ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

6 September 2004 *

In Case T-213/02,

SNF SA, established in Saint-Étienne (France), represented by K. Van Maldegem and C. Mereu, lawyers,

applicant,

v

Commission of the European Communities, represented by X. Lewis, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for the partial annulment of Twenty-sixth Commission Directive 2002/34/EC of 15 April 2002 adapting to technical progress Annexes II, III and VII to Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products (OJ 2002 L 102, p. 19) in so far as it restricts the use of polyacrylamides in the composition of cosmetic products,

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: H. Jung,

makes the following

Order

Law

1 Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (OJ 1976 L 262, p. 169), as most recently amended, prior to the adoption of the directive which forms the subject-matter of the present action, by Commission Directive 2000/41/EC of 19 June 2000 postponing for a second time the date after which animal tests are prohibited for ingredients or combinations of ingredients of cosmetic products (OJ 2000 L 145, p. 25, 'the cosmetics directive') provides, inter alia, that cosmetic products put on the market within the Community must not cause damage to human health when they are applied under normal or reasonably foreseeable conditions of use having regard, inter alia, to the presentation of the product, its labelling, any instructions for its use and disposal and any other statement or information provided by the manufacturer or his agent or any other person responsible for placing those products on the Community market.

2 Article 4(1) of the cosmetics directive provides:

'Without prejudice to their general obligations deriving from Article 2, Member States shall prohibit the marketing of cosmetic products containing:

...

(b) substances listed in the first part of Annex III, beyond the limits and outside the conditions laid down;

...'

3 Article 8 of the cosmetics directive provides:

'1. In accordance with the procedure laid down in Article 10 the following shall be determined:

— the methods of analysis necessary for checking the composition of cosmetic products,

— the criteria of microbiological and chemical purity for cosmetic products and methods for checking compliance with those criteria.

2. The common nomenclature of ingredients used in cosmetic products and, after consultation of the Scientific Committee on Cosmetology, the amendments necessary for the adaptation to technical progress of the Annexes shall be adopted in accordance with the same procedure, as appropriate.'

4 Article 9 of the cosmetics directive provides:

'1. The Committee on the Adaptation to Technical Progress of the Directives on the Removal of Technical Barriers to Trade in the Cosmetic Products Sector, hereinafter called "the Committee", is hereby set up. It shall consist of representatives of the Member States with a representative of the Commission as chairman.

2. The Committee shall adopt its own rules of procedure.'

5 Article 10 of the cosmetics directive provides:

'1. Where the procedure laid down in this Article is to be followed, matters shall be referred to the Committee by the chairman, either on his own initiative or at the request of the representative of a Member State.

2. The representative of the Commission shall submit to the Committee a draft of the measures to be adopted. The Committee shall deliver its opinion on the draft within a time-limit set by the chairman according to the urgency of the matter. ...

3. (a) The Commission shall adopt the proposed measures when they are in accordance with the opinion of the Committee.

(b) Where the proposed measures are not in accordance with the opinion of the Committee, or if no opinion is adopted, the Commission shall without delay propose to the Council the measures to be adopted. The Council shall act by a qualified majority.

(c) If, within three months of the proposal being submitted to it, the Council has not acted, the proposed measures shall be adopted by the Commission.'

6 Article 13 of the cosmetics directive provides:

'Precise reasons shall be stated for any individual measures placing a restriction or ban on the marketing of cosmetic products taken pursuant to this Directive. [They] shall be notified to the party concerned together with particulars of the remedies available to him under the laws in force in the Member States and of the time-limits allowed for the exercise of such remedies.'

7 On 15 April 2002, the Commission adopted Twenty-sixth Commission Directive 2002/34/EC adapting to technical progress Annexes II, III and VII to Council Directive 76/768 (OJ 2002 L 102, p. 19, 'the contested directive'), in accordance with Article 8(2) of the cosmetics directive and after having consulted the Scientific Committee on Cosmetic Products and Non-Food Products intended for consumers ('SCCNFP').

