ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
24 June 1998 *

In Case T-596/97,

Dalmine SpA, a company incorporated under Italian law established at Dalmine (Italy), represented by Fabrizio Arossa, of the Milan Bar, and Rachel Brandenburger, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss et Prussen, 2 Place Winston Churchill,

applicant,

v

Commission of the European Communities, represented by Kirsi Leivo and Richard Lyal, of its Legal Service, acting as Agents, 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 for annulment of Articles 2 and 4 of Commission Decision C(97) 3036 of 6 October 1997 relating to a procedure pursuant to Article 11(5) of Council Regulation No 17 (IV/35.860 — Steel tubes),

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: P. Lindh, President, K. Lenaerts and J. D. Cooke, Judges,

Registrar: H. Jung,

makes the following

Order

Facts

1 The applicant is a public limited company incorporated in Italy which produces steel tubes. 47% of its shares are owned by Techint BV, which is a wholly-owned subsidiary of Siderca Saic, an Argentinian company producing steel tubes which has its seat in Buenos Aires (Argentina) (hereinafter 'Siderca'). According to the Commission, Siderca is controlled by the holding company of the Techint Group, San Faustin NV, which has its seat in Curaçao (Antilles). The seat of the Techint Group is also stated to be in Buenos Aires, at the same address as Siderca.

2 On 13 February 1997, as part of an investigation of information concerning the existence of agreements or concerted practices between steel-tube producers and in

order to determine the compatibility of such agreements with Article 85 of the Treaty, the Commission carried out an inspection at the applicant's premises, with the applicant's consent. By letter dated 4 April 1997, the applicant replied to a number of questions submitted to it during that inspection.

3 By letter of 22 April 1997, the Commission sent to the applicant and to the 'controlling group Techint-Siderca' a request for information pursuant to Article 11 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, hereinafter 'Regulation No 17') setting out in total 12 questions. The applicant replied to that letter by a letter dated 29 May 1997.

4 Considering that the applicant and the controlling group Techint-Siderca had not replied to all its questions, or had replied only incompletely, the Commission sent them a new request, dated 12 June 1997, inviting them to supply the information sought. By letter of 11 July 1997, the applicant provided additional information.

5 Taking the view that the information supplied in response to four of the questions was still incomplete, the Commission adopted, on 6 October 1997, Decision C(97) 3036 relating to a procedure pursuant to Article 11(5) of Council Regulation No 17 (IV/35.860 — Steel tubes) (hereinafter 'the contested decision'), which was notified to the applicant on 7 October 1997. In the contested decision, the Commission explained that the information supplied by the applicant was incomplete in relation to Questions Nos 1(b), 3(b) and 8 and that the information supplied by the Techint-Siderca Group was incomplete in relation to Question No 2.

6 The operative part of the contested decision is worded as follows:

'*Articolo 1*

Entro trenta giorni dalla data di notifica della presente decisione:

— Dalmine S. p. A. è tenuta a fornire le informazioni indicate nelle domande n° 1, lettera b), n° 3, lettera b), n° 8, formulate nell'allegato 1 alla presente decisione;

— Techint Group e SIDERCA Saic sono tenuti a fornire le informazioni indicate nella domanda n° 2 formulata nell'allegato 1 alla presente decisione.

Articolo 2

Qualora Dalmine S. p. A., Techint Group e SIDERCA Saic non forniscano le informazioni richieste nei termini e secondo le modalità indicati nell'articolo 1, viene inflitta a ciascuno di loro una penalità di mora di 1.000 ECU per ogni giorno di ritardo a decorrere dal termine loro assegnato dall'articolo 1.

La società Dalmine S. p. A. è responsabile in via solidale per il pagamento delle penalità di mora inflitte a Techint Group ed a SIDERCA Saic.

Articolo 3

Gli allegati 1 e 2 fanno parte integrante della presente decisione.

