

Case T-13/89

Imperial Chemical Industries plc v Commission of the European Communities

(Competition — Concepts of agreement and concerted practice —
Collective responsibility)

Opinion of Judge Vesterdorf, acting as Advocate General, delivered on
10 July 1991 II - 1025
Judgment of the Court of First Instance (First Chamber), 10 March 1992 II - 1026

Summary of the Judgment

1. *Competition — Administrative procedure — Commission decision finding that an infringement has been committed — Evidence which may be used*
(EEC Treaty, Art. 85(1))
2. *Competition — Administrative procedure — Respect for the rights of the defence — Whether parties involved in a proceeding are entitled to see the hearing officer's report and comment upon it — None*
3. *Competition — Cartels — Agreements between undertakings — Meaning — Common purpose as to conduct to be adopted on the market*
(EEC Treaty, Art. 85(1))
4. *Competition — Cartels — Prohibition — Agreements continuing to produce their effects after they have formally ceased to be in force — Application of Article 85 of the Treaty*
(EEC Treaty, Art. 85)

5. *Competition — Cartels — Concerted practice — Meaning — Coordination and cooperation incompatible with the requirement for each undertaking to determine independently its conduct on the market — Meetings between competitors having as their purpose the exchange of information decisive for the participants' marketing strategy*
(EEC Treaty, Art. 85(1))
6. *Competition — Cartels — Complex infringement involving elements of agreements and elements of concerted practices — A single characterization as an 'agreement and a concerted practice' — Whether permissible — Consequences as regards the proof to be adduced*
(EEC Treaty, Art. 85(1))
7. *Competition — Cartels — Concerted practice — Effect on trade between Member States — To be assessed generally and not with regard to each of the participants*
(EEC Treaty, Art. 85(1))
8. *Acts of the institutions — Reasoning — Duty to state reasons — Scope — Decision implementing the competition rules*
(EEC Treaty, Art. 190)
9. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Assessment factors — Raising of the general level of fines — Whether permissible — Conditions*
(Regulation No 17 of the Council, Art. 15(2))
10. *Acts of the institutions — Presumption of validity — Challenge — Conditions*
 1. In a decision addressed to an undertaking pursuant to Article 85(1) of the Treaty there may be used against it as evidence only documents from which it appeared, at the time when the statement of objections was issued and from the mention made of them in the statement or its annexes, that the Commission intended to rely upon them so that the undertaking was thus able to comment on their probative value at the appropriate time.
 2. The rights of the defence do not require that undertakings involved in proceedings under Article 85(1) of the EEC Treaty should be able to comment on the hearing officer's report. Respect for the rights of the defence is ensured to the requisite legal standard if the various bodies involved in drawing up the final decision have been properly informed of the arguments put forward by the undertakings in response to the objections notified to them by the Commission and to the evidence presented by the Commission in support of those objections. The hearing officer's report is a purely internal Commission document which is in the nature of an opinion and whose purpose is neither to supplement or correct the

undertaking's arguments nor to set forth fresh objections or adduce fresh evidence against the undertakings.

conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

3. In order for there to be an agreement within the meaning of Article 85(1) of the EEC Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way. Such is the case where there were common intentions between undertakings to achieve price and sales volume targets.

Participation in meetings concerning the fixing of price and sales volume targets during which information is exchanged between competitors about the prices which they intend to charge, their profitability thresholds, the sales volume restrictions they judge to be necessary or their sales figures constitutes a concerted practice since the participant undertakings cannot fail to take account of the information thus disclosed in determining their conduct on the market.

4. Article 85 of the EEC Treaty is applicable to agreements between undertakings which are no longer in force but which continue to produce their effects after they have formally ceased to be in force.

5. The criteria of coordination and cooperation enabling the concept of concerted practice to be defined must be understood in the light of the concept inherent in the competition provisions of the EEC Treaty according to which each economic operator must determine independently the policy which he intends to adopt on the common market. Although this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect conduct between such operators the object or effect whereof is either to influence the

6. Since Article 85(1) of the Treaty lays down no specific category for a complex infringement which is nevertheless a single infringement because it consists of continuous conduct, characterized by a single purpose and involving at one and the same time factual elements to be characterized as 'agreements' and elements to be characterized as 'concerted practices', such an infringement may be characterized as 'an agreement and a concerted practice' and proof that each of those factual elements presents the constituent elements both of an agreement and of a concerted practice is not simultaneously and cumulatively required.

7. An undertaking must be regarded as having participated in an agreement or a concerted practice capable of affecting trade between Member States and as having thus infringed Article 85(1) of the Treaty if this could have been the result of the conduct of all the participating undertakings, irrespective of the effect of its individual participation.

those types of infringement which are particularly harmful to the attainment of the objectives of the Community.

8. Although under Article 190 of the EEC Treaty the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure and the considerations which led it to adopt its decision, it is not required, in the case of a decision applying the competition rules, to discuss all the issues of fact and of law raised by every party during the administrative proceedings.

The fact that in the past the Commission has imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. In particular, it is open to the Commission to raise the level of fines in order to strengthen their deterrent effect when, although infringements of a specific type have been established as being unlawful at the outset of Community competition policy, they are still relatively frequent on account of the profit that some of the undertakings concerned are able to derive from them.

9. In assessing the gravity of an infringement for the purpose of fixing the amount of the fine the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary deterrent effect, especially as regards

10. Since a measure which has been notified and published must be presumed to be valid, it is for a person who seeks to allege the lack of formal validity or the inexistence of a measure to provide the Court with grounds enabling it to look behind the apparent validity of the measure in question.