COMMISSION

COMMISSION DECISION

of 14 October 1994

imposing a fine pursuant to Article 15 (1) (c) of Council Regulation No 17 on Akzo Chemicals BV

(Only the Dutch text is authentic)

(94/735/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 14 and 15 thereof,

Having given the undertaking concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19 (1) of Regulation No 17 in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

(1) By Decision of 22 September 1993 pursuant to Article 14 (3) of Regulation No 17, the Commission ordered Akzo Chemicals BV to submit to an investigation into its activities on certain salt markets.

(2) The Articles of the Decision on 22 September 1993 provide as follows :

'*Article 1*

Akzo Chemicals BV and ... are hereby required to submit to an investigation into ...

Akzo Chemicals BV and... shall permit the Commission officials authorized to carry out the investigation and the officials of the Member State concerned assisting them to enter all their business premises, land and means of transport during normal office hours. They shall produce for inspection the books and other business records required by the said officials and shall permit them to examine the books and business records on the spot and take copies of or extracts from them. They shall immediately give on the spot such oral explanations relating to the subject matter of the investigation as the said officials may require.

Article 2

The investigations shall begin on or after 6 October 1993.

Article 3

This Decision is addressed to ... and Akzo Chemicals BV, 4 Stationsplein, NL-3818 Amersfoort and 20 Boortorenweg, NL-7554 RS Hengelo OV.

This Decision shall be notified when certified copies thereof are handed over to each of the undertakings concerned immediately before the investigation by the duly authorized Commission officials.'

(3) On 6 October 1993, shortly after 9.30 a.m., the duly authorized Commission officials notified the Decision to Akzo Chemicals BV by simultaneously handing over certified copies of it at its registered office in Amersfoort and at its branch establishment at Hengelo.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.

(4) The Commission officials began to carry out the investigation at Amersfoort and Hengelo immediately after notification of the Decision. The undertaking had not been informed of the investigation beforehand, so as to safeguard the effectiveness of the investigation by making sure that it came as a surprise.

(5) Shortly after the start of the investigation at the offices of the branch establishment of Akzo Chemicals BV at Hengelo, the Commission officials discovered an 'organization chart'. This appeared to indicate that there was in Arnhem a 'group management' of the Akzo Chemicals Group, of which the 'Business Unit Salt/West Europe' formed part. The Commission officials carrying out the investigation at Hengelo terminated their activities there about 10 a.m. in order to continue the investigation at Arnhem.

(6) On 6 October 1993, at 11.30 a.m., they handed over at the Akzo offices in Arnhem a certified copy of the Decision of 22 September 1993 to Mr Vogelaar, who is identified in the abovementioned 'organization chart' as a member of the 'group management' of the Akzo Chemicals Group. Mr. Vogelaar was assisted by two members of the legal department of Akzo NV. The Commission officials requested the Akzo representatives to allow them access to the office of Mr Kent, who is similarly identified in the abovementioned 'organization chart' as the member of the 'group management' of the Akzo Chemicals Group responsible for 'commercial services', in order to carry out the investigation. This request was refused. The explanation given for such refusal was that 'the terms of reference of the investigation did not include the carrying out of an inquiry under (the)... Decision of 22 September 1993 at Akzo NV Arnhem, where this request was made'. Following this refusal, the Commission officials asked whether there were in fact offices of Akzo Chemicals BV at Arnhem. In answer to this general question, one of the two members of the legal service of Akzo NV stated that 'there are no offices of Akzo Chemicals BV in Arnhem'. This statement, which was officially recorded, was made in the presence of Mr Vogelaar, who, it later emerged, is the designated director of Akzo Chemicals BV. Acting on the basis of this information, the inspectors refrained from requesting access at that time to other premises in Arnhem, including in particular the office of Mr Vogelaar himself.

(7) The Commission officials then left Arnhem. They joined their colleagues who were carrying out the investigation at the business premises of Akzo Chemicals BV in Amersfoort.

(8) The following day, the investigation resumed in Amersfoort. Representatives of Akzo Chemicals BV informed the inspectors that Mr Vogelaar was designated director of the company. In the light of this information, the inspectors asked to be allowed access to Mr Vogelaar's office for the purpose of carrying out the investigation. They addressed this request, in Amersfoort, to Mr Bierman, 'General Manager Business Unit Salt/West Europe' and mandated manager (procuratiehouder) of Akzo Chemicals BV, and as such the company's senior representative present. Mr Bierman did not comply with this request. He stated: 'I cannot grant you access to the office of Mr Vogelaar. Mr Vogelaar has no office in Amersfoort'.

(9) The investigation in Amersfoort was terminated on the same day.

(10) By Decision of 15 October 1993 the Commission imposed on Akzo Chemicals BV a periodic penalty payment in order to compel it to submit to the investigation which it had ordered by Decision of 22 September 1993 and to allow the carrying-out of the investgation at the offices of its manager. On 19 October 1993 the Decision imposing periodic penalty payments was notified to Akzo Chemicals BV by the Commission officials authorized to continue the investigation. A certified copy of the Decision was handed over at its registered office in Amersfoort to Mr Oosterholt, a member of the company's legal department. The Commission officials asked Mr Oosterholt to allow access to the office of Mr Vogelaar, a director of Akzo Chemicals BV, for the purpose of carrying out the investigation. Mr Oosterholt first stated that Mr Vogelaar did not have an office in Amersfoort. However, he said that he would ensure that the investigation would be allowed in the office of Mr Vogelaar. He indicated Arnhem as being the place in which such office was situated. The Commission officials then went to Arnhem, where, under strong protest and with all rights being reserved, they were allowed access to Mr Vogelaar's office.

(11) The Commission officials carried out the investigation in Mr Vogelaar's office that same day. During the further course of this proceeding, Akzo Chemicals BV pointed out that Mr Kent and Mr Vogelaar, identified as members of the 'group management', pursued their activities in the service of Akzo Nederland BV on behalf or in support of the board

of management of Akzo NV. The inspectors were also allowed access, under protest, to the office of Mr Kent. On 20 October 1994 the inspectors had talks with the member of the board of management of Akzo NV responsible for the Chemicals Group, who gave an explanation of the new organizational structure of the Akzo group.

II. LEGAL ASSESSMENT

1. Article 14 of Regulation No 17

(12) Under Article 14 of Regulation No 17, the Commission may, in carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, undertake all necessary investigations into undertakings. To this end the officials authorized by the Commission are empowered:

(a) to examine the books and other business records;

(b) to take copies of or extracts from the books and business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises, land and means of transport of undertakings.

(13) Pursuant to Article 14 (3) of Regulation No 17, undertakings are required to submit to investigations ordered by decision of the Commission.

(14) Akzo Chemicals BV did not submit to the investigation which the Commission ordered by Decision of 22 September 1993 pursuant to Article 14 (3) of Regulation No 17, inasmuch as:

(a) on 6 October 1993 it supplied incorrect oral information to the effect that there were no offices of Akzo Chemicals BV in Arnhem (see recital 6);

(b) on 7 October 1993 it did not comply with the request for access to the office of Mr Vogelaar for the purpose of carrying out the investigation (see recital 8 above).

(15) Akzo Chemicals BV argues that, in its Decision of 22 September 1993, the Commission confined the investigation to its registered office in Amersfoort and its branch establishment at Hengelo. Such restriction stems, according to the undertaking, from Article 3 of the Decision, which specifies only the premises in Amersfoort and Hengelo.

(16) This argument put forward by Akzo Chemicals BV cannot be accepted. The structure of the articles of the Decision of 22 September 1993 makes it clear that the scope of the investigation, and hence the obligation on the relevant undertaking to cooperate, is indicated by Article 1 of the Decision. Such scope is not limited geographically. In particular, the Commission stipulated that Akzo Chemicals BV was required to allow the Commission officials access to all its premises, land and means of transport. Article 3 of the Decision specifies those on whom it is binding 'in its entirety' pursuant to the fourth paragraph of Article 189 of the EC Treaty. The Decision of 22 September 1993 is expressly addressed to Akzo Chemicals BV. If in this connection both the registered office of Akzo Chemicals BV in Amersfoort and its branch establishment in Hengelo are specified, the purpose of such information is solely to indicate as precisely as possible the undertaking to which the Decision is addressed.

(17) Although, with a view to the rights of defence of the relevant undertakings, the Commission endeavours to indicate as precisely as possible the subject-matter and place of the investigation, Regulation 17 does not require it to specify in the decision itself the places at which it will carry out the investigation. This is indeed understandable since, particularly in the case of large undertakings with a complex structure, it is frequently impossible to check beforehand where all the business premises of relevance to the investigation might be situated. In this respect, the Commission inspectors rely on the cooperation and information given by the relevant undertaking. However, the Commission may, if it wishes, limit the scope of an investigation geographically. Any such restriction would have had to be specified in Article 1 of the Decision. This clearly did not occur in the present case.

(18) Akzo Chemicals BV further argues that the offices of its director situated in Arnhem are premises belonging to Akzo NV. In its opinion, this means that:

(a) the oral information given on 6 October 1993 to the effect that there are no offices of Akzo Chemicals BV in Arnhem is correct;

(b) on 7 October 1993 it could not grant access to the office of its designated director since such office belonged to another undertaking (Akzo NV).

