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

In Case T-88/92,

Groupement d'Achat Édouard Leclerc, a cooperative society constituted under French law, established in Paris, represented by Mario Amadio and Gilbert Parléani, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Philippe Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented initially by Bernd Langeheine, then by Berend Jan Drijber, both of its Legal Service, acting as Agents, assisted by Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

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

* Language of the case: French.

Fédération des Industries de la Parfumerie, a federation of associations governed by French law, having its headquarters in Paris, represented by Robert Collin, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

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 Mélanie Thill-Tayara, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Winandy 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

Introduction

1 Cosmetic products cover a wide variety of articles including, in particular, perfumery, skin care and beauty products and hair care and toiletry products. Within the category of cosmetic products, luxury products, that is to say high quality articles sold at a relatively high price and marketed under a prestige brand name, constitute a specific market segment. In general, luxury cosmetic products are sold only through selective distribution networks, all governed by similar conditions. Those networks are, for the most part, made up of specialist perfumeries or specialist areas in department stores.

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

3 The breakdown into product ranges provided by Givenchy in the course of the proceedings shows that in 1990 and 1991 sales of luxury perfumes represented between 80 and 100%, depending on the Member State concerned, of its total sales by selective distribution, the remainder being accounted for by sales of luxury skin care and beauty products. Those products are sold in approximately 10 000 authorized retail outlets, as well as in duty-free shops which account for a significant proportion of sales in several Member States.

4 On 19 March 1990, Givenchy notified the Commission of a network of selective distribution contracts for the marketing in the Community of its perfumery, skin care and beauty products 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.

5 On 8 October 1991, the Commission published a notice pursuant to Article 19(3) of Regulation No 17 (OJ 1990 C 262, p. 2) stating that it proposed to adopt a favourable attitude towards the notified contracts, as amended in response to comments made by it, and inviting interested third parties to send any comments they might have within 30 days.

6 The applicant, Groupement d'Achat Édouard Leclerc (hereinafter 'Galec'), submitted observations dated 6 November 1991 in response to that notice. Galec is a purchasing association in the form of a cooperative society which supplies a network of retail outlets in France called Centres Distributeurs Leclerc (hereinafter 'Leclerc Centres'), most of which are hypermarkets or supermarkets. In its observations, Galec objected to the proposed decision, in particular on the ground that its adoption would preclude the sale of luxury cosmetic products from a number of suitable Leclerc Centres.

7 Galec participated likewise in the administrative procedure in the Yves Saint Laurent Parfums case, in which the Commission adopted on 16 December 1991 Decision 92/33/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/33.242 — Yves Saint Laurent Parfums) (OJ 1992 L 12, p. 24), and which is the subject of a parallel action before the Court (Case T-19/92 *Galec* v *Commission*).

8 On 24 July 1992, the Commission adopted Decision 92/428/EEC 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'), which is the subject of this judgment.

The Givenchy contract

9 It is clear from 'the Authorized EEC Distributor Contract for Perfumery Products' (hereinafter 'the Contract') and the General Conditions of Sale annexed thereto, in the version covered by the Decision, 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 any retail outlets which do not fulfil the conditions of the selective distribution contract.

10 The selection criteria for authorized retailers laid down in the Contract refer essentially to the professional qualifications of staff, the location and fittings of the retail outlet and the shop-name, and to 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 number of competing brands to reflect the image of Givenchy products, the obligation to refrain for one year from the active sale of new products launched in another State, and cooperation on advertising and promotion between the retailer and Givenchy.

11 As regards professional qualifications, Paragraphs II.3 and II.5 of the Contract state:

'(3) *Professional qualification in perfumery*

The authorized EEC retailer, or his sales staff, must possess a professional qualification in perfumery resulting from:

— a beauty diploma;

— a certificate recognized by the competent ministry of one of the Member States of the EEC;

— a professional perfumery training certificate issued by a chamber of commerce and industry of one of the Member States of the EEC; or

— at least three years' perfumery sales experience, including experience in the authorized retail outlet.

...

(5) *Consulting and demonstration service*

The authorized EEC retailer shall provide a consulting and demonstration service which is adequate having regard to the shop's sales area and the number of products displayed and offered to customers.

The adequacy of that service will be assessed on the basis of information provided by the authorized EEC retailer on:

— the number of sales staff; and

— the number of beauticians.'

12 As regards the retail outlet, Paragraphs II.4 and II.6 of the Contract state:

'(4) *Location of the retail outlet*

The standard of the perfumery outlet and of the area surrounding it must reflect the prestige of the brand name.

The shop's surroundings will be assessed in the light of the following information and in accordance with the Givenchy evaluation form drawn up for that purpose:

— colour photographs from which the shop's external surroundings (neighbouring shops and street) can be assessed;

— geographical location (town centre, peripheral district, shopping street and so forth);

— other prestige businesses in the vicinity (jewellers' shops, gift shops, hotels, restaurants and so forth).

...

(6) *Fittings of the retail outlet*

The setting of the shop, of the counters and of the shop-windows, and the environment created by the other products sold in the place of sale must not detract from the Givenchy brand image.

The shop's sales area must not be disproportionate to the number of brands sold. It must allow the authorized EEC retailer to provide, having regard to the brands offered, a location reflecting the prestige of the Givenchy brand name.

The products must be stored in satisfactory conditions for their preservation, in particular in a location where they can be protected from excessive humidity, heat or light.

The internal display or advertising material must be placed on the sales counter or in its immediate vicinity and within public view. The display units, signs, dummies and other advertising material must be placed to good advantage in the external shop-windows or, failing that, inside the shop.

The fittings will be assessed on the basis of the following information and in accordance with the evaluation form returned to Givenchy by the applicant wishing to sell its products:

— colour photographs from which the shop-windows and the shop's internal fittings can be assessed;

— the size of the shop's sales area;

— the number of beauty care cubicles and their area.

For the qualitative assessment, account will be taken of:

— the quality of the façade;

— the decoration of the shop-windows;

— the floor-covering;

— the quality of the walls and ceilings;

— the quality of the furniture.

In addition:

— it is essential that the shop front has one or more shop-windows and that those windows are of sufficient quality for the display of selective perfumes and beauty products;

— those shop-windows must be dressed and the shelf-space set up in line with normal practice in the distribution of luxury products;

— in the case of a specialized area for the sale of perfumery products in a department store, that area must at all times meet the qualitative criteria referred to in this contractual documentation and reflect the prestige of Givenchy.'

13 As to the shop-name, Paragraph II.8 of the Contract states:

'An existing shop-name which has built up its image on the basis of limited decoration or service shall be excluded. A new shop-name perceived by the public as implying a restriction in decoration or service shall also be excluded. However, the pricing policy pursued under a shop-name cannot be regarded as conveying a down-market image.'

14 As regards the procedure for admission to the network, every application to open an account gives rise, in a maximum of three months, to an evaluation of the proposed retail outlet by Givenchy or its exclusive agent, by means of the evaluation form to which the Contract refers, a copy of which was produced by Givenchy in the course of these proceedings (hereinafter the 'evaluation form'). In that evaluation form, criteria relating to the exterior of the retail outlet, its interior and professional aptitude are marked in accordance with a grid containing 15 different headings, each of which is worth between nought and ten points and weighted in accordance with the importance attached to it. The 'external criteria' section comprises five headings and accounts for a possible total of 120 points. The 'internal

criteria' section contains eight headings and accounts for a total of 180 points. The 'professional aptitude' section contains two headings, namely 'experience and duties' (20 points) and 'commercial drive' (30 points). The maximum number of points obtainable is therefore 350 and the minimum number required for a retail outlet to be accepted is fixed at 161. An applicant who obtains four marks of nought under the 15 headings is eliminated.

15 Depending on the outcome of the evaluation, either the application is refused with reasons or the applicant is informed of the steps that he will have to take in order to satisfy the criteria. In the latter case, he is given a maximum period of six months to meet those criteria, after which a new evaluation is carried out. In the event of a positive outcome, the account is opened within a period of nine months from the date of the evaluation.

The Commission's Decision

16 The Commission considers in Paragraph II. A.4 of the Decision that Article 85(1) of the Treaty does not apply to selective distribution systems where three conditions are satisfied: (i) that the properties of the products in question necessitate the establishment of such a system in order to preserve their quality and ensure their proper use; (ii) that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises; and (iii) that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (see Case 26/76 *Metro* v *Commission* [1977] ECR 1875 (hereinafter '*Metro I*'), paragraph 20, Case 31/80 *L'Oréal* v *De Nieuwe AMCK* [1980] ECR 3775, paragraph 16, and Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 33).

17 In that regard, the Commission notes in the second subparagraph of Paragraph II. A.5 of the Decision:

'The articles in question are high-quality articles based on specific research, which is reflected in the originality of their creation, the sophistication of the ranges marketed and the qualitative level of the materials used, including their packaging. Their nature as luxury products ultimately derives from the aura of exclusivity and prestige that distinguishes them from similar products falling within other segments of the market and meeting other consumer requirements. This characteristic is, on the one hand, closely linked to the producer's capacity to develop and maintain an up-market brand image, and, on the other, depends on appropriate marketing that brings out the specific aesthetic or functional quality of each individual product or line of products ...'

18 Next, the Commission finds that Givenchy's selection criteria relating to professional qualifications, the location and fittings of the outlet and the shop-name are not covered by Article 85(1) of the Treaty. It considers, in particular, that 'having specialized technical advice available in the retail outlet is a legitimate requirement in so far as the knowledge specifically required is necessary in order to help consumers select the products best suited to their tastes and requirements and to provide them with the best information on their use and indeed the preservation of such products' (third subparagraph of Paragraph II. A.5), and that 'since the maintenance of a prestige brand image is, on the luxury cosmetic products market, an essential factor in competition, no producer can maintain its position on the market without constant promotion activities. Clearly, such promotion activities would be thwarted if, at the retail stage, Givenchy products were marketed in a manner that was liable to affect the way consumers perceived them. Thus, the criteria governing the location, fitting-out and window-dressing of the retail outlet constitute legitimate requirements by the producer, since they are aimed at providing the consumer with a setting that is in line with the luxurious and exclusive nature of the products and a presentation which reflects the Givenchy brand

image. ... In addition, the criterion relating to the shop-name is [designed] to ensure that the name of the perfumery or shop or area within which the perfumery counter or perfumery is situated is compatible with the principles governing the distribution of the products in question. It should be stressed in this respect that the down-market nature of a retail outlet or of its name cannot be deduced from the retailer's habitual policy on prices' (fourth subparagraph of Paragraph II. A.5).

The Commission continues as follows in the fifth, sixth and seventh subparagraphs of Paragraph II. A.5:

'The ban on selling goods which, through their proximity, are liable to detract from the Givenchy brand image is intended merely to safeguard, in the public's mind, the aura of prestige and exclusivity inherent in the products in question, thus preventing any association with lower-quality goods.

