ORDER OF THE PRESIDENT OF THE COURT
23 March 2001 *

In Case C-7/01 P(R),

Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied, established in The Hague (The Netherlands), represented by E.H. Pijnacker Hordijk, S.H. de Ranitz and S.B. Noë, advocaten, 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 14 December 2000 in Case T-5/00 R *FEG* v *Commission* [2000] ECR II-4121, seeking to have that order set aside and the case referred back to the Court of First Instance, and an order that the costs be reserved,

* Language of the case: Dutch.

the other parties to the proceedings being:

Commission of the European Communities, represented by W. Wils, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

CEF City Electrical Factors BV, established in Rotterdam (The Netherlands),

and

CEF Holdings Ltd, established in Kennilworth (United Kingdom),

represented by C.M.H.C. Vinken-Geijselaers, J. Stuyck and M.A. Poelman, advocaten, with an address for service in Luxembourg,

intervening parties at first instance,

THE PRESIDENT OF THE COURT,

after hearing the views of Advocate General Léger,

makes the following

Order

1 By application lodged at the Registry of the Court on 9 January 2001, the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (hereinafter 'FEG') brought an appeal, pursuant to 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 14 December 2000 in Case T-5/00 R *FEG* v *Commission* [2000] ECR II-4121, dismissing FEG's application for interim relief in the form of partial suspension of the operation of Commission Decision 2000/117/EC, of 26 October 1999, concerning a proceeding pursuant to Article 81 of the EC Treaty [Case IV/33.884 — Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU)] (OJ 2000 L 39, p. 1, hereinafter 'the decision at issue').

2 In addition to applying for the contested order to be set aside, the appellant asks, first, for the case to be referred back to the Court of First Instance for a fresh decision and, second, for an order that the costs be reserved.

3 By a document lodged at the Registry on 31 January 2001, the Commission submitted its written observations to the Court. By a document lodged at the Registry on 9 February 2001, CEF City Electrical Factors BV (hereinafter 'CEF City') and CEF Holdings Ltd (hereinafter 'CEF Holdings') also submitted written observations to the Court.

Legal background, facts and procedure before the Court of First Instance

4 For the legal background, facts and procedure before the Court of First Instance, reference is made to paragraphs 1 to 22 of the contested order.

5 Those paragraphs of the contested order show, in particular, that, following the introduction of an action for annulment of the decision at issue, the appellant, by application lodged at the Registry of the Court of First Instance on 25 September 2000, applied for suspension of the operation of the same decision until the end of the second month following the date of the judgment in the main proceedings.

6 The same paragraphs also show that the appellant amended its application for interim relief by letter received at the Registry of the Court of First Instance on 25 October 2000, in which it stated that it was prepared to make efforts to obtain a bank guarantee equivalent to the value of its own assets at the end of the 1999 financial year (hereinafter 'the proposed guarantee').

The contested order

7 By the contested order, the President of the Court of First Instance granted the application by CEF City and CEF Holdings for leave to intervene in the proceedings for interim relief, and dismissed the application for interim relief.

8 The President of the Court of First Instance decided, first, that the application for suspension of operation of the decision at issue could have no effective purpose other than to obtain authorisation to furnish the proposed guarantee instead of that required by the Commission (hereinafter 'the required guarantee') as a condition of the Commission's not immediately recovering the amount of the fine imposed by that decision.

9 The President of the Court of First Instance then pointed out that, according to settled case-law, such an application can only be granted in exceptional circumstances (orders of the Court of Justice in Cases 107/82 R *AEG* v *Commission* [1982] ECR 1549, paragraph 6; C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 55, and C-364/99 P(R) *DSR-Senator Lines* v *Commission* [1999] ECR I-8733, paragraph 48). The possibility of requiring the provision of a guarantee is expressly laid down for proceedings for interim relief by the Rules of Procedure of the Court of Justice and the Court of First Instance, and in accordance with a general and reasonable policy pursued by the Commission.

10 Therefore, in addressing the question of urgency, the President of the Court of First Instance concerned himself with verifying whether the appellant had established that it was impossible for it to give the required guarantee without jeopardising its continued existence.

