ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE 17 December 1996 *

In Case T-164/96 R,

Moccia Irme SpA, a company incorporated under Italian law, with its registered office in Naples (Italy), represented by Emilio Cappelli, Paolo De Caterini and Andrea Bandini, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Charles Turk, 13b Avenue Guillaume,

applicant,

v

Commission of the European Communities, represented by Paul F. Nemitz and Laura Pignataro, of its Legal Service, acting as Agents, assisted by Massimo Moretto, of the Venice Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION under Article 39 of the ECSC Treaty for an order of the President of the Court of First Instance suspending the operation of Commission Decision 96/678/ECSC of 30 July 1996, and of the previous acts, and requiring the Commission to call upon the Italian authorities to suspend payment of the aid for closure referred to by Decree-Law No 396 of 20 June 1994, converted into Law No 481 of 3 August 1994 until judgment is given on the merits of the case, and in the alternative that the Commission should reopen the consultative procedure examining the aid with the applicant company,

* Language of the case: Italian.

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

makes the following

Order

Facts and procedure

1 Under Article 4(c) of the ECSC Treaty, subsidies or aids granted by States in any form whatsoever are recognized as incompatible with the common market for coal and steel and are accordingly prohibited within the Community. By virtue of the first and second subparagraphs of Article 95, where it proves necessary in order to attain one of the objectives of the Community set out in Articles 2, 3 and 4, the Commission may authorize subsidies or aid granted by the Member States to the steel sector by a decision adopted with the unanimous assent of the Council. With that in view, the Commission adopted Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57), better known as the 'Fifth Steel Aid Code'.

2 Under Article 1(1) of the decision in question, all 'aid to the steel industry, whether specific or non-specific, financed by Member States or their regional or local authorities or through State resources in any form whatsoever may be deemed Community aid and therefore compatible with the orderly functioning of the common market only if it satisfies the provisions of Articles 2 to 5'.

Article 1(3) provides that the aid concerned 'may be granted only after the procedures laiddown in Article 6 have been followed and shall not be payable after 31 December 1996'. As regards aid for closures, the second indent of Article 4(2) states that aid

'to ECSC steel undertakings which permanently cease production of ECSC iron and steel products may be deemed compatible with the orderly functioning of the common market provided that the undertakings

(...)

— have been regularly producing ECSC iron and steel products up to the date of notification of the aid'.

3 In order to permit application of the provisions in question to be effectively monitored, Article 6(1) provides for the Commission to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid of the types referred to in Articles 2 to 5. Under Article 6(4), if 'after giving notice to the interested parties concerned to submit their comments, the Commission finds that aid in a given case is incompatible with the provisions of this decision, it shall inform the Member State concerned of its decision. The Commission shall take such a decision not later than three months after receiving the information needed to assess the proposed aid'. Finally, Article 6(6) provides that all individual awards of the types of aid referred to in Articles 4 and 5 are to be notified to the Commission in accordance with the procedure provided for in paragraph (1).

4 In February 1994, in accordance with Article 6(1) of Decision No 3855/91, the Italian Government notified to the Commission Decree-Law No 103 of 14 February 1994 introducing urgent measures for the implementation of its steel

restructuring programme. As it was not converted into a law, the decree concerned was repeated in Decree-Law No 234 of 14 April 1994 and again in Decree-Law No 396 of 20 June 1994, the latter being definitively converted into Law No 481 of 3 August 1994. Article 1(3) of Law No 481/94 states that 'requests for the grant of aid (...) must be submitted to the General Industrial Production Division of the Ministry of Industry, Trade and Craft Trades before 30 July 1994 (...)', whereas 'dismantling of plant and equipment must take place before 31 March 1995 and the aid is to be paid in instalments by 31 December 1996'.

5 In August 1994 the Italian authorities notified the measure implementing Law No 481 in the form of a Ministerial Decree (Decree No 683 of the Minister for Industry, Trade and Craft Trades of 12 October 1994). In accordance with Article 1(1) of Decree No 683, in order to qualify for the aid referred to in Article 1 of Law No 481/94, the undertakings concerned had *inter alia* to satisfy the following conditions:

'(c) to dismantle the plant and equipment the subject of the aid before 31 March 1995; and

(...)

