ORDER OF THE PRESIDENT OF THE COURT
24 July 2003 *

In Case C-233/03 P(R),

Linea GIG Srl in liquidazione, established in Sesto Fiorentino (Italy), represented by L. D'Amario and B. Calzia, avvocati, with an address for service in Luxembourg,

appellant,

APPEAL against the order of the President of the Court of First Instance of the European Communities of 27 March 2003 in Case T-398/02 R *Linea GIG* v *Commission* [2003] ECR II-1139, seeking to have that order set aside

* Language of the case: Italian.

the other party to the proceedings being:

Commission of the European Communities, represented by L. Pignataro-Nolin and O. Beynet, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE PRESIDENT OF THE COURT

after hearing Advocate General Mischo,

makes the following

Order

1 By application lodged at the Court Registry on 27 May 2003, Linea GIG Srl in liquidazione appealed, pursuant to Article 225 EC and the second paragraph of Article 57 of the Statute of the Court of Justice, against the order of the President of the Court of First Instance of 27 March 2003 in Case T-398/02 R *Linea GIG* v *Commission* [2003] ECR II-1139 ('the order under appeal'), dismissing its application for interim relief brought under Article 104(1) of the Rules of Procedure of the Court of First Instance. In that application it had sought suspension of operation of the Commission's decision of 30 October 2002

relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega-Nintendo) ('the contested decision'), in that it imposes a fine of EUR 1.5 million on the appellant.

2 In addition to annulment of the order under appeal, Linea GIG Srl in liquidazione seeks the same form of order as it sought at first instance and an order for costs against the Commission.

3 By document lodged at the Registry on 16 June 2003, the Commission submitted its written observations to the Court.

Facts and procedure before the Court of First Instance

4 The facts and procedure before the Court of First Instance, as set out in paragraphs 1 to 14 of the order under appeal, may be summarised as follows.

5 Linea GIG SpA ('Linea GIG') was the exclusive distributor of Nintendo products in Italy, at least from 1 October 1992 until 31 December 1997. Because the company was in a difficult financial situation, at an extraordinary general meeting on 8 January 1999 it was decided to put it into liquidation.

6 Linea GIG applied to the Tribunale civile e penale di Firenze (Florence District Court) (Italy) which, by judgment of 17 November 1999, approved the composition with creditors ('concordato preventivo') submitted by the company. Under the judgment, the company is required to liquidate all its assets in order to pay the preferential creditors in full and the unsecured creditors at least 40% of the amount of their claims.

7 On 30 October 2002, the Commission adopted the contested decision, in which it found that Nintendo Corporation Ltd/Nintendo of Europe GmbH and seven other companies which distributed the latter's products, among them Linea GIG, had infringed Article 81(1) EC. *Inter alia* it imposed a fine of EUR 1.5 million on Linea GIG.

8 The Commission notified Linea GIG of the contested decision by letter dated 7 November 2002. The Commission stated that, if an action were brought before the Court of First Instance, it would take no steps to recover the fine until judgment had been delivered, provided that the amount due bore interest calculated from the end of the term of payment and that an acceptable bank guarantee was furnished.

9 On 24 September 2002, Linea GIG was converted into a limited liability company. Since that date the company name has been 'Linea GIG Srl in liquidazione' ('Linea').

10 By application lodged at the Registry of the Court of First Instance on 30 December 2002, Linea brought an action under the fourth paragraph of Article 230 EC for annulment of the contested decision, in whole or in part, or, in the alternative, cancellation or reduction of the fine imposed upon it.

11 By separate document lodged at the Court Registry on 30 January 2003, Linea filed an application for suspension of the operation of the decision in so far as it imposed a fine on it.

