

measures which may appear necessary at any given moment.

From this point of view the Commission must also be able, within the bounds of its supervisory task conferred upon it in competition matters by the Treaty and Regulation No 17, to take protective measures to the extent to which they might appear indispensable in order to avoid the exercise of the power to make decisions given by Article 3 from becoming ineffectual or even illusory because of the action of certain undertakings. The powers which the Commission holds under Article 3 (1) of Regulation No 17 therefore include the power to take interim measures which are indispensable for the effective exercise of its functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist.

However, the Commission could not take such measures without having regard to the legitimate interests of the undertaking concerned by them. For this reason it is essential that interim measures be taken only in cases proved to be urgent in order to avoid a situation likely to cause serious and irreparable damage to the party seeking their adoption, or which is intolerable for the public interest. A further requirement is that these

measures be of a temporary and conservatory nature and restricted to what is required in the given situation. When adopting them the Commission is bound to maintain the essential safeguards guaranteed to the parties concerned by Regulation No 17, in particular by Article 19. Finally, the decisions must be made in such a form that an action may be brought upon them before the Court of Justice by any party who considers he has been injured.

3. It is in accordance with the key principles of the Community that any interim measures which prove to be necessary should be taken by the Community institution which is given the task of receiving complaints by governments or individuals, of making inquiries and of taking decisions in regard to infringements which are found to exist, whilst the role of the Court of Justice consists in undertaking the legal review of the action taken by the Commission in these matters. In this regard, the rights of those concerned are safeguarded by the fact that if interim measures decided upon by the Commission adversely affect the legitimate interests of any party the person concerned may always obtain the revision of the decision made, by the appropriate judicial recourse, applying if necessary for emergency measures under Article 185 or Article 186 of the EEC Treaty.

In Case 792/79 R

CAMERA CARE LIMITED, a company engaged in the repair, hire and sale of professional photographic equipment, with its registered office in Belfast, Northern Ireland, represented, for the written procedure, by Emmanuel

Pollard, Solicitor, London, and, for the oral procedure, by Mark R. P. Barnes, Barrister, of Gray's Inn, instructed by Mr Pollard, with an address for service in Luxembourg at the office of Webber, Wentzel & Co., 50 Route d'Esch,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, John Temple Lang, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

HASSELBLAD (GB) LTD., with its registered office in Wembley, England, and VICTOR HASSELBLAD A/B, an undertaking manufacturing cameras and photographic accessories, with its registered office in Göteborg, Sweden, represented by William T. Stockler, Solicitor, Hamburg, with an address for service in Luxembourg c/o the Vereins- und Westbank Internationale S. A., 25 Boulevard Royal,

interveners,

APPLICATION for the adoption of interim measures,

THE COURT

composed of: H. Kutscher, President, A. O'Keefe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges;

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

makes the following

ORDER

I — Summary of the facts

Camera Care Limited, a company engaged in the repair, hire and sale of professional photographic equipment, whose registered office is in Belfast, asked the Commission by complaint dated 26 June 1979 and received by the Commission on 5 July to open an investigation under Article 3 of Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87), to establish whether Victor Hasselblad A/B, an undertaking manufacturing cameras and photographic equipment, whose registered office is in Göteborg, Sweden, Hasselblad (GB) Limited, whose registered office is in Wembley, England, and Safveans A/B, whose registered office is in Göteborg, were in breach of Articles 85 and 86 of the EEC Treaty.

According to Camera Care Limited the infringements by the companies concerned consisted mainly of:

- (a) withholding direct supplies of Hasselblad products from the applicant and preventing other persons from making indirect supplies;
- (b) withholding and preventing direct and indirect supplies with the object and/or effect of maintaining a fixed price structure and of preventing or determining price competition at the retail level;
- (c) maintaining and applying provisions of supply agreements with certain dealers which restrict or prevent export from, in particular, France and Germany to the United Kingdom.

