ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
14 December 2000 *

In Case T-5/00 R,

Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebeid, established in The Hague (Netherlands), represented by E.H. Pijnaker Hordikj, of the Amsterdam Bar, S.B. Noë, of the Bar of The Hague, and M.S.H. de Ranitz, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by W. Wils, 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: Dutch.

APPLICATION for partial suspension of operation of Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty in 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),

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

makes the following

Order

Facts and procedure

1 The applicant, Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (hereinafter 'the FEG') is an association incorporated under Netherlands law. Its members are engaged in the wholesale trade in the electrotechnical sector in the Netherlands. Its object under its articles of association is to protect the common interests of stockkeeping wholesalers of electrotechnical products.

2 Article 1 of Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty (OJ 2000 L 39, p. 1, hereinafter 'the Decision'), finds that the applicant had infringed Article 81(1) EC

by entering into a collective exclusive dealing arrangement intended to prevent supplies to non-members of the FEG, on the basis of an agreement with NAVEG (a Netherlands association whose members are sole representatives in the electrotechnical sector) and of practices concerted with suppliers not represented in NAVEG.

3 According to Article 2 of the Decision, the applicant had also infringed Article 81(1) EC by directly and indirectly, by various means, restricting the freedom of its members to determine their selling prices independently.

4 Technische Unie BV, 'the largest wholesale distributor of electrotechnical fittings in the Netherlands and thus at the same time the largest FEG member', had, according to Recital 9 in the preamble to and Article 3 of the Decision, taken an active part in the infringements referred to above.

5 According to Article 5 of the Decision:

'1. For the infringements referred to in Articles 1 and 2, a fine of EUR 4.4 million is imposed on the FEG.

2. For the infringements referred to in Article 3, a fine of EUR 2.15 million is imposed on TU.'

6 The fine imposed on the applicant had, pursuant to Article 6 of the Decision, to be paid within three months of the date of notification of that Decision. The

Decision was notified by the Commission's letter of 8 November 1999. In that letter the Commission stated that, in the event of an appeal being brought before the Court of First Instance, no steps would be taken to recover the fine whilst the case was pending before that court, provided that the amount owing carried interest and an acceptable bank guarantee was furnished.

7 By an application lodged at the Registry of the Court of First Instance on 17 January 2000 and registered as Case T-5/00, the applicant brought an action seeking annulment of the Decision.

8 The time-limit set under Article 6 of the Decision expired on 8 February 2000.

9 On 17 February 2000, the Commission received a fax from the applicant's lawyer confirming that he was to act on its behalf, both in the action for annulment before the Court of First Instance and in subsequent dealings with the Commission.

10 By letter of 25 February 2000, the Commission informed the applicant that the time-limit for it to pay the fine imposed or to provide a bank guarantee had already expired. It also stated that, should the applicant not provide a bank guarantee, duly taking into account default interest at a rate of 6% (hereinafter 'the required guarantee'), no later than 15 days after receipt of the letter, the Commission would commence judicial recovery of the principal sum plus interest accruing up to and including the date of actual payment of the fine.

11 After receiving that letter, the applicant requested a meeting with Commission staff. At the meeting, which took place on 12 April 2000, the applicant stated

that it was not in a position either to pay the fine imposed or to provide the required guarantee. The Commission replied that it would nevertheless initiate judicial recovery, since it believed that the FEG members were able to help it furnish the required guarantee.

12 Accordingly, the Commission instigated with the Dutch authorities the procedure under Article 256 EC for obtaining an order for enforcement, whilst the applicant, by letter of 21 April 2000, reiterated that it could neither pay the fine nor provide the required guarantee. There was a further exchange of correspondence in the same vein after that date.

13 By application lodged at the Registry of the Court of First Instance on 28 August 2000, CEF City Electrical Factors BV (hereinafter 'CEF City'), a company incorporated under Netherlands law, and CEF Holdings Ltd (hereinafter 'CEF Holdings'), a company incorporated under English law, both represented by Catharina M.H.C. Vinken-Geijselaers, of the 's-Hertogenbosch Bar, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Medernach, 8-10 Rue Mathias Hardt, applied for leave to intervene in the main proceedings in support of the form of order sought by the Commission.

