JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
17 December 1991 *

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In Case T-6/89,

Enichem Anic S.p.A., a company incorporated under Italian law, having its registered office at Palermo (Italy), represented by G. Guarino and Mario Siragusa, of the Rome Bar, and G. Arcidiacono, of the Milan Bar, with an address for service in Luxembourg at the Chambers of Messrs Arendt & Harles, 4 Avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by Anthony McClellan, Principal Legal Adviser, and G. Marenco, Legal Adviser, acting as Agents, with an address for service in Luxembourg at the office of R. Hayder, a national civil servant seconded to its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149-Polypropylene, Official Journal 1986 L 230, p. 1),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(First Chamber),

composed of: J. L. Cruz Vilaça, President, R. Schintgen, D. A. O. Edward, H. Kirschner and K. Lenaerts, Judges,

Advocate General: B. Vesterdorf,
Registrar: H. Jung,

having regard to the written procedure and further to the hearing held from 10 to 15 December 1990,

after hearing the Opinion of the Advocate General at the sitting on 10 July 1991,

gives the following

Judgment

Facts and background to the action

1 This case concerns a Commission decision fining fifteen producers of polypropylene for infringing Article 85(1) of the EEC Treaty. The product which is the subject-matter of the contested decision (hereinafter referred to as 'the Decision'), polypropylene, is one of the principal bulk thermoplastic polymers. It is sold by the producers to processors for conversion into finished or semi-finished products. The largest producers of polypropylene have a range of more than 100 different grades covering a wide range of end uses. The major basic grades of polypropylene are raffia, homopolymer injection moulding, copolymer injection moulding, high-impact copolymer and film. The undertakings to which the Decision is addressed are all major petrochemical producers.

2 The west European market for polypropylene is supplied almost exclusively from European-based production facilities. Before 1977, that market was supplied by ten producers, namely Montedison (now Montepolimeri SpA), Hoechst AG, Imperial Chemical Industries PLC and Shell International Chemical Company Limited (called 'the big four'), which together account for 64% of the market, Enichem Anic SpA in Italy, Rhône-Poulenc S. A. in France, Alcudia in Spain, Chemische Werke Hüls and BASF AG in Germany and Chemie Linz AG in Austria. Following the expiry of the controlling patents held by Montedison, seven new producers came on stream in western Europe in 1977: Amoco and Hercules Chemicals N. V. in Belgium, ATO Chimie S. A. and Solvay et Cie S. A. in France, SIR in Italy, DSM N. V. in the Netherlands and Taqsa in Spain. Saga Petrokjemi AS & Co, a Norwegian producer, came on stream in the middle of 1978, and Petrofina S. A. in 1980. The arrival of the new producers, with nameplate capacity of some 480 000 tonnes, brought a substantial increase in installed capacity in western Europe which for several years was not matched by the increase in demand in that market. This led to low rates of utilization of production capacity, which, however, rose progressively between 1977 and 1983, increasing from 60% to 90%. According to the Decision, supply and demand were roughly in balance from 1982. However, during most of the period covered by the investigation (1977-1983), the polypropylene market was reported to be characterized by either low profitability or substantial losses, owing in particular to the extent of the fixed costs and to the increase in the cost of the raw material, propylene. According to the Decision (point 8), in 1983 Montepolimeri SpA held 18% of the European polypropylene market, Imperial Chemical Industries PLC, Shell International Chemical Company Limited and Hoechst AG each held 11%, Hercules Chemicals

N. V. slightly below 6%, ATO Chimie S. A., BASF AG, DSM N. V., Chemische Werke Hüls, Chemie Linz AG, Solvay et Cie S. A. and Saga Petrokjemi AS & Co from 3 to 5% and Petrofina S. A. about 2%. The Decision states that there was a substantial trade in polypropylene between Member States because each of the then EEC producers supplied the product in most, if not all, Member States.

3 Enichem Anic S. p. A. (hereinafter referred to as 'Anic') was one of the producers which was supplying the market before 1977. Its position on the polypropylene market was that of a medium-sized producer whose market share was between 2.7 and 4.2%. It left the market in spring 1983, having transferred its polypropylene business to Montepolimeri SpA at the end of October 1982.

4 On 13 and 14 October 1983, Commission officials, acting pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87, hereinafter referred to as 'Regulation No 17'), carried out simultaneous investigations at the premises of the following undertakings, producers of polypropylene supplying the Community market:

ATO Chimie S. A., now Atochem ('ATO'),

BASF AG ('BASF'),

DSM N. V. ('DSM'),

Hercules Chemicals N. V. ('Hercules'),

Hoechst AG ('Hoechst'),

Chemische Werke Hüls ('Hüls'),

Imperial Chemical Industries PLC ('ICI'),

Montepolimeri SpA, now Montedipe ('Monte'),

Shell International Chemical Company Limited ('Shell'),

Solvay et Cie S. A. ('Solvay'),

BP Chimie ('BP').

No investigations were carried out at the premises of Rhône-Poulenc S. A. ('Rhône-Poulenc') or at the premises of Anic.

5 Following the investigations, the Commission addressed requests for information under Article 11 of Regulation No 17 (hereinafter referred to as 'the request for information'), not only to the undertakings mentioned above but also to the following undertakings:

— Amoco,

— Chemie Linz AG ('Linz'),

— Saga Petrokjemi AS & Co, which is now part of Statoil ('Statoil'),

— Petrofina S. A. ('Petrofina'),

— Enichem Anic SpA ('Anic').

Linz, which is an Austrian undertaking, contested the Commission's jurisdiction and declined to reply to the request for information. In accordance with Article 14(2) of Regulation No 17, the Commission's officials then carried out investigations at the premises of Anic and Saga Petrochemicals UK Ltd, the United Kingdom subsidiary of Saga, and of the selling agents of Linz established in the United Kingdom and in the Federal Republic of Germany. No request for information was sent to Rhône-Poulenc.

6 The evidence obtained during the course of those investigations and pursuant to the requests for information led the Commission to form the view that between 1977 and 1983 the producers concerned had, in contravention of Article 85 of the EEC Treaty, by a series of price initiatives, regularly set target prices and developed a system of annual volume control to share out the available market between them according to agreed percentage or tonnage targets. On 30 April 1984, the Commission therefore decided to open the proceedings provided for by Article 3(1) of Regulation No 17 and in May 1984 sent a written statement of objections to the undertakings mentioned above with the exception of Anic and Rhône-Poulenc. All the addressees submitted written answers.

7 On 24 October 1984, the hearing officer appointed by the Commission met the legal advisers of the addressees of the statements of objections in order to agree certain procedural arrangements for the hearing provided for as a part of the administrative procedure, which was to begin on 12 November 1984. At that meeting the Commission announced, as a result of the arguments advanced by the undertakings in their replies to the statement of objections, that it would shortly send them further material complementing the evidence already served on them regarding the implementation of price initiatives. On 31 October 1984, the Commission sent to the legal advisers of the undertakings a bundle of documents consisting of copies of the price instructions given by the producers to their sales offices together with tables summarizing those documents. In order to ensure the protection of business secrets, the sending of that material was made subject to certain conditions; in particular, the documents were not to be made known to the commercial services of the undertakings. The lawyers of a number of undertakings refused to accept those conditions and returned the documentation before the oral hearing.

8 In view of the information supplied in the written replies to the statement of objections, the Commission decided to extend the proceedings to Anic and Rhône-Poulenc. To that end, a statement of objections, similar to the statement of objections addressed to the other fifteen undertakings, was sent to those two undertakings on 25 October 1984.

9 The first session of the oral hearing took place from 12 to 20 November 1984. During that session all the undertakings were heard, with the exception of Shell (which refused to take part in any hearing) and Anic, ICI and Rhône-Poulenc (which considered that they had not had sufficient opportunity to prepare their case).

10 At that session, several undertakings refused to deal with the matters raised in the documentation sent to them on 31 October 1984, asserting that the Commission had completely changed the direction of its case and that at the very least they should have the opportunity to make written observations. Other undertakings claimed that they had had insufficient time to examine the documents in question before the hearing. A joint letter to that effect was sent to the Commission on 28 November 1984 by the lawyers of BASF, DSM, Hercules, Hoechst, ICI, Linz, Monte, Petrofina and Solvay. In a letter of 4 December 1984, Hüls associated itself with the view taken in the joint letter.

11 Consequently, on 29 March 1985 the Commission sent to the undertakings a new set of documentation, setting out price instructions given by the undertakings to their sales offices, accompanied by price tables, as well as a summary of the evidence relating to each price initiative for which documents were available. It requested the undertakings to reply both in writing and at further sessions of the oral hearing and stated that it was removing the original restrictions on disclosure to commercial departments.

12 By another letter of the same date the Commission replied to the argument raised by the lawyers that it had not clearly defined the legal nature of the alleged cartel under Article 85(1) and invited the undertakings to submit written and oral observations.

13 A second session of the oral hearing took place from 8 to 11 July 1985 and on 25 July 1985. Anic, ICI and Rhône-Poulenc submitted their observations and the other undertakings (with the exception of Shell) commented on the matters raised in the Commission's two letters of 29 March 1985.