11 In that respect, the President of the Court of First Instance observed that, where a decision of an association of undertakings infringes Article 81(1) EC, the

maximum fine, equivalent to 10% of the turnover during the preceding business year under Article 15(2) of Council Regulation No 17, of 6 February 1962, First regulation applying Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87), is to be calculated on the basis of the turnover of all of the undertakings of the association, at least when its internal rules permit it to hold its members liable (order in Case T-18/96 R *SCK and FNK* v *Commission* [1996] ECR II-407, paragraph 33, confirmed on appeal by order in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 35). Such an approach is based on the idea that the influence which an association of undertakings has been able to exercise on the market does not depend upon its own 'turnover', which reveals neither its size nor its economic power, but rather upon its members' turnover, which constitutes an indication of its size and its economic power (judgments in Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 137, and T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 385, and order in *SCK and FNK* v *Commission*, cited above, paragraph 33).

12 The President of the Court of First Instance therefore examined the question whether the articles of association and internal rules of FEG contained provisions enabling it to hold its members liable.

13 In that regard, the contested order states that, under Article 2(1), (3)(f) and (g) of its articles of association, the object of FEG is to protect the common interests of stockkeeping wholesalers of electrotechnical products, in particular by 'promoting orderly market relations in the broadest sense of the term' and by concluding cooperation agreements with other bodies or organisations involved in the wholesale trade in electrotechnical products. All members are bound, in particular, under Article 16 of the articles of association, to 'abide strictly by the provisions of the articles of association, the internal rules and the decisions of the Board of Directors and the meeting'. It is apparent from Articles 5(1)(c) and 6 of the articles of association that a member may be expelled from the association if it ceases to satisfy the requirements laid down by the articles of association or

the internal rules. A member may also be liable to a reprimand, suspension or fine of up to NLG 10 000 if the Board of Directors finds that it has acted in disregard of the articles of association, internal rules or decisions validly adopted by the association.

14 Again according to the contested order, in relation to the infringements found to have been committed by the appellant in Articles 1 and 2 of the decision at issue, there are numerous references, in particular in recitals 39, 44, 48, 53, 71, 76, 79, 82, 84, 85, 92, 111 and 122 in the preamble to that decision, to the binding effect on its members of the conduct of the association that led to the alleged agreements, namely the exclusive dealing arrangements and the pricing agreements between its members.

15 According to the President of the Court of First Instance, although the appellant disputed the validity of the Commission's conclusions in the decision at issue as to the existence of those infringements, there was nothing in the documents before him to suggest, on an initial analysis, that implementation of the alleged agreements did not reflect the interests of its members.

16 The President of the Court of First Instance concluded from those findings that the objective interests of the appellant could not, prima facie, be regarded as independent of those of the undertakings constituting it.

17 The President of the Court of First Instance therefore considered that it was necessary for him to assess the likelihood of serious and irreparable harm that would arise, in this case, from provision of the required guarantee, by taking into consideration the size and economic power of the undertakings making up the FEG.

18 In that regard, it appears from the contested order that the Commission had stated, without being challenged on the point by the appellant, that the fine represented less than 0.5% of the total turnover of the members of the FEG for 1994. The President of the Court of First Instance found that there were therefore sufficient grounds for assuming that the members of the FEG had sufficient financial capacity to pay the fine imposed or, at least, to provide the required guarantee.

19 The President of the Court of First Instance therefore found that the appellant had failed to establish that enforcement of Articles 5(1) and 6 of the decision at issue before the Court of First Instance had given judgment in the main proceedings would be liable to cause the serious and irreparable harm alleged, consisting of the appellant's potential insolvency.

20 The President of the Court of First Instance added, lastly, that that conclusion could not be affected by the appellant's arguments in relation to the proposed guarantee.

21 According to the contested order, the mere fact that the appellant had declared itself willing to provide such a guarantee, even if this did represent the supposed value of its assets at the end of 1999, the year in which the fine was imposed, was immaterial. It emerged clearly from the appellant's observations at the hearing, and from its subsequent letter of 6 November 2000, that the small portion, in the region of 4%, of the fine imposed that would be covered by the proposed guarantee reflected only that portion which a number of FEG members had agreed they must ultimately bear in order to enable the FEG to continue its main action. The appellant had adduced no evidence that those members were unable to raise the funds necessary to provide the required guarantee.

22 The President of the Court of First Instance therefore concluded that the appellant had failed to establish that, should the interim relief requested not be granted, it would suffer serious and irreparable harm.

23 Consequently, the application for interim relief was dismissed, without consideration of whether the other requirements for the suspension of operation applied for were fulfilled.

