] ECR II-1931, seeking to have that judgment set aside,

the other parties to the proceedings being:

Commission of the European Communities, represented by B. J. Drijber, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

defendant at first instance,

supported by

* Language of the case: Dutch.

Parfums Givenchy SA, a company incorporated under French law, established in Levallois-Perret, France, represented by F. Bizet, of the Paris Bar, with an address for service in Luxembourg at the Chambers of A. May, 31 Grand-Rue,

Comité de Liaison des Syndicats Européens de l'Industrie de la Parfumerie et des Cosmétiques (Colipa), an international non-profit-making association governed by Belgian law, having its headquarters in Brussels, represented by F. Herbert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of C. Zeyen, 56-58 Rue Charles Martel,

and

Fédération Européenne des Parfumeurs Détaillants (FEPD), an association of national federations or unions governed by French law, having its headquarters in Paris, represented by R. Verniau, of the Lyons Bar,

interveners at first instance,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur) (Presidents of Chambers), G. F. Mancini, C. Gulmann, J. L. Murray, D. A. O. Edward, H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: N. Fennelly,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 February 1998, at which Kruidvat BVBA was represented by P. van Empel, of the Amsterdam Bar, and P. Wytinck; the Commission by W. Wils, of its Legal Service, acting as Agent; Parfums Givenchy SA by F. Bizet; the Comité de Liaison des Syndicats Européens de l'Industrie de la Parfumerie et des Cosmétiques (Colipa) by F. Herbert; and the Fédération Européenne des Parfumeurs Détaillants (FEPD) by R. Verniau,

after hearing the Opinion of the Advocate General at the sitting on 30 April 1998,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 18 February 1997, Kruidvat BVBA (hereinafter 'Kruidvat') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 12 December 1996 in Case T-87/92 *Kruidvat* v *Commission* [1996] ECR II-1931 (hereinafter 'the contested judgment'), in so far as it declared inadmissible Kruidvat's action for the 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, hereinafter 'the Decision').

2 The facts of the case, as set out in the contested judgment, are as follows:

'1 The applicant, BVBA 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 Authorised 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 authorised 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 pur-

chases, 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 voor 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 [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 authorised retailer contract binding Givenchy or, where appropriate, its exclusive agents, to its specialised 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).'

3 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 16 October 1992, Kruidvat brought an action for annulment of the Decision. By a separate document lodged on 3 March 1993 the Commission raised an objection of inadmissibility, which was joined to the substance of the case. 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 Givenchy were granted leave to intervene in support of the form of order sought by the Commission.

4 Before the Court of First Instance, Kruidvat put forward three main arguments to establish that it was individually concerned by the Decision.

5 In its first argument, it submitted that it had 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. In its second argument, it contended 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. It took the view that, since the effect of the Decision was to deny it the right to plead infringement of Article 85(1) of the Treaty in defending those proceedings, it had to be regarded as being individually concerned. It also relied on a letter of 17 July 1992 sent to it by Belluco, which represents all the authorised general distributors for Belgium and Luxembourg in the luxury cosmetics sector, including Givenchy products. Belluco stated in that letter that Kruidvat was not eligible for authorisation as a distributor and that the sale of branded goods by an unauthorised distributor was unlawful. In its final argument, Kruidvat submitted that its action had to be declared admissible in order for it to enjoy complete and effective legal protection of the rights conferred on it by Article 85 of the Treaty.

6 By the contested judgment, the Court of First Instance dismissed Kruidvat's action as inadmissible.

7 In its consideration of whether Kruidvat was individually concerned by the Decision, the Court of First Instance stated first of all, at paragraph 63, that it was 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) of that regulation 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 Netherlands group Evora of which it is a subsidiary. That Court accordingly took the view that this case could be distinguished from Case 26/76 *Metro* v *Commission* [1977] ECR 1875, Case 75/84 *Metro* v *Commission* [1986] ECR 3021 (hereinafter '*Metro II*') and Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, upon which Kruidvat relied.