In its application Camera Care Limited also asked the Commission to make an interim decision requiring Hasselblad A/B and Hasselblad (GB) Limited to bring to an end forthwith the practices complained of and to make supplies of Hasselblad products to the order of the applicant at the prices and upon the terms usually applied.

On 27 August 1979 the Commission informed Camera Care Limited that its complaint of 26 June had been receiving its attention and that it had advised Hasselblad (GB) Limited of its essential points in requesting that company to supply certain supplementary information together with its comments. The Commission also informed Camera Care that it regretted it could not comply with its proposal to take interim measures because under Community law there was no legal basis for this.

II — Written procedure

By an application lodged at the Court Registry on 5 November 1979 Camera Care Limited brought an action under Articles 173 and 175 of the EEC Treaty against the Commission requesting the Court:

- (1) To declare that the Commission acted unlawfully and in breach of the Treaty in failing

- (a) to make a decision to the effect requested by the applicant namely, a decision addressed to Hasselblad AB and Hasselblad (GB) Limited, requiring them and each of them pending the outcome of its investigation to make supplies of Hasselblad products to the reasonable order of the applicant at the prices and upon the terms usually applied to Hasselblad dealers in the United Kingdom and requiring them to refrain whether by themselves, their officers, servants or agents, and whether by the enforcement of contractual stipulation or otherwise howsoever from preventing or in any way hindering or obstructing the supply of Hasselblad products to the applicant by any other person;

or alternatively in failing

- (b) to consider whether it is just and proper that any (and if so what) interim measures be taken for the protection of the applicant's business pending the outcome of the defendant's investigation and to make an order or decision accordingly;
- (2) Alternatively: to make an order setting aside the defendant's refusal to take all or any of the steps aforesaid;
- (3) In any event to order the defendant to remedy the said breaches of the

Treaty forthwith upon judgment in the action by taking the measures specified in (1) (a) or alternatively (1) (b) above.

Also on 5 November 1979 Camera Care Limited applied to the Court under Article 186 of the EEC Treaty, Article 36 of the Protocol on the Statute of the Court of Justice of the EEC and Article 83 of the Rules of Procedure, for the adoption of interim measures. In particular the applicant claimed that the Court should, by way of interim relief:

- (a) Order the Commission forthwith to make a decision addressed to Hasselblad A/B and Hasselblad (GB) Limited, requiring them or each of them pending the outcome of its investigation under Article 3 of Regulation No 17 or the final hearing of this action (whichever shall be sooner) to make supplies of all Hasselblad products including spare parts and repair tools to the reasonable order of the applicant at the prices and upon the terms usually applied to Hasselblad dealers in the United Kingdom and further restraining them and each of them whether by themselves, their officers, servants or agents and whether by the enforcement of contractual stipulation or otherwise howsoever from preventing or in any way hindering or obstructing the supply of Hasselblad products to the applicant by any other person;
- (b) Alternatively, order the Commission forthwith and from time to time pending the outcome of its

investigation under Article 3 of Regulation No 17 or the final hearing of this action (whichever shall be sooner) to take all such measures as may be, or as shall from time to time within such period become, necessary to ensure that the applicant is afforded proper and adequate supplies of Hasselblad products;

- (c) Alternatively make such other order or orders to similar effect as the Court may think fit.

On 23 November 1979 the Commission submitted its written observations on the request for interim measures.

By order of 26 November 1979 the President of the Court decided to refer the decision upon interim measures to the Court under the first paragraph of Article 85 of the Rules of Procedure.

On 10 December 1979, Hasselblad (GB) Limited and Hasselblad AB applied to the Court under the second paragraph of Article 37 of the Statute of the Court of Justice of the EEC to be allowed to intervene in the dispute between Camera Care Limited and the Commission with regard to both the main action and the application for interim measures. On hearing the report of the Judge-Rapporteur and the views of the Advocate General and noting the written observations of the applicant in the main action and of the Commission, the Court allowed the intervention by order of 12 December 1979.