14 Since the order for enforcement required under Article 256 EC had been appended to the decision to recover the sum in June 2000, the Commission served that order on the applicant, by means of a Netherlands process server, on 22 September 2000.

15 By a separate document, lodged at the Registry of the Court of First Instance on 25 September 2000, the applicant lodged an application pursuant to Article 242 EC for suspension of operation of the Decision until the end of the second month after delivery of judgment in the main proceedings. It also applied for an order for costs against the Commission in the interim proceedings.

16 On the same day, the Commission informed the applicant's lawyer by fax that no new enforcement measure would be taken until the Court of First Instance had disposed of the present application.

17 On 11 October 2000, the Commission lodged its observations on the application for suspension, in which it asked the Court to dismiss the application.

18 By order of 16 October 2000, the President of the First Chamber of the Court of First Instance gave leave to CEF City and CEF Holdings to intervene in support of the form of order sought by the Commission in the main proceedings. On 18 October 2000 those two companies, which were unaware of the above-referred order of 16 October 2000, applied to intervene in the procedure for interim relief.

19 The applicant amended its application for interim relief by a letter received at the Registry of the Court of First Instance on 25 October 2000. It stated that it was prepared to endeavour to obtain a bank guarantee corresponding to its own assets as at the end of the 1999 business year. It accordingly requested the judge hearing the interim application to grant its request, with the added condition that it should, within one month of the order suspending operation, lodge a bank guarantee for 401 417 Dutch guilders (NLG), or EUR 182 155 (hereinafter 'the proposed guarantee').

20 The judge hearing the application for interim measures heard the representations of the parties, including CEF City and CEF Holdings, at the hearing on 26 October 2000.

21 By letter of 6 November 2000, the applicant indicated that its members were not willing to provide a bank guarantee in a sum higher than the proposed guarantee, nor to negotiate with the Commission as to the possibility of doing so.

22 In view of that stance on the part of the applicant, the Commission, by letter of 13 November 2000, maintained its request that the application for interim measures be dismissed.

The application for leave to intervene

23 At the hearing, the applicant argued that the application of 18 October 2000 by CEF City and CEF Holdings to intervene in the procedure for interim relief should not be granted, alleging that they had no legal interest in supporting the form of order sought by the Commission which, since the latter asked the Court to refuse the suspension sought, could lead to its becoming insolvent.

24 That argument cannot be accepted.

25 Since interim proceedings are incidental to the main proceedings, a party which has already been given leave to intervene in support of a defendant institution in the main action for annulment of a decision adopted by that institution has in principle an interest in supporting the form of order sought by the latter in interim proceedings inasmuch as it to asks the Court to uphold that decision (see,

to that effect, Case 71/74 R and RR *Fruit- en Groentenimporthandel* v *Commission* [1974] ECR 1031, at 1033).

26 In the present case, the President of the First Chamber of the Court of First Instance, in the above order of 16 October 2000, acknowledged the right of CEF City and CEF Holdings to intervene in support of the form of order sought by the Commission in the main proceedings. In reaching that conclusion he pointed out (paragraph 6 of the order) that a party seeking leave to intervene in an action before the Court of First Instance 'must establish an interest in the result of that case, in accordance with Article 37 of the EC Statute of the Court of Justice' and that 'in an action against a decision adopted by the Commission following a complaint alleging agreements or practices which restrict competition, the person who has lodged that complaint establishes such an interest, in particular where that person has, thereafter, participated in the procedure before the Commission (see Case T-24/93 R *CMBT* v *Commission* [1993] ECR II-543, paragraphs 15 and 16, and Case T-367/94 *British Coal* v *Commission* [1997] ECR II-469, paragraph 31)'. As the order of 16 October 2000 states in paragraph 7, that is true of CEF City and CEF Holdings in the present case.

