ORDER OF THE PRESIDENT OF THE COURT
14 December 1999 *

In Case C-335/99 P(R),

HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG, established at Rosenheim (Germany),

HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH, Verwaltungsgesellschaft, established at Rosenheim,

Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH, established at Rosenheim,

Isoplus Fernwärmetechnik Gesellschaft mbH, established at Hohenberg (Austria),

Isoplus Fernwärmetechnik GmbH, established at Sondershausen (Germany),

represented by P. Krömer and F. Nusterer, Rechtsanwälte, Sankt Pölten, with an address for service in Luxembourg at the Chambers of A. May, 31 Grand-Rue,

appellants,

APPEAL against the order of the President of the Court of First Instance of the European Communities in Case T-9/99 R *HFB and Others* v *Commission* [1999] ECR II-2429, seeking to have that order set aside and requesting that the forms of

* Language of the case: German.

order sought at first instance by the appellants be upheld and that the Commission be ordered to pay costs,

the other party to the proceedings being:

Commission of the European Communities, represented by E. Gippini Fournier and W. Mölls, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of that Service, Wagner Centre, Kirchberg,

defendant at first instance,

THE PRESIDENT OF THE COURT,
after hearing the Advocate General, P. Léger,

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 10 September 1999, HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG, HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH, Verwaltungsgesellschaft, Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH, Isoplus Fernwärmetechnik Gesellschaft mbH and Isoplus Fernwärmetechnik GmbH 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 in Case T-9/99 R *HFB and Others* v *Commission* [1999] ECR II-2429 (hereinafter 'the order under appeal') rejecting their application for suspension of the operation and stay of the enforcement of Articles 3(d) and 4 of Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1), as amended by the rectifying decision of 6 November 1998.

2 As well as seeking to have that order set aside, the appellants request:

— suspension of the operation and stay of enforcement of Articles 3(d) and 4 of Decision 1999/60 until 15 December 2000, in so far as sums representing part of the fine imposed by the Commission have not already been paid, and, at the latest, until the Court of First Instance has given judgment in the main proceedings, in so far as, in the four weeks following the order ruling on this request, the Commission will be provided with a bank guarantee covering part of the amount of the fine, that is to say, EUR 1 500 000, together with interest calculated from 14 February 1999, and, by 15 December 1999, the Commission will receive payment by bank transfer of the sum of EUR 350 000;

— if appropriate, referral of the case back to the Court of First Instance for a fresh decision; and

— that the Commission be ordered to pay the costs.

3 By document lodged at the Registry on 4 October 1999, the Commission submitted its written observations to the Court.

Facts and procedure

4 The factual background to the dispute was described in the order under appeal as follows:

'1 The applicants are five Austrian and German producers of pre-insulated pipes which are mainly used in urban heating systems.

2 On 13 November 1998 Commission Decision 1999/60... was notified to the applicants. In the accompanying letter it was stated that, if the applicants made an application to the Court of First Instance, the Commission would not take any proceedings for recovery whilst the case was pending before that court, subject to the debt bearing interest as from the date of expiry of the period prescribed for payment of the fine, provided that a bank guarantee acceptable to the Commission and covering the principal debt together with interest and any amounts added thereto was provided by that date.

3 Decision 1999/60 was notified to the applicants in their capacity as members of the "Henss/Isoplus Group". Article 1 thereof charges the applicants in particular with infringing Article 85(1) of the EC Treaty (now Article 81(1) EC) from October 1991 to March or April 1996 at least. Consequently, Article 3(d) imposes on the Henss/Isoplus Group a fine of EUR 4 950 000,

for which the five applicant companies, and also Isoplus Fernwärmetechnik GmbH — stille Gesellschaft, are jointly and severally liable. The parties agreed, however, not to involve the latter company in these proceedings.

4 According to the information given by the applicants at the hearing, it appears that they all have links with Mr Henss. They describe their links with him as follows:

— the first applicant, HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG, Rosenheim, Germany ("HFB KG"): Mr Henss has a majority shareholding; he is the individual partner with the largest holding;

— the second applicant, HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH Verwaltungsgesellschaft, Rosenheim ("HFB Holding"): Mr Henss has a majority shareholding;

— the third applicant, Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH, Rosenheim ("Isoplus — Rosenheim"): wholly owned by HFB KG; Mr Henss thus owns it indirectly;

— the fourth applicant, Isoplus Fernwärmetechnik Gesellschaft mbH, Hohenberg, Austria ("Isoplus — Hohenberg"): Mr Henss is the majority shareholder;

— the fifth applicant, Isoplus Fernwärmetechnik GmbH, Sondershausen, Germany ("Isoplus — Sondershausen") belonged, when Decision 1999/60 was adopted, as to one third to the first applicant, as to one third to a company which is itself wholly owned by Mr Henss and as to the remaining one third to another family. After 6 November 1998 Mr Henss's holding in the capital of Isoplus — Sondershausen increased further.'