The order under appeal

12 In the order under appeal, the judge hearing the application for interim relief found, first, in paragraph 54, that, in its letter of 7 November 2002 notifying the contested decision, 'the Commission stated that, if an action were brought, it would take no measures to enforce the fine provided that the applicant furnished an acceptable bank guarantee. In those circumstances, the application for suspension of operation can have no aim other than to obtain dispensation from the obligation to provide a bank guarantee as a condition for non-enforcement by the Commission of its right to immediate payment of the amount of the fine imposed by [that decision]. An application of that nature can be granted only in exceptional circumstances (orders of the President of the Court of Justice in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549, paragraph 6; Case C-364/99 P(R) *DSR-Senator Lines* v *Commission* [1999] ECR I-8733, paragraph 48; and Case C-7/01 P(R) *FEG* v *Commission* [2001] ECR I-2559, paragraph 44). 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 is a general and reasonable policy pursued by the Commission.'

13 In paragraph 55 of the order under appeal, the judge hearing the application for interim relief pointed out that the presence of such exceptional circumstances 'may, as a rule, be regarded as established if the parties seeking dispensation from an obligation to provide a bank guarantee prove that it is objectively impossible to provide that guarantee... or that it is unable to provide a bank guarantee without risking being wound up...'.

14 In that regard, he pointed out, in paragraph 59 of the order under appeal, that, 'even if the main action were dismissed, the bank would enter the proportionate ranking with the applicant's other creditors and it would then be for the national court to determine the nature and rank of the claim in question, which would have arisen after the composition with creditors procedure had been opened. The risk thus incurred of never being paid by the applicant seems to have been substantiated to the point that it must be accepted that no bank would agree to provide the required bank guarantee'. He therefore held, in paragraph 60 of that order, that 'Linea has shown to the requisite legal standard that its current company and financial situation makes it objectively impossible to obtain the guarantee from a bank'.

15 However, the judge hearing the application held, in paragraph 61 of the order under appeal, that 'the balance of the interests at stake precludes the granting of this application for interim relief', on the basis of the following considerations:

'62. In the light of the particular circumstances of the case, suspension of the operation of the [contested decision], in that it requires the applicant to pay a fine, would have the effect of preventing the Commission from bringing any action before the national court to recover the fine and to protect, as well as its own interests, the Community's financial interests (Case T-191/98 R II *Cho Yang Shipping* v *Commission* [2000] ECR II-2551, paragraph 53), the sole aim being, in fact, to protect Linea's other creditors. However, as the Commission has rightly pointed out, the risk that, were the main action to be dismissed, the applicant's assets might then no longer be adequate to pay the fine, in whole or in part, cannot be ruled out with certainty. Furthermore, it is by no means guaranteed, as the applicant acknowledged at the hearing, that the sum of EUR 1.65 million which it has set aside will be allocated solely to paying Linea's debt to the Commission in the event that the main action is dismissed. It is therefore necessary to maintain the enforceability of the [contested decision] in order not to preclude the measures which the Commission considers it necessary to take for the purposes of recovering the amount of the fine imposed by [that decision].

63. As for the alleged interest of Linea and its creditors in avoiding action being taken to recover the fine, this can be assessed only in the light of the classification and rank of the Commission's claim, which it is for the national court to determine, if appropriate after making a reference to the Court of Justice under Article 234 EC.'

16 Consequently, the judge hearing the application for interim relief held that the balance of interests indicated that the application should be dismissed.

The appeal

17 The appellant puts forward two pleas in law in support of its appeal.

18 By its first plea, it complains that the judge hearing the application for interim relief misapplied the principle of the balancing of interests. The objective impossibility of obtaining the bank guarantee required by the Commission precludes balancing the interests. Since it has been shown that there are exceptional circumstances justifying dispensation from providing the bank guarantee required by the Commission, it is not feasible to balance the interests. It is impossible to weigh up the risk that the Commission will not be able to enforce the fine against the fact that it is materially impossible for the appellant to provide the required guarantee. If, as the judge hearing the application pointed out in paragraph 54 of the order under appeal, the application for suspension of operation could have no aim other than to obtain dispensation from the obligation to provide a bank guarantee, once it has been shown that it is objectively impossible to provide that guarantee it is inconsistent to balance the interests.

