ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
11 July 2002 *

In Joined Cases T-107/01 R and T-175/01 R,

Société des mines de Sacilor — Lormines, established in Puteaux (France), represented by R. Schmitt, lawyer,

applicant,

v

Commission of the European Communities, represented by G. Rozet and L. Ström, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

APPLICATION for, first, suspension of the operation of the Commission's decisions of 30 March, 21 April, 9 and 10 July 2001 and, second, interim measures ordering the Commission to uphold the complaints submitted to it by the applicant on 9 February and 9 May 2001,

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

makes the following

Order

Legal context

1 The first and second paragraphs of Article 86 CS provide:

'Member States undertake to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community and to facilitate the performance of the Community's tasks.

Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4.'

2 Article 4 CS provides:

'The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

...

(b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier;

(c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever;

...'

Facts

3 The mining company Société des mines de Sacilor — Lormines (hereinafter 'the applicant') was formed in 1978 to take over the iron mine concessions and leases of Sacilor, Lorraine. In 1991, the French Government decided, in the light of the decline in iron ore extraction in that region, to halt production. Production ceased in 1993.

4 Owing to the disappearance of the object of the company, the applicant was in a position to be dissolved. Accordingly, it initiated the 'abandonment' and 'renunciation' procedures.

5 The aim of the abandonment procedure is to close and secure former mining installations. In an abandonment, a mining company is required to comply with the special mines policy, the purpose of which is to ensure the safety of former mining installations.

6 The aim of the renunciation procedure is to terminate the concession early. It allows the concessionary to avoid the obligations arising from the application of the special mines policy and frees it from the presumption of liability for any damage which occurs at the surface.

7 Abandonment measures were carried out in accordance with the provisions of Decree 80-330 of 7 May 1980 on the mines and quarries policy (JORF of 10 May 1980, p. 1179), as amended, as the competent national authority

recorded in 1996. Notwithstanding that fact, the State did not terminate the concessions.

8 The French administrative courts before which the applicant brought proceedings partially granted its applications for the French Republic to be ordered to accept the renunciation of its concessions, so that it now still holds 18 concessions and two leases.

9 Since the competent minister did not accept the renunciation, the authorities continued to apply the mines policy on the basis of Law 94-588 of 15 July 1994 amending certain provisions of the mining code and Article L. 711-12 of the employment code (JORF of 16 July 1994, p. 10239), and accordingly imposed obligations on the applicant in respect of surveillance and public works.

10 By Law 99-245 of 30 March 1999 on liability for damage resulting from mining and the prevention of mining risks after mining has ended (JORF of 31 March 1999, p. 4767), the presumption of liability in respect of mining was extended inasmuch as there is now a presumption of perpetual liability on the part of the former concessionary. That law also imposes an obligation on the former mine operator to pay a compensation charge designed to finance public expenditure for 10 years.

11 The applicant considered that the French authorities' refusal to terminate its concessions, which gave rise to liability to new, unpredictable and extraordinary charges, constitutes an infringement of Articles 4 CS and 86 CS, and lodged a complaint before the Commission dated 9 February 2001 and registered at the Secretariat-General of the Commission on 21 February 2001.

12 In its complaint, the applicant maintained that the French authorities infringed Article 4(c) CS by imposing 'special charges' on it. It claimed that the Commission should declare, on the basis of Article 88 CS, that the French Republic had failed to fulfil its obligations under the Treaty and should order it:

'— to acknowledge that Lormines has not been the holder of its concessions and leases since the date on which it in fact abandoned them;

— to acknowledge that, since the date on which it in fact abandoned its concessions and leases, Lormines cannot be bound by a presumption of liability;

— to cease imposing any charge whatsoever on Lormines in respect of the aforementioned concessions and leases;

— to reimburse Lormines for the charges it has had to pay since it in fact abandoned its concessions and leases'.

13 At the end of its complaint, the applicant expressed the wish to be kept informed of the steps which the Commission 'takes in respect of the French Republic'.

