ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
28 June 2000 *

In Case T-191/98 R II,

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

applicant,

v

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

defendant,

* Language of the case: English.

APPLICATION for suspension of the operation of Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) (OJ 1999 L 95, p. 1) in so far as, in Article 8, it imposes a fine of EUR 13 750 000 on the applicant,

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

makes the following

Order

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

2 On 19 October 1994 the Commission adopted Decision 94/980/EC relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1), in which, first, it found that certain provisions of the TAA, in particular those relating to certain inland transport services within the Community, infringed Article 85(1) of the EC Treaty (now Article 81(1) EC) and, secondly, it refused to apply to the provisions of the TAA Article 85(3) of the Treaty and Article 5 of Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302). Decision 94/980 required the undertakings to which it was addressed to refrain from price-

fixing practices having the same or a similar object or effect as that of the provisions of the TAA Agreement.

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

4 On 16 September 1998 the Commission adopted Decision 1999/243/EC relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) (OJ 1999 L 95, p. 1, hereinafter 'the Decision').

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

6 According to Articles 5 and 6 of the Decision, the applicant and the other parties to the TACA have infringed Article 86 of the EC Treaty (now Article 82 EC) and Article 54 of the EEA Agreement by altering the competitive structure of the market so as to reinforce their collective dominant position, and by placing restrictions on the availability and content of service contracts.

7 In respect of the infringements complained of in Articles 5 and 6, Article 8 of the Decision imposed fines upon the parties to the TACA Agreement, including one of EUR 13 750 000 to be paid by the applicant. Article 10 provided that the fines

laid down in Article 8 were payable within three months of the date of notification of the Decision, after which time interest would automatically begin to accrue at the rate of 7.5%.

8 By letter of 25 September 1998 the Commission notified the applicant of the Decision. It its letter it stated that, if the applicant brought an action before the Court of First Instance, it would not take any steps to recover the fine while those proceedings were pending before the Court, provided that interest at the rate of 5.50% accrued on the amount due from the date on which the period for payment expired and that a bank guarantee acceptable to the Commission and covering both the principal sum and interest be provided by no later than that date.

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

10 By application lodged at the Registry of the Court of First Instance on 7 December 1998 the applicant, together with 11 other shipping companies party to the TACA, brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of the Decision (Case T-191/98).

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

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

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

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

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

— an order suspending the operation of the Decision in so far as it imposes, at Article 8, a fine of EUR 13 750 000 upon the applicant, until final judgment has been delivered in Case T-191/98 and in any appeal relating thereto, and until signature of the order disposing of the present application for interim relief;

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

14 In addition, the applicant seeks leave to submit observations regarding the treatment of any confidential information that might be contained in the order disposing of the present proceedings.

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

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

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

18 On 7 December 1999 the judge hearing the application for interim relief called upon the applicant to express its views on certain questions raised by the Commission in its observations of 3 December. The applicant replied by letter lodged at the Registry on 15 December 1999.

19 By order of the same date (T-191/98 R II *Cho Yang Shipping* v *Commission*, not published in the Reports) the Court ordered the suspension of operation of the Decision until signature of the final order disposing of the present application for interim measures, and demanded production of the annual accounts for the financial year ending on 31 December 1999, audited and certified by a firm of auditors of international repute, accompanied by a letter from the same firm certifying that the accounts reflect the amount, by way of both principal sum and interest, of the fine imposed on the applicant by the Decision. The third paragraph in the operative part of the order stated that, until the present proceedings for interim relief have been disposed of, interest at the rate of 7.5% would continue to accrue on the fine imposed on the applicant, in accordance with Article 10 of the Decision.

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

Law

21 Under the combined provisions of Articles 242 EC and 243 EC and 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 the circumstances so require, order that application of a contested act be suspended, or may prescribe any necessary interim measures.

22 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 the 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 interim measures must be dismissed if either of them is absent (order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30).

23 The judge hearing an application for interim measures must also, where appropriate, balance the various interests involved (order of the President of the Court of Justice of 29 June 1999 in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011, paragraph 59).