5 By application lodged at the Registry of the Court of First Instance on 18 January 1999, the appellants sought annulment of Decision 1999/60.

6 On 5 February 1999, Isoplus-Rosenheim, Isoplus-Hohenberg and Isoplus-Sondershausen each made a payment to the Commission of EUR 770 000 — giving a total amount of EUR 2 310 000 — by way of partial payment of the fine, thus reducing the amount outstanding to EUR 2 640 000, not including interest.

7 By separate document, lodged at the Registry of the Court of First Instance on 10 February 1999, the appellants lodged an application pursuant to Article 242 EC for suspension of the operation and stay of enforcement of Articles 3(d) and 4 of Decision 1999/60 pending delivery of the judgment in the main proceedings.

8 On 30 April 1999 the appellants limited their application for interim relief, essentially to coincide with the forms of order sought in the present appeal, as set out in paragraph 2 above.

The order under appeal

9 By the order under appeal, the President of the Court of First Instance dismissed the application for interim relief.

10 As regards the purpose of the proceedings, it was held, first, that the practical object of the application for suspension of operation could only be to obtain release from the obligation to provide a bank guarantee as a condition for postponing recovery of the fine imposed by Decision 1999/60 and, secondly, that the application for stay of enforcement of that decision was devoid of purpose.

11 In paragraph 27 of the order under appeal, it was held that the condition relating to a prima facie case was satisfied.

12 As regards the condition relating to urgency, however, the President of the Court of First Instance formed the view that the applicants had failed to show that implementation of Decision 1999/60 could cause them serious and irreparable damage.

13 The President arrived at that conclusion essentially on the basis of four kinds of consideration.

14 First, he held at paragraph 33 of the order under appeal that 'no conclusion [could] be drawn from the unaudited figures produced by the applicants'. Although they had produced balance sheets, a summary auditor's report on their cash-flow and other information from banking establishments, the President found that:

— the 1998 accounts had not been audited (paragraph 30);

— the figures produced failed to disclose substantial financial reserves or, at the very least, there was real uncertainty on that point (paragraph 31);

— the long-term (a term exceeding one year) liquid funds available to the applicants had not been taken into account in the summary report (paragraph 32).

15 In paragraph 35 of the order under appeal, it is stated that there was also uncertainty as to the extent to which Mr Henss, who is directly or indirectly the principal owner of the five applicant undertakings, was a creditor in respect of

part of their short-term debts, the total amount involved being approximately DEM 5 300 000.

16 Secondly, the President of the Court of First Instance noted in paragraph 34 of the order under appeal that:

'Doctor Reimnitz also stated that, under German law, the mere fact that, in certain situations, the members or chief executive of a company are obliged to apply for bankruptcy proceedings to be commenced does not mean that the application will be accepted. Cash-flow difficulties do not necessarily lead to liquidation of the undertaking and, concomitantly, the loss of jobs. The applicants confirmed that, not only under German law but also under Austrian law, there is an alternative to bankruptcy. Thus, where an undertaking is insolvent, it may, under the supervision of the competent national court, enter into a scheme of arrangement with its debtor, under which its debts are discharged.'

17 Thirdly, on the view that it was appropriate to take into account the possibilities available to members of assisting the undertaking in providing a bank guarantee, the President of the Court of First Instance pointed out in paragraph 36 of the order under appeal that the applicants had made no attempt to prove that Mr Henss — in his capacity as principal direct or indirect owner of the five undertakings — was not in a position to provide the necessary assistance.

18 Lastly, the President observed in paragraph 37 of the order under appeal that the applicants had failed to produce evidence to show that there was no possibility of obtaining a bank guarantee covering the amount of the fine outstanding, since only two of the undertakings in question had produced statements from banking

institutions confirming their refusal to grant such a guarantee and they had approached only three banks, with which they had regular dealings.