14 In its letter dated 30 March 2001, which the applicant's legal adviser stated he had received on 20 April 2001 and which was signed by the Director of the 'State Aid II' Directorate of the Directorate-General for Competition, the Commission replied in the following terms:

'On the basis of the information available, the staff of the Directorate-General for Competition have concluded that the matter is not governed by Community law but only French law. The measures criticised, which relate to the conditions imposed by the French State for renunciation of mining concessions by the operating companies, are not measures of implementation specific to ECSC undertakings. They come within the sphere of safety and civil liability, spheres which fall within the competence of the Member States and not the Community. ECSC undertakings are not excluded from the obligations imposed by States for reasons of public order such as safety, civil liability or the environment. The financial costs arising therefrom cannot, therefore, be regarded as special charges imposed on ECSC undertakings under Article 4(c) [CS].

If you have further evidence to show otherwise, I should be grateful if you would communicate it to my staff as soon as possible.'

15 By letter of 9 May 2001, the applicant's legal adviser responded to the Commission's letter. After dealing with the term 'special charges' within the meaning of Article 4(c) CS and the imposition of charges only on undertakings covered by the ECSC Treaty, he pointed out that there was discrimination contrary to Article 4(b) CS. He concluded in the following words: 'For that reason, in so far as necessary and for the purposes of Article 35 CS, I ask the Commission to declare that the French Republic has failed to fulfil its obligations

under Articles 4(b) [CS] and 86 [CS]'. He also requested the order of exactly the same measures as those already referred to in the complaint dated 9 February 2001.

16 By letter of 10 July 2001, which the applicant's legal adviser states that he received on 19 July 2001 and which was signed by the Director of the 'Environmental aspects of enterprise policy, resource-based and specific industries' Directorate of the Directorate-General for Enterprise, the Commission sent the following reply:

'In your letter of [9] May 2001, you claim, in the alternative, that Lormines has been the victim of discrimination contrary to Article 4(b) [CS]. This matter has been examined by the appropriate members of my staff. It is apparent that Article 4(b) [CS] concerns solely sales of ECSC products. The application of the general rule of non-discrimination was specified in Article 60 (sale prices) and Article 70 (transport costs). The special charges imposed following renunciation of mining concessions by the operating companies do not therefore fall within the scope of Article 4(b) [CS].

As to the other aspects of your complaint, I refer to the reply given by the Directorate-General for Competition in its letter of 30 March 2001.'

Procedure

17 By application lodged at the Registry of the Court of First Instance on 9 May 2001, registered under number T-107/01, the applicant brought an action for annulment, first, of the implied decision of 21 April 2001, by which the

Commission refused to uphold its complaint dated 9 February 2001 and, second, of the Commission's decision of 30 March 2001 by which that institution refused to uphold the same complaint.

18 By separate document lodged on 19 June 2001, the Commission raised an objection of inadmissibility against that action. A decision on the objection of inadmissibility was reserved for the final judgment by order of the Court of First Instance of 11 October 2001.

19 The rejoinder in Case T-107/01 was lodged on 23 May 2002.

20 By application lodged at the Registry of the Court of First Instance on 31 July 2001, registered under number T-175/01, the applicant brought an action for annulment, first, of the implied decision of 9 July 2001, by which the Commission refused to uphold its complaint dated 9 May 2001, and, second, of the Commission's decision of 10 July 2001 by which that institution refused to uphold the same complaint.

21 By separate document lodged on 12 October 2001, the Commission raised an objection of inadmissibility against that action. A decision on the objection of inadmissibility was reserved for the final judgment by order of the Court of First Instance of 12 March 2002.

