ORDER OF THE PRESIDENT OF THE COURT
15 December 2000 *

In Case C-361/00 P(R),

Cho Yang Shipping Co. Ltd, established in Seoul, South Korea, represented by N. Bromfield and C. Thomas, Solicitors, with an address for service in Luxembourg at the Chambers of De Bandt, Van Hecke, Lagae and Loesch, 11 Rue Goethe,

appellant,

APPEAL against the order of the President of the Court of First Instance of the European Communities of 28 June 2000 in Case T-191/98 R II *Cho Yang Shipping* v *Commission* [2000] ECR II-2551, seeking to have that order set aside, and

APPLICATION for

— suspension of the operation of Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86

* Language of the case: English.

of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) (OJ 1999 L 95, p. 1) in so far as, in Article 8, it imposes a fine of EUR 13 750 000 on the appellant, until delivery of the final judgment in Case T-191/98 *Atlantic Container Line and Others* v *Commission* and in any appeal,

— an order that the Commission pay the costs,

the other part to the proceedings being:

Commission of the European Communities, represented by R. Lyal, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

THE PRESIDENT OF THE COURT,

after hearing Advocate General Jacobs,

makes the following

Order

1 By application lodged at the Court Registry on 29 September 2000, Cho Yang Shipping Co. Ltd brought an appeal pursuant to Article 225 EC and the second paragraph of Article 50 of the EC Statute of the Court of Justice against the order of the President of the Court of First Instance of 28 June 2000 in Case T-191/98 R II *Cho Yang Shipping* v *Commission* [2000] ECR II-2551 (hereinafter 'the contested order') dismissing its application for the suspension of operation of Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) (OJ 1999 L 95, p. 1, hereinafter 'the contested decision'), in so far as, in Article 8, it imposes a fine of EUR 13 750 000 on the appellant.

2 In addition to the setting aside of the contested order, the appellant also seeks:

— the suspension of operation of the contested decision in so far as, in Article 8, it imposes a fine of EUR 13 750 000 on the appellant, until delivery of the final judgment in Case T-191/98 *Atlantic Container Line and Others* v *Commission* and in any appeal,

— an order that the Commission pay the costs.

3 The appellant also seeks leave to submit observations regarding the treatment of any confidential information that might be contained in the order disposing of the present proceedings.

4 By separate document lodged at the Court Registry on 20 October 2000, the Commission submitted its written observations to the Court.

Relevant legislation, facts and procedure

5 The relevant legislation, the facts underlying the dispute and the course of the proceedings before the Court of First Instance are set out in the contested order as follows:

'1 The appellant was one of 15 shipping companies party to the Trans-Atlantic Agreement ("the TAA"), an agreement relating to trans-Atlantic liner shipping between Northern Europe and the United States of America, which entered into force on 31 August 1992.

2 On 19 October 1994 the Commission adopted Decision 94/980/EC relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1), in which, first, it found that certain provisions of the TAA, in particular those relating to certain inland transport services within the Community, infringed Art-

icle 85(1) of the EC Treaty (now Article 81(1) EC) and, secondly, it refused to apply to the provisions of the TAA Article 85(3) of the Treaty and Article 5 of Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302). Decision 94/980 required the undertakings to which it was addressed to refrain from price-fixing practices having the same or a similar object or effect as that of the provisions of the TAA Agreement.

3 On 5 July 1994, following numerous discussions with the Commission, the parties to the TAA had notified the Commission of a new agreement intended to replace the TAA, called the Trans-Atlantic Conference Agreement ("the TACA"). That agreement entered into force on 24 October 1994.

4 On 16 September 1998 the Commission adopted [the contested] decision.

5 According to Articles 1, 2 and 3 of the [contested] decision, the parties to the TACA had infringed Article 85(1) of the Treaty, Article 53(1) of the Agreement establishing the European Economic Area ("the EEA Agreement") and Article 2 of Regulation No 1017/68 by entering into an agreement under which they carried on various anti-competitive activities.

6 According to Articles 5 and 6 of the [contested] decision, the applicant and the other parties to the TACA have infringed Article 86 of the EC Treaty

(now Article 82 EC) and Article 54 of the EEA Agreement by altering the competitive structure of the market so as to reinforce their collective dominant position, and by placing restrictions on the availability and content of service contracts.

7 In respect of the infringements complained of in Articles 5 and 6, Article 8 of the [contested] decision imposed fines upon the parties to the TACA Agreement, including one of EUR 13 750 000 to be paid by the applicant. Article 10 provided that the fines laid down in Article 8 were payable within three months of the date of notification of the [contested] decision, after which time interest would automatically begin to accrue at the rate of 7.5%.

