ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
20 December 2001 *

In Case T-214/01 R,

Bank für Arbeit und Wirtschaft AG, established in Vienna (Austria), represented by H.J. Niemeyer, lawyer,

applicant,

v

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

defendant,

APPLICATION principally for suspension of the operation of Decision COMP/D-1/36.571 of 25 July 2001 and, in the alternative, for an order enjoining the Commission not to transmit the statement of objections of 10 September 1999

* Language of the case: German.

and the supplementary statement of objections of 21 November 2000 in Case COMP/36.571 to the Freiheitliche Partei Österreichs,

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

makes the following

Order

Facts and procedure

1 The applicant is an Austrian credit institution.

2 On 6 May 1997 the Commission became aware of a document entitled 'Lombard 8.5' and, in the light of that document, initiated upon its own initiative a proceeding for infringement of Article 81 EC against the applicant and seven other Austrian banks pursuant to Article 3(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

3 By letter dated 24 June 1997, the Freiheitliche Partei Österreichs ('the FPÖ') sent the document 'Lombard 8.5' to the Commission and asked it to commence proceedings for infringement of Article 81 EC against eight banks, including the applicant.

4 By letter dated 26 February 1998, the Commission informed the FPÖ, in the context of proceeding COMP/36.571 and in accordance with Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 17), that it intended to refuse its application. The Commission justified its position by stating that only persons or associations of persons with a legitimate interest, within the meaning of Article 3(2) of Regulation No 17, are entitled to make an application aimed at bringing an infringement to an end.

5 The FPÖ replied, by letter dated 2 June 1998, that the party and its members are involved in economic life and are therefore affected financially. It indicated that it carries out numerous banking transactions every day. For those reasons, it again applied to participate in the infringement procedure and thus to be acquainted of the objections.

6 On 16 December 1998 the banks involved sent to the Commission, in connection with proceeding COMP/36.571, a joint summary of the facts, accompanied by 40 000 pages of supporting documents. In a preliminary note, they asked the Commission to treat this summary as confidential. The note stated:

'The attached summary of the facts may be consulted by all the banks involved in proceeding IV/36.571. The Commission is asked, under Article 20 of Regulation No 17/62, not to disclose its contents to third parties.'

7 By letter of 13 September 1999, the Commission sent the applicant the statement of objections of 10 September 1999, in which it alleged that the applicant had concluded anti-competitive agreements with other Austrian banks relating to the fees and conditions applicable to customers — both individuals and undertakings — and had thus infringed Article 81 EC.

8 At the beginning of October 1999 the Commission informed the applicant orally of its intention to transmit to the FPÖ all the objections drawn up in connection with the proceeding, in accordance with Article 7 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18).

9 The applicant responded with two letters dated 6 and 12 October 1999, in which it indicated that the FPÖ did not have a legitimate interest within the meaning of Article 3(2) of Regulation No 17 and could therefore not be regarded as an applicant within the meaning of that provision.

10 The Commission replied by letter dated 5 November 1999. It indicated that the FPÖ, as the customer of a bank, had a legitimate interest in receiving the objections in accordance with Article 7 of Regulation No 2842/98. At the same time, it sent the applicant a list of the passages that were not to be communicated to the FPÖ.

11 On 18 and 19 January 2000 a hearing was held to examine the conduct complained of in the statement of objections of 10 September 1999. The FPÖ did not take part in that hearing.

12 The Commission sent the applicant a supplementary statement of objections on 21 November 2000, in which it alleged that the applicant had concluded anti-

competitive agreements with other Austrian banks relating to bank fees for exchanging currencies for euros.

13 A second hearing took place on 27 February 2001, which again the FPÖ did not attend.

14 By letter dated 27 March 2001, the hearing officer informed the applicant that the FPÖ had repeated its request for a non-confidential copy of the statements of objections and that he intended to respond favourably. The hearing officer attached to his letter a list which, in his opinion, should protect business secrets and which provided for the names of various individuals and the descriptions of their functions to be deleted. The hearing officer also indicated that only Annex A to the statement of objections of 10 September 1999, which contained a list with references to all the documents attached to that statement of objections but not the documents themselves, was to be transmitted.