14 The preliminary draft of the minutes of the oral hearing, together with all other relevant documentation, was given to the Members of the Advisory Committee on Restrictive Practices and Dominant Positions (hereinafter referred to as 'the Advisory Committee') on 19 November 1985 and sent to the applicants on 25 November 1985. The Advisory Committee gave its opinion at its 170th meeting on 5 and 6 December 1985.

15 At the end of that procedure, the Commission adopted the contested decision of 23 April 1986, which has the following operative part:

'Article 1

ANIC SpA, ATO Chemie SA (now Atochem), BASF AG, DSM N. V., Hercules Chemicals N. V., Hoechst AG, Chemische Werke Hüls (now Hüls AG), ICI PLC, Chemische Werke LINZ, Montepolimeri SpA (now Montedipe), Petrofina S. A., Rhône-Poulenc S. A., Shell International Chemical Co. Ltd, Solvay & Cie and SAGA Petrokjemi AG & Co. (now part of Statoil) have infringed Article 85(1) of the EEC Treaty, by participating:

— in the case of ANIC, from about November 1977 until a date in late 1982 or early 1983,

— in the case of Rhône-Poulenc, from about November 1977 until the end of 1980,

— in the case of Petrofina, from 1980 until at least November 1983,

— in the case of Hoechst, ICI, Montepolimeri and Shell from about mid-1977 until at least November 1983,

— in the case of Hercules, LINZ and SAGA and Solvay from about November 1977 until at least November 1983,

— in the case of ATO, from at least 1978 until at least November 1983,

— in the case of BASF, DSM and Hüls, from some time between 1977 and 1979 until at least November 1983,

in an agreement and concerted practice originating in mid-1977 by which the producers supplying polypropylene in the territory of the EEC:

(a) contacted each other and met regularly (from the beginning of 1981, twice each month) in a series of secret meetings so as to discuss and determine their commercial policies;

(b) set "target" (or minimum) prices from time to time for the sale of the product in each Member State of the EEC;

(c) agreed various measures designed to facilitate the implementation of such target prices, including (principally) temporary restrictions on output, the exchange of detailed information on their deliveries, the holding of local meetings and from late 1982 a system of "account management" designed to implement price rises to individual customers;

(d) introduced simultaneous price increase implementing the said targets;

(e) shared the market by allocating to each producer an annual sales target or "quota" (1979, 1980 and for at least part of 1983) or in default of a definitive agreement covering the whole year by requiring producers to limit their sales in each month by reference to some previous period (1981, 1982).

Article 2

The undertakings named in Article 1 shall forthwith bring the said infringement to an end (if they have not already done so) and shall henceforth refrain in relation to their polypropylene operations from any agreement or concerted practice which may have the same or similar object or effect, including any exchange of information of the kind normally covered by business secrecy by which the participants are directly or indirectly informed of the output, deliveries, stock levels, selling prices, costs or investment plans of other individual producers, or by which they might be able to monitor adherence to any express or tacit agreement or to any concerned practice covering prices or market sharing inside the EEC. Any scheme for the exchange of general information to which the producers subscribe (such as Fides) shall be so conducted as to exclude any information from which the behaviour of individual producers can be identified and in particular the undertakings shall refrain from exchanging between themselves any additional information of competitive significance not covered by such a system.

Article 3

The following fines are hereby imposed on the undertakings named herein in respect of the infringement found in Article 1:

(i) ANIC SpA, a fine of 750 000 ECU, or Lit 1 103 692 500;

(ii) Atochem, a fine of 1 750 000 ECU, or FF 11 973 325;

(iii) BASF AG, a fine of 2 500 000 ECU, or DM 5 362 225;

(iv) DSM N. V., a fine of 2 750 000 ECU, or Fl 6 657 640;

(v) Hercules Chemicals N. V., a fine of 2 750 000 ECU, or Bfrs 120 569 620;

(vi) Hoechst AG, a fine of 9 000 000 ECU, or DM 19 304 010;

(vii) Hüls AG, a fine of 2 750 000 ECU, or DM 5 898 447.50;

(viii) ICI PLC, a fine of 10 000 000 ECU, or £ 6 447 970;

(ix) Chemische Werke LINZ, a fine of 1 000 000 ECU, or Lit 1 471 590 000;

(x) Montedipe, a fine of 11 000 000 ECU, or Lit 16 187 490 000;

(xi) Petrofina S. A., a fine of 600 000 ECU, or Bfrs 26 306 100;

(xii) Rhône-Poulenc S. A., a fine of 500 000 ECU, or FF 3 420 950;

(xiii) Shell International Chemical Co. Ltd, a fine of 9 000 000 ECU, or £ 5 803 173;

(xiv) Solvay & Cie, a fine of 2 500 000 ECU, or Bfrs 109 608 750;

(xv) Statoil Den Norske Stats Oljeselskap AS (now incorporating SAGA Petrokjemi), a fine of 1 000 000 ECU or £ 644 797.

Article 4

...

Article 5

...'

16 On 8 July 1986, the definitive minutes of the hearings, incorporating the textual corrections, additions and deletions requested by the applicants, were sent to them.

Procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 31 July 1986, the applicant brought this action seeking annulment of the Decision. Thirteen of the fourteen other addressees of the Decision have also brought actions for its annulment (Cases T-1/89 to T-4/89 and T-7/89 to T-15/89).

18 The written procedure took place entirely before the Court of Justice.

19 By order of 15 November 1989, the Court of Justice referred this case and the thirteen other cases to the Court of First Instance, pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities (hereinafter referred to as 'the Council Decision of 24 October 1988').

20 Pursuant to Article 2(3) of the Council Decision of 24 October 1988, an Advocate General was designated by the President of the Court of First Instance.

21 By letter of 3 May 1990, the Registrar of the Court of First Instance invited the parties to an informal meeting in order to determine the arrangements for the oral procedure. That meeting took place on 28 June 1990.

22 By letter of 9 July 1990, the Registrar of the Court of First Instance requested the parties to submit their observations on the possible joinder of Cases T-1/89 to T-4/89 and T-6/89 to T-15/89 for the purposes of the oral procedure. No party had any objection on this point.

23 By order of 25 September 1990, the Court joined the abovementioned cases for the purposes of the oral procedure, on account of the connection between them, in accordance with Article 43 of the Rules of Procedure, then applicable *mutatis mutandis* to the procedure before the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988.

24 By order of 15 November 1990 the Court adjudicated on the requests for confidential treatment lodged by the applicants in Cases T-2/89, T-3/89, T-9/89, T-11/89, T-12/89 and T-13/89 and granted them in part.

25 By letters lodged at the Registry of the Court between 9 October and 29 November 1990, the parties replied to the questions put to them by the Court in a letter sent to them by the Registrar on 19 July 1990.

26 In the light of the answers provided to its questions, on hearing the report of the Judge-Rapporteur and after hearing the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

27 The parties presented oral argument and answered questions from the Court at the hearing which took place from 10 to 15 December 1990.

28 The Advocate General delivered his Opinion at the sitting on 10 July 1991.

Forms of order sought by the parties

29 Enichem Anic claims that the Court should:

(i) annul in its entirety or in part the decision of the Commission of 23 April 1986 (IV/31.149 — Polypropylene) in so far as it concerns the applicant;

(ii) in the alternative, annul or reduce the fine imposed on the applicant; and

(iii) order the Commission to pay all the applicant's costs and expenses.

The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

Substance

30 It is necessary to examine, *first*, the applicant's grounds of challenge relating to a breach of the rights of the defence allegedly committed by the Commission in so far as (1) it did not set out in the statement of objections all the objections which it subsequently upheld against the applicant in the Decision and thus attributed collective responsibility to the applicant, (2) the final record of the hearings was not transmitted to the Members of the Commission or to the Advisory Committee, (3) it did not communicate to the applicant the hearing officer's report and (4) it failed to take account of the applicant's special position in the administrative procedure; *secondly*, the grounds of challenge relating to proof of the infringement concerning (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty, whereby it is contended that the Commission (A) did not correctly define the infringement, (B) did not correctly assess the restrictive effect on competition and (C) did not correctly assess how trade between Member States was affected; *thirdly*, the grounds of challenge relating to the question whether or not the applicant is answerable for the infringement; *fourthly*, the grounds of challenge relating to the reasoning of the Decision; and, *fifthly*, the grounds of challenge relating to the

determination of the fine, which is alleged to be (1) partially time barred, (2) disproportionate to the duration of the alleged infringement and (3) disproportionate to the gravity of the alleged infringement.

The rights of the defence

1. *New objections and collective responsibility*

31 The applicant submits that in the Decision the Commission has upheld against it objections which were not set out in the particular statement of objections, in particular those described in Article 1(c) of the Decision. The Commission cannot, as it has tried to do, hold the applicant responsible for participating in the cartel in general and consequently indirectly extend that responsibility to conduct through which the cartel manifested itself but which could not be directly ascribed to the applicant. It cannot therefore be held responsible for the conduct described in Article 1(c) of the Decision which the Commission itself has admitted could not be directly ascribed to it.

