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

In Case T-9/99 R,

HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG, a company incorporated under German law, established at Rosenheim (Germany),

HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH, Verwaltungsgesellschaft, a company incorporated under German law, established at Rosenheim,

Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH, a company incorporated under German law, established at Rosenheim,

Isoplus Fernwärmetechnik Gesellschaft mbH, a company incorporated under Austrian law, established at Hohenberg (Austria), and

Isoplus Fernwärmetechnik GmbH, a company incorporated under German law, established at Sondershausen (Germany),

* Language of the case: German.

represented by Peter Krömer and Friedrich Nusterer, Rechtsanwälte, Sankt Pölten, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicants,

v

Commission of the European Communities, represented by Éric Gippini Fournier and Walter Mölls, 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,

defendant,

APPLICATION for suspension of operation or stay of enforcement of Articles 3(d) and 4 of Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1), as rectified by a decision of 6 November 1998, inasmuch as those measures impose on the applicants a fine payable within three months of notification of that decision,

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

makes the following

Order

Facts and procedure

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/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1), as rectified by a decision of 6 November 1998 ('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 received at the Registry of the Court of First Instance on 18 January 1999 the applicants sought the annulment of Decision 1999/60.

6 On 5 February 1999 Isoplus — Rosenheim, Isoplus — Hohenberg and Isoplus — Sondershausen each transferred EUR 770 000, that is to say EUR 2 310 000 in all, to the Commission as payment on account of the fine imposed. Those payments were thus made within the period of three moths laid down in Article 4 of Decision 1999/60. The amount of the fine yet to be paid by the applicants is thus EUR 2 640 000 excluding interest.

7 By separate document lodged at the Registry of the Court of First Instance on 10 February 1999 the applicants applied, under Article 185 of the EC Treaty

(now Article 242 EC), for suspension of the operation of Articles 3(d) and 4 of Decision 1999/60 until final judgment is delivered in the main proceedings and, under the first sentence of the fourth paragraph of Article 192 of the EC Treaty (now Article 256 EC), for suspension of the enforcement of the same provisions of that decision until final judgment is delivered in the main proceedings. They also claimed that the Commission should be ordered to pay the costs.

8 The Commission submitted its observations on the present application for interim relief on 21 February 1999.

9 The parties presented oral argument on 22 March 1999. At the applicants' request, Dr Reimnitz, an auditor, was also heard. At the close of the hearing, the judge hearing the application decided to allow the parties until 1 May 1999 to negotiate an amicable settlement. The parties heard on that point were agreeable to the grant of additional time.

10 On 30 April 1999 the applicants lodged their observations on the progress of the negotiations and proposed limiting the scope of the application for interim relief. It is clear from those observations that an amicable settlement has proved impossible. The applicants annexed further documents to their observations, relating to the negotiations between the parties, and documents evidencing the rejection of their application for a bank guarantee. In those observations they ask the Court of First Instance to:

(a) suspend the operation of Article 3(d) and (4) of Decision 1999/60, in accordance with the second sentence of Article 185 of the Treaty, until

15 December 2000, but not beyond the date of the judgment bringing the main proceedings to a conclusion, provided that, within the four weeks following the decision to be given on the present application, a bank guarantee for a sum of EUR 1 500 000 plus interest as from 14 February 1999, representing part of the fine, is furnished to the Commission and, before 15 December 1999, an amount of EUR 350 000 is paid by bank transfer to the Commission;

(b) suspend enforcement of the same provisions of the above decision, in accordance with the first sentence of the fourth paragraph of Article 192 of the Treaty, until 15 December 2000, but not beyond the date of delivery of the judgment bringing the main proceedings to a conclusion, provided that, within the four weeks following the decision to be given on the application made under the second sentence of Article 185 of the Treaty, a bank guarantee for the sum of EUR 1 500 000 plus interest as from 14 February 1999, representing part of the fine, is furnished to the Commission and, before 15 December 1999, the sum of EUR 350 000 paid by bank transfer to the Commission;

(c) order the Commission to pay the costs.

11 The Commission also lodged its observations on the negotiations between the parties on 3 May 1999.

Law

12 Under the combined provisions of Articles 185 of the Treaty and 186 of the EC Treaty (now Article 243 EC) and Article 4 of Decision 88/591/ECSC, EEC Euratom of 24 October 1998 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 suspension of the operation of the contested measure or prescribe other necessary interim measures.

13 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications relating to 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 requirements are cumulative, so that an application for interim measures must be dismissed if one of them is absent (order of the President of the Court of First Instance of 15 July 1998 in Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 25). It is also incumbent upon the judge hearing applications for interim measures to balance the interests involved (order of the Court of Justice in Case C-180/96 R *United Kingdom* v *Commission* [1996] ECR I-3903, paragraph 44).

