JUDGMENT OF THE COURT (Fifth Chamber)
24 June 1986 *

In Case 53/85

AKZO Chemie BV, whose registered office is at Amersfoort,

AKZO Chemie UK Ltd, whose registered office is at Walton-on-Thames, Surrey,

both represented by Ivo Van Bael and Jean-François Bellis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, Avocats, 15 côte d'Eich, BP 425,

applicants,

v

Commission of the European Communities, represented by its Legal Adviser, A. McClellan, assisted by F. Grondman, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

Engineering & Chemical Supplies (Epsom & Gloucester) Limited, whose registered office is at Upper Mills Estate, Stonehouse, Gloucestershire, represented by Christopher Bellamy and Stephen Morris, Barristers-at-Law, and Anthony Rose, Solicitor, of Charles Russel & Co., Solicitors, London, with an address for service in Luxembourg at the Chambers of Lambert H. Dupong, Dupong & Konsbruck, BP 472, 14 A rue des Bains,

intervener,

APPLICATION requesting the Court to declare void the decision of the Commission of the European Communities of 14 December 1984 concerning the communication to a third party of documents stated to be confidential,

* Language of the Case: Dutch.

THE COURT (fifth chamber)

composed of: U. Everling, President of Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: C. O. Lenz
Registrar: D. Louterman, Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 22 January 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 22 February 1985, AKZO Chemie BV and AKZO Chemie UK Ltd, whose registered offices are at Amersfoort (Netherlands) and Walton-on-Thames (United Kingdom) respectively, brought an action under the second paragraph of Article 173 of the EEC Treaty requesting the Court to declare void the Commission's decision of 18 December 1984 to communicate documents of a confidential nature to a third party who had submitted a complaint.

2 AKZO Chemie BV and AKZO Chemie UK Ltd are part of the AKZO group which is the largest supplier in the Community of benzoyl peroxide, a chemical product which is used in the making of plastics and as a bleach for the treatment of flour. That product is also manufactured by a small undertaking, Engineering and Chemical Supplies (hereinafter referred to as 'ECS'), whose registered office is at Stonehouse (United Kingdom).

3 AKZO is alleged to have threatened to force ECS from the flour additives market through a policy of selective, abnormally low prices if ECS extended its activities to the market in organic peroxides for the plastics industry and to have actually

carried out that threat. On 15 June 1982 ECS made a complaint to the Commission alleging an infringement of Article 86 of the EEC Treaty. As a result of that complaint, officials of the Commission carried out an investigation in December 1982 at the offices of AKZO Chemie BV and of AKZO Chemie UK Ltd under Article 14 (3) of Regulation No 17/62. On that occasion the officials obtained various documents belonging to AKZO.

4 On 10 October 1983 ECS commenced an action in the High Court of Justice claiming damages against AKZO by reason of the practices described in the preceding paragraph. However, the High Court decided to stay the proceedings pending the adoption of a decision by the Commission.

5 On 3 September 1984 the Commission issued a statement of objections addressed to AKZO in which it alleged that the latter had infringed Article 86 of the Treaty by threatening to sell benzoyl peroxide, used as a bleach for the treatment of flour, to ECS's customers at discriminatory and abnormally low prices and by carrying out that threat. The statement of objections was accompanied by 127 annexes.

6 A copy of the statement of objections with the list of annexes was sent to ECS. The accompanying letter indicated that ECS could apply for access to those annexes if it considered it necessary to do so in order to submit its observations. The Commission added that if any documents were made available to ECS, they could be used only for the purposes of the Commission's proceedings.

7 AKZO stated its views on the Commission's objections in its answers of 22 October 1984 and of 16 November 1984 which the Commission communicated to ECS without informing AKZO.

8 By letter of 19 November 1984, ECS sought access to the annexes in order to be able to exercise in full its right to be heard during the administrative procedure, as provided for in Article 19 (2) of Regulation No 17/62.

9 By letter of 29 November 1984, the Commission informed AKZO of ECS's application. It emphasized that it would not disclose any documents which were subject to protection as business secrets, with the exception of those constituting direct evidence of the infringement of Article 86 which had been committed in this case. The letter gave AKZO a period of 10 days in which to make its views known on ECS's application. Moreover, it emerged indirectly from that letter that ECS had been granted access to AKZO's answers to the statement of objections.

