

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 December 1985

relating to a proceeding under Article 86 of the EEC Treaty
(IV/30.698 – ECS/AKZO)

(Only the Dutch text is authentic)

(85/609/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the European
Economic Community,

Having regard to Council Regulation No 17 of
6 February 1962, First Regulation implementing Articles
85 and 86 of the Treaty (1), as last amended by the Act of
Accession of Greece, and in particular Articles 3 and 15
thereof,

Having regard to the complaint dated 15 June 1982 made
to the Commission pursuant to Article 3 of Regulation
17 by Engineering and Chemical Supplies (Epsom and
Gloucester) Ltd of Stonehouse, Gloucestershire, United
Kingdom that AKZO Chemie BV of Amersfoort,
Netherlands had infringed Article 86,

Having regard to the Commission Decision of 8 June
1983 to initiate proceedings in this case,

Having regard to Commission Decision 83/462/EEC of
29 July 1983 relating to a proceeding under Article 86 of
the EEC Treaty (2) ordering interim measures,

Having given the undertaking concerned the opportunity
to make known its views on the objections raised by the
Commission, in accordance with Article 19 (1) of
Regulation No 17 and with Commission Regulation No

99/63/EEC of 25 July 1963 on the hearings provided for
in Article 19 (1) and (2) of Council Regulation No 17 (3),

After consulting the Advisory Committee on Restrictive
Practices and Dominant Positions,

Whereas:

I. THE FACTS

Introduction

1. This Decision arises from an application pursuant
to Article 3 of Regulation No 17 by Engineering
and Chemical Supplies (Epsom and Gloucester)
Ltd (ECS) a small producer of the organic per-
oxide benzoyl peroxide in the United Kingdom.
ECS alleged that AKZO Chemie BV, part of the
large multinational group AKZO had, contrary to
Article 86 of the EEC Treaty, abused the domin-
ant position which it holds in the EEC organic
peroxides market. The alleged abusive conduct
involved the implementation of a policy of
selective and below-cost price-cutting designed to
damage the business of ECS and exclude it as a
competitor. It was claimed by ECS that these
exclusionary pricing tactics had been concentrated
in a relatively specialized sub-market (the flour
additives sector) in the United Kingdom and
Ireland which then accounted for the majority of
ECS's turnover so that it would not be able to
finance its planned expansion to the much broader
EEC market for organic peroxides for the plastics
industry.

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) OJ No 252, 13. 9. 1983, p. 13.

(3) OJ No 127, 20. 8. 1963, p. 2268/63.

2. The behaviour of which ECS complained allegedly commenced at the end of 1979 when representatives of AKZO Chemie BV and its United Kingdom subsidiary AKZO Chemie UK Ltd (1) visited ECS and threatened reprisals in the flour additives sector unless ECS agreed to abandon the polymer (or 'plastics') market, especially exports from the United Kingdom to Germany. ECS claimed that despite the prompt granting of an injunction by the High Court in London AKZO had subsequently implemented its threats and had attempted to put ECS out of business by a sustained and systematic campaign of price cutting. The Commission carried out investigations pursuant to Article 14 (3) of Regulation No 17 without prior warning at AKZO Chemie and AKZO UK in December 1982 and some months later issued an interim-measures decision requiring the United Kingdom subsidiary to return to the profit levels which it had been applying before the alleged threats were made and implemented.
3. AKZO did not bring an action before the Court of Justice for the annulment of the interim-measures decision but in the present proceedings it has vigorously contested not only the factual evidence obtained by the Commission but also the application of EEC competition rules to those facts.
5. AKZO UK is a wholly owned subsidiary of AKZO Chemie. It is responsible for the specialty chemicals business of AKZO Chemie in the United Kingdom and has both manufacturing and marketing activities. Besides being one of several facilities in the EEC where AKZO produces organic peroxides for the polymer industry, AKZO UK also manufactures benzoyl peroxide compounds for use as a bleaching agent in the commercial baking of bread together with other associated flour or milling additives.

AKZO UK had a total turnover in 1984 of £ 65 million (110 million ECU). The flour additives business (UK and elsewhere) involved total sales of £ ... (... ECU).
6. ECS is a small privately owned company founded in 1969 by a former employee of Novadel, a company which was later absorbed into AKZO UK to form its flour additives business. ECS's principal activity was originally the manufacture and marketing of flour additives including benzoyl-peroxide-based bleaching agents but from 1979 onwards it has also produced benzoyl peroxide for use as an initiator in the polymer industry (the 'plastics' application). Since 1981, ECS has had a minority shareholding in Pergan, a company in Germany which now acts as its agent for the sale of organic peroxide initiators in continental Europe.

The undertakings

4. AKZO Chemie and its subsidiaries form the specialty chemicals division of the major Dutch multinational chemical and fibres group AKZO NV. AKZO NV had a total net turnover world-wide in 1984 of Fl 16 520 million (6 608 million ECU), and net profits of Fl 752 million (300 million ECU). The net turnover of AKZO Chemie and its subsidiaries in 1984 in specialty chemicals was Fl 2 498 million (1 000 million ECU). AKZO NV's annual report for 1984 states that process chemicals for the polymer industry (mainly organic peroxides) made an 'outstanding' contribution to earnings growth.

AKZO Chemie's sales of organic peroxides during 1984 were Fl ... million (... million ECU) (2).

- (1) In the reasoning, the term 'AKZO' is used to indicate the single economic unit formed by AKZO Chemie BV and its subsidiary companies. When the context requires a distinction to be made between parent and subsidiary, AKZO Chemie BV is referred to as 'AKZO Chemie' and AKZO Chemie UK Ltd as 'AKZO UK'.
- (2) Pursuant to Article 21 (2) of Regulation No 17, business secrets are not published in the Official Journal.

The products

7. Organic peroxides are specialty chemicals produced by the reaction of the relevant starting product with hydrogen peroxide (H_2O_2); AKZO does not itself manufacture hydrogen peroxide but is one of the largest customers in the EEC for this product.

The major uses of organic peroxides are related to the polymer industry. Organic peroxides act as 'initiators' in various operations: unlike true catalysts they are entirely consumed in the chemical process.

In the polymer industry, the main fields of application are:

- initiators for the polymerization or copolymerization of vinyl monomers (e.g. PVC, LdPE, polystyrene),
- curing agents for elastomers and resins, and
- cross-linking agents for ethylene/propylene and synthetic rubber or silicones.

8. The first field of application in the polymer industry (called by AKZO the 'high polymer' sector) accounts for about 40 % of consumption and here the customers are the major bulk thermoplastics producers.

Of approximately equal importance is the curing by polymerization of unsaturated polyester resins (the 'unsaturated polyester' field). These resins are cured with reinforcing agents such as glass fibres for use in the production of boat hulls, car repairing kits, electrical parts, etc.

The third usage for organic peroxides (accounting for about 10 % of consumption) is the cross-linking field. The cross-linked polymers are used especially in the manufacture of reinforced coatings for car parts.

9. In the polymer industry, there are no, or no readily available, substitutes for organic peroxides for the high polymer and unsaturated polyester applications. In the third field (a relatively minor usage) however sulphur products can be used as a substitute for organic peroxides in the cross-linking of synthetic rubber. Sulphur compounds have a price advantage over organic peroxides but do not always possess the requisite technical properties and hence are not complete substitutes.

There are various other miscellaneous uses of limited importance for organic peroxides as oxidizing agents and intermediates for synthesis in the cosmetic and pharmaceutical fields.

10. Benzoyl peroxide is the major organic peroxide in terms of production and variety of uses. Together with lauroyl and isononanoyl peroxide it is a product of universal application in the polymer industry and is widely used for both the high polymer and polyester curing purposes. It is also used as the active ingredient in skin-care products. In the context of the present case it is also the preferred bleaching agent for flour. It is this specialized usage (limited in the EEC to the United Kingdom and Ireland) in which ECS concentrated before its expansion to the wider plastics sector in 1979.

Other organic peroxides are low-volume specialist products sometimes with a production of only a few tonnes per year. There is an increasing

tendency towards 'tailor-made' products involving a considerable degree of research and technical cooperation between producer and user to produce a product suitable for the individual customer's requirements.

The organic peroxides market and AKZO's position

11. AKZO Chemie's internal documentation indicates that it considers the 'initiators' area as a single market, although for 'purely pragmatic' reasons the business is organized in different divisions according to the three main fields of use.
12. The organic peroxides market world-wide was estimated by AKZO Chemie in 1981 as worth around Fl 900 million (325 million ECU), of which AKZO NV and its associated companies held just over one-third.

In western Europe (a somewhat wider geographic market than the EEC and including peripheral countries where AKZO also operates) the organic peroxides market is worth in the region of 160 million ECU annually.

In this overall European market AKZO Chemie estimates its share at some 50 %. This share has remained constant over several years and indeed it is one of AKZO's declared business aims to maintain its market share at this level. (Another internal AKZO Chemie document puts its market share in Europe [including the East European Statetrading countries] as high as 55 %).

If the various application fields are considered individually AKZO's market share is approximately of the same order in each. In the high polymer ('HP') sector its market share between 1979 and 1982 was just under 50 % and in the unsaturated polyester ('UP') sector, about 55 %. AKZO is also by far the leading EEC producer of organic peroxides used for cross-linking.

In the individual Member States of the EEC AKZO's own market estimates show that for the 'HP' sector its lowest national market share was ... % in the United Kingdom and the highest was ... % in Italy; for the 'UP' sector its lowest share was in Italy and the highest - ... % - in the Netherlands.

13. The market shares of the other main producers of organic peroxides in western Europe have also remained stable over the past five years. The joint Solvay-Laporte 'Interlox' grouping is in second place in Europe with some ... %; the United States-owned Lucidol/Luperlox operation has ... %;

followed by a number of others like Kenogard (Sweden) and Chimie de France (... % together).

In AKZO's view the second-placed producer Interlox possesses strength in the technical field but is not able because of a relatively weak marketing organization to translate this into a higher market share.

14. AKZO Chemie's documents show that it considers itself to have ' "the" leading position' inorganic peroxides and attributes its strength to factors such as:

- (i) a strong commercial and technical marketing organization;
- (ii) a broad, nearly complete range of products (over 100 compared with Interlox's 40);
- (iii) leading knowledge in the important area of safety and toxicology;
- (iv) production spread and market coverage;
- (v) effort in research and development;
- (vi) application know-how.

In a number of internal documents obtained by the Commission at AKZO Chemie the leading or predominant position of AKZO is stressed, as is the perceived need to maintain its 50 % market share 'by all means'.

AKZO Chemie has manufacturing plants for organic peroxides in the Netherlands, Belgium, Germany and the United Kingdom. It sells these products in all the Member States of the EEC and includes among its customers all the main bulk polymer producers.

The United Kingdom/Ireland flour additives market

15. The use of the major organic peroxide – benzoyl peroxide – as a bleach in the treatment of flour is confined in the EEC to the United Kingdom and Ireland (1). These are the only Member States where its use is authorized under current regulations. It is however also employed for this purpose in North and South America, the Middle East, Japan, Australasia and parts of Africa. Both AKZO UK and ECS serve overseas markets.

(1) Ireland accounts for only a small tonnage and is supplied from the United Kingdom.

Under United Kingdom flour regulations, benzoyl peroxide is the only permitted bleaching agent. Other products which are permitted or required to be added to flour to perform certain functions in the industrial bread baking process are:

- improvers – potassium bromate, ascorbic acid, and azodicarbonamide, used to strengthen the gluten in the soft wheat generally used in the United Kingdom and Ireland,
 - alpha fungal amylases, used to improve the gas-sing of dough,
 - enrichment agents – Vitamin B1, nicotinic acid and reduced iron – a survival from wartime legislation requiring millers to add certain essential nutrients to flour.
16. Most of the bread baked in the United Kingdom and Ireland on a commercial scale is produced by the 'Chorleywood' process, in which improvers are often added at the baking stage, rather than during the production of the flour. Flour additives other than bleach can thus be added to dough by the baker as well as being included in the flour by the miller.

The products are supplied in various strengths according to the requirements of the customer. Benzoyl peroxide is sold in 16 % or 20 % strength mixed with an inert filler. Potassium bromate is normally sold to mills ready for use in 6 % and 10 % strength but also in higher concentrations – 20 %, 50 % or 95 % – for mixing by the customer or for addition to dough.

17. There are only three suppliers in the United Kingdom and Ireland of a full, or nearly full, range of flour additives: AKZO UK, ECS and a third supplier, Diaflex. AKZO UK and ECS both produce their own concentrated benzoyl peroxide (for use as an initiator in plastics as well as for flour) from benzoyl chloride and hydrogen peroxide. For the specialized flour use they then add the inert filler. Diaflex's production of concentrated benzoyl peroxide has been intermittent and it now buys in all its requirements of this product from AKZO UK for mixing to produce a compound for flour treatment.

Potassium bromate and other improvers are bought in bulk form by the flour additive producers from other producers and are mixed with inert fillers in a simple blending operation to give the appropriate concentration.

Enrichment agents (vitamin mixes) are also simple mixtures made from bought-in concentrates and filler, but both AKZO UK and ECS sometimes make arrangements with millers whereby the latter supply their own flour at cost for admixture with concentrates to give the required end product.

Bleaching agents and improvers are only available from AKZO UK, ECS and Diaflex. Large customers of AKZO UK may buy some or all of their improvers from AKZO UK in a concentrated form and then mix to the appropriate strength.

AKZO UK, ECS and Diaflex all include, or used to include, enrichment agents as part of their range of flour additives, and in the 1970s AKZO UK had some 90 % of this business. However as the final product can be produced relatively easily with no special know-how, this led to new entrants and cuts in margins. By 1976 AKZO UK had virtually ceased to supply enrichment agents, only buying in for resale if necessary 'as a service to customers'.

18. AKZO UK is the largest supplier of flour additives in the United Kingdom and Ireland. In 1982 it estimated its United Kingdom market share for bleaching agents (the major flour additive product) at 52 %, with ECS at 35 % and Diaflex only 13 %.

Owing to differences in concentration and other factors, a comparison of the absolute tonnages of all flour additives supplied would give a misleading impression of market share and the Commission therefore obtained details of the value of flour additive sales by AKZO UK and ECS from 1979 to 1984 for the United Kingdom and Ireland and for world sales.

These figures show that from 1979 to 1984 ECS's sales in the United Kingdom and Ireland declined in value from £ ... to £ ..., while AKZO UK's increased from £ ... to £ ... in spite of the substantial fall in price levels.

World-wide AKZO UK's total sales of flour additives have almost doubled (from £ ... in 1979 to £ ... in 1984). ECS's world sales were £ ... in 1979 and £ ... in 1984. Its total sales in 1984 were thus only some 40 % of AKZO UK's.

Detailed sales figures are not available for Diaflex but the Commission estimates its sales at no more

than £ ... per annum in the United Kingdom and Ireland, which would give for 1984 market shares overall of AKZO UK 55 %, ECS 30 %, Diaflex 15 %.

19. The principal customers for flour additives in the United Kingdom are the three major milling groups: RHM, Spillers and Allied Mills (part of Associated British Foods). RHM was until its recent closure also one of the two large milling customers in Ireland. These three groups are of roughly comparable size and until Spillers abandoned baking in 1979 were also the three most important bakers of white bread on an industrial scale ('plant bakers') in the United Kingdom. They account for some 85 % of UK sales of bleaching agents. The 'large independents' (i.e. mills independent of the 'big three') take another 10 % with the 'small independents' taking the balance.

Another important customer for other flour additives (apart from bleaching agent) is British Arkady, a manufacturer of 'dough improvers' for the baking industry. It obtains most of its requirements of potassium bromate, azodicarbonamides and amylases in concentrated form from AKZO UK.

20. The business of RHM has historically been shared by AKZO UK and Diaflex. Spillers was supplied mainly by AKZO UK with Diaflex as secondary supplier until 1982. AKZO UK is now its sole supplier. Allied Mills is supplied primarily by ECS via its central buying agency Provincial Merchants Ltd. Before the dispute with ECS, AKZO UK supplied directly one of the mills in the Allied group but since 1982 has gained several more individual mills from ECS.

ECS used to have some two-thirds of the business of the independents and AKZO UK one-third but since 1982 their respective shares have been reversed.

AKZO UK's customers are therefore RHM, Spillers, certain individual Allied mills and independents. Diaflex sells to RHM and to a few small customers.

ECS does not make any substantial sales of flour additives to mills in Ireland which are supplied from the United Kingdom by Diaflex and AKZO UK with benzoyl peroxide 20 %. The price in Ireland is normally the United Kingdom RHM price plus a premium for extra transport costs.

21. Customers look to a single supplier to meet all their requirements of flour additives, and even if they have a secondary supplier they will obtain from both as full a range as possible. Bleach, improvers and amylases are all sold at different prices but the range of products is offered as a 'package', the attractiveness or otherwise of which will be assessed by the customer as a whole. Customers may obtain their enrichment agents (vitamins) from another source but the inclusion by one of the producers in a package, together with the other flour additives of vitamin mixes at an advantageous price may prove a decisive factor in gaining the whole business of the customer.
22. It was a normal practice, prior to the difference between ECS and AKZO, for the producers of flour additives to make 'assistory' or 'co-producer' deliveries between themselves to meet any shortfall in production or to cover the needs of a producer in a product which it did not make itself. Thus AKZO UK was supplying ECS with a certain part of its requirement of benzoyl peroxide 16 % and buying in vitamin mixes from ECS. Up to the present time AKZO UK has supplied Diaflex with a large part, if not all, of its requirements of bulk benzoyl peroxide.

Prices of flour additives in the United Kingdom prior to the dispute

23. Before the dispute between ECS and AKZO in late 1979, prices of flour additives in the United Kingdom rose steadily in regular increments of 10 %. AKZO itself states in its reply to the statement of objections that 'during the period before the High Court proceedings prices in the United Kingdom flour additives were steadily rising' and it describes the market before 1980 as one characterized by 'stable, steadily rising prices'.

There was no apparent customer resistance to the increases, owing partly to the very low percentage (less than 1 %) of the millers' total production costs accounted for by flour additives.

In mid-1977 the AKZO UK selling price to Spillers for benzoyl peroxide 16 % was £ 419 per tonne, with potassium bromate 10 % at £ 267 per tonne.

The prices increased by 10 % during 1978 to £ 463 and £ 293 respectively. There was another 10 % increase on 1 January 1979 to £ 506 and £ 339 followed by yet another on 2 July 1979 to £ 556 and £ 373.

AKZO UK was planning a fresh price increase to take effect at the beginning of 1980. This was implemented in mid-February bringing the Spillers price to £ 605 and £ 405 respectively.

For RHM, the price changes for potassium bromate were similar to those applied to Spillers. RHM bought benzoyl peroxide in 20 % concentration (with a correspondingly higher price than 16 %) and its price went up by the same percentages as Spillers'.

AKZO UK's prices to the independents, who bought in smaller quantities than the majors and hence paid higher prices, were also increased in successive 10 % rises to reach £ 665 for benzoyl peroxide 16 % and £ 468 for potassium bromate 10 % on 2 July 1979.

The prices of Diaflex to the customers which it shared with AKZO UK – RHM and Spillers – invariably corresponded with those of the major producer both in timing and amount (with differences of perhaps £ 1 to £ 2).

24. ECS did not supply RHM or Spillers. Its prices to Allied Mills, its sole major customer, were generally about 10 % below AKZO UK's prices to the other two majors. Its prices to the independents were also substantially below AKZO UK's. ECS also tended to follow AKZO UK's price increases while maintaining the differential. In August 1979 its prices to Allied were BP 16 % £ 532 and PB 10 % £ 330, while the BP 16 % price to the independents was £ 630.

AKZO UK thus encountered no significant customer resistance to its regular price increases in the United Kingdom. It was also able to maintain its share of the market including the larger part of the business of RHM and Spillers in spite of the differential between its price and ECS's.

The origins and expansion of ECS

25. For some years after it began trading in 1969 ECS bought in its benzoyl peroxide in bulk form from AKZO UK and blended it to a concentration suitable for flour additive use. ECS began to develop its own production of bulk benzoyl peroxide for flour additives use in 1977 following a series of rapid price rises from AKZO UK which squeezed its margins. According to ECS AKZO had in 1977 expressed concern at ECS starting its own production but was willing to tolerate the development provided AKZO's interests were not threatened. By 1979 ECS was supplying around

one-third of the flour additives market in the UK as well as overseas markets. ECS estimates that its production costs for benzoyl peroxide are lower than AKZO UK's and states that prior to the dispute with AKZO the sector provided reasonable profit margins.

It was the decision of ECS in 1979 to expand from the flour additives sector to the more lucrative and important plastics usage that gave rise to the events complained of. ECS began to produce benzoyl peroxide products in various forms suitable for the bulk polymer industry, as a hardening agent and for cosmetics. The material was sold via selling agents initially in the United Kingdom only but by September 1979 the first consignment of benzoyl peroxide paste was dispatched to BASF of Ludwigshafen, one of AKZO's major customers in the polymer industry. ECS's price to BASF was some 15 to 20 % below AKZO's then price.

26. ECS alleged that the AKZO reaction to its expansion was swift. On or about 14 November 1979 senior AKZO UK representatives had requested an urgent meeting with ECS which was scheduled for two days later. ECS alleged that in this first meeting direct threats were made by AKZO UK, that unless ECS withdrew from the plastics market retaliation from AKZO UK would follow in the form of both overall price reductions and selective cuts aimed at ECS's customers. These price reductions would be concentrated in the flour additives sector as it would cause the most harm to ECS. AKZO UK had said it was prepared to go down to below cost if necessary, the more profitable side of its business supporting the price reduction venture. According to ECS, the representatives of AKZO UK said they were acting on instructions from their parent company AKZO Chemie in the Netherlands. AKZO Chemie was allegedly particularly annoyed by ECS having begun to supply BASF in Germany, one of the largest consumers of benzoyl peroxide in the EEC. An alternative possibility canvassed by AKZO was that it might even buy out ECS so as to neutralize the competition. ECS also alleged that a second meeting took place about a fortnight later when the AKZO UK representatives were joined by the head office product manager from AKZO Chemie in the Netherlands and the threats were repeated. A few days later ECS applied for and was granted an injunction under Article 86 of the EEC Treaty in an *ex parte* hearing in the High Court in London.

27. In those proceedings AKZO Chemie and AKZO UK vigorously denied in affidavit evidence that any such threats had been made as ECS alleged.

The version of events given by AKZO was that when ECS had appeared on the plastics market selling at significantly lower prices than AKZO it had been decided that assistory or co-producer deliveries of benzoyl peroxide could no longer be maintained and a 'more competitive' sales policy for flour additives would be adopted. The meetings had been a mere 'communications exercise' to explain this to ECS as a matter of courtesy.

After several hearings in which the *ex parte* injunction was continued or varied a settlement was reached out of court. AKZO agreed to pay ECS's legal costs and undertook not to reduce its normal selling prices for benzoyl peroxide in the United Kingdom or elsewhere for either plastics or flour additives 'with the intention of eliminating (ECS) as competitors'. This undertaking which had the force of an injunction was to last for two-and-a-half years from March 1980.

28. The terms of the settlement were not however watertight: it did not cover any flour additives other than benzoyl peroxide and to show any breach of the undertaking ECS would require proof of a direct intent to eliminate ECS. Although it was not mentioned in the order, AKZO appears to have assumed that it could lower its prices to any customer to the lowest price going in the market, irrespective of actual competitive conditions.

The complaint of ECS to the Commission and the interim measures

29. The settlement in the High Court proceedings did not end the dispute. In 1982 ECS complained to the Commission that the behaviour complained of had been continued in spite of the undertaking given to the High Court. The gist of ECS's complaint was that AKZO UK had by a process of attrition taken from it its most important customers in the large independent sector as well as certain individual mills in the Allied group, and that it had only managed to keep its remaining customers by reducing prices to the very low price levels quoted by AKZO UK.

When ECS had complained to AKZO UK's lawyers in February 1981 alleging a breach of the undertaking, the reply was that AKZO UK was merely responding to competition at a level of prices first introduced by ECS and there was no

intent to eliminate ECS. ECS says that given the lack at that stage of any documentary proof it did not pursue the matter in the English Courts.

30. In December 1982 the Commission acting pursuant to Article 14 (3) of Regulation No 17 carried out without prior warning simultaneous investigations at AKZO Chemie and AKZO UK. A few months later ECS made a second application, this time requesting the Commission to order interim measures to secure its survival, since it claimed that the predatory pricing tactics of AKZO had continued even after the investigation and that as a result it was in imminent danger of having to cease trading.

After giving the parties the opportunity of being heard, the Commission on 29 July 1983 issued Decision 83/462/EEC ordering AKZO UK to return to the profit margins which it had been applying in the flour additives sector in the United Kingdom immediately before the dispute had arisen with ECS. AKZO UK had argued strongly that it should as an exception be allowed to align its prices on offers from other producers and provision was made for this in the Decision of the Commission.

ECS's allegations

31. In its complaint to the Commission ECS repeated its version of the two meetings in which AKZO representatives had allegedly presented it with the following ultimatum: abandon plastics or face reprisals particularly in flour additives.

ECS alleged that the destructive price cutting policy threatened by AKZO had been implemented not only in the United Kingdom but also elsewhere, and indeed was not confined to flour additives but also covered plastics.

The abusive conduct alleged in the statement of objections issued by the Commission was however limited to the sale and marketing of flour additives in the United Kingdom. Documentation referring to AKZO UK's flour additives activities in other non-EEC markets was used in so far as it provided evidence of AKZO's overall business strategy.

In the United Kingdom flour additives sector, the principal allegations concerned:

- (i) taking from ECS the business of several individual Allied Mills by means of below cost or unreasonably low prices;

- (ii) taking from ECS the business of at least three important 'independent' customers by similar low price offers;

- (iii) using potassium bromate and vitamin mixes as loss leaders or bait in order to take the whole of the customer's flour additives business;

- (iv) forcing ECS to lower its prices to non-economic levels in order to retain the business of its remaining customers.

The commercial conduct of AKZO towards ECS

32. During its investigations visits pursuant to Article 14 (3) of Regulation No 17 the Commission obtained from AKZO a number of important internal documents which had not been available during the High Court proceedings in 1980.

A note of the meetings between ECS and AKZO in late 1979 had been made by a managerial employee of AKZO UK who had participated in both meetings. This memorandum, dated 7 December 1979 and headed 'Private and Confidential', was addressed to senior executives in AKZO Chemie. It set out a detailed blueprint for the implementation of a plan to discipline and if necessary eliminate ECS.

33. It begins: 'Discussions took place in the office of Engineering and Chemical Supplies at Stonehouse on 3 December. Mr Sullivan, the managing director and principal shareholder of ECS, was informed that he could not expect any cooperation on the 'milling' side if he intended to enter the 'plastics' industry. It was confirmed to Mr Sullivan that AKZO would take aggressive commercial action on the milling products unless he refrained from supplying his products to the plastics industry. It was decided not to take any further action until Tuesday, 11 December allowing time for Mr Sullivan to react to the above proposal.'

Under the heading 'Action' the memorandum continues: 'If Mr Sullivan does not react by midday on Tuesday, 11 December, the proposed action will be taken.' There follows a detailed plan to approach each of ECS's customers and offer a range of flour additives – benzoyl peroxide (BP) 16 %, potassium bromate (PB) 10 % and vitamin

mixes – at prices far below those then prevailing and involving a considerable loss.

34. An appointment had already been made with Provincial Merchants, the central buying agency for ECS's major customer Allied Mills, and it was proposed to offer benzoyl peroxide 16 % at £ 395 per tonne, potassium bromate 10 % at £ 250 per tonne and vitamin mix at £ 430 per tonne plus cost of flour. At the time AKZO UK's own prices for the first two products to its major customers were £ 556 and £ 372 respectively and it had been planning a 10 % increase from the following month. (AKZO UK did not normally supply vitamin mix.)

Appointments were also planned with six named large independent mills then being supplied by ECS. They were to be offered prices approximately £ 55 above those for Allied, i.e. BP 16 % at £ 456, PB 10 % at £ 305 and vitamin mix at £ 590 (including flour), in a special 'package deal' if they took all their requirements of flour additives from AKZO UK.

The 'small independent' mills amongst the clientele of ECS were also to be contacted, with a proposed package deal for their total requirements at prices some £ 50 above those to be offered to the 'large' independent, i.e. BP 16 % at £ 506 per tonne; PB 10 % at £ 367 and vitamin mix at £ 635.

35. It was recognized that these low price offers to ECS customers would necessarily involve some decrease in the prices offered to AKZO's own two major customers, RHM and Spillers: they would in future be given prices of £ 495 for BP 16 % (£ 600 for BP 20 %) and £ 312 for PB 10 %, a drop of some £ 60 per tonne.

The effect on AKZO UK's profitability of these low price offers was analyzed. If all the Allied and 'large independent' business were captured from ECS, a total loss to AKZO of some Fl 170 000 per annum on the business was foreseen. A special budget for 1980 taking account of the plan was attached to the memorandum and while there are some errors of calculation it is evident that AKZO was prepared to allow its flour additive business to be operated at a loss in order to achieve the objective of eliminating or disciplining ECS.

36. The plan as originally conceived could not be put into effect because of the immediate application of ECS to the High Court and the granting of an injunction.

AKZO UK in fact increased its prices to its own customers in early 1980 by some 10 %. ECS did not follow, so the customary price gap between the two suppliers became more apparent.

During 1980, following the price increase from AKZO UK, both Spillers and RHM approached ECS asking for a quotation for supplying flour additives.

Spillers had wanted to supply ECS with flour as a filler for vitamin mixes and ECS had suggested that Spillers in return place some of its flour additive business with ECS. In March 1980 ECS quoted to Spillers prices of £ 532 per tonne for BP 16 % and £ 336 per tonne for PB 10 %. (These quotes corresponded exactly with the prices then offered by ECS to Allied Mills, while AKZO UK's prices to Spillers were then £ 605 and £ 405 respectively.) The response of AKZO UK (whose representative was shown the ECS quotation) was that it did not wish to lose any business whatever to ECS and it adjusted its price downwards to match the ECS quote. For reasons not entirely clear only part of the reduction was to be shown on the invoice, the rest (£ 40 per tonne) to be held over and paid as a year's end rebate. At the same time Spillers told AKZO UK of its dissatisfaction with Diaflex, and indicated that henceforth Spillers would place all its group potassium bromate and azodicarbonamide business with AKZO UK.

37. Later in the year (towards October) Spillers requested quotations for a fixed price contract of six or 12 months' duration from all three suppliers of flour additives. ECS again quoted for its standard product the same prices as it had offered earlier in the year, but at the request of Spillers reduced prices of £ 512 and £ 309 were offered for a special cheap mixture using only gypsum instead of the normal inert filler. Later the offer for the cheap mix was increased by ECS by £ 5.90 to cover the cost of an additive to ensure better flow characteristics. Diaflex also quoted, initially £ 530 and

£ 335 per tonne; then a reduced offer of £ 517 and £ 327 for 12 months or £ 490 and £ 310 for a six months' contract. (The Diaflex product uses the cheaper gypsum filler.)

Spillers again gave AKZO UK full details (including copy correspondence) of the quotes received from both of the other suppliers. With the knowledge of what the other suppliers had offered AKZO UK quoted for its standard formulation £ 489 and £ 309 (thus undercutting by £ 1 per tonne the lowest price which had been offered by either of the other suppliers for a cheap mix) and took the business on the basis that Spillers obtained its total requirements from AKZO UK.

38. AKZO UK had also increased its prices to RHM by 10 % at the beginning of 1980. Several months later (in July) ECS was approached by RHM and again quoted prices equivalent to those which it was charging Allied Mills. No business however resulted. In November 1980 Diaflex heard of the ECS offer and informed AKZO UK, adding as its opinion that they (AKZO UK and Diaflex) would probably have to match the ECS price if they wanted to keep the RHM business. On the basis of Diaflex's information on the prices offered to RHM by ECS, AKZO UK moved its prices downwards from £ 769 to £ 660 for BP 20 % and from £ 405 to £ 330 for PB 10 %. A few months later the price to RHM was lowered still further to £ 640 and £ 314 respectively, and in March 1982 even lower to £ 629 and £ 309.

AKZO UK's reaction to the first ECS quote to Spillers in early 1980 had been to approach Provincial Merchants with 'budget prices' for vitamin mixes and Azobrom, a substitute for potassium bromate. The documentation indicates that it was directly as a result of the ECS quote that AKZO UK contacted Provincial Merchants. At this stage, however, AKZO UK did not make a serious attempt to gain all of Allied's flour additive business.

39. After learning in late 1980 of the ECS quote to RHM, however, the reaction of AKZO UK was more aggressive. The plan was conceived to contact Provincial Merchants and to offer standard quality BP 16 % at £ 517, 90 and PB 10 % at £ 314,90, the same price as ECS had quoted to Spillers for the special cheap mixes. If this did not

result in any business, AKZO UK would contact various individual mills in the Allied group offering these prices, find out which of the mill managers were not content with the existing arrangements to buy from ECS, and try to get their business from ECS. ECS's prices to Allied at the time were still £ 532 and £ 330 for these products, so the AKZO UK quotes were as low as they could go while still leaving the possibility of justifying them as an 'alignment' on a price of ECS if that firm chose to go back to the High Court. The AKZO UK representative was informed by Provincial Merchants that his offer was substantially below ECS's price to Allied (AKZO UK believed up to £ 60 per tonne) and he also offered Nutramin at a price of only £ 314 excluding flour. In return AKZO UK would undertake to buy all the necessary flour filler from Allied Mills. Internal documentation shows that by this tactic AKZO hoped to 'undermine the position', of the chief buyer at Provincial Merchants and thus open the way for AKZO UK to get piecemeal from ECS the business of the individual mills in this group. It is significant that until that time AKZO UK had been supplying Coxes Lock, the one mill in the Allied group which was its customer, at prices of £ 665 (BP 16 %) and £ 468 (PB 10 %), the same as it then applied to the large independents.