14 Before giving a decision on this application for interim measures, it is appropriate to define precisely the purpose of the procedure. The applicants submit, in their application, first, that operation of Decision 1999/60 should be suspended, in so far as Article 3(d) thereof imposes on them a fine of which EUR 2 640 000

remains outstanding, and second, that enforcement of that decision should be suspended.

15 It is common ground that, in its letter of 12 November 1998 notifying that decision, the Commission explained to the applicants that, if they brought proceedings before the Court of First Instance, no action would be taken to recover the fine whilst the proceedings were pending before that court, provided that the amount due would bear interest as from the end of the period within which the fine was required to be paid and that a bank guarantee acceptable to the Commission in respect of the amount of the principal debt and interest thereon and any amounts added to it was furnished by that date.

16 In those circumstances, the applicants' application for suspension of operation can have no other useful purpose than seeking a release from the obligation to provide a bank guarantee as a condition for recovery of the outstanding amount of the debt imposed by Decision 1999/60 not being immediately pursued.

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

18 It should also be pointed out that the application for suspension of the enforcement of Decision 1999/60 has become devoid of purpose. As the Commission indicated in its observations, without being contradicted on that point by the applicants, it has not taken any measure in this case on the basis on Article 192 of the Treaty. Furthermore, as is apparent from the case-law, it is reasonable in circumstances such as those of this case to consider that an application seeking to prevent enforcement of a decision also implies suspension of the operation of that decision which, if granted, would prevent enforcement, as a precautionary measure (order in *AEG* v *Commission* cited above, paragraph 1).

Arguments of the parties

19 The applicants contend that their application for annulment in the main proceedings is neither inadmissible nor unfounded. They put forward, referring essentially to the pleas and arguments relied on in the main proceedings, six main arguments. First, HFB KG and HFB Holding were not heard during the administrative procedure and did not have the statement of objections notified to them, which infringes their rights of defence. Second, the same applicants were not legally constituted until 1997 and are not successors of the undertakings which committed the infringements penalised by Decision 1999/60, so that they cannot have infringed the competition rules. Third, all the applicants criticise the Commission for addressing that decision to the Henss/Isoplus group, even though the latter cannot be a party to the administrative procedure or the judicial proceedings. Fourth, they contend that the companies which the Commission groups together under the name 'Henss/Isoplus' do not constitute a de facto group. Fifth, the applicants deny any participation in the infringements committed before October 1994 and allegedly proved by the Commission. Sixth, and last, they criticise the fine as being disproportionate in comparison with that

imposed on the other undertakings producing pre-insulated pipe concerned by Decision 1999/60.

20 The applicants also submit that the interim measures applied for are necessary to ensure that they do not suffer serious and irreparable harm deriving from their obligation to pay, on the prescribed date, the sum of EUR 2 640 000, excluding interest, the balance of the total fine which remains outstanding. If those interim measures were not granted, their very existence would be threatened, since, without liquid funds, they would be obliged to apply to the competent national courts for insolvency proceedings to be commenced, which might result in the undertakings being closed and wound up.

21 The applicants state that the payment of EUR 2 310 000 made by them on account of the fine exhausted their liquid funds. Moreover, because of their poor financial situation, they are not in a position to provide the Commission with a bank guarantee for the amount outstanding. They can neither provide the banks with the security required to obtain a guarantee covering the outstanding amount nor pay the attendant costs.

22 The Commission contends that none of the six arguments put forward by the applicants is well founded. It adds that they cannot claim that special circumstances in this case exist such as to justify suspension of the obligation to provide a bank guarantee.

23 The Commission also states that, in order to establish whether the condition regarding urgency is fulfilled, it is appropriate to take account of the possibilities which members may have to assist the undertaking in providing a bank guarantee (see, to that effect the order of the President of the Court of First Instance in Case T-295/94 R *Buchmann* v *Commission* [1994] ECR II-1265, paragraph 26). That applies, in particular, to the possibility of providing such security as the banks might require. In that connection, the applicants have produced no specific information or, *a fortiori*, adduced evidence.

24 Moreover, the Commission states that the applicants have failed to provide the information and evidence necessary for proper evaluation of their chances of survival and of the impact which the new loans might have on their present indebtedness.

Findings of the judge hearing the application for interim measures

25 As a preliminary point, it must be borne in mind that, according to settled case-law, in the context of his overall examination of an application for suspension of operation and for other interim measures, the judge hearing the application has a wide discretion 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 (order of the President of the Court of Justice of 17 December 1998 in Case C-364/98 P(R) *Emesa Sugar* v *Commission* [1998] ECR I-8815, paragraph 44).

26 It must be pointed out that the pleas put forward by the applicants, in particular their contention that the participation of the Henss/Isoplus group in the

infringements committed before October 1994 has not been proved, do not *prima facie* appear to be entirely unfounded, and deserve detailed consideration. A detailed factual and legal consideration of that kind goes beyond the scope of the present proceedings, for interim relief.

27 In those circumstances, it must be held that the condition relating to the establishment of a *prima facie* case is here satisfied (order of the President of the Court of First Instance in Case T-308/94 R *Cascades* v *Commission* [1995] ECR II-265, paragraphs 49 and 50).

