JUDGMENT OF THE COURT (Fifth Chamber)
3 July 1991

In Case C-62/86,

AKZO Chemie BV, whose registered office is in Amersfoort (Netherlands), represented by I. Van Bael, J.-F. Bellis and A. Vanderelst, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of F. Brausch, 8 Rue Zithe, BP 1107,

applicant,

v

Commission of the European [Union], represented by B. van der Esch, Principal Legal Adviser, assisted by T. van Rijn and L. Gyselen, members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of G. Berardis, member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's Decision of 14 December 1985 relating to a proceeding under [Article 102 TFEU] (IV/30698 - ECS/AKZO Chemie, Official Journal 1985 L 374, p. 1),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of Chamber, G. C. Rodriguez Iglesias, Sir Gordon Slynn, R. Joliet and M. Zuleeg, Judges,

Advocate General: C. O. Lenz,
Registrar: J. A. Pompe, Deputy Registrar,

Robert Schütze European Union Law Lisbonised Cases

having regard to the Report for the Hearing,

after hearing oral arguments from the parties at the hearing on 20 November 1988, at which the Commission was represented by T. van Rijn, a member of its Legal Service, and T. Ottervanger, of the Rotterdam Bar,

after hearing the Opinion of the Advocate General at the sitting on 19 April 1989, gives the following

Judgment

1 By application lodged at the Court Registry on 5 March 1986, AKZO Chemie BV brought an action under [the fourth paragraph of Article 263 TFEU] for the annulment of Commission Decision 85/609/EEC of 14 December 1985 relating to a proceeding under [Article 102 TFEU] (IV/30698 - ECS/AKZO Chemie, Official Journal 1985 L 374, p. 1).

2 By that decision the Commission found that AKZO had infringed [Article 102 TFEU] by pursuing against a competitor, Engineering and Chemical Supplies (Epsom and Gloucester) Ltd ('ECS'), a course of conduct intended to damage ECS's business and /or to secure its withdrawal from the E[U] organic peroxides market (Article 1).

3 AKZO Chemie and its subsidiaries form the specialty chemicals division of the Dutch group, AKZO NV, which manufactures chemical products and artificial fibres.

4 AKZO UK, a wholly-owned subsidiary of AKZO Chemie (hereinafter 'AKZO' is used to designate the economic entity consisting of AKZO Chemie BV and its subsidiaries), produces, in the United Kingdom, organic peroxides, which are specialty chemicals used in the plastics industry. It also produces compounds based on benzoyl peroxide (one of the organic peroxides) used as bleaching agents for flour, and potassium bromate and vitamin mixes, two other flour additives.

5 Benzoyl peroxide and potassium bromate are supplied in vanous dilutions, depending on customers' requirements. Benzoyl peroxide is sold mainly in a dilution of 16% or 20% and potassium bromate is generally sold in a dilution of 6% or 10%.

Robert Schütze European Union Law Lisbonised Cases

6 According to the decision (point 17), three suppliers (AKZO, ECS and Diaflex) offer a complete (or almost complete) range of flour additives in the United Kingdom and Ireland.

7 The customers for additives may be divided into three categories. The first consists of the three main milling groups, of comparable size, RHM, Spillers and Allied Mills, which together represent about 85% of demand. The second consists of mills independent of the three big groups, the 'large independents', which represent 10% of demand. The remaining 5% is purchased by small mills, the 'small independents'.

8 Before the dispute which broke out between AKZO and ECS and gave rise to the decision which is the subject of the present proceedings, RHM divided its orders between AKZO and Diaflex. Spillers was supplied mainly by AKZO, and for the rest by Diaflex. Allied Mills bought its additives from ECS through its central purchasing agency, Provincial Merchants. However, Coxes Lock, one of the mills in the Allied Mills group, obtained its supplies from AKZO. ECS, moreover, had two-thirds of the business of the 'large independents' and AKZO the remaining third.

9 The Commission found in particular (Article 1 of the decision) that AKZO:

(i) had made direct threats to ECS at meetings in late 1979 with the aim of securing ECS's withdrawal from the market for organic peroxides for the 'plastics' application ;

(ii) from about December 1980 onwards, had systematically offered and supplied flour additives to Provincial Merchants, Allied Mills and ECS's customers in the 'large independent' sector at unreasonably low prices designed to damage ECS's business viability, compelling ECS either to abandon the customer to AKZO or to match a loss-making price in order to retain the customer;

(iii) had made quotations selectively to customers of ECS for flour additives while maintaining substantially (up to 60%) higher prices to comparable buyers who were already their own regular customers;

(iv) had offered potassium bromate and a vitamin mix (the latter a product which it did not normally supply) at a bait price in a package with

Robert Schütze European Union Law Lisbon Case

benzoyl peroxide to ECS's customers in order to attract their business for the full range of flour additives to the exclusion of ECS;

(v) had maintained, as pan of the plan to damage ECS, the prices for flour additives in the United Kingdom at an artificially low level over a prolonged period, a situation which it could survive because of its superior financial resources in comparison with ECS;

(vi) had pursued an exclusionary commercial policy in respect of the major customers RHM and Spillers by obtaining from those customers precise details of offers made by other suppliers of flour additives (including ECS) and then offering a price just below the lowest alternative offer in order to .obtain the business, coupled (in the case of Spillers) with a requirement that the customers should agree to obtain their entire supply of flour additives from AKZO.

10 By the same decision AKZO was ordered to pay a fine of ECU 10 000 000 or HFL 24 696 000 (Article 2) and to terminate the infringement immediately (Article 3).

11 Moreover, under the third, fourth and fifth paragraphs of Article 3 of the decision AKZO was prohibited from offering or applying prices or other conditions of sale for flour additives which would result in customers in respect of whose business it competes with ECS paying to AKZO prices dissimilar to those being offered by AKZO to comparable customers. However, this prohibition does not prevent AKZO from applying price differentials for flour additives as between different categories of customers which reasonably and objectively reflect differences in production and delivery costs attributable to the annual volume requirement of the customer, order size and other commercial factors. The decision stated, in this respect, that offers made by AKZO to mills in the Allied Mills group should not be made on terms substantially more favourable than those offered to the 'large independents'.

12 In support of its application AKZO puts forward, essentially, two pleas in law:

— first plea: the contested decision is vitiated by several formal defects owing to irregularities in the administrative procedure;

— secondly, the contested decision infringes [Article 102 TFEU] inasmuch as the Commission wrongly interpreted and applied concepts of a dominant

Robert Schütze, European Union Law, Annotated Cases

position and of the abusive exploitation of a dominant position in finding that AKZO held such a position and in classifying its behaviour as abusive.

