ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
2 December 1994 *

In Case T-322/94 R,

Union Carbide Corporation, a company governed by the laws of the State of New York, established in Danbury, Connecticut (United States of America), represented by Brian Hartnett, Barrister-at-law, of the Irish Bar, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Richard Lyal, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for suspension of the operation of the Commission decision of 8 June 1994 relating to a proceeding under Council Regulation (EEC)

* Language of the case: English.

No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (IV/M.269 — Shell/Montecatini) and for other interim measures,

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

makes the following

Order

Facts

1 By application lodged at the Registry of the Court of First Instance on 11 October 1994, Union Carbide Corporation (hereinafter 'UCC') brought an action under the fourth paragraph of Article 173 of the Treaty establishing the European Community for the annulment of the decision of the Commission of 8 June 1994 relating to a proceeding under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (IV/M.269 — Shell/Montecatini).

2 By separate document lodged at the Registry of the Court of First Instance on the same day, the applicant also made an application under Articles 185 and 186 of the EC Treaty requesting the Court to:

— suspend the operation of the contested decision;

— order the notifying parties not to carry out the transaction;

— order Shell Petroleum NV, Shell Oil Company (hereinafter 'Shell Oil') and any other company in the Royal Dutch/Shell group (hereinafter 'Shell') to refrain from taking any further action that may prejudice the interests and competitiveness of the UCC/Shell Oil joint venture.

3 On 28 October 1994 the Commission submitted its written observations on this application for interim measures. On 14 November 1994 the parties presented oral argument.

4 Before considering the merits of the application for interim measures, reference should be made to the background of the present case and, in particular, the main facts which have given rise to the dispute before the Court, as set out in the parties' pleadings and the oral argument presented at the hearing on 14 November 1994.

5 The applicant participates in a joint venture with Shell Oil, which is part of the Shell group. The UCC/Shell Oil joint venture, in which each of the participating companies holds 50% of the capital, operates, *inter alia*, on the world-wide market for the licensing of technology to producers of polypropylene resin. UCC/Shell Oil grants to those producers licences to use a technology package (hereinafter 'UNIPOL technology'), which combines the UNIPOL polymerization process, developed by UCC, with the SHAC catalyst developed by Shell Oil. Under the terms of a separate agreement, UCC also participates with Shell Oil and SIRM, which is also part of the Shell group, in a tripartite research and development programme regarding catalysts used in polypropylene technology.

6 Currently, the market for polypropylene technology, a world-wide market, has two main operators, each with advanced technologies which they are ready to license to third-party producers of polypropylene resin. The leading position on the market is held by Himont, a subsidiary of Montedison, part of the Ferruzzi group. Himont owns the Spheripol technology and pioneered development of 'non-slurry' polypropylene technologies. The UCC/Shell Oil joint venture is in second place, well ahead of the other competitors, none of which has a significant market share. According to the applicant, most other undertakings which have developed polypropylene technologies are also resin producers and hence have a restrictive licensing policy, particularly towards third parties which might compete with them on regional markets for the production and sale of polypropylene resin on which those undertakings are themselves active.

7 On 4 January 1994 Shell Petroleum NV, a holding company in the Shell group, and Montedison Nederland NV notified to the Commission under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (revised version published in OJ 1990 L 257, p. 13) the proposed formation of a joint venture to be called 'Sophia' which was to include the interests and assets of the two parties in the polyolefins sector. That operation involved, *inter alia*, the merger of almost all their businesses relating to the production and sale of polypropylene resin and the transfer to the joint venture of a large part of their intellectual property rights and technological research facilities. The assets of Shell Oil were expressly excluded from the notified agreements.

8 By letter of 21 January 1994 UCC replied to the notice published by the Commission on 12 January 1994 inviting interested third parties to submit observations on the notified operation (OJ 1994 C 8, p. 4). The applicant drew the Commission's attention to the current structure of the polypropylene technology market and to the potential negative impact on competition of an association between Shell and Montedison, which each control one of the two basic sources of technology. UCC also adduced various arguments regarding the effects of the notified operation on the polypropylene resin market and on the relationship between that market and the upstream technology market.

