

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
7 June 1991 *

In Case T-19/91 R,

Société d'Hygiène Dermatologique de Vichy, a company incorporated under French law, established at Vichy (France), represented by Robert Collin, Marie-Laure Coignard and Jeanne-Marie Henriot-Bellargent, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 Avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by Bernhard Jansen, a member of its Legal Service, acting as Agent, assisted by Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the suspension of the application of Commission Decision 91/153/EEC of 11 January 1991 (IV/31.624-Vichy) relating to a proceeding under Article 15(6) of Regulation No 17 of the Council of 6 February 1962,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

makes the following

* Language of the case: French.

Order

Facts

- 1 By application lodged at the Registry of the Court of First Instance of the European Communities on 21 March 1991 and registered on 25 March 1991, the Société d'Hygiène Dermatologique de Vichy (hereinafter referred to as 'Vichy') brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission decision of 11 January 1991 (IV/31.624-Vichy) relating to a proceeding under Article 15(6) of Regulation No 17 of the Council.
- 2 By a separate document, registered at the Registry of the Court of First Instance on 24 April 1991, the applicant further applied, under Article 83(1) of the Rules of Procedure of the Court of Justice, for the suspension of the operation of the contested decision.
- 3 The Commission submitted its observations on the application for interim measures on 13 May 1991. The Court heard oral argument from the parties on 30 May 1991.
- 4 Before considering the merits of the present application for interim relief, it is appropriate to recall the context of this case, and in particular the facts which led the Commission to adopt the decision of 11 January 1991, whose application the applicant now seeks to have suspended.
- 5 Laboratoires d'Application Dermatologique de Vichy et Cie, a subsidiary of Vichy, had notified to the Commission on 26 June 1985 a system, limited to French territory, of distributing Vichy cosmetic products exclusively through dispensing chemists.
- 6 By decision of 9 June 1987 of the French Conseil de la Concurrence, upheld by the Cour d'Appel, Paris, in its judgment of 28 January 1988 and by the French

Cour de Cassation in its judgment of 25 April 1989, Vichy was required to revise its distribution system in France, since the exclusive distribution through dispensing chemists was held to be contrary to national law and to Article 85(1) of the EEC Treaty.

- 7 As a result of the French authorities' decisions Vichy notified the Commission on 29 August 1989 of the revised distribution system for France, together with the distribution system for the other Member States (with the exception of Denmark, where Vichy products are not distributed). It is only that second system, applicable to the Member States other than France and based on exclusive distribution through dispensing chemists, which is the subject of the decision of the Commission which has been brought before the Court.
- 8 In its decision of 11 January 1991 the Commission states, after a preliminary examination pursuant to Article 15(6) of Regulation No 17 of the Council of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty, Official Journal, English Special Edition 1959-1962, p. 87, hereinafter referred to as 'Regulation No 17'), that, as regards the provisions of the agreements concluded between Société d'Hygiène Dermatologique de Vichy and wholesale distributors and retail chemists, and in so far as the said agreements provide for the exclusive distribution of Vichy cosmetic products through dispensing chemists, the conditions for the operation of Article 85(1) of the EEC Treaty are satisfied and that application of Article 85(3) is not justified.

Law

- 9 By virtue of Article 185 of the EEC Treaty, read 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, if it considers that circumstances so require, order that the application of the contested act be suspended.
- 10 Article 83(2) of the Rules of Procedure of the Court of Justice — applicable, pursuant to the third paragraph of Article 11 of the aforesaid Council Decision, *mutatis mutandis* to proceedings before the Court of First Instance until the entry

into force of its own Rules of Procedure — provides that an application for an interim measure under Article 185 of the EEC Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the measures applied for. The measures sought must have only an interim effect, which means that they must be without prejudice to the decision on the substance of the case.

11 In this case the applicant claims, essentially, in support of its request, that, inasmuch as it withdraws from the applicant the benefit of the immunity from fines which attaches to the notification of the applicant's agreements, the Commission's decision of 11 January 1991 amounts to nothing less than a *de facto* injunction involving extremely worrying consequences and entailing serious and irreparable harm. The applicant has the alternative of either continuing to distribute its products in accordance with its current arrangements, and thereby risking a higher fine because the duration of the infringement would have been increased by the length of the proceedings before the Community court (over which it has no control), or of abandoning its practice of selling its products exclusively through dispensing chemists, in which case it would be forced to reorganize its entire product distribution policy, which would necessitate considerable effort and expense, with the prospect that the Commission's decision might be annulled, without there being any possibility of returning to the present arrangements which ensure a perfect distribution of the applicant's products.