27 It should be remarked, furthermore, that it is not inconceivable that those companies suffered loss as the result of the infringements which were found to have occurred in the Decision. Suffice it to state, in that regard, that, when they sought leave to intervene in support of the form of order sought by the Commission in these proceedings, the applicant's request for interim measures sought suspension of operation of the Decision, with no condition or limitation.

28 It is clear from the foregoing that suspending operation of the Decision could, as could its annulment, adversely affect the interests of CEF City and CEF Holdings. Since those companies therefore have an interest in intervening in the present procedure for interim relief, it follows that their application for leave to intervene must be granted.

Law

29 First of all, the precise subject-matter of this application for interim measures must be defined.

30 In its application, as amended by its letter received on 25 October 2000, the applicant seeks suspension of operation of the Decision until the end of the second month following delivery of judgment in the main proceedings, provided the proposed guarantee is provided.

31 It should be pointed out that the only provisions of the Decision in whose suspension the applicant has an interest are Article 4(1), Article 5(1) and Article 6, in so far as they order, first, that it must bring the infringements referred to in Articles 1 and 2 to an end forthwith, if it has not already done so, second, the imposition of a fine of EUR 4.4 million on the applicant and, third, that the fine referred to must be paid within three months of the date of notification of the Decision.

32 As regards the obligation set out in Article 4(1) of the Decision, it is not apparent, either from its observations submitted in these interim proceedings or from the correspondence and exchanges which have taken place between the parties, that the applicant seeks suspension of that obligation.

33 It follows that the present application must be understood as seeking only suspension of operation of the two obligations set out in Article 5(1) and Article 6 of the Decision.

34 It is not in dispute in this case (see paragraphs 6, 10 and 16 above) that the Commission stated that no steps would be taken to recover the fine whilst the main action was pending before the Court of First Instance, provided the applicant furnished the required guarantee. Under those circumstances, the suspension of operation sought can have no effective purpose other than to obtain authorisation to furnish the proposed guarantee instead of the required guarantee as a condition of the Commission's not immediately recovering the fine imposed by the Decision (see, to that effect, Case T-191/98 R *DRS-Senator Lines* v *Commission* [1999] ECR II-2531, paragraph 58).

35 By virtue of the combined provisions of Article 242 EC and Article 243 EC and of Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

36 Article 104(2) of the Rules of Procedure establishes that an application for interim relief must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measured applied for. Those requirements are cumulative, so that an application for suspension of operation must be dismissed if one of them is not met (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, and order of the President of the Court of First Instance in Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 25).

Arguments of the parties

Prima facie case

37 The applicant sets out succinctly in its application the pleas advanced in its main action which, in its view, establish a prima facie case as regards the present application. Those pleas allege, first, infringement of the principle that decisions must be given within a reasonable period and of the rights of the defence, second, incorrect definition of the relevant market, third, that there was no collective exclusive dealing arrangement or pricing agreement between its members and, fourth, that the fine is excessive.

38 The Commission, whilst denying that those pleas are founded, considers that the issue of whether there is a prima facie case can be left unresolved since the application for suspension of operation lacks urgency.

The requirement of urgency

39 The applicant contends that the Commission does not dispute that judicial enforcement of the Decision would lead inevitably to its being declared insolvent, which would cause it serious and irreparable harm.

40 The applicant asserts that neither Netherlands law nor its own rules allow it to require its members or former members to pay the fine imposed or provide the required guarantee, and that they could not do so spontaneously since they are not under a legal duty to do so.

41 Furthermore, Community law does not, in its view, allow an association of undertakings to require its members to pay a fine imposed on that association. The applicant refers, on that point, to paragraph 127 of the White Paper modernising the rules for implementing Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC) of 28 April 1998, in which the Commission is said to acknowledge that the fact that Article 15 of Council Regulation No 17 of 16 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) does not lay down the principle that members of an association are jointly liable could prevent recovery of fines. By requiring the applicant's members to provide a bank guarantee, the Commission is seeking to circumvent the fact that it is impossible to recover the fine from them.

