

Case C-62/86

AKZO Chemie BV

v

Commission of the European Communities

(Article 86 — Eliminary practices of a dominant undertaking)

Report for the Hearing	I - 3362
Opinion of Mr Advocate General Lenz delivered on 19 April 1989	I - 3396
Judgment of the Court (Fifth Chamber), 3 July 1991	I - 3439

Summary of the Judgment

1. *Competition — Administrative procedure — Observance of the right to a fair hearing — Commission's obligation to grant access to file — None*
2. *Competition — Administrative procedure — Decision of the Commission finding an infringement — Exclusion of evidence not disclosed to the undertaking to which the decision is addressed*
3. *Competition — Administrative procedure — Statement of objections — Content required*
4. *Competition — Dominant position — Relevant market — Markets covering all products suitable for satisfying constant needs and interchangeable only to a limited extent (Art. 86, EEC Treaty)*
5. *Competition — Dominant position — Existence — Possession of extremely large market share — Generally sufficient evidence (Art. 86, EEC Treaty)*
6. *Competition — Dominant position — Abuse — Concept (Art. 86, EEC Treaty)*

7. *Competition — Dominant position — Abuse — Charging of prices below costs with the object of eliminating a competitor*
(Art. 86, EEC Treaty)
8. *Competition — Dominant position — Abuse — Charging of prices below production costs — Justification — Alignment on a competitor — Conditions — Competitor pursuing an independent policy*
(Art. 86, EEC Treaty)
9. *Competition — Dominant position — Abuse — Acquisition of information regarding terms offered by competitors as part of a plan to eliminate those competitors*
(Art. 86, EEC Treaty)
10. *Competition — Dominant position — Abuse — Exclusive purchasing obligation*
(Art. 86, EEC Treaty)

1. Regard for the rights of the defence requires that the undertaking concerned shall have been enabled to make known effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based. Nevertheless, there are no provisions which require the Commission to divulge the contents of its files to the parties concerned.
2. When the Commission adopts a decision finding that an undertaking has committed a breach of the rules of competition, it may not base its decision on documents which were not disclosed to the undertaking during the administrative procedure preceding the adoption of the decision.
3. The statement of objections must specify clearly the facts upon which the Commission relies and its classification of those facts.
4. In examining the possibly dominant position of an undertaking in a particular market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.
5. Save in exceptional circumstances, very large market shares are in themselves evidence of the existence of a dominant position. That is the case where there is a market share of 50%.
6. The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, by recourse to methods different from those which

condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.

7. Article 86 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, however, not all competition by means of price can be regarded as legitimate.

8. An undertaking in a dominant position cannot justify sales at a price below its production costs by invoking the need to align its prices on those of another supplier, where it is shown that it has maintained close contacts with that supplier regarding the policy to be pursued in the matter of prices.

Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.

9. The acquisition of information by a dominant undertaking from undertakings whose custom it seeks to obtain regarding the terms granted by a competitor cannot be regarded as a normal means of competition where it forms part of a plan intended to eliminate that competitor.

Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.

10. If an undertaking having a dominant position on the market ties buyers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements from that undertaking, this constitutes an abuse of a dominant position within the meaning of Article 86 of the Treaty.