Case 62/86 R

AKZO Chemie BV
v
Commission of the European Communities

(Competition — Abuse of a dominant position — Predatory prices)

Summary

Application for interim measures — Suspension of operation — Interim measures — Conditions for granting — Measures not prejudging the decision on the main application — Serious and irreparable harm

(EEC Treaty, Arts 185 and 186; Rules of Procedure, Art. 83 (2))

ORDER OF THE PRESIDENT OF THE COURT
30 April 1986 *

In Case 62/86 R

AKZO Chemie BV, a company incorporated under Netherlands law, whose registered office is at 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

* Language of the Case: Dutch.

Commission of the European Communities, represented by its Agent, B. Van der Esch, Legal Adviser to the Commission, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the suspension of the operation of the third paragraph of Article 3 of Commission Decision No 85/609/EEC of 14 December 1985 (Official Journal, L 374, p. 1) so that AKZO will be entitled, as a defensive measure, to align its price quotations for flour additives on the lower quotations given by its competitors so far as its existing customers are concerned and to do this until the Court has given judgment on the substance of the case,

THE PRESIDENT OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

1 By an application lodged at the Court Registry on 5 March 1986, AKZO Chemie BV, hereinafter referred to as 'AKZO', brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision No 85/609/EEC of 14 December 1985 relating to a proceeding under Article 86 of the EEC Treaty is void.

2 In that decision the Commission found that AKZO had infringed Article 86 of the EEC Treaty by pursuing against Engineering and Chemical Supplies Limited, hereinafter referred to as 'ECS', whose registered office is at Stonehouse, Gloucestershire, United Kingdom, a course of conduct intended to damage ECS's business or to secure its withdrawal from the EEC organic peroxides market, or both. Accordingly, it imposed on AKZO a fine of 10 million ECU for that conduct, the essential features of which are set out in Article 1 of the decision. Under the

decision AKZO was required to bring to an end forthwith the infringement described above (Articles 3) and to comply with certain additional measures which the Commission regarded as essential for the decision to be fully effective and to re-establish conditions of competition corresponding to the market (Articles 3, 4 and 5).

3 By an application lodged at the Court Registry on 2 April 1986, the applicant applied under Articles 185 and 186 of the EEC Treaty and Article 83 of the Rules of Procedure for an order suspending the operation of the third paragraph of Article 3 of Commission Decision No 85/609 so that AKZO would be entitled, acting in good faith, to align its price quotations and prices actually charged for flour additives on the lower quotations given by its competitors so far as its existing customers are concerned and to do this until the Court has given judgment in the main proceedings.

4 The defendant submitted written observations on 18 April 1986. The parties presented oral argument on 24 April 1986.

5 Before considering whether the application for interim measures is well founded, it may be helpful to describe briefly the events which preceded the adoption by the Commission of Decision No 85/609 and, in particular, the third paragraph of Article 3 thereof.

6 On 15 June 1982, ECS submitted a complaint to the Commission under Article 3 of Regulation No 17/62 of the Council of 6 February 1962 implementing Articles 85 and 86 of the EEC Treaty (Official Journal, English Special Edition 1959-1962, p. 87) alleging that AKZO had abused its dominant position on the organic peroxides market within the meaning of Article 86 of the EEC Treaty by practising, in the flour additives sector in the United Kingdom and Ireland, a policy of selective and below-cost price-cutting in order to exclude ECS as a competitor. The purpose of that conduct, which AKZO was alleged to have engaged in since the beginning of 1979, was to deprive ECS of the finance necessary to expand into the much larger and more profitable market in organic peroxides for the plastics industry.

7 For the sake of completeness, it should be pointed out that there are only three suppliers in the United Kingdom and Ireland of a full range of flour additives:

AKZO UK, ECS and Diaflex. The Commission assessed their respective market shares for 1984 at 55%, 30% and 15%.

8 In December 1982, the Commission, acting pursuant to Article 14 (3) of Regulation No 17/62 of the Council, carried out without prior warning several simultaneous investigations at AKZO Chemie and AKZO UK.

9 On 13 may 1983, ECS made an application requesting the Commission to order interim measures to secure its survival until a final decision was adopted since it claimed that AKZO's pricing tactics in regard to flour additives had continued even after the investigation and that as a result it was in danger of having to go into liquidation.

10 On 29 July 1983, the Commission acceded to that request by adopting Decision No 83/462/EEC (Official Journal, L 252, p. 13) in which, in particular, as an interim measure, it ordered AKZO to comply with certain minimum prices for certain flour additives and to offer such products to comparable buyers at similar prices and on similar terms. However, Article 4 of the decision permitted AKZO UK to depart from those minimum prices and, acting in good faith, to align its price quotations on those of its competitors if the latter could be shown to have offered a lower price to a particular flour milling undertaking.

11 The Commission, closed the procedure which it had opened following the complaint submitted on 15 June 1982 by ECS by adopting Decision No 85/609. The third paragraph of Article 3 of that decision, the operation of which the applicant is seeking to have suspended to the extent set out in paragraph 3 of this order 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 EEC 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.'

The effect of that paragraph is to deprive AKZO and its subsidiaries of the possibility made available to them under Article 4 of Decision No 83/462.

12 According to Article 185 of the Treaty, actions brought before the Court of Justice do not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended. Under Article 186 of the Treaty it may also prescribe any necessary interim measures.

13 Article 83 (2) of the Rules of Procedure provides that an application for interim measures must state the circumstances giving rise to urgency and the factual and legal grounds establishing a *prima facie* case for the interim measures applied for.

14 The Court has consistently held that interim measures may be granted only if they do not prejudge the decision on the substance of the case (see in particular the order of the President of the Court of 7 July 1981 in Joined Cases 60 and 190/81 R *IBM* v *Commission* [1981] ECR 1857) and that the urgency of an application for interim measures referred to in Article 83 (3) of the Rules of Procedure must be assessed in the light of the extent to which an interlocutory order is necessary to avoid serious and irreparable damage to the party seeking the interim measure.

15 It is clear from the documents before the Court and the Commission's statements at the hearing that the Commission justifies its inclusion of the third paragraph of Article 3 in Decision No 85/609, and the difference in the treatment accorded to AKZO under that provision compared to the position under Article 4 of Decision No 83/462, the interim decision, by claiming that it became aware that the possibility of adjusting prices provided for in the interim decision had been used by AKZO for purposes inconsistent with the aim of maintaining effective competition. It considered that compliance with the prohibition laid down in that article was all the more necessary because it was one of the only means whereby the Commission could ensure that AKZO was complying with Article 86 of the EEC Treaty.

16 The Commission considers that it holds clear proof that the price quotations made by Diaflex and the price adjustments carried out by AKZO on the basis of those

quotations under Article 4 of Decision No 83/462 are part of an anti-competitive strategy since there is evidence that Diaflex was not entirely independent of AKZO in its market strategy. The price quotations made by Diaflex were thus not really competitive and were in fact solicited by AKZO. The Commission is therefore of the opinion that the possibility of adjusting prices provided for in Article 4 of Decision No 83/462 has given rise to manipulation and abuse on the part of AKZO.

17 For its part, the applicant claims that it is unreasonable that it should be deprived of the right to align its price quotations on those of its competitors so far as its existing customers are concerned since that is tantamount to leaving it defenceless in the face of undercutting by its competitors. It emphasizes that the purpose of its application for interim measures is merely to maintain the status quo because the right to align prices which it is seeking was granted to it by Article 4 of Decision No 83/462 and that decision remained in force for two years.

18 In that regard, it should be noted that the reasons which led the Commission to withdraw the possibility of aligning prices provided for in Article 4 of Decision No 83/462 and to adopt the third paragraph of Article 3 of Decision No 85/609 can be assessed only in the light of considerations which are closely linked to the main proceedings. To assess them in interlocutory proceedings would amount to prejudging the decision on the substance of the case. The President of the Court is therefore of the opinion that this question cannot be resolved in interlocutory proceedings.

19 In order to demonstrate the urgency of its application and the serious and irreparable damage which it would suffer if the interim measure applied for were not granted, the applicant claims that it has lost customers since 31 December 1985, the date on which Decision No 85/609 entered into force, because it was not able to align its prices on competitors' prices which undercut its own. As a result, its sales of bromide mix have dropped by 50% and those of benzoyl peroxide by 25%. In addition it refers to the figures contained in Annex IV to its main appli-

cation which indicate the undercutting engaged in by its competitors and the alignment of AKZO's prices to which that gave rise.

20 In reply to a question put to it at the hearing, it stated that the undercutting which had taken place with regard to its customers since 31 December 1985 had been carried out solely by Diaflex and not by ECS.

21 Moreover it emphasizes that if the third paragraph of Article 3 remains in force, it will suffer serious and irreparable damage because under that provision only two possible solutions are open to it, both of which are liable to damage it. It can decide either not to align its price quotations and lose the customers concerned or to align them, with a consequent general reduction in its profit margin since it would then be required to adjust the prices charged to all comparable customers.

22 For its part, the Commission emphasizes that AKZO has put forward no argument leading to the conclusion that application of the third paragraph of Article 3 of Decision No 85/609 would jeopardize AKZO's viability in the flour additives sector. Nothing in that provision prevents AKZO from aligning its prices on those offered by Diaflex since the prohibition on aligning its prices contained in that article applies only to cases in which ECS and AKZO are in competition for a customer's order. The figures put forward by the applicant at the hearing cannot therefore constitute evidence that AKZO has suffered serious and irreparable damage.

23 In that connection, it would appear *prima facie* that the actual wording of the third paragraph of Article 3 of Decision No 85/609 confirms the Commission's statement at the hearing to the effect that the prohibition on aligning price quotations applies only when ECS and AKZO are in competition for a customer's order and not when the latter is competing with Diaflex. Thus, had it wished, AKZO could have aligned its price quotations on those made by Diaflex to its customers without infringing that article.

24 That finding must be set alongside the applicant's statement at the hearing that it has not yet encountered a case in which ECS has undercut it and won a customer's order from it because it was unable to align its price on ECS's quotation.

25 Furthermore, it should be emphasized that Annex IV to the main application, relied on by the applicant, refers to transactions which took place before Decision No 85/609 entered into force.

26 It appears from the foregoing that the applicant has put forward no decisive argument showing that application of the third paragraph of Article 3 of Decision No 85/609 would cause it serious and irreparable damage.

27 Since the applicant has failed to establish the urgency required by Article 83 (2) of the Rules of Procedure, it is not necessary to consider whether the factual and legal grounds on which it relies established a *prima facie* case for the grant of the interim measure applied for.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

(1) The application is dismissed.

(2) The costs are reserved.

Luxembourg, 30 April 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President