19 By its second plea, put forward in the alternative, the appellant complains that the judge hearing the application for interim relief committed an error of law when balancing the interests and, more particularly, when he held that the setting aside of the sum of EUR 1.65 million by the judge overseeing the composition with creditors, to secure the Commission's claim, will not fully protect the Commission's interests in obtaining recovery of its debt if the main action brought by Linea is dismissed by the Court of First Instance. Either the Commission's claim may be regarded as a preferential claim, in which case the sum set aside is intended solely to secure that claim, or it is classified as an unsecured claim and, accordingly, the setting aside of that sum protects the Commission's rights only in proportion to the percentage referred to in the composition with creditors and in accordance with the principle that the creditors should be treated equally. Even accepting that the Commission were still able to obtain satisfaction today, it would obtain it only pro rata if its claim were unsecured. Setting aside that sum therefore ensures that, when the Court of First Instance has given a ruling on the merits, the Commission will be in exactly the same position as it is in today.

20 As regards the first plea, the Commission considers that it is apparent from paragraph 48 of the order in *DSR-Senator Lines* v *Commission* that the appraisal of the exceptional circumstances which make it possible not to seek enforcement of a fine even though a bank guarantee has not been furnished is made only when the matter of urgency is considered, so that the existence of such circumstances does not necessarily mean that operation of the decision in question will be suspended. Therefore, after it had been found, from the point of view of urgency, that it was objectively impossible for Linea to provide a bank guarantee, the judge hearing the application for interim relief was right to weigh up the interests, in order to decide whether or not it was necessary to suspend operation of the contested decision. He weighed the applicant's interest in avoiding immediate enforcement of the fine against the Community's financial interest in enforcing it. Therefore, contrary to the appellant's assertions, he did not misapply the criterion of balancing the interests by seeking to weigh up the risk of non-enforcement of the fine against the 'objective impossibility' for Linea of providing the bank

guarantee, because the assessment of the interests at stake was made on the basis of the finding that it was objectively impossible.

21 As regards the second plea, the Commission considers that it is inadmissible in that it reiterates a plea already raised before the judge hearing the application for interim relief, and simply seeks a re-examination of the application lodged at first instance, or a review of the appraisal of the facts already made by the judge at first instance. On the substance of the case, the Commission points out that the appellant acknowledges that the sum of EUR 1.65 million set aside is not intended solely for the Commission, but that the sum necessary to satisfy the Commission's claim must be taken from that sum in the same proportion as the claims of the other unsecured creditors. The Court of First Instance appraised the facts correctly, and that appraisal cannot be challenged in appeal proceedings. As for the argument that the debt could be described as a preferential claim, which would mean that the amount set aside would give full protection to the Commission's rights, the Commission contends that it is for the national court alone to classify a claim. The Commission also expresses its doubts as to that classification in Italian law.

22 The Commission also considers that the refusal of the judge hearing the application for interim relief to grant the application is not based solely on that consideration concerning the nature of the claim in question. Paragraph 62 of the order under appeal also acknowledges that suspension of operation of the contested decision would have the effect of preventing the Commission, pending judgment on the merits of the case, from bringing any action before the national courts to enforce the fine and to protect the Community's financial interests, thus making the Community run the risk that the applicant's assets would not suffice to pay the fine, in whole or in part, on the date when the main action might ultimately be dismissed. That assessment of the facts, which is in itself sufficient to justify the operative part of the order under appeal, is not disputed by the appellant. The second plea is therefore ineffective.

Findings

23 Since the written observations submitted by the parties contain all the information necessary for a decision in this appeal, it is not necessary to hear oral pleadings.

The first plea in law

24 By the first plea of its appeal, the appellant complains that the judge hearing the application for interim relief committed an error of law by balancing the interests involved.

25 The appellant therefore seeks to rely on the case-law relating to the specific case of a dispensation from the obligation to provide a bank guarantee as a condition for non-enforcement of the right to immediate payment of a fine. According to that case-law, dispensation from that obligation can be granted only in exceptional circumstances (see *inter alia* the order in *DSR-Senator Lines* v *Commission*, paragraph 48). It considers that the presence of exceptional circumstances precludes the balancing of interests.

26 In that regard, it must be pointed out that it is settled case-law that the judge hearing an application for interim relief may order suspension of operation of an act, or other interim measures, if it is established that such an order is justified, *prima facie*, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Where

appropriate, the judge hearing such an application must also weigh up the interests involved (see *inter alia* order in Case C-377/98 R *Netherlands* v *Parliament and Council* [2000] ECR I-6229, paragraph 41).