15 By letter dated 18 April 2001 the applicant again objected to the transmission of the objections.

16 By letter of 5 June 2001 the hearing officer confirmed his view and added that the fact that the FPÖ had been accorded the status of an applicant could not be challenged in separate legal proceedings.

17 By a letter of 25 June 2001 to the hearing officer, the applicant reiterated its position and asked to be informed of further developments in the proceeding.

18 Finally, by a letter from the hearing officer notified on 25 July 2001, the applicant was informed of the decision closing in its regard the procedure in Case COMP/36.571 relating to the transmission of the statement of objections of 10 September 1999 and the supplementary statement of objections of 21 November 2000 to the FPÖ (the 'contested decision').

19 By application lodged at the Registry of the Court of First Instance on 19 September 2001, the applicant brought an action for annulment of the contested decision.

20 By a separate document lodged at the Registry of the Court of First Instance on the same date, the applicant lodged this application for interim measures, seeking, principally, suspension of operation of the contested decision and, in the alternative, an order enjoining the Commission not to transmit the statement of objections of 10 September 1999 and the supplementary statement of objections of 21 November 2000 in Case COMP/36.571 to the FPÖ.

21 On 5 October 2001 the Commission submitted its observations on the present application for interim measures.

22 The parties were heard on 8 November 2001. At the end of the hearing, the judge hearing the application for interim measures asked the Commission to indicate whether it was prepared to accept an amicable solution by refraining from transmitting the statements of objections to the FPÖ until judgment had been delivered on the main action, on condition that the applicant consent, in return, to accelerate the procedure by abstaining from lodging a reply and by applying for priority treatment of the case by the Court of First Instance. The judge hearing the application for interim measures gave the Commission until 15 November 2001 to state its position.

23 By letter of 15 November 2001 the Commission stated that it could not accept the amicable arrangement proposed.

24 By fax dated 28 November 2001, the applicant submitted its observations on the Commission's letter of 15 October 2001.

Law

25 Pursuant to 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 circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

26 Under the first subparagraph of Article 104(1) of the Rules of Procedure of the Court of First Instance, an application to suspend the operation of a measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. That rule is not a mere formality, but presupposes that the action as to the substance, from which the application for interim measures is derived, may be heard by the Court of First Instance.

27 Article 104(2) of the Rules of Procedure provides that applications for 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 conditions are cumulative, so that an application to suspend the operation of a measure must be dismissed if any one 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). The judge hearing the applica-

tion must also, where appropriate, balance all the interests at stake (order in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011, paragraph 59).

Admissibility

Arguments of the parties

28 The Commission submits that it is for the judge hearing the application for interim measures to establish that, prima facie, the main application presents features on the basis of which it is possible to conclude with a high degree of probability that it is admissible. In the present case, however, the Commission contends that the main application is manifestly inadmissible.

29 In this regard, the Commission observes that the main application seeks annulment of the contested decision. It maintains that the only decision contained in the contested decision is the rejection of the applicant's request that a new decision be taken not to transmit the statements of objections to the FPÖ, even in a non-confidential version. Elsewhere in the contested decision the hearing officer merely confirmed previous decisions.

30 According to the Commission, in its main application the applicant seeks the adoption of a measure that is manifestly devoid of effect, namely the suspension of operation of a decision denying the admissibility of a request, which would not oblige the Commission to take the decision actually desired by the applicant with regard to whether its request was well founded. The measure sought cannot therefore be ordered in the context of a procedure for interim relief (order of the President of the Court of First Instance in Case T-213/97 R *Eurocoton and Others* v *Council* [1997] ECR II-1609, paragraph 41). Consequently, the Commission contends that the application for interim measures is also inadmissible.

31 According to the Commission, the application is also inadmissible in that the applicant is attempting to prevent any transmission of the statements of objections to the FPÖ before the decision as to the substance, even though the applicant concedes that the versions of the statements of objections which it is intended to transmit do not contain business secrets. The transmission of a non-confidential version of the statements of objections to 'applicants' is in fact compulsory under Article 7 of Regulation No 2842/98. It is not dependent on any decision and is not therefore open to challenge.

32 Moreover, the Commission points out that it had already notified the applicant, by letter dated 5 November 1999, that it intended to proceed in accordance with that provision. The present application does not seek the annulment of a decision that had been adopted at that time.

33 Lastly, any decision by the Commission to 'admit' the FPÖ as an 'applicant' would simply be a measure of organisation of procedure. Such a decision would have no legal effect that would impinge on the applicant's interests by bringing about a distinct change in its legal situation, so that it could not be the subject of a separate challenge. In his letter of 27 March 2001, the hearing officer merely confirmed to the applicant that the FPÖ's interest in submitting an application had been acknowledged and repeated his explanation in this regard. As far as acknowledgement of the FPÖ's interest is concerned, that letter does not constitute a new decision but a simple confirmation that cannot be challenged.

34 The applicant maintains that the contested decision is open to challenge. The announcement in the contested decision that the statements of objections were to be transmitted to the FPÖ definitively determines the position of the hearing officer. The applicant's legal position is therefore irrevocably affected.

35 According to the applicant, it is not simply an intermediate step intended to prepare the ground for a final decision. In Cases 53/85 *AKZO Chemie* v

Commission [1986] ECR 1965, paragraph 17, and T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraph 35, the Court of Justice and the Court of First Instance acknowledged that a letter from the Commission notifying the transmission of documents to an applicant constitutes a decision.

36 The applicant's legal interest in bringing proceedings stems from the possible infringement of its rights to non-disclosure of information contained in the statements of objections if the Commission were to transmit those statements to the FPÖ even before the termination of the main proceeding. According to the applicant, in his letter of 2 August 2001 the hearing officer stated that he would postpone transmission of the statements of objections to the FPÖ only if the applicant applied for interim measures. Such an application was therefore essential to safeguard the applicant's interests.

37 The same applied to the purely alternative application for an order enjoining the Commission not to transmit the objections to the FPÖ before delivery of the judgment in the main proceedings.

Findings of the judge hearing the application for interim measures

38 According to settled case-law, in principle the question of the admissibility of the main application should not be examined in proceedings relating to an application for interim measures, so as not to prejudge the substance of the case. It may nevertheless be found necessary, when, as in this case, it is contended that the main application to which the application for interim measures relates is manifestly inadmissible, to establish whether there are any grounds for concluding prima facie that the main application is admissible (orders of the President of the Court of Justice in Cases 376/87 R *Distrivet* v *Council* [1988] ECR 209, paragraph 21, and C-300/00 P(R) *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council* [2000] ECR I-8797, paragraph 34, and order of the President of the Court of First Instance in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 121).

39 In this case, the judge hearing the application for interim measures considers that, in the light of the arguments put forward by the Commission, it is necessary to ascertain whether the action for annulment is manifestly inadmissible as alleged.

40 It is necessary to ascertain whether, as the Court required in its judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, the contested decision constitutes a measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position, or is simply a preparatory measure, against the possible illegality of which an application relating to the decision terminating the proceeding would provide adequate protection.

41 In this regard, the decision to transmit the statements of objections to the FPÖ formally constitutes an act. That act presupposes a prior decision in which the Commission judged that the FPÖ qualified as an applicant within the meaning of Article 3(2)(b) of Regulation No 17 and that the FPÖ was therefore entitled, under Article 7 of Regulation 2842/98, to receive a copy of the non-confidential version of the statements of objections.

42 As to the decision determining the procedural position of the FPÖ, in its written observations the Commission is able to indicate only that this decision was taken in 1999. However, in his letter of 27 March 2001 the hearing officer indicates that fresh developments in the case led him to re-open a question discussed during the second half of 1999, to which no solution had been found. This was the request from the FPÖ to be considered an applicant within the meaning of Article 3 of Regulation No 17 and hence to be able to participate in the proceeding and obtain non-confidential versions of the statements of objections. It follows prima facie that it was only when the contested decision was adopted that there was a decision determining the procedural position of the FPÖ.

