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

In Case T-192/01 R,

Lior GEIE, established in Brussels (Belgium), represented by V. Marien and J. Choucroun, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by H. van Lier, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for an order requiring the Commission to pay the sum of EUR 68 070 in the context of ALTENER — AGORES contract No XVII/4.1030/Z/99-085, together with interest at the Belgian statutory rate applying

* Language of the case: French.

from 23 July 2001, to be paid within eight days from delivery of the judgment to be given, or in default to pay a periodic penalty of EUR 100 for each day's delay,

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

makes the following

Order

Legal context

1 On 25 July 1985 the Council adopted Regulation (EEC) No 2137/85 on the European Economic Interest Grouping (EEIG) (OJ 1985 L 199, p. 1).

2 Article 24 of Regulation No 2137/85 provides:

'1. The members of a grouping shall have unlimited joint and several liability for its debts and other liabilities of whatever nature. National law shall determine the consequences of such liability.

2. Creditors may not proceed against a member for payment in respect of debts and other liabilities, in accordance with the conditions laid down in paragraph 1, before the liquidation of a grouping is concluded, unless they have first requested the grouping to pay and payment has not been made within an appropriate period.'

3 Article 34 of Regulation No 2137/85 provides that '[w]ithout prejudice to Article 37(1), any member who ceases to belong to a grouping shall remain answerable, in accordance with the conditions laid down in Article 24, for the debts and other liabilities arising out of the grouping's activities before he ceased to be a member.'

Facts and procedure

4 The applicant was incorporated on 4 January 1996, with 10 members, including Deira, a company incorporated under Belgian law ('Deira SA'). On 7 October 1998 four new members joined the applicant.

5 The application for interim measures concerns the Altener — Agores contract No XVII/4.1030/Z/99-085 ('the Agores contract') concluded on 19 March 1999 between the Commission and the applicant in the context of the Altener II programme introduced by Council Decision 98/352/EC of 18 May 1998 concerning a multiannual programme for the promotion of renewable energy sources in the Community (Altener II) (OJ 1998 L 159, p. 53). The contract relates to the creation of an internet site designed to provide information about, and promote the use of, renewable forms of energy, and a link to all sites providing information concerning renewable forms of energy.

6 The Agores contract provides in particular that the Community's financial contribution will be 100% of the eligible costs of the project, up to a limit of EUR 170 175. Under that contract 30% of the costs are payable within 60 days of its being signed, 30% are payable within 60 days of approval by the Commission of the interim report, and the balance is payable following receipt and approval by the Commission of the final report and the statement of the final cost of the expenditure incurred. In addition, Article 5 of the Agores contract provides that the applicant must provide the Commission with any information whatsoever the latter may ask for concerning performance of the work. Article 6(2), entitled 'Participation by third parties in the performance of the contract', provides:

'Draft agreements which provide for the participation of third parties in the programme of work, in particular as part of an association or under a subcontract, must, especially if they involve third parties who are not members of the European Community, be notified by registered letter to the Commission, which may within 30 working days of receipt of that letter, refuse to approve such participation. If the Commission takes no action within the period referred to above it shall be deemed to have approved the draft agreement.

Save as otherwise expressly provided for by the Commission, the contractor shall undertake to include in such agreements with third parties all the necessary provisions enabling it to meet, without any exception, all the conditions of that contract. The contractor shall ensure that the Commission's rights under the contract are not affected in any way by contracts concluded in accordance with that article.'

7 By letter of 28 December 1999 the application sent the Commission 'notification of a sub-contract'. Attached to that notification was an agreement, entitled 'sub-contract', between the applicant and Lior International, a limited company governed by Belgian law, incorporated on 7 November 1999. That agreement provides that '[the applicant] subcontracts to Lior International which accepts the

performance of the three contracts referred here above', including the Agores contract. The agreement, concluded subject to a condition precedent, was signed by Ms Deval for the applicant and by Mr Weber and Mr Buhlman for Lior International.