The Court decided to hear the oral submissions of the parties to the main action and of the intervening parties at a sitting on 9 January 1980.

III — Summary of the written submissions and arguments of the parties to the main action.

Camera Care Limited supports its application for interim measures by arguing that the withholding of direct supplies of Hasselblad products and the obstruction of indirect supplies have caused and continue to cause it substantial damage and loss of business. It has been unable to obtain sufficient supplies to meet demand, still less potential demand. Since termination of the Hasselblad franchise supplies of Hasselblad products to the applicant have been substantially less than previously. Indirect supplies from dealers or even retailers are hardly economic, making it impossible to obtain a proper flow of stock and are necessarily precarious, and defective or damaged products pose abnormal problems for the applicant.

A remedy in damages under national law against members of the Hasselblad group would be inadequate.

The urgency of the matter therefore arises from the continuing and progressive accumulation of damage for which no compensation is available, from the insecurity of present indirect supplies, the resulting possibility that the whole of the applicant's business in the medium format market may be destroyed at very short notice, and from the refusal of the Commission even to consider the possibility of interim measures.

The Commission is in breach of its obligations under the Treaty by failing or refusing to take or to consider taking certain interim measures to protect the applicant's business against practices contrary to Articles 85 and 86.

The Commission argues first that the main application of Camera Care under Article 173 of the EEC Treaty seeking the setting aside of the letter the Commission sent to it on 27 August 1979 is inadmissible and that the application under Article 175 is inadmissible or in any event unfounded.

(a) Whether the Commission has the power under the EEC Treaty to order interim measures in competition matters has not yet been settled. There is no legislative basis in the law of the EEC as distinct from the European Coal and Steel Community for the power of the Commission to take interim measures. The question is therefore whether the Commission should be regarded as having an inherent or implied power to do so.

The tasks of the Commission under the EEC Treaty and the need to protect undertakings injured by breaches of the Treaty suggest that the principle upheld in the case-law of the Court in the context of the ECSC Treaty, by which the Commission has the implied power to take interim measures in cases of abuse of a dominant position, should also apply under the EEC Treaty. The Commission leaves this important question to the Court.

(b) The principles which guide the Court in ordering interim measures

under Article 186 may be summarized as follows:

— The measures must be urgent and necessary to prevent irreversible or at least serious damage. There must be danger of damage which could not be remedied merely by compensation or some other appropriate remedy even if the party seeking the interim measures succeeded in the main action.

— There must be a *prima facie* case on the substance. However, this rule must be reconciled with the rule that the President or the Court, when deciding on interim measures, does not rule on the substance of the case.

— The consequences of ordering interim measures must be balanced against the consequences if interim measures are not ordered, in the light of all the interests involved.

— Interim measures are essentially measures to protect the *status quo*.

— The Court has wide powers to make orders dealing with aspects of the situation which might cause difficulty.

(c) The question whether interim measures should be taken in this case needs to be considered separately in relation to the different breaches of Community law alleged by the applicant. The principal breach to be considered is the refusal to supply.

The first requirement for interim measures, that there must be urgent necessity to prevent serious and irreparable damage is fulfilled in this case.

For a *prima facie* case on the substance, as regards the refusal to supply, the applicant needs to show, *prima facie*, that it has defined the market correctly or substantially correctly, that Hasselblad (GB) is dominant on the market, that the refusal to supply is unjustified and that it affects trade between Member States.

The Commission does not feel that it would be proper to try to state its definitive position on any aspect of the case at this stage.

The third requirement for interim measures is that the balance of the interests involved should make interim measures appropriate. This condition may be considered to be fulfilled in this case.

(d) In conclusion, interim measures should, on balance, probably be ordered in this case. It is for the Court to decide whether interim measures should be ordered by the Court itself, or by the Commission if the Court decides that the Commission has power to order them.

