

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

17 February 1995 ^{*}

In Case T-308/94 R,

Cascades SA, a company established under French law, having its registered office at Bagnolet (France), represented by Jean-Louis Fourgoux, Jean-Patrice de La Laurencie, of the Paris Bar, and Jean-Yves Art, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Richard Lyal, of the Legal Service, and Géraud de Bergues, a national official on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremis, also of the Legal Service, Wagner Centre, Kirchberg,

defendant,

^{*} Language of the case: French.

APPLICATION for

- suspension, until the conclusion of the substantive proceedings in Case T-308/94, of the operation of Articles 3 and 4 of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard, OJ 1994 L 243, p. 1) in so far as those articles require the applicant to pay a fine of ECU 16.2 million by no later than 4 November 1994;
- as a precautionary measure, suspension of the operation of Articles 3 and 4 of that decision until a decision has been taken on the present application for interim measures or until such date as the President of the Court of First Instance may determine,

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

makes the following

Order

Facts and procedure

- 1 On 13 July 1994 the Commission adopted a decision relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard), amended by decision of 26 July 1994 and published in its amended version in OJ 1994 L 243, p. 1, ('the Decision'). According to Article 1 of the Decision, the 19 cartonboard suppliers there listed, which include the applicant, have infringed Article 85(1) of the Treaty

by participating in an agreement and concerted practice, dating back to mid-1986, whereby they engaged in a range of anti-competitive activities within the common market, as summarized in Article 1.

- 2 Article 3 of the Decision imposes on the applicant a fine of ECU 16.2 million in respect of the infringements established in Article 1. Article 4 provides that the fines imposed under Article 3 are payable in ecus within three months of the date of notification of the Decision.
- 3 The Commission notified the Decision to the applicant by letter of 1 August 1994. The Commission pointed out in that letter that if the applicant brought an action before the Court of First Instance the Commission would not take any steps to recover the fine while the case was pending before the Court, provided that interest accrues on the amount due as from the date on which the period for payment expired and that a bank guarantee, acceptable to the Commission, covering both the principal sum of the amount due and interest thereon, was provided by no later than that date.
- 4 By application lodged at the Registry of the Court of First Instance on 6 October 1994 the applicant brought an action under Article 173 of the EC Treaty for annulment of the Decision in so far as it affected the applicant or, in the alternative, for reduction of the fine imposed on it by Article 3 of the Decision.
- 5 By a separate document lodged at the Registry of the Court of First Instance on 4 November 1994, the applicant brought an application under Article 185 of the EC Treaty for an order suspending operation of Articles 3 and 4 of the Decision, in so far as they require the applicant to pay a fine of ECU 16.2 million, until the conclusion of the substantive proceedings in Case T-308/94, and requesting the President of the Court of First Instance to order the Commission, as a precautionary measure, to refrain from recovering the fine imposed on the applicant by Articles 3 and 4 of the Decision until a decision has been reached on the application for interim measures or until such date as the President might determine.

- 6 The Commission submitted its observations on the present application for interim measures on 18 November 1994. The parties presented oral argument on 25 November 1994.
- 7 At the hearing on 25 November 1994 the parties were requested by the President of the Court of First Instance to continue the negotiations which they had begun with a view to attempting to overcome their differences regarding the evaluation of the economic data in issue and, if possible, reaching an agreement capable of resolving the proceedings in the application for interim relief. The President of the Court of First Instance also asked them to forward the results of their discussions within one week of the hearing, either in the form of a single document containing the agreement which they had concluded or in the form of separate reports setting out their respective conclusions. By letters of 2 December 1994 the parties requested an extension of the period for submission of those documents, a request which the President granted by letter of the same date. A further extension was requested by letters of 8 December 1994 and was granted on 9 December 1994. Finally, by letters of 15 December 1994, the last day of the period allowed, the parties informed the President of the Court of First Instance that their negotiations had failed to result in agreement. The letters of 8 and 15 December 1994, accompanied by copies of the correspondence exchanged in connection with the negotiations, explain the course of those negotiations and the parties' respective positions.

Law

Arguments of the parties submitted prior to the hearing

- 8 With regard to the scope of its application, the applicant submits at the outset that the only point of disagreement separating it and the Commission centres on the question whether the suspension of operation of Articles 3 and 4 of the Decision must be made subject to the provision of a bank guarantee covering possible future payment of the fine, plus any interest due.

