

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

27 April 2005^{*}

In Case T-34/05 R,

Makhteshim-Agan Holding BV, established in Amsterdam (Netherlands),

Alfa Georgika Efodia AEVE, established in Athens (Greece),

Aragonesas Agro SA, established in Madrid (Spain),

represented by C. Mereu and K. Van Maldegen, lawyers,

applicants,

v

Commission of the European Communities, represented by B. Doherty, acting as Agent, with an address for service in Luxembourg,

defendant,

^{*} Language of the case: English.

APPLICATION for an order for interim measures concerning the evaluation of Endosulfan with a view to its possible inclusion in Annex I to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1),

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

makes the following

Order

Legal framework

- 1 Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1) establishes inter alia the Community regime applicable to the authorisation and withdrawal of authorisation for the placing on the market of plant protection products.
- 2 Under Article 4 of Directive 91/414 'Member States shall ensure that a plant protection product is not authorised unless ... its active substances are listed in Annex I.' However, active substances which were present on the market two years

after notification of Directive 91/414 and are not included in Annex I may under certain circumstances benefit from a transitional derogatory regime. Thus, Article 8 (2) of Directive 91/414 provides that 'a Member State may, during a period of 12 years following the notification of this Directive, authorise the placing on the market in its territory of plant protection products containing active substances not listed in Annex I that are already on the market two years after the date of notification of this Directive.' That period of 12 years, which expired on 26 July 2003, was extended for certain substances until 31 December 2005 by Commission Regulation (EC) No 2076/2002 of 20 November 2002 extending the time period referred to in Article 8 (2) of Council Directive 91/414/EEC and concerning the non-inclusion of certain active substances in Annex I to that Directive and the withdrawal of authorisations for plant protection products containing these substances (OJ 2002 L 319, p. 3). Amongst the substances affected by that extension is Endosulfan, an active substance utilised in particular in the manufacture of insecticides.

- 3 During the transitional period provided for in Article 8(2) of Directive 91/414 the active substances in question must undergo evaluation following which they may be included in Annex I to Directive 91/414 or, conversely, not be included in Annex I if they do not satisfy the safety requirements laid down in Article 5 of Directive 91/414 or if the requisite information and data for evaluation purposes have not been submitted 'within the prescribed period'. Finally, it is provided in Article 8(2) of Directive 91/414 that the provisions necessary for the implementation of the programme of evaluation will be determined in a regulation to be adopted by the Commission.
- 4 Commission Regulation (EEC) No 3600/92 of 11 December 1992 laying down the detailed rules for the implementation of the first stage of the programme of work referred to in Article 8(2) of Directive 91/414 (OJ 1992 L 366, p. 10) lays down the procedure for evaluating several substances with a view to their possible inclusion in Annex I to Directive 91/414. Those substances include Endosulfan.

- 5 Article 5(2)(b) of Regulation No 3600/92 provides for the designation of a rapporteur Member State for each active substance concerned. The Kingdom of Spain was designated rapporteur Member State for the examination of Endosulfan in accordance with Commission Regulation (EC) No 933/94 of 27 April 1994 laying down the active substances of plant protection products and designating the rapporteur Member States for the implementation of Commission Regulation (EEC) No 3600/92 (OJ 1994 L 107, p. 8).

Facts and procedure

- 6 Makhteshim-Agan Holding BV, Aragonesas Agro SA and Alfa Georgika Efodia AVEE are companies engaged in particular in the production and sale of Endosulfan and plant protection products based on Endosulfan. Aragonesas Agro is a subsidiary and distributor of Makhteshim-Agan Holding. It is the holder of authorisations for the placing on the market in Spain of certain plant protection products based on Endosulfan. Alfa Georgika Efodia is a subsidiary and distributor of Makhteshim-Agan Holding. It holds authorisations for the placing on the market in Greece of certain plant protection products based on Endosulfan.
- 7 Makhteshim-Agan Intern. Coordination is one of the seven producers mentioned in Annex I to Regulation No 933/94 as having notified their intention of securing the inclusion of Endosulfan in Annex I to Directive 91/414. In its observations the Commission refers to that undertaking as 'Makhteshim Agan International Coordination Center'. The applicants state in their application for interim measures that Makhteshim Agan International Coordination Center is a subsidiary of Makhteshim-Agan Holding.