8 By letter of 20 January 2000, the applicant informed the Commission that only 90% of the services remaining to be performed under the contracts covered by the agreement referred to in the preceding paragraph were transferred to Lior International and that the applicant therefore remained the Commission's contractor and would itself make all the reports to, and other contacts with, the Commission as regards the 10% of services still remaining to be performed.

9 In the absence of any response from the Commission the applicant sent it various reminders.

10 An initial interim report relating to the Agores contract entitled 'Progress Report I' was sent to the Commission attached to a letter written on Lior International's notepaper and dated 19 June 2000. The letter requested that the second payment, which was owing, should be made to Lior International, which, as the letter stated, had taken over all the applicant's business.

11 Contrary to that request, the Commission paid the interim amount of EUR 51 052.50, not to Lior International, but to the applicant. The payment was made on 21 September 2000.

12 A second interim report, entitled 'Progress Report II', was sent to the Commission in the same way on 8 February 2001.

13 The Commission stated, in a letter dated 17 May 2001, that it could not accept Lior International acting as a sub-contractor or co-contractor in the performance of the Agores contract and it asked for the final report to be submitted two days later.

14 The final report was sent to the Commission by letter of 18 May 2001. The name given to the Commission's contractor in the covering letter and in the report itself was Lior. The covering letter did, however, state:

'6. The original contractor remains Lior GEIE and so the balance of the payments (EUR 68 070) owing in respect of the performance in full of the contract should be paid to Lior GEIE — DEXIA Bank, Account No 068-22264659-27'.

15 By fax of 27 June 2001, following the submission of the final report, the Commission stated that it could not accept the final statement of costs on the grounds that the applicant's name should appear on it and that that statement contained expenditure incurred by Lior International.

16 On 28 June 2001 Ms Deval sent the Commission an amended version of the final statement of costs, in which the applicant was named as the Commission's contractor.

17 By letter of 12 July 2001 the Commission confirmed its position, referring moreover to the wording of Article 6.2 of the Agores contract (quoted in paragraph 6 above).

18 By letter of 23 July 2001 the applicant's counsel sent the Commission a letter of formal notice to pay.

19 By application lodged at the Registry of the Court of First Instance on 14 August 2001 the applicant brought an action containing a certain number of claims relating to contracts concluded in the context of the Thermie and Altener II programmes, seeking in particular an order that the Commission be required to pay certain sums under those contracts and by way of damages. More particularly, in the case of the Agores contract, the action sought an order requiring the Commission to pay the sum of EUR 68 070, representing the final tranche of the Commission's financial contribution in respect of that contract.

20 By separate document lodged at the Registry of the Court of First Instance the same day the applicant made the present application to the Court of First Instance for an order requiring the Commission to pay the sum of EUR 68 070 in the context of the Agores contract, with interest at the statutory Belgian rate applying from 23 July 2001, to be paid within eight days from delivery of the judgment to be given, or in default to pay a periodic penalty of EUR 100 for each day's delay.

21 On 4 September 2001 the Commission submitted its observations on the present application for interim relief.

22 The parties presented oral argument on 17 September 2001. At the end of the hearing the President of the Court of First Instance stayed the proceedings for one month. The Commission was requested to examine, during that time, the documents relating to the Agores contract which were lodged with it by the applicant. The Commission was also requested, if it acknowledged that it had received all the necessary documents and that those documents enabled it to verify that all the expenditure and costs actually related to the product delivered in accordance with the Agores contract, to inform the President of the Court whether the balance would be paid and, if so, on what date. Finally, the

Commission was requested, if it found information on the file which prevented it from paying the balance, to inform the President of the Court of the nature of that information.

23 By letter of 16 October 2001 the Commission informed the President of the Court of the result of its examination of the documents which had been sent to it relating to the Agores contract. The Commission concluded that the total expenditure it accepted provisionally at that stage amounted to EUR 49 130, although the advances it had paid amounted to EUR 102 105.

24 By fax of 18 October 2001 the applicant submitted its observations on the Commission's letter of 16 October 2001. It informed the President of the Court that it wished to provide a number of additional comments, either in writing or at a further hearing.

