

Case C-235/92 P

Montecatini SpA

v

Commission of the European Communities

(Appeal — Commission's Rules of Procedure — Procedure for the adoption of a decision by the College of Members of the Commission — Competition rules applicable to undertakings — Concepts of agreement and concerted practice — Limitation rules — Fine)

Opinion of Advocate General Cosmas delivered on 15 July 1997 I-4544

Judgment of the Court (Sixth Chamber), 8 July 1999 I-4575

Summary of the Judgment

1. *Procedure — Intervention — Admissibility — May be re-examined even where a previous order has held the intervention admissible*
(EC Statute of the Court of Justice, Art. 37, second para.)
2. *Acts of the institutions — Presumed lawful — Legally non-existent acts — Concept*
(EC Treaty, Art. 189 (now Art. 249 EC))

3. *Procedure — Requests for measures of inquiry — Where the request is made after the oral procedure has been closed — Request that the oral procedure be reopened — Conditions for admissibility*
(Rules of Procedure of the Court of First Instance, Art. 62)
4. *Procedure — Oral procedure — Reopening — Whether the Court of First Instance is obliged to raise of its own motion issues concerning the regularity of the procedure by which the contested decision was adopted — No such obligation*
(Rules of Procedure of the Court of First Instance, Art. 62)
5. *Appeals — Jurisdiction of the Court — Whether it may order measures of inquiry — Excluded*
(EC Statute of the Court of Justice, Art. 54, first para.; Rules of Procedure of the Court of Justice, Art. 113(2))
6. *Competition — Agreements, decisions and concerted practices — Concerted practice — Meaning — Anti-competitive object — Where there are no anti-competitive effects on the market — Irrelevant*
(EC Treaty, Art. 85(1) (now Art. 81(1) EC))
7. *Community law — Principles — Fundamental rights — Freedom of expression — Freedom of association*
(Treaty on European Union, Art. F(2) (now, after amendment, Art. 6(2) EU))
8. *Competition — Agreements, decisions and concerted practices — Prohibition — Justification put forward — Situation of necessity — Financial loss — No such justification*
(EC Treaty, Art. 85(1) (now Art. 81(1) EC))
9. *Competition — Agreements, decisions and concerted practices — Agreement the object of which is to restrict competition — Anti-competitive object — Use of the expression 'scopo anticoncorrenziale' (anti-competitive purpose) in the Italian text of the judgment at first instance — Synonymous with 'anti-competitive object'*
(EC Treaty, Art. 85 (now Art. 81 EC))
10. *Community law — Principles — Fundamental rights — Presumption of innocence — Procedure in competition cases — Whether that principle applies*
11. *Competition — Administrative proceedings — Limitation periods in proceedings — Point from which time starts to run — A 'continuous infringement' — Date of cessation of the infringement*
(EC Treaty, Art. 85(1) (now Art. 81(1) EC); Council Regulation No 2988/74)

1. The fact that the Court has, by a previous order, given a person leave to intervene in support of the form of

order sought by a party does not preclude a fresh examination of the admissibility of the intervention.

2. Acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

From the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations.

3. If made after the oral procedure is closed, a request for measures of inquiry can be admitted only if it relates to facts which may have a decisive influence on the outcome of the case and which the party concerned could not put forward before the close of the oral procedure. The same applies

with regard to the request that the oral procedure be reopened. It is true that, under Article 62 of its Rules of Procedure, the Court of First Instance has discretion in this area. However, the Court of First Instance is not obliged to accede to such a request unless the party concerned relies on facts which may have a decisive influence on the outcome of the case and which it could not have put forward before the close of the oral procedure.

4. The Court of First Instance is not obliged to order that the oral procedure be reopened on the ground of an alleged duty to raise of its own motion issues concerning the regularity of the procedure by which a Commission decision was adopted. Any such obligation to raise matters of public policy could exist only on the basis of the factual evidence adduced before the Court.

5. A request by a party that the Court of Justice order measures of inquiry for the purpose of ascertaining the circumstances in which the Commission adopted the decision which was the subject of the contested judgment goes beyond the scope of an appeal, which is limited to questions of law.

On the one hand, measures of inquiry would necessarily lead to the Court ruling on questions of fact and would change the subject-matter of the pro-

ceedings commenced before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

On the other hand, an appeal relates only to the contested judgment and it is only if that judgment were set aside that the Court of Justice could, in accordance with the first paragraph of Article 54 of the Statute of the Court of Justice, deliver judgment itself in the case and examine possible defects in the decision that was challenged before the Court of First Instance.

6. A concerted practice is caught by Article 85(1) (now Article 81(1) EC), even in the absence of anti-competitive effects on the market.

First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition.

7. Freedom of expression, of peaceful assembly and of association, enshrined *inter alia* in Articles 10 and 11 of the European Convention for the Protection of Human Rights, constitute fundamental rights which, as the Court of Justice has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU), are protected in the Community legal order.
8. Although a situation of necessity might allow conduct which would otherwise infringe Article 85(1) of the Treaty (now Article 81(1) EC) to be considered justified, such a situation can never result from the mere requirement to avoid financial loss.
9. The argument that in using the term 'scopo anticoncorrenziale' ('anti-competitive purpose') in the Italian text of the judgment the Court of First Instance introduced a third condition for applying Article 85(1) of the Treaty (now Article 81(1) EC) cannot be accepted. The term 'scopo anticoncorrenziale', used as a synonym for 'anti-competitive object', appears to correspond to the concept of object in Article 85(1) of the Treaty, according to a comparison of the various language versions of that provision, in particular the Danish version ('formål'), German ('bezwecken'), Finnish

('tarkoituksena'), Irish ('gcuaspóir'), Dutch ('strekken'), Portuguese ('objetivo') and Swedish ('syfte').

10. The presumption of innocence resulting in particular from Article 6(2) of the European Convention on Human Rights is one of the fundamental rights which, according to the Court's settled case-law, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.

Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.

11. Although the concept of a continuous infringement has different meanings in the legal orders of the Member States, in any event it comprises a pattern of unlawful conduct implementing a single infringement, united by a common subjective element.

The Court of First Instance was therefore right in holding that the activities which formed part of schemes, involving regular meetings and the setting of price targets and quotas, and pursued a single purpose constituted a continuous infringement of the provisions of Article 85(1) of the Treaty (now Article 81(1) EC), so that the five-year limitation period provided for in Article 1 of Regulation No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions relating to competition could not begin to run until the day on which the infringement ceased.