8 Article 1 of the contested directive amends the cosmetics directive in accordance with the annex to the contested directive. That annex provides, inter alia, that reference number 66 be added to Annex III to the cosmetics directive and, in respect of polyacrylamides, fixes a maximum residual acrylamide content of 0.1 mg/kg in body-care leave-on products and 0.5 mg/kg in other cosmetic products.

Facts

9 The applicant is a leading producer of acrylamide and acrylamide-based polymers such as polyacrylamides which it sells throughout the world. Using its expertise and know-how in the field of polymer analysis techniques, it developed a range of polyacrylamides, which are polymers specially designed for use in cosmetics and personal care products, under the trade mark FLOCARE.

10 Polyacrylamides are used in cosmetic products owing to their ability to function in many different ways as conditioning agents and film-forming compounds, exfoliating polymers, thickeners, emulsifiers and dispersants for make-up products.

11 The applicant is a member of the Polyacrylamide Producers Group ('PPG') made up of the seven producers of polyacrylamides within the Community. Two of those producers, including the applicant, also manufacture acrylamide. It is estimated that 99.9% of acrylamide in the Community is used in the production of polyacrylamides.

12 The SCCNFP placed the use of polyacrylamides in cosmetic products on the agenda for its meeting on 14 November 1997. In mid-1998, the European Cosmetic Toiletry and Perfumery Association ('Colipa'), an industry association bringing together manufacturers of cosmetic products (but which does not include manufacturers of raw materials, such as the applicant), received a copy of a first draft opinion of the SCCNFP concerning the risk of cancer associated with the use of polyacrylamides in cosmetic products. Neither the PPG nor the applicant received a copy of that document directly. The SCCNFP's proposed conclusion was, inter alia, that life-long use of cosmetics containing polyacrylamides presented an unacceptably high additional risk of cancer owing to the residual concentration of acrylamide. Colipa sent the draft opinion to the PPG.

13 On 3 September 1998, Colipa sent a joint industry response to the SCCNFP, part of which had been prepared by the PPG. It stated in that response that the SCCNFP's draft opinion should be revised in the light of new data and current risk-assessment methodology. The SCCNFP, Colipa and the PPG then entered into a lengthy exchange of correspondence. Colipa and the PPG attended meetings with the SCCNFP and submitted to that body several assessments of the risks associated with the use of polyacrylamides in cosmetic products prior to the adoption of the contested directive on 15 April 2002.

Procedure and forms of order sought by the parties

14 By application lodged at the Court Registry on 12 July 2002, the applicant brought the present action.

15 By separate document lodged at the Registry on 22 August 2002, the Commission raised a plea of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance. The applicant lodged its observations on that plea on 10 October 2002.

16 By way of measures of organisation of procedure, on 28 November 2002 the Court of First Instance (Fifth Chamber) requested the applicant to reply to certain questions and in particular to clarify its position in relation to its argument that certain patents which it held were rendered *de facto* worthless by the adoption of the contested directive and to forward to the Court copies of each of the patents in question. The applicant complied with that request within the prescribed period.

17 In its application and in its observations on the plea of inadmissibility, the applicant claims that the Court should:

— declare the action admissible and well founded or, alternatively, order joinder of the plea of inadmissibility with the claim on the substance;

— partially annul the contested directive;

— order the Commission to pay the costs.

18 In its plea of inadmissibility, the Commission contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

Legal assessment

Arguments of the parties

19 The applicant submits that the present action is admissible under Article 230 EC since the contested directive is a binding act intended to produce legal effects of a definitive nature which are of direct and individual concern to it. As a preliminary point, it asks the Court to examine the substance of the present action before giving a ruling on admissibility or, in the alternative, to reserve any decision until judgment in the main proceedings. It claims, inter alia, that the present case concerns a highly sophisticated area of regulatory law and that its legal position cannot be assessed independently of the substance. It states that the present dispute concerns in particular the relationship between Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967 (I), p. 475), and the cosmetics directive.