The appeal

24 In its notice of appeal, the appellant claims that the President of the Court should:

— set aside the contested order;

— refer the matter back to the Court of First Instance, and

— order that the costs be reserved.

25 In support of its appeal the appellant submits that the effect of the contested order is that, although it has brought an action against the decision at issue, which imposes on it an administrative fine, it will be forced into liquidation by the body imposing that fine even before it has been heard by an independent court in its action against that decision. More specifically, the appellant denies that it is necessary to hold, prima facie, that its objective interests must be treated as identical to those of its members, and therefore to take into account the financial situation of the latter in assessing whether it will suffer serious and irreparable harm without the grant of suspension sought.

26 That single plea is divided into four parts, alleging, first, that the President of the Court of First Instance infringed Community law in treating the appellant as identical to its members; second, that the contested order infringes the appellant's right to full and effective judicial protection; third, infringement of Article 242 EC, read together with Article 104 of the Rules of Procedure of the Court of First Instance, by reason of the manifestly erroneous way in which the interests were weighed against each other; fourth, that the President of the Court of First Instance infringed Community law in allowing the Commission to take improper advantage of the FEG's right of action.

27 The Commission, CEF City and CEF Holdings contend that the Court should dismiss the appeal and order the appellant to pay the costs.

Findings

28 Since the written observations of the parties contain all the information necessary to enable the Court to determine the appeal, there is no need to hear oral argument.

The first part of the plea

29 Under the first part of its plea, the appellant disputes that the President of the Court of First Instance was entitled to find that its interests were not independent of those of its members solely because, prima facie, the application of the agreements was in the interests of its members and that the conduct of the association that gave rise to the infringements was binding on its members.

30 First, an association cannot generally be assimilated to its members in a proceeding under Regulation No 17. Next, the principle, common to the legal systems of the Member States, that third parties are not as a rule responsible for the debts of a legal person, applies equally to the members of an association which has legal personality. Lastly, even if this were not the case, it cannot be right as a matter of law to treat an association of undertakings which has separate legal personality as identical to its members where the association and its members neither constitute an economic entity nor are so closely linked that they may be completely assimilated in their relations with third parties.

31 In this case, the interest of the appellant, which is to challenge the decision at issue, differs from that of its members. In this regard, the appellant points out that the Commission addressed a statement of objections to six of its members, but ultimately decided to withdraw it. It also submits that it is unable to compel its members to provide it with assistance.

32 Furthermore, the appellant argues that the President of the Court of First Instance was wrong in holding that the infringements established arose from decisions of FEG which were binding on its members.

33 In that respect, it must first be observed that it does not appear from the contested order either that the appellant was, in a general way, found to be identical to its members or that it was found that its members were responsible for its debts.

34 The President of the Court of First Instance merely found, after examining the evidence before him, that the appellant's internal rules enabled it to bind its members, and that, prima facie, there were no grounds for doubting that the application of the alleged agreements reflected the members' interests. On the basis of that merger of interests between the FEG and its members, he found that,

in assessing the likelihood of serious and irreparable harm it was proper to take into account the size and economic power of the member undertakings of the appellant.

35 Even if the alleged infringement was brought about through FEG's decision, it follows from the findings of the President of the Court of First Instance that there was, prima facie, in the commission of the infringement, a fusion of the appellant's interests with those of its members.

36 The appellant's arguments do not show that the President of the Court of First Instance committed an error of law in taking into account that fusion of interests in determining whether there was in fact serious and irreparable harm to the appellant.

37 In particular, the fact that the FEG could not compel its members to lend it assistance, of which the President of the Court of First Instance was, moreover, fully aware, is irrelevant. Given the fusion of interests noted, it was sufficient to find that the members of the association had the capacity to provide the guarantee, the alleged harm thus appearing as entirely avoidable.

38 As to the findings of the President of the Court of First Instance concerning the binding character of the association's decisions with regard to its members, they cannot be challenged on appeal. Under Article 225 EC and Article 51 of the EC Statute of the Court of Justice, an appeal is to be limited to points of law, and must be based on grounds of lack of competence of the Court of First Instance, breaches of procedure adversely affecting the interests of the appellant, or infringement of Community law.

The second part of the plea

39 The appellant submits that its right to full and effective judicial protection has been infringed by the contested order, in that the refusal of the interim relief sought will bring about its liquidation and thus render it incapable of taking further steps in the main proceedings.