- 9 In order to reply to that question, the applicant takes the view that it is not necessary to consider whether all the conditions laid down in the Rules of Procedure for the grant of suspension of operation of a measure have been satisfied, but rather solely to determine whether the requirement of a bank guarantee is lawful. In its opinion, the case-law states that an exemption from that requirement is justified in 'exceptional circumstances', which is the position in the present case.
- 10 In this regard the applicant first of all outlines its own financial position. It sets out in turn the losses which it has incurred, the state of its cash-flow, its commitments towards certain financial institutions and the steps which it claims to have taken to secure the guarantee required by the Commission. On the basis of this analysis the applicant concludes that it cannot possibly provide the guarantee in question.
- 11 The applicant also refers to the financial position of its parent company ('CPI') and to that of the company with the majority capital holding in the parent company ('Cascades Inc.'). Neither of those companies, the applicant claims, is in a position to provide the required guarantee or to persuade the banks to grant that guarantee on the applicant's behalf. So far as CPI is concerned, the applicant states that it is in a particularly difficult financial position. It outlines the losses incurred by CPI, its financial commitments and the precarious financial position of its subsidiaries, including the applicant. For its part, Cascades Inc. has merely an indirect shareholding in the applicant which amounts, ultimately, to less than 50%. That company is also in a difficult financial position as it has incurred appreciable losses and its debt burden remains high when measured against its own funds. A decision by the company's directors to engage its assets in order to enable the applicant to obtain the required guarantee could be considered, in those circumstances, as a measure likely to involve them in liability towards the company's shareholders.
- 12 In the event that the President should consider it necessary to determine whether the conditions laid down in Article 104(2) of the Rules of Procedure for the grant

of interim measures have been satisfied, the applicant is of the opinion that those conditions have been satisfied in this case and that there should therefore be an order suspending operation as requested.

- 13 The applicant first points out that in view of the fact that the period for payment of the fine or, in the absence thereof, provision of the bank guarantee was to expire on 4 November 1994, the Commission would be entitled to institute proceedings for recovery of the fine on 5 November 1994 unless the President were to order suspension of the operation of Articles 3 and 4 of the Decision. The condition of urgency, the applicant submits, is therefore satisfied.
- 14 Turning to the question of the establishment of a *prima facie* case for the measures applied for, the applicant takes the view that the arguments set out in support of the main action cannot *prima facie* be regarded as manifestly unfounded. For the purposes of the present interim proceedings, the applicant has summarized those arguments in the form of three pleas in law based respectively on breach of Article 85 of the Treaty and the legal rules relating to its application, breach of the rights of the defence and breach of essential procedural rules applicable in proceedings brought under Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), as amended, and Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47).
- 15 In support of the plea in law based on breach of Article 85 of the Treaty and the legal rules relating to its application, the applicant first take the view that, according to the case-law of the Court of Justice (judgment in Case 66/86 *Abmed Saeed Flugreisen and Silver Line Reisebüro v Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803), the agreement and concerted practice established by the Commission cannot be attributed to the applicant since they result directly and exclusively from the irresistible pressure exerted on it by the parties responsible for the conduct held to be unlawful. Moreover, in view of the criteria applied by the Commission in the reasons for the Decision, the applicant cannot be held responsible for the involvement of the undertakings *Kartonfabrik van Duffel* and

Djupafors AB in the agreement and concerted practice referred to in Article 1 of the Decision prior to the date on which the applicant acquired those companies. The applicant also criticizes the excessive nature of the fine imposed on it. In that regard, it argues, the Decision breaches Article 15 of Regulation No 17 and is also contrary to the practice followed by the Commission in its previous decisions in so far as it fails to take proper account of the nature and seriousness of the infringement of which the applicant is accused. Moreover, insufficient reasons are given in the Decision for the levels of the fines imposed by the Commission and the Decision fails to take account of the extenuating circumstances in the applicant's case.