20 The applicant puts forward five arguments in support of that plea.

21 First, it submits that, although expressed in general terms, the contested directive concerns only the seven producers of polyacrylamides within the Community which are members of the PPG. Both factually and legally those companies form a closed category of economic operators by reason of factual circumstances which distinguish them from all other operators. The cosmetics directive itself identifies them as 'concerned parties' (see Article 5a). It points out that the very presence of polyacrylamides on the Community market and in cosmetic products is entirely due to the continued efforts of the member companies of the PPG. It states that, if the PPG had not invested in the development of polyacrylamides and had not provided data to the Commission, that ingredient would never have been sold in the cosmetics industry and the contested directive would most probably never have been adopted.

22 The applicant considers that, as the technical and commercial know-how required to produce polyacrylamides is substantial, it is not possible for third companies to enter that market in the short term. It adds that by introducing stricter concentration limits for the residual acrylamide in cosmetic products, the contested directive has created an additional regulatory obstacle to potential new entrants.

23 With those new concentration limits it is technically impossible to produce solid polyacrylamide powders which comply with the new threshold values for the residual acrylamide content because current technology does not allow the removal of all residual acrylamide contained in solid polyacrylamides. Consequently, the solid polyacrylamide market for cosmetic applications is *de jure* closed.

24 Moreover, the contested restrictions apply specifically to the applicant's products. The applicant claims that its products are the reason and the subject-matter of the contested restrictions and have caused the institutions to act in this matter. There is therefore a causal link between the contested directive and the applicant's situation. The applicant is the only undertaking which produces solid polyacrylamides and markets them in powder form for cosmetic use. The other operators produce liquid emulsions which are not affected by the new concentration limits for residual acrylamide content. Consequently, the contested directive affects the applicant in a particular way in that it is the only undertaking producing solid polyacrylamide powders for the cosmetics industry and because of the particular characteristics of its product.

25 Second, the applicant considers itself to be individually concerned by the contested directive because it adversely affects certain specific pre-existing rights which it holds, thereby distinguishing it from other economic operators.

26 It submits in this respect that the contested directive will certainly deprive it of its patent protection in France in 2004 since that Member State will then have no choice but to apply the polyacrylamide restrictions set out in the contested directive, which will render the applicant's patent *de facto* worthless. The applicant claims that its exclusive right to market the products resulting from its inventions is identical to the right held by the applicant, as a result of its registered trade mark, in Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853.

27 The applicant states that it produces solid polyacrylamide products for use in the cosmetics industry using a special production process which is the result of a long period of research and development and huge financial investment. Its patent covers a technological process used for cosmetics whereby the applicant produces solid

thickening polymers which alter the viscosity and texture of cosmetic products, such as shampoos and creams so as to remove the solvents (mineral oils) and surfactants (nonylphenols and other ethoxylates), the presence of which is impossible to remove in emulsions produced by its competitors using traditional technology.

28 In its reply to the questions put by the Court (see paragraph 16 above), the applicant stated that it relied in the present case in particular on two patent applications numbered 00 02664 (2805461) and 01 00963 (2819719) lodged on 28 February 2000 and 19 January 2001 respectively. The patents in question cover both the processes and the cosmetic compounds.

29 The applicant submits that it offers its customers and end-users products combining two important factors, namely a solid state and lower residual values of monomer acrylamide. Those factors are peculiar to the applicant and give it a significant advantage over its competitors. However, the contested directive prevents the applicant from exploiting its patented production process for cosmetic applications because its patented technology cannot meet the new concentration values set out in the contested directive for the residual acrylamide content in cosmetic products.

30 The applicant challenges the Commission's assertion that its patent covers other possible uses in the pharmaceutical and veterinary industry sectors. It submits that it is standard practice when filing a patent application to cover as many uses as possible so as to anticipate possible future markets, even though the products are not in fact ready to be marketed for all those uses. In the present case, the applicant's patent is only ready for cosmetic uses. Furthermore, it could not simultaneously cover cosmetic and pharmaceutical uses because of regulatory constraints.

