

## Case T-2/89

**Petrofina SA**

**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 - 1090
Judgment of the Court of First Instance (First Chamber), 24 October 1991 ....	II - 1091

### Summary of the Judgment

- 1. Competition — Administrative procedure — Commission decision finding an infringement — Objections which may be maintained and evidence which may be used (EEC Treaty, Art. 85(1))*
- 2. Competition — Administrative procedure — Hearings — Preliminary nature of the minutes submitted to the Advisory Committee and the Commission — Procedural defect — None (Regulation No 99/63 of the Commission)*
- 3. Competition — Administrative procedure — Observance of the rights of the defence — Right of the parties involved in a procedure to see the hearing officer's report and comment upon it — None*
- 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 — 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)*

6. *Competition — Cartels — Concerted practice — Meaning — Coordination and cooperation incompatible with the obligation upon each undertaking to determine independently its conduct on the market — Meetings between competitors having as their purpose the exchange of information decisive for the elaboration of the marketing strategy of the participants (EEC Treaty, Art. 85(1))*
  7. *Competition — Cartels — Complex infringement exhibiting factual elements to be characterized as agreements and factual elements to be characterized as concerted practices — Single characterization as 'an agreement and a concerted practice' — Whether permissible — Consequences as regards the proof to be adduced (EEC Treaty, Art. 85(1))*
  8. *Competition — Cartels — Concerted practice — Effect on trade between Member States — General assessment not concerned with the conduct of each participant (EEC Treaty, Art. 85(1))*
1. The decision addressed by the Commission to undertakings or associations of undertakings pursuant to Article 85(1) of the Treaty may not contain new objections in addition to those contained in the statement of objections nor fresh evidence in addition to that mentioned in those statements of objections or appended to them. Although that decision must specify the evidence on which the Commission's case hangs, it is not necessary for it to enumerate all the evidence available but it may refer to it in general terms.
  2. The preliminary nature of the minutes of the hearing submitted to the Advisory Committee on Restrictive Practices and Dominant Positions and the Commission may only amount to a defect in the administrative procedure capable of vitiating, on the grounds of illegality, the decision which results from that procedure if the document in question was drawn up in such a way as to mislead its addressees in a material respect.
  3. The rights of the defence do not require that undertakings involved in proceedings under Article 85(1) of the 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 the purpose of which is neither to supplement or correct the undertakings' arguments nor to set forth fresh objections or adduce fresh evidence against the undertakings.
  4. In order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the under-

takings in question should have expressed their joint intention to conduct themselves on the market in a specific way. That is the case where common intentions exist between a number of undertakings to achieve target prices and sales volume targets.

sales volume targets during which information is exchanged between competitors on the prices which 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 information thus disclosed is bound to be taken into account by the participating undertakings in determining their conduct on the market.

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

6. The criteria of coordination and cooperation which enable the concept of a concerted practice to be defined must be understood in the light of the concept inherent in the competition provisions of the 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 preclude any direct or indirect contact 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.

7. Since Article 85(1) of the Treaty does not provide for a specific characterization for an infringement which, whilst being complex, remains 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 factual elements to be characterized as 'concerted practices', such an infringement may be given the characterization of 'an agreement and a concerted practice' and proof is not required, simultaneously and cumulatively, that each of those factual elements presents the constituent elements both of an agreement and of a concerted practice.

8. An undertaking must be considered to have participated in an agreement or a concerted practice capable of having an effect on trade between Member States and thus infringing Article 85(1) of the Treaty if this could have been the result of the conduct of all the participating undertakings, independently of the effect of its individual participation.

Participation in meetings having as their purpose the fixing of target prices and