32 Accordingly, the responsibility imputed to the applicant does not correspond to the matters proved in its regard or to the objections set out in the statement of objections, even if regard is had to the general part of that statement, since that part, which is intended to define the context in which each undertaking's conduct took place, can be considered to be specifically addressed to Anic only in the passages in which it is actually named, and not in passages which concern only other producers.

33 The applicant adds that in spite of the Commission's denials the Decision suggests and implies that Anic participated in all the activities described in Article 1 to the same extent as all the other undertakings concerned.

34 The Commission states that that argument is based on a deliberately incorrect reading of Article 1 of the Decision. The Commission did not assert in that provision that the applicant had participated in all the activities referred to but

only that it had participated in a polypropylene producers' cartel which took concrete form through those activities. The Decision holds the applicant responsible not for a series of separate infringements but for a single infringement, that is to say participation in an agreement and concerted practice intended to support polypropylene prices which took the form of various measures which, taken together, constitute a single infringement.

35 According to the Commission, once participation in the cartel is proved, the resulting liability can concern only the cartel as a whole. The Commission takes the view that the responsibility of an undertaking involved in the cartel does not depend on proof of its actual participation in each separate activity which was carried out in order to achieve the common objective. It therefore considers that it was inappropriate, in Article 1, to specify the degree of each undertaking's actual participation in the various initiatives taken in order to implement the cartel as well as the duration of its participation in the cartel.

36 The Court observes that the objections upheld in Article 1(c) of the Decision were all mentioned in the general or particular statements of objections. The temporary restrictions on output were referred to in points 67 and 79 of the main statement of objections, the exchange of detailed information on deliveries in points 97 and 101, participation in local meetings in point 2(b) of the particular objections and the system of 'account management' in points 85 to 89 of the main statement of objections.

37 The content of the main statement of objections may be raised individually against any of the undertakings to which it is addressed, including the applicant, unless that statement or the particular objections actually state the contrary. As regards the objections in question, that is not the case in relation to the applicant.

38 Moreover, it may be pointed out that the text of the main statement of objections itself — in particular points 1 and 5 — indicates that all the undertakings to which that statement is addressed are accused of all the actions there described.

39 It follows that all the objections upheld in Article 1(c) of the Decision were included in an appropriate statement made to the applicant and are not, therefore, new objections.

40 The question whether the Commission maintained those objections as regards the applicant in the Decision and, if so, whether it has proved the findings of fact supporting those objections to the requisite legal standard falls to be considered by the Court in its examination of the question whether the infringement has been proved. The same is true of the applicant's ground of challenge concerning the alleged collective responsibility imputed to it by the Decision.

2. *Failure to transmit the minutes of the hearings*

41 The applicant considers that the fact that neither the members of the Advisory Committee, the member of the Commission responsible for competition matters nor the other members of the Commission had the final version of the minutes of the hearings when they stated their views or made their decision constitutes a procedural defect.

42 The Commission points out that both the members of the Advisory Committee and the members of the Commission had the provisional version of the minutes of the hearings, from which the final version did not diverge in any significant respect.

43 It adds that it is not obliged to send the minutes to the members of the Advisory Committee and that in any event representatives of the Member States attended the hearings, with the exception of the representatives of Greece and Luxembourg, which did not attend the second session of hearings organized by the Commission. Consequently, says the Commission, the minutes could serve only as a reminder for the members of the Advisory Committee. As for the members of the Commission, they had not only the provisional minutes but also the comments of the undertakings on those minutes.

44 The Commission further observes that since the members of the Commission and of the Advisory Committee were able to make their decision in full knowledge of the facts the Decision would not have been different if the alleged irregularity had not taken place and it is therefore of secondary importance (judgment of the Court of Justice in Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26 and Opinion at p. 2290).

45 The Court observes that it is apparent from the case-law of the Court of Justice that the provisional nature of the minutes of the hearing submitted to the Advisory Committee and to the Commission can only amount to a defect in the administrative procedure capable of vitiating the resulting decision on the grounds of illegality if the document in question is drawn up in such a way as to mislead the persons to whom it is addressed in a material respect (judgment in Case 44/69 *Buchler* v *Commission* [1970] ECR 733, paragraph 17).

46 As regards the minutes forwarded to the Commission, it must be pointed out that along with the provisional minutes the Commission received the remarks and observations made in relation to them by the undertakings, and it must therefore be concluded that the members of the Commission were aware of all the relevant information before they adopted the Decision.

47 As regards the provisional minutes forwarded to the Advisory Committee, it may be observed that the applicant has not stated in what respect those minutes were not a faithful and correct record of the hearings, and it has therefore not shown that the document in question was drawn up in such a way as to mislead the members of the Advisory Committee on an essential issue.

48 It follows that this ground of challenge must be dismissed.

3. *Non-disclosure of the hearing officer's report*

49 The applicant maintains that observance of the rights of the defence requires that it should have been informed of the opinion which, by virtue of his terms of reference, the hearing officer must submit to the Director-General for Competition.

50 The Commission considers that since the report tendered by the hearing officer to the Director General for Competition is a report made by an official of the Commission and is generally made orally it forms part of an internal Commission decision-making procedure and cannot therefore be disclosed to the undertakings.

51 The Commission also points out that the hearing officer's terms of reference do not provide for the report to be made public.

52 Finally, it submits that the independence of the hearing officer and his ability to state his views candidly would be imperilled if his remarks did not remain confidential. That point of view, it says, is confirmed by the order of the Court of Justice of 11 December 1986 (in Case 212/86 R *ICI* v *Commission*, not published in the Reports of Cases before the Court, at paragraphs 5 to 8), according to which the report of the hearing officer need not be taken into account by the Court for the purposes of judicial review.

53 This Court holds that 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, which is a purely internal Commission document. On this question the Court of Justice has held that the hearing officer's report is in the nature of an opinion for the Commission, which is in no way bound to follow it, and that the report does not therefore constitute a decisive factor which must be taken into account by the Community court in performing its judicial review (order of 11 December 1986 in Case 212/86-R, cited above, paragraphs 5 to 8). 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 (judgment of the Court of Justice in Case 322/81 *Nederlandsche Banden-Industrie-Michelin N. V.* v *Commission* [1983] ECR 3461, paragraph 7 at p. 3498).

54 It is to be noted in this regard that the purpose of the hearing officer's report is neither to supplement or correct the undertakings' arguments nor to set forth fresh objections or adduce fresh evidence against the undertakings.

55 It follows that respect for the rights of the defence does not give the undertakings the right to demand disclosure of the hearing officer's report so as to be able to comment upon it (see the judgment of the Court of Justice in Joined Cases 43 and 63/82 *Vereniging ter Bevordering van het Vlaamse Boekwezen, VBVB, and Vereniging ter Bevordering van de Belangen des Boekhandels, VBBB* v *Commission* [1984] ECR 19, paragraph 25 at p. 58).

56 Consequently, this ground of challenge must be dismissed.

4. *The applicant's special position in the administrative procedure*

57 The applicant points out that it became involved in the administrative procedure when it was already under way. It was thus in a special position with the result that it did not have full knowledge of the arguments which had been exchanged up to that point.

58 The Court observes that the applicant has not indicated in what way its special position in the administrative procedure deprived it of the possibility of making known its views as it saw fit on all the objections made against it by the Commission in the statements of objections addressed to it and on the evidence supporting those objections mentioned by the Commission in the statements of objections or annexed to them.

59 The fact that the applicant did not participate in the first series of hearings did not prevent it from stating its position on the objections addressed to it and it cannot therefore rely on the fact that it was not informed of the arguments that had already been exchanged by the Commission and the other undertakings.

60 It follows that the applicant's special position in the administrative procedure did not result in a breach of the rights of the defence and that this ground of challenge must be dismissed.

Proof of the infringement

61 According to the Decision (point 80, first paragraph), from 1977 onwards the polypropylene producers supplying the EEC had been party to a whole complex of schemes, arrangements and measures decided on in the framework of a system of regular meetings and continuous contact. The Decision (point 80, second paragraph) goes on to state that the overall plan of the producers was to meet and reach agreement upon specific matters.

62 It is therefore necessary to verify first of all whether the Commission has established to the requisite legal standard its findings of fact as regards (I) the period from November 1977 to the end of 1978 or the beginning of 1979 and (II) the period from the end of 1978 or the beginning of 1979 to the end of 1982 or the beginning of 1983 concerning (A) the system of regular meetings, (B) the price initiatives, (C) the measures designed to facilitate the implementation of the price initiatives and (D) the fixing of target tonnages and quotas, taking into account (a) the contested decision, (b) the arguments of the parties, before going on to (c) an assessment of them; it will then be necessary to review the application of Article 85(1) of the EEC Treaty to those facts.

1. *The findings of fact*

I. The period from 1977 to the end of 1978 or the beginning of 1979

A. The contested decision

63 The Decision (point 78, fourth paragraph) asserts that the system of regular meetings of polypropylene producers began at about the end of 1977 but that it is not possible to identify the precise date on which each individual producer began to attend. It states that Anic, one of the producers which are not proved to have 'supported' the December 1977 price initiative, admits to having participated in meetings from the beginning.