- 8 Prior to the deadline of 31 October 1995 laid down in Regulation No 933/94, as amended, only Makhteshim Agan International Coordination Center and AgrEvo GmbH, henceforth known as Bayer CropScience AG, lodged with the Kingdom of Spain the dossiers mentioned in Article 6 of Regulation No 3600/92 concerning Endosulfan. Subsequently thereto, Makhteshim Agan International Coordination Center and AgrEvo concentrated their efforts within a working group known as the Endosulfan task force.
- 9 After examining the dossiers submitted, the Kingdom of Spain in February 2000 sent a draft report to the Commission on Endosulfan.
- 10 In the summer of 2000, the Commission, pursuant to Article 7(3) of Regulation No 3600/92, sent the draft report to the Member States and to AgrEvo in the latter's capacity as representative of the Endosulfan task force.
- 11 From January to July 2001 the United Kingdom Pesticide Safety Directorate, acting on behalf of the Commission, organised several meetings of experts from several Member States in order to examine the draft report and the comments on it. On 27 June 2001 the report drafted on conclusion of that examination was distributed to the Member States and, on 25 August 2001, that report was forwarded to the Endosulfan task force with a view to seeking additional comments and clarifications.
- 12 Noting that certain additional information was necessary for the purposes of the examination of Endosulfan, the Commission on 21 November 2001 adopted Decision 2001/810/EC concerning the decision on the possible inclusion of certain

active substances in Annex I to Directive 91/414/EEC (OJ 1991 L 305, p. 32). That decision extended until 25 May 2002 the deadline for presentation of new information on Endosulfan. For long-term studies the deadline for submission was set at 31 May 2003.

- 13 On 8 March 2002 a meeting was held which was attended by the Endosulfan task force and the Spanish authorities.
- 14 The Endosulfan task force submitted the studies required by 25 May 2002, before expiry of that deadline.
- 15 On 17 July 2002 a fresh meeting with the Spanish authorities was held.
- 16 The Endosulfan task force submitted the studies required by 31 May 2003 before expiry of that deadline.
- 17 On 22 January 2004 a further meeting was held which was attended by the Endosulfan task force and the Spanish authorities. At that meeting an expert in environmental matters and ecotoxicology informed the Endosulfan task force of certain of its preoccupations concerning Endosulfan.
- 18 On 26 January 2004 the Kingdom of Spain communicated to one of the members of the Endosulfan task force the evaluation report on the information presented by the task force in May 2002 and 2003.

- 19 On 11 March 2004 a meeting was held between the Commission and the Member States at which it was concluded that there was no evidence justifying the inclusion of Endosulfan in Annex I to Directive 91/414.
- 20 On 17 May 2004 a tripartite meeting took place which was attended by the Commission, the Spanish authorities and the representatives of the Endosulfan task force, pursuant to Article 6(4) of Directive 91/414. At that meeting the representative of the Commission indicated to the Endosulfan task force that the Commission was envisaging proposing to the Standing Committee on the Food Chain and Animal Health ('the committee') that Endosulfan should not be included in Annex I to Directive 91/414 and that the purpose of the meeting was to enable the Endosulfan task force to submit its observations. The Commission's representative stated that the Endosulfan task force could send its comments before 21 June 2004 but that no fresh information in support of its arguments could be accepted, as the deadline of 31 May 2003 had already passed.
- 21 On 25 June 2004 the representatives of the Endosulfan task force sent a letter to the Commission challenging the way in which the evaluation of Endosulfan had been conducted and providing certain additional technical explanations.
- 22 By letter dated 12 July 2004 the Commission requested the Kingdom of Spain not to take account of the new studies produced by the Endosulfan task force.
- 23 On 24 September 2004 the Endosulfan task force sent a letter to the Commission through the intermediary of its advisers. By way of introduction to that letter, the Endosulfan task force stated that it was writing in order 'formally to request the Commission to intervene on grounds of sound administration in order to ensure the correct application of Community law and uphold the attendant rights and legitimate expectations of the [Endosulfan task force]'. Moreover, the Endosulfan task force requested the Commission to 'ensure that the Endosulfan evaluation was

effected appropriately from a scientific and legal point of view and to notify it of the decision by the Commission in that regard'. In that same letter the Endosulfan task force stated that 'the Commission had the duty to examine impartially the matters submitted by the Endosulfan task force, to intervene on grounds of sound administration and to refer examination of Endosulfan to the rapporteur or to the specialised bodies established by Community law, with instructions that all the relevant information be examined on the basis of the appropriate evaluation criteria laid down in Directive 91/414'. The Endosulfan task force concluded its letter by putting the Commission on notice to state its position within a period of 60 days.