The Givenchy selective distribution system is also open to department stores with a specialized selling area. Consequently, in view in particular of the various forms of distribution which Givenchy has authorized at Community level, the qualitative requirements relating to the location, fittings and name of the retail outlet are not in themselves such as to exclude certain modern forms of distribution such as department stores or shopping malls.

The requirement that the authorized retailer should set aside for Givenchy products a location which, having regard to the other brands represented, corresponds to the standing of the Givenchy brand, is intended to meet the objective of

ensuring that the products covered by the contract are presented in an up-market manner. ... such a selection criterion is not, in itself, liable to limit the retailer's freedom to sell and promote competing brands or liable to impede the development of new forms of distribution.'

19 As regards the other obligations and conditions to be fulfilled by authorized retailers, the Commission finds that those relating to the procedure for admission to the network, a minimum amount of annual purchases, the availability in the outlet of competing brands, product stocks, the launch of new products and cooperation on advertising and promotion are caught by Article 85(1) (see Paragraph II. A.6 of the Decision) and that the barriers to competition encountered constitute an appreciable restriction of intra-Community trade (Paragraph II. A.8).

20 The Commission nevertheless finds in Paragraph II. B.1 of the Decision that the contracts underlying the Givenchy distribution system meet the four conditions provided for in Article 85(3) of the Treaty.

21 As to whether the requirements at issue contribute to improving production or distribution within the meaning of Article 85(3) of the Treaty, the Commission states, in Paragraph II. B.2:

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

22 The Commission accordingly considers that the contractual requirements falling within the scope of Article 85(1) (see paragraph 19 above) 'have the effect of ensuring that Givenchy products are distributed only under conditions that can preserve the high quality image and exclusivity associated with the fact that they are luxury cosmetic products' (see the end of the final subparagraph of Paragraph II. B.2).

23 As to whether consumers are allowed 'a fair share of the ... benefit', within the meaning of Article 85(3) of the Treaty, the Commission considers in particular that 'the distribution system notified allows the exclusive character of the contract products to be safeguarded, such exclusive character being the main reason why consumers choose them' (second subparagraph of Paragraph II. B.3) and that 'if customers regard as secondary the brand image or the services associated with sale within the selective distribution system, they can choose similar articles falling within an adjacent market and distributed without the use of selective distribution systems, thus penalizing the commercial strategy pursued by the producer' (third subparagraph of Paragraph II. B.3).

24 Finally, the Commission takes the view, in Paragraph II. B.4 of the Decision, that the Givenchy distribution system does not contain any obligation restricting competition which is not indispensable to the attainment of the objectives envisaged, within the meaning of Article 85(3)(a) of the Treaty, and in Paragraph II. B.5, that the contracts in question do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question, within the meaning of Article 85(3)(b) of the Treaty. The Commission adds in particular that it 'has not been able to establish that the spread of selective distribution systems in the field of luxury cosmetic products impedes in principle certain modern forms of distribution, such as department stores. The selection criteria applied by Givenchy are not such that they cannot also be met by such forms of distribution, even if this requires some change in their particular marketing methods' (fourth subparagraph of Paragraph II. B.5).

25 Article 1 of the Decision reads as follows:

'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.'

Procedure and forms of order sought

26 By application lodged at the Court Registry on 21 October 1992, Galec brought the present action. By order of 31 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 des Industries de la Parfumerie (Federation of Perfumery Industries, hereinafter 'FIP') and the Fédération Européenne des Parfumeurs Détaillants (European Federation of Retail Perfumers, hereinafter 'FEPD') were granted leave to intervene in support of the form of order sought by the Commission.

27 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. However, by way of measures of organization of procedure, as provided for by Article 64 of the Rules of Procedure, the Commission, Givenchy and FEPD were requested to reply in writing to certain questions and to produce certain documents before the hearing. The parties lodged their replies between 16 and 24 January 1996.

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

29 The applicant claims that the Court should:

— annul the Decision in its entirety;

— order the Commission to pay all the costs of the case.

30 The defendant claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs of the case.

31 The intervener Givenchy claims that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs, including those occasioned by Givenchy's intervention.

32 The intervener FIP claims that the Court should:

— make an appropriate order on the admissibility of the action;

— dismiss the action as unfounded;

— order the applicant to pay the costs, including those occasioned by FIP's intervention.

33 The intervener Colipa claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs, including those occasioned by Colipa's intervention.

34 The intervener FEPD claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs, including those incurred as a result of FEPD's intervention.

35 In its observations on the interveners' pleadings, the applicant claims that the Court should:

— declare its action admissible;

— order the interveners to bear their own costs.

Admissibility

Summary of the arguments of the parties

36 Givenchy contends that the action is inadmissible on the grounds that the Decision is not of direct and individual concern to Galec 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') and that it has no legal interest in bringing proceedings.

37 Galec is merely an intermediary between its members, the Leclerc Centres, and the suppliers, and it never buys the products at issue or sells them on to the final customer. Furthermore, it has no authority to represent the Leclerc Centres, which alone have capacity to bring proceedings against the Decision. Galec is thus not directly concerned by the Decision, which does not cause it any particular harm (see Case 25/62 *Plaumann* v *Commission* [1963] ECR 95). Also, Galec cannot show any individual interest other than purely as an intermediary and therefore does not have a 'vested and present interest' in annulment of the Decision (see Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181). Referring to the judgment in Case 135/81 *Groupement des Agences de Voyages* v *Commission* [1982] ECR 3799, at paragraph 7, Givenchy also invokes the maxim that one cannot sue or be sued by proxy.

38 Galec points out that, in the course of the administrative procedure, it lodged observations pursuant to Article 19(3) of Regulation No 17 whose purpose was equivalent to that of a complaint, and that the Commission took up its arguments in the Decision, in particular in Section I. D and at the end of Paragraph II. B.5. Its action is therefore admissible (see Case 75/84 *Metro* v *Commission* [1986] ECR 3021, hereinafter '*Metro II*', paragraphs 20 to 23).

39 Furthermore, as the purchasing centre of an economic grouping, it operates directly on the perfume and cosmetic products market, selecting manufacturers and negotiating terms with regard to product ranges, prices, financial conditions and delivery and supply procedures. In the absence of the Decision, it could normally have obtained Givenchy products by one means or another, but it has now been denied any entitlement to normal access to that market.

40 The Commission does not dispute the admissibility of the action.

Findings of the Court

41 The Commission has not pleaded that the action is inadmissible. Accordingly, Givenchy is not entitled to raise an objection of inadmissibility and the Court is not bound to consider the pleas on which it relies (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 20, 21 and 22).

42 However, the Court will examine the admissibility of the action of its own motion, pursuant to Article 113 of the Rules of Procedure (see *CIRFS and Others*, paragraph 23).

43 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 to examine whether those two conditions are satisfied with regard to Galec.

44 As for the question whether the Decision is of 'individual' concern to Galec, 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 *Plaumann* v *Commission*, cited above, 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).

45 Galec is a cooperative society with variable capital whose members are retailers trading under the name É. Leclerc and is established pursuant to French Law No 72-652 of 11 July 1972. Article 1 of that Law provides that such cooperative societies are to have as their object the improvement, through the joint efforts of their members, of the conditions in which those members pursue their trade. For that purpose, the societies may in particular provide their members with all or part of the merchandise, produce or services, equipment and material which they need to pursue their trade. Article 2(2) of Galec's statutes provides in particular that the services which it proposes to provide to its members shall not be limited in nature or quantity and may in particular relate to any transaction or activity which has any connection with its members' trade. According to Article 30A of its statutes, Galec operates solely on behalf of its members in order to enable them to reduce their purchase costs and costs of distribution to their own members and/or consumers. It may in particular make purchases in its own name on behalf of its members.

46 According to statements made by Galec at the hearing, which have not been disputed, it approached numerous perfumers, including Givenchy, before the Decision was adopted, requesting that at least some of its members be admitted to the network as authorized retailers. Subsequently, by letter of 7 February 1991, one of its members, Rocadis, submitted a 'trial' application in respect of the Leclerc Centre in Poitiers.

47 Givenchy rejected that application by letter of 29 April 1991, on the ground that its selection criteria were not met, and in particular that the shop-name 'Leclerc' did not reflect the prestige and renown of the Givenchy brand image. The evaluation form used on that occasion was essentially the same as the one currently used by Givenchy.

48 It is also not disputed that several other Leclerc Centres have demonstrated their wish to sell Givenchy products, as may be seen from the numerous proceedings under national law to which Galec and Givenchy refer in their pleadings.

49 Furthermore, Galec participated in the administrative procedure before the Commission, submitting detailed observations following publication of the notice provided for by Article 19(3) of Regulation No 17 (see paragraph 6 above). In its observations, Galec contended in particular that the Decision would result in its members being precluded from selling Givenchy products and invited the Commission to visit the Leclerc Centres that wished to be authorized to sell luxury perfumes, in order to verify the conditions in which luxury products were sold there.

50 By letter of 12 December 1991, the Commission confirmed that Galec's observations would be carefully considered. At the hearing, the Commission stated that it took account of those observations when adopting the Decision. It is not disputed,

however, that the Commission essentially approves of the specific features of the Givenchy distribution system criticized by Galec during the administrative procedure.

51 The situation in this case is thus not materially different from that underlying the judgment in *Metro II* (paragraphs 21, 22 and 23), in which the Court of Justice held that an operator whose application for admission to a network as an authorized distributor had been refused and who had submitted observations pursuant to Article 19(3) of Regulation No 17 was directly and individually concerned by a Commission decision upholding the criteria which it had criticized in the course of the administrative procedure.

52 Furthermore, the Decision adversely affects Galec's own interests in so far as its objects under its statutes include the negotiation of the Leclerc Centres' supply contracts. Galec is therefore also individually concerned by the Decision in its capacity as negotiator of such supply contracts (see by analogy the judgments in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 20 to 25, and *CIRFS and Others*, cited above, paragraph 30).

53 In addition, it is apparent from Galec's statutes, in particular Article 2, that it had implied authority to put forward during the administrative procedure not only its own point of view but also that of its members wishing to belong to the Givenchy network. Since those members are potential competitors of the retailers authorized by Givenchy, they themselves are 'interested third parties' within the meaning of Article 19(3) of Regulation No 17. It follows that Galec is also individually con-

cerned by the Decision inasmuch as it participated in the administrative procedure in its capacity as representative of its members (see by analogy *AITEC and Others*, paragraphs 60, 61 and 62).

54 As to whether Galec is directly concerned, it is sufficient to note that the Decision left intact all the effects of the Givenchy network, thus enabling Givenchy to enforce the selection criteria whose lawfulness Galec had contested during the administrative procedure, directly against Galec and its members.

