

Joined Cases T-1/89 to T-4/89 and T-6/89 to T-15/89

Rhône-Poulenc and Others v Commission of the European Communities (Confidentiality)

Order of the Court of First Instance (First Chamber), 15 November 1990 637

Summary of the Order

Procedure — Request for confidential treatment — To be examined with reference to the requirements of the protection of business secrecy and those arising from the principle that all parties must be in a position to reply to any points adversely affecting them
(Rules of Procedure, Art. 91(1))

ORDER OF THE COURT OF FIRST INSTANCE (First Chamber) 15 November 1990*

In Joined Cases T-1/89 to T-4/89 and T-6/89 to T-15/89,

Rhône Poulenc SA, whose registered office is at 25 quai Paul-Doumer, F-92408 Courbevoie (France), represented by R. Saint Esteben, avocat, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 8 rue Zithe,

* Languages of the case: T-1/89 French, T-2/89 French,
T-3/89 French, T-4/89 German,
T-6/89 Italian, T-7/89 English,
T-8/89 Dutch, T-9/89 German,
T-10/89 German, T-11/89 English,
T-12/89 French, T-13/89 English,
T-14/89 Italian, T-15/89 German.

Petrofina SA, having its registered office at 52, rue de l'Industrie, B-1040 Brussels, represented by G. Vandersanden and L. Defalque, avocats, with an address for service in Luxembourg at the Chambers of J. Biver, 8 rue Zithe,

Atochem SA, whose registered office is at 4 and 8 cours Michelet, La Défense 10, Puteaux, Hauts de Seine (France), represented by X. De Roux and C.-H. Léger, avocats, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 côte d'Eich,

BASF Aktiengesellschaft, whose registered office is at 38 Carl-Bosch-Straße, D-6700 Ludwigshafen (Federal Republic of Germany), represented by F. Hermanns and U. F. Kleier, Rechtsanwälte, with an address for service in Luxembourg at the Chambers of J. Loesch, 8 rue Zithe,

Enichem Anic SpA, whose registered office is at 55 via Ruggero Settimo, Palermo (Italy), represented by G. Guarino, M. Siragusa and G. Arcidiacono, avocats, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Harles, 4 avenue Marie-Thérèse,

SA Hercules Chemicals NV, whose registered office is at 1 Industriepark, B-3580 Beringen (Belgium), represented by M. Siragusa, avocat, of Messrs Cleary, Gottlieb, Steen & Hamilton, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 côte d'Eich,

DSM NV, whose registered office is in Heerlen (Netherlands), represented by I. G. F. Cath, avocat, with an address for service in Luxembourg at the Chambers of L. H. Dupong, 14a rue des Bains,

Hüls Aktiengesellschaft, whose registered office is at 1 Paul-Baumann-Straße, D-4370 Marl (Federal Republic of Germany), represented by Messrs Deringer, Tessin, Herrmann und Sedemund, Rechtsanwälte, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 8 rue Zithe,

Hoechst Aktiengesellschaft, whose registered office is Postfach 800320, D-6230 Frankfurt am Main (Federal Republic of Germany), represented by H. Hellmann, Rechtsanwalt, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 8 rue Zithe,

Shell International Chemical Company Ltd, whose registered office is London SE1 7PG (United Kingdom), represented by J. F. Lever QC and K. B. Parker, barrister, instructed by J. W. Osborne of Messrs Clifford Chance, solicitors, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 côte d'Eich,

SA Solvay & Compagnie, whose registered office is 33 rue du Prince-Albert, B-1050 Brussels, represented by L. Simont, avocat, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 8 rue Zithe,

Imperial Chemical Industries, plc, whose registered office is at Millbank, London SW1 (United Kingdom), represented by D. Vaughan QC and D. Andersen, barrister, and by V. O. White and R. J. Coles, solicitors, with an address for service in Luxembourg at the Chambers of L. H. Dupong, 14a rue des Bains,

Montedipe SpA, whose registered office is in Milan (Italy), represented by G. Celona and by P. M. Ferrari, F. Capelli and G. Aghina, avvocati, with an address for service in Luxembourg at the Chambers of G. Margue, 20 rue Phillipe-II,