25 In the light of the information contained in the file, the President of the Court considers that he has all the necessary information to rule on this application for interim measures.

Law

26 Under the provisions of Articles 242 EC and 243 EC, in conjunction with 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 other necessary interim measures.

27 Under the provisions of 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 any 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 assumes that the main action, to which the application for interim relief is an adjunct, can be considered by the Court of First Instance.

28 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for the adoption of 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 for suspension of the operation of a measure must be dismissed where one of the conditions is not met (order of the President of the Court of First Instance in Case T-211/98 R *Willeme* v *Commission* [1999] ECR-SC I-A-15 and II-57, paragraph 18). The President of the Court of First Instance also proceeds, where necessary, to balance the interests at stake (order of the President of the Court of Justice in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011, paragraph 59).

29 In the present case the President of the Court considers it appropriate to consider first of all whether the conditions as to urgency and balancing the interests at stake are met.

Arguments of the parties

30 The applicant contends that it is in a situation likely to endanger its existence, and that the documents it supplied to the President of the Court provide evidence of the impending prospect of serious and irreparable damage.

31 The applicant's debts owing to its suppliers as at 15 July 2001 totalled EUR 158 021. Two of those suppliers are the subject of a judicial arrangement for debt clearance, under which defaulting on the payment of instalments renders the balance of the debts immediately due.

32 Unless the applicant scrupulously observes the due dates for payment its creditors will certainly enforce the orders for enforcement already in their possession. Since the payments due in July 2001 could not be made, the creditors concerned threatened to hand the judgments they had obtained to a bailiff for the enforced recovery of the outstanding balances of their debts together with costs of the proceedings.

33 Although two judgments made provision for a court-approved agreement, numerous other creditors who are still not satisfied will certainly require the debts owing to them to be paid in the near future.

34 The applicant's liquid assets are at present non-existent, since its bank accounts contain either a very small credit balance, of EUR 56.10 on one account as at 17 July 2001, or a debit balance, of EUR 42.94 on another account as at 10 July 2001.

35 The applicant contends, however, that the right of individuals to obtain in the context of proceedings for interim relief an order requiring payment by way of an advance of an amount corresponding to that sought in the main application was acknowledged in the order of the President of the Court of Justice in Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441.

36 The applicant contends that it has been held that damage to an association of undertakings may be assessed in the light of the financial position of its members where the objective interests of that association cannot be considered to be independent of those of its member companies (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, paragraphs 35 to 38). In that regard, the applicant has provided some information concerning the financial position of Deira SA, the company owning 60% of the applicant's shares. That information shows that the applicant's member with the majority shareholding does not possess adequate resources to protect the applicant's interests. Deira SA is already in serious difficulties.

37 Furthermore, the Commission's decision to suspend payment of the balance of EUR 68 070, a payment which the applicant counted on receiving by July 2001 at the latest in view of the completion of the internet site and the production of the final technical and financial reports, places the applicant in an extremely difficult and precarious financial position.

38 The applicant stresses that although its members have unlimited joint and several liability for the debts they have contracted together, several members, most of them established abroad, are no longer involved in the project. The applicant's 14 members now number only five. Furthermore, the applicant no longer has a business.

39 The applicant's principal member, Deira SA, is constantly being contacted by the applicant's creditors and it can no longer adequately meet its financial commitments. The applicant maintains that in those circumstances refusal to grant the interim measures sought will not only result in the applicant's disappearance but could also lead to the disappearance of Deira SA too, since the company will no longer be in a position to meet the applicant's debts, for which it will be liable in view of the joint and several liability of the members of a European Economic Interest Grouping (EEIG), and might also cause the natural

persons who have committed themselves to launch the company and keep it alive to lose everything.

40 Lastly, the applicant states that if the sums owing from the Commission had been paid at the appropriate time this would have enabled the applicant to make in particular part payments in respect of the orders made against it, as they became due, and would have enabled it to avoid the present situation where it is being threatened with enforcement.