27 In the context of the overall examination that the judge hearing an application for interim relief must undertake, he enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions governing the grant of interim measures are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (order in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 23).

28 Consequently, the fact that, in the order under appeal, the judge hearing the application for interim relief balanced the interests at stake cannot be regarded, in itself, as an error of law.

29 Furthermore, the case-law referred to in paragraph 25 of this order, concerning applications for dispensation from the obligation to provide a bank guarantee as a condition for non-enforcement of the right to immediate payment of a fine, cannot be interpreted as meaning that the presence of exceptional circumstances within the meaning of that case-law necessarily results in the granting of suspension and precludes the judge hearing the application for interim relief from weighing up the interests involved, where appropriate.

30 The determination of whether there are exceptional circumstances takes place at the level of the examination of urgency (see, to that effect, the order in *DSR -Senator Lines* v *Commission*, paragraph 48). A finding by the judge hearing the application for interim relief that suspension should be granted in order to avoid

serious and irreparable damage to the applicant's interests does not prevent him from considering the effects which a possible suspension might have on the interests of any other party to the proceedings. In the light of the particular circumstances of each case, the judge must therefore be able to determine whether it is appropriate to weigh up the interests involved.

31 It could prove particularly expedient to weigh up the interests in the present case, since the appellant is in liquidation. Granting suspension of operation of the contested decision in such circumstances might have had harmful consequences for the Community's interests and affected them irreversibly.

32 In those circumstances, the judge hearing the application for interim relilef did not commit an error of law, in the order under appeal, by balancing the interests involved.

33 The first plea must therefore be rejected.

The second plea in law

34 As regards the second plea raised by the appellant, alleging that the interests involved were incorrectly weighed up and that the Commission ran no risk, it should be pointed out that, under Article 225 EC and Article 58 of the Statute of the Court of Justice, an appeal is limited to points of law, to the exclusion of appraisal of the facts.

35 Therefore, the Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice at the appellate stage (see *inter alia* the judgment in Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 29).

36 The provisions and the case-law referred to in paragraphs 34 and 35 of this order apply equally to appeals brought under the second paragraph of Article 57 of the Statute of the Court of Justice (order in *Commission* v *Atlantic Container Line and Others*, paragraph 18).

37 By disputing the balancing of the interests involved that was carried out by the judge hearing the application for interim relief, the appellant calls in question the appraisal of the facts made by that judge. Such appraisal cannot be examined in these appeal proceedings, save where the clear sense of the evidence has been distorted.

38 In this case, the judge hearing the application for interim relief held, in paragraphs 62 and 63 of the order under appeal, that the setting aside of the sum of EUR 1.65 million by the judge overseeing the composition with creditors, to secure the Commission's claim, was not capable of fully protecting the Commission's interests unless that claim was classified as a preferential claim. However, it is for the national court alone to make that classification, if necessary after referral to the Court of Justice under Article 234 EC. It is true that the appellant has disputed that appraisal; however, it has not shown that it constitutes a distortion of the clear sense of the evidence.

39 Lastly, the appellant has signally failed to show how the judge hearing the application for interim relief distorted the clear sense of the evidence submitted to the Court by holding that the grant of the interim measures sought by the appellant would have the effect of preventing the Commission from bringing any action before the national court to recover the fine, and that that inability to bring an action might damage the Community's financial interests, thus making the balance of interests lean in favour of the Commission and justifying the refusal to grant those interim measures.

40 The second plea must therefore also be rejected.

41 It is apparent from all the foregoing considerations that the two pleas in law raised by the appellant in support of its appeal cannot be upheld, and, accordingly, the appeal must be dismissed.

Costs

42 Under Article 69(2) of the Rules of Procedure, which is applicable 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 applied for costs and the appellant has been unsuccessful, the appellant must be ordered to pay the costs.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. **The appeal is dismissed.**

2. **Linea GIG Srl in liquidazione is ordered to pay the costs of these proceedings.**

Luxembourg, 24 July 2003.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President