

ORDER OF THE PRESIDENT OF THE COURT
21 MARCH 1972¹

**Europemballage Corporation and Continental Can Company Inc.
v Commission of the European Communities²**

Case 6/72R

In Case 6/72 R

- (1) EUROPEMBALLAGE CORPORATION, established at Wilmington (USA) and in Brussels (Belgium),
- (2) CONTINENTAL CAN COMPANY INC., established in New York, represented respectively by their Presidents, Waldemar Friebel and C. B. Stauffacher, assisted by Alfred Gleiss and his associates, Advocates of the Stuttgart Bar, having chosen their address for service in Luxembourg at the Chambers of Georges Reuter, Avocat-Avoué, 7 avenue de l'Arsenal,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers Bastiaan Van der Esch and Jochen Thiesing, acting as Agents, having chosen its address for service in Luxembourg at the office of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

Application for the adoption of interim measures ordering the suspension of the operation of Article 2 of the decision of the Commission of 9 December 1971 (Ref. IV/26811-Continental Can Cy.) applying Article 86 of the EEC Treaty to the applicants.

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

¹ — Language of the Case: German.
— CMLR.

²

ORDER

On the basis of Article 86 of the EEC Treaty the Commission, by a decision of 9 December 1971 found on the one hand that the Continental Can Company of New York held, through its German subsidiary Schmalbach-Lubeca-Werke, a dominant position in respect of a substantial part of the common market on the market in light containers for preserves and on the market in metal caps for glass jars, and on the other hand that it has abused this dominant position through the purchase by its European subsidiary, the Europemballage Corporation, of approximately 80% of the shares and convertible debentures of the Netherlands undertaking Thomassen & Drijver-Verblifa, thus practically eliminating competition in a substantial part of the common market.

Under Article 2 of the same decision, Continental Can is required to put an end to this infringement of Article 86 of the EEC Treaty and 'for this purpose it must submit proposals to the Commission before 1 July 1972'.

The decision was published in the Journal Officiel of the European Communities L 7 of 8 January 1972, page 25.

By an application lodged at the Registry on 9 February 1972 and registered under No 6/72, Continental Can and Europemballage Corporation, have asked the Court to annul the disputed decision and to order the Commission to pay the costs.

By a separate document, registered on 23 February 1972, Continental Can and Europemballage, on the basis of the second sentence of Article 185 of the EEC Treaty and in accordance with Article 83 of the Rules of Procedure of the Court, sought by way of an application for interim measures, an order that the operation of Article 2 of the decision of 9 December 1971 should be suspended 'for six months as from the date of the judgment to be given by the Court in the main action'.

In support of that application the *applicants*, after repeating the submissions set out in their main application, pleaded that it was

impossible for them to comply with the contested decision and that the measure sought was one of urgency.

The necessity for suspending the operation of the decision is said to arise in particular from the lack of clarity in the relationships between the duty imposed by the first sentence of Article 2, to put an end to the infringement, and the obligation, contained in the second sentence, to submit proposals to the Commission before 1 July 1972.

Furthermore, the applicants consider that they are required, in carrying out the latter duty, voluntarily to relinquish rights before the Court has decided upon the legality of the decision.

Their situation would be altered in an irreparable and irreversible manner by the mere submission of proposals, which would be impossible to keep secret.

The time allowed should not therefore begin to run until after the expiry of a period of six full months starting from the day on which the Court delivers its judgment.

The applicants state that such an application for suspension comes within the framework of the case-law concerning proceedings for the adoption of interim measures (Order in GEMA of 18 August 1971, JO of 28.9.1971, C 95, p. 5).

The Commission of the European Communities, the *defendant*, by a document lodged at the Registry on 13 March 1972, submitted that the application for the adoption of interim measures should be dismissed.

An action brought before the Court normally has no suspensory effect. Suspension could be granted only if the urgency of the measure requested were justified on factual and legal grounds.

In particular it should be proved that the implementation of the contested decision would lead to irreparable or at least to very grave damage (Order in *Geitling* 19/59 R, Rec. 1960, p. 85; Order in *Acciaierie e Tubificio di Brescia* 31/59 R, Rec. 1960, p. 209; Opinion of Mr Advocate-General.

Gand in *FRG v Commission*, Case 50/59 [1969] ECR 454 and 455).

The case-law of the Court in this respect was recently declared and confirmed by the abovementioned GEMA order, which refused suspension in respect of all measures not appearing to be of such a character as to cause an irreversible paralysis of the company concerned.

In the present case the period of six months allowed to Continental Can within which to submit proposals does not require it immediately to put an end to the infringement found.

Nothing decisive was put forward to support the opposite argument.

On the contrary, negotiations are already

being conducted between the parties, the applicant companies having submitted to the Commission by letter of 24 February 1972, proposals within the meaning of Article 2 of the decision.

The said proposals will be studied and the situation does not therefore justify the grant of a suspension of the operation of the measure.

The parties were summoned to the hearing of the application for the adoption of interim measures on 21 March 1972.

They replied to the questions which were put to them by the judge hearing the proceedings for the adoption of interim measures.

According to Article 185 of the Treaty 'actions brought before the Court of Justice shall not have suspensory effect'. It can only be otherwise if 'circumstances so require'. According to Article 83(2) of the Rules of Procedure suspension of the operation of any measure is subject to the existence of circumstances giving rise to urgency and grounds establishing a *prima facie* case for such a measure.

Subject to the discretion of the court hearing the case, Article 2 of the decision, at least until 1 July 1972, makes the execution of the duty to put an end to the infringement, contained in the first sentence, subject to the prior requirement, which follows from the second sentence, to submit proposals to the Commission before that date. The applicants do not therefore appear to be required to cease the infringement immediately, but only to make proposals for this purpose. In the present state of the procedure, the applicants therefore have until 1 July 1972 to carry out this duty to make proposals which, if they are satisfactory, will put an end to the infringement. If they have already put forward such proposals they can in any case until 1 July 1972 formulate new proposals should their first proposals be rejected.

The obligation to submit proposals in no way prejudices their situation until 1 July 1972 and the outcome of the main action. Assuming them to be real, the uncertainties or threats with which the applicants are said to be faced are constituted less by the decision itself, than the situation in which the undertakings have placed themselves in respect of Article 86. The suspension sought appears to be all the less necessary since there is nothing to indicate that the Court cannot give judgment on the application in good time and decide upon any appropriate measure.

- 4 It therefore does not appear, either from Article 2 of the contested decision or from the file or from the oral submissions, that the applicants would suffer irreparable damage to their rights if they were not granted an extension of time as from now. Consequently there are no grounds for depriving the contested decision of the force attaching to it under Article 185 of the Treaty.
- 5 There is therefore no reason to order the suspension of the operation of Article 2 of the contested decision.

Costs

- 6 The costs should, in the circumstances, be reserved.

On those grounds,

Upon reading the pleadings;

Upon hearing the parties;

Having regard to the Treaty establishing the European Economic Community, especially Articles 86 and 185;

Having regard to the Protocol on the Statute of the Court of Justice of the European Communities, especially Article 36;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 83 to 90,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES,

by way of an interim ruling,

orders:

1. **The application for the suspension of Article 2 of the decision of the Commission of 9 December 1971 is dismissed;**
2. **The costs are reserved.**

So done and ordered at Luxembourg on 21 March 1972.

A. Van Houtte

Registrar

R. Lecourt

President