24 The Commission replied to the request by the Endosulfan task force by letter dated 26 November 2004. In that letter the Commission informed the Endosulfan task force that it was engaged in drawing up a proposal for a decision that Endosulfan should not be included in Annex I to Directive 91/414 and that it intended to submit that proposal to the committee at its first meeting in 2005. The Commission also stated that, in its letter of 12 July 2004, it had drawn attention to the procedure provided for in Regulation No 3600/92 and to the time-limits for finalising examination of the substances referred to in that regulation. Finally, the Commission observed that the request by the Endosulfan task force sought an evaluation by the Commission of studies submitted a short time beforehand, which required detailed analysis, with the result that that request contradicted the request to the Commission for adoption of an overall view of the dossier within a period of 60 days.

25 By application received at the Registry of the Court of First Instance on 31 January 2005, Bayer CropScience and the applicants brought an action for failure to act under Article 232 EC. In that action the applicants essentially claim, first, that the Court of First Instance should:

- Declare that the defendant has failed to comply with its obligations under Community law to review scientific data submitted by the applicants for the review of Endosulfan under Directive 91/414/EEC and to grant them due process during the review;

— Order the defendant to comply with its obligations under Community law and act as requested by the applicants by reviewing and considering all data submitted for the Endosulfan review and by granting them due process, including the rights of the defence and a fair hearing.

- 26 By a separate document, which was received at the Registry on 31 January 2005, the applicants brought this application for interim measures. In it the applicants are requesting the President of the Court of First Instance to give a decision under Article 105(2) of the Rules of Procedure of the Court of First Instance before the Commission has submitted its observations.
- 27 On 8 February 2005 the President of the Court of First Instance put certain questions in writing to the Commission to which the latter replied by letter dated 9 February 2005.
- 28 On 11 February 2005 the applicants lodged with the Registry a letter containing certain comments on the Commission letter of 9 February 2005 which the President of the Court of First Instance decided to place on the file. By a document received at the Registry on 11 February 2005, the Commission submitted its observations on the application for interim measures.
- 29 At the request of the President of the Court of First Instance, the applicants lodged fresh observations on 22 February 2005. In those observations the applicants requested the President to order the Commission to produce certain minutes and agendas of committee meetings to the extent to which they referred to Endosulfan.
- 30 By letter of 2 March 2005, which was received at the Registry on the following day, the Commission submitted its observations on the observations lodged by the

applicants on 22 February 2005. At the request of the President, the Commission stated that it had formally proposed to the committee a draft decision to the effect that Endosulfan should not be included in Annex I to Directive 91/414. The Commission appended to its observations a copy of its draft decision and stated that that draft had been approved by the committee at its meeting on 14 and 15 February 2005.

- 31 On 8 March 2005 the President of the Court of First Instance requested the applicants to lodge any observations on the factual clarifications provided by the Commission at the request of the President of the Court of First Instance. In reply to that request, the applicants submitted their observations by letter of 11 March 2005, to which the Commission replied on 16 March 2005.

Forms of order sought

- 32 The applicants claim that the President should:

- Order the Commission not to terminate the review of the plant protection active substance, ‘Endosulfan’ under Directive 91/414/EEC concerning the placing of plant protection products on the market and, consequently, not to submit a proposal for the non-inclusion of Endosulfan in Annex I to the Standing Committee on the Food Chain and Animal Health, within the meaning of Article 19 of the Directive, at its meeting on 14/15 February 2005 or at any other meeting which would take place pending the full resolution of the dispute in the main proceedings; or order the Commission not to adopt and/or publish in the *Official Journal of the European Union* a decision not to include Endosulfan in Annex I to Directive 91/414/EEC (in case a proposal, within the meaning of Article 19 of the Directive, was already made to and approved by the Standing Committee on the Food Chain and Animal Health); and

- Adopt any other interim measures deemed by the President of the Court appropriate to preserve the applicants' position pending the full resolution of the dispute in the main proceedings;
- Order the Commission to pay the costs

33 The Commission contends that the Court should:

- Dismiss the application as inadmissible or unfounded;
- Order the applicants to pay the costs.

