ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

14 March 1996 *

In Case T-134/95,

Dysan Magnetics Limited, a company governed by English law, established in Reading, United Kingdom, and **Review Magnetics (Macao) Limited,** a company governed by Portuguese law, established in Macao, represented by Mark Clough and Mark Brealey, Barristers, of the Bar of England and Wales, instructed by Rosenblatt, Solicitors, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicants,

v

Commission of the European Communities, represented by Nicholas Khan, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for the annulment of the notice of initiation of anti-dumping proceedings concerning imports of certain magnetic disks (3.5″ microdisks) originating in Canada, Indonesia, Macao and Thailand (OJ 1995 C 84, p. 4),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: C. P. Briët, President, B. Vesterdorf, P. Lindh, A. Potocki and J. L. Cooke, Judges,

Registrar: H. Jung,

makes the following

Order

Facts

1 In 1994 and 1995 Dysan Magnetics Ltd imported into the Community 3.5″ magnetic disks which it purchased from Review Magnetics (Macao) Ltd.

2 On 30 September 1994 the Committee of European Diskette Manufacturers submitted a complaint to the Commission, alleging that certain magnetic disks were being imported at dumped prices, thus causing material injury to the Community industry.

3 Following the submission of the complaint, the Commission initiated an investigation under Article 5 of Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community (OJ 1994 L 349, p. 1). Notice of initiation of anti-dumping proceedings concerning imports of certain magnetic disks (3.5″ microdisks) originating in Canada, Indonesia, Macao and Thailand was published in the *Official Journal of the European Communities* on 6 April 1995 (OJ 1995 C 84, p. 4).

Forms of order sought and procedure

4 By application lodged at the Registry of the Court of First Instance on 22 June 1995, the applicants brought the present proceedings, in which they claim that the Court should:

— annul the Commission's decision of 6 April 1995 to initiate anti-dumping proceedings concerning imports of certain magnetic disks (3.5″ microdisks) originating in Canada, Indonesia, Macao and Thailand; and

— order the Commission to pay the costs.

5 By document lodged at the Court Registry on 7 September 1995, the Commission raised a plea of inadmissibility, in which it contends that the Court should:

— dismiss the application as inadmissible; and

— order the applicants to pay the costs.

6 In their observations on the plea of inadmissibility, lodged on 25 October 1995, the applicants claim that the Court should dismiss the Commission's plea.

Law

7 Under Article 114(3) of the Rules of Procedure, the remainder of the proceedings on the plea of inadmissibility is to be oral unless the Court decides otherwise. In the present case, the Court (Third Chamber, Extended Composition) considers that it has sufficient information and that there is no need to open the oral procedure.

Admissibility

— Arguments of the parties

8 In its plea of inadmissibility, the Commission states that the initiation of anti-dumping proceedings is not an act against which an action for annulment may lie.

Referring to Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and to Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 42, it submits that the initiation of anti-dumping proceedings is a preparatory measure which does not give rise to any irreversible alteration in the applicants' legal position.

9 In the Commission's view, the fact that the initiation of proceedings involves sending out questionnaires, with time-limits for responses and a warning that findings may be made on the basis of the best available evidence, clearly shows that it is merely the first step in a procedure which might lead to the adoption of anti-dumping duties (see, *inter alia*, Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others* v *Commission and Council* [1990] ECR I-719, paragraph 9). The preparatory nature of the initiation of proceedings is further highlighted by the fact that only the Council has the power to impose definitive duties (see the Opinion of Advocate General Mischo in *Nashua Corporation and Others*, at p. I-742).

10 The Commission further points out that a decision under Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), requiring an undertaking to submit to an investigation is a reviewable act because it imposes an obligation to cooperate on the undertaking concerned and, in the event of refusal, a periodic penalty may be imposed under Article 16 of the regulation. Unlike Regulation No 17, Regulation No 3283/94 does not confer any power of investigation on the Commission; in an anti-dumping investigation, information cannot be obtained from companies, whether established within the Community or in a non-member country, other than through voluntary disclosure.

11 Referring to *Cimenteries CBR and Others*, paragraph 47, the Commission submits that neither a decision to treat a particular exporter as non-cooperating nor any of

the countless other decisions that have to be taken about the method of investigation can produce legal effects unless and until anti-dumping duties are imposed. The parties concerned, like the addressees of a statement of objections, are in no way compelled to alter their commercial practices as a result of the initiation of proceedings (*IBM*, paragraph 19). The outcome of the proceedings would not even be influenced by any change in commercial practice as a reaction to their initiation, since the decision whether to impose anti-dumping duties depends on the outcome of the investigation and the finding of injury caused by commercial practices prior to the initiation of proceedings.

12 The Commission further submits that, even if it were to constitute a challengeable decision, the initiation of anti-dumping proceedings is not of direct and individual concern to the applicants. A notice of initiation of proceedings refers to the product and countries concerned but not to any individual exporter or importer. At the time when proceedings are initiated, therefore, the number and identity of the persons concerned cannot have become fixed and ascertainable and such a notice thus cannot be of direct and individual concern to anyone (Joined Cases 106/63 and 107/63 *Toepfer* v *Commission* [1965] ECR 405, at p. 411).

13 The applicants maintain that a decision to initiate anti-dumping proceedings is a reviewable act. They refer to the case-law of the Court of Justice concerning the admissibility of an action brought against a Commission decision to initiate proceedings under Article 93(2) of the EC Treaty in the field of State aid (Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraphs 21, 22 and 23, and Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraphs 27, 28 and 29). The initiation of proceedings represents the adoption of a definitive position by the Commission (*IBM*, paragraphs 11 and 12, *Spain* v *Commission*, paragraphs 21, 22 and 23, and *Italy* v *Commission*, paragraphs 27, 28 and 29), producing legal effects which are capable of affecting their interests (Case 22/70 *Commission* v *Council* ('ERTA') [1971] ECR 263, paragraph 42, and *IBM*, paragraph 9) by bringing about a distinct change in their legal position.

14 The applicants submit that the decision to initiate the anti-dumping proceedings forms the legal basis for the investigation. Its initiation brought about a distinct change in their legal position because as a result they were sent questionnaires (Article 6(2) of Regulation No 3283/94) to which they had to reply within 40 days. Verification visits may also be carried out at their premises (Article 16 of Regulation No 3283/94) and, if they refuse to cooperate, the Commission may impose a high rate of anti-dumping duty on them (Article 18 of Regulation No 3283/94).

15 The applicants consider that a decision to initiate anti-dumping proceedings is comparable to a decision taken by the Commission to carry out an investigation under Article 14 of Regulation No 17, which is a reviewable act (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859). It is precisely because that decision triggers an investigation and allows the Commission to carry out verifications and impose penalties that Article 5 of Regulation No 3283/94 requires the decision to initiate proceedings to be based on sufficient evidence.

16 The applicants then put forward three arguments to support their view that the initiation of anti-dumping proceedings is a definitive measure. First, the Commission is obliged to act on the complaint: it must reject it where there is insufficient evidence of either dumping or injury (Article 5(7) of Regulation No 3283/94) or initiate anti-dumping proceedings if there is sufficient evidence (Article 5(9) of Regulation No 3283/94). Secondly, the decision initiating proceedings constitutes the legal basis enabling the Commission to exercise the powers of investigation and sanction conferred on it by Regulation No 3283/94 and, thirdly, the conditions laid down in Article 5 are intended to safeguard exporters against unsubstantiated complaints. Referring to Case C-216/91 *Rima Eletrometalurgia* v *Council* [1993] ECR I-6303, paragraph 16, where it was held that 'the existence of sufficient evidence of dumping and the injury resulting therefrom is always a prerequisite for the opening of an ... anti-dumping proceeding', the applicants claim that the possibility of

challenging any regulation fixing a definitive anti-dumping duty before the Court does not provide an adequate degree of protection against a breach of Article 5 of Regulation No 3283/94.

17 The applicants consider that they are the addressees of the contested act; in any event, they argue, it is of direct and individual concern to them. Review Magnetics (Macao) Ltd is an exporter of the allegedly dumped product, Dysan Magnetics Ltd is an importer related to Review Magnetics (Macao) Ltd and the Commission would use the information provided by Dysan Magnetics Ltd to construct the export price (Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, paragraphs 10 to 15, Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945, paragraphs 20 and 21; order of 8 July 1987 in Case 279/86 *Sermes* v *Commission* [1987] ECR 3109, paragraphs 14 to 17).

18 Finally, the applicants state that Article 5 of Regulation No 3283/94 provides them with a safeguard which, in order to work effectively, must ensure that 'ill-founded investigations' never commence. That safeguard distinguishes a decision to investigate in anti-dumping proceedings from a statement of objections in competition proceedings. The complaint on the basis of which the contested decision was taken was, they say, a mere photocopy of an earlier complaint and they submit that their rights under Article 5 would be irrevocably infringed if they had to be subject to such an ill-founded investigation.

— Findings of the Court

19 This application, lodged under the fourth paragraph of Article 173 of the Treaty, seeks the annulment of the Commission's 'decision' to initiate anti-dumping proceedings concerning imports of certain magnetic disks originating in Canada, Indonesia, Macao and Thailand.

