ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

7 June 2007 *

In Case T-346/06 R,

Industria Masetto Schio Srl (IMS), established in Schio (Italy), represented by F. Colonna and T. Romolotti, lawyers,

applicant,

v

Commission of the European Communities, represented by C. Zadra and D. Lawunmi, acting as Agents,

defendant,

APPLICATION for the suspension of operation of Commission Opinion C(2006) 3914 of 6 September 2006 concerning a prohibition measure adopted by the French authorities relating to certain mechanical presses of the IMS brand,

* Language of the case: Italian.

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

makes the following

Order

Legal context, measures and procedure

1 Article 2(1) of Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery (OJ 1998 L 207, p. 1), which applies to this case, provides that Member States are to take all appropriate relief to ensure that machinery or safety components covered by the Directive may be placed on the market and put into service only if they do not endanger the health or safety of persons and, where appropriate, domestic animals or property, when properly installed and maintained and used for their intended purpose.

2 Article 4(1) of Directive 98/37 provides that 'Member States shall not prohibit, restrict or impede the placing on the market and putting into service in their territory of machinery and safety components which comply with [the] Directive'.

3 Article 7(1) of Directive 98/37 provides that, where a Member State ascertains that machinery bearing the CE marking, or safety components accompanied by the EC declaration of conformity, used in accordance with their intended purpose, are liable to endanger the safety of persons, and, where appropriate, domestic animals or property, it is to take all appropriate relief to withdraw such machinery or safety components from the market, to prohibit the placing on the market, putting into service or use thereof, or to restrict free movement thereof. The Member State is to inform the Commission immediately of any such measure, indicating the reason for its decision.

4 Article 7(2) of Directive 98/37 provides that the Commission is to enter into consultation with the parties concerned without delay. Where the Commission considers, after this consultation, that the measure is justified, it must immediately so inform the Member State which took the initiative and the other Member States. Where the Commission considers, after this consultation, that the action is unjustified, it must immediately so inform the Member State which took the initiative and the manufacturer or his authorised representative established within the Community. Where the decision referred to in paragraph 1 is based on a shortcoming in the standards, and where the Member State at the origin of the decision maintains its position, the Commission must immediately inform the committee in order to initiate the procedures referred to in Article 6(1).

5 On 8 August 2001, the French Republic notified to the Commission an Interministerial Order of 27 June 2001 relating to the prohibition of placing on the market and the prohibition of use of certain presses for the cold working of metals of the IMS brand produced by the applicant ('the Order of 27 June 2001').

6 The Order of 27 June 2001 prohibited the putting into service and use of IMS-brand presses of the models P40VE, P40VEI, P50VE and P50VEI already manufactured, which had obtained an EC examination certificate issued by the Agenzia nazionale certificazione componenti e prodotti (National Agency for the Certification of Components and Products, ANCCP), unless they had been brought into conformity

with the technical rules applicable to working equipment, inserted in Article R. 233-84 of the Labour Code and the placing on the market, putting into service and use of IMS-brand presses of the models P40VE, P40VEI, P50VE and P50VEI which had obtained an EC examination certificate issued by the Istituto certificazione europea prodotti industriali (Institute for the European Certification of Industrial Products, ICEPI).

7 The French Conseil d'État (Council of State) annulled the Order of 27 June 2001 by decision of 4 December 2002.

8 The French authorities sent a letter to the Commission on 8 April 2005. In that letter, the French authorities stated:

'... By letter dated 2 March 2004, the European Commission informed the French authorities that an independent expert had been appointed to examine the extent of conformity of the aforementioned IMS brand presses. Following that examination, an expert's report was expected by April 2004.

Today, the French authorities respectfully call upon the European Commission to ensure that the consultation procedure provided for in Article 7 of the Directive [98/37] is in fact implemented.

3. Urgency of the request

The French authorities wish to bring to the Commission's attention a new fact. Although the European Commission has never given its opinion on whether or not

the protective measure adopted by France against certain presses of the IMS brand is justified, that manufacturer has brought an action for damages before the competent national court on the basis of a wrongful measure committed by the public authorities.

When applying that protective procedure (provided for by Article 7 of the Directive), the French authorities must point out that they have always complied, firstly, with the provisions of the Directive [98/37] and, secondly, with the provisions laid down by the Treaty on European Union. That is why they hope that the European Commission's opinion can be communicated to them as soon as possible.

4. A problematical situation under Community law

The present absence of a Community response places the French authorities in a difficult position in the light of the provisions of Article 226 of the Treaty on European Union. Under that article, it is the sole responsibility of the European Commission to assess whether a protective measure adopted by a Member State is justified.

If appropriate, where it is apparent that a safeguard clause is not justified, it is then for the Commission not only to request the Member State concerned to repeal its national measure, but also to have recourse to the infringement proceedings provided for by Article 226 of the Treaty on European Union.

Only on the basis of such proceedings is it then possible for a manufacturer, caught by an unjustified measure, to bring any court proceedings which may be necessary in order to be compensated for damage suffered.

5. Responsibility of the French State

In order to enable the French State to fulfil its obligations concerning the health and safety of persons, but also to enable it to conduct its defence in the abovementioned national proceedings, the French authorities request the European Commission kindly to forward to them a copy of the expert's report relating to the assessment of the extent of conformity of certain mechanical presses of the IMS brand.'

9 The Commission examined those relief and, while rejecting various inferences of non-conformity relied on by the French authorities, concluded, following that examination, in Opinion C(2006) 3914 delivered on 6 September 2006 ('the contested measure'), that the Order of 27 June 2001 was partially justified.

10 By application lodged at the Court Registry on 6 December 2006, the applicant brought an action for annulment of the contested measure and an action for damages.

11 By separate document lodged at the Registry on 18 January 2007, the applicant brought the present application for interim relief under Article 242 EC, seeking suspension of the operation of the contested measure.

12 The Commission submitted its written observations on the present application for interim relief on 19 February 2007. It contends that the application for suspension of operation should be dismissed and that the applicant should be ordered to pay the costs.

13 The parties presented their oral argument at a hearing held on 1 March 2007.

14 When called on to submit additional information regarding urgency, the applicant complied with that request by document lodged at the Registry on 9 March 2007.

15 The Commission submitted its observations on that additional information by document lodged at the Registry on 16 March 2007.