- 16 With regard to the plea in law based on breach of the rights of the defence, the applicant submits that the notification of the heads of complaint failed clearly to set out one of the complaints featuring in Article 1 of the Decision, namely that relating to a 'common industry plan' to restrict competition and the regular holding of 'secret and institutionalized meetings'. Moreover, in contrast to the Decision, which applied a reference period from mid-1986 to April 1991, the Commission's press release of 13 July 1994 referred to the 'success' of alleged 'attempts' dating from the 1970s to control the markets in question. This allegation, the applicant claims, infringes its rights in so far as it has been found guilty without compliance with the procedure set out in Regulation No 17 allowing all parties to be heard.
- 17 So far as concerns the breach of essential procedural requirements, the applicant complains that the Commission breached the duty of confidentiality laid down in Article 214 of the EC Treaty and Article 20(2) of Regulation No 17 by announcing to the press that the Decision was imminent and disclosing the applicant's alleged involvement in a prohibited agreement. The applicant also alleges that the Commission infringed the principle of collective responsibility governing adoption of its decisions by adopting on 26 July 1994, under unspecified conditions of deliberation, a decision substantially amending its original decision of 13 July 1994.
- 18 So far as concerns the condition that there must be a risk of serious and irreparable damage, the applicant submits that the payment of the fine of ECU 16.2 million

would place it in such a perilous financial position that it would risk leading to the liquidation of the undertaking or even placing it in a position of no longer being able to meet its debts.

- 19 Referring to Article 107(2) of the Rules of Procedure of the Court of First Instance, the applicant points out that, while it is not able to provide the bank guarantee required by the Commission, it would be in a position to lodge a surety guaranteeing approximately 30% of the amount of the fine, plus any interest due, on condition of being able to realize a fiscal debt which it holds against the French State. Furthermore, it has declared that it is prepared to forward to the Commission on a regular basis documents relating to its financial position and to examine with the Commission each year the possibilities of providing additional guarantees. On the basis of reasonable commercial forecasts, such additional guarantees ought to be forthcoming at regular intervals prior to 31 December 1997.
- 20 Before considering whether the applicant's arguments are well founded, the Commission, in its written observations, considers what purpose the application for interim measures might serve. According to the Commission, if the applicant's request for suspension of operation of Articles 3 and 4 of the Decision was to be upheld by the Court of First Instance, that would in particular have the effect of releasing the applicant from payment of interest on the fine. In the event that the applicant's request sought such a result, this part of the request would have to be rejected since it would necessarily be unfounded in the absence of urgency (order of the President of the Court of Justice in Case 107/82 R *AEG v Commission* [1982] ECR 1549).
- 21 Still as a preliminary point, the Commission also takes the view that the request that the President of the Court of First Instance suspend operation of Articles 3 and 4 of the Decision until a decision has been taken on the application for interim measures serves no purpose. In accordance with its normal practice, the Commission would not take the steps necessary to secure enforcement of the Decision, as provided for in Article 192 of the EC Treaty, prior to the date of delivery of the order concluding the present interim proceedings.

- 22 As to whether the applicant's arguments are well founded, the Commission begins by pointing out that the concept of 'exceptional circumstances', as applied in relevant case-law (in particular, the order of the President of the Court of Justice in Case 234/82 R *Ferriere di Roè Volciano v Commission* [1983] ECR 725 and the order of the President of the Court of First Instance of 25 August 1994 in Case T-156/94 R *Siderúrgica Aristrain Madrid v Commission* [1994] ECR II-715), must be narrowly interpreted. In general terms, the obligation to provide a bank guarantee in an amount corresponding to that of the fine imposed represents the minimum required by the public interest of the Community. As a cartonboard manufacturer belonging to a major international group, the applicant does not satisfy the conditions which the case-law attaches to the above concept.
- 23 Regarding the issue of urgency, the Commission states that the documents forwarded by the applicant with its application for interim measures did not convince the Commission that it would be impossible for the applicant and the group to which it belongs to pay the fine imposed on it or, failing such payment, to provide a bank guarantee covering both the amount of the fine and interest on it.
- 24 In the Commission's opinion, the applicant is itself in a position to provide a bank guarantee covering at least part, that is to say close to 50%, of the amount of the fine. If account is taken of the abovementioned debt owed to it by the French State, the applicant has the means necessary for obtaining a guarantee of up to 30% of that amount. It also has authorized but unused lines of credit.
- 25 The Commission also takes the view that the capacity of an undertaking to pay the amount of a fine or, failing that, to provide the security required must be assessed not solely on the basis of the prospects of the undertaking in question but also by taking account, if necessary, of those of the group to which it belongs. In this connection, it is necessary not only to consider whether the other companies in the group are collectively in a position to provide security in an amount equal to that of the fine, but also to ask how the various companies in the group can individually contribute to the provision of a bank guarantee in that amount.