Articolo 4

Sono destinatarie della presente decisione:

— Dalmine S. p. A., Piazza Caduti 6 luglio 1944, n° 1, I-24044 DALMINE (Bergamo)

— Techint Group, Av. L. N. Alem 1067, Buenos Aires (Argentina)

c/o Dalmine S. p. A., Piazza Caduti 6 luglio 1944, n° 1, I-24044 DALMINE (Bergamo)

— SIDERCA Saic, Av. L. N. Alem 1067, Buenos Aires (Argentina)

c/o Dalmine S. p. A., Piazza Caduti 6 luglio 1944, n° 1, I-24044 DALMINE (Bergamo)

Contro la presente decisione può essere proposto, nei termini previsti dall'articolo 173 del trattato CE, un ricorso al Tribunale di Primo Grado delle Comunità Europee.

Conformemente all'articiolo 185 del trattato CE, il ricorso non ha effetto sospensivo.'

'*Article 1*

Within 30 days of the date of notification of this decision:

— Dalmine SpA must supply the information requested in Questions Nos 1(b), 3(b), and 8 of annex 1 to this decision;

— Techint Group and SIDERCA Saic must supply the information requested in Question No 2 of annex 1 to this decision.

Article 2

Should Dalmine SpA, Techint Group and SIDERCA Saic fail to supply the requested information within the time-limit set and in the manner indicated in Article 1, a penalty of ECU 1 000 per day, calculated from the date set by Article 1, will be imposed on each of them.

The company Dalmine SpA is liable jointly with the Techint Group and SIDERCA Saic for the payment of the periodic penalty payment imposed on the Techint Group and on SIDERCA Saic.

Article 3

Annexes 1 and 2 form part of this decision.

Article 4

The addressees of this decision are:

— Dalmine SpA, Piazza Caduti 6 luglio 1944, No 1, I-24044 DALMINE (Bergamo)

— Techint Group, Av. L. N. Alem 1067, Buenos Aires (Argentinia) c/o Dalmine SpA, Piazza Caduti 6 luglio 1944, No 1, I-24044 DALMINE (Bergamo)

— SIDERCA Saic, Av. L. N. Alem 1067, Buenos Aires (Argentina) c/o Dalmine SpA, Piazza Caduti 6 luglio 1944, No 1, I-24044 DALMINE (Bergamo)

You may appeal against this decision to the Court of First Instance of the European Communities in accordance with the terms of Article 173 of the EC Treaty.

In accordance with Article 185 of the EC Treaty, the appeal will not have suspensive effect.')

7 By letter of 7 November 1997, the applicant, explaining that it considered that it had already provided complete answers to Questions Nos 1(b), 3(b) and 8, replied 'alle ulteriori questioni sollevate dalla Commissione in relazione alle domande citate' ('to the points last raised by the Commission in relation to those questions'). The Commission acknowledged receipt of that letter by letter of 19 November 1997.

8 By application lodged at the Court on 17 December 1997, the applicant brought this action.

Forms of order sought by the parties

9 The applicant claims that the Court should:

— annul Articles 2 and 4 of the contested decision, in so far as they relate to the applicant;

— order the Commission to pay the costs.

10 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

Admissibility

11 According to Article 111 of the Rules of Procedure, where an action is manifestly inadmissible, the Court may, without taking further steps in the proceedings, give a decision by reasoned order.

12 In the present case, the Court considers that it has sufficient information from the application and defence, and from the annexes thereto. It is not therefore necessary to pursue the written procedure or to open the oral procedure.

Arguments of the parties

13 The applicant relies on four grounds in support of its claims, which are presented as being in the alternative in relation to one another, according to the order in which they are set out in its application.

14 The first ground is that the Commission has infringed essential procedural requirements, misused its powers and infringed the Treaty and rules relating to its application. In this regard, the applicant contends that the Commission has no power to address a request for information to third parties by means of a decision under Article 11(5) of Regulation No 17, notified to the applicant, and requiring the latter to forward the decision to the third parties to which it is addressed, in this case Siderca and Techint Group.

15 The second ground is also based on infringement of essential procedural requirements, misuse of power and infringement of the Treaty and rules relating to its application. The applicant contends that the Commission has no power to impose upon it a periodic penalty payment under Article 16(1)(c) of Regulation No 17 nor, consequently, to hold it jointly and severally liable in the event that Siderca and/or Techint Group failed to provide information in response to the contested

decision. Nor does it have any power to make use of such a periodic penalty payment for the purpose of compelling the applicant to send Siderca and/or Techint Group a copy of the contested decision.