55 In addition, even if Galec itself does not seek to become an authorized Givenchy retailer, its purchases of Givenchy products are henceforth subject to compliance with the selection criteria whose lawfulness was confirmed by the Decision. It thus has a vested and present interest in challenging the validity of the Decision.

56 Accordingly, the action is admissible.

Substance

57 Galec's main ground of challenge is that the cumulative effect of the selection criteria approved in the Decision is to exclude a priori from the Givenchy network certain hypermarkets trading under the name É. Leclerc, despite the fact that they would be capable of selling luxury perfumes in proper and product-enhancing conditions. Around that main ground of challenge, Galec raises in its application three groups of pleas relating to, respectively, a defective statement of reasons, errors of fact and errors of law. Those pleas overlap and comprise, in essence, the following four main contentions: (a) the Decision is vitiated by a defective statement of reasons and/or manifest errors of fact inasmuch as the enhancement methods used in hypermarkets and supermarkets (hereinafter 'large retailers') are

regarded in the Decision as inappropriate for selling luxury perfumes; (b) it is vitiated by a defective statement of reasons and/or manifest errors of fact concerning consumer needs and expectations; (c) it is vitiated by errors of law and/or a defective statement of reasons inasmuch as the Commission decided that the criteria summarized in Paragraph II. A.5 are not covered by Article 85(1) of the Treaty; and (d) it is vitiated by errors of law and/or manifest errors of fact and/or a defective statement of reasons in its application of Article 85(3) of the Treaty.

58 It is appropriate to examine first the validity of the Decision with regard to Article 85(1) of the Treaty, bringing together all the pleas and arguments of the parties relating thereto, and then its validity with regard to Article 85(3) of the Treaty.

I — *Validity of the Decision with regard to Article 85(1) of the Treaty*

Summary of the arguments of the parties

Galec's arguments

59 Galec explains first that it sells, through its members operating under the name É. Leclerc, a large number of luxury products (hi-fi equipment, fine wines, jewellery, clocks and watches, cameras, luxury textiles etc.) in perfectly suitable conditions and that it accepts the need for a system based on the concept of 'luxury selectivity' in order to preserve the prestige of luxury products and meet consumer expectations. It also accepts that not all the shops operating under the name É. Leclerc are suited to such a form of marketing. Some large hypermarkets or supermarkets operating under that name, however, already practise luxury selectivity, by

means of particular techniques such as setting aside a specific location in the shop or fitting out a specialized area within the sales area, where appropriate with a further shop-name (for example 'Éole'). Such shops are or can be made suited to the sale of luxury cosmetics, as shown in particular by the photographs, annexed to the application, of 'beauty and health' areas in certain Leclerc Centres.

60 Large retailers are, however, automatically excluded from the Givenchy network by the cumulative effect of the selection criteria approved in the Decision, in particular those relating to the geographic surroundings, the external appearance of neighbouring shops, the retail outlet's fittings, the environment created by the other goods sold which are not to damage the Givenchy brand image, the quality of the façade, the requirement for the shop front to have one or more shop windows, the need for the quality and the dressing of those windows to be in line with the normal practice in the distribution of luxury products, and a shop-name which is not to be perceived by the public as implying a restriction in decoration or service (Paragraphs II.4, II.6 and II.8 of the Contract, cited in paragraphs 12 and 13 above). The above criteria can in fact be met only by traditional forms of trading, such as town-centre retailers and department stores, and shopping malls.

61 In particular, Galec is surprised that the Commission found that a criterion as liable to result in an applicant's elimination as that of the shop-name was legitimate, because that criterion is entirely subjective and excludes all the names used at national and Community level by hypermarkets which historically have been built up on discounting and a restriction in decoration or service — even though that concept has evolved greatly over the last 20 or so years and the name of a large retailer no longer conveys a down-market image to consumers.

62 As regards the statement of reasons in the Decision, Galec takes the view that, in a decision involving issues of principle as in this case, the Commission should have given particularly full reasons. The Commission did not give reasons for its asser-

tion that the criteria set out in the Decision are inherent in luxury selectivity. Despite the observations submitted by Galec during the administrative procedure, the Decision contains no reasoning relating to the ability of large retailers to enhance the image of luxury perfumes. Large retailers have in fact utterly transformed their marketing methods (see paragraph 59 above) and have succeeded not only in protecting the brand image attaching to technically advanced or luxury products but also in being competitive in terms of the image of those products.

63 However, the Commission left to the manufacturers the task of assessing public 'perception' of a shop-name, the environment formed by the other goods and compliance with the 'normal practice' in the sale of luxury products. That amounts to an excessive discretion, akin to an arbitrary condition, whose indispensability the Commission entirely failed to justify. By considering, incorrectly, that the image of luxury perfumes is harmed by having any other merchandise near them, the perfumers are in practice ruling out entirely their sale by large retailers (see, for example, the judgement of the French Cour de Cassation (Court of Cassation) of 19 May 1992 in *Sodigar* v *Dior*, Annex 6 to the application). An illustration of Givenchy's arbitrary and subjective approach and of the a priori exclusion of large retailers is provided by the assertion, contained in its letter of 29 April 1991 relating to the application for authorized status made by Rocadis in respect of the Leclerc Centre in Poitiers, 'that an absolute distinction may be drawn between a traditional perfumery meeting all our qualitative criteria located in a shopping mall adjoining a supermarket and a sales area for luxury perfumes located within the supermarket itself'.

64 Furthermore, the Commission gave no reasons whatever for the statement that consumers who purchase luxury products seek luxury only in traditional shops. The Commission's view that the exclusive nature of the products is the main reason why consumers choose them (fourth subparagraph of Paragraph II. A.5 and the second subparagraph of Paragraph II. B.3 of the Decision) is merely an *ex*

cathedra pronouncement. By not troubling to rely on any survey, analysis of public opinion or statistical study, it has not enabled the Court to check the pertinence of that portrait of the average consumer. The truth is that consumers expect a wide choice of luxury products and respond positively on such choice being made available to them. The Commission's reasoning 'belongs to the past' and is not based on the slightest evidence.

65 As regards the errors of fact in the Decision, Galec contends that, for the reasons already set out, the Commission failed to take account of the ability of large retailers to sell luxury perfumes in satisfactory conditions. In addition, it patently misjudged customer motivation by stating in the second subparagraph of Paragraph II. B.3 of the Decision that 'the distribution system notified allows the exclusive character of the contract products to be safeguarded, such exclusive character being the main reason why consumers choose them'.

66 The truth is that as soon as large retailers manage to market luxury perfumes, they are met by substantial spontaneous demand from consumers, seeking luxury and a chance to dream but not necessarily the price that is asked in a closed network. In particular, there is a category of consumers — often relatively young, well-off, sophisticated and keen on novelties and prestige brands — who prefer to make their purchases, including all 'top of the range' articles, from large retailers, but whose existence the Commission denies.

67 It is thus wrong to assume that consumers still have a uniform and down-market vision of large retailers or that sale by a large retailer transforms every luxury product into an everyday product. In particular, the criterion based on the general perception of a shop-name is inappropriate, because specific areas may be laid out under the same name, such as the 'jewellery carousels' in some Leclerc Centres.

Similarly, consumers may find a number of businesses or services trading together under the same shop-name, so that they do not in that case perceive the products by reference to the shop-name of the Leclerc Centres.

68 According to Galec, it follows from the above that the Commission infringed Article 85(1) of the Treaty by deciding that the criteria summarized in Paragraph II. A.5 of the Decision did not fall within the scope of the prohibition in that provision. In particular, the criteria at issue are neither objective nor uniform and go beyond what is necessary. Also, the Commission discriminated against the enhancement techniques used by large retailers.

69 Furthermore, the restriction in competition resulting from application of those criteria is exacerbated by the cumulative effect of networks similar to Givenchy's. The Commission therefore manifestly erred in law by maintaining that a system of luxury exclusivity operated in parallel and concurrently by all the Community manufacturers did not restrict competition within the meaning of Article 85(1).

70 The Decision fixes the number of distributors on the 'luxury perfumes' market — which is the relevant market according to the report of Professor Weber referred to in Section I. B of the Decision — and endorses the anticompetitive system based on a numerical restriction identified by him. Moreover, no room is left for forms of distribution other than the one described in the Decision and the market is so rigid and highly-structured that there is no workable competition, with the result that Article 85(1) of the Treaty applies (see the judgment in *Metro II*, paragraphs 40, 41 and 42). The Commission incorrectly joined distinct markets together when it stated, in the third paragraph of Section I. B of the Decision, that products marketed by means of selective distribution accounted for between 24% and 36% of all cosmetic products sold.

The Commission's arguments

71 The Commission considers that it did not exclude any modern form of trading a priori. It did not express an opinion on whether certain Leclerc Centres could comply with the criteria notified by Givenchy, but simply stated that the selection criteria at issue were necessary to preserve the products' quality and ensure their proper use, or were connected to the requirements for their distribution (Case 243/83 *Binon* v *AMP* [1985] ECR 2015, paragraph 31). From 1988 onwards, it began to reexamine the competitive conditions in the sector at issue, and that led it to object to a number of contractual provisions with a view to putting an end to all purely quantitative selection criteria. It therefore neither fixed the number of luxury perfume distributors nor endorsed a system based on a numerical restriction, contrary to Galec's assertions.

72 In the sixth subparagraph of Paragraph II. A.5 and the fourth subparagraph of Paragraph II. B.5 of the Decision, the Commission also considered that Givenchy's criteria were not such as to exclude certain modern forms of distribution such as department stores even if some change in their particular marketing methods is required. At the hearing, the Commission's representative confirmed that the Decision did not exclude a priori any form of distribution of the 'supermarket type' in the luxury cosmetic sector and that the term 'department stores' ('*grands magasins*' in the French version) in the sixth subparagraph of Paragraph II. A.5 and the fourth subparagraph of Paragraph II. B.5 of the Decision had to be interpreted as encompassing hypermarkets.

73 As regards the criteria identified by Galec as excluding it from the network, neither the requirement that the shop windows always be in keeping with the prestige of the brand name nor the fact that the other activities in the retail outlet are taken into account necessarily result in the exclusion of hypermarkets and supermarkets.

On the other hand, if the problem were that those criteria are in fact being applied in a discriminatory manner, that would of course be unlawful, but could not be taken into consideration by the Commission when examining their lawfulness.

74 In any event, the need for the criterion relating to the shop-name is clear, because it allows certain names with a manifestly down-market image to be excluded. It is apparent from Galec's arguments that there are hypermarkets and supermarkets whose names are associated with the deliberate construction of an image based on a restriction in decoration or service, which justifies not admitting them to the distribution networks for the products in question. Conversely, retailers with names which are not or are no longer synonymous with a restriction in decoration or service are in no way excluded from Givenchy's selective distribution system. Also, the Commission stated, in the fourth subparagraph of Paragraph II. A.5 of the Decision, that the down-market nature of a retail outlet or of its name should not be deduced from the retailer's habitual policy on prices.

