ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
20 July 1999 *

In Case T-59/99 R,

Ventouris Group Enterprises SA, a company governed by Panamanian law, established in Panama, represented by Maria Proestou and Maria Velmakhou, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Claude Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Dimitris Triantafyllou and Richard Lyal, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Greek.

APPLICATION for, first, suspension of enforcement of Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24), in that it imposed on the applicant a fine of ECU 1.01 million for breach of Article 85 of the EC Treaty (now Article 81 EC) and, second, the unconditional release of the applicant from its obligation to furnish a bank guarantee as a condition of the non-immediate recovery of the amount of the fine imposed by the decision,

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

makes the following

Order

Facts and procedure

1 On 9 December 1998 the Commission adopted Decision 1999/271/EC relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24, 'the Decision'). According to Article 1(2) of the

Decision, the six shipping/maritime transport companies listed therein, including the applicant, infringed Article 85(1) of the EC Treaty (now Article 81(1) EC) by agreeing on the levels of fares for trucks to be applied on the Patras (Greece) to Bari and Brindisi (Italy) routes.

2 Article 2 of the Decision imposes a fine of ECU 1.01 million on the applicant *inter alia* for the infringement found in Article 1. Article 3 of the Decision provides that the fines thus set are to be paid within three months from the date of its notification.

3 By letter of 18 December 1998 the Commission notified the applicant of the Decision. In that letter it was stated that, if the applicant brought an action before the Court of First Instance, the Commission would not take any steps to recover the fine while the case was pending before the Court, provided that the debt bore interest from the date on which the time-limit for payment of the fine expired, and that a bank guarantee acceptable to the Commission covering both the principal sum and such interest and increased amounts as might be payable was provided no later than that date.

4 By application lodged at the Registry of the Court of First Instance on 1 March 1999 the applicant brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for annulment of the Decision.

5 By separate document lodged at the Registry the Court of First Instance on the same day the applicant submitted the present application pursuant to Articles 185 and 186 of the EC Treaty (now Articles 242 and 243 EC) for suspension of enforcement of the Decision and its unconditional release from the obligation to provide a bank guarantee. On 16 March 1999 the Commission lodged its observations on this application for interim relief at the Registry.

6 The hearing of the parties, originally set for 18 May 1999, was put back at the applicant's request to 4 June 1999, on which date it produced a number of documents. The defendant was granted a period of 20 days in which to take a position on those documents. It presented its observations on the documents concerned on 24 June 1999.

Law

7 Under the combined provisions of Articles 185 and 186 of the Treaty and of Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order operation of the contested act to be suspended or prescribe any necessary interim measures.

8 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures must state the circumstances giving rise to

urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for suspension of the operation of an act must be dismissed if any one of them is not met (order of the President of the Court of Justice of 14 October 1996 in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30).

9 It should be observed that it is settled case-law that the judge hearing an application for interim relief has a wide discretion, when considering as a whole application for suspension of operation of an act and for interim measures, and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions 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 analysed and assessed (order of the President of the Court of Justice of 17 December 1998 in Case C-364/98 P(R) *Emesa Sugar* v *Council* [1998] ECR I-8815, paragraph 50).

Arguments of the parties

10 In its application for interim relief, the applicant merely states that, having regard to the decisive arguments it put forward in its principal application, the latter will very likely be granted, and its request for complete annulment of the Decision or, failing that, its alteration, be allowed.

11 The applicant explains, furthermore, that its financial position is currently so precarious that the banks it has approached in connection with the provision of the bank guarantee have required the whole of the sum to be used as the guarantee (namely, ECU 1.01 million) to be deposited in cash and frozen. It alleges that, in the circumstances, it quite simply cannot provide the bank guarantee required by the Commission. The applicant adds that the result of the Commission's initiating the procedure to enforce the Decision would be its liquidation. Since it is currently unable to honour its financial obligations, such a step could only alarm its creditors and spur them into action; they would lose no time in recovering the sums owed them, whether or not those sums were covered by an arrangement.

12 The Commission observes that the documents supplied by the applicant do not demonstrate the urgency of the suspension of enforcement applied for. It adds that the applicant is not a small undertaking, that the fine amounts to less than 2% of its debts and that it has not shown that the addition of just one more conditional debt would necessarily lead it into insolvency. The Commission points out, moreover, that the applicant would have received more favourable treatment if it had asked several banks to guarantee part of the debt owed to it. In addition, it maintains that to release the applicant from the obligation to provide a bank guarantee appears disproportionate to the interest which the Commission has in the possibility of actually recovering the fine if the application in the main proceedings is rejected and in protecting the financial interests of the Community. Finally, the Commission observes that regard must also be had to the possibility that shareholders and other members of the group might assist the applicant in the provision of a bank guarantee.

