ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
15 December 1999 *

In Case T-191/98 R II,

Cho Yang Shipping Co. Ltd, a company incorporated under Korean law, established in Seoul, Korea, represented by Nicholas Bromfield and Christopher Thomas, Solicitors, with an address for service in Luxembourg at the Chambers of De Bandt, Van Hecke, Lagae and Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Richard Lyal, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for suspension of the operation of Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) (OJ 1999 L 95, p. 1) in so far as, in Article 8, it imposes a fine of EUR 13 750 000 on the applicant,

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

makes the following

Order

Background

1 The applicant was one of 15 shipping companies party to the Trans-Atlantic Agreement ('the TAA'), a conference agreement relating to liner shipping across the Atlantic between northern Europe and the United States of America, which entered into force on 3 August 1992.

2 On 19 October 1994 the Commission adopted Decision 94/980/EC relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1), in which, first, it found that certain provisions of the TAA, in particular those relating to certain inland transport services in Community territory, infringed Article 85(1) of the EC Treaty (now Article 81(1) EC) and, second, it refused to apply to those provisions Article 85(3) of

the Treaty (now Article 81(3) EC) and Article 5 of Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302). Decision 94/980 prohibited the undertakings to which it was addressed from engaging, *inter alia*, in price-fixing practices which had the same or a similar object or effect as the provisions contained in the TAA.

3 Following numerous discussions with the Commission, the parties to the TAA notified to the Commission on 5 July 1994 a new agreement intended to replace the TAA, called the Trans-Atlantic Conference Agreement ('the TACA'), which entered into force on 24 October 1994. Because of a succession of amendments, five new versions of the TACA were notified to the Commission after 5 July 1994.

4 On 16 September 1998 the Commission adopted Decision 1999/243/EC relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) (OJ 1999 L 95, p. 1; 'the Decision').

5 According to Articles 1, 2 and 3 of the Decision, the parties to the TACA infringed Article 85(1) of the Treaty, Article 53(1) of the Agreement establishing the European Economic Area (EEA) and Article 2 of Regulation No 1017/68 by entering into an agreement under which they engaged in various anti-competitive activities.

6 Articles 5 and 6 of the Decision state that the applicant and the other parties to the TACA have infringed Article 86 of the Treaty (now Article 82 EC) and Article 54 of the EEA Agreement by altering the competitive structure of the

market so as to reinforce their collective dominant position and by placing restrictions on the availability and contents of service contracts.

7 Article 8 of the Decision imposes a fine of EUR 13 750 000 on the applicant in respect of the infringements found in Articles 5 and 6. Article 10 provides that the fines laid down in Article 8 are to be paid within three months of the date of notification of the Decision. After the expiry of that period, interest is automatically payable at the rate of 7.5%.

8 By letter of 25 September 1998 the Commission notified the applicant of the Decision. In that letter it stated that, if the applicant brought an action before the Court of First Instance, it would not take any steps to recover the fine while the case was pending before the Court, provided that interest at the rate of 5.5% accrued on the amount due from the date on which the period for payment expired and that a bank guarantee acceptable to the Commission and covering both the principal sum and interest was provided no later than that date.

9 By letter of 2 December 1998, the applicant asked for a dispensation from the obligation to provide a bank guarantee or pay the fine.

10 By application lodged at the Registry of the Court of First Instance on 7 December 1998 the applicant, together with 11 other shipping companies party to the TACA, brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of the Decision (Case T-191/98).

11 On 9 June 1999 the Commission rejected the applicant's request for a dispensation and indicated that it was prepared to accept:

'(a) a bank guarantee limited in time (f.i. for a one-year period) while using the attached bank guarantee model;

(b) a payment scheme allowing the Company to pay in instalments provided that late payment interest [was] calculated and that the outstanding balance of the debt [was] covered by a standard bank guarantee'.

12 The form of bank guarantee annexed to that letter provides for an initial duration of one year, the guarantee being automatically renewable for further periods of one year if it is not revoked by the bank. In the event of revocation, the applicant is obliged to pay within 15 days the amount of the fine together with the interest which has fallen due.