- 26 As far as CPI is concerned, the Commission criticizes the applicant for having failed to forward documents capable of proving that this company is unable to intervene with one or more banks in order to obtain all or part of the security required.
- 27 Turning to Cascades Inc., the Commission claims that since its shareholding in CPI amounts to almost 60%, it must be regarded as also controlling the applicant. It is for that reason appropriate, the Commission argues, to take account of the resources of Cascades Inc. when assessing the applicant's capacity to provide the security required, *a fortiori* in view of the fact that there is a high degree of personal integration between the two companies. The onus is on the applicant to demonstrate that Cascades Inc. is unable in any way whatever to contribute to the provision of the security. The applicant has failed to provide any document in support of that contention. On the contrary, in view of the unused lines of credit, recently repaid debts and investments made, as well as in the light of the analysis of the company's accounts, there are grounds for doubting that Cascades Inc. is unable to assist its sub-subsidiary in providing the required bank guarantee. In conclusion, the Commission rejects the argument based on a possible action for liability on the part of the shareholders.

Arguments presented by the parties following their negotiations

- 28 In its observations submitted following the failure of its negotiations with the Commission, the applicant raises once again the question of its capacity to provide the required guarantee and, more particularly, the prospect of other companies in the group assisting in providing that guarantee. The applicant also presents its definitive compromise proposal, explains the details of that proposal as well as the demands of the Commission at the final stage of negotiations, before finally setting out the reasons why it did not consider it possible for it to meet all those requirements.

29 With regard to its capacity to provide the guarantee at issue, the applicant first states that the Commission, in its observations, acknowledged that the applicant is not itself able to provide immediately the whole of the required guarantee. According to the applicant, the Commission also appears to have acknowledged that the portion of the guarantee which the applicant would itself be able to provide at short notice is limited to an amount representing approximately 30% of the total fine, as specified at paragraph 19 of the present order. Consequently, the difference between these two amounts would have to be covered through intervention by other companies within the group.

30 So far as CPI is concerned, the applicant claims that this company was scarcely discussed at all in the Commission's observations or during the meetings between the parties and that the Commission has not submitted any evidence to support its contention that CPI is able to help the applicant in providing all or part of the required guarantee.

31 The applicant confirms once again that Cascades Inc. does not at present have the funds which would allow it to assist the applicant in providing immediately the balance of the guarantee. According to the applicant, if one considers the position of Cascades Inc., particularly with regard to its debt burden, and the modest nature of the recent recovery, the securing of a bank guarantee at the request of Cascades Inc. would presuppose the prior provision to the bank concerned of a counter-guarantee in an equivalent amount, which would be subject to the company's ability to mobilize sufficient assets. The company's non-consolidated balance sheet, closed on 30 September 1994, shows clearly that it does not have any assets which it could mobilize immediately. Furthermore, according to the applicant, legal and economic constraints stand in the way of the mobilization of assets other than those of Cascades Inc. itself. Regarding the legal constraints, the mobilization of assets of a subsidiary for the benefit of another subsidiary of the group is subject, under the applicable national law, to compliance with strict conditions. As for the economic constraints, the applicant relies on three grounds in its contention that it would be impossible to mobilize the assets in question: first, the group's assets are dispersed among a large number of companies; second, the assets in question are essentially industrial assets, the value of which would, as a general rule, be considerably lower in the event of a forced sale than their book value; third, most of the assets belonging to companies within the group are already pledged to various banks.

32 The definitive compromise proposal, which the applicant presented to the Commission on 12 December 1994 and which it also submits to the President of the Court of First Instance in the absence of agreement, consists of the following two parts:

- (a) the applicant undertakes to obtain a bank guarantee for an amount corresponding to the sum indicated at paragraph 19 of the present order within three weeks of notification of the order of the President of the Court of First Instance;
- (b) the applicant undertakes to provide the balance of the bank guarantee requested in the Commission's letter of 1 August 1994 within six months of notification of the order of the President of the Court of First Instance. This guarantee shall be provided by the applicant from its own funds or, failing that, by recourse to the funds to be placed at its disposal by Cascades Inc., subject to approval by the Board of Directors to be obtained before 31 January 1995. If such approval is not given within the period specified, the two parties (that is to say, the Commission and the applicant) shall be released from their commitments under the compromise.