9 After having carried out a preliminary examination in accordance with Article 6 of Regulation No 4064/89, the Commission found that there existed serious doubts as to the compatibility of the notified operation with the common market. Consequently, on 8 February 1994 it initiated the proceedings envisaged in Article 6(1)(c) of that regulation.

10 On 28 March the Commission sent a Statement of Objections to the notifying parties, which stated that the proposed concentration was likely to create a dominant position on the western European market for the production and sale of polypropylene resin and on the world-wide market for the licensing of polypropylene technology to third parties. The Commission took into account, in particular, the participation of Montedison and Shell in other joint ventures on the polypropylene resin market and the fact that the position which Sophia would hold on that market would be reinforced by the control which Shell could exercise over the two main technologies competing on the licensing market.

11 On 30 and 31 May the notifying parties proposed commitments to the Commission to overcome the objections raised in the Statement of Objections. In essence, those commitments related, first, to the sale by Montedison of its interests in Montefina, a European polypropylene resin producer, and, secondly, the continuation of the Spheripol technology business under the sole control of Montedison by the transfer of the necessary assets to a company called 'Technipol', in which Shell would have no financial involvement.

12 In its decision of 8 June 1994 the Commission, considering that the commitments given by the parties were sufficient to remove the risk of a dominant position being created both on the polypropylene resin market and on the technology licensing market, declared the notified operation to be compatible with the common market subject to compliance with those commitments and certain obligations regarding the drawing up and transmission of periodical reports. It is against that decision that the applicant has brought its action before the Court of First Instance.

Law

13 Under Articles 185 and 186 of the Treaty and 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 Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

14 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures referred to in Articles 185 and 186 of the Treaty are to state the circumstances giving rise to urgency and the pleas of fact and of law establishing a prima facie case for the interim measures applied for. Such measures must be of a provisional nature in the sense that they must not prejudge the decision on the substance of the case (see the order of the President of the Court of First Instance of 10 May 1994 in Case T-88/94 R *Société Commerciale des Potasses et de l'Azote et Entreprise Minière et Chimique* v *Commission* [1994] ECR II-263).

Arguments of the parties

15 UCC considers that the conditions in law for the grant of the interim measures applied for are satisfied in the present case. In its view, the contested decision is illegal and its imminent implementation would cause it serious and irreparable damage.

16 As regards the unlawfulness of the decision, UCC claims that the contested measure is vitiated by a number of errors of fact and of law and was adopted in breach of essential procedural requirements. First, it claims that the Commission erred in law by characterizing the operation in question as a concentration, which was

accordingly subject to Regulation No 4064/89, whereas, in the applicant's view, the condition for the application of the regulation laid down in the second subparagraph of Article 3(2) is not satisfied. In view of the interests which the parent undertakings retain on the markets where the joint venture would actually or potentially compete, the operation is clearly cooperative in nature, which ought to have led the Commission to consider it under Article 85 of the EC Treaty. The risk of the parties coordinating competitive behaviour between themselves, and also between themselves and their joint venture, is not eliminated by the commitments to keep Shell and Montedison as independent competitors on the technology licensing market. The applicant stresses the possibility of Sophia's subsequent entry into the polypropylene technology market by reason of the development of the new Catalloy technology which is to be transferred to it by Montedison, and also refers to the terms of the Commission's notice regarding concentrative and cooperative operations under Regulation No 4064/89 (OJ 1990 C 203, p. 10), according to which, where a joint venture is operating in a market downstream of its parent companies, coordination of their sales policy is likely.

17 Secondly, UCC claims that the Commission has made numerous errors in law and in its assessment of the facts by taking the view that the commitments offered by the parties were such as to remove the risk of a dominant position being created on the polypropylene resin market and, especially, on the polypropylene technology market. The polypropylene resin production businesses combined within Sophia are of an economic importance going far beyond that of the businesses of granting technology licences to third parties. According to UCC, such a large disproportion will be a strong economic incentive for the parent companies to coordinate and restrict their businesses on the technology market, even at the cost of profitability, in order to reinforce the position of the Sophia joint venture on the downstream market.