(e) until the date of adoption of Decree-Law No 103 of 14 February 1994, repeated in Decree-Law No 234 of 14 April 1994 and in Decree-Law No 396 of 20 June 1994, converted into Law No 481 of 3 August 1994, to have been in regular production, as certified by a report sworn by a technical expert in the field listed in the register of experts and appointed by the court within whose jurisdiction the company has its head office'.

6 After verifying that Law No 481/94 and Ministerial Decree No 683 complied with Decision No 3855/91 (and, in particular, with Article 4 thereof), the Commission, by decision of 12 December 1994, authorized the aid in question and made the actual grant of aid subject to previous notification. With regard to the condition concerning 'regular production' of ECSC iron and steel products laid down in the second indent of Article 4(2) of Decision No 3855/91, the Commission stated, on the basis of the information notified by the Italian authorities, that the condition in question must be considered satisfied where the undertaking concerned had 'been in operation for on average at least one shift per day, i. e. at least eight hours per day, five days per week for the whole of 1993 and up to February 1994, when Decree-Law No 103/94 was notified to the Commission' (see page 3, paragraph 1, second indent, of the letter of 12 December 1994 addressed to the Italian Government by the Competition Commissioner, Karel van Miert, Annex 8 to the application). The Commission also stated that the Italian authorities could 'establish, on the basis of objective criteria, that an undertaking which did not satisfy that condition had regularly produced ECSC iron and steel products', thereby confirming that the condition in question was to be regarded as mentioned merely by way of example.

7 On the basis of Law No 481/94 and implementing Decree No 683, Moccia Irme SpA, together with other ECSC steel-producing undertakings established in Italy, made an application for authorization for aid for the definitive closure of steelworks.

8 By letters of 15 December 1995 and 2 February 1996, the Commission informed the Italian authorities of its decisions to initiate the procedure under Article 6(4) of Decision No 3855/91 in respect of the individual 'actual cases' of aid duly notified under Article 6(6) of the decision. In the cases in question, the undertakings concerned, while satisfying the other conditions expressly listed in Article 4, could not claim 'to have been regularly producing' ECSC iron and steel products up to the date of notification of the aid (that is to say, February 1994) within the meaning of

the second indent of Article 4(2) of Decision No 3855/91. In particular, during the reference period the applicant had not produced anything at all (see Commission Decision No 96/678/ECSC, end of the fifth paragraph of Chapter I).

9 By letter of 31 January 1996, the Italian Government submitted its observations concerning the initiation of the procedure. However, rather than establishing on the basis of objective criteria that the undertakings in question had been regularly producing ECSC products during the reference period, the Government merely put forward reasons to justify the fact that there had been no regular production, thus implicitly confirming that in those cases the condition in question could not be said to have been satisfied.

10 By decision of 30 July 1996 the Commission therefore decided to declare the State aid proposed by Italy in favour of *inter alia* the applicant incompatible with the common market in steel as defined by Article 4(c) of the ECSC Treaty.

11 By Decree-Law No 143 of 29 April 1995 the time-limit of 31 March 1995 fixed by Article 1(3) of Law No 481/94 and Article 1(1)(c) of Decree No 683 for the dismantling of the plant and equipment was extended to 31 December 1995 and, subsequently, by Decree-Law No 547 of 23 December 1995 to 29 February 1996, by Decree-Law No 78 of 26 February 1996 to 30 April 1996, by Decree-Law No 214 of 26 April 1996 to 30 June 1996, and, last, by Decree-Law No 542 of 23 October 1996 it was definitively set at 30 September 1996, without prejudice to the time-limit of 31 December 1996 already laid down by Law No 481 for the payment of aid by instalments. Article 3(4) of Decree-Law No 542 of 23 October 1996 is worded as follows:

'The time-limit of 31 March 1995 prescribed by Article 1(3) of Decree-Law No 396 of 20 June 1994, converted into law and amended by Law No 481 of

3 August 1994 and already extended to 30 June 1996 is hereby further extended to 30 September 1996. The firms still subject to the procedure under which prior notification is to be given to the Commission of the European Communities must in any event interrupt production as soon as they receive the order granting them aid under Article 1(2) of Decree-Law No 396/94, without prejudice to the other obligations imposed by the Commission and the time-limit of 31 December 1996 fixed for the closure of the procedures for granting that aid'.

