

## Case T-36/91

### Imperial Chemical Industries plc v Commission of the European Communities

(Competition — Concerted practice — Presumption of innocence —  
Administrative procedure — Rights of the defence —  
Equality of arms — Access to the file)

Judgment of the Court of First Instance (First Chamber, Extended Composition),  
29 June 1995 ..... II - 1851

#### Summary of the Judgment

1. *Competition — Administrative procedure — Access to the file — Purpose — Non-disclosure of documents held by the Commission — Examination by the Court of First Instance in the light of the observance of the rights of the defence in each particular case*
2. *Competition — Agreements, decisions and concerted practices — Concerted practice — Meaning — Parallel conduct — Presumption of the existence of concertation — Limits (EEC Treaty, Art. 85(1))*

3. *Competition — Administrative procedure — Observance of the rights of the defence — Documents useful to the defence — Appraisal solely by the Commission — Not permissible (Council Regulation No 17)*
4. *Competition — Administrative procedure — Business secrets — Protection of business secrets — Need to reconcile that protection with observance of the rights of the defence (EEC Treaty, Art. 214; Council Regulation No 17, Arts 19, 20(2) and 21)*
5. *Competition — Administrative procedure — Infringement of the rights of the defence — Regularization during the proceedings before the Court of First Instance — Not possible*

1. The purpose of providing access to the file in competition cases is to enable the addressee of a statement of objections to examine evidence in the Commission's file so that on the basis of that evidence it may effectively express its views on the conclusions reached by the Commission in its statement of objections.

and the latter's defence to such objections it is possible to assess the relevance to that defence of documents which have not been disclosed, both those which may exculpate the undertaking and those showing the existence of the infringement alleged.

That access is one of the procedural safeguards intended to protect the rights of the defence, which is a general principle, the proper observance of which requires that the undertaking concerned be afforded the opportunity during the administrative procedure effectively to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission.

2. A concerted practice is characterized by the fact that it substitutes for the risks of competition cooperation between undertakings, which lessens each undertaking's uncertainty as to the future attitude of its competitors.

Any infringement of the rights of the defence and the consequences thereof must therefore be examined by the Court in relation to the specific circumstances of each particular case. In the light of the objections actually raised by the Commission against the undertaking concerned

Parallel conduct cannot be regarded as proof of concertation unless concertation constitutes the only plausible explanation of such conduct. It is therefore necessary to ascertain whether the parallel conduct found could not, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be

explained otherwise than by concertation, in other words whether the evidence of parallel conduct constitutes a firm, precise and consistent body of evidence of prior concertation.

Commission being responsible for the proper investigation of a competition case, it may not delegate that task to the undertakings, whose economic and procedural interests often conflict.

3. In the defended proceedings for which Regulation No 17 provides it cannot be for the Commission alone to decide which documents are of use for the defence. Where difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed.

That is particularly true where parallel conduct is concerned, which is characterized by a set of actions that are *prima facie* neutral, where documents may just as easily be interpreted in a way favourable to the undertakings concerned as in an unfavourable way. In such circumstances, any error made by the Commission's officials in categorizing as 'neutral' a given document which, as an item of irrelevant evidence, will not then be disclosed to the undertakings, must not be allowed to impair their defence. Such an error could not be discovered in time, before adoption of the Commission's decision, except in the exceptional case where the undertakings concerned cooperated spontaneously, which would present unacceptable risks for the sound administration of justice, because, the

Having regard to the general principle of equality of arms, which presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission, it is not acceptable for the Commission alone to have had available certain documents to it, when taking a decision on an infringement, and to be able to decide on its own whether or not to use those documents against the undertaking when the latter had no access to them and was therefore unable likewise to decide whether or not it would use them in its defence. In such a situation, the rights of defence which the undertaking enjoys during the administrative procedure would be excessively restricted in relation to the powers of the Commission, which would then act as both the authority notifying the objections and the deciding authority, while having more detailed knowledge of the case file than the defence.

Consequently, there is an infringement of an undertaking's rights of defence where the Commission, as from notification of the statement of objections, excludes from the proceeding documents which it possesses and which may be of use in the applicant's defence. That infringement of the rights of the defence is objective in nature and does not depend upon whether

or not the Commission's officials acted in good or bad faith.

sions or by sending a list of documents gathered by the Commission, of evidence in the case file which it might use in its defence.

4. Although, according to a general principle which applies during the course of the administrative procedure applying the Community competition rules and which is expressed in Article 214 of the Treaty and various provisions of Regulation No 17, undertakings have a right to protection of their business secrets, that right must be balanced against the safeguarding of the rights of the defence and cannot therefore justify the Commission's refusal to make disclosure to an undertaking, even in the form of non-confidential ver-
5. An infringement of the rights of defence of an undertaking charged with infringing the Community competition rules which occurs during the administrative procedure cannot be regularized during the proceedings before the Court of First Instance, in which judicial review is conducted only in relation to the pleas raised and which cannot therefore be a substitute for a full investigation of the case by way of an administrative procedure.