8 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, the Court of First Instance found, at paragraph 64, that, although it had been established that one of Kruidvat's parent companies, namely Kruidvat NV, was a member of the Raad FGB at the time, there was nothing in the file to suggest that that letter had been sent at the request of Kruidvat NV or that Kruidvat NV had been involved in its preparation or had authorised, or even had an influence on, its content.

9 It also pointed out, at paragraph 65, that there was at least one significant difference between the view expressed by the Raad FGB in its letter and that taken by Kruidvat in its action, in that the latter disputed, in particular, the very principle of selective distribution in the luxury cosmetics sector, whereas the Raad FGB declared that it was prepared to accept that principle, provided that the selection criteria were objective and non-discriminatory.

10 The Court of First Instance accordingly held, at paragraph 66, that the link between the participation of the Raad FGB in the administrative procedure and the individual situation of Kruidvat NV was 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. *A fortiori*, the letter from the Raad FGB was not sufficient for Kruidvat to be individually distinguished.

11 Next, the Court of First Instance examined whether there were other circumstances which might distinguish Kruidvat individually. It held, at paragraphs 69 and 70, that Kruidvat's situation could not be distinguished from that of numerous other economic operators on the parallel market, and that Kruidvat was not distinguished individually merely because it could not be ruled out that it was unable, in consequence of the Decision, to obtain supplies of Givenchy products in the Community directly from Givenchy, its exclusive agents or authorised distributors.

12 It held furthermore, at paragraph 71, that Kruidvat had not established that it would be prevented by the Decision from using the sources of supply of Givenchy products on which it had legitimately relied previously.

13 As regards the proceedings between Copardis and Kruidvat in the national court, the Court of First Instance observed, at paragraph 73, that, even assuming that there was some link between the outcome of those proceedings and the validity of the Decision, those proceedings were principally concerned with the application of the Belgian law on unfair competition and not with refusal of admission to the Givenchy network or a claim for damages based on an alleged infringement of Article 85(1) of the Treaty.

14 It also held, at paragraph 74, that Kruidvat was not distinguished individually to a sufficient degree merely because the lawfulness of the Decision was relevant to the outcome of the proceedings pending before the national court, since any distributor of perfumes could have an interest in questioning the lawfulness of Givenchy's distribution system in proceedings before a national court. Furthermore, it was purely by chance that such proceedings were pending when the Decision was adopted.

15 At paragraph 75 of the contested judgment, the Court of First Instance pointed out that a national court could, in proceedings before it, have recourse to the preliminary ruling procedure under subparagraph (b) of the first paragraph of Article 177 of the Treaty, which would provide adequate legal protection for a party such as Kruidvat.

16 Finally, as regards the letter from Belluco which had been produced by Kruidvat in response to the questions of the Court, it was held, at paragraph 76, that there was no adequate proof of Givenchy or Copardis having given authority for it to be sent, that it was not a reply to an application by Kruidvat for admission to the Givenchy network, and that it therefore was not pertinent to an assessment of the admissibility of Kruidvat's action.

17 In support of its appeal, Kruidvat relies on two pleas: that the Court of First Instance misconstrued the fourth paragraph of Article 173 of the EC Treaty and that it failed to comply with Article 190 thereof.

The plea that the Court of First Instance misconstrued the fourth paragraph of Article 173 of the Treaty

18 This plea falls into four parts. The first relates to Kruidvat's participation in the administrative procedure through the Raad FGB. The second is concerned with the consequences to be drawn from the fact that proceedings between Kruidvat and Copardis were pending before the national court when the Decision was adopted. In the third part of its plea, Kruidvat alleges that the Court of First Instance assessed the effects of the Decision on its competitive position incorrectly and, in the fourth, it submits that it lacks complete and effective legal protection.

19 The first part of this plea is based on the proposition that Kruidvat did not have to demonstrate that it had been actively involved in the preparation of the letter from the Raad FGB. In Kruidvat's view, the particular feature characterising sector-based associations is that they at all times represent the interests of their whole membership. It draws attention to the judgment in Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, where the Court of First Instance held that the action brought by the sector-based association AITEC was admissible because AITEC had protected the interests of its members in accordance with the powers conferred on it by its statutes.

20 The Commission, on the other hand, submits that an individual interest cannot be inferred merely from membership of a collective grouping. Since the Raad FGB participated in the administrative procedure before the Commission, it was, in principle, entitled to bring an action itself. That interpretation is fully consistent with the reasoning of the Court of First Instance in *AITEC and Others*.

21 Colipa maintains that, for the purpose of determining an individual interest arising from the participation of a sector-based association in the administrative procedure, it must also be possible to distinguish individually the participation of the undertaking represented.

22 It must be held that the Court of First Instance in no way erred in law by finding that 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 was 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.

23 While the extension of the right to bring proceedings to associations defending the interests of their members may offer procedural advantages, the participation of such associations in the administrative procedure cannot relieve their members of the need to establish a link between their individual situation and the action of the association.

24 The opposite view put forward by Kruidvat is not supported by the judgment in *AITEC and Others*, where the Court of First Instance held that three undertakings which were members of the association could be considered to be individually concerned for the purposes of Article 173 of the Treaty because their position on the market was liable to be significantly affected by the aid approved under the Commission's decision being challenged. That judgment contains no indication as regards the situation of the other members of the association.

25 Secondly, Kruidvat submits that the Court of First Instance could not rely on an alleged difference between the views taken by the Raad FGB and itself. In order to conclude that it had not participated in the administrative procedure, the Court of First Instance should have established that those views were contradictory.

26 The Commission considers that part of the reasoning of the Court of First Instance to be superfluous. Even complete agreement between the two sets of views would not have been sufficient for Kruidvat to be individually distinguished as against other undertakings which are also members of the Raad FGB.

27 It must be held that Kruidvat's reading of the contested judgment is incorrect. Far from ruling that there must be no significant difference between the view expressed by the association and that taken by one of its members who has brought an action, the Court of First Instance was citing a factual circumstance in order to establish even more clearly that Kruidvat had exercised no influence on the content of the letter from the Raad FGB.

28 Kruidvat argues in the alternative, still in the context of the first part of this plea, that there was really no significant difference between its point of view and that expressed by the Raad FGB.

29 That argument, it need merely be noted, challenges a finding of fact against which, in accordance with Article 51 of the EC Statute of the Court of Justice, no appeal lies.

30 In the second part of the first plea, Kruidvat submits that under the case-law of the Court of Justice, in particular the *Metro II* judgment, the existence of civil proceedings before a national court is sufficient for a direct action against a Commission decision which is linked to the subject-matter of those proceedings to be held admissible. Kruidvat was thus individually distinguished because Copardis had instituted proceedings against it and it had pleaded, in its defence, that Givenchy's selective distribution system was invalid. Kruidvat considers that it is clear from the Court's judgment in Case C-376/92 *Metro SB-Großmärkte* v *Cartier* [1994] ECR I-15 that, in proceedings for unfair competition, the question of the validity of a distribution system under Article 85 of the Treaty arises in the form of a preliminary issue.

31 The Commission, on the other hand, takes the view that Kruidvat has no interest in pleading in the proceedings before the national court that the Decision is invalid, a factor which distinguishes this case from *Metro SB-Großmärkte* v *Cartier*, cited above, where the issue was whether Metro had induced the authorised distributors to breach their contracts with Cartier. The existence or otherwise of proceedings before a national court is, in the Commission's view, arbitrary and insufficiently objective as a criterion for establishing whether an undertaking is individually concerned by a decision granting an exemption addressed to another undertaking.

