II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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)

(Only the French text is authentic)

(92/428/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to the application for exemption submitted by Parfums Givenchy SA on 19 March 1990 in respect of a standard-form selective distribution contract which the company has drawn up for the retail sale of its products in the European Economic Community,

Having regard to the summary of the notification published pursuant to Article 19 (3) of Regulation No 17 [2],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. The undertakings

Parfums Givenchy SA ('Givenchy') Levallois-Perret, France, forms part of the Louis Vuitton Moët-Hennessy group whose activities include luxury perfumery products, leather goods, luggage and accessories, champagnes and wines, cognac, spirits, haute couture and fashion accessories. The group controls other companies operating in the same market as Givenchy, namely Parfums Christian Dior and Parfums Christian Lacroix. The net consolidated turnover of the Louis Vuitton Moët-Hennessy group in 1991 was FF 22 billion. In the same year, Givenchy achieved a net consolidated turnover of FF 889 million, of which FF 430 million derived from its activities in the Community. The retail sale of Givenchy cosmetic products in the Member States is carried out by a network of authorized retailers, whose contractual conditions are laid down in the agreement to which this proceeding relates.

B. Distribution structure and position of Givenchy on the market

Cosmetic products cover a wide variety of articles intended for many different uses and include, in particular, perfumery, skin care and beauty products and haircare and toiletry products. A study carried out for the Commission [3] confirms that, within the overall category of cosmetic products, luxury products constitute a specific market segment. Luxury cosmetic products are high-quality articles, sold at a relatively high price and marketed under a prestige brand name. The extent to which they are substitutable for similar products falling within other market segments is generally limited.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 262, 8. 10. 1991, p. 2.

[3] 'Les systèmes de distribution sélective dans la Communauté du point de vue de la politique de la concurrence : le cas de l'industrie des parfums et des produits cosmétiques,' André-Paul Weber 1988.

The segmentation of the sector is accompanied by differentiation in distribution channels : cosmetic products are marketed, under various brands, either through authorized retailer networks (perfumeries and department stores), or through pharmacies and similar establishments, or through general and mass marketing outlets (supermarkets, 'drogueries' selling household products and toiletries, grocery shops, etc.), or through direct sale (mail order, etc.).

Generally speaking, luxury cosmetic products, particularly top-of-the-range perfumery, skin care and beauty products, are sold only through authorized retailer networks. According to the abovementioned study, products marketed in this way 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.

On the supply side, the number of both producers and distributors of luxury cosmetic products is fairly large. The structure of the Community industry is marked by the presence of firms of relatively modest size coexisting alongside large firms. In addition, some companies form part of groups which, directly or indirectly, control several firms operating in the sector. By contrast, distribution is relatively homogeneous in structure, with each producer distributing its top-of-the-range articles only through networks of selected retailers whose distribution agreements are based on comparable provisions.

Givenchy is one of the main luxury cosmetic products producers. In 1991, it held 3,1 % of the Community market in luxury perfumery products and around 1 % of the Community market in luxury skin care and beauty products. It is linked to other competing companies, in particular Parfums Christian Dior and Parfums Christian Lacroix. The Louis Vuitton Moët-Hennessy group thus holds, through its affiliated companies, over 10 % of the Community market in luxury perfumery products. Lastly, it should be noted that a substantial proportion of the turnover of Givenchy derives from its sales within the Community other than France.

Givenchy distributes its products within the common market through a network of some 10 000 authorized retail outlets, which it supplies direct in France and through the intermediary of its subsidiaries or independent companies acting as exclusive agents in the other Member States.

C. The notified distribution network

The distribution network notified is based on a standard-form authorized retailer contract binding Givenchy or, where appropriate, the exclusive agents of Givenchy, to its specialized retailers established in the Community, and on the general conditions of sale attached thereto.

The standard-form contract has undergone certain amendments in response to comments made by the Commission and entered into force as from 1 January 1992. Essentially, its content is as follows :

(a) *Selection criteria*

The only retailers admitted into the selective distribution network are those approved by Givenchy or by its exclusive agents on the basis of the selection criteria set out below.

(i) Authorized retailers, or their sales staff, must have a professional qualification in perfumery, in the form either of a beauty specialist's diploma, or a certificate recognized by the relevant Minstry of professional perfumery training certificate issued by a chamber of commerce and industry of one of the Member States, or at least three years' sales experience in perfumery. In addition, authorized retailers undertake to attend the training or further training sessions organized by Givenchy, notably as regards the distribution of its skin care and beauty products and new products, and to provide sufficient advisory and demonstration services with regard to the size of the sales area and the number of brands carried.