Law

16 Under Article 242 EC, in conjunction with Article 225(1) EC, the Court of First Instance may, if it considers that circumstances so require, order that application of the measure contested before it be suspended.

17 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim relief must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim relief applied for.

18 According to settled case-law, the judge hearing an application for interim relief may order suspension of operation of an measure, or other interim relief, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's

interests, it must be made and produce its effects before a decision is reached in the main action. Where appropriate, the judge hearing such an application must also weigh up the interests involved (orders in Case C-377/98 R *Netherlands* v *Parliament and Council* [2000] ECR I-6229, paragraph 41; Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73; and in Case T-310/06 R *Hungary* v *Commission*, paragraph 19).

19 Furthermore, in the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim relief must be assessed (order in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 23).

20 It is in the light of the principles restated above that this application for interim relief must be examined.

Admissibility

Prima facie admissibility of the main action

— Arguments of the parties

21 The Commission submits that the action for annulment, to which the present application for interim relief relates, is manifestly inadmissible, since the contested

measure is not a measure producing binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in its legal position.

22 The Commission further submits that, even if the contested measure were such as to produce such effects, the applicant would in any event not be directly concerned.

23 The condition that an applicant must be directly concerned for the purposes of the fourth paragraph of Article 230 EC requires the contested Community relief to affect directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.

24 According to the Commission, the mechanism established by Directive 98/37 has, inter alia, the following characteristics.

25 Firstly, a Member State which adopts relief pursuant to Article 7(1) of Directive 98/37 must inform the Commission thereof. According to the Commission, notification of those relief is not however a suspensive condition of their effects. Once adopted, they are immediately applicable within the territory of the Member State which has adopted them.

26 Secondly, the procedure laid down by Directive 98/37 does not prescribe any period within which the Commission must conclude its examination of the measure.

According to the Commission, it is only required to consider 'immediately' whether the measure which has been communicated to it is justified. That consideration is possible, after the consultation referred to in Article 7(2), only when the Commission has available to it all the necessary technical information.

27 Thirdly, according to the Commission, if it considers that the measure is not justified, it is simply required so to inform both the Member State concerned, so that it can withdraw the measure in question, and the party concerned, so that it has available to it additional evidence enabling it to contest the measure before the national courts. The Commission's opinion is therefore not such, on its own, as to suspend the effects of the national measure.

28 Fourthly, the Commission submits that, if the measure is justified, it is simply required to inform the Member State concerned and all the other Member States so that they can ascertain the need to adopt similar relief for the purposes of the protection of health and safety. Even in that case, the Commission's opinion is therefore not such, on its own, as to produce in the Member States restrictive effects on trade in the machines concerned.

29 Fifthly, the Commission submits that the opinion, by virtue of which it considers the measure to be justified, is not published in the Official Journal and does not trigger between the Member States any mechanism for reciprocal recognition of the national measure to which the opinion refers. The opinion in question is not immediately applicable in all the Member States.

30 The applicant submits that the main action is admissible act.

— Findings of the President of the Court

31 It should be observed, on the basis of established case-law, that, although it is true that the question of the admissibility of the main action should not, in principle, be examined in the context of proceedings for interim relief, so as not to prejudge the main proceedings, it may nevertheless be necessary, in order for an application for suspension of the operation of an measure to be declared admissible, for the applicant to prove the existence of certain matters permitting the prima facie conclusion that the main action to which his application for interim relief relates is admissible, so as to prevent him from obtaining, by way of proceedings for interim relief, the suspension of the operation of an measure which the Community judicature may subsequently refuse to annul, his main action having been ruled inadmissible (order in Case C-329/99 P(R) *Pfizer Animal Health* v *Council* [1999] ECR I-8343, paragraph 89, and order in Case T-37/04 R *Região autónoma dos Açores* v *Council* [2004] ECR II-2153, paragraph 108).

32 Such an examination of the admissibility of the main action is necessarily summary because the proceedings for interim relief are by nature urgent (order in Case C-300/00 P(R) *Federación de Cofradías de Pescadores and Others* v *Council* [2000] ECR I-8797, paragraph 35, and *Região autónoma dos Açores* v *Council*, cited in paragraph 31 above, paragraph 109).

33 Indeed, in the context of proceedings for interim relief, the admissibility of the main action can only be assessed on a prima facie basis, the aim being to examine whether the applicant has adduced sufficient elements which justify the prima facie conclusion that the admissibility of the main action cannot be excluded. The judge hearing the application for interim relief should only declare that application inadmissible where admissibility of the main action can be wholly excluded. To rule, at the stage of the proceedings for interim relief, on the admissibility of the main action, when its admissibility is not, prima facie, wholly excluded, would be tantamount to prejudging the Court of First Instance's decision in respect of that

action (orders in Case T-342/00 R *Petrolessence and SG2R* v *Commission* [2001] ECR II-67, paragraph 17; Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar* v *Commission* [2001] ECR II-3915, paragraph 47; and *Região autónoma dos Açores* v *Council*, cited in paragraph 31 above, paragraph 110).

34 In this case, firstly, the Commission maintains, in essence, that the main action is inadmissible in that the contested measure is a Commission opinion, by which it takes a view on a national measure, and that that measure therefore does not constitute a decision producing binding legal effects.

35 According to settled case-law, only relief the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are measures or decisions which may be the subject of an action for annulment under Article 230 EC (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Case C-147/96 *Netherlands* v *Commission* [2000] ECR I-4723, paragraph 25). In order to ascertain whether a contested measure produces such effects, it is necessary to look to its substance. However, the form in which such measures or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge by means of an action for annulment (*IBM* v *Commission*, paragraph 9).

36 In that regard, it should, in the first place, be observed that the measure whose suspension is sought is entitled, by the Commission, 'Commission Opinion'.

37 However, it should be noted that Article 7(2) of Directive 98/37 does not use the word 'opinion' or an equivalent term. It does, on the other hand, provide that '[w]here the Commission considers, after this consultation, that the measure is justified, it shall immediately so inform the Member State which took the initiative and the other Member States'.

38 It should, in the second place, be pointed out that the Commission states in point 1 of the contested measure that it 'is required, after consulting the parties concerned, to rule on whether or not such relief are justified' and that '[i]f the measure is considered justified, [it] must so inform the Member States so that they can take all appropriate relief with regard to the machine in question'.