31 The applicant adds that the protection of its rights is a superior principle of law which must be observed in any situation where individual rights and freedoms are at stake. That principle is founded on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

32 Third, the applicant submits that the Commission has infringed the procedural rights conferred upon it by Article 13 of the cosmetics directive. That article provides, inter alia, that any 'party concerned' is to be notified of any restrictive measure taken pursuant to that directive and of possible remedies. It points out more specifically that that article makes no distinction between measures taken by the Commission to restrict chemical substances used in cosmetic products and measures taken by the Member States to ensure that the end-use cosmetic products comply with these restrictions within their national territories. It considers that the Commission was therefore obliged to notify it of any restrictions on the use of polyacrylamides in cosmetic products.

33 In that regard the applicant challenges the Commission's interpretation of the cosmetics directive. It argues that in the field governed by that directive the Commission does not enjoy its usual broad discretion because it must consult experts from the industry and the relevant scientific committees and can only adopt such adaptation measures as are approved by the Adaptation Committee. This is clearly the effect of the procedural rules laid down by Articles 10 and 13 of the cosmetics directive. The specific protection which those articles afford to the undertakings concerned differentiates them within the meaning of the fourth paragraph of Article 230 EC.

34 As for the Commission's reference to the judgment in Case T-199/96 *Bergaderm and Goupil* v *Commission* [1998] ECR II-2805, paragraph 58, the applicant submits that the Court of First Instance expressly recognised the existence of an inter partes procedure. It notes that the Court distinguishes between 'administrative' and 'legislative' procedures leading to the adoption of a Community measure and recognises that persons having a direct interest in the outcome of the administrative procedure and/or having in fact participated in the administrative procedure leading

to the adoption of a Community measure enjoy procedural rights in respect of that measure. In the case in hand, the applicant submits that it derives specific rights from the contested directive because it participated in the administrative procedure by submitting scientific data and adding its comments throughout the adoption process. The Commission evaluated the applicant's product without taking account of the data submitted by the applicant during the administrative procedure leading to the adoption of the Commission's proposal. In so doing the Commission adopted the contested directive in disregard of the procedure and contrary to the existing Community law on polyacrylamides.

35 In any event, even if the Court upheld the Commission's argument that Article 13 of the cosmetics directive does not confer any procedural right on the applicant because the contested directive was adopted pursuant to Article 8(2) of the former directive, the latter article also establishes an administrative procedure from which it derives fundamental rights of defence. It points out specifically that Article 8(2) of the cosmetics directive provides that the amendments adapting to technical progress the annexes to that directive are to be adopted after consultation of the SCCNFP.

36 Fourth, referring to the judgment in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, the applicant submits that the effects of the contested directive on its situation are such as to distinguish it from all other economic operators, even within the PPG, by reason of certain attributes which are peculiar to it. It states in this connection that it is one of the few companies within the PPG manufacturing both acrylamide and polyacrylamides. The effects of the contested directive on it are such that it is affected by it in the same way as an addressee because its whole acrylamide production business is at risk following the adoption of that measure. Over the years the applicant has developed a niche market using its unique high-technology production process for polyacrylamides. Accordingly, its position is peculiar and differs from that of its competitors operating in the traditional thickeners market. The contested directive therefore has a special economic impact on the applicant since it will be forced to abandon its cosmetics business and all its financial investments and industrial property rights.

37 The applicant further asserts that it has no recourse to any other judicial, administrative or governmental body in the Community. It adds that it will not be directly and individually concerned by the measures implementing the contested directive adopted by the Member States.

38 Fifth, the applicant cites recent developments in the case-law on the application of the fourth paragraph of Article 230 EC arising from the judgment in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365, and the Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, I-6681.

39 The Commission takes issue with the applicant's arguments on the admissibility of the present action. It considers that the Court can rule on the admissibility of the present action without examining the substance and that, contrary to the applicant's assertion, there is no link between the issues relating to the scientific data submitted under Directive 67/548 and the applicant's position under the cosmetics directive.

40 First, the Commission submits that the applicant is not a member of a closed category of acrylamide producers. It points out that the applicant has given no reason why manufacturers other than the seven manufacturers of polyacrylamides present in the Community are excluded from that market and prevented from competing with the existing ones.