19 On the basis of all those considerations, the President of the Court of First Instance concluded, in the first sentence of paragraph 38 of the order under appeal, that the applicants had not produced evidence to show that the risk of bankruptcy or liquidation was foreseeable with a sufficient degree of probability in the event of their having to provide a bank guarantee covering the outstanding amount of the fine imposed.

20 It is stated in the second sentence of paragraph 38 of the order under appeal that:

'In that connection, it must be emphasised that the mere risk that the applicants might be obliged to apply for winding-up proceedings cannot constitute serious and irreversible damage..., the object of such proceedings being, on the contrary, to seek to repair the situation of the undertakings concerned.'

The arguments of the parties

The appellants' arguments

21 The appellants rely on four pleas in law, alleging infringement of Community law and, in the alternative, breach of procedure which adversely affected their interests. Essentially, they submit that the President of the Court of First Instance

misinterpreted the concept of urgency for the purposes of Article 104(2) of the Rules of Procedure.

22 By the first plea, it is maintained that the President erred, first, in his view that the mere risk that the appellants would be compelled to seek commencement of bankruptcy proceedings could not amount to serious and irreparable damage and, second, in considering that the objective of such proceedings was to repair the situation of the undertaking concerned.

23 According to the appellants, irreparable damage arises where reparation is attempted too late — for example, where bankruptcy is declared before delivery of the judgment in the main proceedings — and the risk that bankruptcy proceedings may have to be commenced, involving the assets of the party seeking interim relief, constitutes just such a case.

24 The appellants also maintain that, both in Germany and in Austria, the primary purpose of insolvency proceedings is to pay off the creditors as a body, the entirety of the debtor's assets being placed in liquidation and the proceeds distributed between the creditors. Only in certain circumstances — for instance, in connection with a creditors' agreement to waive many of their rights — could it be decided in the context of insolvency arrangements that, by way of extraordinary settlement, the undertaking could remain in business.

25 Moreover, the commencement of insolvency proceedings carries with it grave implications for the assets and management of the undertaking concerned and also entails serious difficulties of a commercial nature. In that respect, the

appellants plead *inter alia* damage to the reputation of the undertaking; loss of tendering capability; and subordination to third parties.

26 According to the appellants, therefore, the President of the Court of First Instance proceeded on the basis of a misinterpretation of what constitutes irreparable damage for the purposes of Community law and made a number of findings at odds with the evidence in the documents before him.

27 As regards the payment of a fine which is not yet definitive (given that an action has been brought for annulment of the Commission decision), it is legally indefensible to compel the undertaking concerned to commence insolvency proceedings and its creditors to waive a substantial portion of the monies owed them, in order to redress the situation of the undertaking.

28 By their second plea in law, the appellants argue that the President of the Court of First Instance erred in basing his evaluation of their financial strength on that of Mr Henss, in his capacity as a natural person who is a member of those undertakings, whereas his liability for their company debts is limited to his capital contributions. Indeed, a natural person who is a member of an undertaking does not constitute an undertaking within the meaning of Article 85(1) of the Treaty or Article 53 of the Agreement on the European Economic Area. In contrast with the situation of companies which are linked together within a group, there is no legal basis by virtue of which such members may be compelled to pay additional amounts in order to set up a bank guarantee.

29 The approach adopted by the President of the Court of First Instance also gives rise to discrimination against undertakings whose members are identifiable as compared with undertakings within which, given the continuously changing

patterns of share ownership, the identity of the members is unknown — as, for example, in the case of public limited companies quoted on the stock exchange with bearer bonds.

30 By their third plea, the appellants argue that in applications for interim relief, the likelihood of serious and irreparable damage must be established with a sufficient degree of probability, not with absolute certainty. Accordingly, the party seeking interim relief need not prove urgency, but must merely make out a prima facie case for the grant of the measure sought. The standard of proof is thus considerably less stringent than that applicable if the appellant had to demonstrate in full its every allegation.

31 However, according to the appellants, it is clear from the order under appeal that, contrary to those principles, the President of the Court of First Instance required the applicants to provide proof of urgency to too high a standard, thereby committing an infringement of Community law or a procedural irregularity adversely affecting their interests. This is evidenced particularly by paragraph 36 of the order under appeal, concerning the taking into account of the financial situation of Mr Henss; paragraph 37, concerning the evidence that it was impossible to obtain a bank guarantee; and paragraph 38, concerning the evidence that the appellants risked bankruptcy or liquidation. The appellants therefore request the Court of Justice, by way of an exception, to re-examine the evidence submitted and to make fresh findings of fact on the basis that the required standard is justification 'prima facie'.

