

ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)

2 May 1997 *

In Case T-90/96,

Automobiles Peugeot SA, a company incorporated under French law, established in Paris, represented by Xavier de Roux, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 8 Rue Zithe,

applicant,

v

Commission of the European Communities, represented initially by Francisco Enrique González Díaz, of its Legal Service, and Guy Charrier, a national civil servant seconded to the Commission, acting as Agents, and subsequently by Mr Charrier alone, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for annulment of four letters from the Commission of 3 and 22 April 1996, purportedly rejecting the applicant's requests for confidential treatment to be accorded to certain information supplied to the Commission under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87),

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

composed of: C. W. Bellamy, President, A. Kalogeropoulos and P. Lindh, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and procedure

- 1 The applicant company, Automobiles Peugeot SA (hereinafter 'PSA'), markets Peugeot (and Citroën) vehicles in Europe. The distributors of those vehicles are linked to PSA by exclusive and selective standard form distribution agreements. PSA's conduct is the subject of four complaints submitted, respectively, by Massol (Complaint No 35.036), Colomb (Complaint No 35.116), Givry (Complaint No 35.148) and Sodima (Complaint No 35.136), which challenge in particular the

conformity of the exclusive and selective standard contract for the distribution of Peugeot vehicles with the Community competition rules granting exemptions from prohibitions.

- 2 Prompted by those complaints, the Commission addressed a request for information to PSA on 26 October 1994, pursuant to Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87; hereinafter 'Regulation No 17'). PSA provided the data by post on 15 February 1995, but stated that it regarded all such data as business secrets.
- 3 By letter of 12 September 1995, the Director of Directorate D ('Restrictive practices, abuse of dominant positions and other distortions of competition') of Commission Directorate-General IV (Competition) (hereinafter 'DG IV') wrote to PSA as follows:

'[...] Without wishing to discuss the content of your answers or to pre-judge the outcome of these cases, I am unable fully to meet your request — as set out on the last page of your letter of 15 February 1995 — that the Commission should treat all the data hitherto unpublished and contained in that letter as business secrets. I must advise you that the Directorate-General for Competition intends to communicate your replies to the complainants with a view to obtaining their comments so as to be in a position to determine, in full knowledge of the facts, the appropriate response to those complaints, and it is your responsibility to identify precisely which items of information you wish to be treated as business secrets, giving your reasons in each case [...].'

4 On 2 November 1995 PSA replied as follows:

'[...] the data and documents forwarded to you, inasmuch as they give details of the way in which our company — as well as a number of the PSA Group's subsidiaries — is linked to the members of our network and the operation of our distribution system, are in the nature of business secrets, with the exception of items previously published [...]'.

5 PSA enclosed a list of the information which had already been published (List I) and a list of items constituting business secrets (List II comprising the information not mentioned in List I).

6 By letters of 3 and 22 April 1996 concerning, respectively, Sodima's complaint and the three other complaints referred to above, the Director of Directorate F (Capital and consumer goods industries) of DG IV replied to PSA that he did not agree that all the information mentioned in List II should be protected, adding:

'[...] the Commission is preparing to forward to the complainant company referred to above the full text of your reply of 15 February 1995 to its request for information, with the exception of sections (1) and (2) above [...]. This is necessary in order to obtain the complainant company's comments so as to be in a position to determine in full knowledge of the facts the steps to be taken in response to its complaint'.

7 Referring to Article 5 of Commission Decision No 94/810/EC, ECSC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (OJ 1994 L 330, p. 67), the Director then informed

PSA that it had one month in which to submit any comments to the hearing officer before the Commission communicated the said information.

- 8 By letters of 14 May 1996, PSA informed the Commission's hearing officer and the Director General of DG IV of its intention to bring proceedings before the Court of Justice under Article 173 of the EC Treaty in respect of the letters of 12 September 1995, 3 April 1996 and 22 April 1996. PSA asked the Commission to ensure that the information which it regarded as constituting business secrets was not communicated to any of the complainants before the Court made a ruling.
- 9 On 13 June 1996 PSA brought the present proceedings.
- 10 On 24 July 1996 the Commission's hearing officer issued four decisions, addressed to PSA, notifying it of his intention 'to proceed, after a period of two months has elapsed, with the communication [to the complainants] of [its] reply of 15 February 1995'.
- 11 In its application, PSA claimed that the Court of First Instance should:
 - annul the Commission's four decisions of 3 and 22 April 1996;
 - order the Commission to pay the costs.

- 12 On 12 September 1996 the Commission raised an objection of inadmissibility, contending that the Court of First Instance should:

— dismiss the application as inadmissible;

— order the applicant to pay the costs.

- 13 On 4 November 1996 PSA submitted observations on the objection of inadmissibility, claiming that the Court of First Instance should:

— reject the Commission's contention that PSA's application should be dismissed as inadmissible;

— declare that the hearing officer's decisions, set out in the correspondence dated 24 July 1996, are void or, at the very least, non-existent.