41 It considers that Article 5a of the cosmetics directive does not operate to close the category of producers of cosmetic ingredients. That provision obliges the Commission to compile an indicative inventory of ingredients, not of manufacturers of ingredients.

42 Second, the Commission submits that the patent applications do not singularise the applicant and do not place it in a position similar or analogous to that of the applicant in *Codorniu* v *Council*.

43 The Commission submits that the applicant has failed to explain how the contested directive invalidates the patents or renders nugatory the protection they may afford. It points out that the contested directive sets the maximum residual content of acrylamide in finished cosmetic products, that the use of acrylamide is not prohibited and that the applicant has not indicated the actual residual acrylamide content of its patented products before adoption of the contested directive. An examination of the patent applications does not disclose any details of quantities of acrylamide residue involved in the use of the products covered by them. Consequently, the applicant has not demonstrated that the imposition of new limits for finished cosmetic products actually affects the chemical compositions covered by the patent applications.

44 The Commission refers to the patent applications numbered 00 02664 (2805461) and 01 00963 (2819719) of 28 February 2000 and 19 January 2001. It states that the second application covers products which are not restricted to cosmetics, but also pharmaceutical, veterinary and detergent products which are entirely unaffected by the contested directive. It also points out that that patent application covers the use of 'one or several' non-ionic monomers, including acrylamide. It adds that the way in which those products are listed seems to indicate that they are substitutable *inter se*. In that case, the patent application dated 28 February 2000 would not lose any of its value or effectiveness even if acrylamides were entirely prohibited.

45 As regards the situation of the applicant in *Codorniu* v *Council*, the Commission points out that in that case, the contested provision reserved the use of the term 'crémant' to quality sparkling wines manufactured under specific conditions in France and Luxembourg. Codorniu, a Spanish producer, had registered the graphic

trade mark 'Gran Cremant de Codorniu' in Spain in 1924 and traditionally used that mark both before and after registration. By reserving to French and Luxembourg producers the right to use the term 'crémant', the contested provision prevented Codorniu from using its trade mark. The Commission considers that, contrary to the applicant's assertion (see, in particular, paragraphs 26 to 28 above), the patent applications do not give it 'specific rights to market polyacrylamides as ingredients for cosmetic products', but give it the right merely to prevent other manufacturers from selling similar chemical preparations.

46 Third, the Commission considers that the applicant's procedural rights were not infringed during the adoption of the contested directive. It points out that that directive was not adopted pursuant to Article 13 of the cosmetics directive, but pursuant to Article 8(2) thereof. Individual undertakings and associations of undertakings play no part in the procedure laid down in Article 8(2) of the cosmetics directive; they do not initiate the procedure and are not consulted thereafter.

47 The Commission submits that the Court of First Instance has clearly established, in *Bergaderm and Goupil* v *Commission* (paragraph 59), that the procedure laid down in Article 8(2) of the cosmetics directive is a legislative one. There was no requirement to guarantee the rights of the defence in the adoption of a legislative act unless there was an express provision to that effect, which there is not in the cosmetics directive.

48 Fourth, the Commission maintains that the applicant has not explained how it is that being 'one of the few' producers of acrylamide and polyacrylamides distinguishes its position from that of other producers. It submits that the mere fact that the applicant's acrylamide business is affected by the contested directive is insufficient to grant the applicant locus standi to seek its annulment.

49 As for the applicant's argument set out at paragraph 37 above, the Commission points out that it is difficult to reconcile the applicant's assertion that the contested directive produces precise, unconditional and non-modifiable effects depriving the Member States of any margin of discretion in its implementation and its assertion that it is not directly concerned by a national implementing measure. It submits that if the contested directive directly concerns the applicant, so will the national implementing measures, since they mirror the directive.