10 By letter of 7 December 1984 AKZO conveyed to the Commission its reactions. It emphasized first of all that it was in any event premature to speak of direct evidence of an infringement of Article 86 of the Treaty at that stage of the procedure. It then expressed surprise that the Commission had communicated to ECS its answers to the statement of objections. Finally, AKZO offered to summarize the annexes or, in any event, to communicate them to ECS only after deleting certain confidential passages and it enclosed a list of documents which were to be regarded as strictly confidential.

11 On 14 December 1984 the Commission communicated to ECS certain annexes to the statement of objections and only informed AKZO that it had done so in a letter of 18 December 1984. In its letter, the Commission emphasized that it was for it to decide whether or not documents were confidential. It stated that it had followed the list drawn up by AKZO with a few exceptions in regard to which it provided a brief explanation.

12 By an application lodged at the Court Registry on 22 February 1985, AKZO brought an action for a declaration that the Commission's decision to transmit certain confidential documents to ECS was void. In its application AKZO also sought an order from the Court requiring the Commission to demand ECS to return the documents transmitted to it.

13 By order of 10 July 1985, the Court granted ECS leave to intervene in the proceedings in support of the Commission's conclusions.

Admissibility of the action

14 The Commission and the intervener contend that the application is inadmissible. In the first place, communication of the documents to ECS was merely a physical act which in no way affected the legal position of the applicant and which could therefore give rise only to an action for damages under Article 215 of the Treaty. Secondly, the act in question was intended to enable the Commission to investigate the case more thoroughly and was therefore merely a preparatory step.

15 The applicant on the other hand submits that its application is admissible. It maintains that the contested act has legal effect in so far as it refuses by implication to accord to the documents transmitted the confidential treatment guaranteed by the Treaty and Regulation No 17/62. Moreover, it affects the applicant's interests by making it possible for ECS to use those documents in legal proceedings pending in the United Kingdom. Finally, it constitutes the culmination of a special procedure and is definitive in nature, with the result that it may be the subject of an action for annulment.

16 It is necessary to determine whether, as was required by the Court in its judgment of 11 November 1981 in Case 60/81 *(International Business Machines Corporation* v *Commission* [1981] ECR 2639), the contested act constitutes a measure producing legal effects of such a kind as to affect the applicant's interests by clearly altering its legal position.

17 In that regard, communication of documents to a third party who has made a complaint is admittedly of itself a physical act. However, that act merely implements a previous decision whereby the Commission, as can be seen from the letter of 18 December 1984, resolved two issues. It decided in the first place that disclosure was necessary for the proper examination of the case and for the proper exercise by the complainant of the right to be heard, and secondly that the documents in question were not among those to which confidential treatment was guaranteed by Community law.

18 That decision had legal effect in relation to the applicant inasmuch as it withheld from the latter the protection provided by Community law.

19 It is necessary to determine whether that decision clearly altered the applicant's legal position or whether it was merely a preparatory step against which, if it was unlawful, the action brought against the decision concluding the procedure would provide sufficient protection.

20 It is certainly true that the documents were transmitted with a view to facilitating the examination of the case. However, the measure adversely affecting the applicant is, as is clear from the foregoing paragraphs, the decision in which the Commission considered that the documents in question did not qualify for the confidential treatment guaranteed by Community law and could therefore be communicated. That measure is definitive in nature and is independent of any decision on the question whether Article 86 of the Treaty has been infringed. The opportunity which the applicant has to bring an action against a final decision establishing that the competition rules have been infringed is not of such a nature as to provide it with an adequate degree of protection of its rights in the matter. On the one hand, it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed. On the other hand, if an action is brought against that decision, it will not in any event provide the applicant with the means of preventing the irreversible consequences which would result from improper disclosure of certain of its documents.

21 AKZO's interest in contesting the decision in question cannot be denied on the ground that in this case the decision had already been implemented at the time when the action was brought. The annulment of such a decision is of itself capable of having legal consequences, in particular by preventing a repetition by the Commission of the practice complained of and by rendering unlawful the use by ECS of any documents improperly communicated to it.

22 It follows that the applicant's claim for a declaration that the contested decision is void is admissible.

23 However, the application for an order requiring the Commission to demand ECS to return the documents transmitted to it must be regarded as inadmissible since the Court has no jurisdiction to make such an order in connection with a review of the legality of an act under Article 173 of the Treaty. According to Article 176 of the Treaty, it is for the institution whose act has been declared void to take the necessary measures to comply with the judgment of the Court.

