OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 10 June 1986 *

Mr President,
Members of the Council,

A — Facts

1. The proceedings in which I am delivering my Opinion today concern a further dispute arising out of a competition procedure which the Commission of the European Communities brought against the AKZO Group on the ground of an alleged abuse of a dominant position and which may well still be in progress.

2. Although these proceedings are concerned only with the lawfulness of a decision of the Commission of 6 November 1984 under which the applicants were required under Article 14 (3) of Regulation No 17 [1] to submit to an investigation in the context of a competition procedure, it would appear necessary to give a brief account of the entire procedure in the context of which the contested decision was adopted.

3. The applicants, AKZO Chemie BV and AKZO Chemie UK Ltd, are part of the AKZO Group, which is the largest supplier in the Community of organic peroxides, chemical products used as catalysts in the making of plastics and, in the United Kingdom and Ireland, as a bleach for the treatment of flour.

4. Engineering and Chemical Supplies (ECS) is a small company set up in 1969 which initially supplied organic peroxides purchased from AKZO UK Ltd to the British flour-milling industry and later began to produce that product itself. In 1979, it extended its activities to the plastics sector, initially in the United Kingdom and later in Germany.

5. In 1982, ECS asked the Commission to initiate a proceeding, claiming that the applicants had infringed Article 86 of the EEC Treaty inasmuch as they were attempting to force ECS from the market by pursuing an abusive policy of selling at low prices. According to the uncontradicted statement of the Commission, ECS's complaint was based on the applicants' price quotations for organic peroxides, both for the plastics sector and for the flour-milling industry.

6. In December 1982 officials of the Commission carried out investigations under Article 14 (3) of Regulation No 17 without prior warning on the premises of both applicants.

7. On 8 June 1983, the Commission decided to initiate a proceeding in this case (IV/30.698 — ECS/AKZO). The subject-matter of the proceeding was an alleged abuse of a dominant position by the applicants and concerned price quotations for organic peroxides both in the flour additives sector and in other sectors. [2]

* Translated from the German.

1 — Regulation No 17 of the Council of 6 February 1962 — First Regulation implementing Articles 85 and 86 of the Treaty, OJ, English Special Edition 1959-1962, p. 87.

2 — *Bulletin of the European Communities* 1983, No 7/8, paragraph 2.1.38.

8. On 29 July 1983, the Commission adopted interim measures[3] under which AKZO Chemie UK Ltd was required to submit to certain conditions in regard to price quotations for supplies to the flour additives sector.

9. In May and July 1984, conversations took place between members of the applicants' staff and Commission officials in which the possibility of a rapid disposal of the competition proceeding was discussed. The Commission stated that having regard to ECS's complaint, it could not accede to the applicants' request to terminate the entire proceeding without adopting a formal decision. At very least in the flour additives sector, there would have to be a final decision. If the applicants accepted the essential points of the complaint and a satisfactory settlement was reached in regard to damages for ECS, those facts would be taken into account in fixing the amount of the fine. If the applicants were prepared to give certain undertakings in regard to their future price quotations in the plastics sector, it was envisaged that the investigations in that sector would not be pursued.

10. Even before that, the Commission had concentrated its investigations on the flour additives sector, even though they had initially extended to all possible uses of organic peroxides. In the plastics sector, they were initially not pursued.

11. On 3 September 1984, the Commission addressed a statement of objections to the applicants which was concerned only with their price quotations in respect of organic peroxides for the flour additives sector. In the introductory general comments in the statement of objections it was however expressly stated that the Commission reserved the right to carry out further investigations into the applicants' market behaviour in regard to organic peroxides in the plastics sector and also reserved the right to issue a further statement of objections in respect of that sector (page 4 of the statement of objections).