42 At the hearing, the applicant pointed out that, even if Article 6(5) of its rules does give the association's general meeting power to increase its members' annual subscriptions, such an increase could not under any circumstances be as much as EUR 4.4 million, that is, 18 to 20 times the total amount of the contributions paid at the time. Moreover, the power of the FEG's Board of Directors to require supplementary payments from members is intended only to cover overspending on expenses limited in the budget, and the amount of those payments can never come close to that of the annual subscription. In any event, it asserts, the Board of Directors is under the control of the general meeting which appoints it.

43 Since pursuing judicial recovery of the fine would lead unavoidably to its becoming insolvent, the applicant argues that such an enforcement measure would in all probability deprive it of its means of seeking redress, since its receiver or court-appointed liquidator, in the event of insolvency, would be unlikely to consider that it was in the interests of all the creditors to spend yet more money in pursuing the main action to its conclusion.

44 Under those circumstances, the applicant believes that the requirement of urgency is satisfied.

45 The Commission, citing the order of the President of the Court of First Instance in Case T-18/96 R *SCK and FNK* v *Commission* [1996] ECR II-407, as confirmed on appeal by the order in Case C-268/96 P(R) *SCK and FNK* v *Commission*, referred to above, argues that it is permissible to seek judicial recovery of the fine before the Court of First Instance has delivered judgment in the main proceedings. According to the Commission, in assessing the alleged risk of serious and irreparable harm to an association, such as the applicant, whose object is to protect the interests of its members and which is subject to their decision-making powers, arising from being required to pay a fine or to provide a bank guarantee, the financial situation of those members should be taken into consideration.

46 The Commission, referring to Recital 6 in the preamble to the Decision, notes that in 1994 the applicant's members recorded a joint turnover of around EUR 1 billion. This means that, even if their turnover had not increased in the meantime, the fine imposed, of EUR 4.4 million, is less than 0.5% of that turnover. It points out that Article 6(5) of the applicant's internal rules allows it to require an additional contribution from its members over and above their normal subscription. FEG members are not therefore, in its view, in any way prevented from coming to its assistance should they wish to do so.

47 In relation to the proposed guarantee, at the hearing the Commission expressed doubts as to whether the amount of that guarantee represented the value of the FEG's assets as at the end of 1999. Those doubts are, it maintains, reinforced by the fact that the members of the FEG are willing to make it possible to furnish the proposed guarantee.

48 In consequence, even if judicial recovery of the fine were to lead to the insolvency of the applicant, there would, it asserts, be no direct and inevitable causal nexus between enforcement and that insolvency. The decisive intervening factor would be the decision of the FEG members not to support the association financially.

49 CEF City and CEF Holdings drew attention at the hearing to the fact that the applicant had, since 1995, at the latest, been aware of the risk of incurring a fine and had resolved, at its general meeting of 20 November 1995, to create a reserve intended to cover the costs involved in its defence, at both Community and national levels, in connection with any decision against it by the Commission. Since the FEG members were prepared, apparently without limitation, to pay such costs, enforcement of the fine would not cause them any loss, at least in terms of their own assets. What is more, the willingness of the FEG members to bear those costs is evidence that they have an interest in paying the fine to prevent the association from becoming insolvent.

50 The Commission, supported by CEF City and CEF Holdings, argues that the requirement of urgency is therefore not made out in the present case.

Findings

51 It is necessary, in this case, to examine whether the requirement of urgency is satisfied.

52 Since the purpose of this application is, as stated in paragraphs 30 to 34 above, to obtain authorisation to provide the proposed guarantee instead of the required guarantee, as a condition of the Commission's not immediately recovering the fine imposed on the applicant by the Decision, it should be observed, first of all, that, according to settled case-law, such an application can be granted only in exceptional circumstances (Case 107/82 R *AEG* v *Commission* [1982] ECR 1549, paragraph 6; Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 55; and Case C-364/99 P(R) *DRS-Senator Lines* v *Commission* [1999] ECR I-8733, paragraph 48). In the context of applications

for interim relief, express provision is made in the Rules of Procedure of both the Court of Justice and the Court of First Instance for requiring a guarantee to be lodged, which is a general and reasonable policy pursued by the Commission.