IV — Oral procedure

The parties to the main action and the interveners presented oral argument at a

sitting on 9 January 1980, dealing in particular, at the request of the Court, with the question of the powers of the Commission to adopt interim measures; they also gave their answers to questions put by the Court.

Camera Care Ltd. took the view that the powers of the Commission to adopt interim measures in the field of competition and, in particular, in this case, result from the EEC Treaty, Regulation No 17 and the case-law of the Court. The Treaty expressly provides for such a power, in particular in Article 3 (f) and in Articles 85, 86, 87, especially paragraph (2), 88, 89 and 155. Regulation No 17, in particular Articles 11, 13, 14 and 19, implies that the Commission, in the exercise of the powers conferred upon it, must, on grounds of urgency, be entitled to adopt interim protective measures. The case-law of the Court, especially the judgment of 31 March 1971 (Case 22/70, *Commission v Council*, European Agreement on road transport, [1971] ECR 263) supports this interpretation.

The *Commission* was of the opinion that it possessed an implied power to take interim decisions, inherent in the powers expressly conferred upon it, for the adoption of provisional conservatory measures, subject to review by the Court. It must be acknowledged to have this power, essentially for reasons of practicality: the Commission must be in a position to protect undertakings which are victims of breaches of the competition rules of the Treaty and to guarantee the efficacy of such provisions, particularly in the event of a boycott or a refusal to supply.

Hasselblad (GB) Ltd. and *Victor Hasselblad A/B*, the interveners, stated that the concept of "interim measures" was capable of being understood in a very broad sense and that accordingly a power on the part of the Commission in this field can result only from an express provision, whereas neither the EEC Treaty nor Regulation No 17 confers on it the power to adopt interim measures.

The argument relating to urgency cannot be accepted: the Commission is entirely in a position to adopt a definitive decision at short notice and without disregarding the right of the parties concerned to be heard.

The *Advocate General* delivered his opinion at a second sitting also held on 9 January 1980.

Decision

- 1 The applicant, Camera Care Limited, whose registered office is in Belfast (Northern Ireland) is engaged in the United Kingdom in the business of repairing, hiring and selling professional photographic equipment. On 26 June 1979 the company brought a complaint before the Commission under Article 3 of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87) against *Hasselblad (GB) Limited* whose registered office is in Wembley, United Kingdom, and *Victor Hasselblad A/B* whose registered office is Göteborg, Sweden, (both hereinafter referred to as "Hasselblad") for infringement of Articles 85 and 86 of the EEC Treaty.
- 2 The applicant complains of the termination by *Hasselblad* of the supply agreement which had existed between the parties until then and of the refusal to supply photographic equipment and spare parts as a result. It alleges that because of the system of agreements existing between *Hasselblad* and its distributors it finds it impossible to obtain cameras or spare parts from other intermediaries and consequently its sale and repair business is in jeopardy. At the end of its complaint the applicant asked the Commission to make an interim decision ordering *Hasselblad* to restore supplies at the usual price and upon the usual conditions.

- 3 On 27 August 1979 the officers of the Directorate-General for Competition sent an interim reply to the applicant, stating that they had immediately communicated the complaint to Hasselblad, requesting their comments, and that they were pursuing their inquiry. The letter ended with the following sentences: "I regret that I cannot comply with your proposal to make an interim decision. There is no legal basis in Community law for such procedure".
- 4 Faced with the refusal by the Commission to adopt interim measures the applicant brought an action on 5 November 1979 based on both Article 173 and Article 175 of the Treaty seeking either the setting aside of the communication referred to above or a declaration by the Court that the Commission was in breach of the Treaty for refraining from meeting the request for the adoption of interim measures.
- 5 In an application for the adoption of interim measures lodged on the same day under Article 186 of the Treaty, the applicant asked the Court as a matter of urgency to make an injunction against the Commission ordering it to take an appropriate decision with regard to Hasselblad or, alternatively, to take urgent measures itself.
- 6 In its written observations on the subject of the application for interim measures, the Commission expressed doubts upon the admissibility of the main action. At the same time, however, it indicated that it thought interim measures might be justified at that stage. Although it believed it possessed the powers needed to do this, in the absence of any clear indication on this point in Regulation No 17, it did not wish to take measures on its own initiative and consequently requested the Court to settle this question of principle at the outset.
- 7 By order of 26 November 1979 the President of the Court referred the application for interim measures to the Court under the first paragraph of Article 85 of the Rules of Procedure.

- 8 By an application of 10 December 1979 the Hasselblad companies applied to be allowed to intervene in the main action and with regard to the application for the adoption of interim measures. The Court allowed the interventions by order of 12 December 1979.
- 9 The parties presented oral argument on 9 January 1980.

Definition of the action

- 10 Because of the doubt about the legal nature of the communication from the officers of the Commission which is at the root of the case, the applicant has based its action upon both Article 173 and Article 175 of the EEC Treaty. Although the action cannot, for the purposes of the final judgment, be defined as resting upon both these articles, there seems to be no need to resolve the question at this stage.
- 11 However the action may in fact be defined, if it were to succeed the Commission would in any event be required under Article 176 of the Treaty to "take the necessary measures to comply with the judgment of the Court of Justice". The two actions have in fact the same object in that the applicant's purpose is that the Commission should adopt the interim measures sought by the applicant.

Power of the Commission to adopt interim measures

- 12 The hesitation shown by the Commission stems from the fact that Regulation No 17 does not expressly confer upon the Commission, after receiving applications under Article 3 of the Regulation or when proceeding on its own initiative under the same provision, the power to adopt interim measures pending the time when it is in a position to adjudicate upon the substance of the case.
- 13 It is recalled that Article 3 (1) of the Regulation provides that: "Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings . . . concerned to bring such an infringement to an

end”. Paragraph (3) of the same article adds that the Commission, before taking a decision under paragraph (1), may “address to the undertakings . . . concerned recommendations for termination of the infringement”.

- 14 It is obvious that in certain circumstances there may be a need to adopt interim protective measures when the practice of certain undertakings in competition matters has the effect of injuring the interests of some Member States, causing damage to other undertakings, or of unacceptably jeopardizing the Community’s competition policy. In such circumstances it is important to ensure that, whilst inquiries are being carried out no irreparable damage is caused such as could not be remedied by any decision which the Commission might take at the conclusion of the administrative procedure.

- 15 Although it is true that, from the point of view of both the efficacy of competition law and the protection of the legitimate interests of the Member States or undertakings concerned, the adoption of protective measures may seem to be necessary in certain circumstances, the provisions of Regulation No 17 must nevertheless be examined to see whether they can accommodate this legal requirement.

- 16 It is as well to observe on this point that Article 3 of the Regulation entitles the Commission to take two types of action in order to bring to an end any infringements that it finds: first, the Commission may take “decisions” which, according to Article 189 of the Treaty, are binding upon those to whom they are addressed and which, according to Articles 15 and 16 of Regulation No 17, may be accompanied by fines and periodic penalty payments; secondly, before taking a binding decision, the Commission is always entitled under Article 3 (3) to address to the undertakings concerned “recommendations for termination of the infringement”. The object of this last provision is to enable the Commission to inform the undertakings concerned of its assessment of the situation with regard to Community law in order to persuade them to comply with its point of view without immediately resorting to legal enforcement. It cannot, however, be construed as a limitation upon the practical ways in which the power to take a decision, which is the core of Article 3, may be exercised.