8 By letter of 25 September 1998 the Commission notified the applicant of the [contested] decision. It its letter it stated that, if the applicant brought an action before the Court of First Instance, it would not take any steps to recover the fine while those proceedings were pending before the Court, provided that interest at the rate of 5.5% accrued on the amount due from the date on which the period for payment expired and that a bank guarantee acceptable to the Commission and covering both the principal sum and interest be provided by no later than that date.

9 By letter of 2 December 1998, the applicant asked for dispensation from the obligation to either provide a bank guarantee or pay the fine.

10 By application lodged at the Registry of the Court of First Instance on 15 December 1998 the applicant, together with 11 other shipping companies

party to the TACA, brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of the [contested] decision (Case T-191/98).

11 On 9 June 1999 the Commission refused the applicant's request for dispensation, indicating that it would be prepared to accept:

"(a) a bank guarantee limited in time (for instance, for a one-year period) [in the form of the model bank guarantee annexed thereto];

(b) a payment scheme allowing the [applicant] to pay in instalments provided that late payment interest be calculated and that the outstanding balance of the debt be covered by a standard bank guarantee".

12 The model bank guarantee annexed to the Commission's letter stipulated that the guarantee should be of an initial duration of one year, and should be automatically renewable for successive periods of a year unless revoked by the bank, in which event the applicant would be required to pay within 15 days the fine plus accrued interest.

13 By document lodged at the Registry of the Court of First Instance on 19 October 1999 the applicant submitted the present application pursuant to Article 242 EC seeking:

— an order suspending the operation of the [contested] decision in so far as it imposes, at Article 8, a fine of EUR 13 750 000 upon the applicant, until

final judgment has been delivered in Case T-191/98 and in any appeal relating thereto, and until signature of the order disposing of the present application for interim relief;

— an order requiring the Commission to pay the costs of the present application for interim relief.

...

15 The Commission lodged its written observations on 29 October 1999.

16 The judge hearing the application for interim relief requested the applicant to reply at the hearing to certain written questions.

17 The parties presented oral argument on 12 November 1999. At the hearing the applicant was asked to supplement its replies to the written questions which it had been asked. On 3 December 1999 the Commission submitted its observations on the supplementary replies which the applicant had lodged at the Registry on 26 November 1999.

18 On 15 December 1999 the judge hearing the application for interim relief called upon the applicant to express its views on certain questions raised by the Commission in its observations of 3 December. The applicant replied by letter lodged at the Registry on 15 December 1999.

19 By order of the same date (T-191/98 R II *Cho Yang Shipping* v *Commission*, ECR II-3909) the Court ordered the suspension of operation of the [contested] decision until signature of the final order disposing of the present application for interim measures, and demanded production of the annual accounts for the financial year ending on 31 December 1999, audited and certified by a firm of auditors of international repute, accompanied by a letter from the same firm certifying that the accounts reflect the amount, by way of both principal sum and interest, of the fine imposed on the applicant by the [contested] decision. The third paragraph in the operative part of the order stated that, until the present proceedings for interim relief have been disposed of, interest at the rate of 7.5% would continue to accrue on the fine imposed on the applicant, in accordance with Article 10 of the [contested] decision.

20 On 31 March 2000 the applicant lodged at the Registry a report from the firm Seo Il & Company presenting its annual accounts for the 1999 financial year. By letter lodged at the Registry on 19 April 2000, the Commission stated its observations on those accounts.'

The contested order

6 By the contested order the President of the Court of First Instance dismissed the application for interim relief.

7 First, he held that the claim for interim relief having effect until delivery of the final judgment in any appeal against the decision of the Court of First Instance in Case T-191/98 *Atlantic Container Line and Others* v *Commission*, cited above, was manifestly inadmissible. He held that he had no jurisdiction to order interim measures which were designed to produce their effects up to such time as the Court of Justice decides any appeal that might be brought against the final judgment of the Court of First Instance.

8 Next, the President of the Court of First Instance observed, at paragraph 42 of the contested order, that the appellant's claim was for the suspension of operation of the contested decision in so far as Article 8 thereof imposed upon it a fine of EUR 13 750 000, whereas the Commission had already stated in its letter of notification of 25 September 1998 that, if the appellant brought an action, it would take no steps to recover the fine, provided that the appellant furnished a bank guarantee securing the principal amount of the fine and interest. The President of the Court of First Instance held that, that being the case, the only possible useful purpose of the application for an order suspending operation of the contested decision was to relieve the appellant of the obligation to provide a bank guarantee, that being the condition imposed in return for the Commission's agreement to refrain from immediately enforcing the fine imposed by the contested decision. In that connection, he observed that, unless there were exceptional circumstances, the appellant's request could not be granted, for to do so would render nugatory the principle laid down in Article 242 EC that actions are not to have suspensory effect (order in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549, paragraph 6, and order of 14 December 1999 in Case C-364/99 P(R) *DSR-Senator Lines* v *Commission* [1999] ECR I-8733, paragraph 48).