12. On 1 October 1984, a telephone conversation took place between the Commission official in charge of the investigation and the head of AKZO Chemie BV's legal department in which the connection between the applicants' reaction to the statement of objections concerning the flour additives sector and the Commission's future attitude to the plastics sector was discussed. I will go into the details of this conversation, the contents of which are in dispute between the parties and in regard to which the Court heard evidence, in my consideration of the legal issues raised in this case (paragraphs 83 *et seq.*).

13. On 22 October 1984, AKZO Chemie BV submitted to the Commission the first part of its reply to the statement of objections in which it asserted that it was not guilty of any abuse of a dominant position.

14. On 26 October 1984, the Commission announced that further investigations in regard to the plastics sector would be carried out on the applicants' premises on 7 and 8 November in the Netherlands and on 12 and 13 November on their premises in the United Kingdom. The member of AKZO Chemie BV's legal department who was informed of that fact accepted it without objection.

15. On the afternoon of 6 November 1984, AKZO Chemie BV informed the Commission by telephone that it was unwilling to submit to the scheduled investi-

3 — OJ, L 252, p. 13.

gations. It stated that the reasons for that refusal were contained in a letter which would reach the Commission on that very day.

16. On the same day, 6 November 1984, the Commission adopted the decision which is contested in these proceedings. On 7 November 1984, officials of the Commission, accompanied by a representative of the Netherlands Government, presented themselves at AKZO Chemie BV's premises for the purpose of carrying out the investigations. Those investigations took place at the premises of AKZO Chemie BV on 7 and 8 November 1984 and at those of AKZO Chemie UK Ltd on 20 and 21 November 1984.

17. The applicants regard that decision as unlawful on several grounds.

18. They maintain that it infringes Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms inasmuch as it was adopted in a way which constitutes a misuse of the authority delegated to the competent member of the Commission, that it does not contain an adequate statement of the reasons on which it is based and, finally, that the competent national authorities were not properly consulted.

19. In their reply, the applicants also claim that the decision infringes their right to a fair hearing and that the Commission is guilty of a misuse of powers.

20. The *applicants* claim that the Court should:

(i) Declare void the Commission's decision of 6 November 1984;

(ii) Order the Commission to return the papers and documents obtained by it in the course of the investigations carried out pursuant to the contested decision and prohibit it from using them in any way in the future;

(iii) Order the Commission to pay the costs.

21. The *Commission* contends that the Court should:

(i) Dismiss the application as unfounded;

(ii) Order the applicants to pay the costs.

22. The Commission regards the applicants' submissions as unfounded. Furthermore, it expressed doubts during the oral proceedings as to whether the submissions put forward by the applicants in their reply (infringement of the right to a fair hearing, misuse of powers) had been properly introduced into the proceedings.

23. I will deal in detail with the parties' legal arguments in the statement of any views on the case.

B — Statement of views

24. The submissions advanced by the applicants against the contested decision, which in substance partly overlap, may be divided into two groups:

(i) Submissions concerning the procedure followed: breach of the principle of the collegiate responsibility of the Commission, inadequate statement of the reasons on which the decision is based, failure to properly consult the authorities of the Member States, infringement of Article 8 of the European Convention on Human Rights through failure to comply with the legal provisions governing the procedure;

(ii) Submissions dealing with the substance of the case: breach of the right to a fair hearing, misuse of powers.

I — *Submissions as to form*

(a) *Absence of a valid decision of the Commission*

25. The *applicants* are of opinion that the contested decision of the Commission was not validly adopted since it was not adopted by the full Commission but by the member of the Commission responsible for competition matters. That procedure is contrary to Article 17 of the Merger Treaty of 8 April 1965 which provides that the Commission is to act by a majority of its members.

26. The applicants do not dispute as a matter of principle that the Commission has the power to permit certain decisions to be adopted by its individual members, as is provided for in Article 27 of the Provisional Rules of Procedure of the Commission.[4] Such a delegation of authority is, however, only permitted in regard to clearly defined measures of management or administration and the principle of the collegiate responsibility of the Commission remains wholly intact.

