ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
6 December 1989 *

In Case T-131/89 R

Cosimex GmbH, whose registered office is at 25 Dellbrücker Straße, D-5000 Cologne 80, represented by Achim von Winterfeld, Rechtsanwalt, Cologne, Federal Republic of Germany, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Norbert Koch, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for interim relief for the purpose of obtaining an order requiring the Commission to reconsider, within a reasonable period and in the light of the interpretation of the law by the Court of Justice, the request for the adoption of interim measures which the applicant made in its complaint of 13 May 1988,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

makes the following

* Language of the case: German.

Order

1 By application lodged at the Registry of the Court of Justice of the European Communities on 16 August 1989, Cosimex GmbH (hereinafter referred to as 'Cosimex') brought an action under the second paragraph of Article 173 of the EEC Treaty seeking a declaration that the decision of the Commission of the European Communities of 7 June 1989 in Case IV/32.724, Moll (Cosimex)/Vichy is void in so far as it rejects the request contained in the applicant's complaint of 13 May 1988.

2 By a separate document lodged at the Court Registry on the same date, Cosimex also submitted an application for interim relief under Article 186 of the EEC Treaty for the purpose of obtaining an order requiring the Commission to reconsider, within a reasonable period and in the light of the interpretation of the law by the Court of Justice, the request made in the complaint of 13 May 1988 for an interim measure prohibiting Société d'hygiène dermatologique de Vichy (hereinafter referred to as 'Vichy') from in any way preventing Cosimex from being supplied with Vichy products by third parties.

3 By order of the President of the Court of Justice of 15 November 1989, the case was referred to the Court of First Instance.

4 The Commission submitted its observations of 15 September 1989. Oral argument was heard from the parties on 21 November 1989.

5 Before considering the merits of this application for interim relief, it would appear to be convenient briefly to outline the context of this case and in particular the various factual considerations which led the Commission to send Cosimex the letter of 7 June 1989, at issue in this case.

6 On 13 May 1988 Cosimex (then Kosmetik Moll GmbH) submitted a complaint to the Commission in which it asked the Commission to find, pursuant to Article 3(1)

and (2) of Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, of 6 February 1962 (Official Journal, English Special Edition 1959-62, p. 87), that by bringing pressure to bear on wholesalers in France and in Belgium in order to prevent them from supplying the complainant with Vichy products, Vichy had infringed Article 85(1) of the EEC Treaty and therefore to order it to bring the infringement to an end. Cosimex also asked the Commission to adopt an interim decision prohibiting Vichy from in any way preventing the complainant from being supplied with Vichy products by third parties.

7 By a letter of 17 February 1989, after several meetings between the complainant and officials of the Commission's Directorate-General for Competition and after the Commission had sent Vichy a request for information, Cosimex asked the Commission to adopt a decision as to whether or not it would take action against Vichy as requested in the complaint of 13 May 1988. Should the Commission decide not to take action, Cosimex requested a decision stating the grounds for the rejection, against which it stated that it intended to institute proceedings under the second paragraph of Article 173 of the EEC Treaty.

8 In its reply of 7 June 1989 the Commission, while stating that it had not yet been adequately demonstrated that the refusal to supply to which the complaint referred could be ascribed to an agreement, decision or concerted practice within the meaning of Article 85(1) of the EEC Treaty, informed the complainant that the content of its complaint would be taken into consideration when Vichy's distribution system, communications concerning which had meanwhile been or were about to be received by the Commission, was analysed, but that a decision could not be expected in the near future.

9 Under Article 186 of the EEC Treaty, read in conjunction with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (Official Journal L 319, 25.11.1988, p. 1, as amended by the corrigendum published in Official Journal L 241, 17.8.1989, p. 4), the Court of First Instance may in any cases before it prescribe any necessary interim measures.

10 Article 83(2) of the Rules of Procedure of the Court of Justice — applicable *mutatis mutandis* to proceedings before the Court of First Instance until the entry

into force of its own Rules of Procedure (see the third paragraph of Article 11 of the aforementioned Council Decision) — provides that applications for the adoption of interim measures referred to in Article 186 of the EEC Treaty are to state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima-facie case for the interim measures applied for.

11 As the Court held in its order of 17 January 1980 in Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119, it is for the Commission, within the bounds of the supervisory task conferred upon it in competition matters by the Treaty and Regulation No 17, to decide by virtue of Article 3(1) of Regulation No 17 whether there are grounds for adopting interim measures when a request is referred to it.

12 Without it being necessary to rule on whether or not the Commission's letter of 7 June 1989 constitutes a decision against which proceedings may be brought — inasmuch as it contains a refusal on the Commission's part to adopt the interim measures requested by Cosimex — it must be pointed out that it would not be consistent with the principles governing the distribution of powers between the different Community institutions, as intended by the authors of the Treaty, for the Court of First Instance to be able to require the Commission to reconsider the application for interim measures which has been submitted to it.

13 It should also be pointed out that Article 173, read in conjunction with Article 176, of the EEC Treaty precludes the Court of First Instance from laying down the framework within which the Commission is to reconsider a request for interim measures without first having declared void the act embodying the refusal to adopt the relevant interim measures.

14 It follows from the foregoing considerations that the legal conditions for the granting of the interim relief applied for are not met and, therefore, that the application must be dismissed without its being necessary to consider the circumstances establishing urgency and necessity.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES,

by way of interim decision,

hereby orders:

(1) The application for interim relief is dismissed.

(2) The costs are reserved.

Luxembourg, 6 December 1989

H. Jung
Registrar

J. L. Cruz Vilaça
President