(19) Akzo Chemicals BV does not make clear the grounds on which it considers that the office of Mr Vogelaar 'belongs' to Akzo NV (property, rental). In the Commission's view, this contention cannot be accepted. Offices are 'premises of undertakings' within the meaning of Article 14 (1) (d) of Regulation No 17 if and to the extent that the business of the undertaking is carried out in them. Without any doubt, the function of designated director forms part of the business of an undertaking. Consequently, Mr Vogelaar's office in Arnhem forms part of the premises of Akzo Chemicals BV

which the Commission officials were authorized to enter in order to carry out the investigation, irrespective of any arrangements that might exist concerning such office between Akzo Chemicals BV and Akzo NV. The view put forward by Akzo Chemicals BV, taken to its logical conclusion, would mean that firms could partially evade investigations by housing their management in premises which, under civil law, belonged to another company. It would also mean that the obligation incumbent on undertakings to cooperate, and hence the effectiveness of investigations, would be curtailed in an unacceptable manner.

(20) Akzo Chemicals BV argues finally that the oral information of 6 October 1993 to the effect that it had no offices in Arnhem was provided by a representative of Akzo NV and not by a representative of Akzo Chemicals BV. It should be noted that the relevant member of the legal service of Akzo NV was expressly specified by the latter company as the interlocutor of the Commission officials with a view to the carrying out of the investigation decision addressed to Akzo Chemicals BV. However, whatever the formal mandate may have been of the person who gave the above information, Akzo Chemicals BV must be held responsible for it, since it was given in the presence of its designated director, who did not contradict it.

2. Article 15 of Regulation No 17

(21) Pursuant to Article 15 (1) (c) of Regulation No 17, the Commission may by decision impose on undertakings fines of from ECU 100 to ECU 5 000 where, intentionally or negligently, they refuse to submit to an investigation which the Commission has ordered by decision issued pursuant to Article 14 (3).

(22) Akzo Chemicals BV did not fully submit to the investigation which the Commission ordered by Decision of 22 September 1993 (see recital 14 above).

(23) With regard to the question as to whether Akzo Chemicals BV evaded the investigation intentionally or negligently, the company points out amongst other things that the investigation at the offices of its director involved legally complex questions, so that there can be no question of culpability. Akzo Chemicals BV also insists in its reply to the statement of objections that the Decision was not addressed to Akzo NV and that in addition the inspectors did not on the first day of the investigation expressly request to be allowed to inspect the office of Mr Vogelaar.

(24) In the Commission's view, it may not be inferred from these circumstances that Akzo Chemicals BV was not at fault in the partial refusal to submit to the investigation. It was known to the company that its director had his office at Arnhem. Akzo Chemicals BV should therefore have realized that that office formed part of the company's premises and that the investigation was supposed to include that office. The statement that 'there are no offices of Akzo Chemicals BV in Arnhem', which was therefore incorrect, and the refusal to ensure, from the establishment in Amersfoort, that access was given to the office of its director mean that Akzo Chemicals BV, at least negligently, failed to submit to the investigation.

(25) It is therefore appropriate that a fine should be imposed on Akzo Chemicals BV. The actions of that undertaking jeopardized the performance of the duties assigned to the Commission by Article 89 of the EC Treaty and by provisions adopted under Article 87 of the EC Treaty. The effectiveness of the investigation which the Commission ordered by Decision of 22 September 1993 depended particularly on its coming as a surprise, which was ensured by the fact that the undertaking was not informed of the investigation beforehand. Akzo Chemicals BV prejudiced this surprise effect, the aim of which is to ensure that any evidence is not destroyed or removed; it thus frustrated the effectiveness of the investigation. In view of the serious consequences this had on the Commission's investigation, it appears appropriate to set the amount of the fine at ECU 5 000,

HAS ADOPTED THIS DECISION:

Article 1

A fine of ECU 5 000 (five thousand) is hereby imposed on Akzo Chemicals BV for failing to submit fully to the investigation which the Commission ordered by the Decision of 22 September 1993 adopted pursuant to Article 14 (3) of Regulation No 17, during which, at the very least negligently, it:

(a) supplied incorrect information on 6 October 1993;

and

(b) did not comply on 7 October 1993 with the request that access be allowed to the office of its designated director.

Article 2

The fine imposed in Article 1 shall be paid, in ecus, within three months of the date of notification of this Decision, into bank account No 310-0933000-43 of the Commission of the European Communities, Banque Bruxelles-Lambert, Agence Européenne, Rond-Point Schuman 5, B-1040 Brussels.

After the expiry of that period, interest shall be automatically payable on the fine at the rate charged by the European Monetary Institute for transactions in ecu on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 9,25 %.

Article 3

This Decision is addressed to: Akzo Chemicals BV having its registered office in Amersfoort.

Address:

Stationsplein 4,
NL-3818 LE Amersfoort.

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

Done at Brussels, 14 October 1994.

For the Commission

Karel VAN MIERT

Member of the Commission