Admissibility

Arguments of the parties

- 14 PSA considers that the letters of 3 and 22 April 1996 constitute decisions in that they state a definitive position on a point of law. As they affect the addressee's legal position in an identifiable and definitive manner, they constitute acts having

adverse effects. The Commission had purely and simply stated its decision to refuse to regard the data supplied by PSA — with the exception of certain particulars — as business secrets.

- 15 According to PSA, the wording of the last paragraph of those letters — ‘before the Commission proceeds with that communication’ — cannot lead the Court to any other conclusion. It is clear from Decision 94/810 that although it is the hearing officer’s responsibility to ensure that hearings are properly conducted and that the rights of the defence are respected, while taking into account the need for the competition rules to be effectively applied, his remit does not make him an independent decision-making authority since he is clearly attached to DG IV and all the essential decisions referred to are a matter for the Commission alone, not for the hearing officer.
- 16 Thus the hearing officer has no power to lay down rules as to whether commercial information is to be regarded as business secrets, that being a power for the Commission alone to exercise. Since the Commission has exercised this power in relation to PSA, that company’s rights can be protected only by means of an action for annulment of the Commission’s decisions adversely affecting it, and the fact that the matter has not been formally placed before the hearing officer has no bearing whatsoever on the admissibility of such an action, given that the hearing officer’s role is not of a legislative nature.
- 17 The Commission points out in its objection of inadmissibility that the letters at issue constitute only the first stage of the procedure, in which it called on PSA, via the hearing officer, to submit its own comments in response. The letters constituting the Commission’s definitive decisions in that regard are those addressed to PSA on 24 July 1996, signed by the hearing officer.

- 18 The Commission explains that the procedure laid down by the Court of Justice in its judgment in Case 53/85 *AKZO Chemie v Commission* [1986] ECR 1965 and set out in detail in Decision 94/810 comprises two stages, which are described as follows in Article 5(3) and (4) of that decision:

‘Where it is intended to disclose information which may constitute a business secret of an undertaking, [the undertaking] shall be informed in writing of this intention and the reasons for it. A time limit shall be fixed within which the undertaking concerned may submit any written comments.

Where the undertaking concerned objects to the disclosure of the information but it is found that the information is not protected and may therefore be disclosed, that finding shall be stated in a reasoned decision which shall be notified to the undertaking concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than one week from the date of notification.’

- 19 The Commission states that it adopted Decision SEC (94) 1696/3 of 19 October 1994 concerning the implementation of the rules ensuring the right to be heard in competition proceedings (hereinafter ‘the Decision of 19 October 1994’), by which, *inter alia*, it empowered the Member of the Commission responsible for competition matters to take the measures needed for preparing the Commission’s final decisions in that area and authorized him to sub-delegate some of those powers to hearing officers.
- 20 By Decision of 6 February 1995 sub-delegating the power to take certain measures concerning the right to be heard in Commission proceedings with respect to restrictive practices, dominant positions and mergers (hereinafter ‘the Decision of 6 February 1995’), the Member of the Commission so authorized sub-delegated certain powers to the hearing officers.

21 The Decision of 6 February 1995 states *inter alia* in Article 3(1):

'Hearing officers are authorized to adopt decisions finding that information obtained from an undertaking by the Commission pursuant to Regulation No 17 of the Council does not constitute business secrets to be protected and may therefore be communicated to other persons or undertakings, or published'.

22 The Commission maintains that this is precisely the procedure which it followed. Initially, by its letters of 3 and 22 April 1996, it issued a reasoned statement of its intentions and gave PSA an opportunity to make its views known. In the penultimate paragraph of those letters, the Commission also set out the detailed rules of that procedure, calling on PSA to address any comments to the hearing officer. The letters at issue are therefore not definitive measures capable in themselves of altering PSA's legal position or affecting its interests. They only constitute preparatory acts for the final decisions set out in the letters of 24 July 1996, signed by the hearing officer concerned.

23 In its observations on the objection of inadmissibility, PSA claims that the Commission has relied for the first time on two new legal bases, namely its Decisions of 19 October 1994 and 6 February 1995, and that these have neither been published nor communicated to PSA.

24 PSA points out that the Commission has refused, despite its express request, to produce the Decision of 19 October 1994 in the present proceedings, even though this is essential for determining whether the Commission's findings were well founded.