33 In justification of the six-month period referred to under Part (b) of its proposal, the applicant explains that the funds which would enable it to provide the balance of the guarantee would have to come either from steps which it might itself take, on the basis of the expected improvement in its results during the first half of 1995, or from financial assistance from Cascades Inc. This assistance could be provided following renegotiation of existing lines of credit, negotiation of new lines of credit, or even from an increase in the share capital of Cascades Inc. The latter, according to the applicant, will require completion of a number of preliminary formalities; so far as reinforcement of lines of credit is concerned, this will require a continuing improvement in the position and results of the company in question, as well as 'due diligence' on the part of the banks concerned.

34 The applicant also explains that its proposal contains two details of clarification requested by the Commission in the report submitted to the Court of First Instance on 8 December 1994 relating to the latest date for approval by the Board

of Directors of Cascades Inc. and to a clause releasing the two parties from their commitments if approval was not forthcoming prior to that date.

35 However, the applicant considers itself unable to comply with a third requirement set out by the Commission in that report, to the effect that Cascades Inc. will have to undertake to secure provision of the guarantee on the applicant's behalf in the event that the latter is itself unable to provide that guarantee within the six-month period.

36 The applicant regards this requirement as being unjustified on several grounds. First, the transfer of the burden of the fine to a company other than that to which the Decision is addressed, which is what the Commission's requirement amounts to, is unacceptable from the legal point of view. While the applicant accepts that the capacity to secure a bank guarantee must be assessed at the level of the group considered in its totality, the obligation to provide that guarantee rests solely with the company to which the contested Decision is addressed. Furthermore, the Commission's proposal fails substantially to take account of the conditions, imposed by case-law, under which a parent company can be held liable for the anti-competitive conduct of its subsidiaries. In essence, since the fine was imposed on the applicant, it is the applicant alone which can lawfully be required to provide the necessary bank guarantee.

37 Second, the applicant claims that the risk against which the Commission wishes to safeguard, namely that the applicant may cease to exist before the expiry of the six-month period without having provided the full guarantee, is not attributable to the extension of the period for the purpose of providing the bank guarantee but is inherent in the actual practice of the Commission, which is to refrain from seeking immediate enforcement of decisions imposing fines and to allow undertakings a three-month period within which to pay the fine or, if annulment proceedings are brought, to provide a bank guarantee. Moreover, the applicant claims that the

Commission has adduced no evidence to establish that, contrary to what was suggested in an audit report annexed to the application, the extension of the period for provision of the guarantee would increase this risk.

- 38 While it accepts that the applicant is not in a position immediately to provide the full guarantee, the Commission none the less takes the view that the applicant has failed to establish that the group to which it belongs is unable to do so.
- 39 In reply to the applicant's argument based on the restrictions imposed by national law, the Commission points out that a financial transfer between Cascades Inc. and its subsidiaries is not necessary in order to enable Cascades Inc. to contribute to the provision of a security since it would be sufficient to pledge the shares which it holds in the capital of its subsidiaries. Furthermore, according to the Commission, the prohibition in the national law in question applies only where the provision of financial aid results in the insolvency of the subsidiary, something which the applicant has not attempted to establish in this case. The Commission also contests the assertion that almost all assets of the group companies are already pledged in order to support their debts. It takes the view that the applicant and the group to which it belongs are able to rely on the confidence of the banks, as evidenced by the availability of long-term lines of credit. The Commission concludes by pointing out that, in the light of the provisional figures for 1994, the situation of the company in question improved markedly over the course of that year.
- 40 Finally, the Commission justifies its third requirement, concerning the undertaking to be given by Cascades Inc., referred to at paragraph 35 of the present order, by the need to safeguard against the possibility that the applicant may cease to exist before it is able to provide the required guarantee. The Commission takes the view that the exception to the budgetary rules represented by the extension of time for provision of the guarantee must not, on grounds of public interest, give rise in any event to a risk of non-payment.