40 The causal link between the refusal of the measures sought and the alleged liquidation is made out. Although the members of the appellant are in a position to help it avoid insolvency, they are not legally obliged to do so.

41 On that point, it should first be observed that the President of the Court of First Instance could properly take the fusion of interests existing between the appellant and its members as a basis for the purpose of determining to what extent its position justified the grant of interim relief.

42 Where a dispute concerns an infringement of the competition rules brought about by the decision of an association of undertakings and where, in that context, it is found that the objective interests of the association are not independent of those of its member undertakings, the interest which the association has in surviving cannot be assessed independently of that of those undertakings.

43 To hold otherwise, as the appellant urges, would, in practice, result in systematically granting suspension of operation to any association of undertakings which brings proceedings for annulment of a Commission decision imposing a fine on that association calculated by reference to the combined turnover of its member undertakings.

44 Such an approach cannot be endorsed, in particular in the very specific context of an application for exemption from the obligation to provide a bank guarantee as a condition of the Commission's not immediately recovering a fine imposed by it, an application which, according to settled case-law, will only be granted in exceptional circumstances (orders in *AEG* v *Commission*, cited above, paragraph 6, in Case 86/82 R *Hasselblad* v *Commission* [1982] ECR 1555, paragraph 3, and in Case 234/82 R *Ferriere di Roè Volciano* v *Commission* [1983] ECR 725, paragraphs 5 and 6).

45 Next, it appears from the contested order that the President of the Court of First Instance concluded that there was no causal link between the refusal of the suspension sought and the harm alleged by the appellant. That is a finding of fact that cannot be challenged on appeal, for the reasons set out at paragraph 38 of this order.

46 Lastly, a mere unilateral refusal on the part of the members of the FEG to provide assistance cannot suffice to preclude the members' financial situation from being taken into account. The extent of the alleged harm cannot depend on the unilateral intention of the members of the association which seeks suspension where the interests of the association and those of its members are merged.

The third part of the plea

47 The appellant submits that the President of the Court of First Instance clearly erred in balancing the interests in question, in that the Commission had not the slightest financial interest in the immediate enforcement of its decision, and that its interest in having that decision complied with would not in any way have been adversely affected by suspension of recovery of the fine.

48 In that respect, it is clear from the contested order that the application for interim relief was dismissed on the ground that the appellant had failed to prove that it risked incurring serious and irreparable harm, without the Commission's interest in immediate enforcement of its decision being weighed against the appellant's interest in obtaining suspension of the obligation to provide the required guarantee.

49 The appellant cannot, therefore, complain that the President of the Court of First Instance erred in balancing the interests in question. He was entitled to dismiss the application since the appellant had been unable to establish that the requirement as to urgency was satisfied.

50 The conditions for granting suspension are cumulative, so that an application for suspension must be dismissed if one of them is not satisfied (order in *SCK and FNK* v *Commission*, cited above, paragraph 30).

The fourth part of the plea

51 According to the appellant, the President of the Court of First Instance allowed the Commission to take improper advantage of the exercise by the FEG of its rights of action in order to obtain full payment of the fine imposed by the decision at issue, although it is not disputed that the Commission would have been unable to recover that fine had no action been brought.

52 In that regard, it must be observed, however, that if the appellant had refrained from exercising its right of action the Commission would have been entitled to seek enforcement of the decision at issue in full.

53 That power of the Commission cannot be set aside by reason of the bringing of an action, since such an action does not, under the system laid down in Article 242 EC, have suspensory effect.

54 In those circumstances, the fact that the Commission agreed, after the action for annulment had been brought, not to take any steps to recover the fine whilst the proceedings were pending, provided that an acceptable bank guarantee was provided, does not amount to improper conduct on its part, and the contested order contains no error of law in that respect.

55 In the light of all the foregoing considerations, the appeal must be dismissed.

Costs

56 Under Article 69(2) of the Rules of Procedure which, by virtue of Article 118 thereof, applies to proceedings on appeal, the unsuccessful party is to pay the costs, if applied for by the successful party. Since the Commission, CEF City and CEF Holdings have applied for costs and the appellant has been unsuccessful, the appellant should be ordered to pay the costs.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The appeal is dismissed.

2. Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied shall pay the costs.

Luxembourg, 23 March 2001.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President