41 The Commission observes, with regard to the condition as to urgency and, in particular, the irreparable nature of pecuniary damage, that it must be borne in mind that interim measures are granted in such circumstances only by way of an exception (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, paragraphs 137 and 138). The granting of interim measures is all the more exceptional in this case since the measure being sought partly overlaps with the object of the main application. The interim measure at issue is in fact, according to the applicant, nothing more than performance by the Commission of its contractual obligations. In view of this, the urgency usually required for interim measures to be ordered must, to cite the terms of the abovementioned case-law, be 'indisputable'.

42 As regards the difficulties which the applicant claims it has in paying its debts, the Commission states, first, that, as is clear from the order in *Pfizer Animal Health* v *Council*, cited above (paragraph 136), only irreparable damage which may be caused to the applicant may be taken into account in the context of examination of the conditions relating to urgency and, second, that as regards the harm to the applicant's financial viability, consideration must be given to the possibilities which may be offered by the structure of which the applicant forms part, and in particular of the resources which the applicant's members have available to them. In that regard, the Commission stresses the importance of Articles 24 and 34 of Regulation No 2137/85; Article 24 provides in particular that '[t]he members of a grouping shall have unlimited joint and several liability for its debts and other liabilities of whatever nature'.

43 In that context, the applicant cannot be considered to have shown indisputably that it is in a situation likely to endanger its existence and that there are no remedies or actions open to it.

44 The applicant admittedly mentions various pressures and threats on the part of some of its creditors which might result in enforcement proceedings. It is appropriate, however, to compare that situation with the opportunities for action which may be taken against all the applicant's members, wherever their place of residence, including those which have already formally left the applicant. That overall accounting assessment has not been made.

45 As regards balancing the interests at stake, the Commission stresses that granting the measure sought could, were the main application to be dismissed, create a contrary situation, to the detriment of Community funds.

46 The Commission adds in that regard that it is having difficulties with the applicant not only in connection with the Agores contract but also in connection with other contracts concluded in the context of the Thermie programme. The problems raised are, to an extent, common to several contracts. The granting of interim measures in connection with only one of the contracts would have the effect of creating an imbalance in relation to the way in which the other contracts may be dealt with.

47 In addition, the Commission sent the applicant, in connection with those contracts concluded in the context of the Thermie programme, two recovery orders in the sum of EUR 72 000. If those recovery orders are not honoured, granting the measure sought will create, in the event of the main application being dismissed, a double financial problem for the Commission, one in connection with the Agores contract, the other in connection with the contracts concluded in the context of the Thermie programme.

Findings of the President of the Court

48 As regards the condition as to urgency, according to settled case-law, the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for those measures. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind (orders of the President of the Court of First Instance in Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 36, and in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 43; and order of the President of the Court of Justice in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14).

49 Although it is correct that, in order to establish the existence of serious and irreparable damage, it is not necessary for the occurrence of the damage to be demonstrated with absolute certainty, it being sufficient to show that damage is foreseeable with a sufficient degree of probability, the applicants are required to prove the facts forming the basis of their claim that serious and irreparable damage is likely (orders of the President of the Court of Justice in Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67, and in Case C-377/98 R *Netherlands* v *Council and Parliament* [2000] ECR I-6229, paragraph 51, and in *Greece* v *Commission*, cited above, paragraph 15).

50 In this particular case, the damage claimed by the applicant is financial. In that regard, it should be pointed out that, as the Commission has stated, according to settled case-law, such damage cannot in principle be regarded as irreparable, or even reparable with difficulty, where it can be the subject of future pecuniary 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-70/99 R *Alpharma* v *Council* [1999] ECR II-2027, paragraph 128).

51 In application of those principles, the interim measure sought would only be justified in the circumstances of this case if it were apparent that without such a measure the applicant would be in a situation likely to endanger its existence.

52 In that regard, it should be observed that the applicant's debts to its suppliers amounted to EUR 158 021 as at 15 July 2001, and that the applicant's current assets are, so to speak, non-existent. As is clear from a statement made by the applicant's accountant on 10 August 2001, and produced by the applicant, the payment of EUR 68 070 sought in this case will not enable the applicant to meet its commitments. Moreover, in view of the fact that the applicant has no longer any business, its interest in obtaining the interim measure it is seeking seems therefore to be only indirect and to coincide in fact with an interest of its members in having its debts reduced, since they have unlimited joint and several liability for those debts.

