

## Case T-4/89

BASF AG

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 - 1526
Judgment of the Court of First Instance (First Chamber), 17 December 1991	II - 1527

#### Summary of the Judgment

- 1. Competition — Administrative procedure — Commission decision finding that an infringement has been committed — Evidence which may be used  
(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 — Prohibition — Agreements continuing 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 requirement for each undertaking to determine independently its conduct on the 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))*
7. *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))*

1. A decision addressed to an undertaking pursuant to Article 85(1) of the Treaty may use as evidence against that undertaking only the documents from which it appeared, at the time when the statement of objections was issued and from the mention made of them in the statement or its annexes, that the Commission intended to rely upon them so that the undertaking was thus able to comment on their probative value at the appropriate time.
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 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.
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.

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. Article 85 of the EEC 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 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 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.

7. 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.