75 As to the assertion that it left to the manufacturers the task of assessing certain criteria such as the shop-name, the Commission contends that most of the qualitative selection criteria cannot be the subject of rigid definition, but involve a case-by-case assessment by the manufacturer which is subject to compliance with the principle of non-discrimination and to review by the competent courts.

76 The statement of reasons in the Decision is clear and complete, in particular in Paragraph II. A.5. Furthermore, it is clear from the judgments in *L'Oréal*, cited above, and in Case 99/79 *Lancôme* v *Etos* [1980] ECR 2511, and from Commission Decision 85/616/EEC of 16 December 1985 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.665 — Villeroy & Boch) (OJ 1985 L 376,

p. 15), that there was nothing novel in considering that preservation of the prestige image of a product may justify criteria relating to a retailer's professional qualifications and to the quality of his premises.

77 As to the consumer, the Commission states that it was able to rely on the observations submitted by a number of consumer associations in the procedure relating to the Yves Saint Laurent decision. It is in any event evident that the essential appeal for consumers who purchase luxury products is the assurance that the product will not become commonplace. Although consumers are initially willing to buy luxury products from retail outlets which do not reflect their luxury nature, over a period of time the availability of those products in such outlets gives them a down-market image and they then cease to be luxury products, with the result that consumers ultimately stop buying them.

78 As regards Article 85(1) of the Treaty, the Commission takes the view that the criteria considered in Paragraph II. A.5 of the Decision are patently objective criteria of a qualitative nature of the kind described in the judgment in *Metro I* and that they are laid down in a uniform and non-discriminatory manner, since they do not exclude any retailer capable of satisfying them. Moreover, the Commission also stated that those criteria were not to be applied in a discriminatory fashion, which is a question of practice and not an assessment of the criteria as such.

79 The criteria in question do not go beyond what is necessary. The Commission stated in the Decision that the characteristics of luxury perfumes, that is to say their high quality and their aura of prestige and exclusivity, were closely linked to the producer's capacity to develop and maintain an up-market brand image, bringing out the specific aesthetic or functional quality of each product or line of products. That finding led to the conclusion that the selection criteria relating to location, to the aesthetic and functional qualities of the retail outlet and to the prohibition of the sale of goods which, through their proximity, were liable to detract from the brand image were necessary to preserve the prestige brand image of Givenchy perfumes.

80 As regards the cumulative effect of networks, the Commission considers that the relevant market is the luxury cosmetics market but that, in any event, it duly took the existence of parallel networks into account (see Paragraph II. A.8 of the Decision). As to Galec's reference to paragraph 40 of the judgment in *Metro II*, it is apparent from paragraphs 41 and 42 of that judgment that selective distribution systems cease to comply with Article 85(1) of the Treaty only when they result in total rigidity in the relevant market, which is thus no longer subject to any competition. That is not the case here, where there is effective competition both between competing brands of luxury cosmetic products and between products with the same brand name, which makes it possible to state that such systems are compatible with Article 85(1).

81 In addition, although substitutability between luxury perfumes and other perfumes not sold under a selective distribution system is limited, consumers wishing to purchase perfumes without paying luxury perfume prices can find such products in other networks (see the third subparagraph of Paragraph II. B.3 of the Decision). That possibility is particularly significant because luxury cosmetic products account for only a limited proportion, varying between 22.4% and 36.2% depending on the Member State, of the total cosmetic products market (third paragraph of Section I. B of the Decision).

Arguments of the interveners

82 Since the interveners have expounded at length arguments similar to those of the Commission, only the following points need to be set out.

83 Givenchy considers that the selection criteria which it has adopted are objective, linear and non-discriminatory, in accordance with the case-law of the Court of Justice, and that it has enabled any trader to dispute its assessment criteria and to

go before the competent courts. It annexes documents relating to its refusal, for reasons which it regards as purely qualitative, of Rocadis's application in respect of the Leclerc Centre in Poitiers (see paragraph 46 above). Rocadis did not dispute the reasons for that refusal.

84 Givenchy also makes clear that it has no preconceived objection to any trader who is able to meet the qualitative criteria objectively laid down by the Decision and that it thus considers all forms of distribution — specialist retailers, shopping malls, department stores and others — capable of meeting the relevant qualitative criteria. Galec's argument that the Decision approved a distribution system which addresses only specialist retailers is accordingly without substance.

85 According to Givenchy, the image, prestige and renown of products bearing the Givenchy brand name are closely tied to their quality and to consumer perception of them, but also to the distribution chain inasmuch as luxury perfumery products — which meet particular specifications and are the fruit of advanced technical research — assume individuality as such products *vis-à-vis* ordinary perfumery products. Without selective distribution, the very concept of luxury perfumery products would disappear. Any interference with the conditions for preserving the image of luxury perfumery products would inevitably bring about the ruin of Givenchy's business in the foreseeable future.

86 The interest of consumers lies, in essence, in acquiring a prestige perfumery product which is different from everyday consumer products. It thus requires retention of a method of distribution which guarantees the preservation of an appropriate product image to meet their particular demands. In addition, the purchaser of such

a perfumery or cosmetic product expects always to be able to receive an appropriate consulting service. It is common knowledge that a prestige perfumery product, just like a cosmetic product, contains specified reactive ingredients which do not have the same effects on different consumers.

87 Not one of the provisions at issue constitutes a restriction which is not indispensable for the marketing of prestige perfumery products. At the hearing, Givenchy added in particular that the criteria relating to geographic location (see paragraph 12 above) seek *inter alia* to exclude retail outlets in areas totally unsuited to guaranteeing the brand image, such as industrial estates, and that it has no preconceived ideas concerning the location of a retail outlet.

88 Givenchy's selective distribution system does not eliminate competition in respect of a substantial proportion of the products at issue because the Contract encourages competition within the Givenchy brand and authorized retailers remain free to market any other brand of prestige perfumery products provided that they fulfil the requisite qualitative criteria. In addition, it is not a monopoly, in particular because consumers are not required to purchase prestige perfumes, but may purchase from other distribution networks perfumery products which do not convey a brand image or do not result from any particular technical expertise.

89 Furthermore, national courts have, on numerous occasions, held parasitic commercial practices to be unlawful, in particular that known as the '*marque d'appel*', which consists of marketing a product with the sole purpose of promoting the

seller's image and drawing consumers to other products lacking any connection with the brand-name product. Annulment of the Decision would allow Galec to engage in that type of marketing, which would directly harm the image and prestige of the Givenchy brand name.

90 As to the shop-name, the Commission acknowledged in particular that there is no question of regarding a shop-name as down-market simply on account of a particular pricing policy. For certain modern forms of distribution operating with lower prices than the 'traditional' forms, the point is simply to guarantee that the decoration and service will reflect the accepted qualitative criteria, so that the shop-name is not perceived as reflecting inadequate decoration or service. It is a matter for Galec — which itself has acknowledged the problem of the shop-name by establishing the further name 'Éole' — to make the necessary changes in order to be able to reflect those accepted qualitative criteria. Both parties can commission surveys of the manner in which a shop-name is perceived and a national court can come to a view on the basis of the experts' reports put before it.

91 Finally, in reply to the Court's questions at the hearing, as to whether Givenchy's position remained as expressed in its letter of 29 April 1991 to Rocadis relied on by Galec (see paragraph 47 above), Givenchy repeated that it had no preconceived objection to Leclerc Centres. It does not refuse applications by hypermarkets automatically, since everything depends on the particular circumstances of a given application.

92 Colipa notes first that the Decision refers to the report of Professor Weber, which accords with Colipa's own knowledge of the market. That report shows that the Community market in cosmetic products is segmented and that the segmentation is accompanied by differences in distribution methods, depending on the sector considered. The Commission rightly stated that luxury perfumery products and

cosmetics have intrinsic qualities, linked to both the nature of their ingredients and the higher quality of presentation, which differentiate them from products falling within other market segments, although there is some overlap between the products in question, consumers using, for varying lengths of time, a product falling within one segment for a particular need and then passing to another segment for a product to satisfy a different need. However, that alternative possibility does not cause luxury products to lose their specific nature.

93 Furthermore, Professor Weber's report confirms that a large number of producers and distributors operate in the luxury cosmetic products market, under dynamic and highly competitive conditions, and that the number of new entrants in the market is also high. In addition, producers must constantly research and develop new products and develop and maintain a marketing policy appropriate to the image of a prestige brand name. The Commission's assessment of the competitive context of the notified contracts in the Decision was therefore correct. Galec's contention that large retailers are excluded by those contracts is not substantiated by any economic analysis or other evidence.

94 Colipa then points out the legal principles that apply to selective distribution, which it derives in particular from an analysis of the case-law of the Court of Justice, as well as from the 'free rider' principle in American law and the 'Immanenztheorie' in German law, and takes the view that that form of distribution is fully justified for luxury cosmetics, as has been recognized by the Court of Justice, in particular in its judgments in *L'Oréal* and *Lancôme*, cited above, and by Advocate General Reischl in Joined Cases 253/78, 1/79, 2/79 and 3/79 *Procureur de la République and Others* v *Giry and Guerlain and Others* [1980] ECR 2327, at p. 2377.

95 That economic approach, based on the rule of reason, recognizes that competition based on factors other than price has advantages, having regard in particular to the substantial investment that is necessary and the need to avoid 'parasite' retailers living at the expense of those who accept the economic constraints of the manu-

facturer's commercial policy. Nor is competition eliminated in the market in question, because the selective distribution at issue exists alongside different methods accounting, in this case, for more than 50% of the products of the European perfumery industry.

96 The parallel existence of other selective distribution networks is relevant only in so far as it constitutes a barrier to access to the market (see Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935), does not leave any room for other forms of distribution centred round a different kind of competition policy, or results in a rigidity in price structure which is not counterbalanced by other competitive factors (*Metro II*), which is not the case here. On the contrary, no modern form of distribution is necessarily precluded from admission to the network and, to be admitted, Galec needed only to apply for authorized status and meet the selection criteria.

97 At the hearing, Colipa also relied on the Monopolies and Mergers Commission report *Fine Fragrances — A Report on the Supply in the UK for Retail Sale of Fine Fragrances* (Cm 2380, November 1993), according to which selective distribution in the luxury cosmetics sector is not contrary to the public interest within the meaning of the Fair Trading Act 1973. Colipa also pointed out that in several Member States luxury cosmetic products are sold through selective distribution networks in 'non-specialist' or 'multiple-product' shops such as Boots in the United Kingdom, Matas in Denmark, Sephora in France, Müller in Germany and so forth.

98 FIP contends that the intangible element of any luxury product is essential and the atmosphere created around any prestige service paramount, because the reputation of the brand name and, therefore, its success, are in the hands of its retailers, who are its shop window for consumers. In that respect, authorized retailers offer

consumers a number of assurances: that the complete range, or a sufficient choice including the brand's most recent new products, will be displayed, that advice will be given by competent staff trained by the manufacturer, that a guarantee and after-sales service will be provided and that the sales environment will make the purchase an evocative moment of pleasure. However, the symbolic forces which make and break luxury can be shattered if prestige products are marketed in unsuitable conditions, or in a product environment (for example with foodstuffs and cleaning products) which may detract from the prestige image of the brand concerned, such as that which led to the demise of Coty perfumes when its brand name became commonplace.

99 In that context, FIP takes the view that the qualitative obligations at issue, including those relating to the shop-name, are indispensable in order to maintain the manufacturer's brand image and ensure better advice to consumers, even if those requirements may lead to some retailers being refused admission to the network. In this case, the Commission observed the case-law of the Court of Justice scrupulously and did not in any way accept the a priori exclusion of a particular form of distribution.

100 FEPD considers in particular that, although Galec places itself in a context of selectivity, the purpose of its action is in fact to undermine the strategic choice made by Givenchy and to take on the small and medium-sized specialist undertakings, which goes against the interests of consumers. The action is not well founded, however, since the Commission correctly concluded that the criteria at issue satisfied the requirements in the case-law and it even went further, stating that those criteria were not such as to exclude undertakings using other marketing methods from the market, provided that they adapted themselves if necessary to the validated criteria. It is thus for Galec to adjust its marketing methods according to the nature of the products at issue, which does not require a radical change in its sales methods, in particular if, as it maintains, certain of its members already meet the qualitative criteria validated by the Commission.

101 As regards consumer expectations and requirements, the Commission's arguments are backed up in particular by the study made by Professor Michel Glais, from which it appears that consumers have a clear interest in purchasing their luxury products from specialist outlets for those products.

102 The Commission correctly defined the relevant market as being the luxury cosmetic products market. The success of the perfumery lines was the mainspring of the commercial success of the brands in question and, in order to prolong that success, the product ranges of those brands were extended to skin care and beauty products. To suggest, therefore, that the relevant market must be reduced to just perfumery products amounts to limiting the potential for extending perfumery lines to skin care and beauty products.

103 FEPD considers that the shop-name of a retailer whose success has been based on a restriction in decoration or service cannot be compatible with the marketing of luxury products in appropriate conditions. The fact that Galec recognizes that its members are not all equally suited to meeting the requirements for luxury selectivity raises the problem of how consumers are to distinguish between the outlets which are selective and those which are not, when they are all grouped together under the same name.

Findings of the Court

104 The assessment of the validity of the Decision in so far as it applies Article 85(1) of the Treaty raises four main questions: (A) whether selective distribution based on qualitative criteria in the luxury cosmetics sector is compatible in principle with Article 85(1) of the Treaty; (B) whether Givenchy's selection criteria referred to in Paragraph II. A.5 of the Decision fulfil the conditions necessary for them to be regarded as lawful under Article 85(1) of the Treaty; (C) whether Galec's pleas and arguments relating to whether its members are excluded a priori from the

Givenchy network and to consumer attitudes in that regard are well founded; and (D) whether Article 85(1) of the Treaty applies because there are parallel networks in the relevant sector.

A — Whether a selective distribution system based on qualitative criteria in the luxury cosmetics sector is compatible in principle with Article 85(1) of the Treaty

105 Although Galec states that it accepts the need for a system based on the concept of 'luxury selectivity' in order to preserve the prestige of luxury products and meet consumer expectations, it nevertheless challenges the lawfulness of Givenchy's selection criteria in the light of Article 85(1) of the Treaty. Accordingly, it is necessary first to examine the basic legal principles governing the application of Article 85(1) in the luxury cosmetics sector.

106 According to the case-law of the Court of Justice, 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 (see *L'Oréal*, cited above, paragraph 16, interpreted in the light of *Metro I*, paragraphs 20 and 21, of *AEG*, cited above, paragraph 33, and of Case T-19/91 *Vichy* v *Commission* [1992] ECR II-415, paragraphs 69, 70 and 71); 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 (see, for example, *Metro I*, paragraph 20, *L'Oréal*, paragraph 15, and *AEG*, paragraph 35); thirdly, that the system in question seeks to achieve a result which enhances competition and thus counterbalances the restriction of competition inherent in selective distri-

bution systems, in particular as regards price (see *Metro I*, paragraphs 20, 21 and 22, *AEG*, paragraphs 33, 34 and 73, and *Metro II*, paragraph 45); and, fourthly, that the criteria laid down do not go beyond what is necessary (see *L'Oréal*, paragraph 16, and *Vichy*, paragraphs 69, 70 and 71). The question whether those conditions are fulfilled must be assessed objectively, taking account of the interests of consumers (see *Metro I*, paragraph 21, and *Vichy*, paragraphs 69, 70, and 71).

107 While the Court of Justice has held in particular that such selective distribution systems based on qualitative criteria may be accepted in the sector covering production of high-quality and technically advanced consumer durables without infringing Article 85(1) of the Treaty, in particular in order to maintain a specialist trade capable of providing specific services for such products (see *Metro I*, paragraph 20, *AEG*, paragraph 33, *Metro II*, paragraph 54, and Case 31/85 *ETA* v *DK Investment* [1985] ECR 3933, paragraph 16), it is also apparent from its case-law that selective distribution systems which are justified by the specific nature of the products or the requirements for their distribution may be established in other economic sectors without infringing Article 85(1) (see *Binon*, cited above, paragraphs 31 and 32, and Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563). Likewise, the Court of Justice held in *Metro I* (paragraph 20) that the nature and intensiveness of the 'workable competition' necessary to attain the objectives of the Treaty could vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors, without offending against the principle in Articles 3 and 85 of the Treaty that competition is not to be distorted.

108 It is common ground, first, that luxury cosmetics, and in particular the luxury perfumes which constitute the bulk of the products at issue, are sophisticated and high-quality products which are the result of meticulous research, and which use materials of high quality, in particular in their presentation and packaging; secondly, that those products enjoy a 'luxury image' which distinguishes them from other similar products lacking such an image; and, thirdly, that that luxury image is important in the eyes of consumers, who appreciate the opportunity of purchasing luxury cosmetics, and luxury perfumes in particular. There is, in consumers' minds, only a low degree of substitutability between luxury cosmetic products and similar products falling within other segments of the sector (see Paragraph II. A.8 of the Decision).

109 Accordingly, the Court considers that the concept of the 'characteristics' of luxury cosmetics, within the meaning of the judgment in *L'Oréal*, cannot be limited to their material characteristics but also encompasses the specific perception that consumers have of them, in particular their 'aura of luxury'. This case is therefore concerned with products which, on the one hand, are of a high intrinsic quality and, on the other, have a luxury character arising from their very nature.

110 As to whether selective distribution constitutes a legitimate requirement in the case of products possessing such characteristics, the Court notes that the reasoning in the Decision on that point (Section II. A) is not based on the concept of a specialist trade capable of providing specific services for technically advanced products, as referred to in the judgments in *Metro I*, *Metro II* and *AEG*, but rather on two other principal considerations, namely (a) Givenchy's interest as a producer of luxury cosmetic products in preserving its prestige brand image and safeguarding the fruits of its promotion activities (see the second and fourth subparagraphs of Paragraph II. A.5 of the Decision and, to like effect, Paragraph II. B.2) and (b) the need to safeguard, in the consumer's mind, the 'aura of exclusivity and prestige' of the products at issue, in particular by ensuring 'appropriate marketing that brings out the specific aesthetic or functional quality' of the products (second subparagraph of Paragraph II. A.5) and 'a setting that is in line with the luxurious and exclusive nature of the products and a presentation which reflects the ... brand image' (fourth subparagraph of Paragraph II. A.5; see also the fifth and sixth subparagraphs).

111 Although a producer is free to choose his own marketing policy, Article 85(1) of the Treaty must be taken into account where implementation of that policy results in agreements which impose on other independent economic operators obligations capable of restricting their freedom to compete to an extent that appreciably affects intra-Community trade. Accordingly, the mere fact that a producer has made significant efforts to promote his products does not in itself constitute an objective justification capable of rendering Article 85(1) inapplicable to a distribution

network which limits the freedom to compete of participating undertakings and third parties. Were it otherwise, any manufacturer could justify the adoption of a selective distribution system simply on the basis of his promotion efforts, and any restrictive selection criterion at all could be justified on the ground that it was necessary in order to protect the marketing policy desired by the manufacturer (see *Vichy*, paragraph 71).

112 A selective distribution system thus falls outside the scope of Article 85(1) of the Treaty only if it is objectively justified, account being also taken of the interests of consumers (see the end of paragraph 106 above).

113 It is in the interests of consumers seeking to purchase luxury cosmetics that such products are appropriately presented in retail outlets. Since they are high-quality products whose luxury image is appreciated by consumers, criteria which seek only to ensure that they are presented in an enhancing manner pursue an objective which improves competition by preserving that luxury image and thus counterbalances the restriction of competition inherent in selective distribution systems. Such criteria thus constitute a legitimate requirement for the purposes of the case-law cited above (see *Metro I*, paragraph 37).

114 In that regard, the Court considers that it is in the interests of consumers seeking to purchase luxury cosmetics that the luxury image of such products is not tarnished, as they would otherwise no longer be regarded as luxury products. The current segmentation of the cosmetics sector between luxury and non-luxury cosmetics reflects the varying needs of consumers and thus is not improper in economic terms. Although the 'luxury' nature of luxury cosmetics also derives, *inter alia*, from their high intrinsic quality, their higher price and manufacturers' advertising campaigns, the fact that they are sold through selective distribution systems which seek to ensure that they are presented in retail outlets in an enhancing manner also contributes to that luxury image and thus to the preservation of one of the

main characteristics of the products which consumers seek to purchase. Generalized distribution of the products at issue, as a result of which Givenchy would have no opportunity of ensuring that its products were sold in appropriate conditions, would entail the risk of deterioration in the presentation of the products in retail outlets which could harm the 'luxury image' and thus the very character of the products concerned. Consequently, criteria aimed at ensuring that the products are presented in retail outlets in a manner which is in keeping with their luxury nature constitute a legitimate requirement of such a kind as to enhance competition in the interests of consumers within the meaning of the case-law cited above.

115 That conclusion is not invalidated by the fact, established in the course of these proceedings, that in certain Member States, in particular the Netherlands but also the United Kingdom and France, a greater or lesser proportion of sales is by unauthorized distributors who obtain their supplies on the parallel market. It cannot be ruled out that consumers' interest in such sales has resulted in part from the luxury image whose preservation is due at least partly to selective distribution. It therefore does not follow that that luxury image would remain intact if there were no selective distribution.

116 However, while it is in the interests of consumers to be able to obtain luxury cosmetics which are suitably presented for sale and to ensure that their luxury image is preserved in that way, it is also in their interests that distribution systems founded on that consideration are not applied too restrictively and, in particular, that access to the products is not limited inordinately, as contended by the four consumer associations in their observations in the Yves Saint Laurent case which have been produced by the Commission at the Court's request (see paragraph 167 below). Also, it is clear from the case-law of the Court of Justice that Givenchy's system cannot be regarded as pursuing a legitimate objective counterbalancing the restriction of competition inherent in that system unless it is open to all potential

retailers who are capable of ensuring that the products will be well presented to consumers in an appropriate setting and of preserving the luxury image of the products concerned (see paragraph 106 above). A selective distribution system which resulted in the exclusion of certain forms of marketing capable of being used to sell products in enhancing conditions, for example in a space or area adapted for that purpose, would simply protect existing forms of trading from competition from new operators and would therefore be inconsistent with Article 85(1) of the Treaty (see *AEG*, paragraphs 74 and 75).

117 It follows that, in the luxury cosmetics 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.

B — Whether Givenchy's selection criteria referred to in Paragraph II. A.5 of the Decision fulfil the conditions necessary for them to be regarded as lawful under Article 85(1)

1. The respective roles of the Court and of the competent national courts and authorities

118 Galec considers that some of Givenchy's selection criteria allow Givenchy a discretion that is excessive and not capable of review and that they are therefore not objective within the meaning of the case-law of the Court of Justice. The Commission and the interveners take the view that those criteria result in a case-by-case assessment by the manufacturer which is subject to compliance with the principle of non-discrimination and to review by the competent courts.

119 In view of those arguments, the respective roles of this Court and of the competent national courts or authorities must be made clear.

120 Review by the Court under Article 173 of the Treaty of whether the criteria at issue fulfil the conditions necessary for them to be regarded as lawful under Article 85(1) of the Treaty, that is to say whether they are qualitative and objective and not discriminatory or disproportionate, is limited to establishing whether the Commission's findings in Paragraph II. A.5 of the Decision 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 this Court to rule on the application of those criteria in specific cases.

121 However, as the Commission and Givenchy have rightly pointed out, the application of those criteria in specific cases is not solely a matter for the manufacturer's discretion but must be determined objectively. For the Givenchy network to be lawful under Article 85(1), an essential element is thus the possibility of obtaining independent and effective review of the application of those criteria in specific cases (see Paragraph II. A.6(a) and the third subparagraph of Paragraph II. B.4 of the Decision).

122 It is settled law that national courts are competent to apply Article 85(1) of the Treaty because it has direct effect (see Case 127/73 *BRT* v *Commission* [1974] ECR 51, paragraphs 15 and 16). An applicant refused admission to the network who considers that the criteria at issue have been applied to him in a manner inconsistent with Article 85(1), in particular in a discriminatory or disproportionate fashion, may therefore bring a case before the competent national courts. Such a case may also be brought, where appropriate, before the national authorities responsible for the application of Article 85(1).

123 It is accordingly for the competent national courts or authorities to which such a case is referred to decide, in the light of the case-law of the Court of Justice and this Court where relevant, whether in a specific case Givenchy's selection criteria have been applied in a discriminatory or disproportionate fashion, thus infringing Article 85(1). Those national courts or authorities 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 detract from their image from gaining admission to the network.

124 In addition, an applicant refused admission to the network may, subject to the principles laid down by this Court in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, 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 (see *AEG*, paragraphs 44, 45 and 46, and 67 et seq.).

2. The lawfulness in principle of the criteria at issue under Article 85(1) of the Treaty

(a) The criteria relating to professional qualifications

125 In its pleadings, Galec has not challenged the criteria in Paragraphs II.3 and II.5 of the Contract relating to the professional qualifications of staff and a consulting and demonstration service (see paragraph 26 of its observations on the statements in intervention), but it submitted at the hearing that those criteria were disproportionate in relation to the demands of selling the products in question in appropriate conditions.

126 The Court finds that 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 luxury cosmetics and an integral element in the proper presentation of those products. As for the remaining aspects, Galec has not adduced any evidence that enables the Court to decide whether the qualifications required by Paragraph II.3 of the Contract, namely either a beauty diploma or an equivalent professional qualification, or three years' perfumery sales experience, are disproportionate having regard to the nature of the products concerned.

127 In any event, it is for the competent national courts or authorities to ensure that the provisions in the Contract relating to professional qualifications are not applied in a discriminatory or disproportionate fashion in specific cases.

(b) The criteria relating to the location and fittings of the retail outlet

128 Galec criticizes in particular the criteria regarding the 'area surrounding' the retail outlet, its external appearance, in particular its shop windows, and the sale of other goods in it. According to Galec, those criteria are too subjective, they are disproportionate and they discriminate against its members.

— The 'area surrounding' the retail outlet and its location

129 Paragraph II.4 of the Contract provides that 'the standard of the perfumery outlet and of the area surrounding it must reflect the prestige of the brand name'. According to that provision, the surroundings are assessed on the basis of 'the shop's external surroundings (neighbouring shops and street)', the 'geographical location (town centre, peripheral district, shopping street and so forth)' and 'other

prestige businesses in the vicinity (jewellers' shops, gift shops, hotels, restaurants and so forth)'. It is apparent from the heading '(a) Quality of the surrounding area — district or street' in the marking grid on Givenchy's evaluation form that a shop located in a district or street with a good name, or next to luxury businesses, is marked higher than a shop located in an ordinary suburb. That heading is also given the maximum weighting (30 points), that is to say a higher weighting than professional qualifications (20 points).

130 The Court finds that a criterion relating to the surroundings of an outlet selling luxury cosmetics 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 totally unsuitable premises, as Givenchy's representative pointed out at the hearing (see paragraph 87 above). It is, however, for the competent national courts or authorities to ensure that such a criterion is not applied in a discriminatory or disproportionate fashion in specific cases.

— The external appearance of the retail outlet, in particular the 'shop front with shop windows'

131 Galec complains about the provisions in the Contract relating to the quality of the façade and about Paragraph II.6 of the Contract according to which it is essential that 'the shop front has one or more shop-windows' which must be dressed 'in line with normal practice in the distribution of luxury products'. On the evaluation form, heading (b) relating to the external appearance of the retail outlet is worth a maximum of 30 points (for a 'particularly opulent' façade) and heading (c) relating to the shop windows is worth a maximum of 10 points.

132 The Court finds that such provisions, in particular those relating to the shop 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 shop front with shop windows, but has fitted out a space or area inside a shop in a manner appropriate to the sale of luxury cosmetics. Furthermore, a shop front with windows does not appear to be necessary for good product presentation in the context of a space or area fitted out inside a 'multiple-product' shop.

133 However, it is apparent from the form used to evaluate Rocadis's application in respect of the Leclerc Centre in Poitiers (see paragraphs 46 and 47 above) that the criteria in the Contract relating to shop windows may be interpreted as referring to the 'shop windows' of an area fitted out inside a retail outlet and not to the external shop windows.

134 Accordingly, it is sufficient to hold that it is for the competent national courts or authorities to ensure that the criteria relating to the external appearance of the retail outlet, including those relating to the shop windows, are not applied in a discriminatory or disproportionate fashion.

— The sale of other goods which may detract from the Givenchy brand image

135 Galec challenges the lawfulness of Paragraph II.6 of the Contract which states that 'the environment created by the other products sold in the place of sale must not detract from the Givenchy brand image'.

136 Neither the Contract nor the evaluation form specify the products which, if sold in the same place, might detract from the Givenchy brand image. In the Decision, the Commission merely states that the purpose of that provision is to safeguard, in

the public's mind, the aura of prestige and exclusivity inherent in the products in question, 'thus preventing any association with lower-quality goods' (fifth subparagraph of Paragraph II. A.5).

137 Paragraph II.6 of the Contract thus lacks precision and clarity and lends itself to being applied in a subjective and possibly discriminatory fashion.

138 However, the Commission takes the view that hypermarkets cannot be excluded from the network simply because they sell other goods (see the fifth and sixth subparagraphs of Paragraph II. A.5 of the Decision and paragraph 156 et seq. below). Nor have the interveners identified the products, with the exception of foodstuffs and cleaning products, whose sale would be such as to detract from the 'image' of cosmetic products.

139 Accordingly, the Decision must be interpreted as meaning that the sale of other goods typically found in a hypermarket is not 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 they are presented in enhancing conditions. That may require certain other products, such as foodstuffs or cleaning products, not to be sold 'near' the luxury cosmetics, or the sale of luxury cosmetics to be separated sufficiently from other, lower-quality, products (see the fifth subparagraph of Paragraph II. A.5 of the Decision).

140 In the light of the above, the supervision to be carried out, where difficulties arise, by the competent national courts or authorities counterbalances the lack of clarity in this criterion. It is for them to ensure that it is not applied in a disproportionate or discriminatory fashion.

— The scale of other activities carried on in the retail outlet

141 In support of the criticism which it makes in its application of the criteria relating to the fittings of the retail outlet and to the sale of other goods, Galec cited at the hearing the heading '(m) The shop's activity' in the 'Internal criteria' section of Givenchy's evaluation form. It is apparent from that heading, which is given the maximum weighting of 30 points, that if perfumery represents a minority of the shop's total activities, or if it takes up less than 50% of the shelf space, the applicant in question receives the mark of nought. Galec considers that heading to be discriminatory.

142 Admittedly, that heading is not mentioned in the Decision. The Decision does state, however, that Givenchy's criteria relating to the fittings of the retail outlet and the sale of other goods, referred to in Paragraph II.6 of the Contract, are not covered by Article 85(1) of the Treaty (fifth and sixth subparagraphs of Paragraph II. A.5). Since the evaluation form constitutes an integral part of Paragraph II.6 of the Contract, it follows that the Decision must be interpreted as also deciding that a criterion such as that provided for by heading (m) is not covered by Article 85(1).

143 Although, according to the evaluation form, applicants are eliminated only if they obtain four marks of nought under the 15 headings in all, heading (m) of the form contributes none the less to the elimination of applicants, such as 'multiple-product' shops, whose perfumery activity accounts for less than 50% of their activities, even if they have a specialized area for the sale of the products at issue.

144 Accordingly, heading (m) of the evaluation form must be regarded as disproportionate inasmuch as the mere fact that perfumery represents less than 50% of a shop's overall activities has no inherent connection with the legitimate requirement of preserving the luxury image of the products in question.

145 Furthermore, heading (m) is discriminatory inasmuch as it tends 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.

146 That heading is therefore inherently likely to restrict or distort competition within the meaning of Article 85(1) of the Treaty inasmuch as its effect is to treat an applicant less favourably merely because perfumery represents a minority of the activities in the shop.

147 Although the evaluation form constitutes an integral part of Paragraph II.6 of the Contract and of the procedure for admission to the Givenchy network, Paragraph II. A.5 of the Decision contains no reasoning to justify the heading at issue. The Decision's statement of reasons is therefore defective in that regard.

