Case T-10/89

Hoechst AG
v
Commission of the European Communities

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

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 — Access to the file — Commission's obligation owing to rules laid down by itself in a report on competition policy*

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. *Acts of the institutions — Reasons — Duty to state them — Scope — Decision implementing the competition rules*
(EEC Treaty, Art. 190)

8. *Action for annulment — Consideration by the Court of its own notion of the question of the existence of the contested measure — Conditions*
(EEC Treaty, Art. 173, second paragraph)

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. Once the Commission, going beyond what is required by observance of the rights of the defence, has established a procedure for providing access to the file in competition cases and has laid down the rules of that procedure and published them in one of its reports on competition policy, it may not depart from the rules which it has imposed on itself and thus has the obligation to make available to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved.

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.

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 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.

   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.

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. 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.

8. Even though the Community court, in an action for annulment under the second paragraph of Article 173 of the Treaty, must of its own motion consider the issue of the existence of the contested measure, that does not mean that in every action brought under the second paragraph of Article 173 of the Treaty the possibility that the contested measure is non-existent must automatically be investigated. It is only in so far as the parties put forward sufficient evidence to suggest that the contested measure is non-existent that the Community court must review that issue of its own motion.