Appraisal of the President of the Court of First Instance

- 41 In the light of the Commission's explanations, as summarized at paragraph 21 of this order and confirmed during the hearing, the present application must be regarded as serving no purpose in so far as it seeks suspension of the operation of Articles 3 and 4 of the Decision for the duration of the interim proceedings.
- 42 It is for that reason necessary to examine solely the applicant's request that it be released from the obligation, imposed by the Commission's letter referred to at paragraph 3 of this order, to provide a bank guarantee in an amount equal to that of the fine imposed on it as a condition of avoiding immediate recovery of that fine.
- 43 It has been consistently held that such an application can be upheld only if there are exceptional circumstances (see most recently the orders of the President of the Court of First Instance in Case T-295/94 R *Buchmann v Commission* [1994] ECR II-1265 and in Case T-301/94 R *Laakmann v Commission* [1994] ECR II-1279). This condition must be understood as being closely linked to the conditions laid down in Article 104(2) of the Rules of Procedure of the Court of First Instance for any application for the grant of interim measures within the meaning of Articles 185 and 186 of the EC Treaty. It follows that in order to determine the principle and details of a release such as that sought in the present case it is, contrary to the arguments of the applicant, necessary to refer to the conditions imposed by Article 104(2) of the Rules of Procedure (see the order in *Aristrain v Commission*, cited above, paragraph 28), that is to say, the existence of circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. According to consistent case-law, a decision to suspend also presumes that the balance of all the interests concerned is in favour of granting that measure (order of the President of the Court of Justice in Case C-6/94 R *Descom v Council* [1994] ECR I-867, paragraph 14).

- 44 So far as the question of urgency is concerned, it is first necessary to consider whether and to what extent it has been *prima facie* established that the applicant cannot possibly provide the guarantee required.
- 45 It is common ground in this regard that the possibility for the applicant to provide the guarantee in question within the immediate future and without the assistance of any third party is limited to the percentage of the fine mentioned in Part (a) of its compromise proposal. With respect to the question whether and within what time-scale the applicant may be in a position to provide the balance of the guarantee, the information on the case-file is insufficient to enable the President to reach a conclusion at this stage of the proceedings.
- 46 However, it follows from the case-law that, in order to assess a trader's ability to provide a guarantee such as that required in this case, account should be taken of the group of undertakings to which it belongs directly or indirectly (order in *Laakmann v Commission*, cited above, paragraph 26).
- 47 With regard to CPI, it must be held, as the applicant has submitted without being contradicted by the Commission, that this company is not at present in a position to assist the applicant in providing the required guarantee.
- 48 So far as Cascades Inc. is concerned, the definitive compromise proposal submitted in the applicant's letter of 15 December 1994 addressed to the President of the Court of First Instance implicitly recognizes that this company is in principle able to provide the applicant with the support necessary for providing the balance of the guarantee, following the completion of certain steps requiring a period of approximately six months. That period is not disputed by the Commission, which has in any event not submitted that alternative arrangements capable of giving the applicant the support necessary for the provision of the guarantee would be achievable within a shorter period of time.

49 With regard to the question whether the action in the main proceedings is prima facie well founded, the inevitable conclusion is that the pleas which the applicant has raised in support of that action, and on which the Commission has in any event not commented in the present interim proceedings, do not prima facie appear to be entirely unfounded. In particular, the plea based on breach of Article 85 of the Treaty and the legal rules governing its application deserves detailed consideration. A detailed factual and legal consideration of this kind goes beyond the scope of the present interim proceedings.

50 In those circumstances, it must be held that the conditions relating to urgency and the establishment of a prima facie case are here satisfied. It is for that reason appropriate to grant the applicant a suspension which takes account of the length of time required to provide the guarantee.

51 However, in order to define the details of this suspension it is necessary to balance the different interests concerned, in particular the Commission's interest in being able to recover the fine if the main action is dismissed and the applicant's interest, in the event that it is unable immediately to provide the full amount of the required guarantee, in avoiding steps being taken to secure immediate recovery of the fine and thereby placing its very existence in jeopardy.

52 The applicant's proposal, as summarized at paragraph 32 of this order, appears to reconcile those two interests, except with regard to the risk which its winding-up by court order during the six-month period referred to in Part (b) of that proposal, without any appropriate guarantee having been provided to cover the balance due in respect of the amount of the fine, would pose for the protection of the Community's legal order and finances. If this were to happen, the mere undertaking by Cascades Inc., following approval by its Board of Directors, to assist the applicant in providing the balance of the guarantee, could forfeit any usefulness which it had for the Commission.

53 In those circumstances, it is necessary to require the applicant, as a condition for the grant of a further six-month period for provision of the balance of the bank

guarantee, to provide an undertaking by Cascades Inc. itself to furnish that guarantee on the applicant's behalf in the event that, prior to the expiry of that period, the applicant is wound-up by court order without having provided that guarantee.