64 However, the Decision (point 105, first and second paragraphs) states that the precise date on which each producer began to attend regular plenary meetings cannot be established with certainty. The date on which Anic, ATO, BASF, DSM and Hüls began to participate in the arrangements cannot have been later than 1979 since all these five producers are shown to have been involved in the market-sharing or quota systems which were first in force in that year.

B. Arguments of the parties

65 The applicant states that the Decision is wrong in so far as it finds that the applicant participated in meetings from November 1977 onwards. The Commission has misinterpreted Anic's reply to the request for information (particular objections addressed to Monte, Appendix 27), to which reference is made in the particular objections addressed to Anic, in which it stated that the meetings began towards the end of the 1970s and that Anic's participation could be dated to a period close to the beginning of those meetings. Since it no longer had the documents concerning that period, the applicant thought in good faith that the beginning of its participation, which it dates to 1979, was close to the beginning of the producers' meetings, which it thought to be towards 1979, that is to say the end of the 1970s.

66 It further states that the Decision is self-contradictory as to the beginning of its participation. In point 105 it places Anic on the same footing as ATO, BASF, DSM and Hüls, while acknowledging that it has no evidence of Anic's participation before 1979. The operative part, on the other hand, states that Anic participated in the infringement from November 1977 onwards, whereas it states that ATO took part from 1978 onwards and BASF, DSM and Hüls from some time between 1977 and 1979.

67 The Commission maintains that it follows from Anic's clear admission in its reply to the request for information that it began to take part in producers' meetings in about November 1977.

68 The Commission states that Anic cannot repudiate such an admission, particularly since in its reply it justified that reversal by the fact that at the time of its reply to the request for information it did not have the Commission's documents, which shows that the applicant has adjusted its reply in the light of the evidence held by the Commission.

C. Assessment by the Court

69 The Court finds that, as the Commission acknowledged at the hearing, the only evidence put forward by it to prove the applicant's participation in the meetings during the period in question is its reply to the request for information (particular objections, Monte, Appendix 27), in which it is stated:

'Incontri fra i produttori Europei di polipropilene sono iniziati negli anni 70 intorno al termini di quel periodo. Non siamo in grado di stabilire con precisione la date in cui è iniziata la partecipazione dell'Anic, ma riteniamo si collochi in un momento prossimo all'inizio degli incontri stessi.'

('Meetings between the European polypropylene producers began during the 1970s, towards the end of that period. We are not in a position to determine precisely the date on which Anic began to take part, but we think it was close to the beginning of the meetings in question.')

70 The applicant's reply cannot be regarded as a clear admission of participation in the meetings from November 1977 onwards. The applicant gives a perfectly plausible literal and contextual interpretation of its reply which is corroborated by ICI's reply to the request for information (main statement of objections, Appendix 8), according to which the 'bosses" and 'experts" meetings began at the end of 1978 or the beginning of 1979 and Anic participated regularly in those meetings during the period of its presence on the polypropylene market between 1979 and 1983, that is to say after the period now under consideration.

71 It must further be pointed out that the doubt expressed by the Commission in the Decision itself (point 105, second paragraph) in stating that the date on which Anic, ATO, BASF, DSM and Hüls began to participate in the arrangements cannot have been later than 1979 also supports the interpretation given by the applicant to its reply to the request for information.

72 That doubt is also apparent in the particular objections addressed to the applicant, in which the Commission simply reproduced Anic's reply to the request for information without indicating the interpretation which it intended to give to it regarding the precise determination of the date when Anic began to participate in the meetings, and in the main statement of objections, in which the Commission does not mention the applicant's name in relation to meetings held before 1979.

73 It follows from the foregoing that since it has not been able to put forward any evidence of such a kind as to support any participation in the infringement on the part of Anic before the end of 1978 or the beginning of 1979 the Commission has not proved its participation to the requisite legal standard.

II. The period from the end of 1978 or the beginning of 1979 to the end of 1982 or the beginning of 1983

A. The system of regular meetings

(a) The contested decision

74 The Decision (point 18, third paragraph, point 78, fourth paragraph, and point 105, second paragraph) accuses the applicant of having participated in the system of regular meetings of polypropylene producers by regularly attending meetings until the middle or the end of 1982 (point 19, first paragraph, and point 78, seventh paragraph), when it ceased to participate following the reorganization of the Italian petrochemical industry and the transfer of its polypropylene business to Monte.

75 In point 21 the Decision states that the purposes of those regular meetings were, in particular, the fixing of target prices and sales volumes and the monitoring of their observance by the producers.

(b) Arguments of the parties

76 Although it admits having taken part in meetings in about 1979, the applicant maintains that the only meeting in which its participation has been proved by the Commission is a meeting of January 1981 (main statement of objections, Appendix 17) and that its participation in the meetings probably ceased at the beginning of 1982 because of the situation in the Italian chemical industry, as is proved by the notes of several meetings in 1982. For example, the note of a meeting of 13 May 1982 (main statement of objections, Appendix 24) states that Anic/SIR were no longer coming, whereas other producers are simply referred to as absent. The note of a meeting of 2 September 1982 (main statement of objections, Appendix 30) also indicates that Anic was no longer present and was considered troublesome, as is confirmed by the note of a meeting of 2 November 1982 (main statement of objections, Appendix 32). It was by error that in its reply to the request for information (particular objections, Monte, Appendix 27) Anic thought that it could state that it had taken part in a meeting in October 1982. In the body of the Decision the Commission itself recognizes that Anic did not participate in meetings 'after about the middle or end of 1982' (Decision, point 19).

77 The applicant asserts that the mention of its name in tables and lists attached to the notes of meetings does not constitute conclusive proof of its presence at the meetings. It appears clearly from a comparison of all the references in the tables that these are the same for the period when Anic seems to have been present at the meetings as for the period when it certainly was not present.

78 It adds that in many of the tables there is joint reference to Anic and SIR as if they were a single undertaking, although there is vigorous competition between those two undertakings and Anic would never have agreed to the impression being given that they formed a single undertaking.

79 The applicant further maintains that its participation in the meetings during the period in question was purely passive, and it points out that the documents produced by the Commission in order to prove the contrary, namely the tables and lists attached to notes of producers' meetings, which refer to Anic and SIR jointly, are not conclusive.

80 It also argues that in notes of meetings such as those of 21 September or 2 November 1982 (main statement of objections, Appendices 30 and 32) Anic was presented as a problem or a troublemaker on which it was necessary to bring pressure to bear. That proves that it conducted itself in a competitive and independent manner on the market.

81 The applicant asserts that its participation in the meetings was merely sporadic, although the Commission's objection requires the proof of regular presence at meetings as a constitutive element of the infringement. It states that the Decision is doubly contradictory in that respect, since it asserts in point 18 that Anic participated regularly in meetings but in point 37, second paragraph, omits Anic from the list of regular participants in meetings, and it refers to Anic's presence only in two meetings in January 1981 (point 33, third paragraph) but asserts that 55 meetings were held between September 1979 and September 1983 (Table 3 to the Decision).

82 The Commission considers that Anic ceased to participate in the meetings in the middle or at the end of 1982. That assertion is based on Anic's reply to the request for information, in which it is stated:

'Ci risulta che l'ultima partecipazione dell'Anic a una riunione di quel tipo dati al mese di ottobre 1982 a Zurigo.'

('It appears to us that the last meeting of that kind in which Anic took part was in October 1982 in Zurich.')

That admission is corroborated by the fact that Anic took part in September 1982 in the fixing of quotas for 1983, as is indicated by two documents found at the premises of ICI (main statement of objections, Appendices 73 and 76).

83 It adds that the notes of the meetings of 13 May, 21 September and 2 November 1982 (main statement of objections, Appendices 24, 30 and 32), cited by the applicant, according to which 'Anic/SIR no longer come', 'Anic were seen as a problem', 'pressure was needed' on Anic and 'Anic were alleged to be a nuisance' cannot exculpate the applicant, since observance of the cartel's arrangements is not to be confused with participation in the cartel and the notes relate to a period when Anic had begun to take no further part in meetings.

84 The Commission observes that it is not a defence for an undertaking which has participated in meetings whose purpose was to fix price targets or quotas to say that it adopted a purely passive attitude at those meetings. There is no relevant distinction between simple presence at the meetings and acceptance of the decisions taken at those meetings. Even passive participation in meetings is sufficient to enable competitors to believe that the participant has committed itself to following the agreed line of conduct and to expose it to the criticism of its competitors when it deviates from that line of conduct.

85 It further states that the allegation that Anic's participation in the meetings was only sporadic is contradicted by ICI's reply to the request for information (main statement of objections, Appendix 8), in which the applicant is numbered among the regular participants in the meetings. The Commission considers that Anic ceased regularly to be present at meetings only in mid-1982 and not at the beginning of that year. It points out that if it was not able to establish precisely the list of meetings which Anic attended, that was because Anic, unlike other producers, no longer had the travel vouchers of the employees who were sent to the meetings.