13 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

I — The first plea: defects in the administrative procedure

14 AKZO maintains that the decision is vitiated by several formal defects owing to irregularities in the administrative procedure. In that respect, it maintains, firstly, that it did not have adequate access to the file, secondly, that the Commission's investigation was incomplete and, finally, that the decision is based on certain complaints on which it was not heard.

A -Access to the file

15 AKZO claims, firstly, that despite repeated requests it did not obtain access to all the investigation reports drawn up by the Commission's inspectors, when those documents could have contained evidence that might have enabled it to defend itself and to confirm that the position it had adopted was justified. That refusal of access to the file conflicts with the line of conduct that the Commission, in its reports on competition policy, has declared that it intends to follow

16 In that respect it should be observed that, as the Court held in Joined Cases 43 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19, paragraph 25, 'although regard for the rights of the defence requires that the undertaking concerned shall have been enabled to make known effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based, there are no provisions which require the Commission to divulge the contents of its files to the parties concerned'.

17 The allegation must therefore be rejected.

18 AKZO also maintains that the Commission based its decision on two documents that were not disclosed to it.

Robert Schuman Centre European Union Law Digitised Cases

19 The first of these is the reply by Steetley Chemicals (an undertaking which supplies the raw material for the manufacture of potassium bromate) to a request for information made to it by the Commission under Article 11 of Regulation No 17, the first regulation implementing [Articles 101 and 102 TFEU] (Official Journal, English Special Edition 1959-62, p. 87). The Commission's defence shows that, in adopting its decision, it took this document into account for the purpose of deter- mining Diaflex's production costs.

20 The Commission does not deny that this document was not disclosed to AKZO. It merely states that AKZO knew, or at least could have assumed, that the prices which Steetley Chemicals charged to Diaflex were considerably higher than those that it charged to AKZO.

21 In that respect it must be held that since the reply of Steetley Chemicals was not disclosed to AKZO, although the Commission drew conclusions from it, the information contained in that document cannot be used in the present proceedings.

22 The second of the documents to which AKZO alleges that it did not have access is a note recording a statement made by Smiths, one of the 'large independents', during an inspection carried out by the Commission. That document, according to AKZO, concerns the assistance which Diaflex allegedly gave to AKZO to enable it to evade the system of minimum prices imposed on it by the Commission as part of the interim measures ordered in Decision 83/462/EEC of 29 July 1983 relating to a proceeding under [Article 102 TFEU] (IV/30698 - ECS/ AKZO - Interim measures, Official Journal 1984 L 252, p. 13, hereinafter referred to as 'the interim measures decision').

23 The Commission replies that that statement, contained in a hand-written note made by one of its inspectors, formed part of the file which AKZO could have inspected at the Commission's premises.

24 It should be observed that that note does not appear in the files produced to the Court, either in the file relating to the administrative procedure or in the annexes to the Commission's pleadings. The Commission has therefore not proved that this document had been disclosed to AKZO. That being so, that note cannot be used to prove the abusive nature of AKZO's conduct.

B - Incomplete investigation

Robert Schütze European Union Law Harmonised Cases

25 AKZO maintains that the Commission's investigation is incomplete, in particular because the Commission failed to include the cost structure of the undertakings in question and the pricing policy of AKZO's main competitors in the flour additives sector.

26 Since the investigation is intended to establish the facts that may constitute an infringement, any inadequacies in it do not constitute procedural defects. They are to be taken into account only when it has to be ascertained whether the facts relied on are correct and whether they justify the conclusions drawn from them. These are matters which fall for consideration when AKZO's substantive pleas are examined.

C -**Breach of the obligation to hear the undertaking**

27 AKZO maintains that the decision contains serious complaints in relation to which it did not have an opportunity to make known its point of view during the administrative procedure. Even though it was heard with regard to the existence of certain facts, AKZO stresses that it was not heard with regard to the classification of those facts as an abuse.

28 The complaints in question are the use of potassium bromate as a bait product, the requests for information made to certain customers by AKZO in order to obtain precise details regarding offers made by its competitors and the exclusive purchasing obligation imposed on a customer.

29 The statement of objections must specify clearly the facts upon which the Commission relies and its classification of those facts.

30 That requirement was satisfied with regard to the use of potassium bromate as a bait product. The supplementary statement of objections (point 10) places this product, at the time when the behaviour was analysed, on the same footing as the vitamin mixes which, according to the Commission, were sold by AKZO at bait prices.

31 With regard to AKZO's acquisition of information and the exclusive purchasing obligation, it should be observed that in the statement of objections (point 70) the Commission classified as abusive AKZO's general strategy which was to endeavour to eliminate ECS from the plastics sector by making threats and then,

Robert Schütze European Union Law Licensed Copies

when this did not succeed, to implement its plan to force ECS into liquidation. The various elements of this plan were described in the part of the statement of objections regarding the 'implementation of the plan to eliminate ECS' (point 27 et seq.). Among those elements were the acquisition of information and the exclusive purchasing obligation. Consequently, there was no breach of AKZO's right to a fair hearing.

32 AKZO maintains, finally, with regard to the complaints relating to unreasonably low prices, that it was unable to make known its point of view regarding the fixed or variable nature of certain items of its production costs, despite the fact that this question was crucial in view of the criterion of lawfulness that it suggests should be applied for the purpose of judging the behaviour of a dominant undertaking.

33 This allegation must be rejected. It was only AKZO's reply to the statement of objections that revealed the difference of opinion between the parties regarding the fixed or variable nature of certain cost components. Nevertheless, AKZO had the opportunity to make known its point of view in response to the questions put to it on this matter by the Commission's representatives at the hearing on 18 June 1985 (p. 33 et seq. of the record of the hearing).

II — The second plea: infringement of [Article 102 TFEU]

34 AKZO maintains that the Commission infringed [Article 102 TFEU] inasmuch as:

— the contested decision wrongly defined the organic peroxides market as the relevant market, wrongly regarded the organic peroxides market as a single market and, finally, the existence of the dominant position alleged was based on incorrect facts;

— in the contested decision 1t was wrongly considered that AKZO's behaviour was abusive.

A - The existence of a dominant position

1. *Determination of the relevant market*

Robert Schütze European Union Law Licensed Copy

35 In the decision it is primarily the organic peroxides market (including the benzoyl peroxide used in the plastics industry) that is held to be the relevant market, because that was the market from which AKZO sought in the long term to exclude ECS (point 66). Alternatively, according to the decision, the abuse took place in the flour additives market (including the benzoyl peroxide used in the milling sector) in the United Kingdom and Ireland (point 91).

36 It must be determined, firstly, whether the Commission was right to define the relevant market as the organic peroxides market.