148 The Decision must accordingly be annulled in so far as it decides that a provision allowing Givenchy to treat retailers' applications less favourably merely because perfumery represents a minority of their activities is not covered by Article 85(1) of the Treaty.

(c) The criterion of the shop-name ('*enseigne*')

149 Galec criticizes as subjective, discriminatory and disproportionate Paragraph II.8 of the Contract which states that 'an existing shop-name which has built up its image on the basis of limited decoration or service shall be excluded. A new shop-name perceived by the public as implying a restriction in decoration or service shall also be excluded. However, the pricing policy pursued under a shop-name

cannot be regarded as conveying a down-market image'. The Commission and the interveners consider that provision to be necessary in order to preserve the luxury character of the products and the luxury image of the Givenchy brand name.

150 A criterion whose sole purpose is to ensure that a retailer's shop-name does not detract from the luxury image of luxury cosmetics 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.

151 However, having regard to the fact that, unlike criteria relating to material aspects of a retail outlet, the criterion of the shop-name cannot be checked by a photographic report or a visit, the competent national courts or authorities have a particular responsibility to ensure that it is not applied in an unjustified or disproportionate fashion.

152 First, that criterion may refer only to current consumer perception of the name in question. It follows that the first sentence of Paragraph II.8 of the Contract, according to which 'an existing shop-name which has built up its image on the basis of limited decoration or service shall be excluded', cannot be interpreted as excluding modern forms of trading which, when they began, were based on limited decoration or services but which since then have developed new enhancement methods for the sale of luxury products, so that their name is no longer regarded as down-market in that regard.

153 Secondly, in accordance with the principles which the Court has just stated (see paragraph 121 et seq. above), the perception of the name in question is not solely a matter for the manufacturer's discretion but must be established in as objective a manner as possible. If disputes arise, objective evidence such as consumer surveys or market studies should, where appropriate, be put before the competent national courts or authorities.

154 Thirdly, as the Commission has itself pointed out, it is stated in Paragraph II. A.5 of the Decision that the image arising from the 'retailer's habitual policy on prices' is not to be regarded as down-market. The criterion of the shop-name cannot be used for the sole purpose of excluding shops capable of offering the products at reduced prices but in product-enhancing conditions.

155 Finally, the criterion of the shop-name must be applied with particular caution when there is no doubt that the retailer has made the necessary investment to satisfy all the requirements concerning the material conditions for selling the products (fittings, separation from other products, qualified staff and so forth) and has accepted the obligations as to stocks, a minimum amount of annual purchases, cooperation on advertising and so forth. In such a case, the competent national courts or authorities have the task of establishing that the criterion of the shop-name is not used for the sole purpose of excluding from the network a retail outlet which is capable of selling the products concerned, where there is no genuine risk of their image being prejudiced.

C — Galec's pleas and arguments relating to whether its members are excluded a priori from the Givenchy network and to consumer attitudes in that regard

156 In the light of the foregoing, it is necessary at this stage to address Galec's pleas and arguments relating to whether its members are excluded a priori from the Givenchy network by the combination of the selection criteria, and to consumer attitudes in that regard.

157 The Commission has made it clear on many occasions during this case that the Decision does not envisage the a priori exclusion of modern forms of trading, such as the hypermarkets operated by the Leclerc Centres (see paragraphs 71 and 72 above). Givenchy has pointed out that it does not have any preconceived objection to hypermarkets and other modern forms of distribution or to Leclerc Centres (see paragraphs 84 and 91 above). The three other interveners have also contended that the Decision does not in itself exclude the form of distribution carried on by Galec's members or other modern forms of distribution. On the contrary, the interveners have pointed out in particular, in order to demonstrate the non-restrictive character of the Givenchy system, that 'multiple-product' retailers are authorized in several Member States.

158 It follows that none of the parties has contended before the Court that hypermarkets or other forms of 'multiple-product' distribution are in principle unsuitable for the sale of luxury cosmetics. The Commission and the interveners accept that the Decision envisages that possibility, as long as such outlets are appropriately fitted out and accept obligations equivalent to those accepted by other authorized retailers. The Court considers that, were it otherwise, Givenchy's network would infringe Article 85(1) of the Treaty, by excluding a priori a category of potential retailers from the system (see paragraph 116 above).

159 Even though the Commission expressed itself somewhat ambiguously in the sixth subparagraph of Paragraph II. A.5 and the fourth subparagraph of Paragraph II. B.5 of the Decision by using the term 'department stores' ('*grands magasins*'), which normally refers to a traditional form of trading, and by stating that it 'has not been able to establish' that the spread of selective distribution systems in the field of luxury cosmetic products impedes 'in principle' certain modern forms of distribution, it has specified during these proceedings that, in adopting the Decision, it did not intend to exclude forms of trading such as the hypermarkets of Galec's members and that the term '*grands magasins*' in the Decision encompasses such forms of trading (see paragraph 72 above).

160 Furthermore, the Court has made clear in this judgment the role to be played by the competent national courts or authorities in ensuring that the criteria at issue are applied in a non-discriminatory and proportionate fashion (see paragraph 121 et seq. above).

161 It follows that Galec has not adequately established that there are currently barriers preventing large retailers from engaging in the distribution of luxury cosmetics if their outlets are suitably adapted for the sale of such products.

162 It is for Galec or its members to submit applications and, if necessary, for the competent national courts or authorities to decide whether refusal of admission in a specific case is compatible with Article 85(1) of the Treaty, in the light of the case-law of the Court of Justice and this Court. In addition, it is for the Commission to ensure, in particular in the event of application being made for renewal of the Decision, that modern forms of distribution are not unjustifiably excluded from Givenchy's network or similar networks.

163 Accordingly, Galec's contention that its members are excluded a priori from the Givenchy network must be rejected.

164 It is also necessary to reject Galec's pleas and/or arguments that the Commission did not give reasons for its assertion that the qualitative criteria set out in the Decision are the only criteria inherent in the selectivity of luxury perfumes and/or that the enhancement methods of large retailers are inadequate for their sale. The Decision cannot be interpreted as containing such an assertion.

165 For the same reasons, Galec's contention that the Commission was manifestly in error as to the facts as regards the alleged exclusion of large retailers from marketing the products at issue must be rejected.

166 For the same reasons again, it is necessary to reject Galec's allegation that the Commission both failed to justify its statements regarding consumer motivation and was manifestly in error as to the facts in that regard.

167 In this connection, it is true that the Commission did not rely on an independent expert's report substantiating its statements regarding consumer motivation, in particular in Paragraph II. B.3 of the Decision. It is also true, as Galec asserted at the hearing, that the four French consumer associations which submitted observations during the administrative procedure which preceded adoption of the Yves Saint Laurent decision, namely the Union Féminine Civique et Sociale (Women's Civic and Social Federation, hereinafter 'UCS'), the Institut National de la Consommation (National Consumer Institute, hereinafter 'INC'), the Confédération Syndicale du Cadre de Vie (Trades Union Confederation for the Quality of Life, hereinafter 'CSCV') and the Confédération des Familles (Confederation for Families, hereinafter 'CSF'), did not support unreservedly the position adopted by the Commission. The CSF and the INC set out their opposition to the proposed decision, in particular on the ground that it would have the effect of maintaining excessively high prices and of preventing a significant part of the population from having access to the products. The UCS contended that some of the provisions at issue made it more difficult than before for new forms of distribution to enter the market and that those provisions were 'not moving in the direction of either the opening up and enjoyment of improved competition in the single market or the interests of consumers'. The CSCV concluded its observations by remarking that 'under cover of the technical nature of its products and the prestige of a brand name, Yves Saint Laurent SA restricts competition through discriminatory selection criteria and artificially maintains very high prices for its products'.

168 However, the Commission did not contend in the Decision that consumers seek luxury only in traditional shops. Nor has Galec established that the Commission manifestly erred as to the facts or provided a defective statement of reasons as

regards consumer expectations. It follows from the Decision that consumers who prefer to buy luxury cosmetics from an appropriately fitted-out hypermarket outlet must have the opportunity to do so, while consumers of the kind referred to in Professor Glais's report, who prefer to make their purchases in a specialist perfumery or a traditional department store, likewise remain free to continue to go to those outlets.

169 Accordingly, all of Galec's pleas and arguments relating to whether its members are precluded a priori from selling luxury cosmetics and its related pleas and arguments concerning consumer attitudes must be rejected.

D — Whether the prohibition in Article 85(1) of the Treaty applies because there are parallel networks in the relevant sector

170 Galec also submits that, in any event, Article 85(1) of the Treaty has been infringed in this case because networks similar to Givenchy's exist in the whole of the sector at issue, so that there is no room left for other forms of distribution and there is no workable competition in the relevant market — that is to say that of 'luxury perfumes' — within the meaning of paragraphs 40, 41 and 42 of the judgment in *Metro II*. The Commission and the interveners take the view that, although there are networks parallel to Givenchy's, there is workable competition in the relevant market — that of 'luxury cosmetics' — so that Article 85(1) is not applicable.

171 As the Court of Justice held in paragraph 40 of its judgment in *Metro II*, although 'simple' selective distribution systems (that is to say systems based solely on qualitative criteria) 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. However, according to paragraphs 41 and 42 of the same judgment, 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). Where there is a proliferation of 'simple' selective distribution systems, Article 85(1) applies only if the relevant market is so rigid and structured that there is no longer any workable competition as regards price (see also paragraphs 44 and 45 of that judgment).

172 Unlike the case which gave rise to the judgment in *Metro II*, in which the consumer electronics equipment at issue was not always sold through selective distribution networks, it is not disputed in this case that almost all the manufacturers in the luxury cosmetics sector use distribution systems similar to Givenchy's.

173 This Court has already held, however, that the selective distribution of luxury cosmetics improves competition in the interests of consumers, in particular by contributing to the preservation of the 'luxury' image of the products compared with similar products which do not enjoy such an image, so that Article 85(1) of the Treaty does not apply to certain qualitative criteria which have that objective (paragraph 108 et seq. above).

174 Accordingly, the reference in *Metro II* to competition being eliminated 'where the existence of a certain number of ... systems does not leave any room for other forms of distribution based on a different type of competition policy' does not mean that Article 85(1) of the Treaty is automatically applicable merely because all the manufacturers in the luxury cosmetics sector have chosen the same distribution methods. In this case, paragraphs 40 to 46 of the judgment in *Metro II* must be interpreted to the effect that, if some of Givenchy'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 (see *Delimitis*, cited above, paragraph 15 et seq.), or that there is no workable competition, in particular as regards price, taking account of the nature of the products at issue.

175 The Court has already found that the existence of barriers preventing access by new competitors capable of selling the products in question has not been established as regards the hypermarkets affiliated to Galec (see paragraph 156 et seq. above).

