intended to hamper the business of an undertaking acting as an intermediary in the motor trade where the effect of their application would be that the very existence of that intermediary would be jeopardized even though its business is in any event liable to have only a minimal impact on the operation of the manufacturer's distribution system, in view of the fact that those measures limit the intermediary's business to its previous volume.

5. Since they are in part a matter of substantive law in so far as they directly affect the interests of the parties to the proceedings, the rules to be applied for the apportionment of costs are those of the Rules of Procedure which are in force at the time when the oral proceedings are closed and the case enters the deliberation stage and not those in force on the date of delivery of judgment, that date in any event being uncertain.

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
12 July 1991 *

In Case T-23/90,

Automobiles Peugeot SA and Peugeot SA companies governed by French law and having their registered offices in Paris, represented by Xavier de Roux, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 8 Rue Zithe,

applicants,

v

Commission of the European Communities represented initially by Jacques Bourgeois, Principal Legal Adviser, then by Giuliano Marenco, Legal Adviser, acting as Agents, assisted by Francis Herbert, of the Brussels Bar, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

* Language of the case: French

Eco System SA a company governed by French law, having its registered office in Rouen, France, represented by Robert Collin, of the Paris Bar, and Nicolas Decker, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 16 Avenue Marie Thérèse,

Bureau Européen des Unions de Consommateurs (BEUC) an international association governed by Belgian law, represented by Philip Bentley, Barrister, of Lincoln's Inn, and Konstantinos Adamantopolous, of the Athens Bar, both of Messrs Stanbrook and Hooper, Brussels, with an address for service in Luxembourg at the Chambers of A. Kronshagen, 12 Boulevard de la Foire,

and

United Kingdom, represented by Hussein A. Kaya, acting as Agent, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

interveners,

APPLICATION for the annulment of the Commission Decision of 26 March 1990 in a proceeding under Article 85 of the EEC Treaty (IV/33.157 Eco System/ Peugeot — Provisional measures),

THE COURT OF FIRST INSTANCE (First Chamber),

composed of: J. L. Cruz Vilaça, President, R. Schintgen, D. A. O. Edward, H. Kirschner and R. García-Valdecasas, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 17 April 1991,

gives the following

Judgment

The facts

1 The contested decision was adopted following a complaint submitted to the Commission by Eco System on 19 April 1989 against Automobiles Peugeot SA and three of its authorized resellers in Belgium on the ground that, since March 1989, they had created obstacles which prevented Eco System from carrying on business in Belgium and Luxembourg as an agent acting on behalf of French final consumers prepared to buy Peugeot vehicles through it. In its complaint, Eco System also asked the Commission to adopt provisional measures putting an end to the serious damage caused to it by the aforementioned obstacles.

2 On 9 May 1989, Peugeot SA distributed a circular, through the subsidiary companies of Automobiles Peugeot SA, asking approved dealers and resellers in France, Belgium and Luxembourg to suspend deliveries to Eco System and no longer to register orders for new Peugeot vehicles from Eco System whether on its own account or on behalf of its principals. About three weeks earlier the text of that circular had been sent to the Commission.

3 On 27 November 1989, the Commission initiated against Automobiles Peugeot SA and Peugeot SA the procedure provided for by Regulation No 17 of 6 February 1982, the First Regulation implementing Articles 85 and 86 of the EEC Treaty (Official Journal, English Special Edition 1959-62, p. 87).

4 By decision of 26 March 1990, the Commission ordered Peugeot SA and Automobiles Peugeot SA, on pain of periodic penalty payments, to send within two weeks to all their dealers and agents a letter suspending the operation of the circular of 9 May 1989 until a final decision had been adopted in the main proceedings commenced following the complaint by Eco System and fixed a quota — 1 211 vehicles a year and no more than 150 a month — for the transactions which Eco System might, during the same period, conduct on behalf of its customers and on the basis of a prior written authorization, with the Peugeot distribution system, and to which the applicants could not object. Finally, the Commission ordered the applicants to instruct the approved members of their

distribution system in France, Belgium and Luxembourg to inform it of the number and models of vehicles sold through Eco System.

5 In its decision, the Commission justified the adoption of the provisional measures by the finding, based on the facts established, that there was a sufficient likelihood of an infringement of Article 85(1) of the EEC Treaty, that serious and irreparable damage was likely to be caused to Eco System unless conservatory measures were ordered and in consequence that it was urgent that such measures should be adopted.