86 For the sake of completeness, the Commission adds that, contrary to the applicant's assertions, in many documents the names of Anic and SIR are not associated.

(c) Assessment by the Court

87 The Court observes that it is clear from the applicant's reply to the request for information (particular objections, Monte, Appendix 27), in conjunction with ICI's reply to that request (main statement of objections, Appendix 8), that the Commission has established to the requisite legal standard that Anic participated in the regular meetings of polypropylene producers from the end of 1978 or the beginning of 1979 onwards.

88 As regards the beginning of Anic's participation in the meetings, it may be pointed out that ICI's reply to the request for information includes the applicant, unlike two other producers, among the regular participants in the 'bosses" and 'experts" meetings from 1979 onwards. That reply must be interpreted as dating the beginning of Anic's participation to the beginning of the system of 'bosses" and 'experts" meetings, which was established at the end of 1978 or the beginning of 1979.

89 ICI's reply to the request for information is confirmed on this point by the interpretation which, in its written pleadings before the Court, the applicant gave to its own reply to the request for information, referring to point 105, second paragraph, of the Decision. The applicant has stated that the only certain date

concerning the beginning of its presumed participation in the meetings remains the year 1979.

90 As regards the end of Anic's participation in the meetings, the Commission acknowledged in the Decision (point 19, first paragraph, and point 78, seventh paragraph) that there was still some doubt as to the precise date and it admitted in its written pleadings before the Court that the applicant's presence at the meetings ceased to be regular from May 1982. Similarly, at the hearing it accepted that from September 1982 Anic no longer participated in the meetings.

91 It also appears from the note of the meeting of 13 May 1982 (main statement of objections, Appendix 24) that it was stated during that meeting that Anic was no longer coming. That statement is corroborated by the notes of subsequent meetings, in which Anic's name no longer appears as a participant, with the exception of the meeting of 9 June 1982 (main statement of objections, Appendix 25), from which it appears that the applicant had provided the author of the note with precise figures on its sales in April and May 1982.

92 As regards the applicant's participation in a meeting in October 1982, the Court notes that after having indicated in its reply to the request for information that it had taken part in that meeting the applicant now states that that is probably incorrect, as it said in its reply to the statement of objections.

93 The note of the meeting in question (main statement of objections, Appendix 31) shows that like the Spanish producers, Hercules, Amoco and BP, at that meeting Anic did not provide data on its sales for September 1982, contrary to what it had done at the meeting of 9 June 1982, since its figures, like those of two of the above-mentioned producers, are accompanied by the note 'est.', which clearly means 'estimate'.

94 Consequently, it must be concluded that the applicant was wrong when it indicated in its reply to the request for information that it had taken part in the meeting of 6 October 1982.

95 As regards the regularity of the applicant's participation in the system of periodic meetings, the Court holds that the Commission was entitled to conclude from ICI's reply to the request for information that Anic's participation was regular from the end of 1978 or the beginning of 1979 to mid-1982.

96 The Commission was also entitled to take the view, based on ICI's reply to the request for information, which is borne out by numerous notes of meetings, that during the period when the applicant was still present on the market the purpose of the meetings was, in particular, to fix target prices and sales volumes. That reply states: '"Target prices" for the basic grade of each principal category of polypropylene as proposed by producers from time to time since 1 January 1979 are set forth in Schedule . . . ' and 'A number of proposals for the volume of individual producers were discussed at meetings'.

97 In addition, in explaining the organization of marketing 'experts'' meetings as well as 'bosses'' meetings from the end of 1978 or the beginning of 1979, ICI's reply to the request for information reveals that the discussions about the fixing of target prices and sales volumes became increasingly concrete and precise whereas in 1978 the 'bosses' had confined themselves to developing the actual concept of target prices.

98 It should be added that the Commission was also entitled to conclude from ICI's reply to the request for information, which states:

'Only "Bosses" and "Experts" meetings came to be held on a monthly basis ... By late 1978/early 1979 it was determined that the "ad hoc" meetings of Senior Managers should be supplemented by meetings of lower level managers with more marketing knowledge',

and from the identical nature and purpose of the meetings that they were part of a system of regular meetings.

99 It must also be noted that the allegedly passive nature of Anic's participation in the meetings is belied in particular by the fact that it provided information on its monthly sales tonnages, for example at the meeting of 9 June 1982 (main statement of objections, Appendix 25), and by the fact that its name appears in various tables (main statement of objections, Appendices 55 to 62) the contents of which must have been provided *inter alia* by the applicant in the meetings in which it participated. Most of the applicants have admitted in their replies to a written question from the Court that it would not have been possible to draw up the tables found at the premises of ICI, ATO and Hercules on the basis of the statistics available under the Fides data exchange system, and in its reply to the request for information ICI stated with reference to one of those tables that 'the source of information for actual historic figures in this table would have been the producers themselves'.

00 It follows that the Commission has established to the requisite legal standard that the applicant regularly participated in the system of regular meetings of polypropylene producers from the end of 1978 or the beginning of 1979 until mid-1982, that the purpose of those meetings was, in particular, to fix price and sales volume targets, that they were part of a system and that the applicant's participation in

those meetings was not purely passive. However, the Commission has not established to the requisite legal standard that that participation continued beyond mid-1982.

B. The price initiatives

(a) The contested decision

101 According to the Decision (points 28 to 46), a system for fixing price targets was implemented through price initiatives of which five could be identified during the material period, the first lasting from July to December 1979, the second from January to May 1981, the third from August to December 1981, the fourth from June to July 1982 and the fifth from September to November 1982.

102 The Decision (point 33) mentions the applicant by name in this regard only to assert that in January 1981 it took part in two meetings at which it was decided that a price increase, fixed in December 1980 for 1 February 1981, was required on the basis of DM 1.75/kg for raffia. The increase took place in two stages; the initial increase remained effective for 1 February and a further increase was to be introduced 'without exception' from 1 March.

103 The Decision (point 77, second paragraph) acknowledges that the applicant did not supply any price instructions but states that the notes of meetings and other documents nevertheless show that participated regularly in meetings in which price initiatives were discussed and agreed.

(b) Arguments of the parties

104 Without denying all participation in the price initiatives, the applicant maintains that the Commission has not adduced proof of its participation. It argues that the Commission has not been able to prove its participation in specific meetings or been able to find any price instructions sent by the applicant to its sales offices.

105 It states that the prices it charged were always different from the target prices, that it never had a list price for polypropylene and that the prices charged by its sales offices were the result of an independent assessment of the market in accordance with the laws of competition.

106 The Commission deduces the applicant's participation in the price initiatives from its participation in the meetings which were concerned mainly with setting price targets.

107 It adds that if it has been unable to collect more evidence that is because Anic has not retained any documents concerning that period. The Commission considers that Anic cannot escape liability by simply denying the existence of any written trace of price instructions, when it does not deny taking part in the producers' meetings.

108 The Commission maintains that the fact that the meetings were followed by similar price instructions issued by the various producers shows that they were not simply information meetings but that their purpose was instead to coordinate the producers' conduct on the market as regards price.

(c) Assessment by the Court

109 The Court finds that the records of the regular meetings of polypropylene producers show that the producers which participated in those meetings agreed to the price initiatives mentioned in the Decision. For example, the note of the two meetings in January 1981 (main statement of objections, Appendix 17) states:

'Whilst all the evidence pointed to actual prices not reaching the previous target levels in February it was agreed that the DM 1.75 target should remain and that DM 2.00 should be introduced without exception in March.'

110 Since it has been established to the requisite legal standard that the applicant participated regularly in those meetings from the end of 1978 or the beginning of 1979 until mid-1982, it cannot assert that it did not support the price initiatives which were decided on, planned and monitored at those meetings, without providing any evidence to corroborate that assertion. In the absence of such evidence, there is no reason to believe that the applicant would not have supported those initiatives, unlike other participants at the meetings.

111 It should be observed that the applicant has put forward two arguments to show that it did not subscribe to the agreed price initiatives. It states, first, that its participation in the meetings was purely passive and, secondly, that it took no account of the results of the meetings in determining its conduct on the market as regards price, and that if some degree of parallel movement can be observed in the reactions of Anic and of the other producers that was due to movements in raw material prices and the normal conduct of a small producer in a market dominated by the 'big four'.

112 Neither of those arguments can be upheld in order to corroborate the applicant's assertion that it did not subscribe to the agreed price initiatives. The Court should point out that the Commission has established to the requisite legal standard that the applicant's participation in the meetings was not purely passive, so that the first argument put forward by the applicant is not founded in fact. As regards the second argument, it may be observed that even if it were supported by the facts it would not contradict the applicant's participation in fixing target prices at the meetings but would at most show that the applicant did not put into effect the results of those meetings. Indeed, the Decision does not assert that the applicant charged prices which always corresponded to the price targets agreed upon at the meetings, which indicates that the contested measure does not rely on the implementation by the applicant of the results of the meetings in order to establish its participation in fixing those target prices.