54 The President of the Court of First Instance takes the view that the applicant has failed to provide sufficiently convincing evidence to justify the *prima facie* conclusion that Cascades Inc. is not in a position to furnish such an undertaking intended to cover the possibility of the applicant's being wound-up during the six-month period. This conclusion results from the findings made at paragraphs 46 and 48 of the present order and is not placed in question by the applicant's argument that the solution advocated, implying as it does a transfer of the burden of the fine to a company other than that to which the contested Decision is addressed, is incompatible with the conditions which must be satisfied for Cascades Inc. to be held liable for the conduct of one of its subsidiaries. In the event that the grant of the requested suspension were to be made subject to such an undertaking, Cascades Inc. would, potentially and indirectly, become indebted to the Commission only if it agreed to sign that undertaking.

55 In the second place, the imposition of such a condition on the grant of the suspension requested does not appear to be disproportionate, irrespective of the actual scope of the risk which it seeks to counter. Account must be taken in this regard of the fact that the postponement not only of the payment of the fine but also, for six months, of provision of the balance of the guarantee represents an exceptional facility granted for the applicant's benefit. That being so, in the event that the risk of the applicant's being wound-up by court order before provision of the balance of the guarantee might be considerable, it cannot be disputed that there is a need to provide an effective guarantee in order to safeguard the public interest. On the other hand, where such a risk proves to be negligible, the undertaking requested would not in any event be followed by enforcement. It is also necessary to bear in mind that compliance with the undertaking to be given by Cascades Inc. will be required only if, prior to the expiry of the six-month period, the applicant is wound-up by court order without having itself been able to provide the whole of the guarantee. In contrast, if, on expiry of that period, the applicant has not been wound-up by court order, the fine will become immediately payable in so far as the applicant has in the interim failed to provide the necessary guarantee.

56 It is, however, also necessary to consider the hypothetical case in which the applicant's position deteriorates considerably during the above period but without its being wound-up by court order. In such a situation, the Commission might have a legitimate interest in taking all necessary measures to safeguard the Community's financial interests and especially in seeking to have the present order varied, pursuant to Article 108 of the Rules of Procedure of the Court of First Instance, with a view in particular to preventing the measure ordered from being diverted from its purpose. In order to enable the Commission to determine at any moment, during the period in question, whether such a step is necessary, it must be kept informed of the course of developments in the applicant's economic and financial position. To that end, therefore, it appears appropriate to provide for the communication, on a monthly basis and until the balance of the guarantee has been provided — or, failing that, until expiry of the abovementioned six-month period — of data enabling the Commission to assess developments in the applicant's capacity to meet its commitments and relating, in particular, to developments in its turnover and profit-and-loss account, as well as changes which may arise in its liabilities and the composition of its assets. Similarly, the applicant must be ordered to notify the Commission, in advance, of any decision which may substantially affect its economic and financial position or its legal status. As soon as the present order has been notified, the Commission shall specify, for the applicant, the information in question in the light of managerial and accounting practices within undertakings.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

- 1) The obligation on the applicant to provide a bank guarantee in favour of the Commission in order to avoid immediate recovery of the fine imposed on the applicant by Article 3 of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) is suspended, subject to the following conditions:

- (a) the applicant shall provide that guarantee in the amount of 30% of the fine, plus interest due in accordance with the letter of notification of 1 August 1994, within three weeks of notification of the present order;
 - (b) the applicant shall provide the balance of the guarantee, plus the above-mentioned interest, within six months of notification of the present order.
- 2) Until such time as the whole of the guarantee has been provided, or, failing that, until expiry of the period specified in Point 1(b) of the operative part of the present order, the applicant shall forward to the Commission:
- (a) on a monthly basis, the principal data relating to developments in its economic and financial position, data to be defined by the Commission following notification of the present order;
 - (b) prior to its adoption, any decision likely to have a substantial effect on the applicant's economic position or seeking to alter its legal status.
- 3) The suspension granted under Point 1(b) of the operative part of the present order shall cease to have effect if the applicant fails to forward to the Commission, within three weeks of notification of the present order:
- (a) the approval, by the Board of Directors of Cascades Inc., of intervention by that company for the purpose of making available to the applicant the funds necessary for provision of the balance of the guarantee, as referred to in Point 1(b) of the operative part of the present order and within the period there specified;
 - (b) the undertaking by Cascades Inc. to provide, on the applicant's behalf, the balance of the guarantee as referred to in Point 1(b) of the operative

part of the present order in the event that, prior to the expiry of the period there specified, the applicant should be wound-up by court order without having provided that balance.

4) The costs are reserved.

Luxembourg, 17 February 1995.

H. Jung

Registrar

J. L. Cruz Vilaça

President