6 In fixing the annual volume of transactions which Eco System might conduct with the Peugeot distribution system while those measures applied, the Commission relied on the volume of transactions achieved during the 12 months preceding 9 May 1989, the date on which the aforementioned circular from Peugeot was sent out. The monitoring of those transactions was to be carried out by dual notification: on the one hand by the dealers concerned to the Commission — which in turn would inform Peugeot without disclosing the identity of the buyer — and, on the other, by Eco System which would concurrently inform the Commission, as it had undertaken to do at the Commission's request for such purposes as might be appropriate.

7 The Court also takes note of the fact that on 25 August 1985 Eco System had lodged a first complaint against Peugeot-Talbot SA concerning the refusal by dealers in the Peugeot distribution system in Belgium to sell new vehicles to it. The investigation of that complaint, which gave rise to several requests for information and the taking of a provisional position by Commission officials, was brought to an end when, on 18 January 1988, Eco System withdrew its complaint.

Procedure

8 By application received at the Registry of the Court of First Instance on 24 April 1990, Automobiles Peugeot SA and Peugeot (hereinafter jointly referred to as 'Peugeot') brought the present action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission Decision of 26 March 1990 in a proceeding under Article 85 of the EEC Treaty (IV/33.157 Eco System/ Peugeot — Provisional measures).

9 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.

10 By order of 21 May 1990, the President of the Court of First Instance dismissed that application.

11 By order of the Court of First Instance (First Chamber) of 5 July 1990, Eco System SA was granted leave to intervene in support of the defendant. By orders of the Court of First Instance (First Chamber) of 24 September 1990, the Bureau Européen des Unions de Consommateurs (BEUC) and the United Kingdom were granted leave to intervene in support of the defendant.

12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure without any preparatory inquiry. The parties presented oral argument and replied to questions put to them by the Court at the hearing on 17 April 1991. At the end of the hearing, the President declared the oral procedure closed.

13 In their application, the applicants claim that the Court should:

(i) annul the decision of the Commission of the European Communities of 26 March 1990;

(ii) order the Commission to pay the costs.

14 The Commission contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicants to pay the costs.

15 Eco System contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicants to pay the costs.

16 The Bureau Européen des Unions de Consommateurs (BEUC) contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicants to pay the costs, including those incurred in respect of BEUC's intervention.

17 The United Kingdom contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicants to pay the costs, including the costs occasioned by the United Kingdom's intervention.

The substance

18 In support of their claims, the applicants rely essentially on two pleas in law. First, they claim that, since the Commission did not establish in law any *prima facie* indication of an infringement, it was not empowered to adopt provisional measures. Their second plea in law is that the Commission produced no evidence of urgency or of any serious and irreparable damage to Eco System.

19 Before considering the applicants' arguments in support of their claim that the contested decision should be annulled, this Court notes that, as the Court of

Justice held in its order in Case 729/79 R *Camera Care* v *Commission* [1980] ECR 119, it is for the Commission, in the exercise of the supervisory powers conferred on it by the Treaty and by Regulation No 17, to decide pursuant to Article 3(1) of Regulation No 17 whether it is appropriate to take provisional measures when asked to do so. However, such measures must be of a temporary and conservatory nature and be restricted to what is required in the circumstances of the case.

20 Moreover, as the Court of Justice also made clear in its judgment in Joined Cases 228 and 229/82 *Ford* v *Commission* [1984] ECR 1129, the provisional measures which the Commission may adopt on a temporary basis must come within the framework of the final decision which may be adopted by the Commission.

21 In the present case, in reviewing the legality of the Commission's decision, this Court must establish in the first place whether the Commission was entitled, in its decision, to take the view that, at first sight, Peugeot's conduct, in ordering its dealers to refuse to sell to a duly authorized trade intermediary, exceeded the limits allowed to it by the applicable provisions of Community law, thus giving rise to serious doubts as to its compatibility with those provisions.

22 It must also consider whether the measures ordered are of a temporary and conservatory nature and are restricted to what is necessary to uphold the effective exercise of the Commission's right of decision, in other words whether there was an urgent need to adopt them in order to avoid, pending the adoption by the Commission of a decision on the substance of the case, any risk that serious and irreparable damage might, in the absence of provisional measures, result from continuation of the practices at issue.

A — *The plea as to the failure to establish, in law, any* prima facie *indication of an infringement*

23 In the applicants' view, the Commission has misinterpreted the Community provisions and exceeded the bounds of its powers. That view is essentially based on four arguments.