43 As to the letters sent to the applicant by the Commission and the hearing officer before the contested decision, none of them announced that the Commission would automatically transmit non-confidential versions of the statements of objections to the FPÖ. On the contrary, all of those letters gave the applicant the opportunity to submit its observations on the versions of the said statements that might be transmitted. It follows that those letters appear to be preparatory acts, whereas the contested decision contains, prima facie, the Commission's definitive position with regard to the transmission of non-confidential versions of the statements of objections to the FPÖ (see, to that effect, the order in Case T-90/96 *Peugeot* v *Commission* [1997] ECR II-663, paragraphs 34 and 36).

44 These circumstances reinforce the prima facie conclusion that it was only when the contested decision was adopted that a distinct change could be brought about in the legal situation of the applicant and its interests affected.

45 It is undoubtedly correct that any transmission of documents is intended to facilitate investigation of the case. In this regard, and apart from the fact that it cannot be excluded that the contested decision is definitive in nature, the latter must nevertheless be regarded as independent of any decision on the question whether Article 81 EC has been infringed. The opportunity which the applicant has to bring an action against a final decision establishing that the competition rules have been infringed is not of such a nature as to provide it with an adequate degree of protection of its rights in the matter (see, to that effect, Case 53/85 *AKZO Chemie* v *Commission*, cited above, paragraph 20). On the one hand, it is possible that the administrative proceeding will not result in a decision finding that an infringement has been committed. On the other hand, the possibility of bringing an action against such a decision, if taken, will not in any event provide the applicant with the means of preventing the consequences of improper disclosure of the statements of objections in question.

46 In these circumstances, it cannot be excluded that the contested decision constitutes an act open to challenge and hence that it is admissible for the applicant to apply for its annulment under the fourth paragraph of Article 230 EC. Consequently, the admissibility of the present application for interim measures cannot be ruled out.

47 In the circumstances, the judge hearing the application for interim measures considers that it is necessary to examine whether the conditions relating to urgency and the balancing of interests is fulfilled.

Urgency and the balancing of interests

Arguments of the parties

48 The applicant contends that implementation of the contested decision will cause it serious and irreparable damage.

49 According to the applicant, the immediate implementation of the contested decision entails the risk that the FPÖ will make targeted disclosure of the complaints contained in the objections for political purposes. The FPÖ and its leading members have a strategy of systematically bringing legal proceedings against their political opponents in order to reduce them to silence. The applicant therefore contends that it has legitimate fears that the FPÖ and its leading members would use information from the statements of objections to exert pressure on the banks or the members of their boards of directors.

50 The targeted disclosure of details extracted from the objections would, in the view of the applicant, have the effect of encouraging the public to condemn the applicant and the members of its board of directors in advance, of causing considerable harm to the applicant's image and, as a consequence, of causing it irreparable financial damage due to a loss of customers.

51 The prospect of serious and irreparable damage also arises from the fact that in a class action before the District Court of the Southern District of New York a large number of US citizens are claiming damages from several European banks, including the applicant and its subsidiary (Österreichische Postsparkasse) as compensation for allegedly excessive fees charged by those banks for foreign exchange transactions involving sums of cash. This class action has been the subject of numerous detailed articles in the Austrian press. The applicant therefore contends that it may legitimately fear that members of the FPÖ or the press will make the statements of objections available to the plaintiffs in that class action.

52 As the names of the banks are given in the non-confidential version of the statements of objections and the alleged agreements are described in detail, the applicant maintains that the use of the objections will have a very negative impact on the Austrian banks. The supplementary objections, in particular, contain a number of potentially misleading insinuations and unfounded accusations against the applicant. If those objections were formally lodged in the proceedings before the US court, compliance with the principle of equality of the parties before a national court would not be guaranteed (order of the President of the Court of First Instance in Case T-353/94 R *Postbank* v *Commission* [1994] ECR II-1141, paragraph 31).

