

Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and
C-125/85 to C-129/85

A. Ahlström Osakeyhtiö and Others

v

Commission of the European Communities

(Concerted practices between undertakings established in non-member countries
affecting selling prices to purchasers established in the Community)

Report for the Hearing	I - 1311
Opinion of Advocate General Darmon delivered on 7 July 1992	I - 1445
Judgment of the Court (Fifth Chamber), 31 March 1993	I - 1575

Summary of the Judgment

1. *Competition — Administrative procedure — Statement of objections — Content required (Regulation No 17 of the Council, Art. 19(1); Regulation No 99/63 of the Commission, Art. 4)*
2. *Competition — Agreements, decisions and concerted practices — Concerted practice — Concept — Coordination and cooperation incompatible with the obligation of each undertaking to determine independently its market behaviour (EEC Treaty, Art. 85(1))*
3. *Competition — Agreements, decisions and concerted practices — Concerted practice — Parallel conduct — Presumption of consultation — Limits (EEC Treaty, Art. 85(1))*
4. *Competition — Administrative procedure — Compliance with the rights of the defence — Right of the parties involved to make known, before any decision, their views on the allegations made and on the documents on which those allegations are based*

5. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States — Agreement fixing the price of an intermediate product*
(EEC Treaty, Art. 85(1))

6. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States — Criteria*
(EEC Treaty, Art. 85(1))

7. *Competition — Agreements, decisions and concerted practices — Effect on competition — Assessment criteria — Anti-competitive purpose — Adequate finding*
(EEC Treaty, Art. 85(1))

8. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States — Export and resale ban*
(EEC Treaty, Art. 85(1))

9. *Action for annulment — Actionable measures — Undertaking given to the Commission by undertakings in a procedure involving the application of competition rules — Assimilation to an order requiring an infringement to be brought to an end — Admissibility*
(EEC Treaty, Art. 173; Regulation No 17 of the Council, Art. 3)

10. *Competition — Fines — Assessment based on the conduct of each individual undertaking — Effect of failure to penalize another trader — None*
(Regulation No 17 of the Council, Art. 15)

1. The statement of objections, the aim of which is to provide undertakings alleged to have infringed the rules of competition with all the information they need to enable them to defend themselves effectively before the Commission adopts a final decision, must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly

to take cognizance of the conduct complained of by the Commission.

That requirement is not fulfilled by a statement of objections which, in contrast to the Commission's final decision, does not set out distinctly the two infringements involved, each having its own

characteristics which relate to factors as crucial as the participants in the consultation or the period of the infringement.

form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.

2. A concerted practice refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them. The criteria of coordination and cooperation which enabled that term to be defined must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market.
4. In order to comply with the rights of the defence in a procedure involving the application of the competition rules, the undertakings concerned must have been afforded the opportunity, before the Commission adopts its decision, to make known their views on the allegations made against them and on the documents on which those allegations are based.

Those criteria are not satisfied in the case of price announcements which are made by producers to users and which, in themselves, constitute market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors since, at the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others.

Those rights are not complied with where, in establishing the infringement set out in its final decision, the Commission must have relied on documents gathered after the statement of objections was drawn up and on which the undertakings concerned have had no opportunity to make their views known.

3. Parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 85 of the Treaty prohibits any
5. Any agreement whose object or effect is to restrict competition by fixing prices for an intermediate product is capable of affecting intra-Community trade, even if there is no trade in that product between Member States, where the product constitutes the raw material for another product marketed elsewhere in the Community.

6. If an agreement is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States.
7. The fact that a clause contained in an agreement between undertakings and intended to restrict competition has not been implemented by the contracting parties is not sufficient to remove it from the prohibition in Article 85(1) of the Treaty.
8. By its nature, a clause contained in an agreement between undertakings and designed to prevent a buyer from reselling or exporting goods he has bought is liable to partition the markets and consequently to affect trade between Member States.
9. An undertaking given to the Commission by undertakings in a procedure involving the application of the competition rules must be regarded as a measure which can be the subject of an action for annulment under Article 173 of the Treaty. The obligations imposed by that undertaking must be treated in the same way as orders requiring an infringement to be brought to an end, as provided for by Article 3 of Regulation No 17, which authorizes the Commission to take any measures, including both orders to act and injunctions to refrain from acting, which are necessary to terminate the infringement established. In giving that undertaking, the undertakings merely assent, for their own reasons, to a decision which the Commission is empowered to adopt unilaterally.
10. Where an undertaking has acted in breach of Article 85(1) of the Treaty, it cannot escape being penalized altogether on the ground that another trader has not been fined, when that trader's circumstances are not even the subject of proceedings before the Court.