24 The applicants claim, first, that Commission 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) exempts from the application of Article 85(1) of the Treaty exclusive and selective distribution agreements concluded in the motor vehicle sector, provided that they meet several conditions laid down in that regulation, particularly in Article 3(11) thereof, which provides that the exemption is also to apply where the distributor undertakes 'to sell motor vehicles within the contract programme or corresponding goods to final consumers using the services of an intermediary only if that intermediary has prior written authorization to purchase a specified motor vehicle . . . '. According to the applicants, those conditions are included in the standard dealership contract which Peugeot concludes with its distributors.

25 Furthermore, since in its Communication 85/C 17/03 of 12 December 1984 concerning its Regulation No 123/85 (Official Journal 1985 C 17, p. 4, hereinafter referred to as 'the communication of 12 December 1984'), the Commission interpreted Article 3(11) of Regulation No 123/85 as meaning that an intermediary 'who carries on an activity equivalent to that of a reseller' cannot rely on Article 3(11) and may be subject to the restrictions imposed by the manufacturer on those conditions, the applicants consider that they were fully entitled to take the view, *prima facie*, that the business of Eco System was equivalent to that of a reseller within the meaning of the Commission's communication. In their view, Eco System offers consumers an alternative source of Peugeot vehicles under conditions equivalent to those of any car dealer, since it gives commitments as to the maximum prices and delivery times for such vehicles, makes payment itself for the vehicle that it obtains for the final customers, finds and offers financing for the purchase and opens sales outlets, in particular on supermarket premises (in this instance, at 'Carrefour' stores) where vehicles are displayed. It follows that the measures taken by Peugeot in the circular of 9 May 1989 with a view to protecting its selective distribution system are, at first sight, compatible with the exemption granted by Regulation No 123/85.

26 In reply, the Commission states first that, in its judgment in Case 10/86 *VAG France* v *Établissements Magne* [1986] ECR 4071, the Court of Justice stated, with respect to Regulation No 123/85, that agreements restricting competition which are capable of affecting trade between Member States are automatically void,

unless the provisions of Article 85(1) have been declared inapplicable by the Commission in accordance with Article 85(3).

27 In the defendant's view, it is essential, to give real effect to the final consumer's possibility of buying a vehicle from any member whatsoever of the approved distribution system in any Member State whatsoever, that the final consumer should be able to use the services of an intermediary to whom prior written authorization has been given in order to purchase and, if appropriate, accept delivery of a specified vehicle. There is no provision in Regulation No 123/85 to indicate whether the intermediary authorized by the final consumer to purchase a vehicle on his behalf and for his account should act as such by way of trade or on an occasional basis.

28 The intervener, Eco System, states that the legal framework for the occupation of motor trade agent is set out in Regulation No 123/85. According to Eco System, that regulation lays down the three essential conditions under which selective distribution is compatible with Article 85 of the EEC Treaty. First, freedom of choice for the final consumer, within the territory of the Community, as to where he decides to buy his vehicle; secondly, the placing of improper obstacles in the way of any such purchase is prohibited; and finally, the final consumer is entitled to use the services of a professional intermediary who offers assistance for the purchase of a vehicle in another Member State. Moreover, in Eco System's opinion, to exclude a professional agent from the benefit of Regulation No 123/85 would be tantamount to preventing a final consumer from obtaining the desired vehicle at the best price from any approved dealer in any Member State as a result of the many steps to be taken and the complex formalities to be completed in order to move a motor vehicle from one Community country to another.

29 At the hearing, Eco System denied that it held any stock of cars for display and sale purposes. The only cars in its possession were those bought on behalf and for account of its principals. It was only during the short period between the arrival of the vehicles and the completion of the administrative formalities necessary before delivery to the owners that those vehicles remained within the control of Eco System and might have been displayed at its premises. Only one Peugeot vehicle, lent by one of Eco Systems principals, had in fact been displayed at the Carrefour stores, and then only for a period of about 10 days. The applicants did not challenge those statements.

30 The United Kingdom submits that there appears to be a strong *prima facie* case of infringement of the competition rules since it is clear from the express words of Article 3(11) of Regulation No 123/85 that the exemption conferred by that provision does not apply to the withholding of supplies in circumstances where an intermediary has prior written authorization to purchase a specified motor vehicle and, as the case may be, to accept delivery of it on behalf of final consumers,

31 It must be borne in mind that, in implementation of Article 85(3) of the EEC Treaty, Regulation No 123/85 declares Article 85(1) inapplicable to certain categories of distribution and sales and after-sales service agreements in respect of motor vehicles provided that those agreements fulfil a number of conditions laid down in the regulation.