37 AKZO disputes this definition in view of the subject-matter of the decision, which relates solely to its allegedly unlawful behaviour in the flour additives sector. It points out in this respect that in the judgment in Joined Cases 6 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, paragraph 21, the Court held that the market in which the effects of the abuse appear is 'irrelevant as regards the determination of the relevant market to be considered for the purpose of a finding that a dominant position exists'.

38 That argument must be examined m the light of the particular circumstances of this case.

39 In that respect it must first be observed that benzoyl peroxide, one of the mam organic peroxides, used in the manufacture of plastics, is also one of the main additives for flour because of its use as a bleaching agent for flour in the United Kingdom and Ireland.

40 Secondly, it should be pointed out that before 1979 ECS operated solely in the flour additives sector. It was only in the course of that year that it decided to extend its activities to the plastics sector. Consequently, when the dispute arose, ECS had only an extremely small market share in that sector.

41 Moreover, it is not disputed that the plastics sector was more important to AKZO than the flour additives sector, since it had a much higher turnover in that sector.

42 AKZO therefore applied price reductions in a sector (that of flour additives) which was vital to ECS but only of limited importance to itself.

43 Furthermore, AKZO was able to set off any losses that it incurred in the flour

Robert Schütze European Union Law Lisbonised Cases

additives sector against profits from its activity in the plastics sector, a possibility not available to ECS.

44 Finally, according to statements made by a manager of AKZO (Annex 20 to the statement of objections, p. 35), which will be considered when the complaint relating to the threats is examined, AKZO did not adopt its behaviour in order to strengthen its position in the flour additives sector, but to preserve its position in the plastics sector by preventing ECS from extending its activities to that sector.

45 The Commission was in those circumstances justified in regarding the organic peroxides market as the relevant market, even though the abusive behaviour alleged was intended to damage ECS's main business activity in a different market.

46 Assuming that the organic peroxides market must be taken to be the relevant market, AKZO further criticizes the Commission for failing to carry out a thorough investigation on that market. Firstly, it did not analyse the alleged offers of AKZO at predatory prices in that sector, despite the fact that many of ECS's accusations related to such offers. Secondly, the Commission did not ascertain whether AKZO's position in the sector had been strengthened by reason of its behaviour in relation to flour additives.

47 In that respect, it is sufficient to observe that these factors, which relate to the abusive nature of the behaviour, are irrelevant for the purpose of defining the relevant market.

48 AKZO maintains, finally, that, in any event, this market cannot be regarded as a single market in view of the manifest absence of interchangeability of organic peroxides between themselves. Peroxides cannot, moreover, be grouped in a single market by virtue of an alleged complementarity, since customers do not use one and the same supplier to satisfy all their requirements for peroxides.

49 In the decision (point 7) it is stated that organic peroxides are chemical products which play an important part in the manufacture of plastics, where they serve as 'initiators' in various operations. Their three main fields of application are as follows:

— initiators for the polymerization or co-polymerization of vinyl monomers;
— curing agents for elastomers and resins, and

Robert Schütze European Union Law Unbonised Cases

— cross-linking agents for ethylene/propylene and synthetic rubber or silicones.

50 It is also stated (point 8) that each of the first two fields of application accounts for 40% of the consumption of organic peroxides, while the third accounts for about 10%.

51 In its judgment in Case 31/80 *L'Oreal v De Nieuwe AM CK* [1980] ECR 3775, paragraph 25, the Court held that when considering the possibly dominant position of an undertaking within a particular market, 'the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products'.

52 It should be observed that organic peroxides may, indeed, be individualized with regard to their formula, their concentration or their presentation in order to meet the particular requirements of customers. Nevertheless, 90% of their use is in various operations in the plastics industry and they are therefore suitable for satisfying constant needs, in the sense expressed in the judgment cited above. Moreover, they are not exposed to competition from other products, such as sulphur-based compounds used in the limited field of vulcanization of synthetic rubber, since the latter products cannot replace them completely as they do not have all the technical properties required.

53 Finally, it may be seen from AKZO's internal documents (Annex 2 to the statement of objections) that AKZO itself regarded organic peroxides as a single market, since it calculates its market share in relation to those products as a totality.

54 The pleas put forward by AKZO to challenge the delineation of the relevant market must therefore be rejected.

2. *The dominant position*

55 The Commission considers that AKZO has a dominant position within the organic peroxides market. It bases its view on AKZO's market share and on the existence of a number of factors which, combined with that market share, is said to give it a marked predominance.

Robert Schütze European Union Law Annotated Cases

56 The Commission describes these factors at point 69 of the decision as follows:

'(i) AKZO's market share is not only large in itself but is equivalent to all the remaining producers put together;

(ii) apart from Interox and Luperox the remaining producers have a limited product range and/or are of local significance only;

(iii) AKZO's market share (as well as that of the second and third placed producers Interox and Luperox) has remained steady over the period under consideration and AKZO has always successfully repulsed any attacks on its position by smaller producers;

(iv) AKZO was able even during periods of economic downturn to maintain its overall margin by regular price increases and /or increases in sales volume;

(v) AKZO offers a far broader range of products than any rival, has the most highly developed commercial and technical marketing organization, and possesses the leading knowledge in safety and toxicology;

(vi) AKZO has on its own account been able effectively to eliminate "troublesome" competitors (besides ECS) from the market or weaken them substantially: the example of Scado for one shows that AKZO is in a position, if it so wishes, to exclude a less powerful producer;

(vii) once such small but potentially dangerous competitors are neutralized, AKZO has been able to raise the price for the particular product in respect of which their competition was felt.'

57 AKZO disputes the assessment of its market share and also the existence or relevance of the other factors mentioned in the decision. In particular, it claims that its market share was evaluated wrongly because the Commission should not have regarded the organic peroxides market as a single market. It maintains, moreover, that the fact that it offers a wider range of products than its competitors cannot constitute evidence of a dominant position.

Robert Schütze European Union Law Disbound Cases

58 Those arguments cannot be accepted. Since the organic peroxides market was rightly regarded as the relevant market, it follows that AKZO's market share had to be calculated by taking organic peroxides as a whole. In that light, it is obvious that the fact that AKZO offered a range of products wider than that of its main rivals was one of the factors that assured for AKZO a dominant position in that market.

59 It should be further observed that according to its own internal documents AKZO had a stable market share of about 50% from 1979 to 1982 (Annexes 2 and 4 to the statement of objections and Table A annexed to that statement). Furthermore, AKZO has not adduced any evidence to show that its share decreased during subsequent years.

60 With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (judgment in Case 85/76 *Hoffman-LA Roche v Commission* [1979] ECR 461, paragraph 41). That is the situation where there is a market share of 50% such as that found to exist in this case.