27. Since the ordering of an investigation under Article 14 (3) of Regulation No 17 is a measure of considerable importance for the undertaking concerned, it is not merely a measure of management or administration. Because of the applicants' refusal to submit to the scheduled investigations, if for no other reason, the principle of collegiate responsibility should once again have come into operation.

28. Even the internal decision of the Commission of 5 November 1980 delegating to the member responsible for competition matters authority to adopt decisions concerning investigations does not release the Commission from its duty to respect the principle of collegiate responsibility which is entrenched in the Treaty.

29. On the other hand, the *Commission* contends that the contested decision could properly be adopted under the delegation of authority provided for in Article 27 of its Provisional Rules of Procedure. A decision ordering an investigation is a measure preparatory to the decision in which the Commission reaches a finding as to the possible existence of an infringement of the competition rules. The preparatory decision is therefore a straightforward measure of management or administration.

30. The Commission considers that Article 27 of its Provisional Rules of Procedure is in conformity with Article 17 of the Merger Treaty. In its decision-making procedures, the obligation laid down in Article 17 of the Merger Treaty, namely the principle of collegiate responsibility, must be reconciled with the need to adopt a large number of decisions. It therefore considered it necessary to authorize certain of its members to adopt certain clearly defined measures in its name and subject to its control. Under internal rules, both prior and subsequent control of such measures is provided for.

31. Finally, the Commission refers to a series of decisions of the Court in which the latter did not take exception to the statement of objections issued in competition proceedings being signed by the Commission's Director General for Competition.

32. In the applicants' favour, it must be admitted that Article 17 of the Merger Treaty,[5] which provides that the

4 — Decision of 6 July 1967, in the version of that article as set out in the Decision of 23 July 1975, OJ 1975, L 199, p. 43.

5 — Treaty establishing a Single Council and a Single Commission of the European Communities of 8 April 1965, *Treaties establishing the European Communities*, 1978, p. 785.

Commission is to act by a majority of its members, requires the latter to respect the principle of collegiate responsibility. That principle is taken up in Article 1 of the Provisional Rules of Procedure of the Commission of 6 July 1967,[6] which reads as follows:

'The Commission shall act as a collegiate body in accordance with these rules.'

33. However, as the Commission rightly points out, that principle must be reconciled with its duty to ensure that its work is carried out in an orderly fashion and in particular with the need to adopt a large number of individual decisions.[7] That was recognized in the Merger Treaty, Article 16 of which states, in regard to the Commission's rules of procedure, as follows:

'The Commission shall adopt its rules of procedure so as to ensure that both it and its departments operate in accordance with the provisions of the Treaties . . .'

34. It must therefore be concluded that the Merger Treaty recognizes and requires both that the Commission's decision-making process should comply with the principle of collegiate responsibility and that the Commission's work should be carried out in an orderly fashion. Consequently, no objection may be raised to the fact that Article 27 of the Provisional Rules of Procedure of the Commission permit that institution to delegate authority to its members to adopt clearly defined measures of management or administration in its name and subject to its control.

35. It must further be considered whether the authority to order investigations under Article 14 (3) of Regulation No 17, delegated on 5 November 1980 to the member of the Commission responsible for competition matters, is covered by Article 27 of the Provisional Rules of Procedure. It could be argued that the expression 'measures of management or administration' refers only to measures which have effects solely within the administration. Measures which have effects outside the administration or which are addressed to third parties would not therefore come within the provisions of Article 27 of the Provisional Rules of Procedure.

36. That argument plainly cannot be refuted by contending that the ordering of an investigation is merely a preparatory measure, solely designed to enable the Commission to arrive at a final decision concerning the existence of an infringement of the competition rules. Unlike the initiation of a competition proceeding under Article 3 of Regulation No 17 or to the communication of a statement of objections within the meaning of Article 2 of Regulation No 99/63[8] which, according to the decisions of the Court, constitute preparatory measures which do not as such engender any legal obligations on the part of persons concerned and which therefore may not themselves be contested before the Court,[9] the ordering of an investigation is a measure which has a direct effect on the legal position of the undertakings concerned. Such an order requires the undertakings concerned to allow the Commission's officials access to their

6 — Journal Officiel 1967, No 147, p.1, referring to the Rules of Procedure of the Commission of the EEC, Journal Officiel 1963, p. 181.