(ii) The location of the retail outlet must reflect the prestige of the Givenchy brand, having regard in particular to the geographical environment of the outlet and the nature and external appearance of neighbouring shops. The fittings of the retail outlet and the surroundings of the goods sold in the area set aside for the sale of the contract products must not detract from Givenchy's brand image. In particular, the fittings are assessed by reference to the quality of the facade and the internal fixtures such as the floor covering, the quality of the walls, ceilings and furniture, and the sales area and the fixtures and fittings of the beauty care cubicles. In addition, the shop-front must contain one or more shop windows whose quality and decoration must be in line with the usages governing the sale of luxury products. Lastly, the shop name must not, in the public's mind, be associated with any restriction in decoration or service. If the outlet

is located in a department store with an area set aside for the sale of perfumery products, its fittings must reflect the prestige of Givenchy and satisfy the same qualitative criteria.

(iii) The products must be stored under satisfactory conditions for their preservation, notably in areas or premises making it possible to avoid extremes of humidity, temperature or light.

(iv) The area set aside for the sale of Givenchy products must not be disproportionate to the number of brands sold. In addition, it must allow the authorized retailer to provide, having regard to the other brands represented, a location reflecting the standing of the Givenchy brand name. The authorized retail outlet must, within eighteen months of the date on which the distribution contract is concluded, carry a sufficient number of competing brands to reflect the image and reputation of Givenchy products. At the Commission's request, Givenchy deleted the clause under which the inclusion and/or maintenance of the retailer in the distribution network was subject to his being authorized to sell a minimum number of brands included on a restricted list drawn up by Givenchy.

(v) Authorized retailers must display and sell Givenchy products solely on the premises covered by the contract and must undertake to sell the products only in their original packaging.

(vi) Authorized retailers are required to provide their most effective assistance to the advertising campaigns organized by Givenchy or by its exclusive agent, by presenting under optimum conditions the display material provided by Givenchy and by ensuring periodically that the contract products are placed to best advantage in their shop windows. They must also actively canvass for customers to ensure their best efforts are directed towards selling the contract products to the said customers.

(vii) Authorized retailers must agree to hold a stock in hand comprising two thirds of the references of each of the ranges marketed by Givenchy and at least one product of each of such references, including new products.

(viii) Authorized retailers must agree to achieve in the retail outlets covered by the contract a minimum amount of annual purchases from Givenchy or its exclusive agent. Following comments from the Commission, Givenchy agreed that the relevant figure should be set in such a way that its amount does not exceed 40 % of the average purchase figure achieved the previous year by the authorized retail outlets established in the territory of each Member State.

(b) *Procedure for admission to the distribution network*

Under the contract provisions notified, the receipt of an application for the opening of an account is followed by an inspection visit to the retail outlet so as to determine whether it meets the qualitative selection criteria described above. Givenchy (or, where appropriate, its exclusive agent) undertakes to carry out such an inspection within a maximum period of three months as from the date on which the application for the opening of an account is made. Thereafter, if the application does not come anywhere near meeting the qualitative criteria, Givenchy (or, as the case may be, its exclusive agent) informs the applicant in writing that its application has been rejected, specifying the grounds on which its decision is based. Conversely, if the application is capable of meeting the qualitative selection criteria subject to certain work being carried out in the retail outlet, the applicant is informed accordingly in writing and, if the work is carried out within a maximum period of three months (extendable to six months at its request), its account will be opened within a maximum period of nine months from the date of the inspection. Lastly, if the application entirely meets the qualitative selection criteria, the applicant is informed accordingly in writing and its account will be opened within a period of nine months as from the date of inspection.

This procedure entered into force on 1 January 1992 and replaces the former system for admission into the Givenchy distribution network. Under the former system, any application from a candidate whose retail outlet was situated in France was entered on a regional (departmental) waiting list, with applications being dealt with in the order in which they were entered on the list. However, decisions to accept appropriate applications were made only when the opening of a new account was considered by Givenchy to be justified, notably in terms of the economic potential of the geographical area in question. Although the admission system applied by Givenchy in Member States other than France did not include the establishment of waiting lists, the opening of a new account was also subject to similar considerations of economic opportuneness. In response to comments made by the Commission, Givenchy has agreed to clear the existing waiting lists during a transitional period ending on 31 December 1992.

