JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

12 October 2007 *

In Case T-474/04,

Pergan Hilfsstoffe für industrielle Prozesse GmbH, established in Bocholt (Germany), represented by M. Klusmann and F. Wiemer, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Bouquet, acting as Agent, assisted by A. Böhlke, lawyer,

defendant,

APPLICATION for the annulment of Commission Decision (2004) D/204343 of 1 October 2004 in so far as it rejects the applicant's request for removal of all references to it in the definitive published version of Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC]

* Language of the case: German.

and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides) (OJ 2005 L 110, p. 44),

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

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2006,

gives the following

Judgment

Legal context

1 According to Article 287 EC '[t]he members of the institutions of the Community ... and the officials and other servants of the Community shall be required ... not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'.

2 Article 20(2) of Council Regulation No 17: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), applicable in this case and headed 'Professional secrecy', provides that '[w]ithout prejudice to the provisions of Articles 19 and 21, the Commission ... [its] officials and other servants shall not disclose information acquired by them as a result of the application of this regulation and of the kind covered by the obligation of professional secrecy'.

3 Article 21 of Regulation No 17, headed 'Publication of decisions', states as follows:

'1. The Commission shall publish the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.'

4 Article 13(1) of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC] (OJ 1998 L 354, p. 18), applicable to the present case, provides:

'Information, including documents, shall not be communicated or made accessible in so far as it contains business secrets of any party, including the parties to which the Commission has addressed objections, applicants and complainants and other third parties, or other confidential information ... The Commission shall make

appropriate arrangements for allowing access to the file, taking due account of the need to protect business secrets ... and other confidential information.'

5 Article 9 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21) provides:

'Where it is intended to disclose information which may constitute a business secret of an undertaking, it 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.

The first and second paragraphs shall apply *mutatis mutandis* to the disclosure of information by publication in the *Official Journal of the European Communities*.'

6 Under Article 1(1)(b) of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community

relating to transport and competition (OJ L 319, p. 1), the power of the Commission to impose fines or penalties for infringements of the rules of the European Economic Community relating to transport or competition is to be subject to a limitation period of five years in the case of infringements of provisions other than those concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations.

Facts, procedure and forms of order sought

7 In 2002, the Commission began an investigation, under Regulation No 17, of European producers of organic peroxides, including the AKZO group, Atofina SA, Atochem's successor ('Atochem/Atofina'), and Peroxid Chemie GmbH & Co. KG, a company controlled by Laporte plc, now Degussa UK Holdings Ltd, Peróxidos Orgánicos SA, FMC Foret SA, AC Treuhand AG and the applicant, in respect of participation in cartels falling under Article 81 EC, including one main cartel and a number of regional cartels, on certain markets for organic peroxides.

8 On 27 March 2003, the Commission began formal proceedings and adopted a statement of objections, which was subsequently notified, inter alia, to the applicant. In its comments of 13 June 2003, the applicant contested, in essence, both the scope and the duration of its participation in the main cartel, stating that it only had sporadic contact with Peroxid Chemie and Atochem/Atofina between 1994 and 1996. It stated, however, that it had not had contact with the other undertakings in question. Thus, the investigation of any infringement by the applicant would, in any event, be time barred.

9 By letter of 10 December 2003, the Commission informed the applicant of its decision to close the proceedings against it.

10 In addition, by Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides) (OJ 2005 L 110, p. 44; 'the peroxides decision'), the Commission imposed fines on Atochem/Atofina, Peroxid Chemie, AC Treuhand, Peróxidos Orgánicos and Degussa UK for breach of Article 81 EC. The decision was addressed to the abovementioned companies but not to the applicant.

11 In the operative part, the peroxides decision does not refer to the applicant's participation in the infringement found. However, it is stated, inter alia, in recital 78 of the decision, in relation to the applicant:

'After having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, the Commission decided to close the proceedings against [the applicant] and [FMC Forest]. For [the applicant], the Commission considered it did not have enough evidence of [its] participation in the single and continuous infringement after 31 January 1997, the point in time when prescription applies ...'

12 Subsequently, inter alia in recitals 156 to 177, the peroxides decision contains a detailed description of the applicant's participation in the main cartel between, in particular, the AKZO group, Atochem/Atofina and Peroxid Chemie which lasted for a period from 1971 to 1999. In essence, the Commission found that the applicant did not participate directly and formally in the main cartel, but that its involvement was limited to a period from 1993 to 1996, by way of meetings and other anti-competitive contacts with Atochem/Atofina and Peroxid Chemie, and the exchange of commercially sensitive data with them.

13 Finally, the peroxides decision states, in recital 319:

'[The applicant] was an addressee of the statements of objections. [The applicant] is not an addressee of this Decision (see recital (78)), as there is no evidence that [the applicant]'s involvement lasted beyond 31 January 1997.'