53 Furthermore, the proceedings before the US court are public. The applicant maintains that widespread disclosure of the objections would entail the risk of further actions brought by other persons on the basis of those objections.

54 Finally, the applicant contends that if the Commission were entitled to transmit the statements of objections to the FPÖ immediately, subsequent annulment of the contested decision would no longer serve any purpose.

55 As to the balancing of interests, the applicant points out that, in view of its arguments with regard to urgency, its interest in obtaining the suspension of operation of the contested decision overrides any interests of the Commission or the FPÖ. Any interest on the part of the Commission to close the proceeding rapidly does not, in the applicant's opinion, deserve protection. The Commission could have taken a definitive decision on the transmission of the objections to the FPÖ as early as October 1999 after hearing the applicant. The dispute as to the legality of that decision could then have been brought before the Court of First Instance and settled two years ago. Moreover, for the judge hearing the application for interim measures to accept the present application would pose no problem for the Commission, other than the delay.

56 The applicant can discern no interest worthy of protection that the FPÖ could claim in opposing the suspension of operation. The FPÖ let almost three years elapse between making its initial application in June 1998 and renewing that application in March 2001. Hence, in the view of the applicant, the suspension of operation sought would not seriously nor disproportionately impede the exercise by the FPÖ of its rights.

57 The Commission contends that the applicant's reasoning with regard to the supposed urgency of its application for interim measures is incomprehensible. The applicant can oppose the transmission of the statements of objections to the FPÖ only if such transmission would lead to 'serious and irreparable damage' as the applicant claims. According to the applicant's own statements, that could happen in only two ways: either as a result of the targeted disclosure of certain details for political purposes or as a result of the use of the statements of objections as evidence in the class action under way in the United States of America.

58 In the Commission's opinion, the way in which a third party might use the statements of objections is relevant for assessing the legality of their transmission only in so far as those statements contain information to which confidential treatment is guaranteed by Community law (Case 53/85 *AKZO Chemie* v *Commission*, cited above, paragraph 17). The applicant replied in the negative to that question in its letter of 18 April 2001. In its application for interim measures the applicant does not explain what makes the versions of the statements of

objections whose transmission the hearing officer announced in his letter of 5 June 2001 confidential.

59 According to the Commission, the Court of First Instance defined the concept of business secrets in the *Postbank* judgment (paragraph 87). That concept is the determinant factor when assessing the transmission of documents. Contrary to what was stated by the Court of First Instance, the applicant does not claim that the mere transmission of the statements of objections will cause it direct harm. The risk of improper use of the statements of objections after their transmission is therefore unconnected with the fact that they contain confidential information.

60 The Commission contends that in any event the applicant could respond to a possible risk of misuse by taking adequate measures and providing additional information. Consequently, priority should be given to the interest of the FPÖ, protected by Regulation No 2842/98, to know how the Commission has reacted to its request seeking termination of the infringements and to have an opportunity to present its observations on the question.

Findings of the judge hearing the application for interim measures

61 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party who requests the interim measure. It is for that party to adduce proof that it cannot await the outcome of the main action without suffering such damage (order of the President of the Court of Justice in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14; orders of the President of the Court of First Instance in Cases T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 36, and T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 43).

62 Although in order to establish the existence of serious and irreparable damage it is not necessary to require absolute proof that no damage will occur and it is enough for it to be foreseeable with a sufficient degree of probability, the applicant is still required to prove the facts opening up the prospect of such serious and irreparable damage (orders of the President of the Court of Justice in Cases C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67, and C-278/00 R, paragraph 15).

63 The serious and irreparable damage alleged by the applicant consists firstly in material damage, namely the loss of customers, and secondly in non-material damage, namely harm to its reputation. Such damage would stem from the prior condemnation which the applicant fears it would suffer in the eyes of third parties and from the probable production, according to the applicant, of the statements of objections in the class action in progress in the United States of America.

64 The alleged material damage, and more specifically the claimed loss of customers, is of a pecuniary nature in view of the fact that it consists in a loss of revenue. However, it is settled case-law that damage of a purely pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation (order of the President of the Court of Justice in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 24, and order of the President of the Court of First Instance in Case T-168/95 R *Eridania and Others* v *Council* [1995] ECR II-2817, paragraph 42).