32 By their fourth plea in law, the appellants argue that the President of the Court of First Instance made several findings at odds with the evidence in the documents before him. It is clear from paragraph 31 of the order under appeal that the President viewed with scepticism the figures produced to him on the ground that three of the appellants had been in a position to make a substantial payment on 5 February 1999 whereas their balance sheets suggested that, on 31 December 1998, they did not have sufficient cash resources available to pay the balance owing on the fine. However, in the auditor's report, appended to the application

for interim measures, it was duly explained how it was possible, notwithstanding a financial deficit on 31 December 1998, to make certain payments in February 1999 at the cost of certain other short-term debts. According to the appellants, that error amounts to an infringement of Community law or a procedural irregularity adversely affecting their interests.

The Commission's arguments

33 As a preliminary step, the Commission sets out its own interpretation of the order under appeal. It maintains, first of all, that the principal conclusion reached by the President of the Court of First Instance is stated in the first sentence of paragraph 38, to the effect that the applicants failed to show that the risk of bankruptcy or liquidation was foreseeable with a sufficient degree of probability in the event of their having to provide a bank guarantee covering the outstanding amount of the fine imposed. Next, the Commission maintains that the President's finding as to insufficient proof must be understood as also applying to the risk that the applicants would have to request commencement of bankruptcy proceedings. According to the Commission, there is nothing in the grounds given in the order under appeal to suggest that the President of the Court of First Instance regarded that risk as sufficiently established.

34 Lastly, according to the Commission, the finding in the second sentence of paragraph 38 of the order under appeal, to the effect that the risk of having to request commencement of bankruptcy proceedings does not constitute serious and irreparable damage, is in the nature of an additional or alternative ground.

35 The Commission concludes that the appeal should be dismissed since the pleas in law put forward in rebuttal of the principal conclusion reached in the order under appeal — specifically, the second, third and fourth pleas — fail to invalidate that

conclusion. The first plea in law should therefore be considered merely by way of an alternative argument.

36 So far as regards the first plea, the Commission contends that the appellants themselves had acknowledged that, even after the declaration of bankruptcy, there were ways of preventing the undertaking from being placed in liquidation. That was the thrust of the second sentence of paragraph 38 of the order under appeal.

37 The damage which the appellants claim that they would suffer even if the insolvency proceedings culminated in an arrangement or composition was not relied upon at first instance. Furthermore, that damage is by no means irreparable, because the appellants have not shown that it is permanent and structural and cannot therefore be remedied by financial means.

38 With respect to the alleged damage to members because of the need to make funds available to the undertaking in order to prevent its entry into liquidation, that is a normal pattern of events and, moreover, a purely financial matter. In any event, according to the Commission, the appellants are not entitled to rely on the risk of damage to a third party in order to establish the urgency of their application (order in Case 12/64 R *Ley* v *Commission* [1965] ECR 132).

39 As regards the second plea, the Commission contends that the President of the Court of First Instance quite properly took into account the possibilities open to

members — in the present case, Mr Henss — to assist the companies in providing a bank guarantee.

40 On that point, the Commission refers to the order in Case C-12/95 P *Transacciones Marítimas and Others* v *Commission* [1995] ECR I-467, paragraph 12, in which no distinction was made, when assessing an undertaking's ability to provide a bank guarantee, between its shareholders, on the one hand, and the group of undertakings to which it belonged, on the other.

41 Emphasising that the obligation to provide a bank guarantee can be waived only in exceptional circumstances, the Commission maintains that until such time as the fine is cancelled or reduced, the members must be prepared to bear all the difficulties arising as a result of the company having to sustain the financial burden entailed by payment of the fine, especially when they wish the company nonetheless to continue in business. The fact that those members may themselves have benefited from the anti-competitive conduct which gave rise to the fine lends added justification to that approach. It is therefore not important to know whether the members are natural or legal persons, or whether or not they are engaged in commercial business on their own account.