14 By letter of 18 February 2004, notified on 19 February 2004, the Commission sent the applicant a copy of the peroxides decision and a summary of that decision. In the letter, the Commission informed the applicant that it intended to publish a non-confidential version of both the peroxides decision and the summary, pursuant to Article 21 of Regulation No 17, and invited it to identify any passages which it considered to contain business secrets or other confidential information.

15 By letter of 4 March 2004, the applicant asked the Commission to remove from the version of the peroxides decision intended for publication all references to the applicant and its alleged offending conduct, in particular, those in recitals 15, 81, 106 (Table 4), and in recitals 120 to 123, 156 to 177, 184, 185, 188, 189, 202, and 270, on the ground that the applicant was not the addressee of the decision and that the proceedings which were initiated against it had been closed (recital 78 of the peroxides decision). It stated that certain passages in the peroxides decision, relating to the applicant's involvement in the infringement established, in particular recitals 169 and 176, which had been disputed by the applicant in the course of the administrative procedure, were inaccurate. In any event, the business secrets in recital 45 (the applicant's market share), in recital 106 (Table 4), recitals 168 and 175 (name of Mr S.), and recitals 173 to 177 and 510 (detailed assessment of the applicant in the context of acquisition negotiations with a third-party) should be removed.

16 By letter of 6 April 2004, the Commission informed the applicant that it would omit every reference to it in the provisional version of the peroxides decision intended for publication, and attached the corresponding non-confidential version. The Commission reserved its position, however, on the applicant's request for confidential treatment concerning the definitive version of the peroxides decision intended for publication.

17 By letter of 13 April 2004, the applicant requested that the reference to its name in recital 15 and Table 4 of the peroxides decision also be removed, and subject to those amendments, it accepted the provisional publication of this decision.

18 By letter of 22 June 2004, the Commission sent the applicant the provisional non-confidential version of the peroxides decision, in the form intended to be published shortly afterwards on the Commission's Internet site, which did not contain any reference to the applicant.

19 By letter of 28 June 2004, the Commission informed the applicant of its intention to reject the request for confidential treatment concerning the reference to the applicant in the definitive version of the peroxides decision intended for publication. It stated that in that decision, the Commission had concluded that the applicant had committed an infringement of Article 81 EC, but was unable to impose a fine on it on account of the time bar. The Commission agreed, however, to remove from the non-confidential definitive version of the peroxides decision, the name of the applicant's manager, Mr S., and the references to the detailed assessment of the applicant in the context of acquisition negotiations with a third party, and to replace the applicant's exact market share figures with bands of market share. Finally, the Commission informed the applicant that it could apply to the hearing officer under Article 9 of Decision 2001/462, in the event that it wished to maintain its request for confidential treatment.

20 By letter of 12 July 2004, the applicant asked the hearing officer to remove all references to the applicant from the definitive version of the peroxides decision intended for publication, in line with the provisional version published on the Commission's Internet site. In that letter, the applicant repeated the arguments it had advanced in its letter of 4 March 2004 and stated that the incorrect reference to its alleged participation in the infringement established, in recitals 15, 45, 61, 66, 71, 78, 81, 106 (Table 4), 108, 120 to 123, 156 to 177, 184, 185, 188, 189, 202, 270, 271, 319, 328, 366, 399, 423 and 510, and point 1.3.1 of the index, had to be removed. In support of its request, the applicant submitted that this information could provide third parties with evidence for the purpose of actions for damages against the applicant and could harm its reputation on the market. In addition, once it has closed the investigation procedure in respect of the applicant, the Commission no longer has the power to accuse it of infringing Article 81 EC or to adopt a decision to this end which adversely affects its interests. Furthermore, the fact that the peroxides decision is not addressed to the applicant wrongly deprives the applicant of the possibility of bringing a direct action against that decision. Finally, the Commission's approach is incompatible with the objective of the rules on limitation and the principles of legal certainty and the presumption of innocence.

21 By letter of 13 September 2004, the hearing officer adopted a first decision under the third paragraph of Article 9 of Decision 2001/462. In that decision, he refused to remove from the definitive version of the peroxides decision intended for publication the references made to the applicant — save for the name of Mr S., information relating to the detailed assessment of the applicant and the reference to the applicant's market share, which were to be replaced by a band of market shares — on the ground that there were no business secrets, as the concept of a business secret presupposes that disclosure of the information in question will cause serious harm to the interests of the person concerned. First, as regards the risk of actions for damages under national law, the hearing officer concluded that the risk does not in itself cause serious and unjust harm to the applicant's interests such as to justify protection of the disputed information. In the event that they are well-founded, actions for damages before national courts are in fact the acceptable consequence of committing an infringement of Community and national competition law. The hearing officer stated that the applicant was not the addressee of the peroxides decision and that this decision, in the absence of a finding that the applicant had infringed Article 81 EC, was therefore not legally binding on national courts.

Secondly, the hearing officer observed that any harm to the applicant's reputation was the reasonable result of publishing the peroxides decision if the applicant had participated in the cartels established. Finally, the hearing officer stated that even if the findings in the peroxides decision were not established as a matter of fact, an issue which the hearing officer was not empowered to determine, this would not cause any serious and lasting harm to the applicant such as to render the disputed information a business secret.