12 The applicant claims that there is a strong presumption that its main application to the Court is well founded. In that connection Vichy puts forward a number of pleas of infringement of essential procedural requirements and of the Treaty, in particular Article 85(1) and (3) thereof, and of the measures adopted in implementation of that article.

13 In challenging the decision at issue the applicant claims that the Advisory Committee was not consulted, as is required under Article 10(3) of Regulation No 17, and that the interim measure adopted under Article 15(6) is unjustified. It also criticizes the Commission for having failed in its decision to provide evidence that competition is appreciably impaired and trade between Member States adversely affected. Lastly, the applicant asserts that the Commission's decision is in breach of the principle of equal treatment of economic operators, in the sense that as a result

of the voluntary notification by the applicant and of the Commission's decision to which that notification gave rise, the applicant is placed in a less favourable position than its competitors, who gave no notifications.

- 14 For its part, the Commission contends in the first place that the contested decision issues no injunction and, by its very nature, is not capable of forming the subject of an order suspending its execution, with the result that the applicant's application is not admissible. Secondly, and in the alternative, the Commission also argues that the conditions laid down in the case-law for the grant of an application for suspension are not satisfied, since the applicant has neither established a presumption that its main application is well founded nor demonstrated that the contested decision is liable to cause it serious and irreparable harm. Finally, the Commission adds that the decision granting the suspension sought would necessarily prejudice the application in the main proceedings and would mean that any decision adopted pursuant to Article 15(6) of Regulation No 17 would automatically have to be suspended. That would nullify the Commission's powers under that provision.
- 15 Article 15(5) of Regulation No 17 provides that the fines provided for in paragraph 2 of that article are not to be imposed in respect of acts taking place after notification to the Commission and before its decision allowing or refusing the application of Article 85(3) of the Treaty, provided that they fall within the limits of the activity described in the notification.
- 16 Under Article 15(6) the foregoing provisions do not have effect where the Commission has informed the undertakings concerned that after preliminary examination it is of the opinion that the conditions for the operation of Article 85(1) are satisfied and that application of Article 85(3) is not justified.
- 17 The decision to withdraw the benefit of immunity from fines does no more than terminate an immunity which the undertaking could claim by virtue of its having

notified the agreement, and re-establishes the undertaking in the legal position in which it found itself before it notified the agreement to the Commission. It carries no sanction and imposes no injunction on Vichy, whether *de jure* or *de facto*. That being so, the equality as between economic operators on which Vichy relies is in no way breached by the decision in question.

18 As the Court of First Instance (First Chamber) held in its order in Case T-3/90 *Vereniging Prodifarma v Commission* [1991] ECR II-1, paragraphs 41 and 42, although such a decision does have legal effects as far as the parties to an agreement are concerned, it does not have the effect of preventing the parties from implementing their agreement. It is true that the risk of a fine could deter them, but on the other hand such a risk is exactly the same as that incurred by any undertaking which has failed to notify to the Commission an agreement liable to fall within the scope of the prohibition under Article 85(1) of the EEC Treaty.

19 It is only if the Commission adopted a decision under Article 3 of Regulation No 17 declaring Vichy to be in breach of Article 85(1) that the withdrawal of immunity could be taken into account in determining the duration of the infringement and hence the amount of the fine to be imposed. The undertaking to which the decision was addressed could then avail itself of the legal remedies enabling it to assert its rights effectively before the Community court. In any event, it is a question of future and uncertain damage which the undertaking to which the decision is addressed is in a position to assess and to which it can put an end at any time, if it considers this to be appropriate.

20 It follows from the foregoing that, by its very nature, a decision adopted by the Commission under Article 15(6) of Regulation No 17 does not, in itself, contain any injunction and requires no enforcement. It does no more than inform the undertaking to which it is addressed of the Commission's preliminary opinion regarding — in this case — the compatibility of an exclusive distribution system with Article 85 of the Treaty. Accordingly, such a decision is not only incapable of

causing its addressee serious and irreparable harm but is also not capable of forming the subject of a measure suspending its application.

- 21 Consequently, without there being any need to examine the applicant's pleas in support of a presumption that the main application is well founded, it must be held that the conditions which would, in law, enable the interim measure sought by the applicant to be granted are not satisfied and that the application must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE,

by way of an interlocutory order, hereby:

(1) Dismisses the application for interim measures;

(2) Reserves the costs.

Luxembourg, 7 June 1991.

H. Jung

Registrar

J. L. Cruz Vilaça

President