9 The Commission accepted that the appellant had made out a *prima facie* case, and consequently the President of the Court of First Instance went on to consider, at paragraph 43 of the contested order, whether the appellant had proved that it was unable to set up a bank guarantee without risking being wound up and whether the requirement of urgency had thus been satisfied. He held that the relevance of the letters in which the banks refused to provide the guarantee sought must be assessed in the light of the appellant's economic situation viewed objectively.

10 So that such assessment, which required intricate analysis of large amounts of accounting and financial data, could be carried out, and in view of the imminence of the 1999 financial year-end, the President of the Court of First Instance demanded in his order of 15 December 1999 in *Cho Yang Shipping* v *Commission*, cited above, production by the appellant, before 1 April 2000, of its latest annual accounts.

11 That assessment having been completed, the President of the Court of First Instance held, at paragraph 45 of the contested order, that the appellant had not proved that it was facing a risk of harm such as to justify the grant of a suspending order.

12 In that connection, at paragraphs 46 and 47 of the contested order, he emphasised that the difficulties to which the appellant referred arose from circumstances existing prior to the contested decision. Since 1995 the appellant had been heavily indebted. Its financial position had deteriorated in 1996 and, in addition, it suffered the effects of the 1997 Asian economic and monetary crisis.

13 The President of the Court of First Instance nevertheless observed, at paragraph 48, that, since 1998, the appellant's position had improved significantly. First, it had reduced its liabilities by more than 16% between 1997 and 1998, and by more than 34% between 1998 and 1999. In 1999 they stood at KRW 557 000 000 000 (557 billion Korean won), that is to say approximately half the figure for 1997. Next, thanks to the restructuring agreement concluded between Seoul Bank and the Cho Yang Group, the appellant had been able, at the end of the 1999 financial year, to eliminate the KRW 480 000 000 000 of losses carried over in the previous financial year and to record operating income of KRW 46 000 000 000, giving net income of over KRW 253 000 000 000. During that financial year, its equity rose from minus KRW 427 000 000 000 to KRW 96 000 000 000, bringing its debt ratio (total liabilities / total shareholders' equity) to six, that is to say almost five times lower than its 1996 level. The appellant's interest charge improved from KRW 117 000 000 000 to KRW 73 000 000 000. During the second half of the 1999 financial year, the appellant recorded better results than it had anticipated when it made its application for interim relief.

14 The President of the Court of First Instance acknowledged, at paragraph 49, that, despite those positive developments, the immediate sale of the appellant's vessels and real property would not generate sufficient liquid assets to enable the fine to be paid. He added, however, that the appellant held shares in the companies Dong Seoul and Dong Young Shipping which, in the context of the restructuring plan, had been earmarked for sale in the near future and whose value far exceeded the amount of the fine.

15 Lastly, the President of the Court of First Instance observed, at paragraph 50, that the appellant now enjoyed a positive cash flow. Cash generated in 1999, whilst insufficient to pay the fine, ought to have enabled the appellant to obtain a bank

guarantee, or, failing that, capital sufficient to pay the fine. The refusal of the banks to which the appellant applied prior to publication of the 1999 accounts were, in that regard, irrelevant.

16 The President of the Court of First Instance concluded, at paragraph 51, that those circumstances did not make it impossible for the appellant to arrange a bank guarantee without risking being wound up. Taking into account the general improvement in its position, enforcing the contested decision before the delivery of a judgment on the substance of the case was not likely to occasion the appellant serious harm that could not be made good if the contested decision were later annulled by the Court of First Instance. The requirement of urgency had not, therefore, been fulfilled.

17 Furthermore, the President of the Court of First Instance observed that the balance of interests involved militated against acceding to the appellant's request. The general interest in ensuring compliance with the contested decision, and thus helping to preserve the effectiveness of Community competition rules and the deterrent effect of fines imposed by the Commission, took precedence over the private interest of the appellant which was no longer facing a risk of serious and irreparable harm.

The appeal

The appellant's arguments

18 The appellant puts forward four pleas in law in support of its appeal, alleging distortion of the nature of the evidence before the President of the Court of First

Instance, breach of procedure on his part, an error of law in his application of the criterion for suspension of operation of the contested decision, and an error of law in his assessment of the Court's jurisdiction.

19 By the first plea, the appellant claims that the assessment of the President of the Court of First Instance of the questions of urgency and the balance of interests was based on a distorted view of the evidence before the Court.

20 The appellant accepts that its financial position has, in general terms, improved. However, it complains that, in describing its position in 1999, the President of the Court of First Instance referred in particular to its operating income, which takes no account of the significant interest charge that must be serviced by that income, and its net income, which was positive not as a result of any profits drawn from business operations, but solely as a result of the sale of assets, in accordance with the restructuring plan, the proceeds of sale of which were immediately paid over to the appellant's bankers in order to reduce its bank debt.