50 Fifth, the Commission submits that the recent innovations in the rules on admissibility brought about by the Court of First Instance in *Jégo-Quéré* v *Commission* and by the Opinion of Advocate General Jacobs in *Unión Pequeños Agricultores* v *Commission* do not assist the applicant. It adds that in the judgment in the latter case, the Court of Justice clearly upheld the traditional case-law on admissibility. In any event, in the present case, the applicant does not seek the annulment of a regulation as in the abovementioned two cases, but of a directive. A directive, unlike a regulation, needs to be implemented by the Member States to which it is addressed.

Findings of the Court

51 Under Article 114(1) of the Rules of Procedure, if a party so requests, the Court may make a decision on admissibility without going into the substance of the case. Pursuant to Article 114(3) of the Rules of Procedure, unless the Court otherwise decides, the remainder of the proceedings are to be oral. The Court of First Instance (Fifth Chamber) considers that in the present case it is adequately informed by the contents of the file and that there is no need to open the oral procedure. It further considers that there is no need to order joinder of the plea of inadmissibility with the substance.

52 Under the fourth paragraph of Article 230 EC 'any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

53 The present case concerns the admissibility of an action for annulment brought by a legal person pursuant to that provision against certain provisions of a directive adopted by the Commission pursuant to Article 8(2) of the cosmetics directive.

54 Although the fourth paragraph of Article 230 EC makes no express provision regarding the admissibility of actions brought by private persons for annulment of a directive, it is clear from the case-law of the Court of Justice that the mere fact that the contested measure is a directive is not sufficient to render such an action inadmissible (Case T-135/96 *UEAPME* v *Council* [1998] ECR II-2335, paragraph 63; order of 10 September 2002 in Case T-223/01 *Japan Tobacco and JT International* v *Parliament and Council* [2002] ECR II-3259, paragraph 28). Moreover, the Community institutions cannot exclude, merely by the choice of the form of the act in question, the judicial protection afforded to individuals under that provision of the Treaty (order of 14 January 2002 in Case T-84/01 *Association contre l'horaire d'été (ACHE)* v *Parliament and Council* [2002] ECR II-99, paragraph 23, and *Japan Tobacco and JT International* v *Parliament and Council*, paragraph 28).

55 Further, in certain circumstances, even a legislative measure which applies to economic operators generally may be of direct and individual concern to some of them (see Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 11 to 32, and Joined Cases T-172/98 and T-175/98 to T-177/98 *Salamander and Others* v *Parliament and Council* [2000] ECR II-2487, paragraph 30).

56 It should be noted in this connection that, according to settled case-law, persons other than the addressees may claim that a decision is of individual concern to them, within the meaning of the fourth paragraph of Article 230 EC, only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107, *UEAPME* v *Council*, paragraph 69, and *Association contre l'heure d'été* v *Parliament and Council*, paragraph 24).

57 That condition governing the admissibility of an action brought by a natural or legal person was recently reiterated by the Court of Justice in its judgments in *Unión de Pequeños Agricultores* v *Council*, paragraph 36, and in Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paragraph 45.

58 The applicant submits, first, that it is individually concerned by the contested directive because it belongs to a restricted circle of operators to which that directive applies.

59 In that regard it should be noted that the possibility of determining more or less precisely the number or even the identity of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question (Case C-213/91 *Abertal and Others* v *Commission* [1993] ECR I-3177, paragraph 16, and Case C-209/94 P *Buralux and Others* v *Council* [1996] ECR I-615, paragraph 24).

60 It is also clear from the case-law that the mere fact of being concerned as an undertaking operating in the sector affected by a measure does not suffice for that undertaking to be regarded as individually concerned within the meaning of the

fourth paragraph of Article 230 EC (see, to that effect, *Piraiki-Patraiki and Others* v *Commission*, paragraph 14, and the orders in Case C-276/93 *Chiquita Banana and Others* v *Council* [1993] ECR I-3345, paragraph 12, and in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 42). That case-law is explained by the presence in those cases of an additional factor, namely a causal link between the operator in question and the intervention of the institution showing that when it adopted the contested measure the institution determined the treatment to be accorded to each operator (see, to that effect, Joined Cases 41/70 to 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411, paragraph 20, and Case C-354/87 *Weddel* v *Commission* [1990] ECR I-3847, paragraph 22). However, that condition is not satisfied in the present case.