Law

34 Article 104(2) of the Rules of Procedure provides that applications for interim measures must specify the subject-matter of the dispute, the circumstances giving rise to urgency as well as the pleas of fact and law *prima facie* justifying the grant of the provisional measure sought (*fumus boni juris*). Those conditions are cumulative so that an application for interim measures must be rejected if one of them is absent (order of the President of the Court in Case C-268/96 P(R) *SCK and FNK v Commission* [1996] ECR I-4971, paragraph 30). In an appropriate case the President has also to weigh up the interests at stake (order of the President of the Court in Case C-445/00 R *Austria v Council* [2001] ECR I-1461, paragraph 73).

- 35 Moreover, in the context of that overall examination the President enjoys a wide margin of discretion and remains free to determine, in light of the particular features of the case, the way in which those different conditions have to be verified and the order of priority of that examination since there is no rule of Community law imposing on him a predetermined analytical model for assessing the need for an interim decision (order of the President in Case C-149/95 P(R) *Commission v Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 23).
- 36 It is in light of those considerations that the present application for interim measures falls to be examined.

Arguments of the parties

Admissibility

- 37 The Commission considers that the main action is manifestly inadmissible, essentially for seven reasons. First, that action is based on a confusion between, on the one hand, actions for failure to act under Article 232 EC and, on the other, actions for annulment under Article 230 EC. Secondly, the Commission has not yet adopted a mandatory act so that the alleged failure of the Commission does not affect the legal situation of the applicants. Thirdly, the formal notice by the applicants is imprecise as to the acts which the Commission is asked to adopt. Fourthly, the Commission was not subject to any obligation to act within the period laid down by the applicants. Fifthly, even on the supposition that the Commission was required to act in the way desired by the applicants, its reply of 26 November 2004 put an end to its alleged failure. Sixthly, the Court of First Instance is not competent to address injunctions to the Commission. Seventhly, Aragonesas Agro and Alfa Georgika Efodia do not have standing to bring an action under Article 232 EC.

38 The Commission further maintains that the application for interim measures is, in itself, inadmissible. First, the application is premature. Secondly, it is in contradiction with the main action. Thirdly, the measures sought prejudice the main action. Fourthly, the claim for adoption of ‘any other provisional measure’ is not in conformity with Article 44(1)(d) of the Rules of Procedure.

39 For their part the applicants maintain that there should be no examination of the admissibility of the main action. They add that the fact that Makhteshim-Agan Holding effectuated a notification and presented a complete dossier is sufficient to distinguish it from all other operators. For their part, Aragonesas Agro and Alfa Georgika Efodia participated in the process of notification through the intermediary of Makhteshim-Agan Holding and therefore enjoy the same rights. Moreover, since the applicants’ action concerns a failure to act, it is not possible for them to challenge an act at national level. Inadmissibility of the applicants’ claim would thus run counter, first, to their fundamental right to an effective remedy and, secondly, to their right to be heard.

40 In their observations dated 22 February 2005 the applicants specifically add that the fact that the Commission did not examine the information at issue affects their legal situation.

The *fumus boni juris*

41 The applicants maintain that the Commission infringed Article 95(3) and Article 152(1) EC, Article 5(1) of Directive 91/414, the principle of sound administration under Article 211 EC, which requires the Commission to examine each case

diligently and impartially in the context of the competences conferred on it under Directive 91/414 and to observe the rights of the defence and the right to due process; the principles of legal certainty, the protection of legitimate expectations, proportionality and equal treatment; the requirement to provide a statement of reasons; the right to carry on commercial activities and the right to property.

- 42 The Commission maintains that the pleas in support of the main action are extremely weak, in particular because the Commission was not under any obligation to act before 27 November 2004.

Urgency

- 43 The applicants maintain that the failure by the Commission to act is manifestly unlawful and that it is therefore not necessary to examine whether in the present case there is a threat of serious and irreparable damage. They further maintain that the measures sought are particularly urgent owing to the imminence of the opinion of the committee. First, there is no doubt that the committee will oppose the inclusion of Endosulfan in Annex I to Directive 91/414 and, secondly, on the basis of that opinion, the Commission will adopt a formal decision not to include Endosulfan in Annex I to Directive 91/414. According to the applicants, publication of that decision in the *Official Journal of the European Union* will entail withdrawal from the market of all the authorisations relating to plant protection products containing Endosulfan.
- 44 The applicants add that, if interim measures are not adopted, the market will evolve irreversibly, or it will be very difficult to reverse that development.

- 45 First of all, Makhteshim-Agan Holding would lose all of its business concerning the preparation and sale of pharmaceutical products based on Endosulfan in the European Union. Makhteshim-Agan Holding acquired that activity from Bayer CropScience during the year 2003 on the basis of new information and applications showing that Endosulfan could be used without risk within the meaning of Directive 91/414 and before the rapporteur Member State raised doubts concerning that substance.
- 46 Next, Aragonesas Agro would lose its authorisations for marketing in Spain its plant-protection products based on Endosulfan. That would involve, first, losses of market share which would also be felt in regard to its other products, secondly, an increase in its costs and, thirdly, the dismissal of employees.
- 47 Finally, in regard to Alfa Georgika Efodia, a ban on Endosulfan would mean, first, the disappearance of the plant-protection products of that company based on Endosulfan, secondly, the loss of commercial agreements, thirdly, other commercial losses arising out of the weakening of its range of products and, fourthly, a reduction in staffing levels.
- 48 In reply to these allegations, the Commission is of the view that the applicants have not shown that it was urgent to order the interim measures sought. First, in the absence of any binding act the legal situation of the applicants remains unchanged. Secondly, whether the Commission would adopt an act and what its contents would be remain uncertain. Thirdly, even if a negative decision were to be adopted, it would not produce any immediate effect. Fourthly, the damage relied on is purely financial and could form the subject-matter of subsequent reparation.

The balance of interests

- 49 The applicants are essentially maintaining that the measures sought merely maintain the status quo. They also dwell on the disproportionate nature of the Commission's conduct in relation to the objective of Directive 91/414. Moreover, Endosulfan has been in use for several decades and has been authorised as a risk-free product in its most recent capsule formula in Italy, Greece and Portugal.
- 50 For its part, the Commission maintains that, should it be necessary to weigh up the interests at stake, public health protection would prevail (order of the President of the Court of First Instance in Case T-392/02 R *Solvay Pharmaceuticals v Council* [2003] ECR II-1825, paragraph 122).

Assessment by the President

- 51 Since the written observations of the parties contain all the information necessary to adjudicate on the claim for interim measures, it is not necessary to hear oral argument from them.
- 52 In its observations the Commission maintains that the interim application is inadmissible for several reasons essentially having to do with either the manifest inadmissibility of the main action or the nature of the interim measures sought (paragraphs 37 and 38 above).

- 53 According to settled case-law, the question of the admissibility of the action before the court determining the merits may not in principle be examined in the context of interim proceedings, owing to the risk of prejudging the main action. None the less, where the manifest inadmissibility of the main action to which the application for interim measures relates is raised, it may prove necessary to establish the existence of matters enabling such an action to be regarded as *prima facie* admissible (order of the President of the Court in Case 376/87 R *Distrivet v Council* [1988] ECR 209, paragraph 21; orders of the President of the Court of First Instance in Case T-13/99 R *Pfizer Animal Health v Council* [1999] ECR II-1961, paragraph 121 and *Solvay Pharmaceuticals v Council*, cited above, paragraph 53).
- 54 In the present case it is necessary to conduct a separate examination of the admissibility of the two sets of submissions made by the applicants in their main action, that is to say first their submission seeking a declaration by the Court of First Instance of a failure by the Commission to act, and, second, their submission seeking an injunction by the Court of First Instance against the Commission.

Submission seeking a declaration that the Commission failed to act

- 55 In the context of the main proceedings the applicants essentially request that the Court of First Instance find that the Commission failed to fulfil its alleged obligation, first of all, to consider the data supplied by the Endosulfan task force and, secondly, to comply with the applicants' right to a fair hearing (paragraph 25 above).
- 56 On the supposition that such a plea accords with the subject-matter of Article 232 EC which, in the case of an individual, concerns a finding that an institution has failed to fulfil its obligation 'to address to that person any act other than a recommendation or an opinion', it is in any event necessary to determine whether the other conditions for admissibility in regard to the application for a declaration of failure to act are met.

- 57 Under the second paragraph of Article 232 EC an action for a declaration of failure to act 'shall be admissible only if the institution concerned has first been called upon to act.' It is settled case-law that in that regard the notice must be sufficiently clear and precise to enable the Commission to ascertain in specific terms the content of the decision which it is being asked to adopt and must make clear that its purpose is to compel the Commission to state its position (see, to that effect, order of the Court in Case C-249/99 P *Pescados Congelados Jogamar v Commission* [1999] ECR I-8333, paragraph 18 and judgment in Case T-17/96 *TF1 v Commission* [1999] ECR II-1757, paragraph 41).
- 58 In this case it is not for the President deciding on the interim application to make a determination on whether the notification to the Endosulfan task force was sufficiently explicit and precise, within the meaning of the case-law referred to above, to enable the Commission to ascertain in specific terms the content of the decision which it was being asked to adopt.
- 59 In the context of these interim proceedings, it must at this juncture be determined whether, on the supposition that the Commission was validly called upon to take action, there is sufficient evidence to justify the conclusion that the Commission failed to adopt a position on the formal notice notified to it by the Endosulfan task force
- 60 In that regard it is settled case-law that, by using the terms 'has failed to address to that person [an] act', Article 232 EC refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered necessary by the persons concerned (judgment in Case 8/71 *Komponistenverband v Commission* [1971] ECR 705, paragraph 2; Joined Cases 166/86 and 220/86 *Irish Cement v Commission* [1988] ECR 6473, paragraph 17 and Joined Cases C-15/91 and C-108/91 *Buckl and Others v Commission* [1992] ECR I-6061, paragraph 17).
- 61 In this case the Commission, in its letter of 26 November 2004, informed the Endosulfan task force that it intended to put before the committee a draft decision not to include Endosulfan in Annex I to Directive 91/414.

- 62 Where the committee issues a favourable opinion on a proposed decision not to include an active substance under Article 5(3) of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), the Commission is to 'adopt the measures envisaged' subject to any resolution by the European Parliament under Article 8 of Decision 1999/468. Such a proposed decision thus clearly indicates the Commission's desire to close the examination of the active substance concerned.
- 63 Furthermore in its letter of 26 November 2004, the Commission rejected the Endosulfan task force's argument that the examination of Endosulfan did not take place according to an 'equitable procedure'. In this regard the Commission referred *inter alia* to its letter of 12 July 2004, a copy of which was addressed to the representatives of the Endosulfan task force, in which it had asked the Spanish authorities not to carry out an examination of the data submitted by the Endosulfan task force and pointed out that the deadline for submitting supplementary studies had expired.
- 64 In light of that information the President considers at this stage that the Commission's letter of 26 November 2004 clearly indicates the Commission's refusal, first, to examine the data produced by the Endosulfan task force before submitting a draft decision not to include Endosulfan and, secondly, to afford to the applicants the benefit of additional procedural safeguards before the submission to the committee of that proposal.
- 65 Indeed the applicants themselves appear to agree since they argue in their application that 'the 26 November 2004 Commission reply letter necessarily implies that the rapporteur and/or the Commission has failed to and will no longer review the new data and related arguments submitted by the Applicants, nor give them a fair hearing to address concerns that were communicated to them by the rapporteur only in January 2004'.

66 Consequently, at this stage and entirely without prejudice to the decision which the Court of First Instance may adopt on this question in the main proceedings, there are not sufficient factors for the President to consider that the letter of 26 November 2004 does not constitute the adoption of a position on the measures which it was asked to adopt. At this juncture therefore the applicants' submission seeking a declaration that the Commission failed to act must be considered manifestly inadmissible.