176 More generally, as to the question whether there is workable competition, it is necessary first to establish the relevant market. Even though the Commission was justified in dealing with the whole of the luxury cosmetics sector in the Decision, on the ground that luxury perfumery, beauty and skin care products share the same luxury image and are often sold together under the same brand name, the question whether there is workable competition can be judged only in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products (see *L'Oréal*, cited above, paragraph 25).

177 It is not disputed in this case that a perfume is not interchangeable as regards its characteristics or use with a beauty product (for example make-up) or a skin care product (for example a night cream). Nor is it disputed that, at the time, luxury perfumes represented approximately 90% of Givenchy's total sales. In the light of

the significance of that distinct sector, it is necessary to ascertain whether luxury perfumes are subject to workable competition at the retail level, despite the fact that they are always marketed by means of selective distribution.

178 First of all, the argument of the Commission and the interveners based on the third subparagraph of Paragraph II. B.3 of the Decision, which states that 'if customers regard as secondary the brand image or the services associated with sale within the selective distribution system, they can choose similar articles falling within an adjacent market and distributed without the use of selective distribution systems, thus penalizing the commercial strategy pursued by the producer' must be rejected. The Commission itself stated in the Decision that the extent to which luxury cosmetics were substitutable for similar products falling within other market segments was 'generally limited' (first paragraph of Section I. B) and that 'given the low degree of substitutability, in the consumer's mind, between luxury cosmetic products and similar products falling within other segments of the sector, the relevant market is that for luxury cosmetic products' (Paragraph II. A.8). In addition, it is apparent from Section I. B and Paragraph II. A.8 of the Decision that the Commission took account of the proportion of the luxury perfumery products market held by the Louis Vuitton Moët-Hennessy group in order to establish whether the restrictions in question were such as to have an appreciable effect on intra-Community trade.

179 Accordingly, in order to determine whether luxury perfumes are subject to workable competition, it is not appropriate to take account of supposed competition with non-luxury perfumes.

180 It is also necessary to reject the argument, put forward by the Commission and the interveners, that the existence of workable competition can be inferred from the fact that, according to the third paragraph of Section I. B of the Decision, which is

based on Professor Weber's report, products marketed through authorized retailer networks 'accounted, in 1987, for 24.7% of all cosmetic products sold in Germany, 30.3% in France, 36.2% in Italy and 22.4% in the United Kingdom'. Those figures come from Table No 22 in Professor Weber's report and represent the proportion of selective distribution sales expressed as a percentage of total sales of all categories of cosmetics combined, that is to say perfume, beauty products, skin care products, hair care products (in particular shampoo) and toiletry products (toothpaste, soap, deodorant and so forth). Also, according to that report (p. 89), the proportion of perfume sold in Italy by selective distribution was 81% and in France 65%. According to the figures produced by FIP, the proportion of perfume sold in France by selective distribution is 73% (see Annex I to its statement in intervention, p. 17). The figures quoted in the third paragraph of Section I. B of the Decision are thus not of assistance for assessing whether there is workable competition in a specific sector such as that of luxury perfumes.

181 The Commission and the interveners contend, however, that even in the luxury perfumes market considered as such, there is workable competition both between manufacturers (inter-brand competition) and between Givenchy's authorized retailers (intra-brand competition).

182 The position of the Commission and the interveners is not supported by Professor Weber's report, from which it appears, in particular at pp. 71, 89 to 96, 105 and 110, that in 1987 there was only very limited competition between luxury perfume retailers and between the different forms of distribution. However, before adopting the Decision in 1992, the Commission required Givenchy to make numerous amendments to its contracts, including the removal of all purely quantitative selection criteria, the deletion of clauses restricting onward sale of the products to other members of the selective network, the deletion of clauses limiting the freedom of

retailers to offer other brands for sale in their outlets and an express acknowledgment that they were free to set their prices independently. In addition, as the Court has just found, the Decision provides for the possibility of new forms of trading which are suitable for sale of the products in question having access to Givenchy's network.

183 It was accordingly for Galec to adduce sufficient evidence that, following the Decision, the market has become so rigid and structured that there is no longer workable competition between authorized retailers of luxury perfumes, in particular as regards price (see *Metro II*, paragraphs 42 and 44). Since Galec has not adduced anything specific in this regard, such evidence is lacking in this case.

184 It follows from all of the above that Galec's pleas and arguments alleging infringement of Article 85(1) of the Treaty and its other related pleas and arguments must be rejected, save in relation to the provision referred to in paragraph 148 above.

II — *Validity of the Decision with regard to Article 85(3) of the Treaty*

Summary of the arguments of the parties

185 As regards the exemption granted, Galec puts forward five main arguments to establish that the conditions of Article 85(3) of the Treaty are not met. First, the Commission sees the improvement of production and distribution of luxury perfumes only within a context of exclusivity (see the first subparagraph of paragraph II. B.2 of the Decision), although the additional obligations set out in the second

to sixth subparagraphs of Paragraph II. B.2 can be met by large retailers. Secondly, as to benefits to consumers, the Commission has retained an outdated view of consumer behaviour and expectations. Thirdly, the Commission has legitimated a complete lack of intra-brand price competition, which large retailers could have ensured. Fourthly, in breach of the principle of proportionality, the Commission failed to compare selective distribution through specialist retailers with selective distribution involving other forms of trading, thus ignoring the fact that large retailers would be subject to the same obligations and charges as any other authorized retailer (see, in particular, the end of the second subparagraph of Paragraph II. B.4 of the Decision). Fifthly, by imposing on other forms of distribution 'some change in their particular marketing methods', the Decision eliminates competition from those forms of distribution, except in the marginal cases of department stores and shopping malls. In any event, the Commission did not concern itself with the situation currently prevailing on the market, nor did it specify the changes to be made.

186 The Commission states in reply that the exemption granted concerns only the procedure for admission, the minimum amount of annual purchases, the obligations regarding stocks and cooperation on advertising and promotion, the prohibition on selling products which have not yet been launched, the checking of invoices by Givenchy and, where the client is himself a retailer, checking that he belongs to the official distribution network — obligations which Galec did not criticize with regard to Article 85(1) of the Treaty. It did not have to examine whether the criteria which were not caught by the prohibition in Article 85(1) fulfilled the conditions laid down in Article 85(3).

187 In addition, Galec's criticisms are not pertinent. In particular, its assertion that the Commission has ceased to be concerned at all with 'intra-brand' competition on prices is incorrect (see subparagraphs (b), (c), (e) and (f) of the second paragraph of Section I. C of the Decision, and the fourth subparagraph of Paragraph II. A.5)

and, in any event, the Court of Justice has held that some limitation in price competition is inherent in any selective distribution system, that limitation being counterbalanced by competition as regards the quality of services (paragraph 45 of the judgment in *Metro II*). The arguments relating to the consumer were rebutted when the Contract was considered in the light of Article 85(1). As regards the alleged breach of the principle of proportionality, the Commission maintains that it did not make a false comparison and notes that the Court of Justice stressed in paragraph 45 of its judgment in *Metro II* that account had to be taken of the costs borne by the retailers in the network as a result of their contractual obligations. As regards elimination of competition, the Decision expressly states that certain modern forms of distribution are not excluded as a matter of principle and that there is competition both between brands and between authorized retailers. With regard to the need for certain modern forms of distribution to make 'some change' in their methods, the Commission made a correct assessment of the situation as it is. The Decision does not specify the changes to be made to those particular marketing methods because they are the product of an individual assessment of each case.

188 The arguments of the interveners support the Commission's position.

Findings of the Court

189 As the Commission has rightly pointed out, the reasoning in Section II. B of the Decision concerns only the aspects of the Contract which the Commission considered were caught by Article 85(1) of the Treaty, that is to say those regarding, in particular, the procedure for admission to the network, stocks, the minimum amount of annual purchases, the availability in the retail outlet of competing brands, the launch of new products and cooperation on advertising and promotion. In its action Galec has not criticized those aspects of the Contract.

190 As to Galec's first argument, that the Commission envisages the improvement of production and distribution only within a context of 'exclusivity', the Commission's statement in the first subparagraph of Paragraph II. B.2 of the Decision, that 'a luxury cosmetics brand must be distributed on an exclusive basis', refers to the Commission's concern to safeguard the exclusive or luxury character of the products at issue (see the second subparagraph of Paragraph II. B.3). That phrase cannot be interpreted, therefore, as meaning that large retailers are automatically excluded from selling the products at issue and that their sale is reserved exclusively for traditional channels such as perfumeries and department stores in the strict sense.

191 Since the Court has already found that the Commission did not intend to preclude large retailers from selling the products at issue (see paragraph 156 et seq. above), Galec's argument that the Commission saw the improvement of production and distribution, within the meaning of Article 85(3) of the Treaty, only within a context which precluded large retailers from selling the products at issue must be rejected.

192 As to Galec's second argument, that the Commission has retained an outdated view of consumer expectations, the Court has already rejected the arguments concerning consumer motivation in paragraph 166 et seq. above.

193 As regards Galec's third argument, that the Commission has legitimated a complete lack of intra-brand price competition, the Court has already found that Galec has not adduced any proof to that effect (see paragraph 183 above).

194 As regards Galec's fourth argument, that the Commission compared selective distribution through specialist retailers with generalized distribution, thus ignoring the possibility of selective distribution through other forms of trading, the Court finds that the Commission made no such comparison.

195 As to Galec's fifth argument, that the imposition of 'some change in their particular marketing methods' eliminates large retailers from the luxury cosmetics sector, it has been established in the course of this case that the Decision does not provide for the elimination of large retailers from the luxury cosmetics sector. The reference to 'some change in their particular marketing methods' must therefore be interpreted as requiring such changes inside the shop and not changes which radically alter the very character of the shop as a supermarket or hypermarket. Although it would have been desirable for the Decision to be clearer on this point, the fact that the Commission did not identify, even in general terms, the changes to be made is not in itself sufficient to vitiate the Decision, in particular since specific cases will, where necessary, be subject to review by the competent national courts or authorities.

196 Accordingly, Galec's pleas and arguments alleging infringement of Article 85(3) of the Treaty must be dismissed.

197 It follows from all of the above that the action must be dismissed, save in relation to the part of the Decision referred to in paragraph 148 above.

Costs

198 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.

199 Since the applicant has been essentially unsuccessful in its claims, it must be ordered to pay its own and the Commission's costs, and also those of the intervener Givenchy, to which the Decision was addressed.

200 The other interveners, FIP, Colipa and FEPD, had a less direct interest than Givenchy in the outcome of the action. Since this is a case in which those three 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. Annuls 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) in so far as it decides that a provision allowing Givenchy to treat retailers' applications less favourably merely because perfumery represents a minority of their activities is not covered by Article 85(1) of the Treaty;

2. Dismisses the remainder of the action;

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

4. Orders each of the other interveners, the Fédération des Industries de la Parfumerie, 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

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