Arguments of the parties

Prima facie case

24 In order to establish a *prima facie* case for the grant of the relief it seeks, the applicant puts forward three pleas in law, namely breach of essential procedural requirements, errors of fact and law in the determination of whether or not Article 86 of the Treaty had been infringed, and the illegality of the fine imposed. The applicant refers to the arguments advanced by the company DSR-Senator Lines in its application for interim relief which gave rise to the order of the President of the Court of First Instance of 21 July 1999 (Case T-191/98 R *DSR-Senator Lines* v *Commission* [1999] ECR I-2531).

25 The Commission does not dispute the existence of a *prima facie* case.

Urgency

26 According to the applicant, there are exceptional circumstances which justify suspending the obligation to pay the fine imposed by the Decision without making such suspension conditional upon the immediate provision of a bank guarantee. The applicant states that it suffered significant losses in 1997 as a result of the Asian economic and monetary crisis and that, despite subsequent restructuring, it remains in a precarious financial position. It lacks sufficient liquidity to enable it to provide the Commission with a bank guarantee, its shareholders are unable to assist, and immediate payment of the fine could cause it to be wound up.

27 The applicant points out that, in 1997, during a difficult period in the shipping sector, it was seriously affected by the Asian economic and monetary crisis, the

effects of which were magnified in Korea by reason of the widespread use of cross-guarantees between companies within the same group and the high level of indebtedness prevalent among undertakings. On ending the financial year with net losses of KRW 429 000 000 000 (EUR 284 000 000), the applicant increased its capital by an issue of KRW 19 000 000 000 (EUR 12 000 000) of new shares, which were subscribed, as to the majority, by new investors, Krota Sea-Land Transportation Ltd, Pieris Investment Pte. Ltd and, to a lesser extent, by existing shareholders, the members of the Park family and Mr Lee Dongjoo.

28 In March 1998, in accordance with measures established by the International Monetary Fund and the Korean Government, the applicant's principal banker, Seoul Bank, required the applicant to conclude an agreement for improving its financial structure. That agreement was to provide, *inter alia*, for the gradual elimination of cross-guarantees between companies in the Cho Yang group and the disposal of numerous assets. Pursuant to that agreement, on 19 July 1999 the applicant, Samik Express, a company within the Cho Yang group, and members of the Park family sold their shares in a Korean Insurance Company, First Life Insurance Co. Ltd ('First Life') to Allianz AG. The applicant used the proceeds from the sale to reduce its indebtedness. It also acquired a 100% interest in a former subsidiary of First Life, Hansin Mutual Saving & Finance Co. Ltd. On 6 August 1999 Samik Express paid the proceeds of the sale of a 28.37% interest in First Life to the applicant. The applicant states that it has sold half of its fleet and is now left with only seven vessels. Whilst the sale of vessels did help to reduce its indebtedness, it also resulted in an increase in operating costs in that the applicant has been constrained to charter additional vessels in order to carry on its business. Lastly, the applicant states that, in the context of the restructuring, it entered into a cooperation agreement in 1998 with DSR-Senator Lines, Hanjin Shipping and United Arab Shipping Company.

29 At the end of the 1998 financial year, the applicant showed a net loss of approximately KRW 47 000 000 000 (EUR 30 000 000), an interest charge of KRW 113 000 000 000 (EUR 72 000 000) and negative equity of KRW 427 000 000 000 (EUR 273 000 000). At the end of the first half of 1999 the applicant estimated that its net losses for the current financial year were already KRW 9 000 000 000 (EUR 7 000 000) and it was forecasting that its end-of-year balance sheet would show assets of KRW 630 000 000 000

(EUR 484 000 000), liabilities of approximately KRW 570 100 000 000 (EUR 438 000 000) and equity of KRW 59 900 000 000 (EUR 46 000 000).

30 Despite that improvement, the applicant regards its position as precarious. All its vessels and real property are mortgaged and the applicant's shareholdings in its affiliates have been pledged as security. As a result of cash-flow problems, ships operated by the applicant have been arrested by third parties exercising maritime liens. Whilst the applicant has been able to persuade its bankers not to adopt enforcement measures, its poor solvency has prevented it from obtaining any new credit since 1998. Between 27 November 1998 and 2 August 1999, Seoul Bank, Korea Development Bank, Korea First Bank and Hana Bank repeatedly refused to provide the applicant with a bank guarantee because of insufficient assets, and in particular liquid assets.

31 The applicant points out that whether or not a company is able quickly to pay a given sum depends upon its current ratio (current assets / current liabilities), and that it has no 'reserves' that would enable it to pay EUR 13 750 000 (KRW 18 000 000 000). In order to pay that sum immediately it would be obliged to sell vessels or other revenue-generating assets. Since its assets have been pledged as security for debts far greater than the amount of the fine, any proceeds of sale would first be used to repay preferential creditors. Disposing of assets in that way would jeopardise the company's ability to generate revenue and could precipitate its being wound up by its creditors, without affording the Commission any real avenues of recovery.

32 The interests and financial positions of the various shareholders and companies within the applicant's group prevent them from offering support. Thus, the applicants submit that the present application should be decided without recourse to any arbitrary rule that would 'require' a shareholder or shareholders to lend the applicant their support.

33 The Commission submits that the requirement of urgency has not been satisfied.

34 Between 1997 and 1999, despite its insolvency, the applicant continued to enjoy the support of its creditors, shareholders and new investors who, according to the Commission, are gambling on the long-term resurgence of the undertaking. It is highly unlikely that they would, in the short term, take the risk of letting the applicant be wound up and losing for ever any possibility of recovering their respective investments. The applicant's over-indebtedness predates the Decision. That being so, recovery of the fine, which is insignificant in comparison with the company's total liabilities, could not bring about the winding up of the applicant. On the other hand, suspending the fine or the obligation to provide a bank guarantee would amount to imposing on the Community taxpayer risks normally borne by the applicant's creditors.

35 When considering the present application regard must be had to the assistance which may be given by undertakings in the same group as the applicant (orders in Case 86/82 R *Hasselblad* v *Commission* [1982] ECR 1555, paragraph 4, and in Case T-295/94 R *Buchmann* v *Commission* [1994] ECR II-1265). It is therefore right to consider whether the applicant, with the assistance of the members of the group to which it belongs, is in a position to provide the bank guarantee demanded. The restructuring agreement between Seoul Bank and the Cho Yang group is sufficient proof of the existence of a group of companies.

36 In any event, the applicant's situation is no longer as serious as it was in 1997 or 1998, and it is thus no longer in danger of being wound up. The Commission has examined the applicant's annual accounts for the 1999 financial year and considers that the applicant is able to pay the fine itself, or to arrange a bank guarantee. In addition, the Commission queries whether the accounts comply with the terms of the order in *Cho Yang Shipping* v *Commission*, cited above, given that they only mention the fine in a note appended to the accounts.

The balance of interests

37 The applicant submits that the Commission imposed a fine upon it in the Decision not because of its own individual conduct, but because the parties to the TACA had abused their dominant position. The present application relates to only ECU 13 750 000, or 5% of the total of EUR 272 980 000 in fines imposed upon the parties to the TACA. The applicant states that it was new to the trans-Atlantic market and that it entered that market by dint of concluding cooperation agreements with other shipping companies. It withdrew from the TACA in 1999. Consequently, the Community interest, be it financial or a matter of competition policy, in obtaining payment of the fine is quite insignificant in the present case, whereas the winding up of the applicant would affect competition on the trans-Atlantic trade.

38 According to the applicant, it is clear from the order of the President of the Court of Justice in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549 that imposing an obligation to provide a bank guarantee is meant to discourage dilatory actions. Given that the case in the main action has been brought by a number of parties together and that the rate of inflation has fallen since delivery of the order in *AEG* v *Commission*, the applicant cannot be guilty of dilatory conduct.