16 The third ground is that the contested decision contravenes Article 190 of the Treaty. According to the applicant, it is inconsistent, contradictory and insufficiently reasoned. It points out that, although the Commission considers Siderca, Techint Group and the applicant to be a single undertaking for the purposes of notification of the request for information, it treats them as separate undertakings as far as liability and imposition of penalty payments are concerned. It alleges that the reasoning of the contested decision on the question of the Commission's right to require the applicant to forward the contested decision to the other addressees is also insufficient.

17 The fourth ground alleges infringement of essential procedural requirements, and infringement of the Treaty and of rules relating to its application. The applicant contends in this regard that, in the contested decision, the Commission purports to fix the amount of the periodic penalty payment at a level higher than Articles 16(1) of Regulation No 17 allows. It points out that Article 2 of the contested decision imposes a total penalty payment of ECU 3 000 per day whereas, in so far as the Commission considers the applicant, Techint Group and Siderca to be a single undertaking, the maximum amount of a penalty payment may not exceed, under Article 16(1) of Regulation No 17, ECU 1 000.

18 The applicant points out that, by letter of 7 November 1997, it has supplied additional information in response to the contested decision, in order to cooperate with the Commission in the investigation which it is conducting. It deduces from the acknowledgement of receipt of its letter of 7 November 1997, which the Commission sent to it by letter of 19 November 1997, and from the lack of reaction on

its part since that date, that the Commission now considers that the applicant has given a complete response to Questions Nos 1(b), 3(b) and 8.

19 The Commission points out first of all that the applicant does not seek annulment of Article 1 of the contested decision; nor does it challenge the part of the decision relating to the periodic penalty payment which would be imposed upon it if it did not supply the information requested. The action is therefore directed, on the one hand, against the fact that the contested decision was notified to Techint Group and Siderca at the applicant's address, thereby obliging the latter to pass it on to them, and, on the other hand, against the fact that the contested decision makes it jointly liable for payment of the periodic penalty payments imposed on Techint Group and Siderca.

20 Next, without formally raising an objection of inadmissibility within the meaning of Article 114 of the Rules of Procedure, the Commission contests the admissibility of the action, both in so far as it seeks annulment of Article 2 of the contested decision and in so far as it seeks annulment of Article 4 thereof.

21 In so far as the action concerns the validity of Article 2 of the contested decision, the action is, in the Commission's view, misconceived and in any event premature, since that article does not impose any enforceable obligation or liability on the part of the applicant, or indeed of Techint Group or Siderca. The Commission explains that it has not yet definitively imposed any periodic penalty payments in this case, under the provisions of Regulation No 17. Those provisions specify the different stages of the procedure to be followed for obtaining information. It begins with a request for information, based on Article 11(3) of Regulation No 17, to be followed, in the event that an undertaking does not supply the information requested within the time allowed by the Commission or supplies incomplete information, by the adoption of a decision under Article 11(5) of Regulation No 17 requiring the information to be supplied. According to the Commission, that decision speci-

fies the information required, fixes an appropriate time-limit within which the information is to be supplied, indicates the penalties provided for in Article 15(1)(b) and Article 16(1)(c) in the event of non-compliance and mentions the right to have any such decision reviewed by the Court of First Instance.

22 Thus, on the basis of Article 16(1)(c) of Regulation No 17, the Commission could impose a periodic penalty payment of ECU 50 to ECU 1 000 per day, either in the decision requiring the information or in a later decision. However, the imposition of such a penalty has no immediate effect. Imposition of a penalty becomes enforceable after adoption of a new decision on the basis of Article 16 of Regulation No 17 determining the amount of the penalty. Only the second decision is enforceable. So, it is only before adoption of the latter decision that the procedural requirements laid down by Regulation No 17 must be fulfilled. The Commission must therefore issue a statement of objections to the undertaking, stating that it has not supplied the information requested, organise a hearing of the undertaking and consult the Advisory Committee (see the judgment of the Court of Justice in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraphs 51 to 58).

23 Consequently, in a decision adopted on the basis of Articles 11(5) and 16(1) of Regulation No 17, a provision such as Article 2 of the contested decision is only preliminary in nature, serving as a warning for the undertaking concerned.

24 Since service of a statement of objections is not an attackable act under Article 173 of the Treaty, the Commission emphasises that Article 2 of the contested decision which, in the procedure, is prior to service of the statement of objections, cannot, *a fortiori* be an attackable act.

25 In so far as the action concerns Article 4 of the contested decision, the Commission observes that it does not concern the applicant, since it cannot have any practical consequences for it, whatever the validity given to the notification made to Techint Group and Siderca.

26 The Commission states first of all that it has notified the contested decision to Techint Group and to Siderca at the address which it considers to be their address in the Community, that is to say the applicant's registered office. It then argues that, if the contested notification is to be regarded as effective, failure by Techint Group and Siderca to provide the information requested in the contested decision cannot have any practical consequences for the applicant before the procedure described above in paragraph 22 is completed and the decision definitively imposing a periodic penalty payment on Techint Group and Siderca is adopted. Finally, if the notification is to be regarded as ineffective, the Commission contends that Techint Group and Siderca will not be obliged to provide the information requested, in which case there would be no consequences for the applicant either. Since the Commission will not in that case be able to impose a penalty on Techint Group and Siderca, the applicant could not therefore be held jointly liable for it.

Findings of the Court

27 It appears from all of the applicants' arguments that it is essentially claiming annulment of Article 2 of the contested decision in so far as it is there held to be jointly liable for payment of the periodic penalty of Techint Group and Siderca, and annulment of Article 4 of the contested decision in so far as the notification address stated there for the Techint Group and Siderca is the applicant's address.

28 It is also clear that the applicant does not seek annulment of Article 1 of the contested decision requiring it to supply the information sought in Questions Nos 1(b), 3(b) and 8 set out in the annex 1 to the application.

29 As regards Article 2 of the contested decision, it should be borne in mind that, according to Article 173 of the Treaty, an action for annulment lies against acts of the Council and the Commission other than recommendations or opinions. That remedy is available in order to ensure that, as Article 164 of the Treaty requires, in the interpretation and application of the Treaty the law is observed, and it would be inconsistent with that objective to interpret restrictively the conditions under which the action is admissible by limiting its scope only to the categories of measures referred to in Article 189 of the Treaty. In order to ascertain whether the measures in question are acts within the meaning of Article 173 of the Treaty, it is therefore necessary to look to their substance. According to settled case-law, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 173 of the Treaty (see Case 60/81 *IBM* v *Commission* [1981] ECR 2369, paragraphs 8 and 9).

30 Furthermore, according to case-law, the fixing of periodic penalty payments under Article 16 of Regulation No 17 necessarily involves two stages. By its first decision, referred to in Article 16(1), the Commission imposes a periodic penalty payment expressed in terms of a number of units of account per day of delay, calculated from a date fixed by it. Since that decision does not determine the total amount of the periodic penalty payment, it cannot be enforced. That amount can be definitively fixed only in another decision (see Joined Cases 46/87 and 227/88, *Hoechst* v *Commission*, cited above, paragraph 55).

31 Since it does not therefore produce binding legal effects, the decision referred to in Article 16(1) of Regulation No 17 imposing a periodic penalty payment expressed in terms of a number of units of account per day of delay, calculated from a date fixed by it, does not constitute a challengeable measure.

32 That decision constitutes, in fact, only a procedural stage during which the Commission adopts, where appropriate, a decision definitively fixing the total amount of the periodic penalty payment and thus bearing enforceable authority. Before it may adopt this last decision, the Commission must, however, fulfil certain procedural obligations. It must serve a statement of objections on the undertaking concerned, organise a hearing of the undertaking and consult the Advisory Committee on Restrictive Practices and Dominant Positions, so that both the undertaking concerned and the Advisory Committee are then in a proper position to express their views on all the matters on basis of which the Commission has imposed the periodic penalty payment and fixed the definitive amount thereof (*Hoechst* v *Commission*, cited above, paragraph 56).

33 In the present case, Article 2 of the contested decision imposes periodic penalty payments of ECU 1 000 per day of delay, calculated from expiry of a period of 30 days running from notification of the contested decision. The decision contained in that article is therefore the one imposing a periodic penalty payment under Article 16(1) of Regulation No 17 and not the one definitively fixing the total amount of a periodic penalty payment.

34 Article 2 of the contested decision does not therefore produce binding legal effects in that it imposes periodic penalty payments.

35 Consequently, it also produces no binding legal effects in so far as, in its second paragraph, it holds the applicant jointly liable for the periodic penalty payments imposed on Techint Group and Siderca. Only express incorporation of that para-

graph in a future decision definitively fixing the total amount of those periodic penalty payments can have binding legal effects. The adoption of such a decision must, however, be preceded by fulfilment of certain procedural obligations (see paragraph 32 above).

36 The claim regarding Article 2 of the contested decision does not therefore concern a challengeable decision. It is therefore manifestly inadmissible.

37 As regards the claim relating to Article 4 of the contested decision, it must be recalled that, according to Article 191(3) of the Treaty, decisions such as the decision in question in the present case are to 'be notified to those to whom they are addressed and shall take effect upon such notification'.

38 According to case-law, that provision cannot be altered by Article 4 of the contested decision so that this article cannot prejudice the applicant (see Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 36 to 38).

39 Any irregularities in the procedure for notification of a decision are extraneous to the measure concerned and cannot therefore invalidate it. In certain circumstances, such irregularities may prevent the period within which the proceedings may be brought from starting to run, in so far as, under the fifth paragraph of Article 173 of the Treaty, the period for instituting proceedings for annulment of individual measures of the Commission starts to run from the date of notification of the

decision to the applicant or, in the absence thereof, from the day on which it came to the applicant's knowledge (see Case 48/69 *ICI* v *Commission*, cited above, paragraphs 39 to 41). However, this is not the case in this instance in which it is accepted that the applicant was notified of the contested decision and availed itself, within the period allowed, of its right to bring proceedings.

40 In such circumstances, the fact that, in Article 4 of the contested decision, the Commission gave the applicant's address as the address for notification of the contested decision for Techint Group and Siderca does not therefore in itself have the effect of requiring the applicant to pass on the decision to them. If, as the applicant maintains, the notification of the contested decision to Techint Group and Siderca at the applicant's registered office were to be regarded as irregular, the decision would quite simply take no effect in their regard.

41 As regards the fact that, under the second paragraph of Article 2 of the contested decision, the applicant is held to be jointly liable for the periodic penalty payments imposed on Techint Group and Siderca, it is sufficient to reiterate that this paragraph does not produce any binding legal effects (see paragraph 35 above).

42 It follows that the question whether irregularities were committed in the notification of the contested decision to Techint Group and Siderca is irrelevant in the context of the present proceedings. That question will be relevant only if it should be necessary to determine whether the contested decision was properly notified to Techint Group and Siderca and, should this be the case, to determine the date from which the period which they had for instituting proceedings against the contested decision under Article 173 of the Treaty began to run.

43 Consequently, the applicant has no interest in pursuing annulment of Article 4 of the contested decision in so far as it gives the applicant's address as the notification address for Techint Group and Siderca.

44 Consequently, the claim for annulment of Article 4 of the contested decision, in so far as the notification address stated there for Techint Group and for Siderca is the applicant's address, is manifestly inadmissible.

45 It follows from all the foregoing that the entire application must be dismissed as manifestly inadmissible, in accordance with Article 111 of the Rules of Procedure.

Costs

46 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if these have been claimed. Since the applicant has failed in its submissions and the Commission has asked for costs to be ordered against it, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. The application is dismissed as manifestly inadmissible.

2. The applicant is ordered to pay the costs.

Luxembourg, 24 June 1998.

H. Jung — Registrar

P. Lindh — President