Chemie Linz AG, whose registered office is in Linz (Austria), represented by Mr Lieberknecht of Messrs Bruckaus, Kreifels, Winkhaus und Lieberknecht, with an address for service in Luxembourg at the Chambers of A. Bonn, 20 côte d'Eich,

applicants,

v

Commission of the European Communities, represented by its Legal Advisers, A. McClellan and G. Marengo, B. Jansen and K. Banks, members of its Legal Department, assisted by Messrs Coutrelis et associés, avocats, and by T. R. Ottervanger, Rechtsanwalt, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149, Polypropylene) is void,

THE COURT OF FIRST INSTANCE (First Chamber)

composed of: J. L. Cruz Vilaça, President, R. Schintgen, D. A. O. Edward, H. Kirschner and K. Lenaerts, Judges,

Advocate General: B. Vesterdorf

Registrar: H. Jung

makes the following

Order

- 1 By letters dated 9 July 1990 sent by the Registrar, the Court requested the parties to submit any observations they might have on the joinder of Cases T-1 to T-4/89 and T-6 to T-15/89 for the purposes of the oral procedure and, in the event of joinder, any requests they might have for confidential treatment of their pleadings, or of annexes thereto, or of both, together with a 'brief statement of reasons'.
- 2 By a letter received at the Court on 18 July 1990, the applicant in Case T-2/89 lodged a request for the confidential treatment of certain material contained in its application and in its reply and of all the annexes to its application and one annex to its reply. However, it did not provide the brief statement of reasons requested by the Court.
- 3 By a letter received at the Court on 25 July 1990, the applicant in Case T-3/89 lodged a request for the confidential treatment of certain material contained in its application and in its reply and of certain material contained in an annex to its application and one annex to its reply. However, it did not provide the brief statement of reasons requested by the Court.

- 4 By letters received at the Court on 10 and 23 July 1990, the applicant in Case T-4/89 lodged a request for the confidential treatment of an annex to its application. However, it did not provide the brief statement of reasons requested by the Court.
- 5 By a letter received at the Court on 12 July 1990, the applicant in Case T-9/89 lodged a request for the confidential treatment of certain material contained in its application and of certain annexes thereto. It merely stated that this material constituted 'secrets d'affaires' and did not provide the brief statement of reasons requested by the Court.
- 6 By letter received at the Court on 24 July 1990, the applicant in Case T-11/89 lodged a request for the confidential treatment of certain material contained in its reply and of all the annexes to its pleadings. It stated that:

'As to the annexes to the pleadings which have been lodged with the Registry, our clients would prefer that these not be made available for consultation by lawyers representing the other applicants. However, if any lawyer representing another applicant wishes to examine any of the annexes in our case they are at liberty to contact me direct, whereupon I will review with SICC whether there is any difficulty in that lawyer examining any class of documents or any particular document. As a general principle I believe that the copies of the pleadings may be made available to the lawyers representing the other applicants, including in-house lawyers, but not to commercial executives of their clients.'

- 7 By a letter received at the Court on 24 July 1990, the applicant in Case T-12/89 lodged a request for the confidential treatment of certain material contained in one page of its application and in two annexes to its application and in one annex to its reply. It stated that:

'The application lodged by Solvay et Cie SA, some of the annexes thereto and some of the annexes to the reply contain material enabling the production costs of the products in question to be determined and are considered to be confidential by

my client. Since this material may not be disclosed to the other parties, I enclose herewith a non-confidential version of the following documents . . . ’ .

- 8 By a letter received at the Court on 25 July 1990, the applicant in Case T-13/89 indicated that:

‘The full text of the ICI defences which form Annexes 3(a), (b) and (c) to ICI’s application should not be communicated to the parties in other cases . . . Annex 9 to ICI’s application and the Coopers and Lybrand Audit which forms Exhibit 4 to ICI’s application should not be disclosed at all to other parties. Finally, the figures at Section 16. D.2. of ICI’s application should also not be communicated to other parties.’

It pointed out that ‘the position with regard to the confidentiality of ICI’s pleadings is set out in Section 1.5 of ICI’s application’, in which it simply states that those documents ‘contain much confidential material’ and requests that they ‘be not disclosed at all’.

- 9 The Commission has not raised any objections to the requests for confidential treatment lodged by the various applicants.
- 10 After establishing that there was no objection to the joinder of the cases, the Court, by order of 25 September 1990, joined Cases T-1 to T-4/89 and T-6 to T-15/89 for the purposes of the oral procedure owing to the their related nature, in accordance with Article 43 of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* by virtue of Article 11(3) of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.
- 11 After finding that in their abovementioned letters, the applicants had not provided the statement of reasons requested by the Court or had not done so sufficiently, the Court requested the applicants in Cases T-2/89, T-9/89, T-11/89, T-12/89 and T-13/89, first, ‘to indicate the specific information . . . for which [they request]

confidential treatment' and, secondly, 'to state clearly in respect of each item of information (or type of information) . . . the reasons on which [their] request for confidential treatment is based, regard being had to the age of the information in question', and the applicants in Cases T-3/89 and T-4/89 'to give a clear statement of the reasons for which [they are] requesting confidential treatment in respect of each item of information (or type of information) . . . regard being had to the age of the information in question'.

- 12 By a letter received at the Court on 9 November 1990, the applicant in Case T-2/89 indicated that:

'Petrofina considers that confidential treatment is a right which it cannot be refused. Would you therefore communicate to the other parties only the annexes as edited, omitted or left as such by Petrofina.'

- 13 By a letter received at the Court on 24 October 1990, the applicant in Case T-4/89 withdrew its request for confidential treatment.

- 14 In a letter received at the Court on 29 October 1990, the applicant in Case T-12/89 stated that:

'Having regard to the period in question in these cases, it is self-evident that the commercial information and statistics contained in the pleadings and annexes of the parties concerned go back several years. That being so, Solvay et Cie SA refers to my letter of 23 July 1990 in which it was explained that the information obscured in the non-confidential version of the application and certain annexes to the reply was information which enabled the production costs of the products in question to be determined and that for that reason it had to be considered confidential. That statement of reasons should suffice.'

- 15 By a letter received at the Court on 16 October 1990, the applicant in Case T-13/89 informed the Court that:

'ICI has reviewed the material in question and waives its request for confidential treatment of p. 103 of the application and Annex 9 to the application on the basis that the information contained therein relating to ICI turnover is now so outdated as to be no longer commercially sensitive. However, ICI would ask the Court to accede to its request for confidential treatment of the full version of its various defences (whilst accepting disclosure of the edited versions) and also in respect of the Coopers and Lybrand Audit of ICI sales. All these documents contain information relating to individual customers of ICI and notwithstanding that the information is of a certain age it is none the less commercially sensitive.'

16 In Cases T-3/89, T-9/89 and T-11/89, no replies to the Registrar's letter of 10 October 1990 have been received.

17 In addition, by letters dated 18 July 1990 sent by the Registrar, the Court requested the parties to reply in writing to certain questions. In their replies, some applicants submitted requests for confidential treatment concerning certain material in those replies or the annexes thereto.

18 By a letter received at the Court on 16 October 1990, the applicant in Case T-9/89 requested that

'the information submitted in Hüls Annex 51 be treated confidentially since it concerns business secrets. The information contained therein, in so far as it was available, represents not only the total sales in the European Community but also the volume of sales in the various Member States, so that the other parties concerned could draw conclusions from it concerning Hüls' market share and conduct on that market. For those reasons, we request you not to send Annex 51 to the other applicants'.

19 By a letter received at the Court on 15 October 1990, the applicant in Case T-11/89 pointed out, in its actual reply to Question 5, that the tables mentioned in its reply were marked 'Confidential — Business Secrets'.

- 20 In a letter received at the Court on 9 October 1990, the applicant in Case T-13/89 marked a number of tables annexed to its reply to Question 5 as 'confidential'. However, by a letter received at the Court of 16 October 1990, the applicant in Case T-13/89 informed the Court that:

'With regard to the three pages of tables included in ICI's reply dated 8 October 1990 to the questions put to it by the Court and which ICI has marked as confidential, ICI has reviewed the position in the light of the comments made in the Court's letter of 10 October 1990. It is content not to make any claim for confidential treatment in respect of such tables given the age of the information concerned.'

- 21 It should be noted first of all that the requests for confidential treatment must be regarded as procedural issues within the meaning of Article 91(1) of the Rules of Procedure of the Court of Justice.
- 22 It should be noted, next, that when examining a request for confidential treatment where several cases have been joined the Court has to resolve a conflict between two opposing principles: on the one hand, the principle of the protection of business secrets and, on the other, the principle that all parties having a potential conflict of interest must be in a position to reply to any points adversely affecting them.
- 23 In the present case, the Court has examined the merits of the requests for confidential treatment in the light of, first, the attitude of some of the applicants which have not made requests for confidential treatment of information comparable to that referred to in the requests before the Court, secondly, the withdrawal by other applicants of their requests for confidential treatment of such information and, thirdly, the age of most of the information which other applicants still classify as 'business secrets' without explaining how such old information can retain the character of 'a business secret'.

24 Having regard to all the foregoing, it must be observed that, of all the requests for confidential treatment, only the following requests concern information which must still be regarded as concerning matters of business secrecy:

- (i) in Case T-2/89, the requests for confidential treatment concerning pp. 13 and 14 of the application and p. 39 of the reply, Annex 11 to the application, pp. 12 and 13 of Annex 14, pp. 6 to 8 of Annex 17, Annexes 19 and 20 to the application, as well as Appendix PET 5 of Annex 3 to the reply and Appendices PET 6/29 and PET 7/37 of Annex 3 to the reply but only so far as the information taken from the Coopers and Lybrand Audit is concerned;
- (ii) in Case T-3/89, the requests for confidential treatment concerning Appendices A6 and A7 of Annex 2 to the application;
- (iii) in Case T-9/89, the requests for confidential treatment concerning pp. 40, 62 and 97 of the application, p. 2 of Annex 26 to the application, and Annexes 30 to 35 to the application;
- (iv) in Case T-11/89, the requests for confidential treatment concerning pp. 114 and 115 of the reply; pp. 73 to 84, Appendices 1, 2, 4, 5 and number 13 of the 'contemporary documents' in Annex 6 to the application as well as Exhibits C2, D1 and D2 and their 'typed copies' in Appendix II of Annex 11 to the application;
- (v) in Case T-12/89, the requests for confidential treatment concerning p. 4 of the application, Annexes 6 and 7 to the application and Annex 2 to the reply;
- (vi) in Case T-13/89, the requests for confidential treatment concerning Annex 3(a) to the application, with the exception of Exhibits 6, first table, 18, 21 and 22; Annex 3(c) to the application, with the exception of the requests relating to Exhibit 5 and p. 17; as well as Exhibit 4 to the application, with the exception of the part entitled 'sales of polypropylene basic products to overlapping customers during the 21 months ended 30 September 1983'.

25 Those requests must, therefore, be granted. Since all the other requests for confidential treatment have been rejected, the information to which those requests relate will be made available to the parties which will be able to inspect it at the Registry of the Court.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby orders as follows:

The following requests shall be granted:

- (i) in Case T-2/89, the requests for confidential treatment concerning pp. 13 and 14 of the application and p. 39 of the reply, Annex 11 to the application, pp. 12 and 13 of Annex 14, pp. 6 to 8 of Annex 17, Annexes 19 and 20 to the application, as well as Appendix PET 5 of Annex 3 to the reply and Appendices PET 6/29 and PET 7/37 of Annex 3 to the reply but only so far as the information taken from the Coopers and Lybrand Audit is concerned;
- (ii) in Case T-3/89, the requests for confidential treatment concerning Appendices A6 and A7 of Annex 2 to the application;
- (iii) in Case T-9/89, the requests for confidential treatment concerning pp. 40, 62 and 97 of the application, p. 2 of Annex 26 to the application, and Annexes 30 to 35 to the application;
- (iv) in Case T-11/89, the requests for confidential treatment concerning pp. 114 and 115 of the reply; pp. 73 to 84, Appendices 1, 2, 4, 5 and number 13 of the 'contemporary documents' in Annex 6 to the application as well as Exhibits C2, D1 and D2 and their 'typed copies' in Appendix II of Annex 11 to the application;
- (v) in Case T-12/89, the requests for confidential treatment concerning p. 4 of the application, Annexes 6 and 7 to the application and Annex 2 to the reply;

- (vi) in Case T-13/89, the requests for confidential treatment concerning Annex 3(a) to the application, with the exception of Exhibits 6, first table, 18, 21 and 22; Annex 3(c) to the application, with the exception of the requests relating to Exhibit 5 and p. 17; as well as Exhibit 4 to the application, with the exception of the part entitled 'sales of polypropylene basic products to overlapping customers during the 21 months ended 30 September 1983'.

Luxembourg, 15 November 1990.

H. Jung

Registrar

J. L. Cruz Vilaça

President