32 In that regard, it must be held that the Court of First Instance was right to find that Kruidvat could not claim to be individually distinguished to a degree sufficient for the purpose of the fourth paragraph of Article 173 of the Treaty merely because the lawfulness of the Decision was relevant to the outcome of the proceedings pending before the national court. As the Advocate General has stated at paragraph 51 of his Opinion, the fact that an action has been brought against a trader by a party who benefits from or is responsible for the organisation of the distribution network, before the expiry of the time-limit for challenging a decision relating to the network, is a matter of pure chance and not directly linked to that decision.

33 Furthermore, contrary to Kruidvat's assertion, the Court's case-law does not show that the existence of civil proceedings is sufficient for an action to be admissible. In *Metro II*, the Court attached importance to the fact that Metro's applications for admission to the distribution network had been refused, but did not refer to the existence of proceedings between Metro and SABA. It also regarded Metro's participation in the administrative procedure as relevant.

34 Nor is Kruidvat's position supported by the judgment in *Metro SB-Großmärkte* v *Cartier*, cited above, where the Court held that, in proceedings for unfair competition, the question of the validity of the contract under Article 85 of the Treaty arose in the form of a preliminary issue. The legality of an administrative measure relied on by one of the parties to proceedings may, in many situations, arise as an issue preliminary to the settling of the dispute, without it thereby being necessary to infer

that the other party has standing to dispute the legality of that measure by means of a direct action before the Court of First Instance.

35 In the third part of the first plea, Kruidvat puts forward a number of arguments in order to show that the Court of First Instance assessed incorrectly the harm caused to its competitive position by the Decision and the importance of that criterion in establishing whether a person is individually concerned.

36 First, Kruidvat submits that it is individually concerned by the Decision because it buys and sells Givenchy perfumery products. In its view, Article 19(3) of Regulation No 17 and Article 93(2) of the EC Treaty, relating to State aids, contain analogous provisions relating to the participation of interested third parties in the administrative procedure before the Commission. According to the case-law of the Court, in particular the judgments in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, the term 'parties concerned' refers not only to recipients of aid but also to their competitors. Accordingly, Kruidvat's competitive position *vis-à-vis* Givenchy's authorised retailers must be sufficient for it to be individually distinguished for the purpose of Article 173 of the Treaty.

37 Second, Kruidvat contends that its competitive position is also expressly harmed because the refusal to admit it to the selective distribution network was a foregone conclusion. That refusal is apparent, first, from the proceedings between it and Copardis, in which the latter stated that Kruidvat's image did not correspond to the luxury image required for the sale of Givenchy perfumes and, secondly, from the letter from Belluco of 17 July 1992, which contains an automatic rejection of Kruidvat as an authorised distributor. According to Kruidvat, it is irrelevant that it never applied for admission to the distribution network.

38 Third, Kruidvat challenges the Court of First Instance's finding that it had not established that it would be prevented from using the same sources of supply as it had before the adoption of the Decision. According to Kruidvat, that reasoning is irrelevant and, moreover, incorrect. It is irrelevant because the question to be asked is not whether or not the previous situation has changed but whether it is more difficult to obtain supplies than it was without the Decision. It is incorrect because it fails to take account of the consequences of the transposition in Belgium of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1). According to Kruidvat, the combined effect of the Decision and that directive is to make it impossible to obtain any supplies on the parallel market.

39 Furthermore, Kruidvat contends that the contested judgment conflicts with the judgment in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others* v *Commission* [1996] ECR II-649. There, the Court of First Instance held that the company Antena 3 was individually concerned by a Commission decision because it could be classed as an interested third party within the meaning of Article 19(3) of Regulation No 17, despite not having participated in the administrative procedure before the Commission. In addition, Kruidvat submits that, in *Métropole Télévision and Others*, the Court of First Instance merely considered whether Antena 3 had been refused admission to the network whereas, in the contested judgment, it adopted a stricter criterion, namely whether Kruidvat had applied for admission.