(c) *Freedom of cross supplies between members of the distribution network*

The standard-form contract notified provides that each authorized retailer may resell Givenchy products to any other authorized retailer established in any Member State, including the country in which he is himself established. The provisions also stipulate that each authorized retailer is free to obtain supplies from other authorized retailers or exclusive agents of Givenchy products established in any Member State, including the country in which he is himself established.

Exercise of this right is subject to the following conditions :

(i) before selling Givenchy products to other network members, authorized retailers must take the necessary precautions in order to ensure that the products thus supplied do not leave the network of Givenchy authorized retailers in the Community. They must in particular ensure that the purchasers are indeed retailers authorized by Givenchy or one of its exclusive agents ;

(ii) authorized retailers must keep copies of the invoices of such resales for one year. Givenchy (or, where appropriate, its exclusive agent) may consult them only where it has evidence involving directly the contractual liability of the authorized retailer ;

(iii) only the value of the orders invoiced by Givenchy (or, where appropriate, by its exclusive agent) is taken into account in calculating the authorized retailer's minimum annual purchases figure, it being understood, however, that the amount of the price paid by the authorized retailer to Givenchy (or to its exclusive agent) for the purchase of products subsequently resold to another network member is not deducted in calculating the minimum purchases figure ;

(iv) authorized retailers undertake, so as not adversely to affect campaigns for launching new Givenchy products, not to engage in active sale of such products in the territory of the Member State or Member States in which such products have not yet been launched, for a period of one year from the date on which the product is first launched in one of the Member States.

(d) *Closed distribution network*

Products bearing the Givenchy brand name are sold only within the framework of a network of retailers who have concluded an authorized retailer contract. So as to ensure consistency in the marketing of its products, Givenchy undertakes to withdraw such products from retail outlets that do not meet the conditions laid down in the selective distribution contract.

(e) *No imposed prices*

Givenchy (or, where appropriate, its exclusive agent) may not interfere in any way in the pricing policy of the authorized retailer, who is free to set the resale price of the products.

(f) *No ban on competition*

Authorized retailers may obtain supplies of articles similar to the articles covered by the contract from competing producers.

(g) *Duration of the contracts*

The contracts are concluded for one year and are renewable by tacit agreement for successive periods of one year, unless notice is given three months before their date of expiry. They may be terminated before the end of their term, with or without notice having been given, where authorized retailers do not abide by their contractual obligations. If the retail outlet is disposed of or if there is a change in the control of the authorized retailing company, the new operator will be offered a new contract, which may be immediately terminated if the new operator is not able to meet the conditions for authorization.

D. Comments from third parties

Following publication of a summary of the content of the notified agreements, pursuant to Article 19 (3) of Regulation No 17, the Commission received a number of comments from interested third parties.

Citing the need to ensure the homogeneity and tightness of the distribution networks, some producers and associations of producers criticized the approach adopted by the Commission, notably as regards the introduction of a system of automatic admission of new resellers into the network, the ceiling on the minimum annual purchases figure imposed on retailers and the arrangements governing resales between authorized retailers. On the other hand, while not disputing the need to have selective distribution for the products in question, some distributors and associations of distributors expressed reservations on the following main points :

— the minimum annual purchases figure, which should eventually be limited,

— the duration of the periods provided for under the procedure for admission to the distribution network, which were considered to be too long, and the duration of the period provided for retailers to acquire certain competing brands, which was considered to be too short,

— the vagueness of certain qualitative criteria, which could result in the selection of retail outlets being discretionary.

In addition, some representatives of the specialized distribution trade called for the retention of quantitative selection criteria. Among the undertakings operating in the non-specialized distribution field, however, some questioned the need for selective distribution of the products in question.

In the light of all the comments received, the Commission persuaded Givenchy to amend the standard-form contract with regard to the threshold for the figure for minimum annual purchases (see point C (a) (viii) above), the duration of the authorization procedure (see point C (b) above) and the period for the acquisition by retailers of certain competing brands (see point C (a) (iv) above). The other points raised by other interested third parties are dealt with in the legal assessment below.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(1) Pursuant to Article 85 (1) of the EEC Treaty, all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited as incompatible with the common market.

(2) The standard-form contract notified, which covers relations between Givenchy or, as the case may be, its exclusive agents and the various authorized retailers established within the common market, provides for arrangements for cooperation between legally independent undertakings and constitutes an agreement between undertakings within the meaning of Article 85 (1).