39 In the context of its application, the applicant has suggested that the following conditions be attached to the suspensive order:

— that it pay interest on EUR 13 750 000 at 5.5% per annum;

— that it give an undertaking, coterminous with the suspension, to contact at least three banks, after adoption of its semi-annual and annual accounts, with

a view to obtaining a bank guarantee in the sum of EUR 13 750 000 plus interest, in the form of the standard bank guarantee sought by the Commission;

— that it communicate, in September and April each year, the results of its endeavours to obtain such a bank guarantee;

— that any preceding obligations be extinguished once any bank guarantee obtained is offered to the Commission.

40 The Commission points out that, as regards the balancing of interests, imposing an obligation to provide a bank guarantee is meant not only to dissuade undertakings which have been fined from bringing dilatory actions but, above all, to protect the financial interests of the Community and ensure the equal treatment of all undertakings. Since the urgency of the present application has not been established, there is no need to weigh up the various interests involved. Moreover, the Commission rejects the applicant's proposal.

Findings of the Court

41 First, the claim for interim relief having effect until delivery of the final judgment in the appeal against the decision of the Court of First Instance in Case T-191/98 must be dismissed as manifestly inadmissible. A judge hearing an application for interim relief has no jurisdiction to order interim measures which are designed to produce their effects up to such time as the Court of Justice decides an appeal that might be brought against the final judgment of the Court of First Instance.

42 It is also necessary to define precisely the purpose of the present application. The applicant is claiming that operation of the Decision should be suspended in so far as it imposes upon the applicant a fine of EUR 13 750 000. However, it is common ground that the Commission stated in its letter of notification of 25 September 1998 that, if the applicant brought an action, it would take no steps to recover the fine, provided that the applicant furnish a bank guarantee securing the principal amount of the fine and interest. That being the case, the only possible useful purpose of the application for an order suspending operation of the Decision is to relieve the applicant of the obligation to provide a bank guarantee, which was the condition imposed in return for the Commission's agreement to refrain from immediately enforcing the fine levied by the Decision. Unless there are exceptional circumstances, the applicant's request cannot be granted, for to do so would render nugatory the principle laid down in Article 242 EC that actions shall not have suspensory effect (order in *AEG* v *Commission*, cited above, and order of 14 December 1999 in Case C-364/99 P(R) *DSR-Senator Lines* v *Commission* [1999] ECR I-8733, paragraph 48).

43 In the present case, in which the Commission accepts that the applicants have made out a *prima facie* case (see paragraph 25 of the present order), it must be considered whether the applicant has proved that it is unable to set up a bank guarantee without risking being wound up and whether the requirement of urgency has thus been satisfied. The relevance of the letters in which the banks refused to provide the guarantee sought must be assessed in the light of the applicant's economic situation considered objectively.

44 An assessment of that kind calls for intricate analysis of large amounts of accounting and financial data. So that such an assessment could be carried out, and in view of the imminence of the 1999 financial year-end, the Court, in the second paragraph of the operative part of the order in *Cho Yang Shipping* v *Commission*, cited above, demanded production by the applicant, before 1 April 2000, of its latest annual accounts, in the form and circumstances described in paragraph 19 of the present order.

45 Even if the Court were to find that, despite the Commission's doubts, the requirements of the order in *Cho Yang Shipping* v *Commission* have been

satisfied, it must be held that the applicant has not proved that it is facing a risk of harm such as to justify the grant of a suspending order.

46 In this connection, it should be emphasised that, since 1995, the applicant has been heavily indebted. In 1995 and 1996 its liabilities amounted to 14 and 29 times its equity. During those financial years its operating income remained at about KRW 63 000 000 000. However, after recording net income of KRW 3 000 000 000 in 1995, the applicant recorded net losses of more than KRW 7 900 000 000 in the following financial year. Taking account of the deterioration in its position, the applicant, which had in 1995 released more than KRW 1 000 000 000 in unappropriated retained earnings carried over, reported in its annual accounts for the 1996 financial year more than KRW 6 700 000 000 in losses carried over.

47 It was in those worsening circumstances that the applicant suffered the effects of the 1997 Asian economic and monetary crisis. During the 1997 financial year, its liabilities increased by more than 44%, reaching KRW 1 027 000 000 000. Operating income, which in 1996 was KRW 63 000 000 000, turned into losses of approximately KRW 163 000 000 000. With approximately KRW 434 000 000 000 in losses carried over, the applicant's equity fell to minus KRW 379 000 000 000. Thus, it is clear from those figures that the difficulties to which the applicant refers arise from circumstances existing prior to the Decision.

48 Furthermore, it should be observed that, since 1998, the applicant's position has improved significantly. First, the applicant reduced its liabilities by more than 16% between 1997 and 1998, and by more than 34% between 1998 and 1999. In 1999 they stood at KRW 557 000 000 000, that is to say approximately half the figure for 1997. Next, thanks to the restructuring plan, the applicant was able, at the end of the 1999 financial year, to eliminate the KRW 480 000 000 000 of losses carried over in the previous financial year and to record operating income of KRW 46 000 000 000, giving net income of over KRW 253 000 000 000. During that financial year, its equity rose from minus KRW 427 000 000 000 to KRW 96 000 000 000, bringing its debt ratio

(total liabilities / total shareholders' equity) to six, that is to say almost five times lower than its 1996 level. The applicant's interest charge improved from KRW 117 000 000 000 to KRW 73 000 000 000. It is also clear from the documents before the Court that, during the second half of the 1999 financial year, the applicant recorded better results than it had anticipated when it brought its application for interim relief.

49 However, it is also clear from the written explanations given in response to the questions put to it at the hearing that, despite those positive developments, the applicant's vessels and real property are worth no more than between... and... [1] of the bank loans they are intended to secure. That being the case, it is clear that their immediate sale would not generate sufficient liquid assets to enable payment of the fine. However, it is also clear from the documents before the Court that the applicant holds certain shares which, in the context of the restructuring plan, have been earmarked for sale.... These are holdings in the companies Dong Seoul and Dong Young Shipping, valued by the applicant's financial backer in the restructuring plan.... Whilst the applicant has stressed that it has encountered difficulties in selling these assets, it is clear that their value far exceeds the amount of the fine.

50 Lastly, it should be observed that the applicant now enjoys a positive cash-flow. Cash generated in 1999 amounted to KRW 908 000 000 (USD 793 252). Cash flows from operating activities stood at KRW 91 000 000 000, a figure significantly higher than its interest expense (KRW 73 000 000 000). Whilst it is insufficient to pay the fine, that cash flow should now enable the applicant to obtain a bank guarantee, or, failing that, capital sufficient to pay the fine. The refusals of the banks to which the applicant applied prior to publication of the 1999 accounts are, in this regard, irrelevant.

1 Confidential information.

51 It follows that the applicant's present position does not indicate that it cannot arrange a bank guarantee without risking being wound up. Against that background of general improvement in its position, enforcing the Decision before the delivery of a substantive judgment is not likely to occasion the applicant serious harm that could not be made good if the Decision were later annulled by the Court of First Instance. The requirement of urgency has not, therefore, been satisfied.

52 Furthermore, the balance of interests involved militates against acceding to the applicant's request.

53 It is necessary to weigh the applicant's interest in avoiding — in the event that it is unable to arrange a bank guarantee — immediate payment of the fine against the Community's financial interest in being able to recover that sum and, more generally, against the public interest in preserving the effectiveness of Community competition rules and the deterrent effect of fines imposed by the Commission.

54 As regards that last aspect, it should be pointed out that the Commission imposed a fine on the applicant because it abused its dominant position, contrary to the prohibition contained in Article 86 of the Treaty, a prohibition in respect of which, according to settled case-law, no exemption of any kind may be granted (Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge and Others* v *Commission* [2000] ECR I-1365, paragraph 135).

55 In those circumstances, the general interest in ensuring compliance with the Decision takes precedence over the private interest of the applicant, which is no longer facing a risk of serious and irreparable harm. Consequently the application must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The application for interim relief is dismissed.**

2. **The applicant is given 15 days in which to lodge at the Registry a request for confidential treatment.**

3. **Costs are reserved.**

Luxembourg, 28 June 2000.

H. Jung

Registrar

B. Vesterdorf

President