18 Finally, the applicant claims that the Commission has infringed essential procedural requirements in adopting the contested decision. It argues that the Commission has

not adduced coherent and convincing evidence to support its contentions regarding the effects of the commitments proposed by the parties and, in that regard, has not provided a sufficient statement of reasons for its decision that the operation is compatible with the common market. Moreover, the Commission adopted its decision without allowing itself the necessary time to assess properly the implications of those commitments, to allow the matter to be referred effectively to the Advisory Committee provided for by Regulation No 4064/89 and to observe the right of UCC and other interested third parties to be heard at that stage of the proceedings. With respect to the last point, UCC claims that the Commission gave it less than 24 hours to submit its observations on the revised version of the commitments, a period which the applicant considers to be manifestly insufficient.

19 With regard to the risk of serious and irreparable damage, the applicant claims that the Commission's authorization for the creation of a joint enterprise between Shell and Montedison will make it impossible for UCC/Shell Oil to participate effectively in the present round of licence negotiations for polypropylene technology, which is taking place during the 1994-1998 period. Certain potential licensees, which consider that the economic interests of Shell will henceforth lie mainly in the resin production market, have already expressed their doubts regarding Shell's willingness to sustain the Unipol technology in the long term. That perception of economic operators has a decisive influence on the choices of technology made by the licensees because, owing to the intensity of competition on the resin production market and the substantial investment required for the construction of a polypropylene plant, they must make sure that the licensor will pursue a continuous and long-term research and development policy which will ensure their access to the latest technological improvements. The damage which would therefore result from the failure to conclude several licensing agreements is not only serious but also irreparable, because even if the Commission's decision were to be annulled by the Court at the end of the main proceedings, the applicant would no longer be in a position to re-establish its competitive position on the polypropylene technology market after the end of the present negotiating round, since most of the 25 new technology licences necessary to increase world-wide polypropylene production capacity have already been granted, principally to the advantage of the Spheripol technology.

20 At the hearing, the applicant also stated that the UCC/Shell Oil joint venture has always stipulated in its licences royalties below the minimum royalties laid down in the joint venture agreement. Until now Shell Oil has agreed to that practice, which is necessary in order to compete with Himont. UCC fears, however, that in future Shell will require the minimum royalty clauses to be observed, which might eliminate UCC/Shell Oil from the market for the grant of new licences.

21 Furthermore, the applicant considers that the grant of the interim measures requested would not prejudice the rights of the notifying parties. It observes that the operation notified has not yet been implemented, pending completion of the notification procedures before the competent Federal authorities for concentrations in the United States. In those circumstances, UCC considers that the interim measures requested do not seriously affect the interests of the parent companies which ought merely to refrain from completing the operation and from altering present market conditions pending delivery of the final judgment of the Court of First Instance in the main proceedings.

22 The Commission first contests the admissibility of the applicant's claim that the Court should make an order against the notifying parties and all the companies in the Shell group. It submits that the Court cannot make an order against third parties in proceedings between one party and a Community institution and that, more generally, jurisdiction to make orders on application by other private parties is a matter for the national courts.

23 The Commission considers that the applicant's arguments as to the alleged illegality of the contested decision are inconsistent and are based solely on suppositions as to the future conduct of the parent companies, the Sophia joint venture and third

parties. Moreover, it contests the applicant's legal interest in bringing proceedings. On the one hand, if, as the applicant claims, Shell and Montedison were led to restrict their activities on the polypropylene technology market in order to reinforce Sophia's position on the market for the production of polypropylene resin, UCC would then benefit from the general increase in the level of royalties flowing from that practice; on the other, in so far as concerns the effects of the operation on the western European polypropylene resin market, the Commission argues that UCC, which is not a producer, has not explained how changes in the structure of the market could affect it. Furthermore, the Commission points to the contradictions which it claims exist in the applicant's arguments to the effect that Shell's objectives are, at the same time, to exercise a dominant position with Montedison on the polypropylene technology market and to prepare its withdrawal from that market in order to concentrate on the resin production market. Finally, the Commission points outs that it has powers, if necessary, to initiate proceedings under Article 85 of the Treaty against any concerted practices which might be implemented on the technology market.

24 With regard to urgency, the Commission considers that UCC has not shown that, if the operation of the contested decision is not suspended, UCC will suffer certain, serious and irreparable harm. The Commission argues, first, that there is no causal link between the decision and the alleged damage. It denies that reservations regarding the long-term viability of the Unipol technology, because of a hypothetical reduction in Shell's support for it, are a decisive factor when potential licensees opt for one or other of the competing technologies. The Commission observes, in addition, that at the time when licensees made statements expressing their concern in that respect, the commitments given by Sophia's parent companies had not yet become known. It also considers that UCC could require Shell to cooperate in order to reassure potential licensees as to the fulfilment of its obligations as co-licensor of the technology. Finally, if the uncertain damage alleged by the applicant were to occur, it would not be irreparable. In so far as that damage was attributable to Shell's actions, UCC could obtain damages in civil proceedings brought in the competent United States courts.

25 As regards the balance of interests, the Commission contends that the damage alleged by the applicant could not in any event threaten its existence, whereas suspension of the operation of the decision, which could call into question the viability of its proposed joint venture with Shell, would have serious consequences for Montedison, whose financial difficulties are well known. In the Commission's opinion, interim measures which have such a serious effect on the interests of third parties which are not parties to the proceedings and have not been able to express their views cannot be justified in the present case. Furthermore, the public interest requires particular caution to be exercised with respect to suspension of the operation of decisions adopted under Regulation No 4064/89, having regard to the restrictions which that regulation already imposes on the commercial freedom of undertakings to which it applies.

Findings of the judge hearing the application for interim measures

26 With regard to the claim for interim measures in the form of orders addressed to the parties to the joint venture and to the companies in the Shell group, it must first be stated that that claim seeks to obtain from the judge hearing the application interim measures which do not come within his jurisdiction and that, consequently, that claim must be rejected as inadmissible.

27 Under the system which the EC Treaty establishes for the division of powers, it is for the Commission, if it considers it necessary in the context of the powers of control accorded to it in competition matters in particular by Article 85 of the Treaty in conjunction with Article 3(1) of Regulation No 17 of the Council of 6 February 1962, First regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) to adopt interim measures addressed to the notifying parties. The role of the Court of First Instance is to carry out a legal review of the Commission's action in those matters and not to take the place of the Commission in the exercise of the powers conferred on it by the abovementioned provisions (see the order of the Court of Justice in Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119). The same considerations apply to the request

for interim measures with regard to companies in the Shell group, which may also fall within the jurisdiction of the national courts.

28 In any event, it should also be pointed out that this application for interim measures is made in the context of an action brought under Article 173 of the Treaty for the annulment of the contested decision of the Commission. In those circumstances, the interim measures applied for can be granted, in principle, only if they fall within the framework of the final decision which can be taken by the Court of First Instance under Article 173 in conjunction with Article 176 of the EC Treaty and concern the relations between the parties, in this case the applicant and the Commission. Those conditions are not satisfied in this instance (see the order of the President of the Court of First Instance of 14 December 1993 in Case T-543/93 R *Gestevisión Telecinco* v *Commission* [1993] ECR II-1409, paragraphs 24 to 26).

29 With regard to the other interim measure requested, namely suspension of the operation of the contested decision, the judge hearing the application cannot at this stage rule out the possibility that the pleas of fact and law invoked by the applicant in support of its main action are well founded.

30 Consequently, it is necessary to consider whether the other condition for the grant of interim measures, namely urgency, is established. It is settled law (see in particular the order in *Gestevisión Telecinco* v *Commission*, paragraph 27) that the urgent nature of an application for interim measures must be assessed by reference to the need to order interim measures in order to avoid serious and irreparable damage to the party requesting those measures. It is for the party requesting suspension of the operation of a contested decision to adduce the evidence to show that it cannot await the outcome of the main proceedings without suffering damage leading to serious and irreparable consequences.

31 It should be pointed out that, according to the applicant, the alleged weakening of its competitive position during the negotiating round would be merely the conse-

quence of possible reactions from potential licensees as a result of their perception of Shell's future conduct on the polypropylene technology market. That conduct cannot be regarded as a necessary consequence of the operation of the contested decision and the damage which it might cause to the applicant is entirely hypothetical and based on the unpredictable probability of future and uncertain events (see the order of the President of the Court of First Instance of 15 July 1994 in Case T-239/94 R *EISA* v *Commission* [1994] ECR II-0000). Accordingly, it must be found that, prima facie, the causal link between the decision and the damage alleged by the applicant has not been established.

32 It is, moreover, apparent from the documents before the Court and from the replies given by the parties to the Court's questions at the hearing on 14 November 1994 that, while the applicant has claimed that certain potential licensees intimated to it their concerns regarding Shell's long-term support for the Unipol technology, it has still not established that those doubts would be decisive with regard to their ultimate decision to obtain a licence and that UCC/Shell Oil would not be able to offer licensees guarantees or inducements of such a nature as to retain their interest. Furthermore, as the Commission has pointed out, it is possible that certain potential customers may express doubts regarding the viability of a technology which is of interest to them in order to obtain better conditions from licensors, especially during the current negotiating round.

33 It is also apparent from what was said by the parties at the hearing that, although UCC considers that Shell's recent statements and conduct, in particular its planned association with Montedison, are likely to cause it damage, it has not been established, nor even alleged, that there has been an actual breach of the contractual obligations now in existence between the two companies, whether pursuant to the UCC/Shell Oil joint venture agreement or in the operation of the separate agreement for the research and development of the Unipol technology and associated catalysts. On the other hand, it is clear from the explanations given by UCC on that same occasion that breach of those contractual obligations would, if the agreement were to break down, have serious economic and financial consequences which should be brought before the competent courts.

34 As to UCC's fears that Shell may require an increase in royalties up to the minimum rate laid down in the UCC/Shell Oil agreement, the applicant has not substantiated its allegations in that respect. On the basis of the evidence adduced by UCC, it is not possible for the judge hearing the application to hold that Shell has been shown to have an interest in destroying the competitive position of a joint venture in which it holds a 50% share to the direct advantage of Technipol, in which it has no financial interest.

35 In those circumstances it must be concluded that the evidence adduced by the applicant has not sufficed to establish to the requisite standard that the damage which it alleges is certain or irreparable and is the direct consequence of the decision adopted by the Commission or its operation. The judge hearing the application also finds that the applicant has not convincingly substantiated its claims that the matter is of such urgency that it cannot await the outcome of the main proceedings. It is foreseeable that the final judgment in the main proceedings will be delivered before the end of the current round of licensing negotiations. It is also doubtful whether suspension of the operation of the contested decision is likely in itself to dispel the uncertainties of third parties regarding Shell's future conduct.

36 In any event, the applicant's interest in having the operation of the contested decision suspended must be weighed against the public interest in implementation of decisions adopted under Regulation No 4064/89 and the interests of third parties directly affected by suspension of the operation of the decision. It must first of all be observed that that regulation was adopted primarily in order to ensure effectiveness of control and legal certainty for the undertakings to which it applies (see the order of the President of the Court of First Instance in Case T-96/92 R *CCE de la Société Générale des Grandes Sources and Others* v *Commission* [1992] ECR II-2579). Furthermore, in the present circumstances, it must be recognized that suspension of the operation of the contested decision could have serious consequences for the parent companies of Sophia, in particular for Montedison.

37 Accordingly, it must be held that the conditions in law for ordering suspension of the operation of the contested decision are not fulfilled and the application must be dismissed.

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, 2 December 1994.

H. Jung — J. L. Cruz Vilaça

Registrar — President