32 Pursuant to Article 3(11) of Regulation No 123/85, the exemption granted under Article 85(3) of the EEC Treaty also applies where the dealer undertakes 'to sell motor vehicles within the contract programme or corresponding goods to final consumers using the services of an intermediary only if that intermediary has prior written authorization to purchase a specified motor vehicle and, as the case may be, to accept delivery thereof on their behalf'.

33 It is apparent from the scheme of that provision that its aim is to preserve the possibility of the involvement of an intermediary provided that there is a direct contractual relationship between the dealer and the final consumer. That contractual relationship must, according to Regulation No 123/85, be established by a prior written authorization given by the buyer of the vehicle to the intermediary.

34 In its circular of 9 May 1989, Peugeot instructed its dealers, first, not to register in respect of Peugeot vehicles that were new or had been registered for less than three months orders placed by Eco System either on its own behalf and for its own account or on behalf and for account of its principals, and, secondly, not to supply any such vehicles to it.

35 It must be emphasized that Article 3(11) of Regulation No 123/85 does not envisage the possibility of refusing to register orders for vehicles placed by an intermediary and to supply such vehicles to it where it is acting on behalf and for account of its principals.

36 It has not been shown in the present case, even as regards the vehicles displayed on its premises and at Carrefour stores, that Eco System made any approach to dealers in the Peugeot distribution system otherwise than within the framework of the authorizations granted to it by final consumers.

37 The Commission was therefore right to consider that, at first sight, the said circular did not meet the conditions laid down by Article 3(11) of Regulation No 123/85 in order to escape the prohibition laid down by Article 85(1) of the EEC Treaty.

38 Secondly, the applicants claim that the Commission also contravened the principle of legal certainty in that it departed from the interpretation which it had itself given of Article 3(11) of Regulation No 123/85 in its communication of 12 December 1984. That breach of the principle of legal certainty was exacerbated, in the applicants' view, by the fact that in the present case the draft circular had been submitted in advance to the competent Commission officials and they had not objected to it.

39 The Commission considers that the applicants' argument concerning legal certainty, with reference to the communication of 12 December 1984, is inapposite since that communication merely made it clear that where an intermediary acts on behalf of a final consumer, the provisions of Article 3(10) and (11) of Regulation No 123/85 do not allow the members of an approved distribution system to be prohibited from supplying him. The Commission adds that, even if it were the case that the communication went further than the text of Article 3(11) in that an intermediary with proper authorization might be denied deliveries, that communication could not in any circumstances take precedence over the legislative content of Regulation No 123/85.

40 As regards the complaint concerning the fact that the draft circular had been submitted in advance to the competent Commission officials, the Commission observes that the draft was sent on or about 18 April 1989, on a personal basis, to Mr Cadieux, Deputy Director-General in the Directorate-General for Competition (DG IV). Since he had replied that he would have the circular examined by his officials in order to identify the problems raised by it, on 25 April 1989 Peugeot indicated to Mr Cadieux that the circular in question was to be regarded as having been sent on an official basis. In reply, Mr Cadieux stated that he was not able to take any position on the matter since his officials had not yet completed their examination.

41 The Commission also states that the very fact of sending the circular undermines the applicants' thesis, according to which the content of the circular was clearly covered by the interpretation of the provisions of the regulation given in the communication of 12 December 1984. It adds that the applicants should have notified the circular to it in the prescribed manner in order to guarantee absolute legal certainty regarding the need for any reaction on the part of its officials.

42 The intervener, Eco System, observes in that regard that, contrary to the applicants' contention, in its communication of 12 December 1984 the Commission clearly defined the cases in which sales may be legitimately refused to certain third parties and the case in which a duly authorized third party may not be prevented from conducting its business. The second part of paragraph I.3 of the communication draws a distinction between, on the one hand, certain activities in respect of which a refusal to sell is justified and, on the other, an activity in respect of which no such refusal is justified, and there can be no doubt, in the light of Regulation No 123/85, that a third party whose existence has been disclosed in advance to the dealer within the distribution system and who acts on behalf and for account of the final consumer must be allowed to conduct his business without being obstructed.