21 By so doing, the President of the Court of First Instance failed to take account of the appellant's interest expenses incurred in servicing its very heavy bank debt and of the most relevant indicator of its ability to generate income in a sustained manner, namely the fact that, leaving aside the extraordinary item arising from the sale of assets, the appellant suffered an ordinary loss in 1999 of KRW 7 000 000 000 (EUR 4 000 000).

22 According to the appellant, its financial position thus remains very fragile, notwithstanding the improvements made through application of the restructuring plan, which is to continue in effect until the end of 2002.

23 It was also a distortion of the evidence for the President of the Court of First Instance to conclude that, in the near future, the appellant would obtain from the sale of its shareholdings in Dong Young Shipping and Dong Seoul liquid assets far exceeding the amount of the fine, that is to say KRW 4 000 000 000 (EUR 3 000 000) and KRW 80 000 000 000 (EUR 63 000 000) respectively, according to the estimate given in the restructuring plan.

24 First of all, as is explained in a note to the appellant's audited 1999 accounts, those shareholdings had been pledged to the Seoul Bank, up to a maximum of KRW 70 202 000 000. The proceeds of their sale could therefore not be used to pay the fine imposed by the Commission.

25 Second, as is clear from the appellant's answers to the questions asked by the Court of First Instance, the appellant had obtained from the Seoul Bank a new target date for the sale of its holdings in Dong Young Shipping and Dong Seoul, namely June 2000 and June 2001 respectively, in view of its inability to find a purchaser for those shares before the end of 1998 as had been anticipated by the restructuring plan. It was not until 17 August 2000 that the appellant was finally able to sell its shareholding in Dong Young Shipping for KRW 5 250 000 000 (EUR 4 000 000), which sum was paid over to the Seoul Bank. As to its shareholding in Dong Seoul, the appellant has still not been able to sell those shares. The proceeds of sale of those shares might, at best, be available to the appellant one year after the making of the contested order.

26 The appellant maintains that the President of the Court of First Instance also distorted the evidence before the Court by concluding, on the basis of a criterion not previously applied by any of the appellant's banks and without taking account of the approach adopted by those banks, that the appellant ought, from that point on, to be able to obtain a bank guarantee or a loan sufficient to pay the fine.

27 The appellant maintains that it had proved that its lead bank, the Seoul Bank, and three other banks had in November 1998 and July / August 1999 refused to grant it a bank guarantee for the same reasons, that is to say the very low ratio between the security lodged by the appellant and its existing borrowing, which was far below the guidelines applied by the banks, and the dual circumstance that the appellant's liabilities exceeded its paid-up capital and that the appellant's debt-to-equity ratio was much higher than the norm. The banks also refused in 1999 to contemplate any new credit line for the appellant.

28 Contrary to the finding of the President of the Court of First Instance, the fact that the appellant's cash flows were not entirely consumed by its interest payments does not mean that it is able to obtain a bank guarantee. Those cash flows are, the appellant maintains, to be used to repay existing borrowing. It is clear from the fact that the appellant's banks again refused to provide it with the bank guarantee it sought on the basis of its audited 1999 accounts that the President of the Court of First Instance erred in drawing that conclusion.

29 The appellant submits that this distortion of the evidence on the three key issues of the appellant's income in 1999, the sale of its holding in Dong Young Shipping and Dong Seoul, and its ability to obtain a bank guarantee or loan, entirely invalidates the finding of the President of the Court of First Instance that the requirement of urgency had not been made out in the present case and his assessment of the balance of interests. In dismissing the application for a suspending order, the President of the Court of First Instance held that, there being no risk of serious and irreparable harm to the appellant, its interest was merely that of avoiding immediate payment of the fine.

30 By its second plea, the appellant submits that the President of the Court of First Instance committed a breach of procedure by not giving the appellant a proper opportunity to submit observations, in writing or orally, on its financial position after adoption of the 1999 audited accounts. That breach amounted to a

violation of the appellant's right to a fair hearing and of the principle of *audi alteram partem*, which are protected by Community law.

31 In this connection, the appellant argues that the narrow scope of an appeal to the Court of Justice is based on the assumption that the parties will have had a proper opportunity to discuss all relevant issues before the Court of First Instance.

32 On sending its audited accounts for 1999 to the President of the Court of First Instance, the appellant anticipated that, like the Commission, it would be allowed to submit its observations on those accounts, or would be invited by the President of the Court of First Instance to respond to a series of detailed questions on the development of its financial position. At the very least, it anticipated a second hearing being held, as had been expressly envisaged by the President of the Court of First Instance, given that the contested order adversely affected the appellant's legal situation by bringing to an end the suspension of operation of the contested decision granted in the order of 15 December 1999 in *Cho Yang Shipping* v *Commission*, referred to above.

33 This breach of procedure deprived the appellant of the opportunity of persuading the President of the Court of First Instance of the merits of its arguments, in particular as regards the matters raised in the first plea and, in particular, of providing him with the most important piece of evidence regarding its ability to obtain a bank guarantee or loan after adoption of the 1999 audited accounts, namely the new letters of refusal sent by the four banks. More generally, the appellant was unable to report to the President of the Court of First Instance on the progress of its restructuring.

34 By its third plea, the appellant claims that the President of the Court of First Instance erred in law in applying the criterion for the grant of a suspending order in that he adopted an unduly restrictive approach to the question whether or not there were exceptional circumstances warranting dispensation from the obligation to provide a bank guarantee.

35 In determining whether such circumstances existed, the President of the Court of First Instance ought, the appellant submits, to have taken the following three factors into consideration.

36 First of all, no independent and impartial tribunal, as required by the fundamental principles of Community law, has yet established the existence of any infringement of that law.

37 That factor is particularly important where there is a question of suspending an obligation to pay a fine imposed by the Commission in a competition matter. Enforcing a decision imposing a fine before the Court of First Instance has given judgment amounts to punishing an undertaking for infringement of the competition rules before it has been found by an independent and impartial tribunal to have infringed those rules.

38 Only by suspending for the duration of any legal proceedings fines imposed by the Commission for infringement of the competition rules, without demanding a bank guarantee, can the right to a fair hearing and access to justice be protected. Moreover, following the order in *DSR-Senator Lines* v *Commission*, referred to above, DSR-Senator Lines GmbH brought an action before the European Court of Human Rights against the 15 Member States of the European Union, claiming that the failure to suspend the fine imposed on it by the contested decision contravened the European Convention for the Protection of Human Rights and Fundamental Freedoms.

39 Second, the legal proceedings for determining the appropriate amount of the fine have not yet been completed.

40 Where the main proceedings are brought under Article 229 EC, the Community judicature has unlimited jurisdiction to cancel or reduce fines imposed by the Commission.

41 The fact that the appropriate amount of any fine imposed on an undertaking that has infringed the competition rules should be determined, ultimately, by the Community judicature is an important consideration to which the President of the Court of First Instance ought to have regard when deciding whether to order the suspension of such a fine.

42 Third, suspending the enforcement of a fine merely affects the timing of the payment of a sum of money, without affecting competition or third parties.

43 That important fact should be taken into account by the judge hearing an application for interim relief when deciding whether to order the suspension of operation of a measure. At the very least, he ought not to adopt, in connection with suspending the enforcement of a fine, a more restrictive approach than that which he takes in cases concerning the suspension of other measures which the Commission may require undertakings to adopt in order to bring to an end an infringement of the competition rules, where there is no need to show exceptional circumstances in order to obtain a suspension.

44 Consideration of those three factors should have led the President of the Court of First Instance to adopt a less restrictive approach to the existence or otherwise of exceptional circumstances.

45 The facts that, in the case at hand, the appellant is clearly in financial difficulty, its activities are constrained by a restructuring plan imposed by its lead bank on the instructions of a governmental agency, and it is able to prove its inability to

obtain a bank guarantee for the amount of the fine and accrued interest, should, the appellant maintains, be viewed as exceptional circumstances justifying suspension of the obligation to pay the fine imposed by the Commission.

46 By its fourth plea, the appellant claims that the President of the Court of First Instance erred in law in holding that he had no jurisdiction to order interim measures which are designed to produce their effects up to such time as the Court of Justice decides any appeal that might be brought against the final judgment of the Court of First Instance.

47 The appellant submits that this conclusion is wrong in law, at least in so far as it concerns the suspension of a fine imposed for infringement of the competition rules. In this field, it is in the interests of an economical administration of justice for the Court of First Instance to have jurisdiction to grant a suspension extending to the period of any appeal. Once an appeal is lodged, the Court of Justice would have jurisdiction, in the event of a change in circumstances, to modify or terminate any suspension.

48 It would appear to follow from Articles 83(1) and 118 of the Rules of Procedure that, until an appeal has been lodged, the Court of Justice has no jurisdiction to grant a suspending order. To ensure effective protection of the undertakings concerned, it is therefore essential that the Court of First Instance should be able, at the very least, to grant an order suspending the execution of a decision imposing a fine until the expiry of the period allowed for bringing an appeal against its judgment in the main proceedings.

The arguments of the Commission

49 The Commission observes at the outset that it has not sought the immediate payment of the fine imposed on the appellant. The latter's interlocutory application therefore solely concerns the obligation to set up a bank guarantee. According to settled case-law, an application to be relieved of that obligation can be upheld only in exceptional circumstances where the provision of such a guarantee is objectively impossible or would itself result in serious and irreparable harm to the applicant.