13 By document lodged at the Registry on 19 October 1999 the applicant, in accordance with Article 242 EC, made the present application for:

— suspension of the operation of Article 8 of the Decision in so far as it imposes a fine of EUR 13 750 000 upon the applicant, until (i) final judgment has been delivered in Case T-191/98 and in any appeal relating thereto and (ii) the order disposing of the present proceedings for interim relief has been made; and

— an order requiring the Commission to pay the costs relating to the present proceedings for interim relief.

14 The Commission lodged its written observations on 29 October 1999.

15 The judge dealing with the application for interim relief requested the applicant to reply at the hearing to certain written questions.

16 The parties presented oral argument on 12 November 1999. At the hearing, the applicant was asked to supplement its replies to the written questions which it had been asked. On 3 December 1999 the Commission submitted observations on the applicant's supplementary replies which had been received at the Registry on 26 November 1999.

17 On 7 December 1999, the judge dealing with the application for interim relief requested the applicant to express its views on certain questions raised by the Commission in its observations of 3 December 1999. The applicant replied by letter lodged at the Registry on 15 December 1999.

Law

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

19 Article 104(2) of the Rules of Procedure of the Court of First Instance 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 measures applied for.

20 The judge hearing an application for interim relief also balances the interests at stake where necessary (order of 29 June 1999 in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011).

Urgency

Arguments of the applicant

21 According to the applicant, exceptional circumstances justify suspension of the obligation to pay the fine imposed by the Decision without that suspension being conditional on the immediate provision of a bank guarantee.

22 It states that in 1997, against an unfavourable background for the shipping sector, it was seriously affected by the Asian economic and monetary crisis. In Korea the effects of that crisis were magnified by reason of the high level of banking debt and the widespread use of cross-guarantees between companies within a conglomerate. The applicant claims that in 1997 it made net losses of KRW 429 000 000 000 (EUR 284 000 000). In 1998 it increased its capital through the contribution of funds from new investors.

23 In accordance with the measures established by the International Monetary Fund and the Korean Government in response to that crisis, the applicant's principal bank, Seoul Bank, required the applicant to conclude an 'agreement for financial structure improvement' in March 1998. That agreement contained, *inter alia*, the following measures:

— the gradual elimination of cross-guarantees between companies in the Cho Yang group;

— the sale of half of the applicant's fleet, which now comprises just seven vessels;

— the disposal of certain shareholdings which it held in other companies.

24 Pursuant to that agreement, on 19 July 1999 the applicant, Samik Express and members of the Park family sold their shares in a Korean insurance company, First Life Insurance Co. Ltd ('First Life'), to Allianz AG. The applicant used the proceeds from the sale of its shares in First Life to reduce its debt. It also acquired a 100% interest in a former subsidiary of First Life, Hansin Mutual Saving & Finance Co. Ltd.

25 Finally, on 5 August 1999 the terminal division of Samik Express was merged with the applicant. On 6 August 1999 Samik Express paid the proceeds from the sale of a 28.37% interest in First Life to the applicant in order for the latter to reduce its debt.

26 As part of its restructuring, in March 1998 the applicant entered into a cooperation agreement ('United Alliance') with DSR-Senator Lines, Hanjin Shipping and United Arab Shipping Company relating to the provision of integrated liner services on the transpacific, Europe-Asia, transatlantic and Mediterranean routes. That cooperation agreement is to enable the applicant to improve the quality and competitiveness of its services.

27 The applicant states that in 1998 it made a net loss of KRW 47 000 000 000 (EUR 30 000 000). The cost of servicing its debt amounted to KRW 113 000 000 000 (EUR 72 000 000) and its indebtedness reached KRW 427 000 000 000 (EUR 273 000 000).

28 At the end of the first half of 1999, its net losses amounted to KRW 9 000 000 000 (EUR 7 000 000). It anticipates that its year-end accounts for 1999 will show assets of KRW 630 000 000 000 (EUR 484 000 000), liabilities of approximately KRW 570 100 000 000 (EUR 438 000 000) and positive equity of approximately KRW 59 900 000 000 (EUR 46 000 000).

29 It nevertheless considers that that improvement is purely relative; its position remains fragile. All its vessels and real estate are mortgaged and its equity holdings pledged as security. Some vessels which it operates have been arrested as a preventive measure by creditors.

30 Although the applicant has been able to persuade its banks not to foreclose on their loans, its poor creditworthiness has prevented it from obtaining new credit since 1998. Thus, Seoul Bank, Korea Development Bank, Korea First Bank and Hana Bank have expressly refused to provide a bank guarantee for suspension of payment of the fine, citing the applicant's net debt ratio.

31 The applicant maintains that it does not have liquid assets enabling it to pay the Commission EUR 13 750 000 (KRW 18 000 000 000). In order to pay that sum immediately it would be obliged to sell vessels or other productive assets. Since those assets have been given as security for debts, of an amount much higher than that of the fine, the proceeds from their disposal would be used first and foremost to repay preferential creditors. A sale of that kind would prejudice the company's ability to generate revenue, with the resultant risk that its creditors would be led to precipitate its liquidation.

32 The applicant asserts that it cannot expect any additional support from investors such as Krota Sea-Land Transportation, Lee Dongjoo and Pieris Investment, nor from Chang Won Development, Nam Buk Fisheries or the Park Family.

Arguments of the Commission

33 The Commission submits that the requirement relating to urgency is not met.

34 For almost two years creditors have continued to support the applicant despite its insolvency, because they consider that, in the long term, it is capable of improving its financial position and that, in the short term, liquidation would not enable them to recover their debts. The fine does not affect that analysis because it accounts for only a tiny part of the applicant's total indebtedness. Its immediate enforcement would not result in the applicant's liquidation. On the other hand, suspension of the fine or of the obligation to provide a bank guarantee would amount to the imposition on the Community taxpayer of risks normally borne by

the applicant's creditors. The banks would thus see an additional source of credit accorded to the applicant, at a lower rate than the rate which they apply.

35 The applicant's situation is no longer as serious as in 1997. At the end of 1999, it should have positive equity amounting in the Commission's estimate to approximately KRW 60 000 000 000 (EUR 46 000 000). No indication has been given of the consideration for the disposal of the 10.19% stake held by the applicant in First Life. Nor has any information been submitted regarding the financial impact of the merger between Samik Express and the applicant in August 1999.

36 In addition, the Commission points out certain contradictions in the applicant's documentation. It also observes that it is apparent from the documents before the Court that the applicant was to receive the proceeds from the sale of other companies in the Cho Yang Group, amounting to at least KRW 485 555 000 000, without having to part with all its productive assets.

37 Those sums must be compared with the size of the applicant's liabilities at 30 June 1999, namely KRW 874 000 000 000. The Commission concludes that the applicant's positive equity, as at 30 June 1999, is in excess of KRW 100 000 000 000 (EUR 79 000 000).

38 Furthermore, when considering the present application regard must be had to the assistance which may be given by undertakings in the same group as the applicant (orders in Case 86/82 R *Hasselblad* v *Commission* [1982] ECR 1555, paragraph 4, and in Case T-295/94 R *Buchmann* v *Commission* [1994] ECR II-1265). Contrary to the applicant's assertions, the reference in those decisions to members of the group is not founded on an arbitrary rule under which shareholders are required to assist the company. The point at issue is merely one of the aspects of urgency which the court hearing an application for interim relief must assess. It is

in the first instance for the shareholders of a company to decide whether the latter is capable of remaining in business. It is therefore justified to consider whether the applicant, with the assistance of the members of the group to which it belongs, is in a position to provide the bank guarantee demanded.

39 The restructuring agreement between Seoul Bank and the Cho Yang Group is sufficient proof of the existence of a company group. Contrary to the applicant's assertions, Mr Lee Dongjoo was a shareholder of the applicant before 1997. Krota Sea-Land Transportation and Pieris Investment took a stake in the applicant when its position had already clearly deteriorated. Those shareholders thus have the same interest as the lenders in an improvement in the applicant's business. The applicant has provided contradictory information on its shareholding structure, in particular on the precise number of shares held by the Park family.