12 By application lodged at the Registry of the Court of First Instance on 19 October 1996, the applicant requested the annulment of Commission Decision 96/678/ECSC of 30 July 1996, and of the other previous acts connected or related thereto.

13 By separate document, registered at the Registry of the Court of First Instance on 29 November 1996, the applicant applied for urgent interim measures under Article 39 of the ECSC Treaty, claiming that the President of the Court of First Instance 'should, having heard the parties, order suspension of the operation of the contested decision and the previous acts, and require the Commission to call upon the Italian authorities to suspend payment of the aid for closures referred to in Law No 481/94 until judgment is given on the merits of the case and, in the alternative, that the Commission should reopen the consultative procedure examining the aid with the applicant company'.

14 The Commission submitted written observations in a document lodged at the Registry of the Court of First Instance on 6 December 1996.

15 The parties submitted oral arguments on 11 December 1996.

Law

16 Under the second and third paragraphs of Article 39 of the ECSC Treaty 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 No 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 1), Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), and Council Decision 95/1/EC, Euratom, ECSC of 1 January 1995 (OJ 1995 L 1, p. 1), 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.

17 Article 104(1) of the Rules of Procedure of the Court of First Instance specifies that an application to suspend the operation of any measure adopted by an institution is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. Article 104(2) provides that applications for the interim measures under the second and third paragraphs of Article 39 of the ECSC Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. The measures sought must be provisional in that they must not prejudge the decision on the substance (see the order of the President of the Court of First Instance of 29 November 1996 in Case T-179/96 R *Antonissen* v *Council and Commission* [1996] ECR II-1641, paragraph 19).

18 In the present case the applicant claims that the President of the Court of First Instance should make an order:

— for the operation of the contested decision and of the previous acts to be suspended;

— for the Commission to call upon the Italian authorities to suspend payment of State aid for the closure of steelworks under Law No 481/94 until judgment is given on the merits of the case;

— in the alternative to the foregoing claim, for the Commission to reopen the procedure for examining the aid to be granted to the applicant.

19 The application therefore seeks an order from the Court prescribing certain interim measures, which the applicant considers necessary in the light of the circumstances which it puts forward, under the second and third paragraphs of Article 39 of the ECSC Treaty.

20 In order to rule on such an application, it is first necessary to determine whether the applicant has an interest in obtaining the interim measures sought.

Whether the applicant has an interest in obtaining the interim measures sought

Arguments of the parties

21 The applicant maintains that its interest in obtaining the interim measures sought is to be discerned in the particular situation in which it found itself as a result of the Commission's decision of 30 July 1996 refusing authorization for the grant of aid for closures referred to in Law No 481/94. That law, as supplemented by Decree-Law No 542/96, lays down a time-limit for the dismantling of plant and equipment, at present set at 30 September 1996, and a time-limit for the payment of the aid which is the same — 31 December 1996 — as that specified generally by Article 1(3) of the Fifth Steel Aid Code. Moccia Irme considers that the Commission's refusal prevents it, so long as the case is pending before the Court, from choosing between obtaining aid for closure and selling the plant and equipment to third parties, and thereby causes it serious and irreparable damage — that of 'being unable to choose': once the two prescribed periods have elapsed, it will no longer be possible for the applicant to qualify for aid for closure and the only alternative

is that of selling the plant at a lower price than was offered when there was still a chance of State aid. Even if its main application were to be upheld, the risk is still that this would be of no avail to Moccia Irme, on account of the inevitable delay, and the applicant can receive adequate judicial protection only if it obtains the interim measures sought in these proceedings.