40 The Commission maintains that there is an important difference between the procedure laid down in Article 93(2) of the Treaty, concerning State aids, and that laid down in Article 19(3) of Regulation No 17. The judgments in *Matra* and in *Cook*, cited above, do not support the conclusion that merely being a party concerned in the abstract is sufficient for an undertaking to be individually distinguished. It is also necessary for the aid to have a significant effect on its competitive position. The Commission adds that all aid has, in principle, the effect of distorting competition, whereas a selective distribution system does not. Third parties such as Kruidvat are not affected by such a system; on the contrary, they may even turn it to their advantage.

41 According to the Commission, the second argument challenges findings of fact, against which no appeal lies. Furthermore, it is clear from the documents submitted by Kruidvat itself at first instance that it has no interest in becoming a Givenchy authorised distributor. Neither the statement by Copardis in the course of the Belgian proceedings nor the letter from Belluco can be interpreted as automatic refusals of membership, but must be read in the light of the proposition that unauthorised traders may not offer Givenchy products for sale.

42 As to the third argument, the Commission responds that in the past Kruidvat had always obtained supplies on the parallel market and the Decision does not preclude that in the future. Nor has Kruidvat succeeded in proving that its competitive position was significantly affected by the Decision, within the meaning of the judgment in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391. Finally, Benelux trademark law was amended as a result of Directive 89/104 only from 1 January 1996, that is to say three years after the Decision was adopted. There is thus neither a temporal nor a causal link between the Decision and that amendment.

43 It must be held that, as the Advocate General has stated in paragraphs 59 to 62 of his Opinion, Kruidvat cannot establish an analogy between the position, as assessed by the Court in *Matra* and in *Cook*, cited above, of undertakings which are parties concerned within the meaning of Article 93(2) of the Treaty and that of interested third parties under Article 19(3) of Regulation No 17. In those judgments, the Court justified the applicants' legal interest in bringing proceedings by the absence of other procedural guarantees in a situation where the Commission decides that an aid is compatible with the common market without initiating the inquiry procedure. In this case, by contrast, there was an invitation to submit observations and interested parties had the opportunity to exercise their right to make their views known to the Commission. It is therefore not necessary for them to be regarded as individually concerned by the Decision in order for their interests to be judicially protected when they did not take advantage of that opportunity.

44 As to Kruidvat's argument concerning the letter from Belluco of 17 July 1992, it must first be pointed out that the findings of the Court of First Instance to the effect that there was no proof that Givenchy or Copardis had given authority for the letter to be sent and that it was not a reply to an application by Kruidvat for admission to the Givenchy network are findings of fact against which no appeal lies. Next, it is to be noted that the Court of First Instance rejected the interpretation that the letter contained a refusal of an application for admission, stressing, on the contrary, that Kruidvat had never applied to be admitted to the distribution network. The Court of First Instance was thus justified in considering that the letter was not pertinent to an assessment of the admissibility of the action.

45 So far as concerns Kruidvat's future supplies, the Court of First Instance examined the issue correctly when finding that Kruidvat had not established that it would be prevented by the Decision from using the sources of supply on which it had legitimately relied previously. That approach is in fact the only possible way of establishing, in circumstances such as those of this case, whether an individual is affected by a decision by reason of circumstances in which he is differentiated from all other persons (see Case 25/62 *Plaumann* v *Commission* [1963] ECR 95). The effects of the Decision, as described by Kruidvat, even in conjunction with the effects which implementation of the Belgian legislation transposing Directive 89/104 might have, do not distinguish Kruidvat from all the other operators outside the Givenchy distribution network.

46 As regards the reference to *Métropole Télévision and Others*, cited above, suffice it to say that the Court of First Instance was fully entitled in this case to find as a relevant fact that Kruidvat had never applied for admission to the Givenchy distribution network and that its situation could not be distinguished from that of numerous other economic operators on the parallel market.

