ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
27 March 2003 *

In Case T-398/02 R,

Linea GIG Srl, in liquidation, established in Florence (Italy), represented by L. D'Amario and B. Calzia, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by L. Pignataro-Nolin and O. Beynet, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for the suspension of operation of the Commission's decision of 30 October 2002 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA agreement (COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega — Nintendo), in that it imposes a fine of EUR 1.5 million on the applicant,

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

makes the following

Order

Facts and procedure

1 The documents before the Court show that Linea GIG SpA was the exclusive distributor of Nintendo products in Italy, at least from 1 October 1992 until 31 December 1997.

2 As a result of a difficult financial situation, it was decided, at an extraordinary general meeting of Linea GIG SpA, on 8 January 1999, to put the company into liquidation.

3 On 16 February 1999, Linea GIG SpA applied to the Florence District Court to open the composition with creditors procedure (concordato preventivo) provided for under Article 160 et seq. of Royal Decree 267 of 16 March 1942 (GURI No 81, of 6 April 1942).

4 By judgment of 17 November 1999, the Florence District court approved the composition with creditors submitted by Linea GIG SpA. Under the terms of the composition thus approved, Linea GIG SpA is required to liquidate all its assets in order to pay the preferential creditors in full and the unsecured creditors at least 40% of their claims. In that procedure, the liquidator appointed by the court disposes of the debtor's assets which are the subject of the composition and distributes the proceeds between the creditors in accordance with the legitimate order of their claims.

5 On 25 April 2000, the Commission initiated a proceeding pursuant to Article 81 EC against Linea GIG SpA, on account of its involvement, during a certain period, in a series of agreements and concerted practices with the aim and effect of restricting imports and parallel exports of Nintendo game consoles and cartridges. On 24 July 2000, Linea GIG SpA submitted its observations on the complaints made against it by the Commission.

6 On 30 October 2002, the Commission adopted a decision relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA agreement (COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega — Nintendo) ('the Decision'), in which it found that several undertakings had infringed Article 81(1) EC and Article 53(1) of the EEA agreement, by participating, for various periods according to the undertakings concerned, in a complex of agreements and concerted practices in the markets for game consoles and game cartridges compatible with Nintendo manufactured

game consoles, with the object and effect of restricting parallel exports of Nintendo game consoles and cartridges. Among the undertakings mentioned in Article 1 of the Decision, apart from Nintendo Corporation Ltd/Nintendo of Europe GmbH, are seven companies which distributed the aforementioned products.

7 One of the distributors mentioned in Article 1 of the Decision is Linea GIG SpA, which the Commission finds responsible for the infringement referred to in that article for the period from 1 October 1992 to the end of December 1997.

8 Under Article 3 of the Decision, the infringement is penalised, in the case of Linea GIG SpA, by a fine of EUR 1.5 million.

9 Under Article 4 of the Decision, the fine imposed on Linea GIG SpA is payable within three months of the date of notification of the Decision. The Commission notified Linea GIG SpA of the Decision by letter dated 7 November 2002. In the letter, the Commission explained that, if an action were brought before the Court of First Instance, it would take no steps to recover the fine whilst the proceedings were pending before that court, provided that the amount due bore interest calculated from the end of the term of payment and that an acceptable bank guarantee was furnished.

10 On 24 September 2002 it was decided to alter the company's legal form and Linea GIG SpA was converted into a limited liability company. Since that date the company name has been 'Linea GIG Srl in liquidazione' (hereinafter 'Linea' or 'the applicant').

11 By application lodged at the Court Registry on 30 December 2002, Linea brought an action under the fourth paragraph of Article 230 EC for the annulment of the Decision, in whole or in part, or, in the alternative, the cancellation or reduction of the fine imposed on it.

12 By separate document lodged at the Court Registry on 30 January 2003, Linea filed an application for suspension of the operation of the Decision in so far as it imposes a fine on the applicant.