22 In particular, the applicant's interest in obtaining an order of the President of the Court of First Instance for the Commission to call upon the Italian authorities to suspend payment of the aid for closure provided for by Law No 481/94 is to be found in the risk that the financial resources allocated at national level to assist the closure of steelworks may be 'definitively distributed amongst the other undertakings which have applied for it', with the result that Moccia Irme would be excluded from all financial aid and reduced to having to sell production plant to purchasers who would be able to 'set their own purchase price'. An interim decision in the form of a 'temporary suspension of the whole system of aid for discontinuation of activity' created by the Italian Government would enable the Commission, the Italian authorities and Moccia Irme to 'examine and implement solutions capable of satisfying all the interests involved'.

23 The Commission considers that the applicant has not adduced any evidence of its alleged interest in obtaining the interim measures applied for. In its view, the risk of damage to Moccia Irme is merely potential, and in any event if 'it did actually occur it would be in the form of purely economic loss' which, if the main application were upheld, could be made good by 'ordinary claims for damages'. In addition, the factual grounds for bringing an action for interim measures must be regarded as no longer in existence since the time-limit for the dismantling of the plant and equipment — 30 September 1996 — has passed: obtaining the measures

sought would not be of any advantage to the applicant which cannot be eligible for State aid since it is no longer legally possible to satisfy the condition — dismantling of the plant and equipment — to which the grant of aid is subject.

24 As regards the claim for suspension of payment of the aid referred to in Law No 481/94, the Commission points out that that interim measure is unnecessary and excessive. It is unnecessary because it is open to the applicant 'pending the final judgment in the main proceedings, to bring an action before the competent Italian authorities in order to obtain a decision reserving to it a certain share of the funds allocated to aid for closure, or also to suspend the entire procedure for granting the aid'. Nor, according to the Commission, is it impossible that further funds might be allocated for 1997 to finance the definitive closure of steelworks: having regard to the expiry of the Fifth Steel Aid Code on 31 December 1996, 'the Commission has already submitted a proposal to replace the previous decision', while at national level Law No 550 of 28 September 1995 ('1996 Finance Law') provides for the allocation of LIT 100 000 000 000 for 1997 as a contribution to the special renewable fund for technological innovation in implementing the restructuring plan for the steel industry. The measure requested is excessive, according to the Commission, because of the consequences which would result in practice if it were to be granted: such a measure would prevent the 'Italian Government from granting aid for closure to any undertaking whatsoever, including those in respect of which aid has been considered to be compatible with the common market', seriously damaging the rights of those which had already dismantled their own plant and equipment in accordance with the national legislation.

25 Last, the Commission notes that an interim measure consisting of an order enjoining it to call upon the Italian authorities to suspend payment of aid for closure until final judgment on the merits manifestly falls outside the powers conferred on it within the scope of the ECSC Treaty, as specified by the Fifth Steel Aid Code, while an interim measure enjoining it to reopen the procedure for examining the

aid to be granted to Moccia Irme produces 'the same results as those sought in the main proceedings and prejudices the decision on the merits'.

Findings of the President of the Court as to the urgency of the relief sought

26 It is settled case-law that when deciding whether to grant interim measures it is necessary to ascertain whether or not the applicant has established an interest in obtaining the measures requested (see the order of the President of the First Chamber of the Court in Case 107/89 R *Caturla-Poch* v *European Parliament* [1989] ECR 1357). That requirement is especially obvious in the case of an application for suspension of a negative act, where it is necessary to establish whether the measure proposed, supposing it were granted, could produce any consequences of use to the applicant (see to this effect the order of the President of the Court of First Instance in Case T-507/93 R *Branco* v *Court of Auditors* [1993] ECR II-1013).

27 In the light of that case-law, it must be enquired whether the interim measures sought by Moccia Irme are actually capable of being of any use to the applicant.