50 According to the Commission, the appellant's first plea, alleging that the President of the Court of First Instance distorted the evidence before the Court, is inadmissible and, in any event, unfounded.

51 The argument made in support of this plea is essentially that the President of the Court of First Instance was mistaken in his assessment of the appellant's financial position or that he ought to have given more importance to certain of the elements mentioned in the contested order and less importance to others. Such an issue cannot, however, form the subject-matter of an appeal.

52 In contrast to the appellant, the Commission contends that the President of the Court of First Instance did not distort the evidence before the Court and that the contested order is wholly justified in the light of that evidence.

53 Thus, the appellant's return to relative financial health was not, the Commission contends, inferred solely from its operating income and net income figures for the year ending 31 December 1999. The President of the Court of First Instance took into account a range of factors, including the very great improvement in the appellant's equity position and debt/equity ratio, the considerable reduction in its

liabilities and bank interest charge, the good results achieved in the second half of 1999, and the recovery made through its restructuring.

54 In any event, the audited accounts for 1999 confirm the drastic improvement in the appellant's position. Its ordinary loss of some KRW 7 000 000 000 in 1999 is to be compared with an ordinary loss in 1998 of more than KRW 100 000 000 000. Those figures indicate that in the second half of 1999 the appellant made a profit, since, in the first half, it had estimated losses of KRW 9 000 000 000.

55 The reduction in the appellant's debt, and thus in its interest charge, referred to in the contested order, is of particular importance in that it enabled the appellant to translate its positive operating results into an ordinary profit. The interest charge paid by the appellant has been halved since 1997 and there was, the Commission maintains, a considerable improvement in the second half of 1999.

56 Similarly, the likely sale of the appellant's holdings in Dong Seoul and Dong Young Shipping was merely one of the factors taken into consideration by the President of the Court of First Instance in assessing the appellant's financial position. That sale was referred to only in response to the argument that the appellant's vessels and real property were worth less than the bank loans secured on them. In addition, payment of the proceeds of sale would further improve the appellant's equity position and reduce its interest charge, thus reinforcing the conclusion arrived at by the President of the Court of First Instance. Moreover, only KRW 70 000 000 000 of the estimated proceeds of sale of KRW 84 000 000 000 are allocated to reducing the appellant's debt.

57 Furthermore, the liquid assets available to the appellant are merely one of the factors that indicate that its financial position has improved and that it might expect a more positive attitude from its banks if they were obliged to choose between supporting it or putting it into liquidation.

58 The Commission maintains that the appellant's second plea, alleging that the President of the Court of First Instance committed a breach of procedure by failing to give the appellant an opportunity of submitting its observations on its financial position after adoption of the 1999 audited accounts, is unfounded.

59 The purpose of the temporary suspension of the contested decision by the order of 15 December 1999 in *Cho Yang Shipping* v *Commission*, cited above, and of the demand for submission of audited accounts for 1999 was, according to the Commission, to enable the President of the Court of First Instance to assess the appellant's arguments on the basis of final figures rather than on the basis of the estimates advanced by the parties. There was therefore no need for further argument on matters that had already been canvassed at length. The Commission did no more than explain why the final figures confirmed its arguments. In any event, when it submitted them to the Court, the appellant could have made such observations on those accounts as it thought useful.

60 Similarly, the appellant was at liberty to provide the President of the Court of First Instance with additional evidence concerning the implementation of its restructuring plan or the new letters from the banks refusing to provide a bank guarantee, if it thought it useful so to do.

61 According to the Commission, the third plea, alleging an error of law on the part of the President of the Court of First Instance in his application of the criterion for suspension of operation of the contested decision, is inadmissible because the appellant did not raise before him the argument that the restrictive case-law on the possibility of suspending enforcement of a fine without the provision of a bank guarantee was wrong in principle.

62 In any event, even if it were held to be admissible, that plea is unfounded. The President of the Court of First Instance merely applied the criterion of exceptional circumstances laid down in the case-law of the Court of Justice.

63 As for the argument that no independent and impartial tribunal has yet established the existence of any infringement of Community competition law, and that the legal proceedings for determining the appropriate amount of the fine have not yet been completed, the Commission accepts that an obligation to pay a fine without suspension in the event of an action being brought before an independent tribunal might be inconsistent with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms or with the corresponding fundamental principles of Community law if the result was to deny the undertaking concerned access to justice, for example, because enforcement of the fine would drive it into liquidation.

64 That is not true, however, in the present case. The Commission itself suspended enforcement of the fine on condition that a bank guarantee be provided. Furthermore, if the undertaking concerned can demonstrate the existence of exceptional circumstances, such as a real inability to set up such a bank guarantee, it is able to obtain from a judge hearing an application for interim relief an order suspending the obligation to provide such a guarantee.