- 25 PSA requests that the Commission be directed to produce that decision.
- 26 PSA argues that the two Decisions of 19 October 1994 and 6 February 1995, which were not published, cannot be relied upon against it for the purpose of having its application for annulment declared inadmissible. Moreover, that application is properly based on the failure to comply with the only decision published by the Commission, namely Decision 94/810. The actual wording of the communications of 3 and 22 April 1996, which were from the Commission, not from the hearing officer, led PSA — in view of their clear and definitive character, and of the risks posed by their immediate implementation — to consider that they were actionable under Article 173 of the Treaty.
- 27 PSA does not accept that the hearing officer enjoyed the decision-making power which the Commission now seeks to ascribe to him, namely the power to adopt the 'final' Decisions of 24 July 1996. That is why PSA considered the Commission's Decisions of 3 and 22 April 1996 to be the only decisions, for the purposes of Article 173 of the Treaty, against which proceedings could be instituted. It requests the Court, on the basis of the alleged absence of delegated powers, to declare the Decisions of 24 July 1996 void or, at the very least, non-existent.
- 28 According to PSA, the first stage envisaged by Article 5(3) of Decision 94/810 consisted in the present case of the letter of 12 September 1995 by which the Commission informed PSA of its intention to communicate that company's replies to the complainants and gave it four weeks in which to draft its comments. PSA concludes from this that, following its reply of 2 November 1995, the second stage provided for by Article 5(4) of Decision 94/810 consisted in the Commission's letters of 3 and 22 April 1996.

- 29 Accordingly, in PSA's view, the letters of 3 and 22 April 1996 were the only Commission decisions against which an action for annulment lay.

Findings of the Court

- 30 Pursuant to Article 114(3) of the Rules of Procedure, where the defendant applies to the Court of First Instance for a decision on admissibility, the remainder of the proceedings are to be oral, unless the Court decides otherwise. In the present case, the Court considers that it has sufficient information from an examination of the documents before it. Accordingly, there is no need to open the oral procedure.
- 31 The first question to be addressed is whether the letters of 3 and 22 April 1996 constitute decisions for the purposes of Article 173 of the Treaty.
- 32 According to settled case-law, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void. More specifically, in the case of acts or decisions adopted by a procedure involving several stages, in principle a measure is actionable only if it definitively lays down the institution's position on the conclusion of that procedure, and is not a provisional measure intended to pave the way for the final decision (see Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraphs 9 and 10; Case C-282/95 P *Guérin Automobiles v Commission* [1997] ECR I-1503, paragraph 34; Case T-64/89 *Automec v Commis-*

sion [1990] ECR II-367, paragraph 42; and the order of the Court of First Instance of 14 March 1996 in Case T-134/95 *Dysan Magnetics and Review Magnetics v Commission* [1996] ECR II-181, paragraph 20).

- 33 The four letters at issue, signed by a director of the Commission's DG IV, are steps in a proceeding concerning the issue of business secrecy raised by PSA. Those letters informed PSA *inter alia* that the Commission did not share its point of view regarding the information which PSA maintained was protected by business secrecy, and that the Commission was ready to communicate to the complainants more information than PSA wished. However, that correspondence also refers to the procedure provided for in Article 5 of Decision 94/810 and gives PSA one month in which to submit its comments to the hearing officer.
- 34 The letters at issue do not state that the Commission intends to proceed automatically, on expiry of the period prescribed, to communicate the information which PSA considers to be protected by business secrecy, but grants PSA time to submit its comments. It is therefore clear from the actual wording of those letters that they constitute preparatory acts forming part of the first stage of the procedure set out in Article 5 of Decision 94/810.
- 35 PSA's argument that the Commission's letter of 12 September 1995 already constituted the first stage referred to in Article 5(3) of Decision 94/810 cannot be accepted. That letter is no more than a request for clarification regarding the information to be protected by business secrecy. It is a measure which paves the way for the procedure provided for in Article 5 of that decision.
- 36 The only letters setting out the Commission's final position regarding the communication of the information in question to the complainants are the hearing officer's letters of 24 July 1996.

37 Consequently, the letters of 3 and 22 April referred to in the application do not constitute measures against which an action for annulment lies. The claim that those letters should be annulled must therefore be rejected as inadmissible.

38 As regards the new form of order sought by PSA in its observations of 4 November 1996, namely annulment of the Decisions of 24 July 1996 (see paragraph 13 above), it should be noted that pursuant to Article 44(1)(c) of the Rules of Procedure, an applicant must state the subject-matter of the dispute in the application and cannot seek new forms of order during the proceedings, thereby altering the subject-matter of the action (see Case 232/78 *Commission v France* [1979] ECR 2729, paragraph 3). However, the new form of order sought by PSA does alter the subject-matter of the action as defined in the application (annulment of the letters of 3 and 22 April 1996). It is therefore inadmissible, *a fortiori* because the initial application is directed against an interim step, whereas the new form of order sought concerns the annulment of a final decision which was adopted subsequently, that is, after the action had been brought (see *Automec v Commission*, cited above, paragraph 69).

39 It follows from the foregoing that the application for annulment must be dismissed in its entirety without there being any need to adjudicate on PSA's arguments concerning the Commission's Decisions of 19 October 1994 and 6 February 1995, which are relevant only to the merits of the case, or to direct the Commission to produce the Decision of 19 October 1994.

Costs

40 Pursuant to the first subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, since the applicant has been unsuccessful in its pleadings and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

- 1. The action is dismissed as inadmissible.**
- 2. The applicant is ordered to pay the costs.**

Luxembourg, 2 May 1997.

H. Jung

Registrar

C. W. Bellamy

President