61 The contested directive amends the cosmetics directive by incorporating, inter alia, polyacrylamides into the list of substances which cosmetic products may not contain beyond certain limits and other than in the conditions indicated in Annex III to the cosmetics directive, and by setting a maximum residual acrylamide content for polyacrylamides of 0.1 mg/kg in body-care leave-on products and 0.5 mg/kg in other cosmetic products. It follows that the contested directive applies to objectively defined situations and gives rise to legal effects in respect of categories of persons defined in general or abstract terms, namely, in particular, all producers of cosmetics.

62 Plainly the provisions in question only concern the applicant in its objective capacity as an undertaking operating in the polyacrylamides manufacturing sector on the same basis as any other operator in the same position. It is clear from the case-law cited at paragraphs 59 and 60 above that that capacity alone is not sufficient to establish that the applicant is individually concerned by those provisions. It matters little in that connection that polyacrylamides are manufactured in the Community by only seven undertakings and that, according to the applicant, it is the only undertaking producing solid polyacrylamides and marketing them in powder form for cosmetic use.

63 In any event, contrary to the applicant's assertion, the circle of manufacturers of polyacrylamides was not closed when the contested directive was adopted since there is nothing in that directive to preclude undertakings which were not yet active in the manufacture of polyacrylamides prior to its adoption from deciding subsequently to carry on that activity.

64 Second, the applicant considers that it is individually concerned by the contested directive because it adversely affects its patent rights thereby distinguishing it from other undertakings. It claims that the contested directive will deprive it of its rights under the two patent applications referred to above and thus places it in an analogous situation to that of the applicant in *Codorniu* v *Council*.

65 Even if it were accepted for the purposes of examining the present argument that the applicant holds exclusive rights as a result of the patents in question, the Court considers that its position is substantively different from that of the applicant in the case giving rise to the judgment in *Codorniu* v *Council*.

66 That case concerned a Spanish company, Codorniu, which produced and marketed sparkling wines and held the Spanish graphic trade mark Gran Cremant de Codorniu, which it had been using since 1924 to designate one of its sparkling wines. It had used that mark both before and after that registration. In its judgment the Court of Justice found that by reserving the right to use the term 'crémant' to French and Luxembourg producers, the contested provision had prevented Codorniu from using its graphic trade mark.

67 In the present case, however, the applicant does not have an exclusive right to produce a 'cosmetic product' as defined by Article 1 of the cosmetics directive. The

applicant's arguments make it clear that it manufactures solid polyacrylamides which it then supplies to cosmetics producers as raw materials or ingredients for the manufacture of cosmetics.

68 The Court considers that, unlike the provision in issue in *Codorniu* v *Council*, the contested directive does not have the effect of preventing the applicant from using its exclusive rights or of depriving it of its rights. The effect of the contested directive is to limit the use of polyacrylamides in cosmetic products. Whilst it is true that if the applicant's patented processes and compounds did not satisfy the requirements of the contested directive they might be more difficult to market, or even become unsaleable to the applicant's existing customers, that circumstance is merely an indirect consequence of the contested directive.

69 In fact the applicant is not affected by the contested directive in its capacity as the proprietor of exclusive rights, but merely as a manufacturer of raw materials or ingredients used in the manufacture of cosmetic products in the same way as any other operator manufacturing those raw materials or ingredients. It should also be noted that the exclusive rights of a patent holder reserve to the inventor a monopoly in exploiting his product or process and enable him to obtain the reward for his creative effort without guaranteeing such reward in all circumstances (see, by analogy, Joined Cases C-267/95 and C-268/95 *Merck and Beecham* [1996] ECR I-6285, paragraph 31).

70 Moreover, as the Commission rightly submits, the applicant's exclusive rights are still valid and the exploitation of them is not necessarily limited to cosmetic products but may also apply to pharmaceutical, veterinary and detergent products. Even if the applicant does not currently manufacture such products, that possibility cannot be ruled out for the future.