53 As the Commission has argued, it is clear from settled case-law that only damage likely to be caused to the applicant can be taken into account examining the condition as to urgency (order in *Pfizer Animal Health* v *Council*, cited above, paragraph 136).

54 It is also important to point out that, in the context of examination of the applicant's financial viability, consideration may be given, for the purposes of assessing its economic circumstances, to the characteristics of the group of which, by virtue of its shareholding structure, it forms part (order of the President of the Court of Justice in Case C-12/95 P *Transacciones Marítimas and Others* v *Commission* [1995] ECR I-467, paragraph 12; orders of the President of the Court of First Instance in Case T-18/96 R *SCK and FNK* v *Commission* [1996] ECR II-407, paragraph 35 and in Case T-260/97 R *Camar* v *Commission and Council* [1997] ECR II-2357, paragraph 50; orders of the President of the Court of Justice in Case C-43/98 P(R) *Camar* v *Commission and Council* [1998] ECR I-1815, paragraph 36 and in *Pfizer Animal Health and Others* v *Council*, cited above, paragraph 155, confirmed by order of the President of the Court of Justice in Case C-329/99 P(R) *Pfizer Animal Health and Others* v *Council* [1999] ECR I-8343, paragraph 67).

55 That approach is based on the idea that the objective interests of the undertaking concerned are not independent from those of the legal or natural persons who direct it and the serious and irreparable nature of the purported damage must therefore be assessed at the level of the group made up of those persons. That coincidence of interests is justification in particular for not assessing the interest of the undertaking concerned in surviving independently from the interest which those who direct it attach to its permanence (order of the President of the Court of First Instance in T-241/00 R *Le Canne* v *Commission* [2001] ECR II-37, paragraph 40).

56 Accordingly, just as the damage incurred by an association of undertakings may be assessed by taking into account the financial situation of its members where the objective interests of that association are not independent of those of the undertakings belonging to it (see order in *SCK and FNL* v *Commission*, cited above, paragraphs 35 to 38), so in this case should account be taken of the financial situation of the applicant's members.

57 In that regard, the applicant has merely supplied information on the situation of its principal member, Deira SA, and has not supplied any information whatsoever regarding the financial situation of its other members, so as to make it possible to assess specifically whether they have sufficient resources to protect its interests.

58 It follows from the above considerations that the applicant has not succeeded in establishing that the condition as to urgency has been met. Dismissal of the action is justified on that ground alone.

59 In any event, even if proof of urgency had been adduced, the grant of the interim measure sought would not be justified as regards balancing the interests of the parties.

60 It appears in that regard from the statement by the applicant's accountant, mentioned in paragraph 52 above, that even if the Commission's purported debt to the applicant, calculated by that accountant to be EUR 144 570, were paid it would not enable the applicant to settle all its debts to its suppliers. The statement indicates also that since 30 November 1999 the applicant has no longer had a business and its accounts have been in deficit. In those circumstances, it is clear that even payment of the EUR 68 070 sought by the applicant in this case would not enable it to meet its commitments. It is therefore likely that it would not be in a position to repay that sum of money to the Commission should the application in the main proceedings be dismissed.

61 Uncertainty regarding the possibility of recovering that sum is all the greater since the Commission, which is only a third party in respect of the grouping constituted by the applicant, is less well placed than the latter to have information which would, at the appropriate time, enable the joint and several financial liability of the members of that grouping, as provided in Article 24 of Regulation No 2137/95, to be incurred.

62 In the light of those considerations, the risk that payment of the sum claimed by way of interim relief might be irreversible and that therefore the grant of the interim measure might render the decision in the main proceedings ineffective would, as regards balancing the interests of the parties, justify dismissal of the present application.

63 The application for interim relief must therefore be dismissed and there is no need to consider the requirement that a prima facie case be established.

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, 7 December 2001.

H. Jung

Registrar

B. Vesterdorf

President