# ORDER OF THE COURT OF FIRST INSTANCE (First Chamber)
9 June 1997 *

In Case T-9/97,

**Elf Atochem SA**, a company incorporated under French law, whose head office is at Puteaux, France, represented by Xavier de Roux, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

applicant,

v

**Commission of the European Communities**, represented by Wouter Wils, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the reports and annexes thereto drawn up by the Commission's officials on 18, 19 and 20 November 1996 following an inves-

* Language of the case: French.

tigation pursuant to Article 14(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), carried out at the applicant's head office in the context of an investigation into the existence of certain agreements and concerted practices incompatible with Article 85(1) of the Treaty in the olefin and polyolefin sector (Case No IV/E-2/35.765),

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

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

Registrar: H. Jung,

makes the following

**Order**

**Background to the dispute**

1 On 8 November 1996, the Commission's Directorate-General for Competition (DG IV) sent the applicant a fax informing it that, in the context of case

No IV/E-2/35.765, concerning an investigation into the existence of certain agreements or concerted practices incompatible with Article 85(1) of the Treaty in the olefin and polyolefin sector, the Commission had decided to undertake an investigation into, *inter alia*, the applicant company, pursuant to Article 14(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

2 The applicant agreed to submit to that investigation which took place on 18, 19 and 20 November 1996.

3 During those three days, the Commission's officials made copies of a number of documents and talked to representatives of the applicant. They suggested that a member of the applicant's staff should take a note of the oral explanations given. That suggestion was rejected by the applicant's representatives.

4 Having themselves taken a note of those explanations, the Commission's officials submitted to the applicant's representatives a document containing a summary of what the representatives had said during the discussions on 18 November 1996

(Annex 1 to the application). That document is described as a 'report' by both the Commission's authorized officials and the applicant.

5 The applicant's representatives refused either to verify the accuracy of the above-mentioned document or to sign it. They did, however, object to the manner in which the document had been drawn up. It was finally signed by the Commission's officials and by the two representatives of the French authority competent within the meaning of Article 14(5) of Regulation No 17, that is to say the Direction générale de la concurrence, de la consommation et de la répression des fraudes (Directorate-General for competition, consumer protection and the prevention of fraud) (DGCCRF).

6 The Commission's officials also drew up a second document containing a summary of the statements made by the applicant's representatives on 19 and 20 November (Annex 2 to the application). As in the case of the first report, those representatives refused to take part in drawing up the document or to sign it. That document is also described as a report by the parties.

**Procedure and forms of order sought**

7 Those were the circumstances in which, by application lodged at the Registry of the Court of First Instance on 17 January 1997, the applicant brought the present action, claiming that the Court should annul in their entirety the reports and the annexes thereto drawn up following the investigation carried out at its premises on 18, 19 and 20 November 1996.

8 By document lodged at the Court Registry on 18 February 1997, the Commission raised a plea of inadmissibility in which it claims that the Court should:

— declare the action inadmissible pursuant to Article 114 of the Rules of Procedure;

— order the applicant to pay the costs.

9 In its observations on the plea of inadmissibility, lodged on 20 March 1997, the applicant claims that the Court should 'accord the applicant the benefit of its earlier written submissions'.

## Law

### *Admissibility*

#### Arguments of the parties

10 The Commission points out that acts or decisions against which an action for annulment may be brought are measures which produce binding legal effects capable of affecting the interests of the applicant by bringing about a significant change in its legal position. It stresses that in the case of acts or decisions adopted by a procedure involving several stages, only those measures which definitively lay down the position of the institution on the conclusion of that procedure constitute, in principle, acts open to review, and not provisional measures intended to pave the way for the final decision (Case 60/81 *IBM* v *Commission* [1981] ECR

2639, paragraph 8 et seq., and Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28).

11 The defendant maintains that the documents challenged by the applicant do not produce legal effects capable of affecting its interests by bringing about a significant change in its legal position. They are simply reports recording the notes taken by the Commission's officials during the investigation.

12 Furthermore, were the Commission to use the reports in any decision it took concerning the applicant as evidence of anti-competitive conduct, the applicant would have every opportunity of challenging that use of the reports before the Commission and, if necessary, before the Community courts.

13 Finally, the defendant points out that while it is possible to challenge a decision by the Commission to make a formal request for information under Article 11(5) of Regulation No 17 or to undertake a formal investigation under Article 14(3), no such challenge is provided for in relation either to a simple request for information under Article 11(1) of Regulation No 17 or to an investigation upon production of the authorization referred to in Article 14(2), as was the case in this instance.