22 In the same letter, the hearing officer also stated under a separate heading, entitled 'Respect for the rights of defence', that, for the purpose of safeguarding the applicant's rights of defence, the information relating to its alleged participation in a regional cartel in Spain, set out in recitals 176, 262 and 328 of the peroxides decision, had to be omitted, because, as that that information had not been referred to in the statement of objections, the applicant had not been given the opportunity to make submissions on it.

23 By letter of 27 September 2004, the applicant stated its intention to begin proceedings before the Court of First Instance against the decision rejecting its request for confidential treatment, as set out in the hearing officer's letter of 13 September 2004, and requested that publication of the definitive version of the peroxides decision containing references concerning the applicant be postponed until termination of those proceedings.

24 By letter of 1 October 2004, containing decision SG-Greffe (2004) D/204343 ('the contested decision'), the hearing officer repeated the reasons set out in his letter of 13 September 2004. The hearing officer also stated that the Commission would postpone publication of the peroxides decision, in the form described in the

contested decision, until the applicant had been given the opportunity to apply to the Court for interim relief under Article 242 EC.

25 By letter of 15 October 2004, the applicant informed the hearing officer that it would not bring an application for interim relief, given the strict conditions laid down in the case-law for such applications.

26 By letter of 18 October 2004, the hearing officer replied that, since the applicant had decided against bringing proceedings for interim relief, there was no longer anything to prevent the envisaged publication of the definitive version of the peroxides decision.

27 Subsequently, the Commission published, on the Internet site of its Directorate-General (DG) for Competition, the non-confidential version of the peroxides decision, which contains references to the applicant and other information disputed by it.

28 By application lodged at the Registry of the Court of First Instance on 10 December 2004, the applicant brought the present action.

29 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the Court's questions at the hearing on 8 June 2006.

30 The applicant claims that the Court should:

— annul the contested decision in so far as it rejects the applicant's request for removal of all references to the applicant in the definitive published version of the peroxides decision;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

A — *Admissibility of the application for annulment*

1. *Arguments of the parties*

32 The Commission contests the applicant's legal interest in bringing proceedings, and therefore, the admissibility of the present action.

33 It takes the view that, since the applicant decided not to apply to the Court of First Instance for interim relief and the peroxides decision has in the meantime been published with the disputed information, the applicant no longer has a legal interest in bringing proceedings against this decision. The applicant itself recognised its lack of legal interest in its letter of 27 September 2004, in stating that publication would render its application inoperative.

34 According to the Commission, the applicant does not in any way specify how the published information in question constitutes business secrets. In any event, annulment of the contested decision could not undo the fact that third parties had read the information and the probability that a similar situation would arise in the future is minimal. It is therefore doubtful that the annulment could give rise to legal effects (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraphs 59 and 60).

35 The Commission submits that the action is based on the false premise that the disputed information is of a binding nature. On the contrary, the findings relating to the infringements, such as those concerning the applicant — since they are only contained in the recitals of the peroxides decision and not formally expressed in the operative part — are not binding (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 315; Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraph 34; Case T-145/89 *Baustahlgewebe* v *Commission* [1995] ECR II-987, paragraphs 35 and 55 et seq.; and Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, publication by extracts, paragraph 699). The Commission considers that the applicant's argument that it has an interest in bringing proceedings because any annulment of the contested decision could form the basis of an action for damages against the Commission if it were ordered to pay damages in national proceedings, is purely hypothetical; it observes that the applicant is not the addressee of a decision finding an infringement of Article 81 EC which is binding on national courts.

36 The applicant submits, in essence, that its action against the contested decision is admissible.

2. *Findings of the Court*

37 As a preliminary point, the Court notes that the present action is directed against the contested decision, which was adopted on the basis of the third paragraph of Article 9 of Decision 2001/462, whereby the Commission rejected in part the applicant's request for confidential treatment, on the ground that it related to certain passages of the non-confidential peroxides decision intended for publication. The aim of the present action is not therefore to challenge the lawfulness of the peroxides decision as such. Furthermore, it is common ground that the time-limit for any action against the peroxides decision, a copy of which was sent to the applicant on 19 February 2004, has expired and that, therefore, that decision has become final as regards the applicant to the extent that it is capable of producing definitive binding legal effects in regard to it.

38 Even though the applicant had the opportunity to bring an action in due time against the peroxides decision, but did not, it does not follow that it has no legal interest in bringing proceedings against the contested decision. Such an interest presupposes that annulment of the measure is of itself capable of having legal consequences (see *Antillean Rice Mills and Others* v *Commission*, cited in paragraph 34 above, paragraph 59, and the case law cited; see also, to that effect, Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 21), that the appeal must therefore be likely, if successful, to procure an advantage for that party (see, by analogy, C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 21), and is justified by a vested and present interest in the annulment of that measure (order in Case T-28/02 *First Data and Others* v *Commission* [2005] ECR II-4119, paragraph 42).