13 The Commission submitted its written observations on the application for interim relief on 14 February 2003.

14 The hearing before the judge hearing the application for interim relief was held on 6 March 2003. At the hearing, that judge reserved his decision as to whether the applicant might be allowed to lodge two further documents; formal note was taken of this in the record.

Law

15 Under the combined provisions of Articles 242 EC and 243 EC and under Article 225(1) EC, the Court may, if it considers that the circumstances so require, order the operation of the contested act to be suspended or prescribe any necessary interim measures.

16 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that an application for interim relief is to state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measure applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order in Case C-286/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30). Where appropriate, the judge hearing such an application must also weigh up the interests involved (order in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73).

17 The measure requested must further be provisional, inasmuch as it must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

Arguments of the parties

Prima facie case

18 The applicant claims, first, that the Commission infringed Article 15(2) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), by imposing on it a fine exceeding the maximum threshold of 10% of the turnover in the preceding business year laid down by that provision.

'The preceding business year' has always been understood to be a reference to the business year preceding the date of the decision imposing the fine. In the present case, Linea had no turnover in 2001.

19 By its second plea, Linea maintains that the Commission incorrectly applied Article 81 EC to the first distribution agreement concluded between Linea and Nintendo Corporation Ltd and that it infringed Article 253 EC.

20 By its third plea, the applicant maintains that the Commission wrongly found it responsible for the anti-competitive practices to which the Decision relates.

21 The fourth plea alleges inconsistencies within the Decision and infringement of Article 253 EC.

22 Finally, the fifth plea alleges a failure to take into account the economic context in which the agreements and/or concerted practices in question occurred.

23 The Commission considers that none of the pleas raised by the applicant supports the conclusion that there is a *prima facie* case.

Urgency and the balancing of interests

24 Linea considers that the condition concerning urgency is satisfied in this case. It bases that conclusion on three arguments connected with the composition with creditors procedure of which it is currently the subject.

25 First, it points out that it ceased all economic activity in 1999 and that it is required to liquidate all its assets in order to pay its preferential creditors in full and the unsecured creditors at least 40% of their claims. It states that the cost of the composition with creditors has been estimated by the receiver at ITL 135 589 911 521 (EUR 70 026 345) but that the assets have been valued at only ITL 125 241 894 385 (EUR 64 682 040), so that there is a deficit of EUR 5 344 305; the applicant maintains, however, that the 'receiver's calculations are so cautious that the deficit is probably not so great'. At the moment, its only income is from the liquidation of its assets and that is allocated to paying its debts in accordance with the terms of the judgment of the Florence District Court of 17 November 1999.

26 Secondly, it claims that, in connection with the composition with creditors, any controversy relating to the existence, amount and preferential or unsecured nature of a claim necessarily has an effect on the distribution of its assets and therefore repercussions for the position of the other creditors. It is therefore necessary, before Linea can pay the fine imposed on it by the Commission and in order to avoid payments likely to compromise equality between creditors, to establish — and this should be done, where appropriate, by the national court — the nature of the Commission's claim and to ascertain whether payment, in whole or in part, may take precedence over the company's other debts.

27 Thirdly, the objective requirement for a composition with creditors is the same as that for bankruptcy, namely the company's insolvency.

28 Those three arguments are enough to show that Linea cannot pay the fine and/or provide the bank guarantee required by the Commission without suffering serious and irreparable harm. They also explain the reasons why it would be, in practical terms, impossible to obtain the bank guarantee requested. Indeed, no bank would be prepared to guarantee Linea's debts since, in the light of the case-law of the Italian courts, according to which debts arising after the date on which the composition with creditors procedure is opened cannot be paid before those which arise prior to that date, it might in the future find itself in the position of having to honour all Linea's commitments to the Commission but able to recover only part from Linea.

29 Finally, payment of the costs connected with providing a bank guarantee, even if they could be taken out of the liquidated assets, would in any event cause serious harm to the creditors even before causing harm to the company. Indeed, the non-recoverable cost of the guarantee would be borne, in essence, by Linea's unsecured creditors, who would see the already small sum allocated for paying their claims proportionally reduced.

