

# Editorial

## AKZO – judgment is given

On 3 July, 1991 the Fifth Chamber of the Court of Justice handed down the long-awaited judgment in Case C-62/86, *AKZO Chemie BV v Commission*, well over a year since Advocate General Lenz presented his Opinion. The judgment related to an appeal against Decision 85/609 (OJ 1985 L374/1) in which the Commission found AKZO guilty of abusing a dominant position by predatory pricing tactics aimed at driving an English company out of the Community market for organic peroxyde. AKZO was *inter alia* fined 10,000,000 Ecu and ordered to cease and desist. This editorial simply notes the main points of the judgment, pending subsequent detailed discussion in this Review.

After initial procedural questions of access to the dossier (in which the Commission failed to prove that AKZO had had access to a hand-written note which was stated to have been in the dossier during the access to dossier visit but which was not in the dossier before the Court and the Court thus concluded that the note could not be used as evidence of abuse) and inadequate investigation and failure to hear AKZO, the Court turned to the alleged abuse of a dominant position, finding first of all

that a proven market share of 50 per cent was already evidence of the existence of a dominant position and that the world market leader position of AKZO and its stronger commercial and technical sales organisation and more extensive knowledge of toxicology and safety simply reinforced that conclusion.

The Court then laid out various criteria to establish the legality of a dominant company's pricing policy. Prices lower than the average variable costs aimed at forcing a competitor out of the market would be impermissible, as would prices lower than the average total costs (the fixed and variable costs) even if they were higher than the average variable costs, if they were set in the context of a plan to force a competitor out of the market. These criteria had to be applied to the facts and the Court concluded that illegal conduct had for the most part been made out. In one instance (certain individual price offers) the Court did not follow the Commission and the Court also annulled part of the future conduct element of the decision. The fine was reduced to 7,500,000 Ecu but for the rest the Commission's decision was upheld and AKZO was ordered to pay the costs.

By and large this judgment vindicates the Commission's decision and conduct; it is now clear that a tough line will be taken on predatory pricing and

deliberate attempts by dominant companies to exclude competitors. Whilst the whole affair has aroused heated passions (and the fact that the Court took so long to give judgment itself speaks for a major debate) the only logical conclusion must be that the Court is sending a firm signal to companies that smaller competitors are as entitled to a free market chance as the bigger operators. From the perspective of SMEs the judgment can only be welcomed.

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## Correction

We apologise to Frances Murphy for the omission of footnotes 7, 8, and 19 from her article "Dismantling Public Sector Monopolies" published in the June issue. Unfortunately, this was caused by teething troubles with our new typesetting system and we now reproduce the footnotes here:

<sup>7</sup>*Potato Marketing Board v Robertsons* [1983] 1 CMLR 93 and 134-138.

<sup>8</sup>See n3 *supra*.

<sup>19</sup>Commission Directive 88/301/EEC, OJ 1988 L131/73.