42 The Commission denies that this approach entails discrimination as between undertakings according to their structure since, even where there are very many shareholders or where the identity of shareholders often changes, the directors can call a general assembly to endorse an appropriate increase in capital. Furthermore, in the present case, the President of the Court of First Instance did not take into account the applicants' members in general but rather Mr Henss in particular, as the principal owner who controls all the applicants and may therefore take the relevant decisions alone.

43 As regards the third plea, which concerns the standard of proof to be met by applicants for interim relief when seeking to establish urgency, the Commission

disputes the appellants' assertions that there is no need to prove urgency, it being sufficient to show that the measures sought are 'prima facie' justified.

44 The Commission points out first that under Article 104(2) of the Rules of Procedure of the Court of First Instance, an application for interim measures must specify 'the circumstances giving rise to urgency'; establishment of a prima facie case is mentioned only in relation to the 'pleas of fact and law' which form the basis of the claim that the provisional measures sought ought to be granted.

45 Secondly, the Commission contends that according to settled case-law, the applicant must establish urgency so that the court hearing the application for interim relief can arrive at its decision 'with full knowledge of the facts' (order in Case C-35/92 P-R *Parliament* v *Frederiksen* [1992] ECR I-2399, paragraph 21). That approach, which is consistent with the general rules governing the distribution of the evidentiary burden, is justified in the present case *a fortiori* because the obligation to provide a bank guarantee may be waived only in exceptional circumstances.

46 Lastly, the Commission acknowledges that, in order to prove the urgency of an application, it is not necessary to establish with absolute certainty that the damage relied upon will materialise. However, although it is enough, therefore, to establish the imminence of the damage, the standard of proof to be met by applicants is not thereby mitigated, inasmuch as they must still produce full proof of the facts on which their claims are based.

47 The Commission concludes that the arguments put forward in support of the third plea in law, concerning the grounds set out in the order under appeal in the

context of the successive examination of the facts, in reality concern the evaluation of those facts and are therefore inadmissible in the context of an appeal.

48 As regards the fourth plea in law, alleging that the order under appeal is based on findings inconsistent with the documents before the Court of First Instance, the Commission points out that in the auditor's report referred to in paragraph 30 of the order, the February 1999 payments merely represented planned expenditure. Moreover, no indication was given as to the source of the funds used or the real effects of those payments on the figures quoted in the auditor's report, which gave the position as at 31 December 1998. Thus, in effect the appellants' arguments challenge the assessment of the facts made by the President of the Court of First Instance.

49 Since the parties' written observations contain all the information necessary in order to decide the appeal, there is no need to hear oral argument from them.

Findings

50 It should be noted at the outset that under Article 225 EC and Article 51 of the EC Statute of the Court of Justice, appeals are to be limited to points of law and 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 appellant or an infringement of Community law by the Court of First Instance.

51 The Court of First Instance has exclusive jurisdiction to establish the facts, save where a substantive inaccuracy in its findings is apparent from the documents submitted to it, and to appraise those facts.

52 Moreover, 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 assessment 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 (Case C-159/98 P(R) *Netherlands Antilles* v *Council* [1998] ECR I-4147, paragraph 68).

53 In the present case, it should first be noted that the four pleas in law relied upon by the appellants are closely linked. They focus on the various factors which, taken together, form the basis of the conclusion reached by the President of the Court of First Instance in the order under appeal that the applicants had failed to establish sufficiently the urgency of their application.

54 Consequently, it is possible only to allow those pleas as a body or to reject them overall.

55 Moreover, it is important to bear in mind, when assessing the merits of these pleas challenging the appraisal of urgency in the order under appeal, that the President of the Court of First Instance made that appraisal in the very specific context of an application seeking waiver of the obligation to provide a bank guarantee as a condition for postponing recovery of a fine imposed by the Commission. As was rightly emphasised in paragraph 17 of the order under appeal, such an application may be granted only in exceptional circumstances (orders in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549, paragraph 6; Case 86/82 R *Hasselblad* v *Commission* [1982] ECR 1555, paragraph 3; Case 234/82 R *Ferriere di Roè Volciano* v *Commission* [1983] ECR 725, paragraphs 5 and 6; and Case 213/86 R *Montedipe* v *Commission* [1986] ECR 2623, paragraph 22). 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 in the context of applications for interim relief, consistent with the general policy of the Commission which has been found to be reasonable (see Case 263/82 R *Klöckner-Werke* v *Commission* [1982] ECR 3995, paragraph 5).