Findings of the court

13 Before a decision can be given on the application for interim relief the subject-matter of the proceedings ought to be clearly defined. In the application, the applicant requests, first, suspension of enforcement of the decision in so far as it imposes a fine of ECU 1.01 million and, second, its unconditional release from the obligation to provide a bank guarantee.

14 It is common ground that in its letter of 18 December 1998 notifying the Decision the Commission told the applicant that if it, the applicant, instituted proceedings before the Court of First Instance no steps would be taken to recover the fine while the case was pending before that court so long as the debt bore interest from the date on which the time-limit for payment of the fine expired and so long as a bank guarantee acceptable to the Commission and covering both the principal sum and interest and any increased amounts due was provided no later than that date. In those circumstances the sole purpose of the application is in fact to obtain release from the obligation to provide a bank guarantee as a condition of the Commission's not immediately recovering the amount of the fine imposed by the Decision.

15 According to a consistent line of case-law, such an application can be upheld only in exceptional circumstances (see, in particular, orders of the President of the Court of Justice of 6 May 1982 in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549, paragraph 6, and 15 March 1983 in Case 234/82 R *Ferriere di Roè Volciano* v *Commission* [1983] ECR 725, paragraphs 2 and 8, and of the President of the Court of First Instance of 21 December 1994 in Case T-301/94 R *Laakmann Karton* v *Commission* [1994] ECR II-1279, paragraph 22).

16 In the circumstances, the first question to be considered must be whether the applicant has, at first sight, succeeded in demonstrating that it is impossible for it to provide the bank guarantee and, by the same token, that the matter is urgent.

17 In support of its application for interim relief, the applicant has produced several documents, including 15 letters from banks, 11 of them dating from before 1998. Although those documents illustrate the applicant's precarious financial situation, they do not, however, lead to the *prima facie* conclusion that its existence is seriously jeopardised by the requirement that it should provide a bank guarantee in order to avoid immediate recovery of the fine pending delivery of the judgment in the main proceedings. The applicant has also produced a document which sets out the debts, as at 31 December 1998, on the loans it has taken out. Since the applicant has supplied information concerning its liabilities only it is impossible to assess whether its indebtedness is such as to threaten its carrying on business.

18 At the hearing the applicant produced several further documents, including several letters from banks, extracts from loan contracts and a consolidated profit and loss account for the years 1997 and 1998, certified by an accountant, Mr Stamou. Those documents also illustrate the applicant's precarious financial situation. They do not, however, lead to the *prima facie* conclusion that the applicant's existence is seriously jeopardised by the requirement that it should provide a bank guarantee in order to avoid immediate recovery of the fine pending delivery of the judgment in the main proceedings.

19 It must be added that among the documents produced by the applicant at the hearing was a note intended to explain and clarify the claims made in the request

for suspension. In paragraph III of that note, the applicant explains that it had endeavoured, and was still endeavouring, to come to arrangements and obtain more favourable terms for its debts and obligations, whether or not they had fallen due, owed to creditor banks and other creditors, with a view to reconstructing and reestablishing its economic activity. The applicant has thus explained that it has repaid the National Bank of Greece all the loans made to it by the latter for a sum amounting at 31 December 1998 to USD 16 257 367, thanks to the sale of the ship *Polaris* on 5 March 1999, that is to say, shortly after the bringing of this action. Furthermore, the applicant has obtained, or was about to obtain, definitive agreements concerning its debts with three other banks, namely Ioniki Trapeza tis Ellados, Royal Bank of Scotland and Emporiki Trapeza tis Ellados. In light of those facts, it must be observed that if the applicant is able to obtain agreements concerning its debts after the Commission imposed the fine and, especially, if it is able to repay a debt of more than USD 16 million, it is barely conceivable that it should not be in a position to provide the bank guarantee required by the Commission, which is for the sum of about USD 1.5 million only.

20 It follows that the applicant has not succeeded in establishing that it would, if the measures sought were not granted, suffer serious and irreparable damage.

21 In consequence, the application for interim relief must be rejected, and there is no need to consider whether the other conditions for granting suspension of enforcement have been satisfied.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim relief is rejected.

2. Costs are reserved.

Luxembourg, 20 July 1999.

H. Jung
Registrar

B. Vesterdorf
President