28 As regards the condition relating to urgency, it must be pointed out that, according to settled case-law, an application for suspension of the operation of a decision, to the extent to which it imposes a fine, can be upheld only if there are exceptional circumstances. It is consequently necessary to appraise the urgency of the interim measures applied for by examining whether the enforcement of the contested measure prior to any decision on the substance would be liable to cause the parties seeking those measures serious and irreversible damage which could not be made good even if the contested decision were ultimately annulled by the Court. In any event, it is for the applicant to prove that it cannot await the outcome of the main proceedings without suffering such damage. Furthermore, the decision to suspend also presumes that the balance of the interests concerned is in favour of granting that measure (order of the President of the Court of First Instance in Case T-104/95 R *Tsimenta Chalkidos* v *Commission* [1995] ECR II-2235, paragraph 19).

29 It is also clear from the case-law that it is not necessary for it to be established with absolute certainty that the harm is imminent. It is sufficient that the harm in question, particularly when it depends on the occurrence of a number of factors, should be foreseeable with a sufficient degree of probability (order of the

President of the Court of Justice in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2195, paragraph 38).

30 In those circumstances, it must be pointed out that, to prove that serious and irreversible harm is imminent, the applicants have produced balance sheets, a summary auditor's report on their cash-flow and other information from banking establishments. However, Doctor Reimnitz, the auditor who wrote the report, stated at the hearing that he had not examined the 1998 accounts.

31 Although the balance sheets produced by the applicants indicate that, as at 31 December 1998, they had no longer sufficient liquid funds to pay the balance of the fine and in fact were experiencing a cash-low deficit of about DEM 5 525 000, the fact remains that three of them were in a position to pay EUR 2 310 000 on 5 February 1999 — a payment which, moreover, is not recorded in the figures produced — which suggests that the figures produced failed to disclose substantial reserves or, at least, that there is real uncertainty on this point.

32 The applicants also admitted at the hearing that the 'long-term — that is to say, a term exceeding one year — liquid funds' of which they might avail themselves

had not been taken into account in the summary report. In that connection Doctor Riemnitz observed that it was important to determine whether the long-term survival of the undertaking was possible and whether or not the figures were conducive to that hypothesis, so that the 'short-term liquidity' should not be the only funds taken into account.

33 In view of the foregoing, it must be held that no conclusion can be drawn from the unaudited figures produced by the applicants.

34 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.

35 Furthermore, in the group's consolidated balance sheet as at 31 December 1998, annexed to the summary report, there is an item under liabilities entitled 'other debts' amounting to about DEM 5 300 000, which are regarded as short-term. At the hearing, the applicants mentioned the existence of set-off arrangements between the controlled companies and the owner thereof involving a substantial amount. Moreover, the applicants have not stated precisely who was their creditor in respect of those debts. There is therefore uncertainty as to the extent to which Mr Henss, who is directly or indirectly the principal owner of the five undertakings, is a creditor of them.

36 Moreover, the applicants have not made any attempt to prove that Mr Henss, as direct or indirect owner of the five undertakings, is not in a position to assist them in providing a bank guarantee. By limiting the application for interim measures lodged on 30 April 1999, the applicants have demonstrated that Mr Henss, together with his wife and two other members, still possessed resources enabling them to provide, through HFB KG and HFB Holding, a bank guarantee of the order of EUR 1 500 000. In that connection, it would seem appropriate, as is also clear from the case-law, to take account of the possibilities available to members to assist the company in providing a bank guarantee (order in *Buchmann* v *Commission* cited above, paragraph 26).

37 Furthermore, the applicants have produced no evidence to show that it is wholly impossible to obtain a bank guarantee for the amount outstanding. Only Isoplus — Rosenheim and Isoplus — Hohenberg have produced statements from banking institutions confirming their refusal to grant such a bank guarantee. Moreover, those two applicants approached only three banks with which they had habitual dealings. The applicants did not see fit to produce similar statements for the three other applicants, even though Isoplus — Sondershausen was, on 5 February 1999, in a position to pay EUR 770 000 to the Commission and, according to their balance sheets as at 31 December 1998, HFB KG and HFB Holding possessed liquid funds.

38 In view of the foregoing, the applicants have not produced evidence to show that the risk of bankrupcy or liquidation is forseeable 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. 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 (see, to that effect, the order in *Laakmann Karton* v *Commission*, cited above, paragraph 28), the object of such proceedings being, on the contrary, to seek to repair the situation of the undertakings concerned.

39 It is clear from the foregoing that the applicants have not shown that enforcement of Decision 1999/60, the annulment of which they seek in their main action, might cause them serious and irreparable harm which could not be remedied even if the decision was annulled by the Court of First Instance.

40 The application for interim measures must therefore be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 9 July 1999.

H. Jung

Registrar

B. Vesterdorf

President