22 The Commission lodged its defence in Case T-175/01 on 23 May 2002.

23 By separate document lodged at the Registry of the Court of First Instance on 29 May 2002, registered under numbers T-107/01 R and T-175/01 R, the applicant brought an application for interim measures, claiming that the Court should:

'— order suspension of operation of the decisions of 30 March, 21 April, 9 and 10 July 2001 by which the Commission refused to find that France had failed to fulfil its obligations under Articles 4(b) and (c) [CS] and 86 [CS], and require the institution to remedy the situation in accordance with the measures specified by Lormines in its formal notices of 9 February and 9 May 2001;

— order the Commission to adopt a decision pursuant to Article 88 [CS] declaring that France has failed to fulfil its obligations under Articles 4(b) and (c) [CS] and 86 [CS], to the detriment of Lormines, within one month of the date of the order to be made and, in any event, before expiry of the ECSC Treaty on 23 July 2002;

— order the Commission to adopt a decision under Article 88 [CS]... within one month of the date of the order to be made and, in any event, before expiry of the ECSC Treaty on 23 July 2002, instructing France to remedy its failure to fulfil its obligations under Articles 4(b) and (c) [CS] and 86 [CS] and, in particular:

— to acknowledge that Lormines has not been the holder of its concessions and leases since the date on which it in fact abandoned them;

— to acknowledge that, since the date on which it in fact abandoned its concessions and leases, Lormines cannot be bound by a presumption of liability;

— to cease imposing any charge whatsoever on Lormines in respect of the aforementioned concessions and leases;

— to reimburse Lormines for the charges it has had to pay since it in fact abandoned its concessions and leases'.

24 The Commission lodged its written observations on the application for interim measures on 14 June 2002.

25 Given the documents in the file, the President of the Court of First Instance considers that he has all the necessary information to determine the present application for interim measures, without needing to hear the parties' oral submissions.

Law

26 Under the second and third paragraphs of Article 39 CS in conjunction with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it thinks that

circumstances so require, order that application of the contested decision be suspended or may prescribe any necessary interim measures.

27 In the present case, the President of the Court considers that it is necessary, first of all, to examine whether the application for interim measures is admissible.

Arguments of the parties

Admissibility of the main actions

28 The applicant merely observes that the conditions laid down in Article 104(1) of the Rules of Procedure of the Court of First Instance are fulfilled.

29 The Commission considers that the application for interim relief should be dismissed, since the actions on which it is based are manifestly inadmissible. Its arguments are structured around four pleas of inadmissibility.

30 First, the applicant, which no longer pursues any activity falling within the scope of the ECSC Treaty, is not an undertaking within the meaning of Article 80 of that Treaty. It therefore does not have *locus standi*.

31 Secondly, the actions based on Article 35 CS are inadmissible, since the request for a ruling was not made to the Commission within a reasonable time. In the present case, the applicant raised the matter with the Commission a long time after the occurrence of the events which gave rise to the alleged failure by the French authorities to fulfil their obligations under the ECSC Treaty.

32 Thirdly, the actions based on Article 35 CS are also inadmissible because the Commission's failure to act was not called into question beforehand. Within the context of that argument, the Commission maintains that the letters of 9 February and 9 May 2001 cannot be regarded as containing a formal notice to take action. In any event, it states that, in circumstances such as those of this case, to call on the Commission to act pursuant to Article 35 CS in exercise of the powers conferred on it by Article 88 CS is tantamount to requiring it to adopt a 'binding measure', which, in view of the periods of time needed to complete the procedure under that article, could only be a measure rejecting the claim brought before it. That interpretation cannot be upheld.

33 Fourthly, the actions brought under Article 33 CS are inadmissible, since the Commission's letters of 30 March and 10 July 2001 do not constitute acts open to challenge. Even if the letter of 10 July 2001 were regarded as a decision expressly rejecting the applicant's complaint, it merely confirms a previous measure, namely the implied decision of 9 July 2001 to refuse to uphold the applicant's complaint of 9 May 2001.