14 The applicant claims that the very existence of the documents in issue constitutes an act adversely affecting it because, although described as preparatory documents,

they do have a legal effect since they will inevitably influence developments in the case and the preparation of the final decision. The documents therefore have a detrimental effect on its legal position.

15 It maintains that, since the Court of Justice has recognized the possibility of challenging a request for information based on Article 11 of Regulation No 17 (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283 and Case 27/88 *Solvay* v *Commission* [1989] ECR 3355) and since the Commission's officials misused the procedure under Regulation No 17 in this case, by seeking to obtain written answers to questions on the basis of Article 14, a measure that ought to have been based on Article 11 of the regulation, this action should be held admissible.

16 The applicant concludes that, rather than run the risk of nullifying the final act which may be adopted by the Commission, it would seem preferable, in the interests of the sound administration of justice and providing greater protection for the right to a fair hearing, to annul the acts adversely affecting the applicant before they produce more serious effects liable to vitiate the whole of the procedure.

17 In its observations on the plea of inadmissibility, moreover, the applicant argues that the documents are far from being mere 'notes recording the oral explanations given', since the Commission's officials asked both the applicant's representatives and the representatives of the national authorities to sign them. It stresses that they constitute veritable reports which the Commission is reserving the right to use as evidence or factors in support of its decision.

*Findings of the Court*

18 Pursuant to Article 114 of the Rules of Procedure, the Court may, where a party so requests, decide on admissibility without going into the substance of the case. In this case, the Court of First Instance considers that it is sufficiently informed by the documents before it and can decide on the application without opening the oral procedure or going into the substance of the case.

19 In order to decide whether the action is admissible, it must be borne in mind that acts or decisions against which an action for annulment may be brought under Article 173 of the Treaty are measures which produce binding legal effects capable of affecting the interests of the applicant by bringing about a significant change in its legal position (*IBM*, cited above, paragraph 9).

20 In the case of acts or decisions adopted by a procedure involving several stages, an act is in principle challengeable only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not an intermediate step intended to pave the way for the final decision (see *IBM*, cited above, paragraph 10; Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 42; *Cimenteries CBR and Others*, cited above, paragraph 28; Case T-186/94 *Guérin Automobiles* v *Commission* [1995] ECR II-1753, paragraph 39; and Case T-134/95 *Dysan Magnetics and Review Magnetics* v *Commission* [1996] ECR II-180, paragraph 20).

21 In this case, therefore, the Court must determine whether the two documents — including the annexes thereto — described as reports, which have been challenged by the applicant, are themselves of a kind to produce legal effects capable of affecting the interests of the applicant or whether the drawing-up of the documents is rather a preparatory step whose legality could be challenged in an action against any final decision, whilst still providing sufficient protection for the parties concerned (Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 19, and *Cimenteries CBR and Others*, cited above, paragraph 31). Only in the case of measures immediately and irreversibly affecting the legal situation of the undertaking concerned could an action for annulment justifiably be held admissible before the administrative procedure is completed (*Cimenteries CBR and Others*, cited above, paragraph 42, and *Dysan Magnetics and Review Magnetics*, cited above, paragraph 21).

22 The investigation procedure referred to in Article 14 of Regulation No 17 is not aimed at terminating an infringement or declaring that an act is unlawful, but has the sole object of enabling the Commission to gather the necessary information to check the actual existence and scope of a given factual and legal situation (Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 21). Any decision establishing an infringement of Article 85 or Article 86 of the Treaty, pursuant to Article 3(1) of Regulation No 17, is taken only at a later stage.

23 Furthermore, Article 14(1)(c) of Regulation No 17 empowers the officials authorized by the Commission to ask for oral explanations during and for the purposes of the investigation. The fact that they have that power to request information on specific questions arising from the books and business records which they examine is not sufficient to conclude that an investigation is identical to a procedure intended to obtain information within the meaning of Article 11 of Regulation No 17 (*National Panasonic*, cited above, paragraph 15).

24 In any event, while a formal decision to undertake an investigation may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (see Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 26), a request for explanations or information that is not in the nature of a formal decision cannot be deemed to be similarly decisive.

25 Finally, the issues concerning the way in which the investigation was carried out, including the drawing-up of the reports, may, if appropriate, be examined in the context of an action challenging any final decision of the Commission.

26 In those circumstances, since the documents challenged by the applicant cannot be considered to affect its legal position immediately and irreversibly, their existence is not such as to justify holding an action for annulment admissible before the administrative procedure is completed.

27 It follows from all the foregoing that the action must be declared inadmissible.

## Costs

28 In accordance with Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs, if they have been

applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby orders:

**1. The action is dismissed as inadmissible.**

**2. The applicant shall bear all the costs.**

Luxembourg, 9 June 1997.

H. Jung

Registrar

A. Saggio

President