113 It should also be pointed out that although the Commission was not able to obtain price instructions issued by the applicant and thus had no proof of its implementation of the price initiatives in question or of parallel conduct, that does not impugn in any way the finding that the applicant participated in those initiatives.

114 Furthermore, the Commission was fully entitled to deduce from ICI's reply to the request for information (main statement of objections, Appendix 8), in which it is stated that

'"Target prices" for the basic grade of each principal category of polypropylene as proposed by producers from time to time since 1 January 1979 are set forth in Schedule . . . ',

that those initiatives were part of a system of fixing target prices.

115 It follows that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom there emerged common intentions concerning the price initiatives mentioned in points 29 to 39 of the Decision and that those initiatives were part of a system. However, since it has not proved to the requisite legal standard that the applicant participated in the regular meetings in the second half of 1982, the Commission has not established to the requisite legal standard that the applicant participated in the price initiative mentioned in points 40 to 46 of the Decision.

C. The measures designed to facilitate the implementation of the price initiatives

(a) The contested decision

116 In the Decision (Article 1(c) and point 27; see also point 42) the Commission asserts that the applicant agreed with the other producers various measures designed to facilitate the implementation of target prices, such as temporary restrictions on output, exchanges of detailed information on their deliveries, the holding of local meetings and, from September 1982, a system of 'account management' designed to implement price rises to individual customers.

117 As regards the system of 'account management', whose later more refined form, 'account leadership', dates from December 1982, the applicant, like all the producers, was nominated coordinator or 'leader' for at least one major customer, in respect of whom it was charged with secretly coordinating its dealings with suppliers. Under that system, customers were identified in Belgium, Italy, Germany and the United Kingdom and a 'coordinator' was nominated for each of them. In December 1982, a more general adoption of the system was proposed, with an account leader named for each major customer who would guide, discuss and organize price moves. Other producers which had regular dealings with the customer were known as 'contenders' and would cooperate with the account leader in quoting prices to the customer in question. In order to 'protect' the account leader and the contenders, any other producers approached by the customers were to quote prices higher than the desired target. Despite ICI's assertions, according to which the scheme collapsed after only a few months of partial and ineffective operation, the Commission states in the Decision that a full note of the meeting held on 3 May 1983 shows that at that time detailed discussions took place on individual customers, on the prices offered or to be offered to them by each producer, and on the volumes supplied or on order.

(b) Arguments of the parties

118 The applicant maintains that it is difficult to understand what the Commission is referring to when it accuses the applicant of having participated in temporary restrictions on output, the exchange of detailed information on deliveries and the organization of local meetings. It states that the Commission has no evidence of its participation in those activities. It always produced at its maximum effective capacity, subject to reductions owing to strikes in 1980 and 1981 and to equipment breakdowns in 1980 and 1981. In the notes of meetings drawn up by an ICI employee there is no reference to information on Anic's deliveries; the only reference is to market share, almost always for Anic and SIR together. Finally, the Decision makes no mention of its participation in local meetings, or even to the existence of such meetings in Italy.

119 As regards its participation in the 'account management' system, the applicant points out that that system was developed during a period when it no longer participated in the meetings.

120 The Commission states that the objections concerning temporary restrictions on output and the holding of local meetings are mentioned in points 71 and 43 of the main statement of objections and the exchange of detailed information on deliveries is discussed in points 56 to 59 of the Decision, on the temporary restrictions of sales volumes in 1981 and 1982. As for the system of 'account management', the Commission states that it has never sought to assert that the applicant was responsible, and it is for that reason that the statement of objections does not mention it.

(c) Assessment by the Court

121 The Court considers that point 27 of the Decision is to be interpreted in the light of the second paragraph of point 26, not as contending that each of the producers committed itself individually to adopt all the measures mentioned there but as asserting that at various times those producers adopted at those meetings together with the other producers a set of measures mentioned in the Decision and designed to bring about conditions favourable to an increase in prices, in particular by artificially reducing the supply of polypropylene, and that the implementation of the various measures involved was by common agreement shared between the various producers according to their specific situation.

122 It must be concluded that the Commission has not been able to establish to the requisite legal standard that the applicant participated in the meetings during which that set of measures was adopted (in particular those of 13 May, 2 and 21 September and 2 December 1982 (main statement of objections, Appendices 24, 29, 30 and 33), and that it has therefore not established to the requisite legal standard that the applicant subscribed to that set of measures.

123 It follows, first, that the applicant's participation in the 'account management' system has not been proved to the requisite legal standard. The Commission stated in its defence that it had never sought to hold Anic responsible in that respect. The Court observes, however, that such a limitation of the objections raised against the applicant is not apparent from the Decision or from the statements of objections. In the Decision (point 19, first paragraph, and point 78, seventh paragrph) the Commission left open the possibility that the applicant had participated in the meetings during the second half of 1982, which implies that it must also have considered that if that were the case the applicant had taken part in the measures

described in point 27, which were adopted at those meetings and of which all the producers which took part in the regular meetings without exception are accused. In particular, point 85 of the main statement of objections states that 'the producers devised a scheme to implement the planned price increases on a customer-by-customer basis', and neither that statement nor the particular objections addressed to the applicant contain any limitation on that objection in its respect.

124 It follows, secondly, that the applicant's participation in the output restrictions has not been proved to the requisite legal standard either. In its defence the Commission maintained that objection in relation to the applicant, referring to point 71 of the main statement of objections (in fact the relevant points are points 67 and 79), while at the hearing it stated that it had never accused the applicant of having participated directly in this conduct on the market.

125 The Commission further asserted that its objection regarding the exchange of information on sales, which is also mentioned in point 27 of the Decision, was not distinct from its objection regarding the quotas for 1981 and 1982 (Decision, Article 1(e)) and should therefore be examined with the latter.

126 As regards the applicant's participation in local meetings, the Commission stated at the hearing that it did not accuse the applicant of such participation. Point 20 of the Decision lists the producers against which this objection is made and the applicant is not one of them. Consequently, it must be held that this objection was not raised against the applicant in the contested measure.

127 It follows from the foregoing that the Commission has not established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom there emerged common intentions concerning the measures designed to facilitate the implementation of the price initiatives, in so far as the Decision accuses it of having taken part.

D. Target tonnages and quotas

(a) The contested decision

128 According to the Decision (point 31, third paragraph), it was 'recognized that a tight quota system [was] essential' at the meeting held on 26 and 27 September 1979, the note of which refers to a scheme proposed or agreed in Zurich to limit monthly sales to 80% of the average achieved during the first eight months of the year.

129 The Decision (point 52) further points out that before August 1982 various schemes for sharing the market were applied. While percentage shares of the estimated available business had been allocated to each producer, there was not at this stage any systematic limitation in advance of overall production. Thus, estimates of the total market had to be revised on a rolling basis and the sales (in tonnes) of each producer had to be adjusted to fit the percentage entitlement.

130 Volume targets (in tonnes) were set for 1979 based in part at least on sales in the preceding three years. Tables found at the premises of ICI show the 'revised target' for each producer for 1979 compared with actual tonnage sales achieved during that period in Western Europe (Decision, point 54).

131 By the end of February 1980, volume targets — again expressed in tonnage terms — had been agreed for 1980 by the producers, based on an expected market of 1 390 000 tonnes. According to the Decision (point 55), a number of tables showing the 'agreed targets' for each producer for 1980 were found at the premises of ATO and ICI. The original estimated total market available proved over-optimistic and the quota of each producer had to be revised downwards to fit total consumption during the year of only 1 200 000 tonnes. Except for ICI and DSM, the sales achieved by the various producers were largely in line with their targets.

132 According to the Decision (point 56), the sharing of the market for 1981 was the subject of prolonged and complex negotiations. At the meetings in January 1981,

it was agreed that as a temporary measure to help to achieve the February/March price initiative each producer would restrict monthly sales to one-twelfth of 85% of the 1980 'target'. In preparation for a more permanent scheme, each producer communicated to the meeting the tonnage it hoped to sell during 1981. However, added together, those 'aspirations' largely exceeded total forecast demand. In spite of various compromise schemes put forward by Shell and ICI, no definitive quota agreement was reached for 1981. As a stopgap measure the producers took the previous year's quota of each producer as a theoretical entitlement and reported their actual sales each month to the meeting. In this way actual sales were monitored against a notional split of the available market based on the 1980 quota (Decision, point 57).

133 The Decision (point 58) states that for a 1982 scheme complicated proposals were advanced which attempted to reconcile divergent factors such as previous achievements, market aspirations and available capacity. The total market to be divided was estimated at 1 450 000 tonnes. Some producers submitted detailed plans for market sharing while others were content to communicate only their own tonnage aspirations. At the meeting on 10 March 1982 Monte and ICI tried to reach an agreement. The Decision (point 58, last paragraph) states, however, that, as in 1981, no definitive agreement was reached and for the first half of the year the monthly sales for each producer were communicated during the meetings and monitored against its achieved percentage share in the previous year. According to the Decision (point 59), in the August 1982 meeting negotiations for an agreement on quotas for 1983 were held and ICI held bilateral discussions with each of the producers on the new system. However, pending the introduction of such a quota scheme, producers were required in the second part of 1982 to aim to restrict their monthly sales to the same percentage of the overall market which each of them had achieved in the first six months of 1982. Thus, in 1982, the market shares had reached a relative equilibrium and were stable in comparison with previous years in the case of the majority of producers.