39 In that regard, it must be borne in mind, first, that the question of whether annulment of the contested decision is capable of procuring an advantage for the applicant, and therefore giving rise to an interest in bringing proceedings, depends on an examination of an issue of substance, that is, the scope of 'business secret' within the meaning of the first paragraph of Article 9 of Decision 2001/462, read in conjunction with Article 21(2) of Regulation No 17. Assuming that the applicant's request for confidential treatment concerns, at least in part, business secrets covered by the abovementioned provisions — a question to be decided when appraising the substance of the present action — the contested decision rejecting that request would be unlawful since it is based on an incorrect application of that concept. Accordingly, annulment of the contested decision would be capable of procuring an advantage for the applicant in that the Commission, would, under Article 233 EC, have to give due effect to it for the publication of the peroxides decision, and, under Article 21(2) of Regulation No 17, have to have regard to the applicant's legitimate interest in the protection of its business secrets.

40 Secondly, contrary to the Commission's view, the mere fact that the disputed information has already been published and that certain third parties may already have read it cannot deprive the applicant of an interest in bringing proceedings against the contested decision. On the contrary, continued disclosure of that information continues to harm the interests and, in particular, the reputation of the applicant, and as such constitutes a vested and present interest within the meaning of the case-law cited in paragraph 38 above. Furthermore, any other interpretation, which would make admissibility of the action dependent on whether or not the Commission had disclosed the disputed information — and therefore on whether the Commission had created a fait accompli — would allow the Commission to avoid scrutiny by the courts by making such disclosure even if it was unlawful.

41 More generally, the assessment made in paragraph 39 and 40 above is confirmed by case-law to the effect that annulment of a decision may, per se, have legal consequences, in particular by obliging the Commission to take the measures needed to comply with the Court's judgment in accordance with Article 233 EC and by preventing the Commission from repeating such a practice (see, to that effect, Case T-46/92 *Scottish Football* v *Commission* [1994] ECR II-1039, paragraph 14, and

the case-law cited). However, in the present case, the precise effect of the contested decision is to post continuously on the Internet site of DG Competition the non-confidential version of the peroxides decision, from which the passages relating to the applicant have not been removed. Therefore, annulment, at least in part, of the contested decision would require the Commission, under Article 233 EC, to cease to make public certain disputed passages.

42 In the light of the foregoing, the Court must reject the Commission's plea of inadmissibility and there is no need to examine the other arguments advanced by the parties in this context.

B — *Substance*

1. *Preliminary observation*

43 In support of its action, the applicant puts forward three pleas in law alleging, first, infringement of Article 21 of Regulation No 17, second, that the Commission lacks the power under Articles 3 and 15 of Regulation No 17 to adopt and publish a decision finding an infringement attributable to the applicant, and third, infringement of its right to effective judicial protection.

3. *The plea alleging infringement of Article 21 of Regulation No 17*

(a) Arguments of the parties

44 The applicant maintains that the mere fact that it is not the addressee of the peroxides decision prevents the Commission from publishing the findings which relate to it.

45 According to the applicant, the publication provided for in Article 21(2) of Regulation No 17 relates only to the parties. However, the concept of 'parties' in that provision is only directed at the addressees of a decision imposing a fine and not the undertakings involved that are not the addressees of such a decision. In fact, publication of such a decision containing findings adversely affecting undertakings that are not addressees penalises them, owing to the negative repercussions on their reputation resulting from such publication and the increased risk that they would be exposed, on the basis of evidence that is apparent from the decision, to actions for damages brought by third parties before national courts. According to the applicant, unlike the addressees of a decision, such undertakings are also not in a position to contest the substance of those findings in court in order to avoid the negative effects and risks referred to above, which constitutes an unacceptable limitation on their right to effective judicial protection.

46 At the hearing, the applicant submitted, in essence, referring to the argument used in its second plea and to the judgment in Case T-198/03 *Bank Austria Creditanstalt* v *Commission* [2006] ECR II-1429, that the Commission's power to publish a decision under Article 21(2) of Regulation No 17 was limited, first, by the protection of professional secrecy within the meaning of Article 287 EC, which also covers the disclosure of matters such as those falling within Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission

documents (OJ 2001 L 145, p. 43), and secondly, by the principle of the presumption of innocence as provided for in Article 48 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) and in the light of which the scope of the Commission's power of publication should be assessed. The principle of the presumption of innocence prevents the Commission from disclosing incriminating evidence which the undertaking in question has not had the opportunity to contest in court.

47 Consequently, the publication of the peroxides decision containing findings relating to alleged offending conduct of the applicant is a breach of Article 21(2) of Regulation No 17.

48 According to the Commission, the fact that the peroxides decision was not sent to the applicant as an addressee has no effect on its power to publish a version of the decision which contains references to the applicant. This is all the more so since the applicant was party to the administrative procedure concerning it until the moment it was closed.