30 In the last part of its application for interim relief, Linea adds that, through the receiver, it asked the appointed judge, who acceded to its request, for EUR 1.65 million, that is, the equivalent of the amount of the fine imposed together with interest, to be set aside as security for the Commission's claim, and for its distribution to the company's creditors to be prohibited until a ruling was given in the main action. That measure is an even more solid guarantee than the bank guarantee required by the Commission and consequently should dispel any fears

that the fine will not be paid if the Court does not grant the application for the annulment of the Decision in the main action. Indeed, that measure was adopted by a legal authority requested to oversee the composition with creditors procedure and without whose consent the sums released by the liquidation of the company cannot be distributed.

31 The Commission considers that Linea has by no means proved that providing the bank guarantee would cause it serious and irreparable harm.

32 It maintains, in particular, that it has not been shown that banks have been requested to provide a guarantee or that those requests have actually been refused.

33 The Commission also considers that the setting aside of a sum of EUR 1.65 million should enable the banks requested to provide the bank guarantee to do so. The setting aside of that sum proves that it exists and, at least while the main action is pending before the Court, cannot be freed to pay the creditors.

34 Finally, the applicant is not justified in invoking the harm constituted by paying the costs of providing the bank guarantee, since that harm will be suffered by the company's unsecured creditors. Harm occasioned to a third party cannot be taken into consideration for the purposes of granting interim measures (Case T-213/97 R *Eurocoton and Others* v *Council* [1997] ECR II-1609, paragraph 46).

35 Even if, *quod non*, the applicant might suffer harm as a result of providing the bank guarantee owing to its difficult financial situation, that harm could not be

regarded as irreparable since the applicant has by no means established, particularly by convincing financial data, that it was impossible for it to provide the bank guarantee without risking liquidation (Case C-361/00 P(R) *Cho Yang Shipping* v *Commission* [2000] ECR I-11657, paragraph 89; Case T-59/99 R *Ventouris* v *Commission* [1999] ECR II-2519, paragraphs 16 and 18).

36 There is no evidence that the setting up of the bank guarantee would be the only or main cause of the company's possible disappearance from the market, since the losses and difficulties referred to arose out of events which occurred long before the Decision was adopted.

37 The Commission maintains that it is necessary, when assessing the interests at stake, to achieve a balance between the applicant's interest — since it maintains that it cannot arrange a bank guarantee — in avoiding immediate payment of the fine, and the Community's financial interest in being able to recover that sum and, more generally, the public interest in preserving the effectiveness of Community competition rules and the deterrent effect of fines imposed by the Commission.

38 In the present case, it states that, as regards general principles, the requirement to provide a bank guarantee in an amount equal to the fine imposed as an alternative to paying it, if an undertaking brings an action against the decision imposing the fine, is the minimum required by the Community public interest.

39 As for the setting aside of a sum of EUR 1.65 million (see paragraph 30 above), this, contrary to the applicant's submission, cannot constitute satisfactory security for the Commission.

40 First, the judge hearing the application for interim relief is not obliged to consider the alternative measures proposed by the applicant since the latter has been unable to establish that it was impossible for it to provide the bank guarantee (see, to this effect, Case C-364/99 P(R) *DSR-Senator Lines* v *Commission* [1999] ECR I-8733, paragraph 64).

41 Secondly, it is not certain that the sum set aside will be security for the Commission alone. It is not specified, and is not clear from the documentary evidence supplied by the applicant, whether creditors are able to assert their claims over the sum set aside or whether that setting aside removes from the proportionate ranking of the other preferred and unsecured creditors the sum corresponding to the fine owed to the Commission.

42 Moreover, account should be taken of the fact that the composition with creditors might conceivably be terminated or annulled under the applicable legislation; this would have the effect of reopening the proportionate ranking of old and new creditors. Consequently, if the Commission had to wait until the end of the proceedings in the main action pending before the Court of First Instance, there would still be the objective risk that, if the composition were terminated or annulled, there would not be adequate assets to cover the amount of the fine.

43 According to the Commission, it is therefore evident, first, that the alternative solution proposed by Linea does not protect its financial interests in the same way as the bank guarantee and, secondly, that a possible suspension of operation of the Decision would prevent it from pursuing any other judicial remedy to recover the fine and safeguard its interests. The Commission would therefore run the genuine risk, once the proceedings before the Court of First Instance had ended, if the application in the main action were dismissed, of finding that there were no longer enough assets to obtain payment of the fine, even in part. On the other hand, it is clear that the provision of a bank guarantee would protect the whole of the Commission's claim.

Findings of the judge hearing the application for interim relief

Admissibility of the main action

44 It is well established that an application for interim relief cannot be examined if the action to which it relates is not admissible. Applicants must be precluded from obtaining, by means of interim relief, measures to which they would not be entitled if their action were declared inadmissible by the Court in its examination of the substance of the case.

45 In the present case, the Commission has not challenged the admissibility of the main action in connection with the proceedings for interim relief. However, since the lack of a legal interest in bringing proceedings is an absolute bar to proceedings (orders in Case 19/85 *Grégoire-Foulon* v *Parliament* [1985] ECR 3771, paragraphs 7 to 9; Case 108/86 *D.M.* v *Council and ESC* [1987] ECR 3933, paragraph 10; Case T-45/91 *McAvoy* v *Parliament* [1993] ECR II-83, paragraph 22), it is for the judge hearing the application for interim relief to consider of his own motion whether the applicant has *prima facie* an interest in obtaining annulment of the Decision.

46 According to settled case-law, a legal interest in bringing proceedings is present only if the annulment of the measure is itself capable of having legal consequences (Case T-188/99 *Euroalliages* v *Commission* [2001] ECR II-1757, paragraph 26). Furthermore, a legal interest in bringing proceedings is assessed as on the date on which the action is commenced (Case T-22/97 *Kesko* v *Commission* [1999] ECR II-3775, paragraph 55).

47 Furthermore, it has already been held that the interest in bringing proceedings relied on by an applicant company constituted according to Italian law no longer subsisted since it had been declared bankrupt in the meantime (Case T-443/93 *Casillo Grani* v *Commission* [1995] ECR II-1375).

48 In the present case, the applicant is a company in liquidation and that liquidation, far from occurring during the proceedings before the Court, began well before the date on which the main action was brought.

49 When questioned by the judge hearing the application for interim relief at the hearing, the applicant stated that, at this stage, only its preferential creditors have been paid off. It therefore still has to pay its secured creditors in accordance with the terms of the composition with creditors. Also in reply to an oral question, it stated, without being contradicted on that point by the Commission, that Italian law does not lay down any time-limit within which the liquidation must be completed.

50 It appears from those replies that Linea may not yet be dissolved when the Court of First Instance gives a ruling on the substance of the case.

51 In those circumstances and since an annulment of the Decision or a reduction in the amount of the fine would have the legal effect, as the case may be, of extinguishing or reducing the amount of the Commission's claim, it must be concluded that the applicant, on the date that its main action was lodged, had an interest in obtaining the annulment of the Decision.

52 It follows that the application for interim relief is admissible.

Urgency and balancing of interests

53 It is necessary at the outset to specify the aim of this application for interim relief.

54 The application seeks to obtain the suspension of the operation of the Decision in so far as it imposes a fine on the applicant. The parties agree that, in its letter of 7 November 2002 notifying the Decision, the Commission stated that, if an action were brought, it would take no measures to enforce the fine provided that the applicant furnished an acceptable bank guarantee. In those circumstances, the application for suspension of operation can have no aim other than to obtain dispensation from the obligation to provide a bank guarantee as a condition for non-enforcement by the Commission of its right to immediate payment of the amount of the fine imposed by that decision. An application of that nature can be granted only in exceptional circumstances (orders in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549, paragraph 6; *DSR-Senator Lines* v *Commission*, cited above, paragraph 48; and Case C-7/01 P(R) *FEG* v *Commission* [2001] ECR I-2559, paragraph 44). In the context of applications for interim relief, express provision is made in the Rules of Procedure of both the Court of Justice and the Court of First Instance for requiring security to be lodged, which is a general and reasonable policy pursued by the Commission.

55 The presence of such exceptional circumstances may, as a rule, be regarded as established if the party seeking dispensation from an obligation to provide a bank guarantee proves that it is objectively impossible to provide that guarantee (see, to that effect, *DSR-Senator Lines* v *Commission* and *FEG* v *Commission*, cited above) or that it is unable to provide a bank guarantee without placing its existence in jeopardy (see *inter alia* orders in Case T-295/94 R *Buchmann* v *Commission* [1994] ECR II-1265, paragraph 24, and Case T-191/98 R II *Cho Yang Shipping* v *Commission* [2000] ECR II-2551, paragraph 43).

56 In the present case, it is established that the applicant no longer carries on any economic activity, that since 1999 — three years before the Commission imposed on it the fine specified in Article 3 of the Decision — it has been the subject of a composition with creditors procedure governed by the applicable national law, and that it is in liquidation. It follows that there cannot be any causal link between a refusal to grant the measure sought and the applicant's insolvency. Therefore, the assessment of serious and irreparable harm cannot, in the factual and legal circumstances which characterise this case, be carried out using the criterion of the threat to the applicant's existence, as the Commission suggests in its observations.

57 The main argument put forward by the applicant is that no bank can agree to guarantee the debt it owes the Commission since a bank's claim, arising after the date on which the composition with creditors procedure was opened, could never be recovered.

58 In that regard, the Commission points out that the sum of EUR 1.65 million was set aside, as the applicant asserts, to 'guarantee' payment of the fine together with interest. Since the alleged aim in setting that sum aside is to enable the applicant to pay its debt to the Commission if its main action is dismissed, the Commission considers that the sum in question could have been set aside on the same terms in favour of a bank for the purposes of providing the required guarantee.

59 However, as Linea maintained at the hearing, the sum of EUR 1.65 million cannot be frozen for the sole benefit of a bank, so the bank would not be certain of actually being paid by the applicant. Even if the main action were dismissed, the bank would enter the proportionate ranking with the applicant's other creditors and it would then be for the national court to determine the nature and rank of the claim in question, which would have arisen after the composition with creditors procedure had been opened. The risk thus incurred of never being paid by the applicant seems to have been substantiated to the point that it must be accepted that no bank would agree to provide the required bank guarantee.

60 In those circumstances, it must be held that Linea has shown to the requisite legal standard that its current company and financial situation makes it objectively impossible to obtain the guarantee from a bank.

61 Nevertheless, the balance of interests at stake precludes the granting of this application for interim relief.

62 In the light of the particular circumstances of the case, suspension of the operation of the Decision, in that it requires the applicant to pay a fine, would have the effect of preventing the Commission from bringing any action before the national court to recover the fine and to protect, as well as its own interests, the Community's financial interests (*Cho-Yang Shipping*, cited above, paragraph 53), the sole aim being, in fact, to protect Linea's other creditors. However, as the Commission has rightly pointed out, the risk that, were the main action to be dismissed, the applicant's assets might then no longer be adequate to pay the fine, in whole or in part, cannot be ruled out with certainty. Furthermore, it is by no means guaranteed, as the applicant acknowledged at the hearing, that the sum of EUR 1.65 million which it has set aside will be allocated solely to paying Linea's debt to the Commission in the event that the main action is dismissed. It is therefore necessary to maintain the enforceability of the Decision in order not to preclude any measures which the Commission considers it necessary to take for the purposes of recovering the amount of the fine imposed by the Decision.

63 As for the alleged interest of Linea and its creditors in avoiding action being taken to recover the fine, this can be assessed only in the light of the classification and rank of the Commission's claim, which it is for the national court alone to determine, if appropriate after making a reference to the Court of Justice under Article 234 EC.

64 Since the balance of interests indicates that operation of the Decision should not be suspended, this application must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim relief is dismissed.

2. Costs are reserved.

Luxembourg, 27 March 2003.

H. Jung

Registrar

B. Vesterdorf

President