

3. When application is made for suspension of the operation of an order issued provisionally by the Commission in respect of an undertaking pending a final decision within the meaning of Article 3 of Regulation No 17 the judge hearing the application must consider whether there is a serious risk that the detrimental

effects of such an order might, if it were put into operation immediately, exceed those of a conservatory measure and in the meantime cause damage considerably in excess of the inevitable but short-lived disadvantages arising from such a measure.

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
21 May 1990*

In Case T-23/90 R

Automobiles Peugeot SA,

and

Peugeot SA, whose registered office is in Paris, represented by Xavier de Roux, of the Paris Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, 8, rue Zithe,

applicants,

v

Commission of the European Communities, represented by Jacques Bourgeois, acting as Agent, assisted by Francis Herbert, of the Brussels Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

supported by

* Language of the case: French.

Ecosystem, whose registered office is in Rouen (France), represented by Mr Collin, of the Paris Bar, and Mr Decker, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers at 16, avenue Marie-Thérèse,

and by

Bureau européen des unions de consommateurs (BEUC), an international association incorporated under Belgian law, whose registered office is in Brussels, represented by Mr Bentley and Mr Adamantopoulos, of the firm Stanbrook and Hooper, Brussels, with an address for service in Luxembourg at the Chambers of Stanbrook and Hooper, 3, rue Thomas Edison,

interveners,

APPLICATION to suspend the operation of the Commission Decision of 26 March 1990 in a proceeding under Article 85 of the EEC Treaty (IV/33.157 Ecosystem/Peugeot — Provisional measures),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

makes the following

Order

Facts and procedure

- 1 By application received at the Registry of the Court of First Instance of the European Communities on 24 April 1990, Automobiles Peugeot SA and Peugeot SA brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission Decision of 26 March 1990 adopting provisional measures in respect of the applicants in a proceeding under Article 85 of the EEC Treaty (IV/33.157 Ecosystem/Peugeot — Provisional measures) is void.
- 2 By a separate document received at the Registry of the Court of First Instance on the same day the applicants also made application under Article 186 of the EEC Treaty for suspension of the operation of the contested decision.

- 3 By application lodged at the Registry of the Court of First Instance on 4 May 1990 Ecosystem sought leave to intervene in Case T-23/90 R in support of the defendant's conclusions.
- 4 By application lodged at the Registry of the Court of First Instance on 7 May 1990 the Bureau européen des unions de consommateurs (BEUC) also sought leave to intervene in Case T-23/90 R in support of the defendant's conclusions.
- 5 By order of the President of the Court of First Instance of 11 May 1990 Ecosystem and BEUC were granted leave to intervene in support of the Commission's conclusions at the hearing of the application for interim measures.
- 6 The Commission submitted its observations on the application for interim measures on 10 May 1990. The parties presented oral argument on 16 May 1990.
- 7 Before the merits of the present application for interim measures are considered a brief account should be given of the context of the present case and in particular the various factual matters which led the Commission to adopt the decision prescribing provisional measures which the applicants are seeking to have suspended.
- 8 The decision at issue was adopted following a complaint submitted to the Commission by Ecosystem on 19 April 1989 seeking a finding that Peugeot SA and its Paris subsidiary, Automobiles Peugeot SA, had infringed the provisions of Article 85 of the EEC Treaty by preventing Ecosystem, since March 1989, from carrying on its business in Belgium and the Grand Duchy of Luxembourg as an agent acting on behalf of French final consumers prepared to buy Peugeot vehicles through it.
- 9 The complaint was originally directed against Automobiles Peugeot SA, which was held to be responsible for the obstacles referred to above, and against three of its authorized resellers in Belgium on the ground that they were not performing the contracts of sale concluded through Ecosystem. In the meantime, on 9 May 1989, Peugeot SA distributed a circular requesting approved dealers and resellers in