(3) The selective distribution contract notified by Givenchy imposes on the authorized retailers the requirement that they must resell the products covered by the contract only to final consumers or to other members of the Givenchy network. For their part, Givenchy and its exclusive agents undertake not to supply products bearing the Givenchy brand name to distribution undertakings not forming part of such network. These obligations constitute restrictions of competition, since access to the Givenchy distribution system is granted exclusively to traders who not only fulfil certain general professional and technical conditions, but are in addition willing to enter into subsequent commitments and to provide special services.

(4) As the Court of Justice has pointed out (Case 107/82, AEG v. Commission [1983] ECR 3151, paragraph 33), agreements constituting a selective distribution system necessarily affect competition in the common market. However, it has always been recognized that certain products which are not ordinary products or services have properties such that they cannot properly be supplied to the public without the intervention of specialized distributors. A system of selective distribution may thus constitute an element of competition which is in conformity with Article 85 (1), if it is established 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 (Case 31/80, L'Oréal v. De Nieuwe AMCK [1980] ECR 3775, paragraph 16) and provided 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 that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (Case 26/76, Metro v. Commission [1977] ECR 1875, paragraph 20).

(5) In this instance, the standard-form contract underlying the network for the selective distribution of Givenchy products is not covered by Article 85 (1) in so far as it is limited to establishing, for access to distribution, qualitative criteria of a technical and professional nature laid down in a uniform manner for all potential resellers and in so far as such criteria are not applied in a discriminatory manner.

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. This is all the more necessary as there exists, on the luxury cosmetic products market, a considerable number of competing brands and since, as a general rule, each retailer sells a wide range of brands. In this respect, it should be noted that, far from aiming at ensuring exclusive representation of Givenchy products, the selective distribution system notified is, on the contrary, based on Givenchy articles being sold alongside other competing high-quality brands.

Accordingly, 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. In addition, the requirement that the authorized retailer undertake to have his staff attend the training sessions organized by Givenchy and which essentially concern Givenchy beauty and skin care products and new products, is intended merely to ensure that they have adequate knowledge of the contract products and is not such as to restrict the authorized retailer's freedom to sell or promote competing brands.

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. The obligation on retailers to provide technically adequate storage conditions for the contract products ensures, moreover, that the latter are always sold in a perfect state of freshness and preservation. In addition, the criterion relating to the shop name is designated 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.

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. In addition, since this requirement does not involve either binding contractual specifications as to the identity or number of the brands sold alongside Givenchy products or minimum quantitative requirements regarding the allocation of the space set aside for the sale of the contract products, 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.

(6) However, the selective distribution contracts must be assessed from another angle where they contain authorization requirements and criteria that go beyond the limits indicated above. They are then caught by Article 85 (1), although they may, where appropriate, be exempted under Article 85 (3) (Case 99/79, Lancôme v. Etos [1980] ECR 2511). The contracts notified do contain such specific obligations.

(a) The procedure for dealing with applications for the opening of an account requires Givenchy to take a decision, within precise deadlines, on any request for authorization sent to it by interested resellers, admitting into its network all qualified retailers or, where appropriate, informing the applicant expressly of the ground on which its request has been rejected. To this extent, the procedure in question eliminates the risk of arbitrariness that was inherent in the admission system initially provided for in the contracts notified, where the producer had been given an exclusive and discretionary right to decide, as the final arbiter, on whether or not a new reseller should be integrated into its network. Nevertheless, the procedure has the effect of restricting access to the distribution network to resellers who are able and willing to carry out work on their retail outlets, while not being able to sell the contract products until the end of a period whose relative length is likely to discourage certain potentially qualified retailers. Thus, the duration of the periods provided for in this context is liable to affect competition between retailers of Givenchy products.

(b) The authorized retailers are required to achieve, in their retail outlets, a minimum annual purchases figure set periodically by Givenchy or, where appropriate, by the exclusive agent of the country in which the retail outlet in situated. This requirement goes beyond the requirements regarding the technical qualification of retailers or their sales staff and the appropriate location and fitting-out of retail outlet that are necessary for proper distribution of luxury cosmetic products. It restricts competition, both within the Givenchy brand and between it and other competing brands, since it has the effect, on the one hand, of restricting access to the Givenchy distribution network to resellers who are able to enter into such a commitment and, on the other, of obliging authorized retailers to devote a significant proportion of their activities to selling the contract products. The requirement in question is, in addition, liable to affect the freedom of the members of the distribution network to obtain supplies, since only the value of the orders invoiced by Givenchy (or, where appropriate, by its exclusive agent) is taken into account in calculating the minimum purchases figure.