67 In any event it is settled case-law that the remedy provided for in Article 232 EC is based on the idea that an unlawful failure to act on the part of the institution called upon to act enables application to be made to the Community Courts for a declaration that the failure to act is contrary to the EC Treaty where the institution concerned has not remedied that failure. Such declaration has the effect under Article 233 EC of requiring the defendant institution to take the measures necessary in order to comply with the judgment of the Community Court without prejudice to the actions for non-contractual liability which may stem from that declaration. Where the act whose omission forms the subject-matter of the dispute was adopted after the action was brought but before delivery of the judgment, a declaration by the Community Courts establishing the unlawfulness of the initial failure can no longer entail the consequences provided for in Article 233 EC. That means that, in such a case, just as in a case where the defendant institution reacts to the request to act within the period of two months, the subject-matter of the action has ceased to exist and there is no longer any need for the Court to give a decision (order of the Court in Case C-44/00 P *Sodima v Commission* [2000] ECR I-11231, paragraph 83, and judgment in Case T-105/96 *Pharos v Commission* [1998] ECR II-285, paragraphs 41 and 42).

68 In the present case the Commission stated in its observations dated 2 March 2005 that it had formally submitted to the committee a proposal for a decision not to include Endosulfan in Annex I to Directive 91/414 (see paragraph 30 above). As has already been held at paragraph 62 above, such proposal clearly underlines the Commission's intention to close the examination of the active substance in question.

- 69 In that regard it should be added that the fact that such proposal does not prima facie constitute an act challengeable by an action for annulment does not mean that it may not constitute a definition of position terminating the failure to act if it is the prerequisite for the next step in a procedure which has, in principle, to culminate in a legal act which itself will be challengeable by an action for annulment (Case T-186/94 *Guérin Automobiles v Commission* [1995] ECR II-1753, paragraph 25 and *Pharos v Commission*, cited at paragraph 67 above, paragraph 43).
- 70 Consequently, there is every reason to believe at this stage that the fact that the Commission formally submitted a proposal for a decision not to include Endosulfan in Annex I to Directive 91/414, without undertaking the matters requested by the Endosulfan task force, constitutes a definition of position on the formal notice notified by the latter.
- 71 In addition, a failure to act comes to an end on the day on which the person who called upon an institution to act received the document by which that institution defined its position (judgment in Joined Cases T-194/97 and T-83/98 *Branco v Commission* [2000] ECR II-69, paragraph 55).
- 72 In the present case the Commission states that on 1 March 2005 it sent to a representative of the Endosulfan task force a copy of the proposed decision approved by the committee. In their observations of 11 March 2005 the applicants confirm that Makhteshim-Agan Holding indeed received a copy of that proposal on 1 March 2005. Moreover, the Commission's observations of 2 March 2005, to which was annexed a copy of the Commission's draft decision, were notified to the applicants by the Registry of the Court of First Instance on 7 March 2005. Consequently, even on the supposition that, after receiving the formal notice from the Endosulfan task force, the Commission was in a situation characterised by failure, that failure ceased not later than 7 March 2005.

- 73 At this juncture the President does not therefore have sufficient information available before him to form the view that it is still necessary to adjudicate on the applicants' submission that the Court of First Instance should declare that the Commission has failed to act.

Submission that an injunction against the Commission should be issued

- 74 In addition to their submission seeking a declaration of the Commission's failure to act, the applicants principally submit that the Court of First Instance should order the Commission to comply with its obligations, in particular by examining all the information submitted in connection with the examination of Endosulfan and by observing the applicants' alleged procedural rights.

- 75 On this point it is sufficient to point out that the Community Courts are not competent to issue injunctions against an institution in the context of proceedings under Article 232 EC (see, in that regard, judgments in Case C-25/91 *Pesqueras Echebastar v Commission* [1993] ECR I-1719, paragraph 14 and order of the Court of First Instance in Case T-5/94 *J v Commission* [1994] ECR II-391, paragraph 17).

- 76 Accordingly, the President does not have sufficient information available before him to form the view that the submission that an injunction against the Commission should be issued is admissible.

- 77 At this juncture, the main action appears therefore to be manifestly inadmissible or, on the one hand, discloses no cause of action and, for the remainder, must be declared manifestly inadmissible.

⁷⁸ Consequently, the application for interim measures must be rejected; in that connection there is no need, on the one hand, to rule on the other grounds of inadmissibility relied on by the Commission and, on the other, on the applicants' submission that the Commission should be ordered to produce the minutes and agendas of meetings of committees in so far as they refer to Endosulfan.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 27 April 2005.

H. Jung

Registrar

B. Vesterdorf

President