Case 85/87 R

Dow Chemical Nederland BV
v
Commission of the European Communities

(Competition — Commission investigations)

Order of the President of the Court, 28 October 1987 4367

Summary of the Order

Application for interim measures — Interim measures — Conditions for granting — Serious and irreparable damage

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

ORDER OF THE PRESIDENT OF THE COURT
28 October 1987 *

In Case 85/87 R

Dow Chemical Nederland BV, a company incorporated under Netherlands Law whose registered office is at 45 Aert van Nesstraat, 3012 CA Rotterdam, represented by P. V. F. Bos, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 81, rue Zithe,

applicant,

* Language of the Case: Dutch.

V

Commission of the European Communities, represented by its Agents R. Barents and N. Koch, Members of its Legal Department, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

concerning primarily the applicant's application for an interim order prohibiting the Commission, pending the Court's judgment on the main application, from using the various documents and information which it obtained during the investigation carried out on 20 and 21 January 1987 at its premises and requiring the Commission to suspend, as regards the applicant, the inquiry which it is conducting in Cases IV 31865 and IV 31866 and to refrain from opening new inquiries into the same matter without first providing a reasonable and proper definition of the markets and products concerned by the inquiry and of the supposed Treaty infringement and, secondly, providing evidence capable of justifying the conduct of the inquiry,

THE PRESIDENT OF THE FIFTH CHAMBER,

replacing the President of the Court pursuant to Articles 85 (2) and 11 of the Rules of Procedure,

makes the following

Order

1 By application lodged at the Court Registry on 23 March 1987 Dow Chemical Nederland BV (hereinafter referred to as 'Dow') brought an action under the second paragraph of Article 177 of the EEC Treaty for the annulment of the Commission Decision of 15 January 1987 (Cases IV 31865, PVC, and IV 31866, LdPE) ordering an investigation under Article 14 (3) of Regulation No 17/62 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the EEC Treaty (Official Journal, English Special Edition 1959-62, p. 87).

2 By application lodged at the Court Registry on 5 October 1987 the applicant requested the Court under Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure to make an interim order requiring the Commission, pending the Court's judgment on the main application:

to refrain from using the various documents and information which it obtained during the investigation carried out on 20 and 21 January 1987 at its premises;

in the alternative, to refrain from using the information obtained during the said investigation which does not concern PVC and LdPE;

to suspend, at least as regards the applicant, the inquiry which it is conducting in Cases IV 31865 and IV 31866 and to refrain from opening new inquiries into the same matter without first giving a reasonable and proper definition of the markets and products concerned by the inquiry and of the supposed Treaty infringement and secondly providing evidence capable of justifying the conduct of the inquiry;

to lodge at the Court Registry, within 10 days of the order, all the documents and information collected during the investigation.

3 The defendant submitted its written observations on 21 October 1987. The parties presented oral argument on 23 October 1987.

4 Before examining the merits of this application for interim measures, a brief account should be given of the background to the case and in particular the facts which led the Commission to adopt the aforesaid decision.

5 The Commission had, according to its own account, come into the possession of information revealing the existence of agreements or concerted practices between certain producers and suppliers of PVC and polyethylene, including LdPE, in the EEC. Those agreements or concerted practices, which had not been notified to the Commission, fixed the selling prices, quotas and sales targets or objectives of those products in the EEC.

6 On the basis of the information in its possession, the Commission considered that there was reason to believe that the applicant was a party to those agreements or concerted practices which, should their existence be proved, might constitute a serious infringement of Article 85 (1) of the EEC Treaty. It therefore decided to undertake an investigation pursuant to Article 14 (3) of Regulation No 17/62 of the Council and for that purpose adopted the aforesaid decision of 15 January 1987.

7 On 20 and 21 January 1987 two officials authorized by the Commission, accompanied by an official from the Competition and Mergers Directorate of the Netherlands Ministry of Economic Affairs presented to Dow's representatives the Commission decision of 15 January 1987 ordering an investigation under Article 14 (3) of Regulation 17. The official of the Netherlands Ministry of Economic Affairs at the same time presented a written investigation warrant issued by the Directorate-General for Competition.

8 Dow did not resist the investigation but at the time it put forward three complaints against the decision ordering the investigation and the manner in which it was implemented. The first two complaints concern the defective reasoning of the decision with respect to the choice of markets and the failure to specify, even approximately, the period during which the alleged infringements were committed. The third complaint concerns the unlawful manner in which the investigation was carried out by the Commission official.

9 Article 186 of the EEC Treaty provides that the Court of Justice may in any cases before it prescribe any necessary interim measures.

10 In order for interim measures such as those requested to be granted, Article 83 (2) of the Rules of Procedure requires that applications for such measures should state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima facie case for the interim measures applied for.

11 The Court has consistently held that the urgency of an application for interim measures, as referred to in Article 83 (2) of the Rules of Procedure, must be assessed on the basis of whether it is necessary to grant such measures in order to avoid serious and irreparable damage to the party seeking them.

12 The applicant has stated that the main aim of its application for interim measures is to put an end to the steps taken by the Commission to render nugatory the Court's judgment on the main application should it be in the applicant's favour. The applicant, who alleges that the Commission carried out further investigations at the premises of other undertakings after the investigation carried out at its premises and decided to pursue the inquiry in Cases IV 31865 and IV 31866, argues that the Court's judgment might be rendered nugatory for three reasons:

either the Commission will obtain further information on the basis of the information collected, unlawfully in the applicant's view, at its offices; or

the Commission will obtain information concerning the applicant during its inquiry in Cases IV 31865 and IV 31866 on an unlawful basis, since the market in question is imprecisely defined, and on the basis of a presumption of a Treaty infringement which is unlawful by reason of its being imprecisely defined; or

the Commission will obtain further information concerning the applicant during its inquiry in Cases IV 31865 and IV 31866 on the basis of unlawful or unsubstantiated evidence relied upon in order to justify the investigation in question.

13 The applicant considers that by its conduct the Commission is creating a situation in which it will be impossible in the future to distinguish information obtained lawfully from information obtained unlawfully. That situation would deprive the applicant of the benefit of a judgment in its favour and would infringe its rights of defence and in itself cause the applicant serious and irreparable damage which could be prevented if the interim measures sought were granted.

14 The applicant claims further that the urgent need for the interim measures is clearly apparent from the fact that the Commission is now intensifying the inquiry which it is conducting in Cases IV 31865 and IV 31866 and refuses to refrain from using, whilst the applicant's case is pending before the Court, the information which it obtained during the investigation in question and to lodge it at the Registry of the Court.

15 In the written and oral observations which it submitted during the interlocutory proceedings the Commission expressed certain reservations concerning the admissibility of the application for interim measures. It considers that, in so far as this application seeks an order requiring the Commission to put an end to its inquiry in Cases IV 31865 and IV 31866, when that inquiry concerns not only the applicant but also other undertakings in the chemical industry, it should be declared inadmissible. In so far as its purpose is to put an end to the inquiry relating to those undertakings, it is unconnected with the object of the main application, which concerns solely the Commission's investigation decision of 15 January 1987 concerning the applicant and its implementation on 20 and 21 January 1987.

16 The President of the Court considers that the applicant has failed to put forward any conclusive argument demonstrating that it will suffer serious and irreparable damage if the interim measures sought are not granted.

17 It must be remembered that the Court has held that, if an investigation decision were annulled by the Court in the exercise of its powers of judicial review, the Commission would in that event be prevented from using, for the purposes of a proceeding in the matter of an infringement of Article 85 of the EEC Treaty, any documentary evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might be annulled in so far as it was based on such evidence (see *inter alia* the order of the President of the Court of 26 March 1987 in Case 46/87 R *Hoechst* v *Commission* [1987] ECR 1549).

18 The President of the Court considers that the resultant obligation on the Commission and any penalty imposed in the event of its non-observance would in any event prima facie remedy damage such as that alleged by the applicant, with the result that it cannot be regarded as serious and irreparable.

19 Consequently, it must be held that, in the absence of serious and irreparable damage, the applicant has failed to demonstrate the urgency of its application.

20 Consequently, it does not appear necessary to examine whether the other conditions required for the grant of interim measures are met or to consider the question of admissibility raised by the Commission.

21 It follows from the foregoing that the application for interim measures must be dismissed.

On those grounds,

THE PRESIDENT OF THE FIFTH CHAMBER,

replacing the President of the Court pursuant to Article 85 (2) and 11 of the Rules of Procedure,

by way of interim decision,

hereby orders as follows:

(1) The application for interim measures is dismissed.

(2) Costs are reserved.

Luxembourg, 28 October 1987.

P. Heim
Registrar

G. Bosco
President of the Fifth Chamber,
acting as President