- France, Belgium and Luxembourg to suspend deliveries to Ecosystem and no longer to register orders for new Peugeot vehicles from Ecosystem whether on its own account or on behalf of its principals.
- 10 Ecosystem also requested the Commission to adopt provisional measures putting an end to the serious damage caused to it by the aforementioned obstacles and in particular by the circular of 9 May 1989.
 - 11 By decision of 26 March 1990, and pending the adoption of a final decision in the main proceeding initiated on Ecosystem's complaint, the Commission ordered the applicants, on pain of periodic penalty payments, to send within a period of two weeks to all dealers and agents a letter suspending the operation of the circular of 9 May 1989 and fixed a quota (1 211 vehicles a year and no more than 150 a month) for the transactions which Ecosystem might, on behalf of its customers and on the basis of a prior written authorization, conduct with the Peugeot network and to which the applicants could not object. The Commission also ordered the applicants to instruct the approved members of their network in France, Belgium and Luxembourg to inform the Commission of the number and models of vehicles sold through Ecosystem.
 - 12 In the grounds of its decision the Commission justifies the adoption of the provisional measures by the finding, on the basis of the facts established, that there is a sufficient likelihood of an infringement of Article 85(1), that serious and irreparable damage is likely to be caused to Ecosystem unless conservatory measures are ordered and in consequence that it is urgent that such measures should be adopted.
 - 13 In fixing the annual volume of transactions which Ecosystem may conduct with the Peugeot network the Commission based itself on the volume achieved during the 12 months preceding 9 May 1989, the date on which the aforementioned circular from Peugeot was sent out. The monitoring of these transactions is carried out 'by dual notification, on the one hand, by the dealers concerned to the Commission, which will in turn inform Peugeot without disclosing the identity of

the buyer and, on the other hand, by Ecosystem which will concurrently inform the Commission, as it has undertaken to do at the Commission's request' (see points 1 and 3, on p. 18 of the decision).

Law

14 Pursuant to Article 186 of the EEC Treaty in conjunction with Article 4 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of First Instance may order any necessary interim measures in cases brought before it.

15 Article 83(2) of the Rules of Procedure of the Court of Justice, which is applicable *mutatis mutandis* to proceedings before the Court of First Instance until entry into force of its own Rules of Procedure pursuant to the third paragraph of Article 11 of the aforementioned Council decision, provides that applications for interim measures referred to in Article 186 of the EEC Treaty must state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima-facie case for the interim measures applied for. Such measures must be of an interim nature in that they must not prejudice the decision on the substance of the case.

16 In the present case the applicants essentially submit in support of their application that the provisional measures which the Commission ordered:

- (i) constitute a manifest mistake of law;
- (ii) are not necessary, since Ecosystem is still carrying on business under normal financial conditions;
- (iii) are not appropriate, since they are in fact wholly inapplicable;
- (iv) are likely to cause serious and irreparable damage to Peugeot.

- 17 As the Court of Justice stated in its order of 17 January 1980 in Case 792/79 R *Camera Care v Commission* [1980] ECR 119, the Commission has the power, within the bounds of its supervisory task conferred upon it in competition matters by the Treaty and Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-62, p. 87), the first regulation implementing Articles 85 and 86 of the Treaty, to determine pursuant to Article 3(1) of Regulation No 17 whether provisional measures should be adopted where a request to that effect is made to it. Such measures must however be of a temporary nature and be restricted to what is required in the given situation.
- 18 In consequence, without there being any need to rule on all the submissions put forward by the applicants against the provisional measures adopted by the Commission, submissions which, moreover, are also put forward in the main application and fall to be examined in the proceedings on the substance of the case, it is sufficient for the purposes of the present proceedings on the application for interim measures to consider whether the submissions of law and fact relied on *prima facie* justify a suspension of the operation of the contested decision and whether the maintenance of the Commission's decision until the Court of First Instance has given its decision in the main proceedings is likely to cause serious and irreparable damage to the applicants.
- 19 The applicants claim that in adopting the decision at issue the Commission committed a manifest error of law. Since in their view Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor-vehicle distribution and servicing agreements (Official Journal 1985, L 15, p. 16) exempted motor-vehicle distribution from the application of Article 85(1) of the Treaty, it was incumbent on the Commission to establish that the circular at issue did not come within the scope of the regulation and, more precisely, to define the concept of an activity equivalent to that of a reseller before deciding that in consequence the exempting regulation was not applicable and that an infringement of Article 85(1) was thus established.
- 20 As the Court of Justice has held (judgment of 18 December 1986 in Case 10/86 *VAG France v Magne* [1986] ECR 4071, paragraph 12), 'Regulation No 123/85, as a regulation applying Article 85(3) of the EEC Treaty, is limited to providing economic agents in the motor-vehicle industry with certain possibilities enabling them to remove their distribution and servicing agreements from the scope of the

prohibition contained in Article 85(1) despite the inclusion in those agreements of certain types of exclusivity and no-competition clauses’.

- 21 It follows that, contrary to what the applicants maintain, it cannot be said, in general terms, that motor-vehicle distribution has been exempted from the application of Article 85(1) and that in consequence, in the context of the present case, the Commission, before adopting the provisional measures, ought to have established that the circular of 9 May 1989 did not come within the scope of Regulation No 123/85.
- 22 It is not possible, however, to overlook the fact that certain questions which are raised in the present case give rise to serious problems of interpretation. That is so in particular as regards the question whether and to what extent carrying on a business as an agent, with recourse to an active policy of promotion and advertisement of particular models of a make of motor vehicle, can amount to an activity equivalent to that of a reseller. In that respect it is proper to point out that the Commission itself in its notice 85/C 17/03 concerning Regulation No 123/85 (Official Journal 1985, C 17, p. 4, Point I 3) admits that undertakings within the distribution system can be obliged not to supply motor vehicles within the contract programme to a third party who carries on an activity equivalent to that of a reseller.
- 23 However, even if such considerations are capable of justifying a suspension of the operation of the decision at issue, they are not in themselves sufficient for that purpose.
- 24 Bearing in mind that the Commission decision is itself only a provisional measure, it is necessary also to consider whether there is a serious risk that the detrimental effects of the said decision, if it were put into operation immediately, would exceed those of a conservatory measure and in the meantime cause damage considerably in excess of the inevitable but short-lived disadvantages arising from such a measure (order of the President of the Court of Justice of 29 September 1982 in Joined Cases 229 and 228/82 R *Ford v Commission* [1982] ECR 3091, paragraphs 11 and 14).

- 25 In that respect the applicants argue in the first place that such damage would arise from destroying the watertight nature of the network of exclusive distributors set up by Peugeot, in so far as the Commission's decision would amount to suspending provisionally the rights of the members of the distribution network recognized by Regulation No 123/85 and consequently nullifying the *raison d'être* of Peugeot's exclusive dealership network.
- 26 The decision at issue however confined to requiring the applicants to suspend the application of the circular of 9 May 1989 until the date on which the final decision is adopted, so that Ecosystem is able to achieve, on behalf of customers who so request and on the basis of prior written authorizations, an annual volume of transactions equal to that which it achieved during the 12 months preceding notification of the said circular to the members of the network. Those provisional measures concern only transactions with Ecosystem. It does not prevent the applicants from applying a sales boycott to third parties pursuing an activity equivalent to that of a reseller.
- 27 It is moreover to be observed that according to the figures cited by the defendant and not challenged by the applicants the volume of transactions from which Ecosystem will be able provisionally to benefit represents only 0.24% of the total number of Peugeot registrations in France in 1988 whereas the same volume of transactions constitutes 34.29% of the total number of motor vehicles imported into France by Ecosystem during the same period.
- 28 Contrary to what is claimed by the applicants, those findings do not therefore provide grounds for concluding that there is a risk that the exclusive nature of Peugeot's network may be destroyed, a result liable to cause serious and irreparable damage to the applicants and thus justifying suspension of the operation of the contested decision.
- 29 In the second place the applicants plead the existence of a situation likely to cause them serious and irreparable damage inasmuch as the provisional measures adopted by the Commission adversely affect the image of Peugeot as a maker of motor cars.

30 It has not been established to what extent application of the decision at issue would involve serious and irreparable confusion likely to have an adverse effect on the image of Peugeot as a maker of motor cars. The result sought by the Commission's decision is confined at this stage to re-establishing provisionally a pre-existing situation for the sole benefit of Ecosystem, a situation which cannot of itself give rise, as the applicants maintain, to 'an inevitable abundance of intermediate undertakings marketing all kinds of motor vehicles without any regard for the specificity of the particular make'.

31 In the third and last place the applicants claim that suspension of the provisional measures adopted by the Commission is a matter of urgency also because a periodic penalty payment of ECU 1 000 per day is imposed by the decision at issue.

32 The periodic penalty payment of ECU 1 000 per day provided for by Article 4 of the contested decision should the applicants fail to comply with the orders addressed to them cannot be regarded as an argument establishing the urgency of suspending the provisional measures. The periodic penalty payment applies only if the applicants do not comply with the decision. Even assuming that such a periodic penalty payment is disproportionate, which in any event has not been shown, it is sufficient to observe that if the applicants comply with the obligations imposed on them by the decision the periodic penalty payment will not apply and therefore will not cause them serious and irreparable damage.

33 There is therefore no serious risk that the detrimental effects of the provisional measures adopted by the Commission will in the meantime cause damage exceeding the inevitable but short-lived disadvantages arising from such a measure.

34 It follows from the above considerations that the conditions which in law would enable the interim measures claimed to be granted are not satisfied and that therefore the claim must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE,

by way of interim decision,

hereby orders as follows:

- (1) The application for suspension of the operation of the Commission Decision of 26 March 1990 adopting provisional measures is dismissed.**
- (2) Costs are reserved.**

Luxembourg, 21 May 1990.

H. Jung

Registrar

J. L. Cruz Vilaça

President