39 In the light of those considerations, and having regard to the scheme and purpose of Directive 98/37, it must, firstly, be observed that the Commission seems, prima facie, to have an obligation and not merely a discretionary power, under the provisions of Article 7 of Directive 98/37, to rule on the national measure which has been notified to it. Secondly, it must be pointed out that it also seems, at first sight, that the Commission is required to rule, not on a draft measure, but on a national measure which, having been adopted by a Member State, has the effect of restricting free movement of the machinery concerned.

40 It should, moreover, be borne in mind that, pursuant to the provisions of Article 2(1) of Directive 98/37, Member States are to take all appropriate relief to ensure that machinery or safety components covered by that directive may not be placed on the market and put into service if they endanger the health or safety of persons and, where appropriate, domestic animals or property.

41 The possibility therefore remains, prima facie, that, when the Commission communicates to Member States the measure by which it finds that the machinery covered by the national measure endangers the health and safety of persons and, where appropriate, domestic animals or property, and so informs the other Member States, in accordance with the provisions of Article 7(2) of Directive 98/37, it is then for the latter to take, in accordance with Article 2(1) and Article 7(1) of Directive 98/37, all appropriate relief to withdraw such machinery or safety components from the market, to prohibit the placing on the market, putting into service or use thereof, or to restrict free movement thereof.

42 It is therefore not possible for the judge hearing an application for interim relief to preclude, at this stage, the finding by the Commission that a national measure adopted by a Member State under Article 7(1) of Directive 98/37 is justified and the sending of that information to the other Member States, in accordance with Article 7(2) of that directive, from bringing about a distinct change in the legal position of the producer of the machinery concerned by the Commission's measure by prohibiting that machinery from being put into circulation or into service on the market of the Member States to which that measure is addressed. Consequently, the possibility remains, prima facie, that the Commission's measure may give rise to binding legal effects for the producer of the machinery covered by that measure.

43 The remainder of the Commission's argument must also be rejected.

44 In the first place, the Commission states that 'the failure of a Member State to adopt similar relief following the communication of the Commission opinion could, it is true, form the subject-matter of proceedings under Article 226 of the Treaty, but for infringement of the relevant provisions of the Directive, and not for contravention of the aforementioned Opinion'.

45 Without there being any need to rule, in the context of the present application for interim relief, on the legal basis capable of justifying a possible action for failure to fulfil obligations under the Treaty, it is sufficient to point out that the Commission acknowledges, in that way, that an obligation rests on the other Member States following the adoption of its Opinion.

46 In the second place, it should be observed that the circumstance that there is no reciprocal recognition of the national measure, as the Commission contends, arises, prima facie, from the fact that it is the Commission's responsibility to assess whether the national measure is justified and that it is for it, following that examination, to rule whether that measure is justified, partially justified or unjustified.

47 In the third place, the Commission contends that its opinion is not sufficient, on its own, to suspend the effects of a national measure notified to it pursuant to Article 7(1) of Directive 98/37, and that it is for the undertaking concerned to apply to the national courts in order to secure withdrawal of the measure. Although it seems, prima facie, that the Commission does not have any power to order the annulment of the national measure, since only the national courts have such a power, the Commission cannot use that lack of power as an argument to demonstrate that the measure by which it rules on the validity of the national measure is not in the nature of a decision. Furthermore, the possibility remains, prima facie, that the Commission may also bring infringement proceedings against that Member State if the measure at issue is not withdrawn, or annulled, following its opinion.

48 Secondly, it should be examined whether the applicant has advanced evidence showing, at least on a prima facie basis, that it may possibly have standing to bring legal proceedings for the purpose of securing the partial annulment of the contested measure pursuant to the fourth paragraph of Article 230 EC.

49 The Commission maintains, in essence, firstly, that it is the measures taken — where they are taken — by the Member States which, alone, are capable of affecting the applicant and, secondly, that the Member States had a discretion as regards the implementation of the contested measure.

50 Direct concern to the applicant, as a condition of the admissibility of an action for annulment under the fourth paragraph of Article 230 EC, requires that the contested Community measure must directly affect the legal situation of the applicant and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules. This means that, where a Community measure is addressed to a Member State by an institution, if the action to be taken by the Member State to implement that measure is automatic or is a foregone conclusion, it is of direct

concern to any person affected by that action. If, on the other hand, the measure leaves the Member State free to measure or not to measure, or does not require it to measure in a certain way, it is the Member State's action or inaction which is of direct concern to the person affected, and not the measure itself (order in Case T-137/04 *Mayer and Others* v *Commission* [2006] ECR II-1825, paragraphs 58 and 59).

51 The fact that the Commission's measure calls for national implementing relief does not seem to mean, prima facie, from a reading of the applicable provisions, and contrary to what the Commission maintains, that the Member States can examine the need to adopt relief similar to the prohibition measure considered justified by the Commission. Indeed, it seems, at first sight, that it is the Commission which assesses the need to adopt such relief, the Member States being then, it seems, obliged to take the appropriate relief dictated by such an assessment, namely, to withdraw the machines from the market and not to permit the placing on the market or putting into service of those machines if they endanger the health and safety of persons, in accordance with Article 2(1) of Directive 98/37.

52 It is therefore possible that the Member States do not have, prima facie, any freedom of action when they are addressees of a measure by which the Commission informs them, pursuant to Article 7(2) of Directive 98/37, that a national measure prohibiting the placing on the market or putting into circulation of certain machines is justified or partially justified. Member States to which such a measure is addressed seem, prima facie, able only to prevent the placing on the market or putting into service of the machines covered by the Commission's measure declaring the national measure justified.

53 The Commission's argument that, where, with respect to the machines located within its territory, the Member State does not consider that there is any danger, because the manufacturer has, for example, made the necessary modifications, it is not for the Member State to adopt restrictive relief must, moreover, be rejected. It

seems, prima facie, that the Member State cannot order the withdrawal from the market and prevent the entry into free circulation and putting into service of machines which are not covered by the Commission's measure.

54 Following that analysis, it must be observed that the Commission's measure seems, prima facie, to require the Member States to which it is addressed to prevent the placing on the market and entry into free circulation of the machines within the territory of the Member States and to withdraw the machines present on the market. The Commission's measure therefore seems, prima facie, to oblige the Member States to measure in a particular way, and does not leave them, prima facie, free to measure or not to measure where machines are considered, by the Commission, to be liable to endanger the health and safety of persons, animals or property.