43 The intervener, BEUC, submits that Regulation No 123/85, in particular Article 3(10) and (11) thereof, is sufficiently clear for it to be unnecessary to refer to the interpretation of it given in the communication of 12 December 1984. In any event, in BEUC's opinion, that communication cannot alter the content of the regulation since the Commission cannot enter into commitments which conflict with legislative provisions. BEUC also states that Peugeot had already been alerted

to the illegality of its conduct by a letter — produced in the proceedings by the defendant with its rejoinder — of 15 June 1987 from Mr Stöver, Head of Department in Commission DG IV, which was sent to Peugeot-Talbot SA in the course of the investigative procedure commenced following the complaint lodged by Eco System on 25 October 1985 (see paragraph 7, above). BEUC thus concludes that the applicants were aware that even if the communication had some legal value, which was not the case, it would not enable them to refuse to sell motor vehicles to the customers of an agent with prior written authorization.

44 The United Kingdom considers that the Commission communication cannot derogate from the provisions of Regulation No 123/85 which, on its proper construction, does not purport to do so. The United Kingdom therefore considers that Peugeot's arguments in that regard, if upheld, would deprive Article 3(11) of the regulation of much of its force and would seriously limit the scope for professional intermediaries to operate in that field.

45 In view of those matters of fact and law, and without its being necessary at this stage to make any judgment as to the legal value of the communication of 12 December 1984 or the interpretation to be given of the term 'activity equivalent to that of a reseller', this Court observes that, according to the very terms of the Commission communication, 'The European consumer must be able to make use of the services of individuals or undertakings to assist in purchasing a new vehicle in another Member State' (paragraph I.3). There is no immediately apparent reason why the final consumer should not be able to use a professional intermediary for the purchase of a new vehicle. The only obligation imposed by Article 3(11) of Regulation No 123/85 on an intermediary or final consumer — an obligation mentioned also in paragraph I.3 of the communication — is to give the dealer within the distribution system prior written evidence that the intermediary, in buying and accepting delivery of a vehicle, is acting on behalf and for account of the final consumer.

46 *Prima facie*, it cannot therefore be concluded that, by referring to '. . . a third party (who) carries on an activity equivalent to that of a reseller', the communication of 12 December 1984 purported to exclude professional intermediaries with prior written authorization from the buyer.

47 It must also be emphasized that, although they disclosed the draft circular to the Commission about three weeks before it was sent to the dealers in the Peugeot distribution system, the applicants did not effect a formal notification for the purpose of obtaining an individual declaration that Article 85(1) did not apply to that circular. In the present case, only such a notification would have placed the Commission staff under an obligation to reply and, thus, to afford the applicants the legal certainty upon which they seek to rely in relation to the legality of the contested circular under Article 85 of the EEC Treaty and Regulation No 123/85. In any event, after receiving the complaint lodged by Eco System and the draft circular from Peugeot, the Commission twice asked the applicants to provide information and subsequently sent them, on 6 December 1989, two statements of objections concerning the imposition of provisional measures and the main proceedings respectively.

48 Finally, it must be pointed out that, as is apparent from the abovementioned letter from Mr Stöver of 15 June 1987, the applicants already knew the views of the Commission officials regarding the assimilation of the activities of certain intermediaries to those of an unapproved reseller and in particular regarding the expression 'activity equivalent to that of a reseller' used in the communication of 12 December 1984. Paragraph 3.2 of that letter clearly stated that 'provided that an intermediary assumes the type of entrepreneurial risk that is appropriate for a service undertaking and not an entrepreneurial risk of the kind . . . appropriate to the business of buying and reselling, the business of that intermediary cannot be described as an "activity equivalent to that of a reseller" within the meaning of the communication . . . '. In that letter, the Commission officials came to the conclusion that Peugeot and the undertakings in its distribution system should refrain from withholding deliveries or having deliveries withheld from intermediaries such as Eco System, which had proper authorization, and asked Peugeot to send a circular giving notice of that fact to the members of its distribution system in Belgium and Luxembourg.

49 It follows from the foregoing that the applicants have no grounds for alleging that the contested decision is in breach of the principle of legal certainty.

50 The applicants claim, thirdly, that according to a decision of the Court of Justice (Joined Cases 228 and 229/82 *Ford*, cited above, paragraphs 19 and 22), the measures that the Commission may adopt on a provisional basis must come within

the framework of the final decision which may be adopted and consequently that the Commission has no authority to convert, by means of a provisional decision, a condition to which the grant or maintenance of an exemption is subject into a separate enforceable order which leaves no choice to the undertaking concerned. However, that, they claim, is what the Commission did in adopting the contested decision.