Substance of the case

24 The applicant puts forward three submissions in support of its application. In the first place, it alleges that by communicating to ECS certain documents which were all in some way confidential, the Commission acted in breach of its obligation not to disclose information which is covered by the obligation of professional secrecy or which is subject to protection as a business secret. In the second place, by communicating to ECS certain documents which the latter could use in the legal proceedings pending in the United Kingdom, the Commission infringed Article 20 (1) of Regulation No 17/62 which provides that information acquired by the Commission in the exercise of its powers of investigation may be used only for the purpose for which it was obtained. Finally, the Commission has infringed Article 185 of the Treaty inasmuch as, by implementing its decision before notifying it to the applicant, it deprived the latter of the possibility of applying for an order suspending the operation of that decision at the same time as it instituted proceedings for annulment.

25 The Commission, with whose arguments the intervener essentially agrees, considers first of all that documents constituting evidence of an infringement of Article 86 of the Treaty, such as those communicated to ECS, are not of a confidential nature. It goes on to emphasize that ECS was given access to the documents only on the express condition that it would not use them for any purpose other than the proceedings before the Commission. Finally, it denies that there was any infringement of Article 185 of the Treaty because it did not adopt any decision which could be the subject of an application for annulment.

26 In the first place, it must be borne in mind that Article 214 of the Treaty requires the officials and other servants of the institutions of the Community not to disclose information in their possession of the kind covered by the obligation of professional secrecy. Article 20 of Regulation No 17/62, which implements that provision in regard to the rules applicable to undertakings, contains in paragraph (2) a special provision worded as follows: 'Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this regulation and of the kind covered by the obligation of professional secrecy.'

27 The provisions of Articles 19 and 21, the application of which is thus reserved, deal with the Commission's obligations in regard to hearings and the publication of decisions. It follows that the obligation of professional secrecy laid down in Article 20 (2) is mitigated in regard to third parties on whom Article 19 (2) confers

the right to be heard, that is to say in regard, in particular, to a third party who has made a complaint. The Commission may communicate to such a party certain information covered by the obligation of professional secrecy in so far as it is necessary to do so for the proper conduct of the investigation.

28 However, that power does not apply to all documents of the kind covered by the obligation of professional secrecy. Article 19 (3) which provides for the publication of notices prior to the granting of negative clearance or exemptions, and Article 21 which provides for the publication of certain decisions, both require the Commission to have regard to the legitimate interest of undertakings in the protection of their business secrets. Business secrets are thus afforded very special protection. Although they deal with particular situations, those provisions must be regarded as the expression of a general principle which applies during the course of the administrative procedure. It follows that a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets. Any other solution would lead to the unacceptable consequence that an undertaking might be inspired to lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets.

29 It is undoubtedly for the Commission to assess whether or not a particular document contains business secrets. After giving an undertaking an opportunity to state its views, the Commission is required to adopt a decision in that connection which contains an adequate statement of the reasons on which it is based and which must be notified to the undertaking concerned. Having regard to the extremely serious damage which could result from improper communication of documents to a competitor, the Commission must, before implementing its decision, give the undertaking an opportunity to bring an action before the Court with a view to having the assessments made reviewed by it and to preventing disclosure of the documents in question.

30 In this case, the Commission gave the undertaking concerned an opportunity to make its position known and adopted a decision containing an adequate statement of the reasons on which it was based and concerning both the confidential nature of the documents at issue and the possibility of communicating them. At the same time, however, by an act which cannot be severed from that decision, the Commission decided to hand over the documents to the third party who had made the complaint even before it notified its findings to that undertaking. It thus made it impossible for the undertaking to avail itself of the means of redress provided by Article 173 in conjunction with Article 185 of the Treaty with a view to preventing the implementation of a contested decision.

31 That being the case, the decision which the Commission notified to the applicant by letter of 18 December 1984 must be declared void without there being any need to determine whether the documents communicated to the intervener did in fact contain business secrets.

Costs

32 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its main submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Declares void the decision which the Commission notified to the applicant by letter of 18 December 1984;

(2) Dismisses the remainder of the application;

(3) Orders the Commission to pay the costs.

Everling Joliet

Due Galmot Kakouris

Delivered in open court in Luxembourg on 24 June 1986.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber