

Case T-11/89

Shell International Chemical Company Ltd

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 - 761
Judgment of the Court of First Instance (First Chamber), 10 March 1992	II - 762

Summary of the Judgment

1. *Competition — Administrative procedure — Inapplicability of Article 6 of the European Convention for the Protection of Human Rights*
2. *Community law — Principles — Rights of the defence — Observance in administrative proceedings — Competition — Extent*
(Council Regulation No 17, Art. 19(1); Commission Regulation No 99/63, Art. 4)
3. *Competition — Administrative procedure — Commission decision finding that an infringement has been committed — Evidence which may be used*
(EEC Treaty, Art. 85(1))
4. *Competition — Cartels — Agreements between undertakings — Meaning — Common purpose as to conduct to be adopted on the market*
(EEC Treaty, Art. 85(1))

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 — Undertaking — Meaning — Single economic unit — Attaching liability for infringements*
(EEC Treaty, Art. 85(1))
7. *Acts of the institutions — Reasons — Obligation to state them — Scope — Decision applying the competition rules*
(EEC Treaty, Art. 190)
8. *Competition — Fines — Amount — Determination — Criteria — Previous conduct of the undertaking*
(Regulation No 17 of the Council, Art. 15(2))
9. *Acts of the institutions — Presumption of validity — Challenge — Conditions*

1. Although the Commission is bound to respect the procedural guarantees provided for by Community competition law, the Commission cannot be described as a 'tribunal' within the meaning of Article 6 of the European Convention for the Protection of Human Rights which provides that everyone is entitled to a fair hearing by an independent and impartial tribunal.

2. The provisions relating to the procedural guarantees provided for by Article 19(1) of Regulation No 17 and by Regulation No 99/63 are an application of a fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings, even

those of an administrative nature, and which means in particular that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the EEC Treaty.

The procedural guarantees provided for by Community law do not, however, require the Commission to adopt an internal organization precluding the same official from acting as investigator and rapporteur in the same case.

3. 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.

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.

4. 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.

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

6. The concept of undertaking, within the meaning of Article 85(1) of the Treaty, must be understood as referring to an economic unit which consists of a unitary organization of personnel, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision.

For that reason, where a group of companies constitutes a single undertaking, the Commission is right to attach liability for an infringement committed by that undertaking and to impose a fine

on the company responsible for the coordination of the group's action in the context of the infringement.

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. Where it is a matter of determining the amount of the fine to be imposed for an

infringement of the competition laws of the Treaty, the fact that the Commission has in the past already found an undertaking guilty of infringing the competition rules and penalized it for that infringement may be treated as an aggravating factor as against that undertaking but the absence of any previous infringement is a normal circumstance which the Commission does not have to take into account as a mitigating factor.

9. 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.