51 The Commission, whilst recalling that the *Ford* judgment was given prior to the entry into force of Regulation No 123/85, observes that the present situation is wholly different from the one underlying that judgment; in the present case, the provisional decision falls precisely within the framework of the envisaged final decision. According to the Commission, the final decision entails, in addition to a finding that the circular constitutes an infringement of Article 85(1) of the EEC Treaty, the withdrawal for the countries in question (Belgium, Luxembourg and France) of the benefit of the exemption granted by Regulation No 123/85, the possibility of such a withdrawal being envisaged in Article 10(2) of that regulation.

52 BEUC states in that regard that the concerted practice which the circular of 9 May 1989 is intended to put into effect does not fall within the scope of the block exemption granted by Regulation No 123/85 and, moreover, was not the subject of any application for individual exemption. BEUC considers that, in those circumstances, the Commission may confine itself to finding an infringement of Article 85(1) of the Treaty, with respect to that practice, regardless of any withdrawal of the benefit of the block exemption for the standard exclusive dealership agreement. A provisional measure compelling the undertakings concerned to bring an infringement to an end falls, in BEUC's opinion, entirely within the framework of the final decision which may be adopted.

53 The United Kingdom maintains that the provisional measures adopted fall within the framework of any final decision which the Commission may adopt and that the present situation is totally different from that under consideration in the *Ford* case.

54 It must be borne in mind that, as was held in the *Ford* judgment (paragraph 19), 'the interim measures must come within the framework of the final decision which may be adopted by virtue of Article 3' of Regulation No 17. In that case, the

Court of Justice emphasized that since the main proceedings were concerned with the dealer agreement between Ford AG and its dealers, an order intended to bring to an end a refusal to deliver, which, 'according to the Commission, does not infringe either Article 85 or Article 86 of the Treaty' did not come within the framework of any final decision that the Commission might adopt under Article 3(1) of Regulation No 17 (paragraphs 20 and 21).

55 In the contested decision, on the other hand, the Commission confines itself, in a procedure under Article 3 of Regulation No 17 intended to appraise the legality of the circular sent by Peugeot to its dealers in the light of Article 85(1) of the EEC Treaty and, more particularly, the provisions of Regulation No 123/85, to requiring the applicants to refrain, within the limits set by the decision itself, from complying with that circular until a decision is given on the substance, in other words partially and temporarily to return to the previous situation as regards the registration of orders and the supply of vehicles to Eco System, an intermediary acting on behalf and for account of its principals.

56 By contrast with the situation examined by the Court of Justice in the *Ford* case, the contested circular in this case constitutes the subject-matter of the main proceedings. The final decision which the Commission will have to take on conclusion of the proceedings concerns the question whether or not that circular constitutes an infringement of Article 85(1) of the EEC Treaty.

57 It follows that the conservatory measures adopted by the Commission come within the framework of the final decision to be adopted by it and, consequently, that the applicants have no grounds for criticizing the Commission for converting, by means of those measures, a condition to which the maintenance of an exemption is subject into a separate enforceable order.

58 Finally, the applicants claim that the Commission was not empowered to take provisional measures since the situation was not sufficiently clear as a matter of law and the Commission has not shown that there was any particular likelihood of the existence of an infringement. They refer, in support of their views, to the Opinion of Advocate General Sir Gordon Slynn in the *Ford* cases (cited above, at

p. 1168) and the order made by the President of the Court of First Instance in the present case (order of 21 May 1990 in Case T-23/90 *Peugeot* v *Commission* [1990] ECR II-195), according to which certain issues in the present case raise serious problems of interpretation.

59 The Commission, whilst criticizing the applicants for deliberately misconstruing the terms of the order of the President of the Court of First Instance out of their context, replies that the effect of their views is to place on exactly the same footing both the requirement of a *prima facie* infringement in relation to a decision prescribing provisional measures and the requirement of certainty in relation to the final decision, an approach which is contrary to consistent case-law of the Court of Justice (orders in Case 3/75 R *Johnson and Firth Brown* v *Commission* [1975] ECR 6; Case 232/81 R *Agricola Commerciale Olio Srl and Others* v *Commission* [1981] ECR 2199; Case 42/82R *Commission* v *France* [1982] ECR 856; and Case T-23/90R *Peugeot*, cited above). The defendant thus concludes that such problems of interpretation as may arise regarding the term 'activity equivalent to that of a reseller' are not in any way incompatible with a finding of a *prima facie* infringement which enables provisional measures of limited scope to be adopted.

60 In the United Kingdom's view, there appears to be a strong case that Peugeot's conduct is in breach of the EEC Treaty competition rules. The Commission therefore acted correctly in taking the action that it did pending final determination of the relevant factual and legal issues.