61 Moreover, the Commission rightly pointed out that other factors confirmed AKZO's predominance in the market. In addition to the fact that AKZO regards itself as the world leader in the peroxides market, it should be observed that, as AKZO itself admits, it has the most highly developed marketing organization, both commercially and technically, and wider knowledge than that of their competitors with regard to safety and toxicology (Annexes 2 and 4 to the statement of objections).

62 The pleas put forward by AKZO in order to deny that it had a dominant position within the organic peroxides market as a whole must therefore be rejected.

B -The existence of an abuse of a dominant position

1. *Preliminary considerations -Criterion of legality of conduct of a dominant under- taking in relation to prices*

63 According to the contested decision (point 75) AKZO had abusively exploited its dominant position by endeavouring to eliminate ECS from the organic peroxides market mainly by massive and prolonged price-cutting in the flour additives sector.

Robert Schütze European Union Law Licensed Copies

64 According to the Commission, [Article 102 TFEU] does not make costs the decisive criterion for determining whether price reductions by a dominant undertaking are abusive (point 77). Such a criterion does not take any account of the general objectives of the E[U] competition rules as defined in [Article 3 TEU] and in particular the need to prevent the impairment of an effective structure of competition in the common market. A mechanical criterion would not give adequate weight to the strategic aspect of price-cutting behaviour. There can be an anti-competitive object in price-cutting whether or not the aggressor sets its prices above or below its own costs, whatever the manner in which those costs are understood (point 79).

65 A detailed analysis of the costs of the dominant undertaking might, however, according to the Commission, be of considerable importance in establishing the reasonableness or otherwise of its pricing conduct. The exclusionary consequences of a price-cutting campaign by a dominant producer might be so self-evident that no evidence of intention to eliminate a competitor is necessary. On the other hand, where the low pricing could be susceptible of several explanations, evidence of an intention to eliminate a competitor or restrict competition might also be required to prove an infringement (point 80).

66 AKZO disputes the relevance of the criterion of lawfulness adopted by the Commission, which it regards as nebulous or at least inapplicable. It maintains that the Commission should have adopted an objective criterion based on its costs.

67 In that respect, it states that the question of the lawfulness of a particular level of prices cannot be separated from the specific market situation in which the prices were fixed. There is no abuse if the dominant undertaking endeavours to obtain an optimum selling-price and a positive coverage margin. A price is optimum if the undertaking may reasonably expect that the offer of another price or the absence of a price would produce a less favourable operating profit in the short term. Furthermore, a coverage margin is positive if the value of the order exceeds the sum of the variable costs.

68 According to AKZO, a criterion based on an endeavour to obtain an optimal price in the short term cannot be rejected on the grounds that it would jeopardize the viability of the undertaking in the long term. It is only after a certain time that the undertaking in question could take measures to eliminate the losses or withdraw from a loss-making branch of business. In the meantime the undertaking would have to accept 'optimum orders' in order to reduce its deficit and to ensure continuity of operation.

Robert Schütze, European Union Law, Lisbon Edition, CUP

69 It should be observed that, as the Court held in its judgment in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 91, the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of compe- tition is weakened and through recourse to methods which, different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

70 It follows that [Article 102 TFEU] prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, however, not all competition by means of price can be regarded as legitimate.

71 Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.

72 Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.

73 These are the criteria that must be applied to the situation in the present case.

74 Since the criterion of legitimacy to be adopted is a criterion based on the costs and the strategy of the dominant undertaking itself, AKZO's allegation concerning the inadequacy of the Commission's investigation with regard to the cost structure and the pricing policy of its competitors must be rejected at the outset.

Robert Schütze European Union Law Lisbon Edition

2. *The various aspects of the abuse*

75 The abusive conduct alleged relates to threats said to have been made by AKZO against ECS in late 1979 and also to the prices offered or granted in respect of three flour additives between December 1980, the date of the first of the offers at issue, and July 1983, the date of the decision ordering interim measures, mntioned above, which required AKZO to comply with a system of minimum prices.

(a) *The threats*

76 The Commission found that AKZO had made direct threats to ECS during meetings held in late 1979 with managers of ECS, with the aim of securing ECS's withdrawal from the market for the organic peroxides for the 'plastics' application (Article 1(i) of the decision).

77 AKZO denies that it threatened ECS. It states that it merely informed ECS that it could not rely on the continuation of AKZO's collaboration in the flour additives sector if ECS persisted in making offers at very low prices in the plastics sector. Before the dispute ECS and AKZO used to supply one another with certain flour additives at reduced prices in order to supplement inadequate output or to meet the needs of the party which did not itself manufacture one of those products. Thus AKZO satisfied some of ECS's benzoyl-peroxide requirements while ECS supplied AKZO with vitamin mixes.

78 In order to decide whether this allegation is well founded it is necessary to determine the content of the meetings which took place on 16 November and 3 December 1979. In this respect the Court has records of these meetings prepared by officers of ECS, a statement made by a manager of AKZO and a note made by another officer of AKZO.

79 The information contained in the various documents prepared by the managers of ECS is substantially consistent (Annexes 12, 13, 14, 15, 16, 17 and 18 to the statement of objections). It shows in particular that during the first meeting AKZO made known its intention to make a general price reduction in the flour additives sector if ECS continued to sell benzoyl peroxide in the plastics sector, and its determination to sell at prices below its production cost, if necessary, even if this entailed incurring a loss estimated at UKL 250 000. During the second meeting AKZO confirmed that it was prepared to sell at below its production

Robert Schuman Centre European Union Law Lisbon Leading Cases

cost, if need be.

80 Those meetings prompted ECS to apply to the High Court in London for an order prohibiting AKZO from carrying its threats on the ground that they constituted an infringement of [Article 102 TFEU]. It was in the course of those proceedings that one of AKZO's officers described in an affidavit the content of the meetings. That affidavit (Annex 20 to the statement of objections, p. 35) also shows that AKZO was prepared to sell at below its cost prices and, if necessary, to incur a loss, if ECS did not withdraw from the plastics market.

81 The content of these meetings is further confirmed by a note of 7 December 1979 prepared by a manager of AKZO (Annex 21 to the statement of objections). That note makes it clear that AKZO would take aggressive measures in the milling products sector if ECS did not cease to supply its products to the plastics industry. It contains, in addition, a detailed plan, with figures, describing the measures that would be put into effect if ECS did not refrain from supplying its products. The plan shows, in particular, that AKZO would endeavour to win all of ECS's customers by offering them the complete range of flour additives at loss-making prices.

82 In view of this concordant evidence it must be concluded that in late 1979 AKZO threatened ECS in order to secure its withdrawal from the market for organic peroxides for the 'plastics' application.