134 According to the Decision (point 60), for 1983 ICI invited each producer to indicate its own quota ambitions and suggestions for what percentage each of the others should be allowed. Monte, Anic, ATO, DSM, Linz, Saga and Solvay, as well as the German producers via BASF, submitted their own detailed proposals. The various proposals were then processed by computer to obtain an average which was compared with the aspirations of each producer. Those steps enabled

ICI to propose guidelines for a new framework agreement for 1983. Those proposals were discussed at the meetings of November and December 1982. A proposal initially restricted to the first quarter of the year was discussed at the meeting on 2 December 1982. The note of that meeting drawn up by ICI shows that ATO, DSM, Hoechst, Hüls, ICI, Monte and Solvay, as well as Hercules, found their allocated quota 'acceptable' (Decision, point 63). Those facts are borne out by the ICI note of a telephone conversation with Hercules of 3 December 1982.

135 The Decision (point 77, second paragraph, *in fine*) states that the documentation relating to the quota arrangements shows that the applicant was fully involved in those arrangements throughout the period of its presence on the polypropylene market and that it was still involved in the quota arrangements covering the first quarter of 1983 at least (point 78, seventh paragraph).

(b) Arguments of the parties

136 In respect of the years 1979 to 1982 the applicant argues that the tables mentioned by the Commission (main statement of objections, Appendices 55 to 62) were drawn up by third parties and not by it itself; accordingly, they can only reflect the thoughts of their author and cannot constitute conclusive proof of Anic's participation in their preparation or of any correspondence between what is written and the objective reality.

137 It considers that the fact that its name is mentioned in the tables is not conclusive for two reasons: first, there is nothing to show that those tables are the result of discussions between the producers and, secondly, Anic is mentioned jointly with SIR as regards both its sales figures and its quota, which Anic would never have accepted, in view of the vigorous competition between the two undertakings.

138 The applicant further states that its participation in the quota system is disproved by the fact that its plant was always used at its maximum capacity, except during strikes and equipment breakdowns in 1980 and 1981.

139 As regards 1983, the applicant maintains that it is not plausible that it could have participated in the quota agreements by informing ICI of its aspirations, since it did not attend the meetings at which those agreements were concluded and it has not been proved that there were contacts between it and other producers for that purpose outside the meetings. In order to assert the contrary the Commission relies on suppositions which have no foundation in reality, thus seeking to reverse the burden of proof.

140 Moreover, the alleged communication of its aspirations in a document of 28 October 1982 (main statement of objections, Appendix 76) cannot be regarded as good evidence since it concerns 1983, and Anic had transferred its polypropylene business to Monte after mid-1982. It ceased to take part in the meetings in mid-1982 and it would have been illogical for it to participate in late 1982 in negotiations on a quota agreement for 1983 concerning a market which it would have left. The applicant therefore denies that the document in question has any evidentiary value, and states that the document cannot have come from it.

141 The Commission considers that Anic's participation in the quota agreements must be inferred from the fact that its name appears in various tables (main statement of objections, Appendices 55 to 62) which contain sales figures for various years for all the west European polypropylene producers, along with 'revised targets', 'quotas', 'aspirations' or 'agreed targets'. Most of those tables were drawn up between 1979 and 1982 and concern sales volumes for those years. They were found at the premises of ICI and ATO in particular, and came from various producers. To those tables the Commission adds the note of the meetings of January 1981 (main statement of objections, Appendix 17), to which a table comparing 'targets' and 'actual' sales is attached.

142 It states that, contrary to Anic's assertions, not all those documents come from ICI and in most of them the figures for Anic are stated separately from those for SIR.

143 The Commission also states that those documents contain figures which must necessarily have come from Anic itself.

144 It further maintains that Anic took part in the 1983 quota agreements. It bases that view on the combination of two documents (main statement of objections, Appendices 73 and 76). The first, which contains a concise description of the quota system for 1983, was found at the premises of ICI and shows that ICI asked the producers to set out individually their own aspirations for quotas, which they did, as is shown by various documents (main statement of objections, Appendices 74 to 77). According to the Commission, the second document is Anic's statement of its aspirations. All those aspirations were incorporated in a computer summary prepared by ICI (main statement of objections, Appendix 85).

145 The Commission states in this regard that even though Anic did not attend the meetings which were held during this period it continued to participate in the quota agreements. The cartel did not consist solely in presence at the meetings, and it cannot be inferred from the applicant's absence from one or other of the meetings that it had ceased to be a member of the cartel, for such absence does not in itself mean that it was not aware of the outcome of those meetings or that it did not subscribe to their outcome, as is shown by the document dated 28 October 1982 containing Anic's aspirations (main statement of objections, Appendix 76) and ICI's reply to the request for information (main statement of objections, Appendix 8), which indicates that there were contacts with absent producers.

146 It adds that, contrary to the applicant's assertions, it is entirely plausible that it should have continued to participate in such agreements in 1983, since although it transfered its business to Monte at the end of 1982 it remained in the market until April 1983. The Commission bases that assertion on the annexes to Anic's reply to the request for information, which contains Anic's polypropylene production figures. Anic provided figures for the period until April 1983. The Commission therefore considers that it is not at all illogical that Anic should have taken part in October 1982 in negotiations for a 1983 quota agreement.

(c) Assessment by the Court

147 It has already been found that from the end of 1978 or the beginning of 1979 until mid-1982 the applicant participated regularly in the system of regular meetings of polypropylene producers at which discussions relating to the sales volumes of the various producers were held and information was exchanged on that subject.

148 In addition to Anic's participation in the meetings, it should be pointed out that its name appears in various tables (main statement of objections, Appendices 55 et seq.) whose content clearly indicates that they were intended to be used in setting sales volume targets. Most of the applicants have admitted in their replies to a written question from the Court that it would not have been possible to draw up the tables found at the premises of ICI, ATO and Hercules on the basis of the statistics available under the Fides system, and in its reply to the request for information (main statement of objections, Appendix 8) ICI stated with reference to one of those tables that 'the source of information for actual historic figures in this table would have been the producers themselves'. The Commission was therefore entitled to take the view that the content of those tables had been provided by Anic in the meetings in which it participated.

149 The terms used in the various documents relating to the years 1979 and 1980 produced by the Commission (such as 'revised target', 'opening suggestions', 'proposed adjustments', 'agreed targets') justify the conclusion that the producers had arrived at a common purpose.

150 As regards the year 1979 in particular, having regard both to the whole of the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12) and to the undated table taken from the premises of ICI (main statement of objections, Appendix 55) headed 'Producers' Sales to West Europe', which sets out for all the polypropylene producers of western Europe the sales figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual', 'revised target' and '79', it is apparent that the need to tighten the quota system agreed for 1979 for the last three months of that year was recognized at that meeting. The term 'tight', read in conjunction with the restriction to 80% of one-twelfth of planned annual sales, indicates that the scheme originally planned for 1979 had to be made tighter for those last three months. That interpretation of the note is borne out by the abovementioned table because it contains, under the heading '79' in the last column to the right of the column headed 'revised target', figures which must correspond to the quotas initially fixed. These had to be circumscribed because they had been drawn up on the basis of an over-optimistic market evaluation, as was also the case in 1980. The reference in the third paragraph of point 31 of the Decision to a scheme 'proposed or agreed in Zurich to limit monthly sales to 80% of the average achieved during the first eight months of the year' does not tell against these findings. That

reference, read in conjunction with point 54 of the Decision, is to be taken as meaning that sales volume targets had already been set initially for the monthly sales of the first eight months of 1979.

151 As regards the year 1980, the Court finds that it is clear from the table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60), which contains a column headed 'agreed targets 1980', and from the note of the January 1981 meetings (main statement of objections, Appendix 17) at which producers, including the applicant, compared the quantities actually sold ('Actual kt') with the targets set ('Target kt'), that sales volume targets were set for the whole of the year. Those documents are further supported by a table dated 8 October 1980 (main statement of objections, Appendix 57) comparing two columns, one setting out the '1980 Nameplate Capacity' and the other the '1980 Quota' for the various producers.

152 As regards the year 1981, the complaint against the producers is that they took part in negotiations in order to reach a quota agreement for that year and that in that context they communicated their 'aspirations' and, pending such an agreement, agreed as a temporary measure to restrict their monthly sales to one-twelfth of 85% of the 'target' agreed for 1980 during February and March 1981, that they took the previous year's quota as a theoretical entitlement for the rest of the year, that they reported their sales each month to the meetings and, finally, that they monitored whether their sales matched the theoretical quota allocated to them.