Admissibility of the claims in the application for interim measures

34 The applicant points out that its application for interim measures seeks an order requiring the Commission to uphold, before the date of expiry of the ECSC

Treaty, that is 23 July 2002, the complaints in the formal notices dated 9 February and 9 May 2001. It adds that, if the Court of First Instance granted that application, the Commission would have to declare that the French Republic had failed to fulfil its obligations under Articles 4(b) and (c) CS and 86 CS and order that Member State to remedy the situation in accordance with the measures requested by the applicant in the two formal notices.

35 The applicant also considers, on the basis of paragraphs 44 to 46 of the order of the President of the Court of Justice in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, that Article 39 CS excludes neither suspension of the operation of adverse decisions nor instructions to the defendant institution, whose adverse decision is contested, to uphold the claim submitted to it (see, by analogy, Case C-68/95 *T. Port* [1996] ECR I-6065, paragraphs 59 and 60).

36 Finally, the applicant points out that the application for interim measures is now the only means of obtaining judicial protection for its rights under the ECSC Treaty, since the Treaty expires on 23 July 2002, and that, in view of that imminent expiry date, the Commission will no longer be able to use the specific powers conferred on it by the Treaty to enforce a judgment annulling the contested decisions. Furthermore, granting this application would be consistent with the case-law, according to which an application for interim measures may be used to bring an end to an action or failure to act which it is sought to penalise by means of the main action (orders of the Court of Justice in Joined Cases 31/77 R and 53/77 R *Commission* v *United Kingdom* [1977] ECR 921; Case 61/77 R *Commission* v *Ireland* [1977] ECR 937; Case 61/77 R II *Commission* v *Ireland* [1977] ECR 1411, and Case C-120/94 R *Commission* v *Greece* [1994] ECR I-3037). That case-law shows that the requirement that the measures ordered by the court hearing an application for interim relief must be provisional is qualified. On that point, the applicant points out that the interim measures applied for would lapse if the actions on the substance were dismissed or if the Court of Justice subsequently annulled the Commission's decision declaring that the French Republic had failed to fulfil its obligations.

37 The Commission makes the preliminary point that the present application was lodged more than 12 months and almost 10 months after proceedings were

brought before the Court of First Instance in Cases T-107/01 and T-175/01 respectively. In that regard, it points out that the interest and efficiency of interlocutory proceedings do not brook undue delay (order of the President of the Court of Justice in Joined Cases 3/58 to 18/58, 25/58 and 26/58 *Barbara Erzbergbau and Others* v *High Authority* [1960] ECR 220).

38 The Commission also argues that, although the power to order interim measures is not restricted by legislation to certain legal remedies, in point of fact the grant of those measures appears to be restricted to direct actions. Thus, the power to order interim measures ancillary to an action for failure to fulfil obligations has been recognised (order in Case 61/77 R *Commission* v *Ireland*, cited above), leading to the suspension of national legislative measures and/or the requirement of specific procedures for the action of a national authority. However, although, according to the Commission, the power to order interim measures ancillary to an action for failure to act has been recognised in principle by the Court of Justice (*T. Port*, cited above) and the Court of First Instance (order of the President of the Court of First Instance in Case T-79/96 R *Camar* v *Commission* [1997] ECR II-403, paragraph 44), the applicant has not referred to any case in which that power has been exercised.

39 In the present case, the subject-matter of the measures applied for renders the application for interim relief inadmissible.

40 The Commission states that the decisions of 30 March, 21 April, 9 and 10 July 2001 are decisions refusing to uphold the complaints brought before it. Those various decisions, by their very nature, do not in themselves contain any direction and do not call for any implementation. In any event, the suspension of operation of such decisions cannot amount to the grant of the measure refused by the Commission (see to that effect the order of the Court of Justice in Case 50/69 R *Germany* v *Commission* [1969] ECR 449, 451). The Commission maintains,

therefore, that those decisions cannot be the subject-matter of a measure suspending operation and that this application is inadmissible in that regard.