65 The application made by DSR-Senator Lines to the European Court of Human Rights is essentially concerned with a different issue, that is to say, whether the Community judicature is entitled to take account of the financial strength of the group to which the undertaking concerned belongs, even where that undertaking is a separate legal entity distinct from the group.

66 Furthermore, the argument that suspension of a fine has no direct effect on competition is inadmissible for two reasons: first, it was not raised before the President of the Court of First Instance, and second, it puts in question his assessment of the balance of interests.

67 In any event, a judge hearing an application for interim relief will apply the same criterion both to the suspension of enforcement of a fine and to the suspension of

other measures which the Commission may require undertakings to adopt in order to bring to an end an infringement of the competition rules, that criterion being whether suspension is necessary in order to avoid serious and irreparable harm. The obligation to prove exceptional circumstances in order to obtain suspension of the obligation to provide a bank guarantee is simply attributable to the fact that suspension of the fine itself is already available and it is only exceptionally that the obligation to provide a bank guarantee can also be suspended.

68 Lastly, the Commission submits that the fourth and final plea, alleging that the President of the Court of First Instance erred in law in his assessment of his own jurisdiction, is unfounded because he does not in fact have power to order interim measures which produce their effects up to such time as a decision is given on any appeal that might be brought against the final judgment of the Court of First Instance. Once the matter is before the Court of Justice, it is for that court to decide whether the Commission's decision should be suspended pending judgment.

69 On the other hand, the Commission argues that it is not unreasonable to maintain that a judge hearing an application for interim relief should have jurisdiction to suspend enforcement of a fine until the period for lodging an appeal has expired.

70 The Commission argues, in any event, that even if the President of the Court of First Instance was mistaken as to his jurisdiction to order suspension of operation until final judgment of the Court of Justice, such an error would have no bearing on the outcome of the appeal because the President of the Court of First Instance rejected the appellant's arguments on the need for a suspending order.

71 Given that the written observations of the parties contain all the information necessary for a decision to be given on the appeal, there is no need to hear oral argument from the parties.

Findings of the President of the Court

72 It should be borne in mind at the outset that, according to Article 225 EC and Article 51 of the EC Statute of the Court of Justice, any appeal must be limited to points of law and must lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the applicant or infringement of Community law by the Court of First Instance.

73 The Court of First Instance alone has jurisdiction to make findings of fact, except where it is clear from the documents before it that it has made a material error in so doing, and to assess the facts.

74 Furthermore, the Court of Justice does not in principle have jurisdiction to examine evidence which the Court of First Instance has accepted in support of its findings or assessments of the facts. Where the general principles of law and rules of procedure governing the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the weight to be attributed to the evidence produced (order in Case C-159/98 P(R) *Netherlands Antilles* v *Commission* [1998] ECR I-4147, paragraph 68).

75 It is in the light of those rules that the pleas put forward in the appeal must be considered.

76 By its first plea, the appellant argues that the President of the Court of First Instance distorted the nature of the evidence before him concerning its 1999 financial results, the sale of its shareholdings in Dong Young Shipping and Dong Seoul, and its ability to obtain a bank guarantee or loan.

77 In this connection, it should be observed that there is nothing in either the appellant's allegations or in the contested order which indicates that the findings made by the President of the Court of First Instance with regard to the three matters mentioned in the previous paragraph were materially incorrect.

78 Furthermore, contrary to the arguments raised by the appellant in its appeal, the President of the Court of First Instance did take account of the interest charge borne by the appellant and did not base his findings exclusively on the appellant's operating income and net income for 1999 when considering whether its financial position had improved to such an extent that it might now be in a position to set up a bank guarantee without risking liquidation.

79 In finding that the appellant had returned to relative financial health, the President of the Court of First Instance took into account, at paragraph 48 of the contested order, a range of factors, including the great improvement in the appellant's equity position and debt ratio, the considerable reduction in its liabilities and interest charge, the better-than-expected results achieved in the second half of 1999, and the recovery made through its restructuring.

80 As far as the appellant's shareholdings in Dong Young Shipping and Dong Seoul are concerned, it should be observed that the President of the Court of First Instance merely observed, at paragraph 49 of the contested order, that, despite the difficulties encountered by the appellant in selling those shares, their value far exceeded the amount of the fine.

81 That being so, the finding of the President of the Court of First Instance that the improvement in the appellant's financial position, the value of the shareholdings just mentioned and the positive cash flow generated in 1999 ought to enable it to obtain a bank guarantee, or, failing that, capital sufficient to pay the fine cannot

be re-examined in the context of the appeal for the reasons set out in paragraphs 72 to 74 of the present order.

82 The first plea must therefore be rejected.

83 By its second plea, the appellant maintains that the President of the Court of First Instance committed a breach of procedure by not giving the appellant a proper opportunity to submit observations, in writing or orally, on its financial position after adoption of the 1999 audited accounts.

