

Case T-9/89

Hüls AG

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 - 503
Judgment of the Court of First Instance (First Chamber), 10 March 1992	II - 504

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 — Administrative procedure — Respect for the rights of the defence — Notification of objections — Changes occurring during the procedure in the assessment made by the Commission — Permissible (Commission Regulation No 99/63, Art. 4)*
4. *Competition — Administrative procedure — Hearings — Provisional nature of the minutes submitted to the Advisory Committee and to the Commission — Procedural defect — None (Commission Regulation No 99/63)*
5. *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*

6. *Competition — Cartels — Agreement between undertakings — Meaning — Common purpose as to conduct to be adopted on the market*
(EEC Treaty, Art. 85(1))
 7. *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(1))
 8. *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))
 9. *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))
 10. *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))
 11. *Acts of the institutions — Reasons — Duty to state them — Scope — Decision implementing the competition rules*
(EEC Treaty, Art. 190)
 12. *Action for annulment — Consideration by the Court of its own motion 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 in 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. A decision finding that the competition rules have been infringed is not necessarily required to be a replica of the Commission's notice of objections. The Commission must take into account the factors emerging from the administrative procedure in order either to abandon such objections which have proved to be unfounded or to supplement and redraft its arguments both in fact and in law in support of the objections it maintains. This latter possibility does not conflict with the principle of the rights of the defence protected by Article 4 of Regulation No 99/63.
4. The provisional nature of the minutes of the hearing submitted to the Advisory Committee on Restrictive Practices and Dominant Positions, can amount to a defect in the administrative procedure capable of vitiating the resulting decision on the grounds of illegality only if the document in question is drawn up in such a way as to mislead in a material respect the persons to whom it is addressed.
5. 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.
6. 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.
7. 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.
8. 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.

9. 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.

10. 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.
11. 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.
12. 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.