53 It is necessary, therefore, to examine whether the applicant has established that there are such exceptional circumstances, that is, that it is impossible for it to lodge the required guarantee without jeopardising its existence (Case T-59/99 R *Ventouris* v *Commission* [1999] ECR II-2519, paragraphs 16 and 18).

54 It should next be noted that, where Article 81(1) EC is infringed as a result of a decision of an association of undertakings, the ceiling of the fine, equivalent to 10% of the turnover in the preceding business year (Article 15(2) of Regulation No 17), must be calculated on the basis of the turnover of all the member undertakings of the association, at least where its internal rules permit it to hold its members liable (Case T-18/96 R *SCK and FNK* v *Commission*, cited above, paragraph 33, confirmed, on appeal, in Case C-268/96 P(R) *SCK and FNK* v *Commission*, cited above, 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 economic power (Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 137; Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 385; and Case T-18/96 R *SCK and FNK* v *Commission*, cited above, paragraph 33).

55 It is material, accordingly, to examine whether the articles of association and internal rules of the FEG contain provisions which permit it to hold its members liable.

56 Under Article 2(1), Article 2(3)(f) and Article 2(3)(g) of its articles of association, the object of the 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 meetings'. It is apparent from Article 5(1)(c) and Article 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.

57 As regards the infringements found against the applicant in Articles 1 and 2 of the Decision, 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 the Decision, to the fact that the association's conduct which led to the alleged agreements, namely the collective exclusive dealing arrangements and the pricing agreements between its members, was binding on its members. Although the applicant disputes that the Commission's conclusions in the Decision as to the existence of those infringements are well founded, nothing in the documents before the Court suggests, on an initial analysis, that implementation of the alleged agreements did not reflect the interests of its members.

58 Consequently, the applicant's interests cannot prima facie be considered to be independent of those of its member undertakings.

59 It follows that, according to the case-law referred to above, assessment of the likelihood of serious and irreparable harm which would arise, in the present case, from provision of the required guarantee, must be on the basis of the size and economic power of the FEG member undertakings.

60 The Commission has stated, and the applicant has not challenged it on that point, that the fine represents less than 0.5% of the joint turnover of FEG members for 1994. There are therefore grounds for assuming that the FEG members have sufficient financial capacity to pay the fine imposed or, at least, to provide the required guarantee.

61 Accordingly, the applicant has failed to establish that enforcement of Article 5(1) and Article 6 of the Decision before the Court of First Instance has given judgment in the main proceedings would be liable to cause the serious and irreparable harm alleged, consisting of its potential insolvency.

62 The applicant's arguments in relation to the proposed guarantee cannot affect that conclusion.

63 The mere fact that the applicant has declared itself willing to provide such a guarantee, even if the latter does represent the supposed value of its assets as at the end of 1999, the year in which the fine was imposed, is immaterial. It emerges clearly from the applicant'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 which would be covered by the proposed guarantee reflects only that portion which a number of FEG members have agreed they must ultimately bear in order to enable the FEG to continue its main action. The applicant has produced no evidence that those members are unable to raise the necessary funds to provide the required guarantee.

64 It follows from the foregoing that the applicant has not succeeded in establishing that, should the interim measures requested not be granted, it would suffer serious and irreparable harm.

65 The application for interim measures must therefore be dismissed, and it is not necessary to examine whether the remaining requirements for grant of the suspension sought are met.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **CEF City Electrical Factors BV and CEF Holdings Ltd are granted leave to intervene in support of the form of order sought by the defendant in the procedure for interim relief.**

2. **The application for interim measures is dismissed.**

3. **The costs are reserved.**

Luxembourg, 14 December 2000.

H. Jung — Registrar

B. Vesterdorf — President