55 It therefore remains possible, prima facie, that the applicant is directly concerned by the contested measure.

56 Thirdly, it should be borne in mind that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as the addressee of the decision would be (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 107).

57 Since the Commission Opinion concerns expressly and exclusively the machines produced by the applicant, considering the Order of 27 June 2001 to be justified as

regards, firstly, P40VEI presses manufactured prior to 4 August 2000 and, secondly, P40VE and P50VE presses, it must be held that it is possible, prima facie, that the contested measure concerns the applicant individually.

58 The possibility therefore remains, prima facie, that the applicant is directly and individually concerned by the contested measure and that, consequently, the main action is admissible.

59 The Commission's argument seeking to show that the main action is manifestly inadmissible must therefore be rejected.

60 For the sake of completeness, it should be stated that, in its main action, the applicant has brought an action for damages under Article 235 EC and the second paragraph of Article 288 EC. On the basis of the material available to the judge hearing the application for interim relief, there is no reason to believe that that action is inadmissible.

Admissibility of the application for interim relief

61 The Commission contends that the applicant has not adduced, in the part of the application for interim relief relating to the facts, any hard evidence enabling the judge hearing that application to assess the serious and irreparable character of the damage or, consequently, the urgency justifying the grant of suspension sought.

62 Moreover, the application does not establish the possible causal connection between the alleged damage and the claimed effects of the contested measure.

63 The application therefore does not satisfy the requirements of Article 104(2) of the Rules of Procedure.

64 It must be borne in mind that, pursuant to the first paragraph of Article 21 of the Statute of the Court of Justice and Article 44(1) of the Rules of Procedure, to which Article 104(3) of those rules refers, the application initiating proceedings must contain a summary of the pleas in law on which it is based. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court of First Instance to decide the case, if appropriate without other information. In order to ensure legal certainty and the sound administration of justice, for an action to be admissible the essential points of measure and law on which it is based must be apparent from the text of the application itself, even if stated only briefly, provided the statement is coherent and comprehensible (see order in Case T-91/04 *Just* v *Commission* [2005] ECR-SC I-A-395 and II-1801, paragraph 35, and case-law cited, and order in Case T-171/05 R II *Nijs* v *Court of Auditors* [2006] ECR-SC I-A-2-11 and II-A-2-47, paragraph 23).

65 It must be pointed out, firstly, in this case that, although it is true that the application for interim relief is formulated succinctly, the measure remains that it is comprehensible and that it sets out, even though only briefly, the damage to which the applicant considers itself exposed on account of the contested measure.

66 The applicant claims in essence that, if the Member States were to take, pursuant to the contested measure, relief restricting or prohibiting the entry into free circulation or putting into service of the machines concerned by that decision, that would aggravate its financial difficulties, affecting not only the sale of its machines but also the whole of its business, which could therefore be seriously jeopardised.

67 It must therefore be pointed out, secondly, as regards proof of the causal connection between the damage alleged and the possible effects of the contested measure, that this is a question which falls within the scope of an assessment of the arguments advanced by the applicant with regard to proof of the condition relating to urgency, and is not an issue of admissibility of the application for interim relief.

68 It must therefore be held that the arguments advanced by the applicant in its application give a sufficiently clear and precise indication of the threat of serious and irreparable damage which the contested measure poses for it.

69 The application for interim relief must therefore be ruled admissible.

Substance

Prima facie case

— Arguments of the parties

70 In the applicant's submission, since the Conseil d'État annulled, by decision of 4 December 2002, the Order of 27 June 2001, the contested measure is without justification.

71 The Commission contends that the Order of 27 June 2001 was annulled by the Conseil d'État because of the irregularity of the procedure which led to its adoption

and not for reasons connected with its substance. The Commission argues, in essence, that it was still its duty, therefore, to rule on the relief taken by the French authorities, notwithstanding that annulment by the Conseil d'État.

72 The Commission submits that the procedure laid down in Article 7(2) of Directive 98/37 is intended to ensure an equivalent level of protection of health and safety throughout the Community. It makes it possible, in the Commission's view, to alert the Member States to the possible dangers arising from the free movement of machinery which has already been the subject of a substantially justified restrictive national measure. It contends that the effectiveness of that procedure would be jeopardised if the annulment of the measure in question by a national court on account of a procedural defect were necessarily to prevent the Commission from expressing its opinion on the measure in question and from sending it to all the Member States.

73 The Commission adds that Article 7 of Directive 98/37 does not in fact confer on it discretion to refrain from ruling where, even though the notified national measure is no longer producing any effects, the Member State concerned has not withdrawn the notification and has even subsequently asked the Commission to give a ruling.

74 According to the Commission, the French authorities asked it to adopt the contested measure, notwithstanding the judgment of the Conseil d'État, by letter of 8 April 2005.

75 Lastly, the Commission maintains that a decision of a national court annulling a national measure cannot extend its effects to the point where it automatically renders unlawful a Community measure such as the contested measure, even if the latter is adopted in relation to the national measure.

— Findings of the President of the Court

76 It should be observed that the Order of 27 June 2001 was annulled by the Conseil d'État by decision of 4 December 2002.

77 Contrary to what the Commission maintains, the reasons which led to the annulment of the Order of 27 June 2001 are, it seems, of little importance.

78 It must be pointed out that the French authorities have not adopted a fresh order confirming the findings of the Order of 27 June 2001 with regard to the machines produced by the applicant, even though, since the reason for the annulment of the Order of 27 June 2001 was a procedural defect, nothing seemed to preclude them, on the basis of the material in the file, from immediately adopting a new measure to ensure the protection of the health and safety of workers required to use those machines.

79 However, although the procedure laid down in Article 7 of Directive 98/37 presupposes that a national measure has been notified to the Commission, referral to the Commission presupposes, prima facie, that the measure in question still exists at the time when the Commission gives its ruling.

80 The purpose of the procedure provided for by Directive 98/37 is, prima facie, for a ruling to be given as to whether a national measure is justified, which presupposes that that measure exists.

81 The Commission cannot, prima facie, take refuge behind the reasons which led a national court to annul a decision in order to decide whether or not that measure still exists. Moreover, it is conceivable that, in the absence of the procedural defect

which led the Conseil d'État to annul the Order of 27 June 2001, the content of that order would have been different, or that that order would also be unlawful in substance, irrespective of the procedural defect. Furthermore, such a situation, in which the Commission would be disregarding the binding authority of a national judicial decision, would create, prima facie, an uncertainty of the law which could not be allowed.

