

## Case T-6/89

Enichem Anic SpA

v

Commission of the European Communities

(Competition — Concepts of agreement and concerted practice —  
Collective responsibility — Whether a party is answerable for an infringement)

Opinion of Judge Vesterdorf, acting as Advocate General delivered on 10 July  
1991 ..... II - 1627  
Judgment of the Court of First Instance (First Chamber), 17 December 1991 II - 1628

### Summary of the Judgment

1. *Competition — Administrative procedure — Commission decision finding that an infringement has been committed — Objections which may be maintained (EEC Treaty, Art. 85(1))*
2. *Competition — Administrative procedure — Hearings — Provisional nature of the minutes submitted to the Advisory Committee and to the Commission — Procedural defect — None (Commission Regulation No 99/63)*
3. *Competition — Administrative procedure — Respect for the rights of the defence — Whether parties involved in a proceeding are entitled to see the hearing officer's report and comment upon it — No*
4. *Competition — Cartels — Agreements between undertakings — Meaning — Common purpose as to the 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 the policy which it intends to adopt on the common market — Meetings between competitors having as their purpose the exchange of information decisive for the formation of the participants' marketing strategy*  
(EEC Treaty, Art. 85(1))
6. *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))
7. *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))
8. *Competition — Community rules — Infringements — Answerability — Cessation of a branch of activity — Legal person responsible for the operation of the undertaking at the time of the infringement — Disappearance — The legal person continuing the operation to be held answerable*  
(EEC Treaty, Art. 85(1))
9. *Acts of the institutions — Reasoning — Reference to opinions 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)
10. *Competition — Fines — Amount — Determination — Criteria — Previous conduct of the undertaking*  
(Regulation No 17 of the Council, Art. 15(2))

1. The decision addressed by the Commission to undertakings or associations of undertakings pursuant to Article 85(1) of the Treaty may not contain any new objection in relation to those contained in the statement of objections.

the administrative procedure capable of vitiating the resulting decision on the grounds of illegality only if the document in question is drawn up in such a way as to mislead in a material respect the persons to whom it is addressed.

2. The provisional nature of the minutes of the hearing submitted to the Advisory Committee on Restrictive Practices and Dominant Positions and to the Commission can amount to a defect in

3. The rights of the defence do not require that undertakings involved in proceedings under Article 85(1) of the EEC Treaty should be able to comment on the hearing officer's report. Respect for the rights of the defence is ensured to the requisite legal standard if the

various bodies involved in drawing up the final decision have been properly informed of the arguments put forward by the undertakings in response to the objections notified to them by the Commission and to the evidence presented by the Commission in support of those objections. The hearing officer's report is a purely internal Commission document which is in the nature of an opinion and whose purpose is neither to supplement or correct the undertakings' arguments nor to set forth fresh objections or adduce fresh evidence against the undertakings.

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.

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.

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

6. 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 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.

7. An undertaking must be regarded as having participated in an agreement or a concerted practice capable of affecting trade between Member States and 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.
8. Article 85(1) of the EEC Treaty is aimed at economic units made up of a combination of personal and physical elements which can contribute to the commission of an infringement of the kind referred to in that provision. When such an infringement is found to have been committed, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed, so that it can answer for it. However, where between the commission of the infringement and the time when the undertaking in question must answer for it the person responsible for the operation of that undertaking has ceased to exist in law, it is necessary, first, to find the combination of physical and human elements which contributed to the commission of the infringement and then to identify the person who has become responsible for their operation, so as to avoid the result that because of the disappearance of the person responsible for its operation when the infringement was committed the undertaking may fail to answer for it.
9. 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.
10. 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.