(c) The authorized retail outlet must, within eighteen months of the date on which the distribution is concluded, carry a sufficient number of competing brands to reflect the image and reputation of Givenchy products. Although the sole purpose of this clause, whether seen in isolation or in the framework of the Givenchy standard-form selective distribution contract, is to maintain a distribution system based on the sale of Givenchy products alongside other competing luxury brands without restructing the freedom of choice of retailers in this respect, it could nevertheless have the effect of restricting the ability of authorized retailers to gain access to the selective distribution network as a result of the possible overlapping of the contractual obligations imposed by competing manufacturers, notably as regards the minimum annual purchases figure.

(d) The notified contracts also impose on the retailer specific obligations regarding stocks, and cooperation in advertising and promotion activities. These requirements constitute restrictions of competition, since they result, on the one hand, in firms which, while meeting the qualitative conditions for authorization, are not able to assume such additional commitments being significantly excluded from the distribution of Givenchy products and, on the other, in the autonomy of authorized retailers to determine their commercial policy being restricted.

(e) The distribution contracts require authorized retailers on whose territory a new Givenchy product has not yet been launched to refrain from engaging in active sale of it for one year as from the date on which the product was first launched in a Community country. This requirement constitutes a restriction of competition since it has the effect of limiting authorized retailers' freedom of commercial initiative and of impeding cross supplies between members of the distribution network.

(7) The verification requirements imposed on authorized retailers where they buy from or sell to members of the distribution network (checking of the invoices by Givenchy, checking that the customer belongs to the official distribution network) are designed to allow Givenchy to supervise the distribution system. Provided that they do not exceed what is necessary for appropriate verification, such requirements are the corollary of the principal obligation whose fulfilment they must ensure, and must be viewed in legal terms in the same way as such principal obligation (Case 26/76,

Metro v. Commission [1977] ECR 1875, paragraph 27). Since the ban on authorized retailers supplying non-authorized traders must in this instance be deemed to be restriction of competition, the same also applies to the verification requirements designed to ensure the application and supervision of such ban. However, the verification requirements are not in themselves a restriction of competition in so far as they are confined to what is strictly necessary in order to ensure the cohesiveness of the distribution system. In particular:

(i) the checking by Givenchy of the authorized retailer's invoices relating to the resale or purchase of Givenchy products to or from other members of the distribution network is expressly limited to cases where the producer has concrete evidence that the retailer has been involved in reselling the contract products outside the authorized distribution network. For the manufacturer, such monitoring is an indispensable means of taking action against possible breaches of the selective distribution contract and of ensuring the homogeneity and tightness of the system;

(ii) although the contract requires the authorized retailer, before supplying another member of the network, to ensure that the latter is indeed an authorized Givenchy retailer, the choice of appropriate means of fulfilling this requirement is left to the discretion of the authorized retailer. As Givenchy does not have to be consulted on this matter, the authorized retailer is free to supply another retailer without the knowledge of Givenchy.

(8) The Givenchy distribution system covers the whole of the Community. Since it restricts competition, it is liable to affect trade between Member States. As to whether or not the restriction is appreciable, the Court of Justice has ruled that an undertaking which supplies some 5 % of a market is in a position to influence intra-Community trade through its conduct (Case 19/77, Miller v. Commission [1978] ECR 131). It should be recalled in this respect 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. Givenchy's parent company, the Louis Vuitton Moët-Hennessy group, also controls Parfums Christian Dior and Parfums Christian Lacroix which, like Givenchy, operate on the market in luxury cosmetic products. Under such conditions, the relevant market share is that held in the Community market for luxury cosmetic products by Louis Vuitton Moët-Hennessy; as stated in Chapter I.B above, the share is well in excess of the abovementioned threshold. Consequently, the view must be taken that the barriers to competition encountered constitute an appreciable restriction of intra-Community trade. It should also be added that the agreements notified form part of an economic context in which selective distribution systems comprising restrictions of competition similar to those described above are the rule and that, consequently, the appreciable nature of the restrictions noted may be said to derive from the cumulative effect inherent in such a distribution structure.

B. Article 85 (3)

(1) The contracts underlying the Givenchy system of selective distribution in the Community meet the conditions provided for in Article 85 (3).

(2) *Improving production and distribution*

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.

Against this background, the procedure for dealing with applications for the opening of an account, as provided for under the amendments to the contract requested by the Commission, is intended to ensure flexible integration of new retailers into the Givenchy selective distribution network. The period laid down take account, on the one hand, of the organizational requirements of Givenchy as regards in particular the inspection visits to retail outlets, the training sessions for sales staff, the adjustment of its own production programmes and

the manufacture, usually by other undertakings, of the various advertising and presentation material for the new retail outlets. On the other hand, the procedure allows the retailer to carry out in a proper manner any refitting of the retail outlet that may be required to meet the qualitative criteria for authorization.

The minimum annual purchase requirement is intended to maintain continuous supplies and allows Givenchy (or, where appropriate, its exclusive agents) to concentrate distribution on the most effective retail outlets, thus rationalizing the spread of the costs associated with the distribution of its products and with the provision of assistance to retail outlets. In particular, this obligation is a means of ensuring, on the one hand, that the costs borne by the manufacturer will be covered by an adequate volume of business and, on the other, that the authorized retailer will contribute actively to enhancing the brand through customer service that is in line with the reputation of the contract products. The rationalization function inherent in the minimum annual purchase requirement also derives from the limits imposed on its implementation, with the minimum purchases figure being set annually by Givenchy (or by each of its exclusive agents) in such a way that its amount does not exceed 40 % of the average purchases, during the previous year, of all the retail outlets operating in the territory of a Member State. Furthermore, given the level of this threshold, the view may be taken that the requirement in question is not such as to restrict unduly the retailer's freedom to sell or promote competing brands.

The requirement that authorized retailers carry, in their outlet, a sufficient number of competing brands to reflect the image and reputation of Givenchy products is intended to maintain a distribution system based on the sale of Givenchy products alongside other competing luxury brands, which ensures that retailers are able to run a specialized business that is capable of offering consumers a wide range of competing products and thereby attract customers. This also helps to ensure the enhanced presentation of the contract goods whilst stimulating inter-brand competition.

The requirements on the holding of stocks have the effect of extending the range of Givenchy products available through authorized retailers, so that consumers can always find, at each retail outlet, the main products in each of the ranges marketed by Givenchy and rely on the products which they desire being rapidly available.

The provisions on cooperation in advertising and promotional activities, which are generic obligations to support the Givenchy brand, are a necessary corollary, in each retail outlet, to the various advertising measures carried out at national or local level by Givenchy or, where appropriate, by its exclusive agents. The provisions make it possible in particular to coordinate, in the common interest of the contracting parties, the promotional measures taken by the manufacturer and its authorized retailers and thus to plan as rationally as possible coordinated advertising campaigns. Furthermore, the constraints imposed by such requirements are not such as to prevent Givenchy from taking advantage of inter-brand competition.

The requirement imposed on authorized retailers on whose territory a new product has not yet been launched to refrain from engaging in the active sale of such product for one year enables the manufacturer to test a new product on a given market and to reserve the right, in the light of the results obtained on that market, to extend or stop the marketing of the product. The launching of a new luxury cosmetic product is a complex industrial and commercial operation entailing large-scale investment and sophisticated advertising promotion. The success of such an operation presupposes close cooperation between the manufacturer and its authorized retailers, who, for their part, require specific training in order to provide final customers with the professional advice they expect.

Viewed as a whole, these benefits clearly outweigh the disadvantage that, amongst qualified traders, the only ones authorized are those who declare that they are willing to assume the additional obligations described above. These restrictions 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.

(3) *Benefits to consumers*

Consumers derive direct advantage from the benefits inherent in the Givenchy selective distribution system.

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. The consumer is thus assured that the luxury product will not become an everyday product as a result of a downgrading of its image and a decrease in the level of creation.

In addition, the establishment of such a system has the effect of focusing on factors of competition other than the price, such as the provision of an advisory service for customers and the constant availability of the essential products in the ranges, including new products, marketed by Givenchy. Furthermore, 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. In addition, since the Givenchy distribution system is based on the products being sold alongside other prestige brands, and authorized retailers are no longer restricted in the choice of competing brands to be sold in their outlets, consumers can always decide not to buy the Givenchy brand if the level of its prices are considered no longer to correspond to the quality of its products. The clause requiring competing brands to be sold in the retail outlet gives customers the opportunity to compare a range of competing products when making a purchase.

Lastly, in view of the number of authorized retailers currently included in the Givenchy network and in view of the fact that the producer cannot refuse the inclusion of new retailers on the basis of purely quantitative criteria, the view may be taken that the system is not such as to restrict unduly intra-brand competition. Accordingly, consumers are allowed a fair share of the benefits resulting from the rationalization of distribution, particularly since the contracts notified provide for complete freedom in the setting of retail prices by authorized retailers.

(4) *Indispensable nature of the restriction of competition*

The Givenchy distribution system does not contain any restrictive obligation that is not indispensable to the attainment of the abovementioned benefits.

Prohibiting authorized retailers from supplying contract products to traders not previously authorized by Givenchy or by one of its exclusive agents is a necessary condition for ensuring the cohesiveness and tightness of the selective distribution system. In this context, the requirement incumbent on Givenchy or, where appropriate, its exclusive agents to market the products bearing the Givenchy brand name only in retail outlets that meet the conditions specified in the selective distribution contract is complementary to the specialization requirement imposed on authorized retailers and makes it possible to ensure uniform conditions of competition between resellers of the brand. Otherwise, competition would be distorted if Givenchy supplied traders which, not being subject to the same obligations, had to bear financial charges that were appreciably smaller than those borne by the members of the selective distribution network. In such a situation, it would no longer be possible to require authorized Givenchy retailers to continue to carry out their own obligations, with the result that the selective distribution system could no longer be maintained.

As a corollary to the requirements intended to ensure that the distribution network is closed, the verification by Givenchy of the authorized retailer's invoices for the resale or purchase of Givenchy products to or from other network members is an indispensable means of taking action against any breaches of the selective distribution contract, provided that such monitoring does not go beyond the limits expressly provided in the contract.

The authorization procedure does not go beyond the limits of what is necessary in order to ensure flexible integration of new resellers into the distribution network. It should be pointed out, in particular, that the procedure is applicable only in the case of requests from new candidates or from former authorized retailers whose distribution contracts have been terminated as a result of a breach of contract which they have committed. Consequently, the procedure cannot give rise to abuses during the periodical renewals of contracts. Furthermore, such a procedure is not liable to affect the retailer's freedom to dispose of his business, notably by selling it to third parties, since the extension of the distribution contract in the name of a new operator is automatic, subject to verification of the latter's professional qualifications. Lastly, since Givenchy is required to inform the retailer of the reasons for any rejection of his application, the retailer will always be able to challenge the implementation of the admission procedure with respect to him, notably where the selection criteria have been applied in a discriminatory manner. In addition, it should be observed that, while the periods currently provided for in the context of the aforesaid procedure are relatively long, they have nevertheless been regarded as

acceptable in order to facilitate the transition from a closed distribution system, based on the application of quantitative criteria, to a system subject only to the application of certain qualitative criteria. In the light of this, the Commission considers it necessary to re-examine the question of the duration of the admission procedure at the end of the period of validity of this Decision.

The requirements regarding minimum annual purchases, the sale of competing brands, the holding of stocks and cooperation in advertising and promotional activities are also indispensable to the attainment of the abovementioned benefits. If there were no provisions specifying minimum purchases of supplies, giving authorization to all the retailers having the professional and technical qualifications required by Givenchy would result in a considerable extension in the distribution network which, however, given the relative stability of the market in question, would not result in a proportionate increase in sales. The producer would then be confronted not only with higher distribution costs, but also with a gradual deterioration in the image of the products. Moreover, the minimum annual purchases requirement may be considered reasonable in that the amount of purchases which Givenchy has undertaken to require from its retailers cannot exceed 40 % of the average purchases figure, during the previous year, of all the retail outlets concerned. Consequently, it may be considered that such limitation of the amount relating to the minimum annual purchases requirement is such as to safeguard the retailer's capacity to market a sufficiently broad range of competing brands as well as the access of new retailers to the network. However, the Commission considers it necessary to re-examine this aspect of the distribution system at the end of the period of validity of this Decision.