61 It must be pointed out that in proceedings relating to the legality of a Commission decision imposing provisional measures, the requirement of a finding of a *prima facie* infringement cannot be placed on the same footing as the requirement of certainty that a final decision must satisfy.

62 As this Court states in paragraph 37 above, the circular that Peugeot sent to its dealers does appear, at first sight, to exceed the bounds permitted by Regulation No 123/85 and in particular Article 3(11) thereof, since it undermines the possibility of final consumers obtaining vehicles through a third party to whom they give prior written authorization.

63 The Commission was thus fully entitled to take the view that, at first sight, there were serious doubts as to the legality of the circular in relation to the Treaty competition rules and that it could therefore adopt provisional measures pending a decision on the substance.

64 It follows from the foregoing that the applicants' plea concerning the lack of any legal determination of a *prima facie* infringement is unfounded.

B — *The plea that the decision does not contain an adequate statement of reasons regarding evidence of urgency or of serious and irreparable damage to Eco System*

65 The applicants also complain that the Commission did not produce evidence of urgency or of any serious and irreparable damage to Eco System. In support of that view, they rely essentially on two arguments.

66 In the first place, the applicants claim that the Commission did not produce evidence either that Eco System was on the verge of insolvency or of any causal link between that alleged financial situation and the contested Peugeot circular. On the contrary, the applicants maintain that the accounts of Eco System made up to 31 August 1989 reflect a trading position which is not only normal but is in fact clearly improving, thus providing 'glaring' evidence that Eco System is not on the point of going out of business. Moreover, the applicants observe that Eco System is still offering Peugeot vehicles for sale in its advertising material. In the applicants' view, that commercial availability and that financial prosperity clearly show that the urgency on which the provisional measures were based is non-existent.

67 The Commission states, first, that whilst it is true that it is entitled to adopt provisional measures only in cases of proven urgency, the fact remains that such urgency may derive from a risk arising from a situation likely to cause serious and irreparable damage (orders of the Court of Justice in Case 729/79 R *Camera Care*, cited above, paragraph 1, and Joined Cases 229/82 and 228/82 R *Ford* v *Commission* [1982] ECR 3091, paragraph 13).

68 As regards proof of urgency, the defendant contends that it is apparent from the contested decision, and in particular paragraphs 15 and 21 thereof, that the circumstances on which its finding of urgency was based relate to the direct and undeniable impact of the circular on the business of Eco System. The Commission states that following distribution of the contested circular, the number of Peugeot vehicles imported by Eco System from Belgium and Luxembourg fell by 93%. Furthermore, it adds, whereas in 1988 imports of Peugeot vehicles accounted for 35.23% of Eco System's business, that figure fell to 5.36% for the period from May to December 1989.

69 The defendant also considers that the fact that, after distribution of the circular, Eco System is still offering Peugeot vehicles is irrelevant since it is normal for Eco System, confronted by supply problems that it considers to stem from unlawful conduct, should continue to promote transactions in which it is involved as an agent protected by Community law. The same applies to the arguments based on Eco System's financial statements, since they relate to the year to 31 August 1989 and it is apparent both from the table in paragraph 15 of the decision and from those included in the defence that the adverse impact of the circular made itself felt as from July 1989.

70 Eco System confines itself to stating that the drop in its sales following distribution of the contested circular was very considerable since, after falling by half in the first three months, its volume of sales continued to decrease, falling as low as one-third, and then one-quarter, of the volume of sales for the same month of the previous year.

71 The United Kingdom considers that even if Eco System could have survived without the adoption of provisional measures, it is very doubtful whether the subsequent award of damages could adequately have compensated it for the damage done to its business in the meantime.

72 It must be stated that, as appears from the information given in paragraph 15 of the Commission's decision, which has not been challenged by the parties, the number of Peugeot vehicles imported by Eco System from Belgium and Luxembourg following distribution of the contested circular fell by 93%, whereas imports of such vehicles had previously accounted for about one-third of Eco System's business. Such a situation is liable to endanger the very existence of that undertaking, which has had a substantial proportion of its sources of income taken away from it and which, if the situation persists, is liable to have to cease trading and thereby to suffer serious and irreparable damage. In that connection, the argument that Eco System's accounts to 31 December 1989 show not only normal but clearly improving results is unacceptable since those accounts cannot reflect the effects of the circular sent to the dealers in the distribution system less than four months earlier.