49 The Commission takes the view that the only limitation on its power of publication, as provided for in the second part of Article 21(2) of Regulation No 17, is its obligation to have regard to the legitimate interest of undertakings in the protection of their business secrets. On the other hand, the first part refers only to the minimum requirements which published information must satisfy, that is, to state the names of the parties and the main content of the decision.

50 The case-law confirms this interpretation in recognising that published information which exceeds these minimum requirements is acceptable. Therefore, publication of the full text of a decision imposing fines is lawful, even if the decisions taken under

Article 15 of Regulation No 17 are not included in those mentioned in Article 21(1) of the regulation (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 101 to 103, and Case 54/69 *Francolor* v *Commission* [1972] ECR 851, paragraphs 30 and 31). Consequently, the Commission was correct to find in the contested decision, on the basis of that case-law, that it can also publish decisions, or parts of decisions, in respect of which secondary legislation has not provided for any publication obligation, provided that this does not lead to the disclosure of business secrets.

51 The Commission also argues that, even if the term 'parties' in the first part of Article 21(2) of Regulation No 17 specifies only the addressees of the decision, it nevertheless follows from the use of the wider concept of 'undertaking' — as opposed to 'party' — used in the second half of that sentence that persons other than the parties can be mentioned in the published decision.

52 The Commission also considers that the non-binding information relating to the applicant in the peroxides decision, which is not formally expressed in the operative part of the decision, is not, for the purposes of the case-law (Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 52), the subject of a Commission decision which the national courts must take into account in any action for damages (Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 86). In the present case, the Commission's findings in the preamble to the peroxides decision are thus capable of being the subject of an action for annulment only to the extent to which, as grounds of an act adversely affecting a person's interests, they constitute the necessary support for its operative part (Case T-138/89 *NVB* v *Commission* [1992] ECR II-2181, paragraph 31, Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others v Commission* [1996] ECR II-1201, paragraph 150, and Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 178). On the other hand, the information relating to infringements in the preamble, but which do not constitute such support, do not adversely affect the interests of either the parties or third

parties. It follows that the Commission correctly stated, in the contested decision, that the peroxides decision is not a decision which finds that the applicant has infringed Article 81 EC and binds national courts in that respect.

53 In fact, the peroxides decision does not contain any binding finding concerning the applicant capable of prejudging the independent appraisal by a national court, but only a description of the applicant's conduct as an aid to understanding the origin and context of the infringement committed by the addressees of the decision. It is therefore not conceivable that the applicant would be exposed to any actions for damages before national courts without being able to defend itself. In particular, contrary to the applicant's claim, the published peroxides decision cannot be used as conclusive evidence against it, or to facilitate, in any significant way, the production of evidence by third parties in such a dispute.

54 In addition, the Commission takes the view that Article 30 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) — which has replaced Article 21 of Regulation No 17 and extended the publication requirements so that decisions imposing fines and periodic penalty payments are explicitly covered — confirms its approach and certainly does not contradict its past practice on publication. Publication serves, first, to ensure the transparency of administration, and secondly, as regards, in particular, decisions imposing fines, as a deterrent, in accordance with the objective of general deterrence recognised by the Court in *Chemiefarma* v *Commission*, paragraph 50 above. According to the Commission, the applicant's alleged penalty constituted by the publication of the disputed information is capable neither of calling in question the objective of general deterrence nor of modifying the scope of the rules on limitation by extending their sphere so as to limit the Commission's power of publication. In that regard, the Commission submits that, with regard to the limitation periods for the imposition of penalties, Article 25 of Regulation No 1/2003 now expressly refers to 'the powers conferred on the Commission by Articles 23 and 24', and therefore, does not refer to publication of decisions under Article 30 of the regulation.

55 Finally, at the hearing, the Commission relied on the approach taken in *Bank Austria Creditanstalt* v *Commission*, cited in paragraph 46 above (paragraph 89). According to that case, the inclusion, in a decision imposing fines, of findings of fact in respect of a cartel cannot be conditional on the Commission having the power to find an infringement relating thereto or on its actually having found such an infringement and it is legitimate for the Commission, in a decision finding an infringement and imposing a penalty, to describe the factual and historical context of the conduct in issue. The Commission also argued that, according to that judgment, the same is true for the publication of that description, given that publication may be of use in allowing interested persons to understand fully the reasoning behind such a decision and it is for the Commission to judge whether the inclusion of such matters is appropriate.

56 Consequently, the plea alleging infringement of Article 21(2) of Regulation No 17 should be rejected.

(b) Findings of the Court

Preliminary observation

57 In its first plea, the applicant, in essence, contests the scope of the Commission's power under Article 21(2) of Regulation No 17 to publish a decision adopted on the basis of Regulation No 17 which was not addressed to it and in which the Commission found, in the grounds and not in the operative part, that the applicant had committed an infringement. In support of its plea, the applicant essentially argues, first, that it is not a 'party' within the meaning of the first part of Article 21(2) of Regulation No 17 in respect of which publication may be made in this way, and

secondly, that publication of the peroxides decision adversely affects it since it discloses information covered by professional secrecy within the meaning of Article 287 EC.

58 The Court considers that it is appropriate to begin with an examination, in the light of Article 287 EC, of the merits of the second part of the first plea, relating to the scope of the Commission's power of publication.

The scope of the Commission's power of publication under Article 21 of Regulation No 17

59 First of all, it is appropriate to recall the content of Article 21 of Regulation No 17, which governs the scope of the Commission's power of publication.

60 Article 21(1) of Regulation No 17 lists the types of decisions which the Commission is authorised to publish, a list to which, according to case-law, decisions imposing fines under Article 15 of the regulation must be added (see, to that effect, *Chemiefarma* v *Commission*, cited in paragraph 50 above, paragraphs 101 to 104, and *Francolor* v *Commission*, cited in paragraph 50 above, paragraphs 30 and 31). Article 21(2) of the regulation provides, in the first part of the sentence, that '[t]he publication shall state the names of the parties and the main content of the decision', and in the second part, that the Commission must 'have regard to the legitimate interest of undertakings in the protection of their business secrets'.

61 More generally, the Court would point out that, even if publication of a measure is not explicitly prescribed by the Treaties or by another act of general application, it is apparent from the scheme laid down by the Treaties, in particular Article 1 EU, Articles 254 EC and 255 EC, and the principle of openness and the requirement of transparency in acts of the Community institutions that are enshrined in those provisions, that, in the absence of provisions explicitly ordering or prohibiting publication, the rule is that the institutions have a power to publish acts which they adopt. However, there are exceptions to that rule in so far as Community law, in particular through provisions ensuring compliance with the obligation of professional secrecy, prevents disclosure of such acts or of certain information contained in them. Thus, the aim of Article 21(2) of Regulation No 17 is not to limit the Commission's freedom to publish, of its own volition, a version of its decision that is fuller than the minimum necessary and also to include information whose publication is not required, in so far as the disclosure of that information is not inconsistent with the protection of professional secrecy (*Bank Austria Creditanstalt* v *Commission*, cited in paragraph 46 above, paragraphs 69 and 79).

62 In addition, the Court would point out that the second part of Article 21(2) of Regulation No 17, like Article 20 of the Regulation, is only the expression in secondary Community legislation of the protection of professional secrecy laid down in Article 287 EC and that the procedure provided for in Article 9 of Decision 2001/462 aims merely to implement the procedural requirements which the Court prescribed to that end in *AKZO Chemie* v *Commission*, cited in paragraph 38 above (in particular paragraphs 29 and 30; see also, to that effect, *Bank Austria Creditanstalt* v *Commission*, cited in paragraph 46 above, paragraph 28). Thus this procedure applies where the Commission, in the course of competition proceedings, intends to disclose information capable of undermining the protection of professional secrecy within the meaning of Article 287 EC (first and second paragraphs), and is applicable whatever form that disclosure may take, including publication of a decision in the *Official Journal of the European Communities* (third paragraph) or on the Internet.

63 The Court would point out, next, that neither Article 287 EC nor Regulation No 17 state explicitly what information, apart from business secrets, is covered by the

obligation of professional secrecy. It is apparent, however, from the open wording of Article 287 EC (which prohibits disclosure of 'information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'), from Article 13(1) of Regulation No 2842/98 and from the case-law, that the concept of 'information covered by the obligation of professional secrecy' also includes confidential information other than business secrets (Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 34, and Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraph 86).

64 It follows from this wider understanding of the concept of 'information covered by the obligation of professional secrecy' that Article 21 of Regulation No 17 and Article 9 of Decision 2001/462 must be interpreted as meaning that they apply, in the same way as Article 13(1) of Regulation No 2842/98, both to business secrets and to other confidential information. In addition, the confidentiality of information, for which professional secrecy requires that it be protected under Article 287 EC, may also stem from other provisions of primary or secondary Community law, such as Article 4 of Regulation No 1049/2001 (cited in paragraph 46 above) or from Article 286 EC and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1) (see also, to that effect, *Bank Austria Creditanstalt* v *Commission*, cited in paragraph 46 above, paragraphs 34 and 35).

65 As regards, generally, the nature of business secrets or other information covered by the obligation of professional secrecy, it is necessary, first of all, that such business secrets or confidential information be known only to a limited number of persons. Next, it must be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties (*Postbank* v *Commission*, cited in paragraph 63 above, paragraph 87, and see also Commission Notice 2005/C 325/07 on the rules for access to the Commission file in cases pursuant to Articles 81 [EC] and 82 [EC] (OJ 2005 C 325, p. 7), paragraphs 3.2.1 and 3.2.2). Finally, the interests liable to be harmed by disclosure must be worthy of protection. The assessment as to the confidentiality of a piece of information requires, in this regard, the individual

legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible (*Bank Austria Creditanstalt* v *Commission*, cited in paragraph 46 above, paragraph 71).