47 In the fourth part of the first plea, Kruidvat contends that if its action is not declared admissible it will not be accorded adequate legal protection. It submits that the Court of First Instance is best able to determine direct actions calling into question whether exemptions are lawful under Article 85 of the Treaty. The legal

protection offered by a national court, in conjunction with a preliminary reference, is not sufficient.

48 In that regard, it should be recalled that in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions (see Case 294/83 *'Les Verts'* v *Parliament* [1986] ECR 1339, paragraph 23).

49 In this case, whilst Kruidvat could not bring an application for the annulment of the Decision, it remained able — in accordance with the ruling in Case 216/82 *Universität Hamburg* v *Hauptzollamt Hamburg-Kehrwieder* [1983] ECR 2771, at paragraph 10, as the Commission points out — to plead before national courts, adjudicating in accordance with Article 177 of the Treaty, that the Decision was unlawful.

50 In the light of the foregoing, the first plea must be rejected.

The plea that the Court of First Instance failed to comply with Article 190 of the Treaty

51 By this plea, Kruidvat submits that there are a number of defects in the reasoning of the contested judgment, contrary to Article 190 of the Treaty.

52 In the first part of this plea, Kruidvat contends that Article 190 of the Treaty is infringed if, in a judgment, the Court of First Instance departs from previous case-law without giving the reasons for so doing. Kruidvat takes the view that

the Court of First Instance failed to take due account of the judgments in *AITEC and Others*, cited above, concerning the nature of sector-based organisations, in Case T-19/92 *Leclerc* v *Commission* [1996] ECR II-1851, Case T-88/92 *Leclerc* v *Commission* [1996] ECR II-1961 and *Metro SB-Großmärkte* v *Cartier*, cited above, concerning the link between national proceedings and the validity of the contested decision, and in *Métropole Télévision and Others*, concerning harm to the competitive position of the applicant undertaking.

53 In the second part of the plea, Kruidvat contends that Article 190 of the Treaty was also infringed in four other respects. First, the Court of First Instance failed to explain adequately, at paragraph 65 of the contested judgment, why it had not accepted Kruidvat's arguments regarding the absence of differences between its view and that of the Raad FGB. Next, there is a contradiction between paragraph 1 of the judgment, in which the Court of First Instance considers that Kruidvat is the 'undisputed number one' for the sale of perfumes in the Netherlands and paragraph 70, where it states that Kruidvat's situation cannot be distinguished from that of numerous other economic operators on the parallel market. In addition, the Court of First Instance failed to take due account of the arguments relating to the lack of adequate legal protection at paragraph 70 of the judgment. Finally, it did not consider the combined effect of the Decision and Directive 89/104.

54 According to the Commission, this plea is not self-standing, the arguments put forward being in essence the same as those relied on under the first plea.

55 In that regard, it is sufficient to note that the arguments relied on in support of this plea all relate to points of law which have already been considered under the first plea, in the context of which it was concluded that the Court of First Instance did not err in law in the reasoning of the contested judgment.

56 The second plea must therefore also be rejected.

57 It follows that the appeal must be dismissed in its entirety.

Costs

58 Under Article 69(2) of the Rules of Procedure, applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(4) of the Rules of Procedure, the Court may order an intervener, other than the Member States and institutions, to bear its own costs.

59 Since the appellant has been unsuccessful, it must be ordered to pay the costs of the Commission and the intervener Givenchy, to which the Decision was addressed. The interveners Colipa and FEPD have a less direct interest in the outcome of the case than Givenchy and must therefore be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1) Dismisses the appeal;

2) **Orders Kruidvat BVBA to pay the costs of the Commission and of the intervener Parfums Givenchy SA, and to bear its own costs;**

3) **Orders 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 their own costs.**

Rodríguez Iglesias Puissochet Hirsch

Jann Mancini Gulmann

Murray Edward Ragnemalm

Sevón Wathelet

Delivered in open court in Luxembourg on 17 November 1998.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President