73 The applicants maintain, secondly, that the provisional measures ordered by the Commission do not affect Eco System but, on the other hand, affect Peugeot, in that they give rise to irreversible disruption of the distribution system and undermine the group's brand image and the credibility of its exclusive distribution system, which thus loses its exclusivity. In the applicants' view, the overall effect of the Commission's decision is provisionally to suspend the benefit of the rights granted to the members of the distribution system by Regulation No 123/85 and, consequently, to negate the *raison d'être* of Peugeot's exclusive distribution system. The applicants conclude from this that the damage that they have suffered exceeds the permissible consequences of the normal application of the EEC Treaty competition rules.

74 The Commission replies that the applicants' complaint that it is Peugeot that will suffer serious and irreparable damage was one of the main arguments put forward in the application for interim measures and, as such, has already been rejected by the order of the President of the Court of First Instance of 22 May 1990. Moreover, the Commission emphasizes that the number of vehicles affected by the provisional measures adopted by it accounts for only 0.24% of the total number of registrations of Peugeot vehicles in France in 1988. The balance of interests here thus confirms that the contested decision is well founded. The defendant also

observes that the balance of interests to which it is obliged to have regard must also take account, first, of the interests of the French final consumers who wish, in accordance with the principles of Article 85 of the EEC Treaty and Regulation No 123/85, to obtain vehicles from other Member States and, secondly, of the general interest in maintaining an effective structure for both 'intra-brand' and 'inter-brand' competition.

75 BEUC contends that Peugeot has not suffered any damage, observing, first, that the provisional measures allow the applicants to decline to sell to Eco System's customers more than 1211 vehicles a year, even if Eco System is acting with prior written authorization, and, secondly, that Eco System's business brings customers to the applicants' distribution system, not only for the sale of Peugeot cars but also for maintenance and after-sales service.

76 It must be pointed out that, by fixing an annual volume of transactions equal to that carried out by Eco System in the 12 months before the contested circular was sent out, the Commission's decision confines itself, at the present stage of the procedure, to restoring, solely for Eco System's benefit and until the adoption of the final decision, a pre-existing situation which, from the standpoint of the impact on the total number of sales of the Peugeot distribution system in France, represents about 0.24% and consequently has only a minimal effect on the operation of Peugeot's exclusive distribution system. It cannot therefore be contended that the provisional measures adopted by the Commission are of such a kind as to cause the applicants serious and irreparable damage by irreversibly detracting from Peugeot's brand image and the credibility of its exclusive distribution system.

77 It follows from the foregoing that the plea in law concerning the lack of a proper statement of reasons concerning proof of urgency and of the existence of serious and irreparable damage for Eco System is also unfounded and that, consequently, the application must be dismissed.

Costs

78 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which under the third paragraph of Article 11 of the Council Decision of 24 October 1988 are applicable *mutatis mutandis* to proceedings before the Court of First Instance until the entry into force of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they are asked for in the successful party's pleadings. The Rules of Procedure of the Court of First Instance (Official Journal 1991 L 136, p. 1), adopted on 2 May 1991, entered into force, by virtue of Article 130 thereof, on 1 July 1991. Although Article 87(2) of the Rules of Procedure of the Court of First Instance likewise provides that the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings, Article 87(4), unlike the Rules of Procedure of the Court of Justice, provides that the Member States and institutions which intervened in the proceedings are to bear their own costs. Since the United Kingdom has intervened in the present proceedings, it is necessary to decide which Rules of Procedure should apply to the award of costs in the present case.

79 Pursuant to Article 73(b) of the Rules of Procedure of the Court of Justice (Article 91(b) of the Rules of Procedure of the Court of First Instance), expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers, are regarded as recoverable costs.

80 The rules laying down the criteria applicable to the award of costs are in part a matter of substantive law in so far as they directly affect the interests of the parties to the proceedings. When the Rules of Procedure of the Court of First Instance entered into force the oral procedure in the present case had already been closed and the case was in deliberation. In this regard, it is not permissible for the applicable rules to vary according to the date of delivery of the judgment, which is not predetermined, the entire procedure having been conducted under the old Rules of Procedure. The relevant provisions of the Rules of Procedure of the Court of Justice must therefore be applied.

81 Since the applicants have been unsuccessful, it is appropriate, pursuant to Article 69(2) of the Rules of Procedure of the Court of Justice, to order them jointly and severally to pay the costs, including those of the application for interim measures and those of the interveners.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicants jointly and severally to pay the costs, including those of the application for interim measures and those of the interveners.**

Cruz Vilaça Schintgen

Edward Kirschner García-Valdecasas

Delivered in open court in Luxembourg on 12 July 1991.

H. Jung
Registrar

J. L. Cruz Vilaça
President