20 In order to decide whether the action is admissible, it must be borne in mind that acts or decisions against which an action for annulment may be brought under Article 173 of the Treaty are measures which produce binding legal effects capable of affecting applicants' interests and bringing about a distinct change in their legal position. In the case of acts or decisions adopted by a procedure involving several stages, an act is in principle challengeable only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not an intermediate step intended to pave the way for that final decision (*IBM*, paragraph 8 et seq., Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 42, *Cimenteries CBR and Others*, paragraph 28, Case T-186/94 *Guérin Automobiles* v *Commission* [1995] ECR II-1753, paragraph 39).

21 The Court must therefore determine whether the contested act is in itself of a kind to produce legal effects capable of affecting the applicants' interests or rather merely a preparatory step whose legality could be challenged in an action against the final decision, whilst still providing sufficient protection for the parties concerned (Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 19, *Cimenteries CBR and Others*, paragraph 31). Only in the case of measures immediately and irreversibly affecting the legal position of the undertakings concerned could an action for annulment justifiably be held admissible before the administrative procedure is completed (*Cimenteries CBR and Others*, paragraph 42).

22 Under Regulation No 3283/94 the Commission is responsible for carrying out anti-dumping investigations and deciding, on the basis of those investigations, whether to terminate the proceedings or to continue them by adopting provisional measures and proposing that the Council adopt definitive measures. The final decision, however, is a matter for the Council; it may refrain from taking any decision if it disagrees with the Commission, or else take a decision on the basis of the Commission's proposals.

23 Since, therefore, the Commission's role forms an integral part of the Council's decision-making process (orders of 8 May 1985 in Case 256/84 *Koyo Seiko* v *Council and Commission* [1985] ECR 1351, paragraph 3, of 15 October 1986 in Case 299/85 *Tokyo Juki Industrial* v *Council and Commission* [1986] ECR 2965, at p. 2967, and of 11 November 1987 in Case 150/87 *Nashua Corporation* v *Council and Commission* [1987] ECR 4421, paragraph 6, and judgment in Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 7), the Commission's 'decision' to initiate anti-dumping proceedings is a purely preparatory act, not capable of immediately and irreversibly affecting the applicants' legal position.

24 That conclusion is not contradicted by the case-law concerning decisions to carry out investigations taken by the Commission under Article 14 of Regulation No 17 or decisions to commence the procedure provided for under Article 93(2) of the Treaty in the field of State aid.

25 As regards such decisions to carry out investigations, review is explicitly provided for by Article 14(3) of Regulation No 17; furthermore, in contrast to Regulation No 17, Regulation No 3283/94 does not confer on the Commission any power to require the undertakings concerned to submit to investigations. It is clear, moreover, from the case-law of the Court of Justice that, unlike a decision to carry out an investigation under Article 14 of Regulation No 17, a 'decision' by the Commission to initiate proceedings relating to an infringement of Articles 85 and/or 86 of the Treaty is not a measure open to challenge under Article 173 (*IBM*, paragraph 21).

26 Decisions to open the procedure provided for under Article 93(2) of the Treaty, the Court of Justice has held, involve a choice as to the classification of the aid and the relevant procedural rules and thus produce definitive legal effects, comprising in

particular suspension of payment of the proposed aid (*Spain* v *Commission*, paragraph 24, and *Italy* v *Commission*, paragraph 30). Neither a subsequent decision of the Commission finding the aid to be compatible with the Treaty nor the possibility of bringing an action against a Commission decision finding it to be incompatible could eradicate the irreversible consequences of the delay in the payment of the aid (*Spain* v *Commission*, paragraphs 22 and 23, *Italy* v *Commission*, paragraphs 28 and 29, and *Cimenteries CBR and Others*, paragraph 46).

27 Unlike the situations mentioned above, the initiation of anti-dumping proceedings is not capable of immediately and irreversibly affecting the legal position of the undertakings concerned. As has been pointed out above, initiation of proceedings does not automatically entail the imposition of anti-dumping duties; the proceedings may be terminated without measures being imposed (Article 9 of Regulation No 3283/94). Undertakings involved in an anti-dumping investigation are in no way compelled to alter their commercial policy as a result of the initiation of the proceedings; nor, in contrast to the situation in proceedings under Regulation No 17 relating to an infringement of Articles 85 and/or 86 of the Treaty, can they be required to cooperate in the investigation.

28 Initiation of anti-dumping proceedings cannot, therefore, be regarded, by reason of its nature and effects, as a decision within the meaning of Article 173 of the Treaty against which an action for annulment could lie.

29 It follows from all the foregoing that the application must be declared inadmissible, without there being any need to decide whether the applicants are directly and individually concerned by the contested act.

Costs

Under Article 87(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 applicants have been unsuccessful, they must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicants shall bear the costs.

Luxembourg, 14 March 1996.

H. Jung — Registrar

C. P. Briët — President