82 Moreover, the existence of a notification of the Order of 27 June 2001 cannot, prima facie, be sufficient to maintain that order or its content in existence after its annulment. It seems that the Commission does not rule on the notification of the measure, but on the measure itself.

83 Furthermore, under Article 4(1) of Directive 98/37, Member States may not prohibit, restrict or impede the placing on the market and putting into service in their territory of machinery and safety components which comply with that directive.

84 In this case, since the Order of 27 June 2001 was annulled by the Conseil d'État, and since no other measure has been adopted by the French authorities, it seems that the machines produced must be considered to comply with the provisions of Directive 98/37, for the purposes of Article 4(1) of that directive, and therefore benefit from a presumption of conformity under Article 5(1) of Directive 98/37. The Member States must not, therefore, prima facie, prohibit, restrict or impede the placing on the market and putting into service in their territory of those machines.

85 However, the contested measure seems, prima facie, to lead them to have to prevent the placing on the market and putting into service of the machines in the absence of any national protective measure adopted by way of the procedure laid down in Article 7 of Directive 98/37, a situation which appears, prima facie, contrary to the system established by the Directive.

86 Moreover, the statement of reasons for the contested measure appears manifestly inadequate for the purpose of providing those to whom it is addressed with precise and correct information.

87 The contested measure does not make any reference to the annulment by the Conseil d'État of the Order of 27 June 2001. Such an omission is manifestly capable of giving the impression that the measure on which the Commission ruled in September 2006 is still in force in France, even though, as a result of the annulment decided upon by the Conseil d'État on 4 December 2002, it is deemed never to have existed.

88 Lastly, it must be pointed out that the fact that, in 2005, the French authorities asked the Commission to give an opinion does not seem, prima facie, capable of authorising the latter to disregard the decision of the Conseil d'État and the consequences thereof for the measure justifying the referral to it under Directive 98/37. That request by the French authorities also raises questions as to the reasons which led the Commission to adopt the contested measure more than five years after the notification of the Order of 27 June 2001, even though that order had been annulled four years earlier by the Conseil d'État.

89 The letter sent by the French authorities to the Commission on 8 April 2005 does seem to show, prima facie, that their request was in essence motivated by the desire to obtain a decision on the part of the Commission in order to enable them to ensure their defence in proceedings for compensation brought against them by the applicant.

90 The grounds relating to the health and safety of workers, put forward both by the Commission in the present case and by the French authorities in that letter, are hardly comprehensible. Firstly, it took the Commission more than five years to adopt a decision, which hardly seems compatible with such an objective, which seems, rather, to call for urgent relief. Secondly, the French authorities, for their part,

did not adopt any new prohibition relief against the applicant's machines, in spite of the fact that the reason for the annulment of the Order of 27 June 2001 was a procedural defect and that, consequently, assuming that a measure was necessary, nothing seemed to preclude them from adopting it immediately in order to ensure the protection of the health and safety of workers required to use those machines.

91 It should also be pointed out that the applicant argued at the hearing, without being contradicted by the Commission, that the machines which had been examined by the French authorities and had been considered by them to be liable to endanger the health and safety of persons had undergone modifications by the French undertaking which purchased them and that the malfunctions noticed on those machines were not present on the machines at the time of their sale by the applicant.

92 That argument of the applicant, which likewise does not seem, prima facie, to be without substance as regards the assessment of the relevance of the Commission's conclusions as set out in the contested measure, calls for an examination which cannot be carried out at this stage by the President of the Court.

93 In the light of the foregoing, the factual and legal arguments put forward by the applicant in its first plea give rise, having regard to the material available to the President of the Court, to very serious doubts as to the lawfulness of the contested measure. In those circumstances, the present application cannot be dismissed for failure to make a prima facie case, with the result that it is necessary to examine whether it satisfies the condition relating to urgency.

Urgency

— Arguments of the parties

94 In its application, the applicant has confined itself, in essence, to maintaining that the contested measure could seriously jeopardise, or even prevent, the continuation of its activities. It claims, in essence, in that regard, that, in addition to the direct and indirect financial damage of which it is already a victim as a result of the Order of 27 June 2001, it could have to face a significant, or even fatal, worsening of its financial situation if the Member States adopted, pursuant to the contested measure, relief prohibiting the entry into free circulation and putting into service of the machinery referred to in that decision.

95 At the hearing, the applicant stated, in essence, not only that this would affect sales of the presses covered by the contested measure, but also that, in such an event, the reputation of its machines was liable to be seriously compromised, which, in view of the fact that it is a small undertaking, could seriously affect all of its operations and, consequently, render it insolvent, having regard to its current financial situation.

96 The applicant also stated at the hearing that it ran the risk, moreover, of facing actions for damages brought by its customers on account of the alleged non-conformity of the machines purchased by them.

97 The applicant was invited, at the same hearing, to provide additional information on its turnover and sales in the various Member States in which it is active.

98 On the basis of the evidence which it brought to the attention of the President of the Court by document lodged at the Registry on 9 March 2007, the turnover relating to the presses produced by the applicant fell from EUR 2 599 943.18 in 2000 to EUR 796 918.25 in 2006, whereas the total turnover of the undertaking fell from EUR 7 188 804.58 in 2000 to EUR 4 188 829.20 in 2006.

99 The applicant further explains that the fall in its turnover forced it to resort to higher levels of financing and lines of credit with banks, its indebtedness rising from EUR 1 679 788 during 2000 to EUR 2 686 237 at the end of 2005, that debt burden being increased by additional financial contributions amounting to EUR 200 000 paid by the partners during the first few months of 2006.

100 However, in view of its current situation, a worsening of the fall in the company's turnover could, according to the applicant, prompt its creditors and, in particular, the banks to withdraw their credit from it, which would have the consequence of triggering its insolvency.

101 The applicant further submits, in essence, that retention of the contested measure would be liable to affect its competitive position and that the damage which would result from that could not be adequately compensated for by damages awarded as a result of judicial proceedings, whereas suspension of operation of that measure could serve to avoid such consequences on the market.

102 The Commission contends, in essence, that the applicant has failed to demonstrate that it is threatened by serious and irreparable harm as a result of the contested measure.

103 It should be noted, as a preliminary observation, be noted that the Commission contends, in respect of the admissibility of the application for suspension of operation, that the applicant has not demonstrated the causal connection between the damage which it alleges and the possible effects of the contested measure. The Commission maintains that the possible harm which the applicant could suffer could not result from the contested measure, but from the relief taken, where appropriate, by the Member States in response to the Commission's measure.

104 Moreover, firstly, the Commission argues that the economic harm which the applicant alleges is purely hypothetical, since the applicant does not demonstrate that implementing relief have been taken — or are about to be taken — by the Member States in response to the adoption of the contested measure by the Commission.

105 Furthermore, the Commission contends that, assuming that such relief are taken, the only harm which could result from them for the applicant would be of a financial nature which would, by definition, be reparable.

106 Secondly, the Commission maintains, in essence, that the information provided by the applicant does not prove that it would suffer serious and irreparable harm.

107 In the first place, the Commission claims that it is not in a position to know how many and which types of presses have been produced and marketed by the applicant over the last few years, but that, on the basis of the information which it has been able to gather on the Internet, it produces and markets, at the present time, at least 17 types of presses, of which only three were covered by the Order of 27 June 2001 and, therefore, by the contested measure.

108 In the second place, the data provided by the applicant relate, according to the Commission, only to its total turnover and its turnover in the press sector for the period from 2000 to 2006 and therefore refer to an economic situation predating the adoption of the contested measure, of which they do not therefore reflect the consequences.

109 In the third place, the Commission contends, in essence, that the data relating to 2006 do not serve to establish the effects which the contested measure had on the turnover in the press sector between the time of adoption of the contested measure and the start of 2007.

110 In the fourth place, the Commission contends that the data relating to the applicant's turnover in the press sector refer without distinction to all types of presses manufactured and sold by it. The applicant does not provide any data concerning the trend of the specific turnover resulting from sales of the three types of presses covered by the national prohibition measure and the contested measure. It therefore does not adduce proof of any decrease in the turnover relating to the types of presses covered by the contested measure.

111 In the fifth place, in the Commission's view, the variations in the applicant's total turnover do not reflect the variations in its turnover in the press sector.

112 In the sixth place, the Commission argues that the progressive reduction in the turnover for the whole of the press sector (EUR 2 599 943.18 in 2000, EUR 796 918.25 in 2006), except for the period from 2003 to 2004 when that turnover increased, does not necessarily reflect the variations in the turnover for the press sector in certain Member States. Consequently, in the Commission's view, despite the decrease in the turnover for the whole of the press sector between 2005

and 2006 (falling from EUR 1 059 064.37 to EUR 796 918.25), the turnover figures for the sector increased appreciably so far as concerns the German market (from EUR 262 512.07 to EUR 333 812.75), the Finnish market (from EUR 36 150.00 to EUR 50 025.00), the Portuguese market (from EUR 31 531.50 to EUR 49 845.00) and the Polish market (from EUR 0 to EUR 33 320.00).

113 In the seventh place, in the Commission's view, the data provided do not prove any connection between, on the one hand, the variations in the turnover for the whole of the press sector and the variations in the French turnover and, on the other, the latter variations and those in the turnover for each of the other Member States.

114 In the eighth place, the Commission complains, in essence, that the applicant has failed to provide any information making it possible to determine on what bases it calculated the turnover losses which it claims to have suffered as a result of the Order of 21 June 2001.

115 In the ninth place, the Commission maintains that the applicant does not provide any data relating to the definition of the relevant market and of the market shares held by it, in aggregate and in the various Member States, before and after the adoption of the contested measure. In the absence of any objective evidence relating to the characteristics of the market in presses and to the market shares held by the applicant in that sector, the data provided by it regarding its total turnover and its turnover in the press sector are, in the Commission's view, completely irrelevant. In particular, they do not make it possible to establish whether, and to what extent, the progressive decrease in the applicant's turnover reflects the fluctuations of the relevant market

116 The Commission submits, in conclusion, that no evidence provided by the applicant proves, firstly, whether and to what extent the reduction in total turnover and the reduction in turnover for the press sector for 2000 to 2006 are the direct consequence of the Order of 27 June 2001 and of the contested measure and, secondly, what the consequences of the contested measure are.

117 Thirdly, the Commission argues that the contested measure and, therefore, the possible national relief called for by that decision, concern only three of the seventeen types of presses currently manufactured and sold by the applicant. The contested measure therefore does not affect the applicant's operations as regards the other machines which it produces.

118 In the Commission's view, in the absence of further information, even assuming that the adoption of national prohibition relief is the immediate and automatic consequence of the notification of the contested measure to the Member States, the applicant still fails to demonstrate the effect which such relief could have on its turnover, since those relief concern only three types of machines out of seventeen. Nor does the applicant demonstrate that such relief will automatically result in a reduction in its total turnover, the certain withdrawal of bank credits and, ultimately, its insolvency.

119 Fourthly, the Commission submits, in essence, that the fact that applicant showed itself in no hurry to make an application for suspension of operation indicates the non-imminence of any serious and irreparable harm. The applicant, having been informed of the adoption of the contested measure by the Commission on 11 October 2006, did not bring its main action until 6 December 2006 and its application for interim relief until 18 January 2007.

120 Fifthly, as regards the possible advantage resulting from the contested measure for the applicant's competitors, the Commission maintains that it is, admittedly, possible that the applicant will or could well suffer economic consequences as a result of the Order of 27 June 2001 or the contested measure, but, assuming that such effects are the direct consequence of the contested measure and not of the Order of 27 June 2001 or of the anticipation, by economic operators, of national relief adopted in pursuance of the contested measure, those consequences would, in any event, apply only to the applicant's de facto situation and not to its legal situation.

— Findings of the President of the Court

121 According to settled case-law, urgency must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party seeking the interim measure (see order in Case T-303/04 R *European Dynamics* v *Commission* [2004] ECR II-3889, paragraph 65, and case-law cited).

122 Although damage of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation, an interim measure is justified if it appears that, without that measure, the applicant would be in a position that could imperil its existence before final judgment in the main action (order in Case T-181/02 R *Neue Reba Lautex* v *Commission* [2002] ECR II-5081, paragraph 84).