71 Accordingly, that possibility highlights the difference between the applicant's position in the present case and that of the applicant in the case giving rise to the judgment in *Codorniu* v *Council*, in which the effect of the contested provision was to make the applicant's commercial use of its trade mark immediately and definitively unlawful.

72 Third, the applicant submits that its procedural rights acquired under Article 13 of the cosmetics directive as a 'party concerned' were infringed by the adoption of the contested directive and that it is individually concerned thereby in a way which distinguishes it from other undertakings.

73 That argument is erroneous. It is clear from the second citation of the contested directive that that directive's legal basis is Article 8(2) of the cosmetics directive and not Article 13 thereof. Article 13 of the cosmetics directive concerns individual measures placing a restriction or ban on the marketing of cosmetic products taken pursuant to that directive. That provision requires that precise reasons be given for those measures and that they be notified to the 'party concerned' with particulars of the remedies available under the laws in force in the Member States and of the time-limits allowed for the exercise of such remedies.

74 Yet the contested directive is not an individual measure placing a restriction or ban on the marketing of cosmetic products but a measure of general application adopted by the Commission pursuant to Article 8(2) of the cosmetics directive adapting to technical progress, inter alia, Annex III to that directive. Article 8(2) of the cosmetics directive does not confer any procedural right on the applicant. It follows that the adoption of the contested directive cannot infringe any procedural right.

75 Moreover, the consultation of the SCCNFP provided for in Article 8(2) of the cosmetics directive does not transform the procedure leading to the adoption of the legislative measure in question into an administrative procedure, as the applicant submits, nor, in that respect, does it create for it a right to be heard by the Commission in the course of that procedure, which might potentially distinguish it from all other third parties.

76 Fourth, the applicant, referring by analogy to *Extramet Industrie* v *Council*, submits that the effects of the contested directive on its position are such as to distinguish it from all other economic operators by reason of certain attributes which are peculiar to it. It points out in this connection that it is one of the few companies in the PPG which manufactures both acrylamide and polyacrylamides and that the contested directive has a special economic impact on it since it will be forced to abandon its cosmetics business and all its financial investments and industrial property rights.

77 That argument cannot be upheld. It is clear from *Extramet Industrie* v *Council* that an undertaking is not individually concerned by a legislative measure merely because that provision affects its business. The situation at issue in that case arose from a set of specific circumstances which are not present in this case and the applicant has not demonstrated that it was in a situation comparable to that of Extramet Industrie on the market for calcium metal. In that judgment (paragraph 17), the Court considered that an undertaking must be regarded as individually concerned where it is both the largest importer and end-user of the product forming the subject-matter of the anti-dumping measure in question, and also demonstrates that its business activities depend to a very large extent on its imports and are seriously affected by the contested regulation in view of the limited number of manufacturers of the product concerned, and of the difficulties which it encounters in obtaining supplies from the sole Community producer, its main competitor for the processed product. The Court found that that set of factors constituted a situation peculiar to Extramet Industrie and differentiated it, as regards the measure in question, from all other traders. However, those factors have no equivalent in the present case.

78 Fifth, as regards the applicant's argument based on recent developments in the case-law on the application of the fourth paragraph of Article 230 EC arising from the judgment in *Jégo-Quéré* v *Commission* and the Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores* v *Council*, it suffices to note that the Court of Justice in its judgments in *Unión de Pequeños Agricultores* v *Council* (paragraph 36) and *Commission* v *Jégo-Quéré* (paragraphs 37, 38 and 45), confirmed its settled case-law on the matter.

79 It must therefore be concluded that the applicant has failed to demonstrate that it is individually concerned by the contested directive.

80 It follows that the action is inadmissible and must therefore be dismissed without the need to examine whether the applicant is directly concerned by the contested directive.

Costs

81 Under 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. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action as inadmissible;

2. Orders the applicant to bear its own costs and those of the defendant.

Luxembourg, 6 September 2004.

H. Jung

Registrar

P. Lindh

President