- 17 As regards the right to take decisions conferred upon the Commission by Article 3 (1), it is essential that it should be exercised in the most efficacious manner best suited to the circumstances of each given situation. To this end the possibility cannot be excluded that the exercise of the right to take decisions conferred upon the Commission should comprise successive stages so that a decision finding that there is an infringement may be preceded by any preliminary measures which may appear necessary at any given moment.
- 18 From this point of view the Commission must also be able, within the bounds of its supervisory task conferred upon it in competition matters by the Treaty and Regulation No 17, to take protective measures to the extent to which they might appear indispensable in order to avoid the exercise of the power to make decisions given by Article 3 from becoming ineffectual or even illusory because of the action of certain undertakings. The powers which the Commission holds under Article 3 (1) of Regulation No 17 therefore include the power to take interim measures which are indispensable for the effective exercise of its functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist.
- 19 However, the Commission could not take such measures without having regard to the legitimate interests of the undertaking concerned by them. For this reason it is essential that interim measures be taken only in cases proved to be urgent in order to avoid a situation likely to cause serious and irreparable damage to the party seeking their adoption, or which is intolerable for the public interest. A further requirement is that these measures be of a temporary and conservatory nature and restricted to what is required in the given situation. When adopting them the Commission is bound to maintain the essential safeguards guaranteed to the parties concerned by Regulation No 17, in particular by Article 19. Finally, the decisions must be made in such a form that an action may be brought upon them before the Court of Justice by any party who considers he has been injured.

- 20 As the President of the Court has indicated, in the context of the ECSC Treaty, in his interlocutory order of 22 October 1975 in Case 109/75R (*National Carbonising Company*, [1975] ECR 1193), it is in accordance with the key principles of the Community that any interim measures which prove to be necessary should be taken by the Community institution which is given the task of receiving complaints by governments or individuals, of making inquiries and of taking decisions in regard to infringements which are found to exist, whilst the role of the Court of Justice consists in undertaking the legal review of the action taken by the Commission in these matters. In this regard, the rights of those concerned are safeguarded by the fact that if interim measures decided upon by the Commission adversely affect the legitimate interests of any party the person concerned may always obtain the revision of the decision made, by the appropriate judicial recourse, applying if necessary for emergency measures under Article 185 or Article 186 of the EEC Treaty.
- 21 It follows from these considerations that the Commission possesses the powers needed to meet the request of the applicant if it thinks this request is justified in the circumstances. The applicant must therefore be referred back to the Commission so that it may, without prejudice to the rights and interests of the party concerned by the complaint, take a decision upon the request for interim measures upon the conditions set out above.

On those grounds

THE COURT

as an interlocutory decision, hereby orders as follows:

1. It is for the Commission to decide by virtue of Article 3 (1) of Regulation No 17 whether there are grounds for adopting interim measures pursuant to the application made by the applicant.
The remainder of the applicant's claims are dismissed.

2. Costs are reserved.

Luxembourg, 17 January 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER
DELIVERED ON 9 JANUARY 1980

My Lords,

The facts of this case and the arguments of the parties are in the forefront of Your Lordship's minds and I need not rehearse them.

The Commission in its written observations on the application for interim measures took two points as to the admissibility of the main application in so far as it is founded on Article 173 of the Treaty. There was some discussion this morning on the question whether those points could be relevant at this stage. In my opinion they must be, because, if Your Lordships were to take the view that the main application was clearly inadmissible, the present application must fail, or at all events it would be open to Your Lordships to reject it on that ground.

The first point was that the letter of 27 August 1979 signed by an official of the Commission and in which he said to the applicant's Solicitors:

"I regret that I cannot comply with your proposal to make an interim decision. There is no legal basis in Community law for such procedure."

was not, in form or in substance, a decision of the Commission. On that point the Commission cited the opinion of Mr Advocate General Mayras in Cases 109 and 114/75 *N.C.C. v Commission* [1977] 1 ECR 381, an opinion which, because of the subsequent discontinuance of the proceedings, was not followed by a judgment of the Court. It seems to me that, as was submitted on behalf of the applicant, that opinion, in which Mr Advocate General Mayras very thoroughly considered the relevant law, is a clear authority against the Commission's submission, because