ORDER OF THE COURT (Fourth Chamber)
9 December 2003 *

In Case C-224/03,

Italian Republic, represented by I.V. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by L. Pignataro and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, under Article 97 CS, the powers and competence of the Commission of the European Communities in the sectors which under the ECSC Treaty were assigned to the High Authority have ceased to

* Language of the case: Italian.

exist with effect from 24 July 2002, with the result that any measure adopted or to be adopted by it in those sectors which have not formed the subject-matter of a new agreement between the signatory States must be regarded as null and void and of no effect,

THE COURT (Fourth Chamber),

composed of: J.N. Cunha Rodrigues, President of the Chamber, F. Macken and K. Lenaerts (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Registry of the Court on 22 May 2003, the Italian Republic applied to the Court for a declaration that, under Article 97 CS, the powers and competence of the Commission of the European Communities in the sectors which under the ECSC Treaty were assigned to the High Authority have

ceased to exist with effect from 24 July 2002, with the result that any measure adopted or to be adopted by it in those sectors which have not formed the subject-matter of a new agreement between the signatory States must be regarded as null and void and of no effect.

Legal background

2 Pursuant to Article 97 of the ECSC Treaty, that treaty expired on 23 July 2002.

3 On 18 June 2002, the Commission of the European Communities adopted a communication concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty (OJ 2002 C 152, p. 5, 'the communication').

4 At paragraph 1 of that communication, the Commission states that the expiry of the ECSC Treaty on 23 July 2002 'means in principle that as from 24 July 2002 the sectors previously covered by the ECSC Treaty and the procedural rules and other secondary legislation derived from the ECSC Treaty will be subject to the rules of the EC Treaty as well as the procedural rules and other secondary legislation derived from the EC Treaty.'

5 Paragraph 2 of the communication states that the purpose thereof is:

'— to summarise for economic operators and Member States, in so far as they are concerned by the ECSC Treaty and its related secondary legislation, the most important changes with regard to the applicable substantive and procedural law arising from the transition to the EC regime,

— ... to explain how the Commission intends to deal with specific issues raised by the transition from the ECSC regime to the EC regime in the areas of antitrust, merger control and State aid control.'

6 Paragraph 31 of the communication, which appears in the section addressing specific problems raised by the transition from the ECSC regime to the EC regime, provides as follows:

'If the Commission, when applying the Community competition rules to agreements, identifies an infringement in a field covered by the ECSC Treaty, the substantive law applicable will be, irrespective of when such application takes place, the law in force at the time when the facts constituting the infringement occurred. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC law.'

Procedure

7 The Italian Republic brought the present action by application lodged at the Registry of the Court on 22 May 2003.

8 By separate document lodged at the Registry of the Court on 18 July 2003, the Commission raised a plea of inadmissibility under Article 91(1) of the Rules of Procedure of the Court. The Italian Republic lodged its observations on that plea on 9 October 2003.

Forms of order sought

9 The Italian Republic claims that the Court should make a declaration that under Article 97 CS, the powers and competence of the Commission of the European Communities in the sectors which under the ECSC Treaty were assigned to the High Authority have ceased to exist with effect from 24 July 2002, with the result that any measure adopted or to be adopted by it in those sectors which have not formed the subject-matter of a new agreement by the signatory States must be regarded as null and void and of no effect.

10 In its plea of inadmissibility, the Commission contends that the Court should:

— declare the action inadmissible;

— order the applicant to pay the costs.

11 In its observations on the plea of inadmissibility, the Italian Republic contends that the Court should reject that plea.

Admissibility

12 The Commission alleges that the action is clearly inadmissible.

13 In support of that plea, it points out that the Italian Republic asks the Court to grant declaratory relief where the Court only has jurisdiction to do so in the situations, which do not apply in the present case, referred to in Articles 226 EC to 228 EC, 238 EC and 239 EC.

14 The Commission submits that Article 230 EC does not allow the Court to give judgments of a purely declaratory nature. It adds that, according to the case-law, the powers of the Community judicature under Article 230 EC do not include the power to make declarations (see, to that effect, the order of 10 February 1994 in Case T-468/93 *Frinil* v *Commission* [1994] ECR II-33, paragraphs 36 and 37), nor that to issue directions to a Community institution (see, for example, the order of 26 October 1995 in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 24, and Case C-5/93 P *DSM* v *Commission* [1999] ECR I-4695, paragraph 36).

15 The Italian Republic replies that, following the communication, the Commission adopted Decision C (2002) 5087 final of 17 December 2002 on a proceeding pursuant to Article 65 CS (Case COMP/37.956 — Reinforced concrete), in which it finds that the Italian steel-making companies entered into agreements contrary to Article 65 CS and imposes fines on them amounting to EUR 85 million. It submits that, in the absence of agreement between the States signatory to the ECSC Treaty on the transition from the ECSC regime to the EC regime in the competition sector, the adoption of such a decision constitutes an abuse of power on the part of the Commission.

16 It insists in this connection on the Court's jurisdiction to ensure, in the interests of the Member States and the proper working of the Community, that the Commission does not exceed the powers attributed to it. It submits that, in the

present case, after setting out its intentions in the communication, the Commission put these into practice through decisions which show that the Commission arrogated a power to itself without prior agreement between the Member States and which have an impact on the interests of the undertakings penalised.

17 It submits that, faced with such an abuse of power, the only recourse available to the Member State concerned is to refuse to append the necessary order for enforcement under Article 256 EC for enforcement of a Commission decision imposing a pecuniary obligation on natural or legal persons. It adds that such a refusal would however have exposed it to an action by the Commission for infringement of the obligation laid down by Article 256 EC, which would have raised the question of the scope of judicial review in respect of that refusal.

18 Furthermore, it stresses that in the present case it seeks not the annulment of individual decisions, on the basis of lack of powers, but the resolution of a constitutional issue of conflicting powers. It submits that the sole means to that end consists of challenging the Commission's claim, under the ECSC Treaty, to a power which it does not have under that treaty. It asserts in this connection, first, that the communication is formally no more than an expression of intention and does not therefore amount to an abuse of power and, second, that the individual decisions relate to specific cases and cannot be challenged by a Member State in the general interest.

19 Under Article 92(1) of the Rules of Procedure, where it is clear that it has no jurisdiction to take cognisance of an action, the Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action.

20 By its application in the present case the Italian Republic seeks from the Court a declaratory judgment that, since 24 July 2002, the Commission has had no power to adopt measures under the ECSC Treaty in sectors not forming the subject-matter of an agreement between the States signatory to that treaty temporarily to extend the period of application of that treaty so as to cover the transition from the ECSC regime to the EC regime. It is clear from its observations on the plea of inadmissibility that the Italian Republic itself excludes the interpretation of its application as seeking annulment of the communication and the individual decisions adopted by the Commission after 23 July 2002 on the basis of the ECSC Treaty, such as the decision referred to at paragraph 15 above.

21 However, such an application does not fall within any of the categories of action which the Court has jurisdiction to hear.

22 It follows that the Court has no jurisdiction to take cognisance of the action brought before it by the Italian Republic and that that action must therefore be dismissed as manifestly inadmissible.

Costs

23 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby orders:

1. **The action is dismissed.**

2. **The Italian Republic is ordered to pay the costs.**

Luxembourg, 9 December 2003.

R. Grass
Registrar

J.N. Cunha Rodrigues
President of the Fourth Chamber