56 With respect to the first plea, by which the appellants challenge the failure of the President of the Court of First Instance to regard as serious and irreparable damage the risk that they might have to apply for commencement of bankruptcy proceedings, it should be noted that a situation in which an undertaking is compelled to seek liquidation may indeed constitute serious and irreparable damage, since the very existence of the undertaking would thereby be placed in jeopardy, and given the serious consequences to which such proceedings give rise, hindering normal operations.

57 However, such an assessment must be carried out on a case-by-case basis, having regard to the facts of each case and the legal issues involved.

58 It is clear from the order under appeal that the President of the Court of First Instance, while not entirely discounting the possibility that the applicant might be forced into liquidation as a result of having to provide a bank guarantee, nevertheless took the view that the importance of this was relative. Indeed he found that the applicants' purported difficulties stemmed essentially from the fact that they were experiencing a cash-flow deficit and, as was pointed out in paragraph 34 of the order under appeal, that difficulties of that nature do not necessarily cause an undertaking to be placed in liquidation, a view which was confirmed upon examination of the applicable national law.

59 The appraisal of the facts made on an application for interim relief cannot be directly challenged in the context of an appeal.

60 By their second plea in law, the appellants complain that the President of the Court of First Instance took into account the ways in which Mr Henss could have assisted them in providing a bank guarantee.

61 On that point, it is settled law that in order to assess whether an undertaking is in a position to provide a bank guarantee, regard must be had to the group of undertakings to which it belongs (*Hasselblad*, cited above, paragraph 4) and, in particular, to the resources available to that group as a whole (*Transacciones Marítimas*, cited above, paragraph 12).

62 That approach is based on the idea that the objective interests of the undertaking concerned are not wholly distinct from those of the natural or legal persons which control it and that the serious and irreparable nature of the damage alleged must therefore be appraised at the level of the group comprising those persons. In particular, the fact that interests thus overlap is justification for not assessing the undertaking's interest in its own survival separately from the controlling group's interest in seeing it survive.

63 On the same grounds, it is proper in a comparable situation for the damage to an association of undertakings to be assessed having regard to the financial situation

of its members, where the objective interests of the association are not independent of those of the member undertakings (order in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraphs 35 to 38).

64 It seems, therefore, that no importance is to be attributed to the fact that — as in the present case — the person who controls the undertakings by virtue of being their principal owner is a natural person who is not himself an undertaking.

65 Nor is there any foundation to the appellants' argument that the reasoning adopted by the President of the Court of First Instance amounts to discrimination as between undertakings, depending on whether or not their shareholders can be identified. The assessment of the serious and irreparable nature of the damage alleged must be carried out having regard to the circumstances of the individual case rather than in a general way on the basis of abstract categories. An undertaking found to be controlled by other persons is in a special situation which the court hearing an application for interim relief must take into account.

66 The third plea concerns the standard of proof to be met by the applicants at first instance in order to establish that the condition of urgency is satisfied.

67 As the Commission rightly pointed out, although in order to establish the existence of serious and irreparable damage it is not necessary for the occurrence of the damage to be demonstrated with absolute certainty, it being sufficient to show that damage is foreseeable with a sufficient degree of probability, the applicants are required to prove the facts forming the basis of their claim that serious and irreparable damage is likely.

68 That requirement is all the more justified in a case such as the present, in the light of the principle set out in paragraph 55 above.

69 As regards the fourth and final plea, it is enough to note that the information to which the appellants refer merely furnishes further detail, which admittedly gives a fuller picture of the facts set out in paragraph 31 of the order under appeal, but which does not indicate that the findings of the President of the Court of First Instance are vitiated by material inaccuracy.

70 In those circumstances, for the reasons set out in paragraphs 50 to 52 above, the appraisal of the evidence made by the President of the Court of First Instance cannot be reviewed in the context of this appeal.

71 It follows from all the foregoing considerations that the pleas in law relied upon by the appellants in support of their appeal are not well founded and that the appeal must therefore be dismissed.

Costs

72 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Commission applied for costs

and the appellants have been unsuccessful in their pleadings, they must be ordered to pay the costs.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. **The appeal is dismissed.**

2. **HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG, HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH, Verwaltungsgesellschaft, Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH, Isoplus Fernwärmetechnik Gesellschaft mbH and Isoplus Fernwärmetechnik GmbH shall pay the costs.**

Luxembourg, 14 December 1999.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President