When the approach to Provincial Merchants brought no results, AKZO UK went directly to the individual mills in the Allied group and offered the new prices of £ 517,90 and £ 314,90.

40. In December 1980 the same sales manager who had drafted the note of the meetings with ECS in late 1979 systematically approached each of the 'large independents' then being supplied by ECS and offered low prices. ECS's prices to this group of customers were at the time: BP 16 %, £ 630; PB 6 % £ 362, and vitamin mix £ 654, somewhat below AKZO UK's prices to its regular large independent customers. The prices AKZO UK now quoted to the independents buying from ECS were as follows: BP 16 % £ 563 to £ 568; PB 10 % £ 339; PB 6 % £ 255 to £ 260 and vitamin mix £ 565. These selective offers were thus far below the price at which ECS was supplying the customer and were even further (20 to 30 %) below AKZO UK's then prices to its own customers among the large independents whose terms remained unchanged (at £ 665 – for BP 16 % and £ 468 for PB 10 %).

As with Allied, the low prices offered by AKZO UK, were not calculated by reference to a market price or the price then being paid by the customer but from the price which ECS had earlier (and unsuccessfully) quoted to Spillers for the cheap mix.

A few days before these visits, Diaflex had also been to two of the large independent customers of ECS and offered them prices similar to those quoted by AKZO UK. These were customers with which Diaflex had had no previous business relations. As AKZO UK noted in a report of 15 September 1981, Diaflex did not thereby gain any business from ECS's customers.

41. The result of these systematic low price offers from AKZO UK – which were assiduously followed up – was that ECS gradually lost the business of its three most important large independent customers plus several individual Allied Mills. The custom of the remaining mills was only kept by price reductions to match the AKZO UK quotes. In about January 1983 AKZO UK lowered its price offers to the Allied Mills and to the independents still further, and ECS to retain its customers was again obliged to decrease its prices despite substantial cost increases for labour and raw materials.

Besides quoting low prices to ECS's customers for benzoyl peroxide and potassium bromate AKZO UK was also including vitamin additives as part of the package although it did not normally supply this product. The delivered price quoted by AKZO UK for vitamins was below the cost of buying in the materials.

AKZO's factual arguments

42. AKZO has contested every important allegation of fact set out in the complaint of ECS and in the statement of objections.

The ECS version of the meetings in late 1979 is strongly disputed. AKZO claims that in the first meeting all that was said by AKZO UK was that the 'previously harmonious' relations between the two firms would be ended if ECS continued to offer benzoyl peroxide on the plastics market at prices substantially below those of AKZO. The second meeting was said to have been no more than a trap orchestrated by ECS and its then lawyers to gather evidence so that ECS could retaliate against AKZO.

Although the internal memorandum of 7 December 1979 confirms in every important respect the

version of events consistently given by ECS, AKZO has continued to deny vigorously that any threats were ever made. The memorandum is dismissed by AKZO as being just the personal impression of a 'salesman' prone to exaggeration.

As for the allegedly abusive pricing from December 1980 onwards, AKZO argues that the low prices were entirely the fault of ECS which itself brought about a collapse in prices during 1980. ECS is said to have undercut AKZO UK at its two important customers. AKZO UK had to drop its prices to keep the business. In order to recoup lost revenue, it then had no alternative but to seek out new business, the large independent mills and the individual Allied group mills being obvious candidates. The buying power of the large customers and strong competition from Diaflex are cited as further reasons for the fall in prices from 1980 onwards. In any event, AKZO says, the prices which it offered were not abusive since they always included an element of profit. (By this AKZO means that they covered variable but not necessarily total costs).

As a general comment AKZO claims that the Commission has allowed itself to be duped by the complainant which was out to shift the blame for its own poor performance and bad investment decisions on to other participants in the market and ultimately on to the consumer.

43. In the light of the documentary evidence, the Commission does not accept the arguments of AKZO.

The claim that the fall in prices was the result of factors beyond AKZO's control is contradicted by the evidence. Prior to 1980 AKZO UK had effectively determined the price level in the United Kingdom for flour additives. It had encountered no difficulty in increasing the prices at regular intervals in steps of 10 %. The customary differential between its prices and those of ECS had not resulted in any significant pressure from RHM and Spillers for it to align down to ECS. Besides the important factor of customer loyalty the very small percentage of the mills' total costs accounted for by flour additives had made the market one characterized by steadily increasing prices. Even if after 1980 the market became more competitive, customer 'resistance' was not sufficient to prevent AKZO UK from at least increasing its prices in line with costs.

44. The tactics adopted by AKZO UK towards the ECS customers Allied Mills and the large independents cannot be considered as a defensive measure or normal competition. The argument that AKZO UK was simply trying to recoup some of the profits lost by the fall in prices to RHM and Spillers is disproved by the fact that the 'new' business was heavily loss-making. The circumstances and timing of the approaches made by AKZO UK to Allied and the independents are indicative of an aggressive campaign to displace the regular supplier. The low prices which were offered bore no relation to the price then being paid by those customers or to AKZO UK's own price structure but were calculated to be as low as possible while still 'justifiable' by reference to the earlier (and unsuccessful) quotes from ECS to Spillers for the cheap mix. Nor could they be said to reflect 'market levels' since AKZO UK was able to maintain at the same time its old (and far higher prices) to its own equivalent customers.

45. The Commission does not accept that prices were forced down by strong competition from Diaflex. As a small producer with only an intermittent production of benzoyl peroxide and a substantial dependence upon AKZO UK for supplies, Diaflex can at the most be regarded as only marginal competition. Its prices had always in the past increased simultaneously and uniformly with those of AKZO UK.

There is documented evidence that both before and after the dispute arose between ECS and AKZO, AKZO UK was in close contact with Diaflex on pricing. A handwritten note of a meeting on 20 June 1979 between the two companies shows that details were discussed of a price increase to RHM and Spillers (customers which they then shared and which ECS did not supply) which went into effect on 1 July 1979. Evidence that AKZO UK controlled the price of Diaflex is provided by a note of an internal AKZO Chemie meeting in which it was decided that the sales director of AKZO UK would contact the owner of Diaflex 'and get him to move up'. AKZO's explanation of this reference is that as Diaflex had been slow to pay for purchases of bulk benzoyl peroxide, AKZO UK wanted to put up the price to Diaflex, which might imply the necessity of a corresponding increase by Diaflex as well. The Commission finds this explanation unconvincing. Diaflex itself recognized its dependence upon

AKZO UK in documents which indicate the existence of an 'unwritten law' that it would not try to take business from AKZO UK but had no similar reserves about ECS.

46. The evidence also contradicts AKZO's arguments on overcapacity. While it is correct that demand for white bread in the United Kingdom has declined somewhat since 1979, the value of AKZO UK's sales of flour additives has continued to rise. Any shortfall in the United Kingdom was more than balanced by a substantial increase in export business, which almost doubled in five years. The internal management reports of AKZO UK show that from the beginning of 1983 the flour additives plant at AKZO UK's Gillingham works was operating full time (24 hours a day) and still could not keep pace with demand. There is even a reference to 'substantial undercapacity in the milling area'.

47. The Commission will also have regard, in its assessment of the factual evidence, to internal reports of AKZO which demonstrate a continuing concern on the part of AKZO to inflict damage upon the business of ECS.

The detailed memorandum of 7 December 1979 showed a firm intention to discipline and, if necessary, eliminate ECS by attacking its base in flour additives in retaliation for its expansion to the plastics sector. The Commission is not persuaded by AKZO's attacks on the credibility of its own employee who for a long time had been responsible for the commercial side of its flour additives business and occupied a managerial position.

The prompt issue of an injunction by the High Court prevented the implementation of the plan in its original form. With the settlement in March 1980 of the action brought by ECS, AKZO considered that the order imposed certain restraints on aggressive pricing. It is however significant that the tactics used from autumn 1980 onwards were very similar to those detailed in the memorandum and the ECS customers approached by AKZO UK were the same as those mentioned in the note.

AKZO UK was however careful, at least for the two-and-a-half year period for which the order was in force, to relate the prices which it offered to ECS's customers to the earlier offer made by ECS to Spillers.

Internal documents dating from 1981 and 1982 however show that the original intention to damage ECS had not been abandoned. They also reinforce the conclusion, drawn by the Commission from the circumstances and timing of the low price offers made by AKZO UK to Allied and the large independents, that these were not thrust upon AKZO UK by market conditions.

In a report dated 22 November 1982 made to the Sales Director of AKZO UK, the manager of the flour additives business dealt with the developments in the flour additives market since 1979. It is recorded that 'ECS have lost a third of the independent mills (more will follow) and have suffered a very considerable reduction in margins. Prices charged by ECS to Allied Mills have dropped. Examples:

(£)

Product	1979	1982
Vitamin Mix	589	462
BP 16 %	508	500
Glutex 10	405	320'

It is reported with satisfaction that the general drop in prices had not affected AKZO UK's margins as seriously as it must have done ECS, for various reasons which included the possibility of obtaining bulk potassium bromate on consignment terms.

The report concludes: 'Allied Mills have proved a difficult "nut" to crack, particularly with the price constraints imposed by the court injunction, but in time some of the mill will break away from ECS as pressure is maintained.'

The language used here by AKZO UK – particularly the reference to maintaining 'pressure' on ECS – is incompatible with the argument that it had no alternative but to follow market trends.

An earlier handwritten note of 15 September 1981 was expressed in similar terms, drawing attention to the fact that ECS had lost three mills to AKZO UK and had been forced to reduce its prices to the remainder. (This was the report which had also noted that Diaflex had not managed to gain any business from ECS.)

It is also significant that AKZO UK obtained, or attempted to obtain, from the suppliers of potassium bromate details of the tonnages bought by ECS, information of a type normally considered

confidential and which could provide an indication of the effect upon ECS's business of AKZO UK's pricing tactics.

48. The policy documents found at AKZO UK and AKZO Chemie show an explicit link between AKZO's policy in the plastics market and its action in the flour additives market. This link had in fact been crucial to the threats made to ECS in December 1979. AKZO was concerned in the long run to protect its market position in the plastics market and the most effective method of achieving this in the case of ECS was to react in the smaller flour additives market which was of only marginal importance to itself but accounted for most of ECS's turnover. It was one of AKZO's primary business objectives, according to its internal reports, to 'maintain actual market share by all means'. The operations of particular producers were to be watched carefully to see that they did not threaten AKZO's interests. Certain competitive activities might be tolerated if the rival was important as a customer. Where however a producer was regarded as dangerous, AKZO was prepared to take action to eliminate it from the market. One such producer was Scado: the annual reports of AKZO Chemie's 'Plastics and Elastomers' department for 1980 and 1981 show that AKZO believed that the virtual withdrawal of this producer from the market was the result of an aggressive campaign directed by AKZO against it. It was reported that the actions of AKZO Chemie which included 'competing (against) them as violently as possible there where they showed up' and 'our quantity contracts' had resulted in the effective disappearance of Scado from the market and, more importantly, the abandonment by Scado of plans to construct a new plant as a result of sales falling to only 20 % of their previous level. With Scado neutralized, AKZO was able to increase the price for the relevant product. The same reports identify ECS and Pergan, its associated company in Germany, as potentially dangerous competitors for AKZO and in a particularly significant paragraph it is recommended that the 'Scado approach' be adopted to deal with the problem.

Another report (in fact referring to an export order) emphasizes that AKZO UK planned in flour additives to gain business where possible at the expense of ECS even if this meant a substantial loss, an intention which was attributed to 'P & E strategies' (1).

(1) The flour additives business forms a part of the Plastics and Elastomers (P & E) business unit in the AKZO Chemie organization.

49. Many of the arguments advanced by AKZO are directly contradicted by its own documents, but in resolving the dispute on factual issues the Commission has also taken into account the credibility of the opposing parties. The memorandum of the meeting of 2 December 1979 which is of crucial importance was not disclosed to the High Court by AKZO and indeed during the investigation pursuant to Article 14 (3) only came to light after it had been claimed by AKZO that no such papers existed. Despite the overwhelming evidence of its own memorandum AKZO has continued to deny that any threats were made to ECS. The explanations given of certain references such as the contacts with Diaflex on pricing are wholly unconvincing. On the other hand, the version of events given by ECS is confirmed by its own contemporaneous record and by the notes made by its bank manager who was present at the second meeting. AKZO's own internal documentation also corroborates in every important respect the allegations of ECS.

The effect upon ECS

50. As AKZO UK surmised, the general fall in prices and loss of custom by ECS had a serious effect upon its business.

The value of ECS' flour additives sales in the United Kingdom had by 1984 declined to 70 % of its 1980 sales (if account is taken of inflation its sales in this market were halved in real terms). In effect the 'independents' and Allied Mills lost to AKZO UK accounted for almost one-third of its flour additive business in the United Kingdom.

The general decline in prices of flour additives also involved a reduction in the margins on the business which ECS retained. In order to remain in business (says ECS) it was obliged to increase its bank borrowings substantially thereby incurring additional bank charges and interest.

The lack of available funds also caused ECS to reduce its budget for research and development and to delay modifications to its plant intended to deal with new organic peroxide business.

AKZO UK's costs

51. During the interim measures procedure, in which relatively limited financial and accounting information was available, AKZO UK gave the impression that its ability to charge lower prices than ECS was due in part at least to its 'efficiency' (i.e.

lower costs and better profitability) as an undertaking in comparison with its rivals.

Prior to the dispute with ECS, the flour additive sector had indeed constituted a reasonably profitable business for AKZO UK with operating profits in 1979 standing at some ... % of net revenue.

52. AKZO UK's flour additive activities form only a part of its total business and details are not given in its statutory accounts; separate internal management accounts are however maintained which demonstrate that after the dispute arose not only were particular products supplied to ECS's customers being sold below cost but also that between 1981 and 1983 at least the whole flour additives business operated at a loss.

During 1981 the loss on total business of just over £ ... was some £ ... even before allowing for financing of working capital which took the loss to £

For 1982 a slight profit was shown on flour additives by treating the transfer of the intermediate product to the flour additive sector from the plastics and elastomers department at the cost of the material only. An internal memorandum from AKZO UK's accounts manager shows that were this transfer to have been on the basis of fixed and variable cost the operating profit of the flour additives business would have been reduced by £ ... If account were taken of finance charges this would have brought the business into loss.

In 1983 again the internal documents show that on an increased turnover the flour additives business also made a loss.

53. The extent of the losses is confirmed by the annual reports of the plastics and elastomers business unit prepared for the head office in the Netherlands which show the profit and loss accounts of the flour additives business separately but tend to underestimate the result by reason of the omission of items such as indirect selling costs and other overhead expenses.

AKZO has also argued that its prices for flour additives 'always included a profit margin'. This broad statement has to be read subject to the important qualification that AKZO means by this only that prices were above 'variable' cost (but usually not full cost).

54. In assessing AKZO's argument (that it was covering variable cost), it is essential to ascertain what AKZO included in the term. In the AKZO accounting classification 'variable' costs cover only the cost of raw material, energy packaging and transport. Other major items, such as labour, maintenance, warehousing and dispatching are all treated by AKZO as 'fixed', although accounting systems more usually consider them as 'variable' (1).

AKZO itself recognized the apparent inconsistency in its accounting methodology: various analyses of its business performance indicate that as a rule of thumb some 50 % of the costs treated as 'fixed' (and hence ignored by AKZO when it claimed to be covering its costs) are acknowledged to be 'marginal' or 'variable', i.e. affected by output levels.

Further, even if AKZO's treatment of its variable cost elements is revised so as to include labour and other charges, the figures provided by AKZO for the 'labour' element, which accounts for at least 10 % of total costs, are a notional calculation based on forecast plant utilization levels and show important variations when compared with actual labour costs (which are almost invariably higher).

55. If AKZO's calculations are adjusted, it is apparent that for both potassium bromate improvers and vitamin mixes (at least) the prices which it offered to the customers which it hoped to gain from ECS between 1981 and 1984 fell well short of covering even variable costs as normally defined.

In benzoyl peroxide the quotes to Allied Mills of £ 517,90 did not cover variable costs in 1981 or 1982. Even if after 1982 organizational and accounting changes at AKZO UK resulted in a reduction of certain manufacturing costs for benzoyl peroxide, and the price quoted by AKZO UK normally covered variable if not total costs, flour

(1) Fixed costs are costs which remain constant in spite of changes in output and generally include management overheads, depreciation, interest and property taxes.

Variable costs are costs which vary with changes in output and generally include materials, energy, direct labour, supervision, repair and maintenance, and royalties.

Total cost is the sum of fixed and variable costs.

Average cost is total cost divided by output.

Marginal cost is the addition to cost resulting from the production of an additional unit of output.

additives were offered as a package, so that pricing the other products at below marginal cost in effect involved an additional subsidy on benzoyl peroxide.

The majority, if not all, of the prices offered by AKZO UK to the individual Allied Mills and to selected 'large independent' customers of ECS over several years in order to take them away from their then supplier were thus below AKZO's variable costs. It is also important that in many cases AKZO often did not have to supply the material at the prices which it offered, leaving it to ECS to drop its prices so as to keep the customer and thus incur a loss.

AKZO UK pricing after the interim measures

56. AKZO UK knew that the interim measures application had been prompted in particular by its finally gaining the business of several 'independents' from ECS in late 1982 and early 1983.

The day before the hearing in the interim measures application it had sought to obviate the need for an order by putting up its price to these customers for potassium bromate 6 % improvers by some 50 % so as to bring it up to cost price.

57. The Commission in its interim measures Decision, at AKZO UK's request, included a provision allowing AKZO UK to go below the prices set out in the Decision in order to align in good faith on the competitive price level. The purpose of this measure was to avoid a situation where another producer could take all the business by quoting a few pounds below AKZO UK.

After the interim measures Decision, AKZO UK retained the business of all the customers which it had gained from ECS, and even gained several more mills, at prices for benzoyl peroxide which were not dissimilar to those by which it had originally won their business. AKZO sought to justify the low prices by reference to 'competitive' quotes from Diaflex, which in the event gained little or no business.

58. At the time of the interim measures Decision, the Commission did not have before it the evidence which was later obtained from Diaflex which showed that it was not the effective and vigorous competitor which AKZO UK had asserted it to be.

After the interim measures Decision, AKZO UK encouraged the customers won from ECS to obtain a 'quote' from Diaflex, the implication being that it would then meet whatever price Diaflex quoted. There is no direct evidence that Diaflex was then quoting low prices to help AKZO UK defeat the order, but as late as November 1982 AKZO believed it was still able to control Diaflex's pricing. Given the declared attitude of Diaflex that it would willingly take business from ECS but did not want to attack AKZO UK, the Commission considers it is entitled to draw the inference that the Diaflex quote was not a realistic market price. This inference is strengthened by the fact that the prices allegedly quoted by Diaflex of £ 570 for benzoyl peroxide and £ 330 for potassium bromate 10 % could not on the prices it was paying for raw material have been profitable had it been called upon to deliver. From early 1984 onwards AKZO UK was supplying Diaflex with all its bulk requirements of benzoyl peroxide, at a price (£ ... per tonne) which would not have enabled Diaflex to cover its costs, overheads and make a reasonable profit on a selling price of £ 570 to £ 580.

59. AKZO claims that it was entitled to 'align' on the Diaflex price but accepts that this might not be the case where the price would be taken below its own variable costs. AKZO treats as 'variable' only the cost of raw material and energy, with the result that on its figures its prices meet this standard. If however variable costs are given their normal meaning (i.e. including labour, etc) AKZO's price, at least for potassium bromate 10 % of £ 330, does not meet the test it proposes. These low prices as a package enabled it to keep the business and still exclude ECS.

At the same time AKZO UK was still supplying most of its own traditional customers in the large independent sector at the far higher prices which had remained unchanged.

II. LEGAL ASSESSMENT

60. Under Article 86 of the EEC Treaty any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof is prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may in particular consist in

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) ...;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
- (d) ...

61. The essential questions to be decided are

- whether AKZO Chemie holds a dominant position in the terms of Article 86;
- whether the alleged conduct constitutes an abuse of such a dominant position;
- whether there is a appreciable effect upon trade between Member States.

A number of questions arising out of AKZO's defense will also have to be examined.

Dominant position

(a) THE RELEVANT MARKET

62. In order for the Commission to determine whether AKZO occupies a dominant position within the meaning of Article 86 it is necessary first to define the relevant market. This constitutes the area of business in which the economic power of the undertaking in question *vis-à-vis* its competitors is to be judged.

In the present case, the complainant alleges that AKZO's aggressive price cutting in the relatively limited flour additives sector was in the long run aimed at securing the removal of ECS as an effective competitor to AKZO in the wider organic peroxides market.

The question will be examined in greater detail at points 87 to 89 of this Decision, but it has been established by the Court of Justice in its Judgment of 21 February 1973 in Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* (1), that the strengthening of a dominant position held in a particular product market may constitute an abuse of that dominant position irrespective of the precise means adopted.

(1) ECR 215 (1973).

This Decision will, following the judgment in *Continental Can*, proceed on the basis that the 'relevant market' for the purposes of this case in the market from which AKZO sought in the long term to exclude ECS, namely the organic peroxides market as a whole.

63. The question arises of the proper definition of the organic peroxides market. Beyond a denial that the organic peroxides sector is a relevant market AKZO has addressed no argument to the Commission on this point. However in relation to the much more limited flour additives sector it claims that there is not one single 'product' market but one for every concentration of each of the flour additives produced by ECS and AKZO. The argument is that each additive has a specific use and since one cannot be substituted for another, they cannot together form one market.

If adopted this argument would lead to a result at odds with commercial reality. Transposed to the organic peroxides 'plastics' sector it would mean that there are hundreds of separate 'markets', one for each formulation, concentration or presentation.

64. In the context of Article 86, the object of market delineation is to define the area of commerce in which conditions of competition and the market power of the dominant firm is to be assessed. The concept of substitutability involves the question whether the market is drawn broadly enough so as to include not only the products manufactured or marketed by the allegedly dominant producer but also those which are in effective competition with it.

To determine the extent of the market power held by AKZO, the real issue here is thus not whether one organic peroxide is a 'substitute' for another (which may in fact often be the case) but whether and to what extent there are other products which are substitutable for organic peroxides and so could be said to form part of the same market.

65. As pointed out earlier, it is only in the relatively minor cross-linking field that organic peroxides face competition from substitute products (sulphur compounds). Even here sulphur-based products do not necessarily meet the requisite technical specifications for particular usages where organic peroxides are preferable. The Commission

does not therefore consider for the purposes of assessing the relevant market power of AKZO, that the possible substitutability of other products for organic peroxides in a relatively minor application requires that the output of sulphur compounds be included in a definition of the market. However even if they are included, the overall market power of AKZO is not greatly affected given the fact that in the more important usages organic peroxides are not subject to competition from other chemicals.

66. From the geographic standpoint, the whole of the EEC should be considered as the appropriate area where competition is to be measured. AKZO produces organic peroxides in several Member States and supplies the products in all of them. Transport cost is a factor but does not constitute a serious barrier to trade across national borders. Geographical spread is considered by AKZO to be one of the significant factors contributing to its market strength. As the example of ECS demonstrates, substantial competitive opportunities are available for sales from one Member State to another.

The Commission therefore concludes that for the purposes of Article 86 the relevant market is the organic peroxides sector in the EEC as a whole.

(b) EXISTENCE OF A DOMINANT POSITION

67. It must then be determined whether AKZO holds a dominant position in that market. A dominant position under Article 86 has been defined by the Court of Justice as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition ... but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which competition will develop, and in any case to act largely in disregard of it so long as such conduct does not act to its detriment' (Judgment in Case 85/76, *Hoffmann-La Roche v. Commission* (1), point 39).

The above definition was given by the Court in a case where the infringement of Article 86 involved primarily the exploitation of customers and

(1) ECR 461 (1979).

reflects the importance in this connection of the ability to behave independently. The power to exclude effective competition is not however in all cases coterminous with independence from competitive factors but may also involve the ability to eliminate or seriously weaken existing competitors or to prevent potential competitors from entering the market.

As the Court stated, the existence of a dominant position does not require the producer enjoying it to have eliminated all opportunity for competition (see also Case No 27/76, *United Brands* (1), point 113). There may even from time to time be some manifestation of lively competition from other producers and the leading firm is still dominant. (In this connection the fact that in spite of their exertions the attacking firms have not succeeded in increasing their market share may be a significant pointer to dominance.)

68. In the present case AKZO estimates its own share of the market at 50 % or more. Together with the high shares it holds in each Member State this factor would already be indicative of a significant degree of market power.

Market share, while important, is only one of the indicators from which the existence of a dominant position may be inferred. Its significance in a particular case may vary from market to market according to the structure and characteristics of the market in question.

69. To assess market power for the purposes of the present case, the Commission must consider also all the relevant economic evidence, including the following elements:

- (i) AKZO's market share is not only large in itself but is equivalent to all the remaining producers put together;
- (ii) apart from Interlox and Luperox the remaining producers have a limited product range and/or are of local significance only;
- (iii) AKZO's market share (as well as that of the second and third placed producers Interlox and Luperox) has remained steady over the period under consideration and AKZO has

always successfully repulsed any attacks on its position by smaller producers;

- (iv) AKZO was able even during periods of economic downturn to maintain its overall margin by regular price increases and/or increases in sales volume;
- (v) AKZO offers a far broader range of products than any rival, has the most highly developed commercial and technical marketing organization, and possesses the leading knowledge in safety and toxicology;
- (vi) AKZO has on its own account been able effectively to eliminate 'troublesome' competitors (besides ECS) from the market or weaken them substantially: the example of Scado for one shows that AKZO is in a position, if it so wishes, to exclude a less powerful producer;
- (vii) once such small but potentially dangerous competitors are neutralized, AKZO has been able to raise the price for the particular product in respect of which their competition was felt.

70. The Commission will also take into account the possibility of market entry or expansion. The annual reports of AKZO's Plastics and Elastomers sector indicate that smaller firms which have attempted to expand their market share or penetrate new markets have almost invariably been unsuccessful in the face of AKZO's response. Firms which have disappeared or lost substantial business in Europe to AKZO include Scado, Kenogard and Aztec/Dart. Apart from ECS (which already had a 'base' in flour additives) there appear to have been no recent entrants to the organic peroxides market. Having regard to the high start up costs, and the market structure, it is most unlikely that new producers, knowing the likely reaction of AKZO, will be ready to enter the market.

71. On the basis of the above considerations, the Commission considers that at all material times AKZO occupied a dominant position in the EEC market for organic peroxides.

Abuse of dominant position

72. The next question to be examined is whether the conduct of AKZO constituted an abuse of this dominant position.

(1) ECR 207 (1978).

Consideration will be given to two related aspects: first, whether behaviour of the type complained of, namely pricing and commercial conduct intended to damage a smaller competitor or eliminate it from the market, can in principle fall under Article 86, and secondly, whether such conduct in relation to the sale of flour additives can constitute an abuse of the dominant position held by AKZO in the wider organic peroxides market.

73. On the first point, it should be noted that the Court of Justice has confirmed that the list of abuses contained in Article 86 (a) to (d) is not an exhaustive enumeration of possible infringements but only cites illustrations (Case 6/72, *Continental Can*).

In order to interpret the provisions of Article 86 the Commission must have regard to the system and objectives of the Treaty. Article 86 is part of the chapter of the Treaty dealing with common rules on the Community's policy in the field of competition, which is based primarily on Articles 3 (f) of the Treaty, which requires that the Community pursue the institution of a system of effective competition. Any behaviour by a dominant undertaking which undermines the purpose of Article 3 (f) and endangers the structure of competition might therefore constitute an abuse of a dominant position under Article 86. Article 86 is not aimed solely at practices which might damage consumers or customers directly but also those which are indirectly detrimental to them through their impact on effective competitive structure. (*Continental Can v. Commission*; also *Joined Cases 6 and 7/73, Istituto Chemioterapico Italiana SpA and Commercial Solvents Corporation v. Commission* (1)).

74. In its Judgment in Case 85/76, *Hoffmann-La Roche v. Commission*, the Court of Justice defined (point 91) the notion of abuse under Article 86 as an objective concept relating to the behaviour of an undertaking in a dominant position which was such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition was weakened, and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, had the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

In Case 85/76, *Hoffmann-La Roche v. Commission*, the exclusionary behaviour consisted of the grant of loyalty rebates which tied customers to the dominant producer. It is clear however from the judgments of the Court that other forms of unfair or unreasonable behaviour which tend to exclude competitors from the market and so affect the structure of competition may fall under Article 86: see e.g., Cases 6 and 7/73, *Commercial Solvents Corporation v. Commission*.

Any unfair commercial practices on the part of a dominant undertaking intended to eliminate, discipline or deter smaller competitors would thus fall within the scope of the prohibition of Article 86 if the other conditions for its application were fulfilled.

75. In the present case, the main thrust of the complaints made against AKZO is that its behaviour was intended to eliminate ECS as a competitor in the organic peroxides market and while deep and prolonged price cutting was the principle means of achieving this aim, there are other aspects of AKZO Chemie's commercial conduct which may also fall under the heading of exclusionary behaviour.

Article 86 does not prescribe any cost-based legal rule to define the precise stage at which price-cutting by a dominant firm may become abusive and indeed the broad application of the concept of abuse to different forms of exclusionary behaviour would argue against such a narrow test.

AKZO however argues that the only criterion for assessing the legality or otherwise of its conduct is whether the prices it charged were above its average variable costs (used as a proxy for marginal costs).

The rationale for this argument is said to be that only less efficient firms will be harmed by pricing above average variable cost. A higher level than average variable cost will, according to AKZO, mean first that less efficient competitors will remain in business and secondly that the higher prices will lead to lower output and a misallocation of resources. In advancing this test AKZO are drawing in part on the marginal cost pricing rule propounded in 1975 by Professors Areeda and Turner in relation to United States anti-trust legislation (in 88 *Harvard Law Review* 697). That rule presents a *per se* test: a price at or above marginal cost is presumed lawful and a price below marginal cost is presumed abusive.

(1) ECR 223 (1974).

76. It should be noted that AKZO in any event fails its own test. The assertion that all the prices offered to attract customers from ECS were above 'variable' or 'marginal' cost depends upon accepting at face value AKZO's classification of costs which treats as 'variable' only raw material and energy costs. The authors of the Areeda-Turner rule however emphasize that variable costs must include such direct manufacturing costs as labour, repair and maintenance, (all treated by AKZO as fixed), and they specifically exclude from variable cost only:

- capital cost (interest on debt, etc) attributable to investment in land, plant and equipment,
- property and other taxes unaffected by output, and
- depreciation on plant attributable to obsolescence (III P. Areeda and D. Turner, Anti-trust Law, § 715c).

77. The Commission does not accept the argument that the incidence of Article 86 depends entirely on the mechanical application of a *per se* test based on marginal or variable cost. The standard proposed by AKZO based on a static and short-term conception of 'efficiency' takes no account of the broad objectives of EEC competition rules set out in Article 3 (f) and particularly the need to guard against the impairment of an effective structure of competition in the common market. It also fails to take account of the longer-term strategic considerations which may underlie sustained price cutting and which are particularly apparent in the present case. Further it ignores the fundamental importance of the element of discrimination in seeming to permit a dominant manufacturer to recover its full costs from its regular customers while tempting a rival's customers at lower prices. Yet even if the underlying policy considerations of Articles 85 and 86 were limited (as AKZO argues) to the achievement of short-term efficiency, it is not only the 'less efficient' firms which will be harmed if a dominant firm sells below its total cost but above variable cost. If prices are taken to a level where a business does not cover its total costs, smaller but possibly more efficient firms will eventually be eliminated and the larger firm with the greater economic resources – including the possibility of cross-subsidization – will survive.

78. At the oral hearing Professor B. Yamey, an economics expert retained for the purposes of these

proceedings by AKZO, suggested a slightly different test from that originally advanced by AKZO: according to his submission, a price cut could not be abusive where it was 'profit-maximizing' in the short term for the leading firm, even if at the same time it would inevitably damage the business of a smaller rival. He placed the emphasis not on the intention of the leading firm directed against the competitor but on the conception of the leading firm of its short-term interest. The same objections apply to this variation as to the rule as originally proposed by AKZO, with the additional factor that it would excuse almost any behaviour, no matter how destructive of competition, if it served the dominant producer's short-term interests.

A test based on the aggressor's costs alone will not cover all cases of unfair conduct designed to exclude or damage a competitor. Apart from the inherent difficulty of accurately establishing costs, no such test would give sufficient weight to the strategic aspect of price cutting behaviour.

79. Indeed it is not necessary, in order to achieve the desired long-term goal behind a price cutting campaign, for a dominant firm to go beneath its own total average costs. As Professor Yamey himself said in a leading article published in 1972: 'The aggressor may be able to achieve its objective of eliminating or disciplining the rival and of discouraging potential entrants by means of price cutting falling short of predatory pricing as this is defined currently'. (15 *Journal of Law and Economics* 129, 133). The dominant firm has an interest in achieving its aim at the lowest cost to itself (thus in the present case AKZO concentrated its price cuts on the flour additives market which was extremely important to ECS but of relatively minor significance to AKZO in the context of its overall organic peroxides business). The important element is the rival's assessment of the aggressor's determination to frustrate its expectations, for example as to rate of growth or attainable profit margins, rather than whether or not the dominant firm covers its own costs. There can thus be an anti-competitive object in price cutting whether or not the aggressor sets its prices above or below its own costs (in one or other meaning of the term).

80. The pursuance by a dominant firm of a strategy of eliminating competitors or potential competitors by unfair means differing from normal competition would in principle fall under Article 86 whatever the detailed mode of implementation. It

could be manifested not only in pricing policies but also in exclusionary commercial practices such as exclusive requirements contracts or loyalty rebates. A detailed analysis of the alleged aggressor's costs may however be of considerable importance in establishing the reasonableness or otherwise of its pricing conduct as well as the underlying purpose thereof.

There may be circumstances where the exclusionary consequences of a price cutting campaign by a dominant producer are so self-evident that no evidence of intention to eliminate a competitor is necessary. On the other hand, where low pricing could be susceptible of several explanations, evidence of an intention to eliminate a competitor or restrict competition might also be required to prove an infringement. Such evidence may exist in the form of internal documentation of the dominant company pointing to a scheme to damage competitors. In the absence however of direct documentary evidence an exclusionary intention might be inferred from all the circumstances of the case.

81. In the present case, there is convincing documentary evidence of a detailed plan made by AKZO in late 1979 to eliminate ECS as a competitor in the plastics sector. Subsequent documents indicate that the later pricing behaviour of AKZO UK in flour additives from late 1980 onwards was also part of a strategy to damage the business of ECS while taking account of the constraints imposed by the High Court injunction. Other factors which reinforce the documentary evidence of anti-competitive intent include:

- (i) the selective nature of the price cuts to regular customers of ECS while maintaining higher levels to established customers;
- (ii) the departure by AKZO UK from its previous pattern (prior to the dispute with ECS) of full cost recovery in flour additives;
- (iii) the subsidizing of price cut in the flour additives sector by below-cost transfer prices from the plastics and elastomers division.

The Commission emphasizes that it does not consider an intention even by a dominant firm to

prevail over its rivals as unlawful. A dominant firm is entitled to compete on the merits. Nor does the Commission suggest that large producers should be under any obligation to refrain from competing vigorously with smaller competitors or new entrants. The maintenance of a system of effective competition does however require that a small competitor be protected against behaviour by dominant undertakings designed to exclude it from the market not by virtue of greater efficiency or superior performance but by an abuse of market power.

82. The behaviour of AKZO has to be considered as a whole, but the particular aspects in which in the circumstances of the present case its pricing conduct is abusive under Article 86 are as follows:

- (i) making direct threats to ECS in two meetings in late 1979;
- (ii) from about the end of 1980 onwards, systematically offering and/or supplying flour additives to Provincial Merchants, Allied Mills and the customers of ECS in the large independent sector at unreasonably low prices intended to damage ECS's viability by either taking the customer's business or forcing ECS itself to supply at uneconomic prices in order to keep the business;
- (iii) making the above quotations selectively to ECS customers while maintaining substantially (up to 60 %) higher prices to the similarly-placed customers it already supplied itself;
- (iv) offering potassium bromate and vitamin mix (the latter a product which it did not normally supply) at bait prices to ECS's customers so as to secure the whole of their business in flour additives;
- (v) as part of the plan to damage ECS by keeping prices generally at an uneconomic level, which it could survive because of its superior financial resources, maintaining below cost prices to Spillers and RHM over a prolonged period of time;
- (vi) pursuing an exclusionary commercial policy in respect of RHM and Spillers by obtaining from the customer precise details of quotes from other producers and then offering a price just below the competing quotation so

as to obtain the business, coupled (in the case of Spillers) with an exclusive supply obligation which kept out other suppliers;

(vii) implementing the above tactics with the long-term purpose of damaging and/or securing the withdrawal of ECS as a competitor in the broader organic peroxides market as a whole.

83. The common feature of the above aspects of AKZO's behaviour is their serious effect, both actually and potentially, upon the structure of competition by their tendency to exclude ECS as a competitor.

Discrimination between similarly-placed customers is expressly prohibited by Article 86 (c) when it places certain firms at a competitive disadvantage. In the present case however the anti-competitive effect of AKZO's differential pricing involved not so much direct injury to customers but rather a serious impact on the structure of competition at the level of supply by reason of its exclusionary effect.

In the same way, the inclusion by a dominant producer in a 'package' of various items at well below cost is abusive since it acts as a 'bait' to attract the whole of the business of the customer and thus exclude competitors from the market.

The Commission also considers that the tactic of systematically obtaining from customers details of price offers made by other suppliers and then with the benefit of knowledge not available to the other suppliers obtaining all the customer's business by pricing just below the lowest alternative quote was exclusionary in purpose, as was the stipulation that a price was conditional upon the customer taking the whole of its requirements from AKZO UK. In effect the smaller suppliers are excluded from the possibility of obtaining any business which – it has been decided in advance – will be awarded to the dominant producer.

The effect of such arrangements is to deny to the smaller firm the benefits of the free play of competition. In the present case, the systematic taking from ECS of its customers for flour additives would, had it remained unchecked, eventually have led to the withdrawal of ECS not only from the flour additives sector but also from the organic peroxide 'plastics' market.

84. AKZO has argued that after the Decision ordering interim measures it could not be guilty of any infringement of Article 86 since it was permitted by the terms of that Decision to align on any offer from another producer.

For the reasons set out at point 58, the Commission considers that the Diaflex offers did not represent a realistic market price and that AKZO knew or ought to have known this.

Further, the prices on which AKZO UK aligned and which enabled it to retain the business of the 'large independent' customers which it earlier gained from ECS were for potassium bromate at least below its variable costs and were discriminatory in comparison with those still charged to its other customers in the sector.

Even if the purported alignment did not go outside the terms of the interim order, the interim measures Decision would not legitimize all pricing behaviour by AKZO UK which was not in breach thereof. The fact that the interim order did not specifically prohibit certain conduct does not mean that the behaviour in question could not still be an infringement of the provisions of Article 86.

The exclusionary behaviour of AKZO thus continued even after the interim measures Decision.

85. The next question to be considered in relation to the establishment of an abuse is whether AKZO's conduct constituted an abuse of its dominant position in the overall EEC organic peroxides market.

The Judgment of the Court of Justice in Case 6/72, *Continental Can Corporation v. Commission*, shows that strengthening a dominant position already held in a particular market in such a way that the degree of dominance reached substantially fetters competition may in principle constitute an abuse of that dominant position irrespective of whether the firm actually uses its market power to achieve that purpose. The Court specifically held that the question of the link between the dominant position and its abuse was of no consequence, since the strengthening of a dominant position might be an abuse and prohibited under Article 86 regardless of the means and procedure whereby it was achieved, if it had the effect of substantially restricting competition. In its judgment in Case 85/76, *Hoffmann-La Roche v. Commission*, the Court of Justice (point 91) again rejected the argument that the dominant undertaking had to have brought about the result complained of by means of the economic power conveyed by the alleged dominant position. It follows that a dominant position held in one market may be abused by

conduct in a market other than the one in which the dominant position is held (for example, a specialized sub-market or an associated market).

86. ECS was considered by AKZO as a small but potentially dangerous competitor in the organic peroxides field. It is of course true that even if AKZO had succeeded in eliminating ECS from the polymer market there would still have been other producers besides AKZO. However several of these were considered by AKZO to be of local importance only. As for the two larger producers, Luperox and Interlox, their market share in organic peroxides has remained static since 1980 and it is apparent that AKZO does not consider them as a serious danger to its market position or to the price structure. The importance of a particular firm to the maintenance of competition does not depend so much upon its size as upon the impetus and direction of the competition which it provides to the larger established producers. Further, the elimination of ECS would have a dissuasive effect upon any other small producer which might be minded to attack AKZO's established market position. The Commission therefore considers that the elimination of ECS from the organic peroxides market would have had a substantial effect upon competition notwithstanding its still minor market share and the existence of other suppliers.
87. Having regard to the strategic objective behind the pricing policy adopted towards ECS in flour additives, namely its elimination as a competitor in the larger EEC organic peroxides market, the conduct of AKZO may be considered an abuse of a dominant position in that market, on the assumption that the other requirements of Article 86 are met.

The same conduct may of course also constitute an abuse of a dominant position in the particular market where it was carried out.

Effect on trade between Member States

88. As the Court of Justice held in Case 27/76, *United Brands*, (point 201), where the occupier of a dominant position established in the common market aims at eliminating a competitor also established in the common market, it is immaterial whether this behaviour relates directly to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition within the common market.

Indeed the Court held in Cases 6 and 7/73, *Commercial Solvents*, (point 33) that it would not even matter if the eliminatory conduct were directed against the rival's exports outside the Community if this would affect the competitive structure inside the Community.

In the present case, the abusive behaviour dealt with in the statement of objections concerned the commercial practices of AKZO in the flour additives market in the United Kingdom. (It should be noted that ECS's complaint also related to export sales, and while this aspect was not dealt with expressly in the statement of objections, and hence is not covered by this Decision, there would appear to be no reason in principle why exclusionary pricing in an export market would not fall under Article 86 if it affected the competitive structure inside the EEC.)

It is not therefore necessary, for Article 86 to apply, that the abusive behaviour be implemented in a transaction directly involving inter-State trade.

89. In any event, the aggressive behaviour of AKZO UK in flour additives did have a direct causal link to trade between Member States. The original threats were a direct result of ECS's expansion into the plastics sector and particularly its exports to Germany. Although in quantitative terms the exports by ECS to Germany were of a relatively small order, AKZO foresaw a considerable potential for expansion, and the persistence which it demonstrated over a long period underlies the competitive importance, in its view, of this particular channel of trade.

The Commission has already determined in relation to Article 85 in its Decision 82/897/EEC ⁽¹⁾ in the *Toltecs/Dorcet* trade marks case, that where a national market is dominated by a few large undertakings, the restriction of even a small supplier from another Member State is a particularly serious infringement, particularly where the firm imposing the restriction is of considerable importance in the market. The same considerations apply *a fortiori* under Article 86 to a case where a dominant firm adopts a course of conduct to deter a smaller producer from entering a new market or to punish it for having done so.

Had AKZO succeeded in eradicating or neutralizing ECS as a competitor, the trade from the

⁽¹⁾ OJ No L 379, 31. 12. 1982, p. 19.

United Kingdom to Germany would have been stopped and the competition which it represented to AKZO would have been eliminated.

Thus not only would the competitive structure within the common market have been affected but there would have been a direct result upon the flow of trade between Member States.

The addressee of the Decision

90. AKZO objects to the fact that the statement of objections in the present proceedings was addressed to AKZO Chemie whereas the interim measures Decision named only its United Kingdom subsidiary.

It may well be that in private law a parent company and its subsidiaries are separate legal persons. The relevant prohibitions in Articles 85 and 86 are directed to 'undertakings', a concept not limited by the strict application of the doctrine of legal personality. The present case concerns an abuse of the dominant position held by AKZO in the organic peroxides market as a whole. AKZO Chemie and the subsidiary companies through which it operates in the different Member States form a single economic unit. In any case, the actions of AKZO UK on the flour additives market were carried out on the direction and with the knowledge of senior executives from the parent company AKZO Chemie. AKZO UK can in no way be said to conduct its business autonomously of its parent.

The Commission therefore considers that AKZO Chemie BV (including its subsidiary companies), as the economic unit in which the activities of the AKZO group in specialty chemicals are organized, is the appropriate addressee of this Decision.