41 As regards the other interim measures applied for (see paragraph 23 above), as specified in the text of the application (see paragraph 34 above), they are directions requiring the Commission, first, to declare that France had failed to fulfil various obligations under Community law and, second, to issue directions to that Member State requiring it to adopt four measures. Those requests correspond exactly to those which the applicant sent to the Commission in its letters of 9 February and 9 May 2001.

42 The Commission submits that it would not be consistent with the principles governing the distribution of powers between the various Community institutions, as intended by the authors of the Treaty, for the Community judicature to be able to require the Commission to accede to the request for interim measures submitted to it (orders of the President of the Court of First Instance in Case T-131/89 R *Cosimex* v *Commission* [1990] ECR II-1, paragraphs 11 and 12, and Case T-107/96 R *Pantochim* v *Commission* [1996] ECR II-1361, paragraph 43).

43 Furthermore, the adoption of the interim measures applied for would prejudice the ruling to be given by the Court on the substance. As to the effects of such measures, they would not be interrupted by the judgment, since the Court is called upon to rule on the legality of the decision refusing to uphold the applicant's claims and not on the legality of the decision which the Commission would thereby be required to adopt. It follows that the measures applied for cannot be described as provisional (see to that effect the order of the President of the Court of First Instance in Case T-610/97 R *Carlsen and Others* v *Council* [1998] ECR II-485, paragraph 56).

44 For those reasons, it is clear that the interim measures applied for do not fall within the jurisdiction of the President of the Court of First Instance. Accordingly, the Commission maintains that the present application must be dismissed as inadmissible.

Findings of the President of the Court of First Instance

45 This application for interim measures has a dual purpose.

46 By this application the applicant seeks, first, suspension of the operation of four 'decisions' dated 30 March, 21 April, 9 and 10 July 2001, by which the Commission refused to find that the French Republic had failed to fulfil its obligations under Articles 4(b) and (c) CS and 86 CS, and an order requiring the institution to remedy the situation in the manner specified by Lormines in its letters of 9 February and 9 May 2001.

47 According to Article 35 CS, the implied decisions of refusal dated 21 April and 9 July 2001 are inferred from the Commission's silence at the end of the two months following the preliminary formal notice to act. As to the letters of 30 March and 10 July 2001, the applicant considers that they constitute an express refusal to declare that the French Republic had failed to fulfil its obligations and are in the nature of decisions.

48 It follows that, since the effect common to the four 'decisions' lies in the Commission's refusal to adopt the measures requested by the applicant to put an end to the infringements of the ECSC Treaty allegedly committed by the French Republic, the suspension of operation applied for concerns negative measures. It should be remembered that an application for suspension of operation cannot, in principle, be envisaged against a negative administrative decision, since the grant of suspension could not have the effect of changing the applicant's position (see, in particular, the order of the President of the Second Chamber of the Court of Justice in Case C-206/89 R *S.* v *Commission* [1989] ECR 2841, paragraph 14; and the orders of the President of the Court of Justice in Case C-89/97 P(R) *Moccia Irme* v *Commission* [1997] ECR I-2327, paragraph 45, and in Joined Cases C-486/01 P-R and C-488/01 P-R *Front national and Martinez* v *Parliament* [2002] ECR I-1843, paragraph 73).

49 In the circumstances of this case, suspension of the operation of the contested measures would not have the effect of requiring the Commission to declare the alleged breach of obligations. Consequently, it would be of no interest to the applicant and therefore cannot be ordered by the President of the Court.

50 Secondly, the purpose of this application is to obtain interim measures requiring the Commission, first, to declare, before 23 July 2002, that the French Republic has failed to fulfil its obligations under the ECSC Treaty and, second, to issue directions to that Member State requiring it to remedy that failure by adopting four measures.

51 First of all, it should be stated that, according to the system introduced by Article 88 CS, it is only if the Commission 'considers' that a State has failed to

fulfil an obligation under the Treaty that it is to record this failure in a reasoned decision, after giving the State concerned the opportunity to submit its comments.

52 Furthermore, the interim measure applied for — an order requiring the Commission to find that the French Republic has failed to fulfil its obligations — has exactly the same content and the same effects as the measure which, according to the applicant, the Commission unlawfully refused to adopt. The applicant therefore clearly intends to obtain from the President of the Court what it has not obtained from the Commission, since the claims submitted in the interlocutory proceedings are formulated in the same terms as those stated in the letters of 9 February and 9 May 2001. In the light of those circumstances, the applicant is arguing, in essence, that if the Commission refuses to record a Member State's failure on the basis of Article 88 CS and if an application for interim relief is brought before the President of the Court in order to avoid the effects of that refusal, he should assume the role of the Commission in applying Article 88.

53 That measure, if it were to be ordered, would constitute an interference with the exercise of the Commission's power, incompatible with the distribution of powers between the various Community institutions, as intended by the authors of the ECSC Treaty. It cannot therefore be entertained (see to that effect the order of the President of the Court of First Instance in Case T-213/97 R *Eurocoton and Others* v *Council* [1997] ECR II-1609, paragraph 40).

54 In that respect, it should be pointed out that the applicant's argument, in so far as it is based on the judgment in *T. Port*, cited above, cannot succeed. It cannot necessarily be inferred from that judgment that interim measures to compensate for an institution's failure to act consist in ordering the institution to declare the infringement of Community law previously alleged by the applicant in the complaint which it lodged with the institution.

55 In that judgment, the Court of Justice stated, in essence, that the right to judicial protection includes, in an action for failure to act brought by an individual under Article 232 EC against an institution which has failed to adopt 'any act other than a recommendation or an opinion', the possibility to request the Community judicature to take interim measures under Article 243 EC.

56 That finding of the Court of Justice is based on the EC Treaty, a treaty under which it was acknowledged that there was no necessary link between the action for annulment and the action for failure to act (Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 16). The action for failure to act may make it possible to declare that an institution has acted unlawfully by failing to adopt a measure which, according to settled case-law (in particular, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 10), cannot be challenged under Article 230 EC because of its preparatory nature. It follows that the institution concerned may terminate its failure to act merely by adopting a measure of a preparatory nature and not necessarily by adopting the measure concluding the administrative procedure in question in the manner the applicant wishes (see to that effect Case C-282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503).

57 Similarly, interim measures ordered by the court hearing the application for interim relief may serve to compensate for an institution's failure to act without those measures consisting as a matter of principle, as has been suggested, in ordering the institution to uphold the applicant's complaint.

58 In the present case, the finding of a breach of obligations, which the President of the Court is asked, in particular, to require from the Commission, would definitively conclude the procedure for recording a failure to fulfil obligations established in Article 88 CS and, accordingly, is not a protective measure.

59 Finally, as regards more specifically the measure applied for consisting in an order to the Commission to instruct the French Republic to remedy the alleged failure to fulfil its obligations by adopting four measures, it must also be stated that, if the President of the Court granted that request, he would in fact be addressing the Member State concerned.

60 It is not within the jurisdiction of the President of the Court to order such interim measures if, as in the present case, the main action on which the application is based seeks the annulment of 'decisions' taken by the defendant institution. The interim measures applied for can be granted, as a matter of principle, only if they fall within the framework of the final decision which can be taken by the Court of First Instance under Article 34 CS in conjunction with Article 35 CS and concern the relations between the parties, in this case the applicant and the Commission.

61 In any event, the President of the Court cannot order the Commission to issue instructions to a Member State, since Article 88 CS does not provide that the Commission has competence to order such measures, even if the Member State concerned has not fulfilled its obligation within the time-limit fixed for the purpose by the Commission.

62 In the light of the foregoing considerations, and expressly without prejudice to the assessment of the pleas of inadmissibility raised by the Commission in the main actions, the present application for interim measures must be dismissed as inadmissible.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The application for interim measures is dismissed.**

2. **The costs are reserved.**

Luxembourg, 11 July 2002.

H. Jung
Registrar

B. Vesterdorf
President