(b) *AKZO's behaviour in relation to prices*

(i) AKZO's costs

83 In view of the criterion adopted for the purpose of appraising the conduct of a dominant undertaking in relation to prices, AKZO's total costs and variable costs for each of the additives in question during the relevant period must be determined.

AKZO's total costs

84 The Commission appended to the letter supplementing the statement of objections (Table F) an estimate of AKZO's total costs, calculated on the basis of its accounts. However, the Commission stated that AKZO's total costs must have been higher than this estimate (point 9 of the letter supplementing the

Robert Schütze European Union Law Labour Law Cases

statement of objections and Table G).

85 AKZO has appended to its pleadings the report of a firm of auditors containing *inter alia* an evaluation of those costs for the same period (Annex 3 to the application and Annex 12 to the reply).

86 These calculations show that AKZO's total costs are in some cases lower and in some cases higher than those shown in the calculations made by the officers of the Commission.

87 The Commission has not challenged those figures during the proceedings before the Court. On the one hand, it stated that they confirmed 'its belief that the calculations that it had made itself on the basis of AKZO's own documents were correct' (point 104 of the defence). On the other hand, it stressed that these figures did not contradict its contention 'that the price offers made by AKZO to ECS's regular customers almost always generated losses' (point 52 of the rejoinder).

88 It must therefore be held that AKZO's total costs are those shown in the report annexed to its pleadings.

89 Those costs, expressed in UKL per tonne, are as follows:

— benzoyl peroxide 16%:

1981: 557.9; 1982: 578.1 ; 1983: 519.2;

— benzoyl peroxide 20% :

1981: 649.6; 1982: 700.29; 1983: 582.57;

— potassium bromate 6%:

1981: 290.14; 1982: 316.84; 1983: 308.14;

— potassium bromate 10%:

Robert Schütze European Union Disbonded Cases

1981: 350.34; 1982: 370.98; 1983: 360;

— vitamin mixes (nutramin):

1981: 665.86; 1982: 714.4.

AKZO's variable costs

90 The parties have submitted to the Court very different calculations of AKZO's variable costs. Essentially these differences are due to the fact that the parties disagree as to whether certain cost components are fixed or variable.

91 In the decision it is stated (point 5) that items such as labour, maintenance, ware- housing and dispatching must be regarded as variable costs, since most accounting systems classify them as such.

92 AKZO maintains that the sole criterion for determining whether a particular item is fixed or variable is whether or not it varies according to the quantities produced. In the present case labour costs should be regarded as fixed costs. A comparison between the evolution of annual labour costs for the years 1980 to 1985 and that of the quantities produced during the same period shows that there is no correlation between them (Annex 3 to the application, auditors' report, in particular Annex 7 to that report).

93 The Commission replies, firstly, that AKZO's accounting records show that a large proportion of what it classifies as fixed costs varies, in fact, with changes in production (point 99 of the defence) and, secondly, that in March 1984 AKZO engaged two new workers to strengthen its production capacity, so that there is a correlation between the volume of labour and that of production (point 48 of the rejoinder).

94 It should be pointed out that an item of cost is not fixed or variable by nature. It must be determined, therefore, whether, in the present case, labour costs did vary according to the quantities produced. .

95 The figures cited by AKZO show that there is no direct correlation between the quantities produced and labour costs. Thus in 1982 and 1983, when AKZO's output of benzoyl peroxide increased, labour costs, after allowing for inflation, decreased. Conversely, in 1983 and 1984, when the output of potassium bromate

Robert Schütze European Union Law Lisbonised Cases

decreased, labour costs, after allowing for inflation, increased. Therefore, in the present case, labour costs must be regarded as fixed costs.

96 Consequently, it must be held that AKZO's variable costs are those shown in the documents which that undertaking submitted to the Court.

97 Those costs, expressed in UKL per tonne, are as follows:

— benzoyl peroxide 16%:

1981: 298.3; 1982: 324.7; 1983: 314.1;

— benzoyl peroxi e 20%:

1981: 352.8; 1982: 383.1; 1983: 359.5;

potassium bromate 6%:

1981: 169.4; 1982: 188.6; 1983: 200.7;

— potassium bromate 10% :

1981: 229.6; 1982: 242.74; 1983: 252.56;

— vitamin mixes (nutramin):

1981: 541.02; 1982: 578.

(ii) The unreasonably low prices granted to ECS's customers

98 The Commission found that from about December 1980 onwards AKZO had systematically offered and supplied flour additives to Provincial Merchants, Allied Mills and ECS's customers in the 'large independents' sector at unreasonably low prices with the aim of damaging ECS's viability (Article 1 (ii) of the decision).

Robert Schütze European Union Law Visbonised Cases

The quotations made to Allied Mills and mills in the Allied group

99 AKZO denies that it offered additives to Allied Mills or the mills in the Allied group at unreasonably low prices with the aim of damaging ECS. In the first place, it had no such intention. It merely sought to win new customers in order to increase its turnover and thus to reduce the considerable fall in its profit margins, caused by the offers made to RHM and Spillers by ECS in 1980. Secondly, the prices quoted cannot be regarded as unreasonably low. Those that it proposed to Allied Mills in January 1981 were equal to those quoted to Spillers by ECS in October 1980. The prices quoted during the period in question were above the average of its variable costs.

100 It should be observed that AKZO quoted the following prices to Allied Mills and the mills in the Allied group:

— benzoyl peroxide 16%:

from January1981 to January1983: UKL 517.90; in February 1983: UKL 512;

— potassium bromate 10%:

from January 1981: UKL 314.90;

— vitamin mixes:

in September 1981: UKL 565; in October 1982: UKL 455 for a cheap mix.

101 With regard to the vitamin mixes (sold in 1981), benzoyl peroxide 16% and potassium bromate 10%, these prices are below AKZO's average total costs but above its average variable costs as found above (see paragraphs 89 and 97). With regard to the price of UKL 455 quoted by AKZO in 1982 for a cheap vitamin mix, it was, in any event, below its average total costs, calculated at UKL 714.40, for the standard vitamin mix.

102 Moreover, all these quotations can only be explained by AKZO's intention to damage ECS and not by its endeavour to restore its profit margins. A note prepared by one of AKZO's representatives (Annex 51 to the statement of objections) shows that AKZO established the prices offered to Allied Mills in

Robert Schütze European Union Law Lisbon Cases

January 1981 by calculating that they were well below those charged to Allied Mills by ECS. This shows that AKZO's intention was not solely to win the order, which would have induced it to reduce its prices only to the extent necessary for this purpose. In addition, in quoting to Allied Mills a price equal to that offered to Spillers by ECS, AKZO's objective was to set its prices at the lowest level possible without infringing the undertaking that it had given in the High Court in London not to reduce its selling prices for benzoyl peroxide with the aim of eliminating ECS.