66 It follows, first, that when the hearing officer takes a decision under the third paragraph of Article 9 of Decision 2001/462, he must not merely examine whether the version of a decision taken under Regulation No 17 and intended for publication contains business secrets or other confidential information enjoying similar protection. He must also check whether that version contains other information which cannot be disclosed to the public either on the basis of rules of Community law affording such information specific protection or because it is information of the kind covered by the obligation of professional secrecy (*Bank Austria Creditanstalt* v *Commission*, cited in paragraph 46 above, paragraph 34). Secondly, in the context of this review of legality, the Court must ensure that the hearing officer observes the limits of his terms of reference, as just defined, and must therefore determine whether the hearing officer correctly applied the protection of professional secrecy in the particular case. However, the Court cannot complain that the hearing officer did not correct any procedural irregularities committed by the Commission when adopting the decision which is to be published, since the review of such procedural irregularities does not fall within his powers. Therefore, the Court cannot call in question either the procedural legality or the merits of the decision intended for publication, even if that decision were to contain serious errors.

67 It is in the light of the principles set out in paragraphs 59 to 66 above that the Court must ascertain whether and to what extent the information disputed by the applicant is protected by the obligation of professional secrecy under Article 287 EC.

The protection of the disputed information through the obligation of professional secrecy

— General observation

68 In the light of the foregoing, the Court must examine whether the disputed information constitutes information covered by the obligation of professional secrecy under Article 287 EC, as that concept is interpreted in paragraphs 63 and 65 above, and, in particular, ascertain whether publication of that information is likely to cause serious harm to the applicant.

— The aspects of the protection of professional secrecy taken into account by the hearing officer

69 The Court would point out, first of all, that, after the applicant had disputed the publication of certain passages relating to it in the peroxides decision and had made its request for confidential treatment of those passages, the hearing officer, in the contested decision, merely ascertained whether the information contested by the applicant constituted business secrets, disclosure of which would be likely to harm its legitimate interests.

70 It must be borne in mind that, even if the hearing officer thereby formally restricted the subject-matter of his examination, in the course of his assessment he nevertheless adopted a position on whether disclosure of the disputed information would be harmful, and therefore, whether it was confidential. Thus the hearing officer examined, first, whether publication of the disputed information was capable

of providing to third parties evidence enabling them to bring actions for damages against the applicant before national courts and, secondly, whether such publication might cause serious harm to the applicant's reputation on the market.

71 It is apparent from the foregoing, as from paragraph 21 above, that, in essence, in reply to the applicant's request for confidential treatment, the hearing officer also examined whether the disputed information constituted confidential information other than business secrets. In that regard, the hearing officer concluded that the applicant's interest in the removal of the disputed information from the definitive version of the peroxides decision intended for publication was not sufficient.

— The substance of the contested decision in relation to observance of the obligation of professional secrecy

72 The Court would point out that the interest of an undertaking which the Commission has fined for breach of competition law in the non-disclosure to the public of details of the offending conduct of which it is accused does not merit any particular protection, given, first, the public interest in knowing as fully as possible the reasons for any Commission action, the interest of economic operators in knowing the sort of behaviour for which they are liable to be penalised and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished, and, second, the fined undertaking's ability to seek judicial review of such a decision (*Bank Austria Creditanstalt* v *Commission*, cited in paragraph 46 above, paragraph 78). The Court considers that this appraisal applies *mutatis mutandis* to a decision in which an undertaking is found to have committed an infringement, but proceedings against it are barred by limitation pursuant to Article 1 of Regulation No 2988/74, the Commission being implicitly authorised to take that decision on the basis of the rules laid down by Regulation No 17, provided

that it shows a legitimate interest for doing so (Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemical* v *Commission* [2005] ECR II-4065, paragraphs 60 to 63).

73 However, the application of the case-law cited in paragraph 72 above presupposes that the infringement found at least appears in the operative part of the decision and that the decision is addressed to the undertaking concerned so that it may contest that infringement in court. As the Commission itself argues, regardless of the grounds on which such a decision is based, only the operative part thereof is capable of producing legal effects and, as a consequence, of adversely affecting an undertaking's interests. By contrast, the assessments made in the grounds of a decision are not in themselves capable of forming the subject of an application for annulment. They can be subject to judicial review by the Community judicature only to the extent that, as grounds of a measure adversely affecting a person's interests, they constitute the essential basis for the operative part of that measure (order in Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177, paragraph 21; Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 186), and if, in particular, those grounds are likely to alter the substance of what was decided in the operative part of the measure in question (see, to that effect, Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraphs 67 and 68).

74 In the present case, it follows from the foregoing that, regardless of whether or not the Commission was justified in finding, in the grounds of the peroxides decision, an infringement attributable to the applicant, in the absence of such a finding in the operative part, the applicant did not have standing to bring an action against that decision. Accordingly, an action brought by the applicant against the peroxides decision seeking review by the Court of First Instance of the substance of the disputed information would, in any event, have been inadmissible, even if brought within the time-limit provided for in the fifth paragraph of Article 230 EC (see, to that effect, *Compagnie maritime belge transports and Others* v *Commission*, cited in paragraph 52 above, paragraph 150).