7 — The Commission's figures vary. During the written procedure, a figure of over 35 000 decisions for 1984 was put forward but that was reduced to about 21 000 at the hearing. Even on the basis of the figures published in the General Report on the Activities of the European Communities for 1984 and 1985, namely 5 190 instruments, 555 proposals, recommendations or drafts and 242 communications, memoranda and reports (1985: 7 442, 694 and 224 respectively), the number of decisions is considerable (see 18th General Report on the Activities of the European Communities, paragraph 23, and 19th General Report on the Activities of the European Communities, paragraph 26).

8 — Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17, OJ, English Special Edition 1963-1964, p. 47.

9 — Judgment of 11 November 1984 in Case 60/81, *IBM* v *Commission*, [1981] ECR 2639.

premises, to make available to them their books and other business records and to submit to other measures taken on the spot. Undertakings may be obliged to comply with that obligation by the imposition of fines and periodic penalty payments.

37. The effect of such an order on the legal position of the undertakings concerned was regarded by the Community legislature as being of such consequence that it expressly required the Commission, in the last sentence of Article 14 (3), to specify that the decision could be reviewed by the Court of Justice.

38. However, the structure of the Provisional Rules of Procedure of the Commission militates against a restrictive interpretation of Article 27. That article is part of Chapter III (Representation and Delegations of Authority) of the Rules of Procedure. The internal relations between the Commission and its members on the one hand and the directorates general on the other are dealt with in Section II of the first chapter. In particular, Article 13 deals with the authority of the competent member of the Commission vis-à-vis a directorate general whose field of activities has been specifically assigned to him.

39. Thus, if Chapter III and in particular Article 27 thereof has an independent meaning the measures of management or administration therein referred to may be either measures which are concerned with the internal affairs of the Commission or those which have effects vis-à-vis third parties.

40. The delegation of authority to the member of the Commission responsible for competition matters entitling him to order investigations under Article 14 (3) of Regulation No 17 thus comes within the scope of Article 27 of the Provisional Rules of Procedure of the Commission.

41. That delegation of authority does not become invalid, as the applicants claim, by the fact that the undertakings concerned do not agree to the investigation and inform the Commission of that fact. That very situation is the normal case envisaged in Article 14 (3) of Regulation No 17. If the undertaking concerned agrees to the investigation, a non-binding authorization under the first sentence of Article 14 (2) is sufficient. It is only when the undertaking does not agree to the investigation that a binding decision under Article 14 (3) ordering that investigation is necessary.

(b) *Absence of a decision of the competent member of the Commission ordering the investigation*

42. Without formulating this complaint as a separate submission, the *applicants* claim that it is not certain that the competent member of the Commission gave his consent to the contested decision. The certified photocopy of the decision shown to the applicants did not bear the signature of the competent member of the Commission. Nor does the document submitted by the Commission as proof that the competent member signed the contested decision prove that that member gave his consent thereto since his signature bears no date and, moreover, it is not stated what other documents are enclosed with the document bearing the signature. It cannot be excluded that the competent member of the Commission signed a blank document in advance at a time which cannot be precisely determined.

43. The *Commission* contends that the contested decision was notified to the undertaking concerned in the usual way. That is sufficient to prove the existence of a decision. It produces the internal document

of 6 November 1984 addressed to the General Secretariat of the Commission merely for the purpose of showing that the usual internal procedure was followed.

44. Although the applicants have not made any formal submission on the point, it may be gathered from their arguments that they suggest that the Court should verify of its own motion whether the contested decision was actually adopted by the competent member of the Commission.

45. The first thing to be noted in connection with that verification is that the decision adopted by the member of the Commission responsible for competition matters does not in fact bear a date nor does it mention the legal provisions on which it is based. It can however be seen from the original of the decision, which has been produced to the Court, that it is to be found on the back of the memorandum of 6 November 1984 addressed to the Secretariat General and that that document contains the relevant information.

46. However, the decisive factor is that the applicants were given a certified copy of the full text of the decision adopted by the competent member of the Commission. The authenticity of the certificate on the copy is not contested by the applicants. Furthermore, nothing in the proceedings thus far gives any grounds for believing that there was anything abnormal in the conditions under which that copy was certified.

47. We thus have before us a decision which has been adopted in the name of the Commission by the member of the Commission responsible for competition matters.

(c) *Inadequate statement of the reasons on which the decision is based*

48. The *applicants* are of opinion that the contested decision infringes the requirement in Article 190 of the EEC Treaty that measures are to state the reasons on which they are based because it does not mention their letter of 6 November 1984 or deal with the matters raised in it. In that letter, they set out the reasons for which they were not prepared to submit voluntarily to an investigation.

49. The *Commission* replies that it was not required to refute AKZO BV's arguments of 6 November 1984. Furthermore, the decision complies with the requirements laid down by Article 14 (3) of Regulation No 17 regarding the statement of the reasons on which a decision ordering an investigation is based.

50. That provision sets out the essential elements of the statement of reasons for a decision ordering an investigation. It is to specify 'the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15 (1) (c) and Article 16 (1) (d) and the right to have the decision reviewed by the Court of Justice'.

51. The objective which the contested decision was intended to achieve, namely to investigate circumstances which might indicate the existence of an abuse of a dominant position in the benzoyl peroxide market, is set out in the statement of the reasons for that decision. Reference is also made to the enforcement measures provided for in Article 15 (1) (c) and Article 16 (1) (d) of Regulation No 17. Articles 1 and 2 specify the subject matter of the investigations to be carried out and the time at which these are to take place. Finally, the

third paragraph of Article 3 of the decision refers to the possibility of instituting proceedings against it in the Court of Justice in accordance with Article 173 of the EEC Treaty.

52. By complying with Article 14 (3) of Regulation No 17, the Commission has fulfilled its obligation under Article 190 of the EEC Treaty to state the reasons on which its decision is based.[10] Moreover, the defendant mentioned in the statement of reasons the fact that the applicants had refused to submit voluntarily to an investigation and that a decision had therefore to be adopted requiring the applicants to submit to the scheduled investigations.

53. The Commission was not required to reply to the reasons which the applicants advanced for their refusal to submit to an investigation. As has already been mentioned, such a refusal is the normal case envisaged by Article 14 (3) of Regulation No 17 and not an exceptional situation which might require a special statement of reasons going beyond the matters which Article 14 (3) requires to be specified.

54. The submission that the decision does not contain an adequate statement of the reasons on which it is based is therefore unfounded.

(d) *Failure properly to consult the competent national authorities*

55. The *applicants* refer to the practice which has developed in regard to the consultation of the authorities in the Member States before a decision is adopted ordering an investigation: the draft decision is submitted to the national authorities and commented on, the subject matter and results of the hearing are set out in writing. The national authorities are informed at least two weeks in advance. It is not possible for those conditions to have been fulfilled in the very short period of time within which the contested decision was adopted.

56. At the hearing, the applicants produced a copy of the instructions issued by the Netherlands Ministry of Economic Affairs in which an official of that ministry was instructed to be present during the investigations. That document refers to an investigation under Article 14 (1) of Regulation No 17, a letter from the Commission dated 29 October 1984 and telephone conversations of 26 October and 5 November 1984.

57. The *Commission* contends that it can be seen from the minute of the consultation with the competent Netherlands authority that such consultation actually took place on 6 November 1984. Because of the urgency of the decision, the competent British authority was consulted by telephone. That is established by a letter from the Office of Fair Trading dated 20 December 1984. The drafting of a written minute is not an essential factor in the consultation of the competent authority.

58. The consultation of the Member States under Article 14 (4) of Regulation No 17 is not regulated in any greater detail either in that regulation or in the implementing regulations adopted subsequently. All that can be inferred from the last sentence of Article 14 (2) of Regulation No 17, which in regard to ordinary investigations requires that the competent authority of the Member State in whose territory the investigation is to be carried out is to be informed in good time thereof, is that the competent authority of

10 — See the judgment of 26 June 1980 in Case 136/79, *National Panasonic (UK) v Commission*, [1980] ECR 2033.

the Member State must also be consulted in good time in the case of a compulsory investigation. However, the expression 'in good time' is extremely relative and may vary in import according to the urgency of the decision to be adopted. In any event, it would appear that the authorities of the Member States were consulted in good time if they were in a position to inform the Commission of their views or of any objection they might have before the investigation was carried out.

59. Since investigations had already been carried out in the context of the Commission's inquiry into the applicants' conduct, the authorities concerned were not being consulted in regard to a new procedure as yet unknown to them. Consultation with officials of the competent Netherlands authority took place during a meeting of the Advisory Committee on Restrictive Practices and Dominant Positions in Brussels. The British authority was consulted by telephone. It is not known whether the national authorities objected to the way in which they were consulted and the applicants have not alleged that they do. There is no evidence to suggest that the consultations were not properly carried out. That is also true in regard to the argument that no minute of the consultation with the British authorities was drawn up, since there is no legal requirement that this should be done.

60. The fact that the Netherlands civil servant who accompanied the Commission's officials during the investigation had instructions which referred to a voluntary investigation is also of no relevance in regard to the lawfulness of the decision ordering the investigation. Although those instructions are not dated, it can be seen from the facts therein mentioned that they were issued after the Commission had informed the Netherlands authorities of the voluntary investigation which was initially planned.

61. The fact that when the investigations were carried out on 7 November 1984, the Netherlands civil servant concerned had not been issued, following the consultation which took place with the Netherlands authority on the preceding day, with new instructions referring expressly to the compulsory investigation under Article 14 (3) of Regulation No 17 has no effect on the lawfulness of the Commission's decision ordering the investigation.

62. The submission alleging inadequate consultation of the competent authorities of the Member States cannot therefore succeed.

(e) *Infringement of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*

63. The *applicants* refer first to the particular nature of the investigation procedure introduced by Article 14 (3) of Regulation No 17, which the Commission may initiate without being authorized so to do by any other body.

64. They accept however that in the present state of Community law, the Commission is not required to obtain authority from an independent body in order to carry out such an investigation. However, the absence of such a guarantee can only be compensated for by ensuring, by means of other procedural guarantees of equal value, that the procedure is conducted in a fair and even-handed manner.

65. Consideration of the three other submissions as to form (misuse of the delegation of authority, inadequate statement of reasons, failure properly to consult the competent national authorities) shows that, having regard in particular to the extremely short period of time within which the decision at issue was adopted, the

procedural guarantees laid down in Article 14 (3) of Regulation No 17 were certainly not respected.

66. The manner in which the contested decision was adopted is therefore contrary to the principles laid down in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms since the procedure required by law was not followed.

67. The *Commission* denies that this submission has any independent significance and contends that all guarantees and conditions contained in Article 14 of Regulation No 17 were respected.

68. Article 8 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 provides essentially that everyone has the right to respect for his private and family life, his home and his correspondence. That right is available not merely to natural persons but also to legal persons in so far as it can be applied to them.

69. According to Article 8 (2), there is to be no interference by a public authority with the exercise of that right 'except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

70. The Court of Justice has already decided, in its judgment of 27 June 1980 in Case 136/79, cited above, that Article 14 (3) of Regulation No 17 is in conformity with that admittedly very wide limitation. It should be added however that Article 8 of the above-mentioned Convention does not require that the interference by a public authority with the exercise of that right should have been previously authorized by another, independent body.

71. It is thus possible for there to be an infringement of Article 8 of the Convention only if the procedural guarantees in Article 14 of Regulation No 17 have not been respected. It has already been seen, when considering the applicants' other three submissions as to form, that that is not the case.

72. The submission alleging an infringement of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms must therefore also fail.

II — *Submissions as to substance*

73. In their reply, the *applicants* put forward two new submissions which were not expressly set out in their application: infringement of their right to a fair hearing and misuse of powers.

74. The applicants put forward the following arguments to justify their advancing those submissions only after the proceedings had commenced.

75. At the time when the proceedings were initiated, they were convinced that the threat made by the Commission official in charge of the inquiry that further investigations would be carried out in regard to the plastics sector if the applicants did not accept the statement of objections in regard to the flour additives sector was to be attributed to a personal initiative on the part of that official. They did not believe however, that the Commission would approve of such unconscionable conduct. However, the Commission made clear in its defence that it fully and completely approved of the way in which its official had dealt with the matter. For the applicants, that was a new fact which first came to light in the course of the written procedure.

76. In its rejoinder, the *Commission* dealt with the substance of the two new submissions. It was only at the hearing that it first expressed doubts as to whether those submissions had been properly introduced into the proceedings in the first place.

77. I am of opinion that the Court should agree to consider the two additional submissions on the basis of Article 42 (2) of the Rules of Procedure, as the applicants have requested.

(a) *Infringement of the right to a fair hearing*

78. The *applicants* rely on the provisions of Article 19 (1) of Regulation No 17, according to which the Commission is to give the undertaking concerned the opportunity of being heard on the matters to which the Commission has taken objection. That right is infringed if, as in this case, the decision of the undertaking to contest the statement of objections in regard to a particular sector leads to investigations being undertaken by way of sanction in another sector.

79. The *Commission* contends that it did not interfere with the applicants' exercise of their right to a fair hearing. It is correct to say that the fact that the applicants contested the statement of objections concerning the flour additives sector was of such a nature as to justify additional investigations being carried out in regard to the plastics sector. However, that does not constitute a sanction but is merely the consequence of its becoming clear that the applicants were unwilling to settle the matter in the way proposed by the Commission.

80. I cannot see what significance is to be attributed to the linking of the applicants' reaction to the statement of objections on the one hand and the continuance of the proceedings in regard to the plastics sector on the other from the point of view of an infringement of the right to a fair hearing or from that of an adverse effect on the rights of the defence. If such a threat on the part of the Commission — assuming there was one — was unsuccessful, it would be of no consequence for the lawfulness of the decision at issue here since the above-mentioned rights would have in no way been adversely affected. If on the other hand such a threat was successful then those rights might possibly have been so affected when the reply to the statement of objections was being drafted. Whether the applicants' rights were affected in that way and whether that was of any consequence would be matters falling for consideration in the context of the proceedings relating to the Commission's final decision concerning the applicants' behaviour vis-à-vis their competitors, namely Case 62/86. This submission is of no significance for the present proceedings.

(b) *Misuse of powers*

81. The *applicants* are of opinion that the Commission used its investigating powers for a purpose other than that for which they were granted in Article 14 (3) of Regulation No 17 and is therefore guilty of a misuse of powers. The Commission was not interested in obtaining further information concerning the plastics sector but intended rather to carry out the threat made during the telephone conversation on 1 October 1984, namely to pursue its investigations in regard to the plastics sector if the applicants did not accept the complaints concerning the additives sector contained in the statement of objections.

82. The *Commission* replies that the purpose of the further investigations was to make certain whether or not the applicants had abused their dominant position on the benzoyl peroxide market in regard to supplies of that product to the plastics sector. ECS had submitted a complaint and the procedure concerned the applicants' behaviour on the market in both sectors. Since no agreement could be reached concerning the settlement proposed by the Commission for the plastics sector, it became necessary to pursue or bring to a close the procedure in the proper manner.

83. The Court heard a series of witnesses on the contents of the telephone conversation of 1 October 1984. On the basis of that evidence I am of opinion that what occurred was as follows.

84. The Commission official responsible for conducting the competititon procedure asked the head of AKZO Chemie BV's legal department for his reaction to the statement of objections. When he was informed that the substance of the objections would in all probability be very largely contested, the official said that he therefore assumed that the bilateral 'agreement' no longer existed, or words to that effect.

85. That 'agreement' (of July 1984) was described by the official as essentially a personal conversation between him and the head of AKZO Chemie BV's legal department to the effect that the investigation into the flour additives sector would first be concluded and a statement of objections would be issued. If no substantive defence to those objections (concerning the flour additives sector) was put forward and if the applicants gave undertakings regarding their future conduct in the plastics sector, the procedure could be brought to a satisfactory conclusion.

86. From the point of view of the head of AKZO Chemie BV's legal department, that July 1984 accord was not really an 'agreement' but rather a discussion on ways of bringing to an end the proceeding which had been brought against the applicants.

87. Can there be a threat and, consequently, a possible misuse of powers, when it is established that an 'agreement' which one of the two parties did not regard as binding was described as terminated and it was then announced that the investigation procedure would continue in the sector in respect of which it had been suspended?

88. It is possible that the applicants, subjectively, regarded the Commission's conduct as a threat. However, it must be borne in mind that even if there was a threat, the conduct intimated was not unlawful, but in fact perfectly lawful conduct on the part of the Commission. A complaint had, after all, been submitted by ECS alleging abuse of a dominant position in regard to all uses of benzoyl peroxide and other organic peroxides. The procedure had been opened in regard to all uses of those products and its practcial implementation had merely been temporarily suspended in regard to one particular sector.

89. Since the investigations in regard to the flour additives sector had been completed, it was appropriate to proceed with the investigations into the other sector, namely plastics. The Commission was not merely entitled to do so, it was in fact required to

do so since ECS had submitted a complaint to it and the Commission also had evidence which suggested that the suspicions concerning an abuse of a dominant position were not wholly unfounded. Had the Commission adopted a decision discontinuing the procedure in respect of the plastics sector that decision could have been challenged before the Court by ECS. [11]

90. No blackmail, no threat and, consequently, no misuse of powers on the part of the Commission may be seen in the announcement that the pending procedure was to be properly pursued. The question which would arise is much more whether the partial discontinuance of the procedure without a formal decision, as the original 'agreement' sought to achieve, could have been reconciled with the Commission's obligation to ensure that competition in the Community is not distorted. That question would have to be answered in the negative since Mr Schuddeboom and Mr Joshua both agreed in their evidence that account was to be taken of the interests of ECS (damages, consent to the settlement).

91. The applicants' submission alleging a misuse of powers must therefore also fail.

92. Since the action for annulment must therefore be dismissed, it is no longer necessary to deal with the applicants' further claim for return of the papers and documents seized by the Commission during the investigation carried out on the basis of the contested decision and for an order prohibiting the Commission from using them in any way in the future. That claim could only have been formulated on the basis that the decision would be declared void. If it is not declared void, such a claim is pointless.

93. It should also be pointed out that even if the action for annulment were successful, such a claim would not be admissible since, under Article 176 of the EEC Treaty, it is for the institution whose act has been declared void to take the necessary measures to comply with the judgment. It is in any event not for the Court to specify those measures in the operative part of its judgment.

C — Conclusion

94. On the basis of the foregoing, I propose that the Court dismiss the application and order the applicants to pay the costs.

11 — See the judgment of the Court of 25 October 1977 in Case 26/76, *Metro* v *Commission*, [1977] ECR 1875, and the judgment of 11 October 1983 in Case 210/81, *Demo-Studio Schmidt* v *Commission*, [1983] ECR 3045.