123 It is for the party who pleads serious and irreparable damage to prove its existence (order in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14). It is not necessary for the imminence of the damage to be demonstrated with

absolute certainty, it being sufficient, especially when the occurrence of the damage depends on the concurrence of a series of factors, to show that damage is foreseeable with a sufficient degree of probability (order in *Commission* v *Atlantic Container Line and Others*, cited in paragraph 19 above, paragraph 38, and order in Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR I-2769, paragraph 38).

124 Firstly, as regards the causal connection between the damage alleged by the applicant and the possible effects of the contested measure, it must be pointed out that, as was held in paragraph 54 above, the contested measure seems, prima facie, to require the Member States to which it is addressed to prevent the placing on the market and entry into free circulation of the applicant's machines in the territory of the Member States, and to withdraw the machines present on the market, and that it does not, prima facie, leave the Member States free to measure or not to measure, but on the contrary requires them to measure in a certain way.

125 The harm which the applicant claims is liable to occur, namely the damage caused to sales of its machines covered by the contested measure and that caused to its reputation, which is capable of affecting the whole of its turnover, a situation which could render it insolvent, do not, therefore, result from the national relief, which merely implement that measure in each Member State, but from the contested measure itself, which orders, prima facie, such measures to be adopted.

126 The Commission's argument that, in any event, it has not been shown that the Member States have up to now taken any such measures must be rejected from the outset.

127 Since the purpose of the application for interim relief is precisely to prevent the adoption of such relief by the Member States, assuming that the conditions for granting such interim relief are satisfied, it is not possible to wait for those relief to be taken before suspending the contested measure.

128 Secondly, the data provided by the applicant confirm a gradual and significant decrease, between 2000 and 2006, in its total turnover, as well as, in particular, in its turnover in the press sector. The exceptions represented by 2004 and 2006, and certain specific results for individual countries, do not appear such as to cast doubt on that trend. That decrease is 42% in seven years in the case of the aggregate turnover and 70% in the case of the press sector alone.

129 The data submitted by the applicant as regards its liabilities also show its considerable indebtedness to banks, amounting to over EUR 2 600 000 at the end of 2005.

130 The applicant argues, in essence, that a worsening of its present financial difficulties could be fatal to it. Such a worsening could result, firstly, from the prohibition of the placing on the market and putting into service of the machines covered by the contested measure and, secondly, from the damage to its commercial reputation and the reputation of its machines, which could arise from such a prohibition measure, which could affect the whole of its turnover.

131 It should first of all be pointed out that implementation of the contested measure could have the consequence of preventing, in all Member States, the sale of the types of machines covered by that decision. The ensuing significant worsening of the financial situation for the press sector therefore appears to have been demonstrated with a sufficient degree of probability.

132 However, the turnover achieved by the applicant in the press sector at present accounts for only a little under 20% of its total turnover.

133 It is therefore necessary to examine the relevance of the applicant's argument concerning the possible damage to its commercial reputation which could result from the contested measure, damage which could have the consequence of affecting its operations as a whole.

134 It must first of all be held that the case-law relating to the harm to the reputation of an undertaking eliminated from a tender for a public contract and rejecting the argument that such harm constitutes serious and irreparable damage (orders of the President of the Court of First Instance in Case T-195/05 R *Deloitte Business Advisory* v *Commission* [2005] ECR II-3485, paragraph 126, and *European Dynamics* v *Commission*, cited in paragraph 121 above, paragraph 82) does not appear relevant for the purpose of assessing harm to reputation such as that which could affect the applicant in this case. Failing to obtain a public contract cannot be compared to having some of one's products described as dangerous to the health and safety of persons.

135 It should be pointed out in that regard that the Court of Justice has recognised the detrimental nature of the harm to the reputation of an undertaking whose machines bear the CE marking of conformity and the safety of which is called into question in the absence of any national prohibition measure pursuant to Directive 98/37 (see, to that effect, Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749, paragraphs 61 to 65).

136 In this case, it must be held that a Commission decision having, prima facie, the necessary authority to require all the Member States to take relief restricting trade, in this instance relief prohibiting the placing on the market and entry into free circulation of the machines in question, on account of the risks to the health and safety of persons which those machines would pose, is liable to harm the reputation of the undertaking which produces those machines.

137 The detrimental nature of such harm must therefore be acknowledged.

138 It is also necessary to take into consideration, in this case, the fact that the contested measure does not state either that the original national measure, that is, the Order of 27 June 2001, was annulled by the Conseil d'État, or that, following that annulment, no new measure was taken by the French authorities.

139 In the light of the particular circumstances of this case, and in particular of the fact that the applicant is a small undertaking with a limited and specialised production — of hydraulic presses and industrial machinery for cutting and perforating metal parts — it must be held that it has been demonstrated to the requisite legal standard that the contested measure, calling into question, in all the Member States, the safety of some of the machines which it produces, is liable to harm its reputation with regard to the whole of its production.

140 The Commission's argument seeking to maintain that only a part of the applicant's production could be affected by the contested measure cannot therefore be accepted.

141 It should therefore be established whether such damage is, in this case, serious and reparable only with difficulty for the applicant.

142 In the first place, such harm to the commercial reputation of an undertaking and to the safety reputation of its products is such as to cause it damage which, because it is difficult to assess, is reparable only with difficulty.

143 Having regard to the circumstances of this case and to the fact that the applicant has a limited and specialised production, such damage can also be characterised as serious since such harm is liable, as a result of the contested measure, to have effects in all the Member States and, consequently, on all the markets in which the applicant is active and not only on one of them.

144 In the second place, in view, on the one hand, of the fact that the undertaking in question is small and, on the other, of the applicant's current financial situation, such harm to its reputation is liable to entail irreparable consequences for its production, both in the press sector and in its other sectors of activity, which also concern machine tools and, consequently, for its overall financial situation. Accordingly, the risk that it could rapidly be driven to the brink of insolvency does not appear to be purely hypothetical but is, on the contrary, foreseeable with a sufficient degree of probability.

145 In the third place, it is conceivable that the applicant could be exposed, as it maintains, to actions for damages on the part of its customers if, pursuant to Article 7(1) of Directive 98/37, the machines which they have purchased from it were withdrawn from the market. Apart from the fact that such relief would also be liable to undermine the applicant's commercial reputation with its customers, such actions would very probably worsen the applicant's financial situation and, consequently, contribute to the occurrence of the serious and irreparable damage alleged by it.

146 In the light of the particular circumstances of this case, it must be held, having regard to all those considerations, that operation of the contested measure could cause serious and irreparable damage to the applicant, threatening its existence, with the result that the urgency of the relief applied for appears indisputable (see, to that effect, order in Case T-44/98 R II *Emesa Sugar* v *Commission* [1999] ECR II-1427, paragraph 131).

147 It must be pointed out in that regard that the urgency which the applicant may invoke must be acknowledged a fortiori by the President of the Court because, as is apparent from paragraphs 76 to 93 above, the factual and legal arguments put forward by the applicant seem particularly sound (see, to that effect, order in *Austria* v *Council*, cited in paragraph 18 above, paragraph 110, and order in Case T-114/06 R *Globe* v *Commission* [2006] ECR II-2627, paragraph 140).

148 In those circumstances, the Commission's other arguments seeking to dispute the existence of serious and irreparable damage cannot be upheld.

149 Firstly, the Commission's objections according to which the data provided by the applicant do not prove the existence of a risk of serious and irreparable damage cannot be upheld.

150 In that regard, the Commission's argument that the damage should not be assessed as a whole but only in relation to the machines concerned by the contested measure cannot succeed. The harm to commercial reputation, of which the applicant is liable to be a victim, is, in this case, capable of affecting all its sales and therefore of threatening not only the press sector, but the whole of its activity.

151 Nor can the applicant be criticised for providing data only in respect of the past, in this instance for 2000 to 2006 inclusive. Those data enable the judge hearing the application for interim relief to assess the development of the applicant's financial situation and to assess the relevance of its claims as regards the financial risk which

it would run if the Commission's decision took the form, in the Member States, of relief prohibiting the sale of the machines covered and a recall of those in service.

152 In addition, the applicant cannot be criticised for the lack of data relating to the effect on sales of the machines covered by the contested measure after its adoption, since, firstly, it is established that the contested measure is not published in the Official Journal and, therefore, the applicant's customers cannot be aware of its existence before the Member States implement it, and, secondly, it is also established that the Member States have not yet taken any relief to that end.

153 Moreover, the absence of any indication of the method of calculating the damage resulting from the adoption, by the French Republic, of the Order of 27 June 2001 appears irrelevant for the purpose of determining whether urgency is established in the context of the present application, since assessment by the applicant of the possible damage sustained by it between 2000 and 2006 is not a condition for the suspension of the contested measure, since that question concerns the action for damages brought by the applicant before the French courts.

154 Lastly, the absence of information relating to the applicant's market shares is not in itself capable of rendering irrelevant the data provided by the applicant on its financial situation. In the light of the progressive worsening of that situation and of the risks to which the applicant is exposed by a decision capable of affecting the reputation of its products, whether or not its market shares are significant in the press sector appears immaterial.

155 Secondly, the Commission's argument that, by not bringing its main action before the Court of First Instance more quickly and by not making the present application

to the President of the Court of First Instance more quickly, the applicant demonstrates by its attitude that the criterion of urgency is not satisfied.

156 It should first of all be pointed out that the main action was brought within the period of two months prescribed by the fifth paragraph of Article 230 EC.

157 Secondly, it should be pointed out that no period is prescribed for bringing an application for interim relief before the President of the Court.

158 Although it is true that, when ruling on the question of urgency, the President of the Court may find it necessary to determine, in the light of the circumstances of the case, the point in time when the application for interim relief was made (see, to that effect, order in Case T-288/02 R *AIT* v *Commission* [2003] ECR II-2885, paragraph 17), it should be noted that the main action was brought on 6 December 2006, whereas the present application was lodged at the Court Registry on 18 January 2007. The period of time which elapsed between the main action and the application for interim relief cannot, in this case, be considered excessive and does not demonstrate the lack of urgency of that application.

159 Thirdly, in those circumstances, there is no need to adjudicate, in the context of the assessment of serious and irreparable damage, on the applicant's claims concerning the effect on its competitive position, which it puts forward, in any event, only as a further alternative and only among the additional information which it submitted to the President of the Court following the hearing.

160 In conclusion, it must be held that, in this case, the condition of urgency is satisfied.

The balance of interests

161 The Commission contends, in essence, that the balance of interests leans in favour of dismissal of the application for suspension of operation since the Community interest in ensuring an equivalent degree of protection of health and safety in all the Member States must, on any view, outweigh the specific interest of the applicant.

162 According to the Commission, the purpose of the contested measure is to ensure the protection of the health and safety of workers, which would be endangered by the machines covered by the contested measure.

163 It is clear, however, that the Commission took more than five years to issue the contested measure, without the health and safety of workers, which it is its responsibility to ensure, having prompted swifter action on its part.

164 The only explanation which it was able to give in that regard at the hearing was that it was required to initiate a procedure in order to select an expert to analyse the applicant's machines, and that that procedure took longer than planned.

165 Firstly, the Commission does not prove those contentions. Secondly, it seems hardly likely that it would take the Commission more than five years to select an expert, obtain a report from that expert and deliver an opinion in the context of a procedure aimed at the adoption of protective relief where machines are liable to endanger the health and safety of persons.

166 Moreover, it must be pointed out that it was only after the French authorities had asked the Commission to deliver an opinion relating to the measure which they had notified, in order to enable it to defend itself in proceedings brought before the French courts, that the contested measure was finally adopted by the Commission.

167 Furthermore, the Commission has not disputed the applicant's claims that no accident has occurred since the adoption of the Order of 27 June 2001 and that the only relief adopted by the French authorities in that regard were annulled by the Conseil d'État in 2002 without any new relief having been adopted following that annulment.

168 Lastly, it is necessary to take into consideration the fact that the factual and legal arguments put forward by the applicant in connection with its first plea in support of a prima facie case give rise, in the light of the material available to the President of the Court, to serious doubts as to the lawfulness of the contested measure.

169 The balance of interests cannot therefore be in favour of rejecting the measure suspending operation as the Commission contends.

170 In conclusion, since the conditions for granting a suspension of operation have been satisfied, the application must be allowed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The operation of Commission Opinion C (2006) 3914 of 6 September 2006 concerning a prohibition measure adopted by the French authorities relating to certain IMS brand mechanical presses is suspended pending the judgment of the Court in the main proceedings;**

2. **Costs are reserved.**

Luxembourg, 7 June 2007.

E. Coulon — Registrar

B. Vesterdorf — President