The clause requiring retailers to carry a sufficient number of competing brands is necessary in order to attract and retain the loyalty of consumers who expect to find, in each retail outlet, a specialized commercial environment allowing them to choose from a range of competing brands. It should also be stressed that, following amendments made by Givenchy at the request of the Commission, authorized retailers are no longer restricted in choice to the list drawn up by the manufacturer of the brands likely to constitute such an environment. Retailers are now free to choose from competing brands, which, forming part of the same market for luxury cosmetic products, are usually distributed through networks of authorized retailers. As regards the requirement that a sufficient number of brands be carried in the retail outlet, it seems that the minimum number of four brands imposed until now by Givenchy is not unduly high, given the degree of specialization that is currently a usual feature of the distribution of luxury cosmetic products in the Community.

It is also to be feared that, if there were no requirements regarding the holding of stocks, authorized retailers would decide to concentrate their promotion activities only on the brand leader products of each of the lines marketed by Givenchy. In addition, the retailer's cooperation in advertising and promotional activities is indispensable in ensuring maximum effectiveness in promotional campaigns, the cost of which represents a substantial proportion of the producer's investment. Lastly, the clause prohibiting active sale of new products while they are still being launched by Givenchy is necessary in order to allow the producer to limit the territory within which a new product is launched so as to gauge consumer reaction and decide, in the light of the results obtained, whether larger-scale production may be envisaged.

(5) *Elimination of competition*

The contracts on which the Givenchy selective distribution system is based do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Since, on the one hand, the contracts do not contain any no-competition clauses and since, on the other, the Community market comprises a large number of undertakings manufacturing or marketing luxury cosmetic products, authorized Givenchy retailers are able to take advantage of inter-brand competition.

In addition, authorized Givenchy retailers may compete with one another throughout the Community. They have the right to obtain their supplies wherever it is most advantageous to them, since they can procure Givenchy products from any exclusive agent within the Community, and supplies between authorized retailers are now

allowed without any restriction within the Community distribution network. The Givenchy contracts no longer contain either the clause which prohibited resale between retailers established within one and the same Member State or the clause which provided that amounts relating to products resold by a retailer to other network members had to be deducted in calculating the annual purchases of such retailer. It may thus be hoped that such changes will help to prevent any rigidity in the structure of prices in the common market.

Similarly, the Commission 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.

All the conditions for exemption under Article 85 (3) are thus met.

C. **Articles 6 and 8 of Regulation No 17**

All the amendments made by Givenchy to its standard-form authorized retailer contracts entered into force on 1 January 1992. It therefore seems appropriate, pursuant to Article 6 of Regulation No 17, to give effect to the exemption granted under Article 85 (3) of the EEC Treaty as from that date.

So as to be able, at the end of a relatively short period, to reexamine the effects of the Givenchy distribution system on competition, the Commission considers it appropriate, pursuant to Article 8 (1) of Regulation No 17, to make this Decision applicable until 31 May 1997.

Lastly, this Decision should be accompanied by conditions and obligations so as to enable the Commission to check whether the amounts imposed on authorized Givenchy retailers under the minimum annual purchases requirement continue to meet the conditions for exemption laid down in Article 85 (3) of the EEC Treaty. Accordingly, Givenchy is required to submit, every two years, detailed reports specifying, for each Member State, the amount set annually by Givenchy and by its exclusive agents in implementation of the abovementioned requirement and the average purchases of Givenchy products achieved by all the retail outlets concerned during each of the previous years. This Decision is based, in this respect, on Article 8 (1) of Regulation No 17,

HAS ADOPTED THIS DECISION :

Article 1

The provisions of Article 85 (1) of the EEC Treaty are hereby declared inapplicable, pursuant to Article 85 (3), to the standard-form authorized retailer contract binding Givenchy or, where appropriate, its exclusive agents, to its specialized retailers established in the Community, and to the general conditions of sale annexed thereto.

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

Article 2

Parfums Givenchy SA shall present to the Commission every two years, starting on 1 June 1993, reports specifying :

— the total amount of purchases of Givenchy products achieved, during each of the previous years, by all the authorized retail outlets in each Member State of the Community, the increases made in prices and the launching of new products or the withdrawal from the market of old products,

— the number of authorized retail outlets in each Member State as at 31 December of each of the previous years, and

— the amounts set annually by Givenchy or, where appropriate, by its exclusive agents, pursuant to the minimum annual purchases requirement incumbent on authorized retailers.

Article 3

This Decision is addressed to :

Parfums Givenchy SA
74 Rue Anatole France
F-92300 Levallois-Perret

Done at Brussels, 24 July 1992.

For the Commission
Leon BRITTAN
Vice-President