Findings of the Court

40 It is necessary to examine whether enforcement of the Decision, before judgment is delivered on the merits, is liable to result in serious and irreversible harm for the applicant which could not be made good even if the Decision were to be annulled by the Court. It is not necessary to establish with absolute certainty that the harm is imminent. It is sufficient that the harm in question, particularly when it depends on the occurrence of a number of factors, should be foreseeable with a sufficient degree of probability (order in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 38).

41 Prima facie, the matters disclosed to the Court show that, by reason of the monetary and economic crisis in Korea, the applicant was in a fragile financial

position in 1997 and 1998. In order to assess whether the applicant, in the absence of a bank guarantee in favour of the Commission, would be faced with an imminent risk of liquidation jeopardising its existence, an analysis should be carried out as to the impact of the restructuring measures which have been implemented on its most recent accounts and financial results. Such an examination entails a complex analysis of a large amount of accounting and financial data. Given that closure of the annual accounts for the 1999 financial year is imminent, it appears necessary to defer an examination of that kind until those documents have been produced, before disposing of the present proceedings for interim measures.

42 In order to establish the conditions under which that postponement will take place, it is necessary to balance the various interests at play, in particular the Commission's interest in being able to recover the fine should the main action be dismissed and, more generally, the public interest in maintaining the deterrent effect of fines imposed by the Commission (order in Case 78/83 R *USINOR* v *Commission* [1983] ECR 2183, paragraph 8).

43 At the hearing, the applicant replied to a number of questions concerning principally: (a) its share ownership structure and that of the Cho Yang Group; (b) its financial position in 1999 and progress with the restructuring programme established by Seoul Bank; and (c) the treatment accorded, in the accounts for the financial years 1996 and 1997, to the financial risks linked to the investigation concerning the TACA and, in the accounts for 1998, to the fine which has been imposed upon it.

44 With regard to that last point, the applicant stated at the hearing that the amount of the fine had not been shown in the accounts for the 1998 financial year and that, in the preceding years, no provision had been made to reflect the risks of

being fined as a result of the investigation relating to the TACA. Such accounting practices do not give a true and fair view of the company's assets, financial position and profit or loss.

45 In those circumstances, the applicant should be required to produce, before 1 April 2000, its annual accounts for the 1999 financial year, audited and certified by a firm of auditors of international repute, accompanied by a letter from that firm certifying that those accounts also reflect the amount, by way of both principal sum and interest, of the fine imposed by the Decision.

46 Pending that information, it is necessary to determine whether suspension of the obligation on the applicant to provide a bank guarantee should be ordered as an interim measure. In the present case, such a suspension does not appear such as to prejudice the public interest or the interest of the Commission in the immediate enforcement of its decision: interest will continue to accrue on the fine imposed on the applicant as provided in Article 10 of the Decision.

47 An order should accordingly be made as an interim measure suspending the obligation imposed on the applicant to provide a bank guarantee until the order disposing of the present proceedings for interim relief has been made.

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 as a condition for avoiding the immediate recovery of the fine

imposed on it by Article 8 of Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) is suspended until the order disposing of the present proceedings for interim relief has been made.

2. The suspension granted in paragraph 1 above shall cease to have effect if the applicant does not lodge the following documents at the Registry of the Court of First Instance before 1 April 2000:

   (a) its annual accounts (balance sheet; statement of income; statement of cash flow) for the financial year ending on 31 December 1999, audited and certified by a firm of auditors of international repute;

   (b) a letter from the firm referred to in (a) above certifying that those annual accounts reflect the amount, by way of both principal sum and interest, of the fine imposed on the applicant by the contested decision.

3. Until the present proceedings for interim relief have been disposed of, interest at the rate of 7.5% shall continue to accrue on the fine imposed on the applicant, in accordance with Article 10 of Decision 1999/243.

Luxembourg, 15 December 1999

H. Jung — Registrar

B. Vesterdorf — For the President