

Case T-7/89

S. A. Hercules Chemicals N. V.

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 - 1714
Judgment of the Court of First Instance (First Chamber), 17 De- cember 1991	II - 1715

Summary of the Judgment

1. *Competition — Administrative procedure — Access to the file — Commission's obligation on account of rules laid down by itself in a report on competition policy*
2. *Competition — Cartels — Agreements between undertakings — Meaning — Common purpose as to the conduct to be adopted on the market
(EEC Treaty, Art. 85(1))*
3. *Competition — Cartels — Prohibition — Agreements which continue to produce their effects after they have formally ceased to be in force — Application of Article 85 of the Treaty
(EEC Treaty, Art. 85)*
4. *Competition — Cartels — Concerted practice — Meaning — Coordination and cooperation incompatible with the requirement for each undertaking to determine independently the policy which it intends to adopt on the market — Meetings between competitors having as their purpose the exchange of information decisive for the formulation of the participants' marketing strategy
(EEC Treaty, Art. 85(1))*

5. *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))*
6. *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))*
7. *Acts of the institutions — Reasoning — Reference to opinions which are required to be obtained — Obligation — Scope — Decision implementing the competition rules — Opinion of the hearing officer — Not one which is required to be obtained (EEC Treaty, Art. 190)*
8. *Competition — Fines — Amount — Determination — Criteria — Previous conduct of the undertaking (Regulation No 17 of the Council, Art. 15(2))*

1. 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.

2. 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 existed between undertakings common intentions to achieve price and sales volume targets.

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 Article 85 of the Treaty is applicable to agreements which are no longer in force but which continue to produce their effects after they have formally ceased to be in force.

4. 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 inde-

pendently 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 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.

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.

5. 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

6. 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.

7. The fact that a decision implementing the competition rules makes no reference to the hearing officer's report does not constitute a breach of Article 190 of the Treaty since that report, which is not required by any provision to be passed on to the Advisory Committee on Restrictive Practices and Dominant Positions or to the Commission, is not an opinion which the Commission is required to obtain when taking a decision.

8. When it is a question of determining the amount of fine imposed owing to a breach of the competition rules 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.