75 In addition, as the applicant admits, the scope of the Commission's power to adopt and publish decisions on the basis of Regulation No 17 and the scope of the protection of professional secrecy must be interpreted in the light of general principles and fundamental rights, which are an integral part of the Community legal order, and, in particular, of the principle of presumption of innocence — as reaffirmed in Article 48 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) — which applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 150; Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 178; *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission*, cited in paragraph 72 above, paragraphs 104 and 105).

76 The Court also observes that the presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of defence in the normal course of proceedings resulting in a decision on the merits of the case (*Sumitomo Chemical and Sumika Fine Chemicals* v *Commission*, cited in paragraph 72 above, paragraph 106). Furthermore, the guilt of a person accused of an infringement is established definitively only where the decision finding that infringement has acquired the force of *res judicata*, which implies either the absence of an appeal against that decision by the person concerned within the time-limits provided for in the fifth paragraph of Article 230 EC, or, after such an appeal, the definitive closure of the contentious proceedings, in particular, by a judicial decision confirming the lawfulness of that decision.

77 As a consequence, findings which the person charged with an infringement, even though he contests their merits, has not had the opportunity to contest before the Community judicature cannot be regarded as established in law. The fact that such findings evade any review by the courts, and therefore, in the event that they are unlawful, any correction by the Community judicature, is manifestly contrary to the

principle of the presumption of innocence. Any other interpretation would upset the system of division of functions and the institutional balance between the administration and the courts, on the ground that, where findings are contested, it is for the courts alone to make a definitive ruling on the existence of sufficient evidence that an undertaking is liable for an infringement of the rules on competition.

78 The Court considers, further, that, since the Commission's findings relating to an infringement committed by an undertaking are capable of infringing the principle of the presumption of innocence, those findings must, in principle, be regarded as confidential as regards the public, and therefore as being of the kind covered by the obligation of professional secrecy. This principle stems, inter alia, from the need to respect the reputation and dignity of the person concerned as that person has not been finally found guilty of an infringement (see, by analogy, Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 604). The confidentiality of such information is confirmed by Article 4(1)(b) of Regulation No 1049/2001, which provides that information, whose disclosure would harm the protection of privacy and the integrity of the individual, is to be protected. Finally, the confidentiality of that information cannot depend on whether, and to what extent, it is of probative value for the purpose of proceedings at national level.

79 In that regard, the defendant cannot rely on paragraph 89 of the ruling in *Bank Austria Creditanstalt* v *Commission*, cited in paragraph 46 above, given that the Court's appraisal in that part of the ruling does not concern a similar situation to that in the present case, in which the applicant has no possibility of contesting the merits of the assertions relating to it in the peroxides decision (*Bank Austria Creditanstalt* v *Commission*, cited in paragraph 46 above, last line of paragraph 78). It is clear from the case-law cited in paragraphs 72 and 73 above that the Commission cannot adopt a decision finding an infringement after expiry of the limitation period, where such a finding is not justified by the existence of a legitimate interest and where the undertaking concerned has no possibility of seeking review of that finding by the Community judicature (see also, to that effect, *Coca-Cola* v *Commission*, cited in paragraph 52 above, paragraph 86).

80 In the present case, as the Court has pointed out in paragraph 74 above, the applicant did not have standing to bring an action against the peroxides decision, given, in particular, that its participation in the infringement was not referred to in the operative part even though it contested the merits of the grounds of that decision in which its participation in the infringement was mentioned. Such a situation is contrary to the principle of the presumption of innocence and infringes the protection of professional secrecy, as interpreted in paragraphs 75 to 78 above, which require that respect for the reputation and dignity of the applicant be ensured. The disputed information must therefore be held to be covered by the obligation of professional secrecy within the meaning of Article 287 EC. In that regard, the Court would point out, finally, that the Commission itself accepted, during the hearing, that it could have published the peroxides decision by limiting itself to finding that the applicant had participated in the administrative procedure and to closing the investigation in its regard by reason of the limitation period. It must be held that, in those circumstances, there is therefore no public interest in publishing the disputed information that is capable of prevailing over the applicant's legitimate interest in having such information protected.

81 It follows from the foregoing that the hearing officer, in finding that the disputed information was not worthy of protection and that its publication would not cause serious and unjust harm to the applicant's interests, misapplied the protection of professional secrecy in the present case. As a consequence, the contested decision must be annulled in so far as it rejects the applicant's request for confidential treatment, and it is not necessary to rule on the applicant's other pleas in law and complaints.

Costs

82 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Annuls Commission Decision (2004) D/204343 of 1 October 2004;

2. Orders the Commission to pay the costs.

Jaeger Azizi Cremona

Delivered in open court in Luxembourg on 12 October 2007.

E. Coulon M. Jaeger

Registrar President

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