103 The Commission was therefore right in considering that AKZO had offered and supplied flour additives to Allied Mills and mills in the Allied group at unreasonably low prices with the aim of damaging ECS's viability.

The offers made to the 'large independents' which were customers of ECS

104 With regard to the complaint concerning offers made to the 'large independents' which were customers of ECS, AKZO puts forward arguments substantially the same as those advanced to challenge the complaint concerning the offers at unreasonably low prices made to the Allied group.

105 AKZO quoted the following prices to 'large independents' which were customers of ECS:

— benzoyl peroxide 16%:

in January 1981: UKL 532; from April 1981: UKL 530;

— potassium bromate 6%:

in December 1980: UKL 260; in January and April 1981: UKL 245; in June 1983: UKL 320;

— potassium bromate 10%:

in December 1980: UKL 339; in May 1981: UKL 336; in May 1982: UKL 325;

— vitamin mixes:

Robert Schütze European Union Law Licensed to CELEX

in December 1908: UKL 595; in May 1981: UKL 575; in October 1982 (nutramin 50): UKL 489; in June 1983 (nutramin 50): UKL 757.

106 It must be pointed out that AKZO's quotations are below their average total costs, but above their average variable costs, as ascertained above (see paragraphs 89 and 97), and that, in the case of the quotation in October 1982 relating to vitamin mixes, they are even below its variable costs.

107 The quotations in June 1983 regarding potassium bromate 6% and vitamin mixes are above its average total costs. However, they do not show AKZO's behaviour during the period in question. In fact, they were made two days before the hearing in the procedure on the request for interim measures (23 June 1983) and slightly more than a month before the adoption of the interim measures decision (29 July 1983).

108 It should further be noted that the prices quoted by AKZO in December 1980 to this category of ECS's customers show that AKZO's aim was to damage ECS and not to restore its own profit margins. Those prices are well below what was necessary to compete with ECS, since, compared with the prices charged to this category of customers by ECS at that time, they show a difference of more than UKL 70 for benzoyl peroxide 16%, more than UKL 100 for potassium bromate 60/o and more than UKL 60 for vitamin mixes.

109 The Commission therefore rightly found that AKZO had offered and supplied flour additives to customers of ECS in the category of the 'large independents' at unreasonably low prices with the aim of damaging ECS's viability.

(iii) Selective prices

110 The Commission further accuses AKZO of having made selective quotations to customers of ECS while maintaining the substantially higher prices that it charged to comparable buyers who were already their own regular customers (Article 1(iii)).

111 The Commission's pleadings show that this accusation relates to two distinct categories of customers. Firstly, the Commission finds an infringement on the part of AKZO in the fact that it offered advantageous prices to the 'large independents' which were customers of ECS, while maintaining considerably higher prices in relation to 'large independents' which were its own customers. Secondly, the fact that AKZO offered to individual mills in the Allied Mills

Robert Schütze European Union Law Monised Cases

group prices considerably more advantageous than those charged to 'large independents' which were their own regular customers constituted, in the Commission's view, an infringement of [Article 102 TFEU].

The selective nature of the quotations to the 'large independents'

112 AKZO maintains that this complaint has no basis in fact or in law. It is unfounded in fact because AKZO did not set different prices according to whether the customers were its own or those of ECS. The comparison should have been made between customers for whose orders ECS and AKZO competed and AKZO's customers who had not received offers from competitors. The complaint is unfounded in law because in setting higher prices in relation to some of its regular customers AKZO did not injure ECS.

113 AKZO has not denied that it charged differing prices to buyers of comparable size. It has, furthermore, not advanced arguments to show that these differences related to the quality of the products sold or to special production costs.

114 The prices charged by AKZO to its own customers were above its average total costs, whereas those offered to customers of ECS were below its average total costs.

115 AKZO is thus able, at least partly, to set off losses resulting from the sales to customers of ECS against profits made on the sales to the 'large independents' which were among its own customers. This behaviour shows that AKZO's intention was not to pursue a general policy of favourable prices, but to adopt a strategy that could damage ECS. The complaint is therefore substantiated.

The selective nature of the quotations to individual mills in the Allied Mills group

116 The Commission considers that AKZO should have refrained from quoting, from January 1981, to individual mills in the Allied group, which were essentially customers of ECS, prices more advantageous than those that it charged to 'large independents' which were customers of its own. The Commission justifies this view on the ground that, according to it, the individual mills in the Allied group and the 'large independents' are comparable customers. In that regard, it points out that, before January 1981, AKZO had charged, in the case of Coxes Lock, the only individual mill in the Allied group which was one of AKZO's customers, prices that were the same as those that it charged to the 'large

Robert Schütze, European Union Law, Selected Cases

independents'.

117 AKZO contests the complaint on the grounds that the individual mills in the Allied group and the 'large independents' are not comparable customers.

118 It must be observed that the prices quoted by AKZO during the dispute to the individual mills in the Allied group were the same as those than it offered to Provincial Merchants, the group's central purchasing agency. Those prices were in fact more advantageous than those that it charged to the 'large independents' which were among its own customers.

119 In that respect it must be observed, firstly, that the policy pursued by AKZO did not entail any discrimination between the mills in the Allied Mills group *inter se*. In fact, from January 1981 AKZO quoted the same prices to all the mills in the Allied group, including Coxes Lock, so that it cannot be accused of having granted to individual mills in the group which were customers of ECS prices more advantageous than those that it granted to the only mill in the group that was one of its customers.

120 It should next be pointed out that there was no abusive policy of discrimination between the individual mills in the Allied group and the 'large independents', as these two categories of customers are not comparable. On the one hand, the central purchasing agency of the Allied group (30% of the purchases of benzoyl peroxide) has always enjoyed (whoever the supplier was) more advantageous prices than those granted to the 'large independents', which buy only small quantities (together they account for 10% of the purchases of benzoyl peroxide). On the other hand, a mill in the Allied group can always obtain supplies of additives through its central purchasing agency. Consequently, an offer to an individual mill has no real chance of succeeding unless it is at the level of the price quoted to the purchasing agency. It cannot normally be expected that an individual mill will agree to pay to its suppliers a price higher than that which it can obtain through the purchasing agency.

121 The complaint regarding selective nature of the quotations made to individual mills in the Allied group is therefore unfounded.

(iv)Bait prices

122 The Commission further complains that AKZO offered potassium bromate

Robert Schütze © European Union Law Lisbon Case

and a vitamin mix (the latter a product which it did not normally supply) at a bait price in a package including benzoyl peroxide to customers of ECS in order to obtain their orders for the complete range of flour additives, thereby ousting ECS (Article 1 (iv) of the decision).

Bait prices relating to potassium bromate

123 It is apparent from the documents before the Court that, according to the Commission, the abuse with which AKZO is charged is to be found in the fact that it offered potassium bromate to customers of ECS at unreasonably low prices in order to induce them to order all their additives from AKZO.

124 AKZO states that the use of a product for a policy of bait prices makes no sense unless trifling quantities of the product are offered. Since, on the contrary, it has always sold large quantities of potassium bromate, the complaint is unfounded. AKZO points out that it did not offer this product solely to customers of ECS.

125 In that respect it should be observed that a comparison between the production costs of potassium bromate and those of benzoyl peroxide shows that potassium bromate was offered at prices proportionately more advantageous than those for benzoyl peroxide.

126 The more advantageous prices for potassium bromate, a product which AKZO usually offered simultaneously with benzoyl peroxide, were intended to increase the attractiveness of the range of additives that they offered. The complaint is therefore well founded.

Bait prices relating to vitamin mixes

127 The Commission regards as an abuse the fact that AKZO offered vitamin mixes to customers of ECS at unreasonably low prices, when it did not supply this product to its own customers.

128 AKZO contests this complaint and maintains that it is denied by the facts. Certain mills to which it offered the complete range of additives, including vitamin mixes, chose to buy only benzoyl peroxide and potassium bromate. Furthermore, it had been able to offer this product, in the form of a service to its customers, only at very low prices, owing to strong competition from

Robert Schütze European Union Law Liberalised Cases

Vitrition, the main supplier of vitamin mixes.

129 It must be pointed out that the fact that some customers chose not to buy vitamin mixes cannot prove that a policy of bait prices on the pan of AKZO did not exist.

130 Moreover, two facts prove that the complaint is well founded. Firstly, AKZO made its range of additives more attractive by including in it vitamin mixes for ECS's customers, although it did not sell this product to its main customers, RHM and Spillers. Secondly, it offered these mixes at prices that were particularly advantageous, since, as it has conceded, in some cases they did not cover its average variable costs (point 185 of the application). Vitrition's competitive prices cannot justify the fact that AKZO offered this product at unreasonably low prices having regard to the structure of its costs.

(v) The maintenance of prices at an artificially low level over a prolonged period

131 The Commission complains that AKZO maintained, as part of a plan to damage ECS, the prices of flour additives in the United Kingdom at an artificially low level over a prolonged period, a situation which it could survive because of its superior financial resources as compared with those of ECS (Article l (v) of the decision).

132 AKZO and the Commission agree that this complaint relates to prices granted to RHM and Spillers.

133 AKZO maintains that its prices were not abusive, since they were justified by alignments intended to counter offers made by ECS or Diaflex.

134 The Commission does not, in principle, dispute the right of a dominant undertaking to effect alignments of prices. However, it does not accept that AKZO's prices were reduced because of strong competition from Diaflex (point 45 of the decision). Various documents show that AKZO was exercising control over Diaflex's prices. In the present case, therefore, AKZO's alignments on those prices are not legitimate.

135 The documents to which the Commission refers show in particular:

Robert Schütze European Union Law Unionised Cases

— that in June 1979 Diaflex and AKZO consulted one another regarding the procedures to be adopted for an increase in the prices that they charged to RHM and Spillers (Annex 119 to the statement of objections);

— that in 1980 one of Diaflex's advisers noted that there was an 'unwritten law' which prohibited Diaflex from taking customers from AKZO (Annex 117 to the statement of objections);

— that in November 1980 Diaflex told AKZO the amount of an offer made to RHM by ECS. According to that document Diaflex and AKZO had to reduce the prices that they charged to RHM if they wanted to keep that customer (Annex 38 to the statement of objections);

— that in November 1982 a manager of AKZO was instructed to contact Diaflex to persuade it to raise its prices (Annex.120 to the statement of objections).

136 Those documents show that AKZO and Diaflex maintained close contacts regarding the policy to be pursued in relation to prices during the period preceding the interim measures decision. Consequently, the Commission was entitled to regard AKZO's alignments on prices charged by Diaflex as unlawful. Diaflex's offers must therefore be disregarded in the examination of this complaint.

137 With regard to benzoyl peroxide 20% it should be observed that from January 1981 to March 1982 AKZO charged a price of UKL 640 to RHM without having to face quotations from undertakings other than Diaflex. In March 1982 AKZO reduced its price to UKL 629 in order to counter a quotation from an independent dealer at that price. That quotation cannot justify the fact that AKZO maintained that price until the adoption of the interim measures decision, since it did not subsequently have to face other competing quotations. The prices of UKL 640 and UKL 629 were below its average total costs but above its average variable costs, as found above (see paragraphs 89 and 97).

138 With regard to potassium bromate 10%, from January 1981 to March 1982 AKZO charged a price of UKL 314, from March 1982 to February 1983 a price of UKL 309, from February 1983 to June 1983 a price of UKL 325 and from June 1983 a price of UKL 339. These prices, granted in the absence of

Robert Schütze European Union Law Unbounded Cases

competing quotations, were below its average total costs but above its average variable costs.

139 It follows that the prices charged to RHM by AKZO were not affected by competing quotations, with the exception of the price of UKL 629, which related to benzoyl peroxide (March 1982).

140 By maintaining prices below its average total costs over a prolonged period, without any objective justification, AKZO was thus able to damage ECS by dissuading it from making inroads into its customers.

Prices granted to Spillers

141 For the reasons described above the quotations to Spillers by Diaflex are to be disregarded.

142 With regard to benzoyl peroxide 16%, it must be observed that AKZO charged a price of UKL 489 to Spillers from November 1980 to March 1982. This price was below its average total costs, but above its average variable costs, as found above (see paragraphs 89 and 97). It is not explained by the need to counter competing quotations.

143 Subsequently, AKZO charged to Spillers for benzoyl peroxide prices even more advantageous (UKL 425 from March 1982 and UKL 435 from June 1983), which, however, did not include carriage costs, which AKZO calculated at UKL 35.00 per tonne (Annex 3 to the application). The documents before the Court do not show that there were any competing quotations during this period.

144 With regard to potassium bromate 10%, throughout the period in question AKZO offered a price of UKL 309, which was below its average total costs but above its average variable costs, without having to face competing quotations.

145 It follows that, like the prices offered by AKZO to RHM, those offered to Spillers were not influenced by competing quotations.

146 By maintaining prices below its average total costs over a prolonged period

Robert Schütze: European Union Law Lisbonised Cases

without any objective justification, AKZO was thus able to damage ECS by dissuading it from making inroads into its customers.

(vi) The acquisition of information regarding rival offers and the exclusive supply obligation

147 The Commission also regards as abusive the fact that AKZO pursued an exclusionary commercial policy in relation to suppliers of RHM and Spillers by obtaining from these customers precise details of offers made by other suppliers of flour additives and then offering a price just below the lowest competing offer, to which the Commission adds (in the case of Spillers) the obligation imposed on the customer to obtain his total requirements in flour additives from AKZO (Article l (vi) of the decision).

148 With regard to the acquisition of information, it must be observed that where such a practice forms part of a plan to eliminate a competitor, as in the present case, it cannot be regarded as a normal means of competition.

149 With regard to the exclusive supply obligation it should be borne in mind that the Court held in its judgment in *Hoffman-La Roche,* cited above, at paragraph 89, that if an undertaking having a dominant position on the market ties buyers -even if it does so at their request -by an obligation or promise on their part to obtain all or most of their requirements from that undertaking, this constitutes an abuse of a dominant position within the meaning of [Article 102 TFEU].

150 The contract concluded by AKZO with Spillers must therefore be regarded as an abusive practice.

III — The measures imposed

151 AKZO maintains that some of the measures imposed on it in order to terminate the infringement must be annulled.

152 Those measures, set out in the third and fifth paragraphs of Article 3 of the decision, prohibit AKZO from applying different prices to customers of comparable size and in particular from granting to individual mills in the Allied group prices more favourable than those granted to the 'large independents'.

Robert Schütze European Union Law Selected Cases

The prohibition on differing prices

153 Article 3(3) of the decision is worded as follows:

> 'In particular, but without prejudice to the other obligations arising from Article 1(i) to (vi), AKZO Chemie BV and its subsidiaries shall refrain (except in order to meet orders at prices accepted before the date of notification of this Decision) from offering or applying prices or other conditions of sale for flour additives in the E[U] which would result in customers in respect of whose business it competes with ECS paying to AKZO Chemie BV prices which are dissimilar from those being offered by AKZO Chemie BV to comparable customers.'

154 AKZO maintains that this measure is unfair. If ECS approaches its customers, it is faced with a choice: either to align its prices and extend to all its customers of comparable size the prices that it has had to concede in order to retain the customer, which would be very expensive, or to lose the customer.

155 In that regard it must be pointed out that the measure in question is intended to prevent repetition of the infringement and to eliminate its consequences. That is the light in which that provision must be seen. Firstly, it prohibits AKZO from approaching ECS's customers again by quoting to them advantageous prices without extending those prices to its own customers. Secondly, if ECS endeavours to win back from them the customers whom it has taken from ECS unlawfully, it prevents AKZO from aligning itself on ECS's prices without giving its customers the benefit of this adjustment.

156 On the other hand, the situation evoked by AKZO in support of its allegation is not covered by that provision. In fact, the provision does not prohibit them from making defensive adjustments, even aligning itself on ECS's prices, in order to keep the customers which were originally its own.

157 The measure complained of cannot be regarded as unfair, since it is confined to prohibiting AKZO from pursuing its unlawful conduct and to enabling ECS to re-establish the situation that existed before the dispute. This allegation must therefore be rejected.

Offers to individual mills in the Allied group

Robert Schütze European Union Law Annotated Cases

158 The wording of Article 3(5) is as follows:

> 'For the avoidance of doubt, it is hereby provided that offers by AKZO Chemie BV for the supply of flour additives to individual mills of the Allied group shall not be made on terms substantially more favourable than those offered to the "large independents".'

159 In the examination of the complaint relating to selective prices it was held that the individual mills in the Allied group and the 'large independents' were not in a comparable position. There was therefore no discrimination of the kind prohibited by [Article 102 TFEU].

160 In ordering AKZO to offer to individual mills in the Allied group prices equivalent to those that it offers to the 'large independents' the Commission imposed on it a measure which goes beyond what is necessary in order to secure observance of the prohibition on discrimination contained in [Article 102(c) TFEU]. The fifth paragraph of Article 3 of the contested decision must therefore be annulled.

IV -The fine

161 Alternatively, AKZO asks that the fine imposed on it by Article 2 of the decision be annulled or at least reduced.

162 In that respect it must be observed that the infringement committed by AKZO is particularly serious, since the behaviour complained of was intended to prevent a competitor from extending its activity into a market in which AKZO held a dominant position.

163 Nevertheless, there are three factors which prompt the Court to reduce the fine. Firstly, with regard to the unreasonably low prices that AKZO quoted or granted both to its own customers and to those of ECS, it must be observed that abuses of this kind come within a field of law in which the rules of competition had never been determined precisely. Moreover, the limited effect of the dispute between AKZO and ECS must be taken into account, since the infringement did not significantly affect their respective shares of the flour additives market. It is mentioned in the decision (point 18) that before the dispute ECS had a market share of 350/o, compared with 30% in 1984, while that of AKZO rose from 520/o to 55%. Finally, the Commission was not

Wolters Kluwer European Union Law Digitised Cases

justified in regarding the infringement of the interim measures decision, consisting in alignments on Diaflex's prices, as an aggravating factor capable of justifying the high amount of the fine. That decision permitted alignment on the prices of any competitor and did not exclude those of Diaflex. Consequently, as soon as the Commission had evidence proving that Diaflex was not a genuine competitor and that the alignments were therefore not made in good faith, it should have exercised the powers to impose sanctions that it had reserved to itself.

164 In those circumstances the fine must be reduced by 250/o to ECU 7 500 000 or HFL 18 522 000.

Costs

165 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has in all essential respects failed in its pleas it must be ordered to pay the costs, including those relating to the proceedings on the application for interim relief.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares void Article l(iii) of Commission Decision 85/609/EEC of 14 December 1985 relating to a proceeding under [Article 102 TFEU] to the extent that it concerns offers made by AKZO to individual mills in the Allied group;**

2. **Annuls the fifth paragraph of Article 3 of the decision;**

3. **Fixes the fine at ECU 7 500 000 or HFL 18 522 000;**

4. **For the rest, dismisses the application;**

Robert Schütze European Union Law Lisbonised Cases

5. **Orders the applicant to pay the costs, including those relating to the proceedings on the application for interim relief.**

Moitinho de Almeida Rodriguez Iglesias

Slynn Joliet Zuleeg

Delivered in open court in Luxembourg on 3 July 1991.

J.-G. Giraud
Registrar

J. C. Moitinho de Almeida
President of the Fifth Chamber

Robert Schütze European Union Law Lisbonised Cases