Abuse of a dominant position in the United Kingdom/Ireland flour additives market

91. The Commission considers (point 66, *ante*) that the relevant market for the purposes of Article 86 is the EEC organic peroxide sector as a whole. It should however be emphasized that even if the relevant market were taken to be the United Kingdom/Ireland flour additives market, the end result is the same as AKZO is also dominant in this market and has abused its dominant position.

92. Apart from AKZO's high share of the flour additives business in the United Kingdom and Ireland, the other main factors which are relevant to the establishment of a dominant position in that sub-market are:

- (i) the fact that AKZO UK supplies exclusively two out of the three major United Kingdom milling customers;
- (ii) the close relations with Diaflex and the influence of AKZO UK on that firm's prices;
- (iii) the structure of the AKZO NV group with its superior financial resources compared to ECS and the possibility of cross-financing of losses in its flour additives business by the plastics and elastomers division;
- (iv) the privileged position of AKZO UK compared with ECS *vis-a-vis* suppliers including the ability to obtain goods on consignment and/or more favourable terms and access to 'inside' information on other producers from suppliers and customers;
- (v) the breadth of AKZO UK's product range in flour additives, including strength in high-margin products such as amylases, compared with ECS;
- (vi) AKZO UK's historical role as price leader in the United Kingdom flour additives market prior to 1980;
- (vii) AKZO's recognition of its own ability to control prices as described in its internal documentation and the very success of its plan in bringing and holding down price levels.

93. AKZO has argued that there is no flour additives market (or sub-market) as such but that separate markets exist for each flour additive and indeed each formulation thereof. It maintains that there are five relevant markets – one for each of the products treated in detail in the evidence – and thus eliminates from consideration its substantial sales of other flour additives. It also claims that in some of the five markets at least – particularly vitamins – it is ECS, not itself, which has the 'dominant' share.

94. The documentation of AKZO however shows that 'flour additives' constitutes an identifiable business area with customers preferring to take the full range of products from one supplier.

For the same reasons as set out in points 63 and 64, the flour additives sector constitutes a single 'line of business' or market in which the relative power of ECS and AKZO can be judged.

The other elements considered by the Commission above concerning abusive behaviour and the effect

upon inter-State trade would also apply to any evaluation under Article 86 of competition on the flour additives market.

AKZO does not seem to dispute that the United Kingdom and Ireland constitute a substantial part of the common market for the purposes of Article 86.

The Commission therefore concludes that, even if its reasoning based on the doctrine in *Continental Can* were to be considered incorrect, the conduct of AKZO nevertheless still constitutes an infringement of Article 86 as being an abuse of its dominant position in the market for flour additives in the United Kingdom and Ireland.

Conclusions

95. On the basis of the considerations set out above the Commission concludes that AKZO has infringed Article 86 of the EEC Treaty:

- (i) at all material times AKZO occupied a dominant position in the EEC organic peroxides market;
- (ii) AKZO abused its dominant position in the EEC organic peroxides market by the making of threats to ECS in late 1979 and then systematic implementation since the end of 1980 of a course of commercial behaviour in the flour additives sector designed to damage the business of ECS and in the long term secure its withdrawal as a competitor from the organic peroxides market thereby reinforcing by unfair means the dominant position of AKZO;
- (iii) the abuse by AKZO of its dominant position had and was intended to have an appreciable effect upon trade between Member States;
- (iv) even if the relevant market for the purposes of Article 86 were taken to be the United Kingdom/Ireland flour additives market, rather than the whole EEC organic peroxides market, the conduct of AKZO still constitutes an abuse of its dominant position in this market;
- (v) the infringement began in late 1979 and was not abandoned after the issuing of the interim measures Decision.

Remedies

(a) FINES

96. Under Article 15 of Regulation No 17, infringements of Article 86 may be sanctioned by fines of

up to 1 million ECU or 10 % of the turnover of the undertaking in the preceding business year, whichever is the greater. Regard must be had to both the gravity and the duration of the infringement.

In the present case the Commission takes the view that the infringement is of a particularly serious nature and that a substantial fine should be imposed upon AKZO.

97. The infringement in the present case involved the making of direct threats to a small competitor in order to deter it from expanding into a new market and providing an important element of competition to AKZO's position of market dominance. When AKZO's threats were ignored, AKZO sought in a systematic and determined manner to implement a plan to damage the business of ECS. AKZO employed its substantial resources to subsidize over a long period of time a course of conduct designed not only to harm ECS specifically but also to serve its policy of retaining by any means its dominant market position in an important industrial sector. By taking this action to prevent or punish the expansion of a small competitor to another Member State, AKZO was flouting one of the fundamental objectives of the Treaty, namely the creation of a single market between Member States. The seriousness of the infringement is heightened by the fact that AKZO continues its abusive behaviour long after proceedings had been taken in the High Court and indeed even after the Commission had issued a Decision ordering interim measures. The Commission also considers it a further aggravating factor that AKZO had given a totally misleading version of the events to the High Court and that given the difficulties of proof it would probably have succeeded in achieving its purpose of eliminating ECS had the Commission not discovered the evidence on which this Decision is based. It is further apparent that the aggressive behaviour against ECS was not an isolated event but occurred in the context of a settled corporate policy by AKZO to use its market power to discipline or destroy unwanted competitors.

98. The infringement was committed deliberately and AKZO was well aware it was infringing the rules of competition: at the first meeting in November 1979 it had been pointed out to AKZO by ECS that its threats constituted an abuse of a dominant position.

The infringement was also of long duration. The original threats were made in December 1979 and were implemented in a serious manner a year later. The abusive behaviour continued even after the interim measures Decision.

(b) TERMINATION OF INFRINGEMENTS

99. Under Article 3 of Regulation No 17, the Commission may, on finding that there is an infringement of Article 86 of the Treaty, require the undertaking concerned to terminate the said infringement.

In the circumstances of the present case the Commission considers that it is essential not only to impose a substantial fine on AKZO but also to specify measures to ensure that the infringement is not repeated or continued. It is established by the judgment in Joined Cases 6 and 7/73, Commercial Solvents, that the Commission has a discretionary power to order measures to ensure that its Decision is effective, including requiring the undertaking to do certain specific acts. The power to order such measures is not confined to acts directly involving trade between Member States, particularly where the objective is the maintenance of an effective competitive structure in the common market.

100. The measures specified should be proportionate to the threat and should not go beyond what is necessary in order to provide adequate protection to the complainant and maintain conditions of competition in the common market.

Although ECS had complained that the exclusionary behaviour of AKZO was manifested not only in the flour additives sector but also in relation to the plastics application, the present finding of an infringement has been confined to the alleged abusive conduct in the sale of flour additives and the Commission will therefore make an order which covers only the sale of flour additives in the EEC.

101. AKZO must in the first place be prohibited in relation to the sale of flour additives from offering prices to existing or potential customers of ECS which are discriminatory. Price differentials may be permitted between different categories of customers where these reflect reasonable cost differences in the commercial attributes of the transaction but inside the same category of customers AKZO shall not be permitted to discriminate in its treatment of its own regular customers on the one hand and on the other the present or former customers of ECS of which it hopes to gain or retain the custom.

For the avoidance of doubt, it is specified that the supply by AKZO of flour additives to individual mills in the Allied group shall be made on the same terms and conditions as those given to the large independent mills.

It is also considered necessary to include a provision for reporting to the Commission at appropriate intervals so that the compliance of AKZO with the Decision can be monitored.

The requirement of AKZO to refrain from particular abusive behaviour shall be without limit of time but it is considered appropriate that the reporting requirement should not be applicable for more than a reasonable period, which will be set a five years.

As provided in Decision 83/462/EEC, this Decision replaces the obligations imposed on AKZO Chemie UK by that Decision,

HAS ADOPTED THIS DECISION:

Article 1

AKZO Chemie BV infringed Article 86 of the EEC Treaty by pursuing against ECS a course of conduct intended to damage ECS's business or to secure its withdrawal from the EEC organic peroxides market, or both, the essential features of which consisted of:

- (i) making direct threats to ECS in meetings in late 1979 with the aim of securing ECS's withdrawal from the market for organic peroxides for the 'plastics' application;
- (ii) from about December 1980 onwards systematically offering and supplying flour additives to Provincial Merchants, Allied Mills and the customers of ECS in the 'large independent' sector at unreasonably low prices designed to damage ECS's business viability in that ECS was obliged either to abandon the customer to AKZO Chemie BV or to match a loss-making price in order to retain the customer;
- (iii) making such quotations selectively to ECS customers for flour additives while maintaining substantially (up to 60 %) higher prices to comparable buyers which were already its own regular customers;
- (iv) offering potassium bromate and vitamin mix (the latter a product which it did not normally supply) at a bait price in a package with benzoyl peroxide to ECS's customers in order to attract their business for the full range of flour additives to the exclusion of ECS;
- (v) maintaining, as part of the plan to damage ECS, the prices for flour additives in the United Kingdom at an artificially low level over a prolonged period, a situation which it could survive because of its superior financial resources in comparison with ECS;
- (vi) pursuing an exclusionary commercial policy in respect of the major customers RHM and Spillers by obtaining from the said customers precise details of offers made by other suppliers (including ECS) for

flour additives and then offering a price just below the lowest alternative offer in order to obtain the business, coupled (in the case of Spillers) with a requirement that the customer agree to obtain its total requirements in flour additives from AKZO Chemie BV.

Article 2

A fine of 10 million ECU, that is, Fl 24 696 000, is hereby imposed on AKZO Chemie BV.

This fine shall be paid, in guilders, within three months of the date of notification of this Decision to the account of the Commission of the European Communities, No 41-60-95-518 at Amro Bank, Amsterdam.

Article 3

AKZO Chemie BV shall forthwith bring to an end the infringement referred to in Article 1 to the extent that it has not already done so.

To this end, AKZO Chemie BV and any subsidiary company forming part of the AKZO Chemie BV undertaking shall refrain from repeating or continuing any of the acts or behaviour specified in Article 1 (i) to (vi).

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.

This provision shall not prevent AKZO Chemie BV from applying price differentials for flour additives as between different categories of customers which reasonably and objectively reflect differences in production and delivery costs attributable to the annual requirement of the customer, order size and other commercial factors.

For the avoidance of doubt, it is hereby provided that offers by AKZO Chemie BV for the supply of flour additives to individual mills of the Allied group shall not be made on terms substantially more favourable than those offered to the 'large independents'.

Article 4

AKZO Chemie BV shall inform those of its customers for flour additives in the United Kingdom and Ireland which have accepted a stipulation whether oral or in writing, express or implied, requiring them to obtain the whole or effectively the whole of their requirements from AKZO Chemie BV that such a stipulation is not binding on them, and it shall notify the Commission that it has done so by 1 April 1986.

Article 5

AKZO Chemie BV shall, for a period of five years from 1 January 1986, within two months following the end of each calendar year, furnish to the Commission a compliance report, which shall for the year in question list the prices offered and applied by AKZO Chemie BV to each customer for each flour additive product in the territory of the EEC, include the internal financial statements for the flour additive business and indicate the basis on which costings were calculated (including transfer prices of raw materials or intermediates from other departments in the AKZO group).

Article 6

In respect of each obligation set out in Articles 4 and 5 a periodic penalty payment of 1 000 ECU per day shall be payable in respect of each day of delay after the dates stated therein.

Article 7

The operation of Decision 83/462/EEC is hereby terminated in accordance with Article 8 of that Decision.

Article 8

This Decision is addressed to AKZO Chemie BV, Stationsstraat 48, Amersfoort, Netherlands.

This Decision shall be enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 14 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission