

ORDER OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
29 May 1997 *

In Case T-89/96,

British Steel plc, whose registered office is in London, represented by William Sibree and Philip Raven, Solicitors, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by Nicholas Khan and Paul Nemitz, 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 the annulment of Commission Decision 96/315/ECSC of 7 February 1996 concerning aid to be granted by Ireland to the steel company Irish Steel (OJ 1996 L 121, p. 16),

* Language of the case: English.

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

composed of: A. Saggio, President, A. Kalogeropoulos, V. Tiili, A. Potocki and
R. M. Moura Ramos, Judges,

Registrar: H. Jung,

makes the following

Order

Facts, procedure and arguments of the parties

1 By application lodged at the Registry of the Court of First Instance on 5 November 1996, Irish Ispat Ltd, a company incorporated under Irish law, having its registered office in Haulbowline, Ireland, represented by David Barnville, Barrister-at-Law, and by Richard Martin, Solicitor, with an address for service in Luxembourg at the Chambers of Zeyen, Beghin, Feider, Loeff, Claeys and Verbeke, 67 Rue Ermesinde, applied to intervene in Case T-89/96 in support of the form of order sought by the defendant. That case was brought by British Steel plc, seeking the annulment of Commission Decision 96/315/ECSC of 7 February 1996 concerning aid to be granted by Ireland to the steel company Irish Steel (OJ 1996 L 121, p. 16).

2 In support of its application to intervene, Irish Ispat Ltd points out that it is affected by the contested decision since it concerns aid to be granted by Ireland to

Irish Steel Ltd. Irish Ispat Ltd explains that the name of Irish Steel Ltd was changed on 18 June 1996 and that the company is now known as Irish Ispat Ltd. Since the Commission regarded the aid granted to the company in question in connection with its sale as compatible with the proper functioning of the common market, Irish Ispat concludes that it has an interest in the result of the proceedings initiated by British Steel.

- 3 By application lodged at the Court Registry on 6 November 1996, Ireland, represented by Michael A. Buckley, Chief State Solicitor, acting as Agent, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon, also applied to intervene in Case T-89/96 in support of the form of order sought by the defendant. Ireland explained that it was applying to intervene in the case in its capacity as the Member State to which the contested decision is addressed.

- 4 By application lodged at the Court Registry on 8 November 1996, Hoogovens Staal BV, a company constituted under Netherlands law, whose registered office is in IJmuiden, the Netherlands, represented by Erik H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Luc Frieden, 62 Avenue Guillaume, applied to intervene in the same case in support of the form of order sought by the applicant.

- 5 In support of its application to intervene, Hoogovens Staal states that it is in competition with Irish Steel and points out that the contested decision concerns a market for steel products that is at least EC-wide. In those circumstances, Hoogovens Staal maintains that it falls within the category of undertakings which are entitled to institute proceedings against the contested decision on the basis of Article 33 of the Treaty establishing the European Coal and Steel Community ('the ECSC Treaty'). Accordingly, it considers it has an interest in the outcome of the present case within the meaning of Article 34 of the ECSC Statute of the Court of Justice ('the ECSC Statute').

- 6 Those three applications to intervene were served on the applicant and the defendant in accordance with Article 116 of the Rules of Procedure of the Court of First Instance.
- 7 By letter of 13 November 1996 the Commission stated that in its view both Irish Ispat and Ireland have established an interest in the result of the case within the meaning of Article 34 of the ECSC Statute.
- 8 The applicant raised no objection to the applications to intervene made by Irish Ispat and by Ireland.
- 9 The Commission lodged observations at the Court Registry on 25 November 1996, raising a number of objections against Hoogovens Staal's application to intervene on the ground that it had not sufficiently established an interest in the result of the case. The Commission considers that, unlike British Steel, Hoogovens Staal has not shown that it is in competition with Irish Steel in the production and supply of a number of products listed in Annex I to the ECSC Treaty. Moreover, according to the Commission's information, Hoogovens Staal does not produce steel beams, Irish Steel's main product line. Accordingly, the Commission considers that Hoogovens Staal has not established that the contested decision concerns it within the meaning of Article 33 of the ECSC Treaty or that it has an interest in the result of the case and claims that the application for leave to intervene should be refused.
- 10 The applicant, however, supports Hoogovens Staal's application to intervene in the present case. In a letter also dated 25 November 1996, British Steel states that Hoogovens Staal, like itself, manufactures the same range of products as Irish Steel and is therefore an undertaking in competition with the latter.

- 11 By letter lodged at the Court Registry on 21 November 1996, the applicant requested confidential treatment for elements of the report reproduced in Annex 15 to the application ('the Cockerill Report') and for elements of the defence which paraphrase or repeat data contained in that report. It indicated that its request was for confidential treatment *vis-à-vis* both Irish Ispat and Ireland. In its letter of 25 November 1996, the applicant requested the Court to treat the data in question as confidential also *vis-à-vis* Hoogovens Staal.

- 12 The request for confidential treatment concerns, firstly, figures showing production volumes and the shares of the billet market held by British Steel and by British Steel Engineering Steel (BSES), together with the prices charged by those companies. Secondly, it concerns the impact of the aid and the foreseeable development of the applicant's activities on the beam market.

- 13 By letter lodged at the Court Registry on 28 November 1996, the applicant further requested that certain elements of its reply be treated as confidential *vis-à-vis* all the applicants for leave to intervene.

- 14 In its observations lodged at the Court Registry on 11 December 1996, the Commission set out its position on the applicant's requests for confidential treatment. The Commission accepted that the applicant had restricted the scope of its requests to the minimum. It claims, however, that they cannot be accepted in their entirety. The Commission raises objections with regard to several phrases and expressions in the procedural documents for which the applicant has requested confidential treatment. Its objections are essentially that the nature of the data in question is vague or general and that disclosure would therefore not harm the applicant's business interests. Moreover, the Commission submits, the interveners must have the opportunity to respond to certain statements made by British Steel on the basis of data for which it requests confidential treatment.

- 15 By letter dated 13 December 1996, the Commission informed the Court that, owing to an oversight, the Cockerill Report had in the meantime been transmitted by the Directorate-General for Competition (DG IV) to Ireland and Irish Ispat for their comments on certain questions concerning Irish Steel's capacity and output contained in that report. The Commission apologized for that accidental transmission of certain confidential information included in the Cockerill Report and stated that Ireland and Irish Ispat had given oral undertakings to return to the Commission all copies of the report and to make no use of the confidential information contained therein. It awaited written confirmation of those undertakings.
- 16 By letter lodged at the Court Registry on 24 December 1996, the applicant confirmed that it had been informed by the Commission's Agent of the disclosure to Ireland and Irish Ispat of elements in respect of which it had requested confidential treatment. The applicant considers that such conduct constitutes serious disregard for the obligation of confidentiality imposed on the Commission by the second paragraph of Article 47 of the ECSC Treaty. It considers, moreover, that the Commission thus arrogated the powers of the Court to decide what material contained in the parties' pleadings is confidential. The applicant affirms that the elements for which it requested confidential treatment are business secrets the disclosure of which to a competitor such as Irish Ispat is likely to cause it damage and considerable commercial embarrassment. It reserves the right to seek damages from the Commission in compensation, pursuant to the second paragraph of Article 40 of the ECSC Treaty.

Findings of the Court

The applications for leave to intervene

- 17 The first application for leave to intervene submitted in the present case was brought in accordance with Article 115 of the Rules of Procedure of the Court of

First Instance and Irish Ispat has sufficiently established its interest in the result of the case within the meaning of Article 34 of the ECSC Statute, applicable to the procedure before the Court of First Instance by virtue of the first paragraph of Article 46 thereof.

- 18 Since Ireland's application to intervene was submitted pursuant to Article 115 of the Rules of Procedure, it, too, must be allowed pursuant to Article 34 of the ECSC Statute, applicable to the procedure before the Court of First Instance by virtue of the first paragraph of Article 46 thereof.
- 19 Hoogovens Staal, in its application to intervene, merely claims, in order to establish its interest in the result of the case, to be an ECSC undertaking and a competitor of the undertaking receiving the contested aid, without specifying the products in which it competes with Irish Steel. The Commission considers that failure to do so precludes its being granted leave to intervene, since it falls to Hoogovens Staal to provide the Court with evidence to show that it is a competitor of the beneficiary of the aid and therefore that it has an interest in the result of the present case.
- 20 It must be stressed that the Commission has not undermined the substance of Hoogovens Staal's claim that it is in competition with Irish Steel. In its observations, the Commission has merely drawn the Court's attention to the fact that, to its knowledge, Hoogovens Staal does not produce beams, whereas beams are Irish Steel's main product. Those observations thus do not in any way call into question the existence of a competitive relationship between Hoogovens Staal's production and that of Irish Steel with regard to other steel products, such as billets. Nor does the Commission suggest that only ECSC undertakings manufacturing beams may have an interest in the outcome of the present case. Moreover, the applicant has confirmed, without going into further detail, that Hoogovens Staal and Irish Steel manufacture the same range of products and are therefore competing undertakings.

In so far as there is no information in the documents before the Court which belies the existence of a competitive relationship between the two steel undertakings, as claimed by Hoogovens Staal, the applicant for leave to intervene cannot be considered to have failed to provide evidence as it was required to do in order to prove the abovementioned matter of fact.

- 21 It follows that Hoogovens Staal's application to intervene must be held to be in accordance with Article 115 of the Rules of Procedure of the Court of First Instance, since it has sufficiently set out the reasons establishing its interest in the result of the case within the meaning of Article 34 of the ECSC Statute, applicable to the procedure before the Court of First Instance.

The requests for confidential treatment

- 22 The requests for confidential treatment of certain information contained in the case-file were made by the applicant *vis-à-vis* all the interveners on the basis of Article 116(2) of the Rules of Procedure of the Court of First Instance, which provides: 'If the President allows the intervention, the intervener shall receive a copy of every document served on the parties. The President may, however, on application by one of the parties, omit secret or confidential documents.'
- 23 This Court has held that, for the purpose of determining the conditions under which confidential treatment may be given to certain documents in the file, it is necessary to balance the applicant's legitimate concern to prevent substantial damage to its business interests and the intervener's equally legitimate concern to have the necessary information for the purpose of being fully in a position to assert its rights and to state its case before the Court (see, in particular, the order of 4 April 1990 in Case T-30/89 *Hilti v Commission* [1990] ECR II-163, paragraph 11, and the order of 6 February 1997 in Case T-322/94 *Union Carbide v Commission*, not published in the European Court Reports, paragraph 16).

- 24 It emerges from that case-law that a party to the proceedings which has decided to place in the file information having, in its view, the nature of business secrets is entitled to request that such information is not transmitted to any interveners. The concern to protect the confidentiality of information relating to the industrial and commercial activities of the applicant is particularly understandable in the context of an action such as the present, which seeks the annulment of a decision of the Commission authorizing the grant of State aid to a competitor. Where such proceedings are brought, which by definition presupposes an advantage to have been given to one or several undertakings which are in competition with the applicant in the common market, it is desirable that the latter should not be further penalized by the disclosure of its business secrets to its competitors. None the less, the fact remains that any party to proceedings before the Court must take into account the requirements of the *audi alteram partem* rule and of the public nature of the administration of justice by the Community judicature. Consequently, parties should always envisage the possibility that the Court, having regard to those requirements and in accordance with the case-law referred to above, might not be able to accord confidential treatment to information which is essential to the presentation of arguments submitted in the proceedings and to the intelligibility of the final decision.
- 25 It must be stressed that, in the present case, the applicant has exercised with restraint its right to request confidential treatment of certain parts of the file. None the less, its requests concern various types of information, each of which must be examined individually in order to determine whether it should be deleted from the pleadings to be served on the interveners. The fact that the intermediate source of all that information is a single document, drawn up at the request of the applicant and attached by it to its application, is irrelevant when determining whether the information in question may or may not be treated confidentially in its entirety.
- 26 The information concerning market shares, sales volumes and the prices charged by the companies belonging to the British Steel group ought to be treated confidentially to the extent that it comprises specific or detailed data, not normally available to the general public or to specialist circles.

- 27 It should be observed that, of the great volume of data contained in the report drawn up by Professor Cockerill, only Tables 3.4 and 3.5, which are reproduced at pages 17 and 18 respectively of the report, together with Figure 10 and Annexes 1 and 2 to the report, clearly identify their source as being British Steel. Although that may give the impression that the rest of the information contained in the report, concerning the markets for ECSC products, circulates freely and is accessible to the experts and undertakings concerned, it should be acknowledged that such information consists in the main of estimates based on overall statistical and historical data. Thus, only actual and specific data, of the kind contained in Table 3.5 of the Cockerill Report, Figure 10 attached thereto and the table reproduced at page 22 (paragraph 4.37) of the reply, can be held to be neither generally available nor known by competitors, and accordingly granted confidential treatment.
- 28 For the same reasons, confidential treatment should also be accorded to the detailed information contained in the third and fourth sentences of paragraph 3.25 of the Cockerill Report inasmuch as they give specific figures for sales volumes and market shares held by the companies of the British Steel group in various markets.
- 29 By the same token, on the other hand, confidential treatment should be refused for data in the form of an approximation or estimate, as in paragraph 3.23 of the Cockerill Report and the first, second and last sentences of paragraph 3.25. Examination of the case-file reveals that such estimates and approximations form part of the information which is generally shared by the undertakings which operate on the markets for ECSC products.
- 30 Nor can the expressions describing the market shares held by the companies in the British Steel group or the figure indicating the volume of the market in question, as they appear in the defence, be treated confidentially. The expressions used by the Commission do not indicate the specific market share figures and represent no

more than its own assessment, which may as such be challenged by the applicant. The figure in question, which is merely an approximation derived from the Cockerill Report, is mentioned in paragraph 31 of the defence with a view to illustrating the difference in magnitude between the possible sales volume of Irish Steel and the actual volume of the market. Moreover, discussion of the impact of the contested aid on the relevant markets cannot, at this stage, be regarded as not being essential for the resolution of the dispute before the Court. The interveners must, consequently, be able to submit their observations on the arguments put forward in that respect by the main parties.

- 31 So far as concerns the allegedly confidential data contained in paragraph 6.6 of the Cockerill Report, a reading of the paragraph in question does not reveal that the applicant has already taken decisions relating to its commercial strategy in response to the grant of the contested aid. On the contrary, the author of the report merely recommends review of the investment policy and sets out the activities which are particularly threatened, without giving further details. Transmission of such data to the interveners will do no more than keep them in doubt as to the strategic decisions which will actually be adopted by British Steel and cannot therefore harm the latter's business interests. Moreover, as the Commission has pointed out, the effect of such uncertainty in the context of the applicant's relations with its staff and clients is due not to the transmission of the Cockerill Report to the interveners but to the fact that British Steel has stated publicly that were the contested aid to be authorized it could be forced to make certain reductions in capacity. There is thus no objective reason to justify confidential treatment for paragraph 6.6 of the Cockerill Report.

- 32 Having regard to all the foregoing considerations, the applicant's requests for confidential treatment must be granted in part, to the extent that they relate to the data contained in the Cockerill Report in the third and fourth sentences of

paragraph 3.25, in Table 3.5 and in Figure 10, and to the data contained in the table reproduced at paragraph 4.37 of the reply. The remainder of those requests must be dismissed.

33 In any event, the Commission must be reminded that it is supposed not to disclose procedural documents to third parties, even if the third parties in question are in a particularly good position to help it present its case. Irish Ispat and Ireland therefore may not use any information they may have received by such means and are requested to return to the Commission all copies of the improperly disclosed procedural documents.

On those grounds,

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

hereby orders:

1. Irish Ispat Ltd is granted leave to intervene in Case T-89/96 in support of the form of order sought by the defendant.
2. Ireland is granted leave to intervene in Case T-89/96 in support of the form of order sought by the defendant.
3. Hoogovens Staal BV is granted leave to intervene in Case T-89/96 in support of the form of order sought by the applicant.

4. The request for confidential treatment, *vis-à-vis* the interveners, is granted for the data contained in the third and fourth sentences of paragraph 3.25, in Table 3.5 and in Figure 10, all in the Cockerill Report, and for the data contained in the table reproduced at paragraph 4.37 of the reply. The remainder of the request for confidential treatment is dismissed.

5. The Registrar shall serve on each of the interveners a non-confidential version of the documents in the case.

6. A period shall be prescribed within which the interveners must set out, in writing, the pleas relied on in support of the forms of order which they seek.

7. The costs are reserved.

Luxembourg, 29 May 1997.

H. Jung

Registrar

A. Saggio

President