84 In this connection, suffice it to observe that the appellant was at liberty to submit to the President of the Court of First Instance, either orally or in writing, its observations on developments in its financial position. The examination by the President of the Court of First Instance of the appellant's 1999 audited accounts, to which the appellant could have annexed any observations it thought useful, was thus the final stage in a judicial procedure during which the appellant was able, on a number of occasions, to submit argument on its financial position.

85 That being so, the fact that the President of the Court of First Instance found that it was not necessary to arrange a further hearing following receipt from the appellant of its 1999 audited accounts, or to put questions to the appellant in writing concerning those accounts, cannot be regarded as amounting to an infringement of the rights of the defence or the *audi alteram partem* principle.

86 The second plea must, therefore, also be rejected.

87 By its third plea the appellant claims that the President of the Court of First Instance erred in law by adopting an unduly restrictive approach to the question whether or not there were exceptional circumstances warranting dispensation from the obligation to provide a bank guarantee.

88 It must be borne in mind that a request for dispensation from the obligation to set up a bank guarantee, where that guarantee is the condition imposed in return for staying enforcement of a fine imposed by the Commission, cannot be granted unless there are exceptional circumstances. In the context of applications for interim relief, express provision is made in the Rules of Procedure of both the Court of Justice and the Court of First Instance for requiring security to be lodged, which reflects a general and reasonable policy pursued by the Commission (see, most recently, the order in *DSR-Senator Lines* v *Commission*, cited above, paragraph 48).

89 The President of the Court of First Instance therefore very properly considered whether there were exceptional circumstances in the present case, and he concluded, for the reasons set out in paragraphs 78 to 80 of the present order, that it was not impossible for the appellant to set up a bank guarantee without risking liquidation.

90 In this connection, it should be borne in mind that the appellant's object in bringing the present proceedings for interim relief is not to obtain an order suspending enforcement of the fine but to be relieved of its obligation to provide a bank guarantee, that being the alternative to the immediate payment of the fine.

91 The appellant has not shown any reason for which, in the absence of exceptional circumstances, a refusal to suspend its obligation to provide a bank guarantee, by way of an alternative to immediate payment of the fine, is inconsistent with the fundamental principles of Community law.

92 In this connection, it should be observed that the possibility for an undertaking to obtain suspension of an obligation to pay a fine imposed on it for infringement of the competition rules, coupled with the fact that it is open to it to show that exceptional circumstances warrant its being relieved of any obligation to set up a bank guarantee, takes account, in particular, of the fact that it will not yet have been established by an independent and impartial tribunal that there has been such an infringement and that the amount of the fine will not yet have been definitively determined.

93 That being so, the President of the Court of First Instance did not err in law in his assessment of whether there were circumstances warranting dispensation from the obligation to provide a bank guarantee.

94 Consequently, the third plea must necessarily be rejected.

95 By its fourth and final plea the appellant claims that the President of the Court of First Instance erred in law in holding that he had no jurisdiction to order interim measures designed to produce their effects up to such time as the Court of Justice decides any appeal that might be brought against the final judgment of the Court of First Instance.

96 It should be observed first of all that it follows from the wording of Articles 242 EC and 243 EC that suspension of operation of an act — like other interim measures — may be ordered by the Court of Justice or by the Court of First Instance only in the context of a case pending before it.

97 Next, it is clear from Article 107(3) of the Rules of Procedure of the Court of First Instance that, unless the order fixes the date on which the interim measure is to lapse, it will lapse when final judgment is delivered.

98 Lastly, as is clear from the second paragraph of Article 53 of the EC Statute of the Court of Justice, where an appeal is brought, it is for the Court of Justice to rule on any application by a party for suspension of operation of a measure or for the grant of other interim measures.

99 It follows that the President of the Court of First Instance has jurisdiction to grant, by way of reasoned order, the suspension of operation of an act in the context of proceedings that are pending before that court but may not extend the effects of such an order to any appeal which may be brought before the Court of Justice and that only the Court of Justice has jurisdiction to rule on any application for suspension of operation of a measure made in the context of an appeal.

100 Therefore, as the President of the Court of First Instance rightly held in paragraph 41 of the contested order, he has no jurisdiction to order interim measures designed to produce their effects up to such time as the Court of Justice decides any appeal that might be brought against the final judgment of the Court of First Instance.

101 The fourth plea must therefore also be rejected.

102 It follows from the foregoing considerations that the pleas put forward by the appellant in support of its appeal cannot be upheld. The appeal must be therefore be dismissed.

Costs

103 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for costs and the appellant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. **The appeal is dismissed.**

2. **Cho Yang Shipping Co. Ltd shall pay the costs.**

Luxembourg, 15 December 2000.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President