65 In accordance with those principles, the suspension sought in the present case would be justified only if it appeared that, without such a measure, the applicant would be exposed to a situation liable to endanger its very existence or to restrict its market share irreversibly. The applicant has provided no evidence which gives grounds for considering that without such a suspension of operation it would find itself in such a situation.

66 In any event, it must be concluded that the loss of customers feared by the applicant constitutes purely hypothetical damage in that it assumes the occurrence of future and uncertain events, namely public exploitation of the statements of objections by the FPÖ for the purposes of denigration (see, to that effect, the orders of the President of the Court of First Instance in Cases T-239/94 R *EISA* v *Commission* [1994] ECR II-703, paragraph 20; T-322/94 R *Union Carbide* v *Commission* [1994] ECR II-1159, paragraph 31; and T-241/00 R *Le Canne* v *Commission* [2001] ECR II-37, paragraph 37).

67 As to the serious and irreparable damage that the applicant claims would result from the production of the statements of objections in the class action in progress in the United States of America and the bringing of new proceedings by other persons with the help of these statements of objections, it must be concluded that it too constitutes purely hypothetical damage; it presupposes, first, that the FPÖ will pass the said statements of objections to the plaintiffs in that class action and that those documents will be admitted as evidence by the US courts and, secondly, that new actions will be brought on the basis of those documents.

68 With regard to the non-material damage claimed by the applicant, which would allegedly result primarily from improper use of the statements of objections by the FPÖ for political purposes, it should be remembered first of all that the versions of the statements of objections in question are the non-confidential versions prepared by the Commission.

69 It should also be remembered that, in accordance with settled case-law, only damage that may be caused to the applicant may be taken into consideration when examining the requirement as to urgency (order in Case T-13/99 *Pfizer Animal Health* v *Council*, cited above, paragraph 136). It follows that any damage to the personal reputation of certain employees and members of the board of directors of the applicant or the fact that the FPÖ may exert pressure on those persons may not be taken into consideration when examining the said

requirement, unless the applicant succeeds in showing that such damage is likely to cause serious harm to its own reputation. That is not the case here.

70 The applicant has not provided evidence to show, with a sufficient degree of probability, that there is a prospect of serious and irreparable damage to its own reputation. The mere prospect, which in any case is hypothetical, that the FPÖ will use the statements of objections for political purposes does not enable the judge hearing the application for interim measures to reach any other conclusion. In this regard it must be noted that it does not appear, at least prima facie, that if the FPÖ simply places non-confidential information about the applicant in the public domain that will cause the applicant irreparable damage. In any event, it must be pointed out that, as in essence the hearing officer reminded the applicant in the letter of 27 March 2001, the transmission of the statement of objections to the complainant takes place solely within the context of and for the purposes of the proceeding initiated by the Commission. The complainant is therefore deemed to use the information contained in that statement in that context alone. Any improper or deceitful use of the information contained in the statements of objections could, if necessary, be challenged before the national court.

71 Even if the alleged damage could constitute serious and irreparable damage, the balancing of the applicant's interest in obtaining suspension of operation of the contested decision on the one hand, against the public interest in the implementation of decisions taken under Regulations No 17 and No 2842/98 and the interests of third parties directly affected by such a suspension of operation on the other, means that the present application must be dismissed.

72 In the present case, the Community interest in placing third parties whom the Commission has recognised as having a legitimate interest in applying under Article 3 of Regulation No 17 in a position to make appropriate observations on the objections raised by the Commission must take priority over that of the applicant to delay transmission of the statements of objections.

73 As the requirement of urgency is not fulfilled and the balancing of interests does not lean in favour of suspending the operation of the contested decision, the present application must be dismissed without there being any need to examine the other arguments adduced by the applicant to demonstrate that it has a prima facie case.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

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

2. **The costs are reserved.**

Luxembourg, 20 December 2001.

H. Jung
Registrar

B. Vesterdorf
President