28 The first interim measure sought consists of suspension of the operation of the contested decision pursuant to the second paragraph of Article 39 of the ECSC Treaty. In this regard, it should be noted that the contested decision is negative in character and that its suspension would be of no avail to the applicant: in order for it to be granted aid by the Italian Government, it would be necessary for the Commission to adopt a positive decision under Article 6(4) of the Fifth Steel Aid Code, failing which the prohibition on subsidies and aid laid down by Article 4(c) of the

ECSC Treaty must apply. Granting the measure in question — as well as suspension of the prior acts, such as the Fifth Steel Aid Code — would not therefore be of any use to the applicant since it would not render illusory the damage which it fears: it would still be 'unable to choose' between aid for closure and sale of plant and equipment, since there is no way in which the Italian Government could pay the applicant the aid granted to it in the absence of a decision by the Commission giving positive authorization.

29 The alternative claim that the Court should order the Commission to reopen the procedure for examining the aid in question is nothing more than a different formulation of the claim for suspension of operation of the contested decision: it expressly seeks to bring about what the first claim sought by implication, that is to say a possible change of mind by the Commission as regards authorizing aid to Moccia Irme. Such a possibility would seem totally hypothetical since reopening the procedure for examining aid provided for and governed by Article 6 of the Fifth Steel Aid Code, even if ordered as an interim measure, would not necessarily lead the Commission to adopt the positive decision which alone could permit the Italian Government to grant the aid to the applicant. Furthermore, as the Commission correctly points out, a measure of that kind would not be an interim measure, since it would produce the same results as those sought in the main proceedings and prejudge the decision on the merits (see, most recently, the order of the President of the Court of First Instance of 29 November 1996 in Case T-179/96 R *Antonissen* v *Council and Commission*, cited above, paragraphs 29 and 30): according to the first paragraph of Article 34 of the ECSC Treaty, it is only where the contested act is annulled that the Commission is obliged to re-examine the case and take the necessary steps to comply with the judgment.

30 As for the claim for the Commission to be ordered to call upon the Italian authorities to suspend payment of aid for closure, the usefulness of upholding it is merely apparent, not real. Suspending payments would freeze the existing situation but without any benefit to the applicant: 'temporary suspension of the whole system of aid for discontinuation of activity' would admittedly prevent financial resources from being 'definitively distributed amongst the other undertakings which have applied' for aid, but it would not alter the fact that the time-limit expires on

31 December 1996, after which — as required, at the Community level, by Article 1(3) of the Fifth Steel Aid Code — no more aid can be paid, either to the undertakings authorized to receive it by the Commission or to the applicant, which would not gain any advantage from the damage caused to its competitors by suspension of the system. Furthermore, Article 1(4) of Decree-Law No 542/96, according to which 'firms still subject to the procedure under which prior notification is to be given to the Commission of the European Communities must in any event interrupt production as soon as they receive the order granting them aid under Article 1(2) of Decree-Law No 396/94, without prejudice to the other obligations imposed by the Commission and the time-limit of 31 December 1996 fixed for the closure of the procedures for granting that aid', does not seem to be relevant to the case in point, since the prior notification procedure has already been closed by decision of the Commission of 30 July 1996 refusing to authorize the aid in question. In fact, as it was possible to establish at the hearing on 11 December 1996, Moccia Irme's interests could equally be protected by reserving the funds — 13 509 million lire — granted to it by the Italian Government but not paid by reason of the Commission's refusal to authorize the aid: however, the measure sought, even if it were to be adopted, would have no effect for that purpose since at the end of the financial year the sum already set aside for the applicant, although capable of conversion into a debit balance, could not be paid after 31 December 1996 unless new legislation refinancing the system of aid for closures were to be adopted. To allow the application in question would therefore be of no use to the applicant, and moreover would entail the adoption of a measure which would manifestly be beyond the powers conferred on the Commission in the sphere of the ECSC Treaty, since it would amount to ordering a Member State to suspend an aid scheme already found to be compatible with the Treaty (see the order of the President of the Court of First Instance of 21 October 1996 in Case T-107/96 R *Pantochim* v *Commission* [1996] ECR II-1361, paragraph 36).

31 It follows that the conditions for granting the interim measures sought are not satisfied. The present application must therefore be dismissed without there being any need to consider whether the pleas in law and arguments put forward by the applicant to establish a case for granting the interim measures sought appear to be well founded.

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, 17 December 1996.

H. Jung	A. Saggio
Registrar	President