153 The existence of negotiations between the producers in order to achieve the establishment of a quota system and the communication of their 'aspirations' during those negotiations are attested by various pieces of evidence such as tables setting out, for each producer, its 'actual' figures and 'targets' for the years 1979 and 1980 and its 'aspirations' for 1981 (main statement of objections, Appendices 59 and 61); a table written in Italian (main statement of objections, Appendix 62) setting out, for each producer, its quota for 1980, the proposals of other producers as to the quota to be allocated to it for 1981 and its own 'aspirations' for 1981,

and an ICI internal note (main statement of objections, Appendix 63) describing the progress of those negotiations in which it is stated:

'Taking the various alternatives discussed at yesterday's meeting we would prefer to limit the volume to be shared to no more than the market is expected to reach in 1981, say 1.35 million tonnes. Although there has been no further discussion with Shell, the four majors could set the lead by accepting a reduction in their 1980 target market share of about 0.35% provided the more ambitious smaller producers such as Solvay, Saga, DSM, Chemie Linz, Anic/SIR also tempered their demands. Provided the majors are in agreement the anomalies could be best handled by individual discussions at Senior level, if possible before the meeting in Zurich'.

That document is accompanied by a compromise proposal, supported by figures, which compares the result obtained for each producer in relation to 1980 ('% of 1980 target').

154 The adoption of temporary measures consisting in a reduction of monthly sales to one-twelfth of 85% of the target agreed for the previous year during February and March 1981 is apparent from the note of the meetings of January 1981, in which it is stated:

'In the meantime [February-March] monthly volume would be restricted to 1/12 of 85% of the 1980 target with a freeze on customers'.

155 The fact that the producers each took their previous year's quota as a theoretical entitlement for the rest of the year and monitored whether sales matched that quota by exchanging their sales figures each month is established by the combination of three documents: first, a table dated 21 December 1981 (main statement of objections, Appendix 67) setting out for each producer its sales broken down by month, the last three columns, relating to the months of November and December and the annual total, having been added by hand; secondly, an undated table written in Italian entitled 'Scarti per società' ('Differences company by company') and found at the premises of ICI (main statement of objections, Appendix 65), comparing for each producer for the period January-December 1981 the 'actual' sales figures with the 'theoretic' figures; and finally, an undated table found at the premises of ICI (main statement of objections, Appendix 68) comparing for each producer for the period January-November 1981 sales figures and market shares with those for 1979 and 1980 and making a forward projection to the end of the year.

156 The first table shows that the producers exchanged their monthly sales figures. Combined with the comparisons made between those figures and those achieved in 1980 (comparisons which are made in the two other tables covering the same period — such an exchange of information which an independent operator would keep strictly secret as confidential business information corroborates the conclusions reached in the Decision.

157 The applicant's participation in those various activities is apparent, first, from its participation in the meetings at which those activities took place, in particular the January 1981 meetings, and, secondly, from the fact that its name appears in the various documents mentioned above. Furthermore, in those documents are set out figures with regard to which ICI in fact stated in its reply to a written question from the Court — to which other applicants refer in their own reply — that it would not have been possible to ascertain them on the basis of the statistical data available under the Fides system.

158 As regards 1982, the complaint against the producers is that they took part in negotiations in order to reach an agreement on quotas for that year; that in that connection they communicated their tonnage aspirations; that, failing a definitive agreement, they communicated at meetings their monthly sales figures during the first half of the year, comparing them with the percentage achieved during the previous year and, during the second half of the year, attempting to restrict their

monthly sales to the same percentage of the overall market achieved in the first six months of that year.

159 The existence of negotiations between the producers with a view to introducing a quota system and the communication of their aspirations during those negotiations are evidenced, first, by a document entitled 'Scheme for discussions "quota system 1982"' (main statement of objections, Annex 69), which contains, for all the addressees of the Decision with the exception of Hercules, the tonnage to which each producer considered itself entitled and, in addition, for some of them (all the producers except Anic, Linz, Petrofina, Shell and Solvay), the tonnage which in their own view had to be allocated to the other producers; secondly, by an ICI note entitled 'Polypropylene 1982, Guidelines' (main statement of objections, Appendix 70(a)), in which ICI analyses the negotiations in progress; thirdly, by a table dated 17 February 1982 (main statement of objections, Appendix 70(b)), in which various sales-sharing proposals are compared — one of which, entitled 'ICI Original Scheme', has undergone, in another handwritten table, minor adjustments made by Monte in a column entitled 'Milliavacca 27/1/82' (the name is that of a Monte employee) (main statement of objections, Appendix 70(c)) — and, lastly, by a table written in Italian (main statement of objections, Appendix 71) which is a complex proposal (mentioned in the second paragraph *in fine* of point 58 of the Decision).

160 The measures adopted for the first half of the year are established by the note of the meeting on 13 May 1982 (main statement of objections, Appendix 24), which states *inter alia*:

'To support the move a number of other actions are needed (a) limit sales volume to some agreed prop. of normal sales'.

The implementation of those measures is evidenced by the note of the meeting of 9 June 1982 (main statement of objections, Appendix 25), to which is attached a table setting out for each producer the 'actual' figure for its sales for the months from January to April 1982 compared with a figure representing the 'theoretical based on 1981 av[erage] market share', and by the note of the meeting held on 20 and 21 July 1982 (main statement of objections, Appendix 26) as regards the period January-May 1982 and by that of 20 August 1982 (main statement of objections, Appendix 28) as regards the period from January to July 1982.

161 The Court finds that, as regards the year 1981 and the first half of 1982, the Commission was entitled to conclude from the mutual monitoring, conducted at the regular meetings, of the implementation of a system for restricting monthly sales by reference to a previous period that that system had been adopted by the participants at the meetings.

162 Owing to the identical aim of the various measures for restricting sales volumes — namely to reduce the pressure exerted on prices by excess supply — the Commission was entitled to conclude that those measures were part of a quota system.

163 The arguments put forward by the applicant do not weaken the findings of fact made by the Commission as regards its participation in the various measures restricting sales volumes for 1979, 1980, 1981 and the first half of 1982.

164 First of all, the applicant's argument that the documents produced by the Commission come from third parties and are not the result of discussions between the producers is contradicted by the content of the notes of meetings (main statement of objections, Appendices 12, 17, 23 and 25) which indicate that they concerned in particular the fixing of sales volume targets and that the producers provided their own figures.

165 Secondly, even if it is established that the applicant was using its production capacity to the maximum, that does not necessarily mean that the producers did not allocate sales volumes. All that it might establish is that the applicant did not do what it had agreed to do.

166 Thirdly and finally, the fact that Anic and SIR are mentioned jointly in several documents does not affect the evidentiary value of the documents concerned. They are mentioned jointly only in documents dating from after November 1980, whereas in earlier documents (main statement of objections, Appendices 55 to 58) Anic and SIR are given separate figures. That is explained by the fact that after 28 November 1980 ENI, to which Anic belonged, was authorized pursuant to

Article 2 of Law No 784 of 28 November 1980 'ad assumere il mandato per la gestione della predetta società' ('to take over the management of the abovementioned company') and accordingly those companies were no longer competitors.

167 However, the Court finds that the Commission has not established to the requisite legal standard that the applicant took part in the measures restricting sales volumes in the second half of 1982, since Anic had ceased to participate in meetings as from mid-1982 and the restriction of monthly sales to the percentage of the total market achieved during the first half of the year could not be dissociated from the *a posteriori* monitoring by the producers during their meetings of the correspondence between the figures actually achieved for any given month and those which should in theory have been achieved.

168 That finding is confirmed by the fact that the notes of the meetings in which the implementation of the restriction of monthly sales was monitored (those of 6 October and 2 December 1982, main statement of objections, Appendices 29 and 33) indicate that the applicant did not participate in that monitoring by providing its sales figures, since in the tables attached to those notes Anic's name is followed either by 'est.' (for 'estimate') or by 'N. A.' (for 'not available') and an estimated figure.

169 Finally, the Court notes that the applicant is accused of having continued to be 'involved in the quota arrangements covering the first quarter of 1983 at least' (Decision, point 78, second paragraph) although it had ceased to take part in the meetings in mid-1982 or at the end of that year.

170 It is apparent from a reading of the operative part of the Decision in the light of its grounds (points 19, 60, 77, second paragraph, 78, seventh paragraph, and 96, second paragraph) and the particular objections addresed to the applicant that what Anic is accused of is having taken part during the last quarter of 1982 in negotiations with a view to fixing quotas for the first quarter of 1983.

171 The applicant replies to that accusation that it is highly unlikely that it would have participated in late 1982 in the negotiation of a quota agreement for 1983 since at that time it had left the polypropylene market.

172 It must be held that the Commission was entitled to conclude from the annexes to the applicant's reply to the request for information, which contains its own sales figures until April 1983, that Anic remained on the polypropylene market until April 1983.

173 At the hearing it became apparent that the decree-law concerning the transfer of business from Anic to Monte was adopted in July 1982 but that at that time the exact amount concerned in the transaction was not yet known. It was only on 29 October 1982 that the agreement was formalized and the determination of the price toook place.

174 It follows from those factors that it is not unlikely that in late 1982 the applicant should have informed the other producers of its aspirations with a view to fixing quotas for the first quarter of 1983. It must therefore be determined whether the Commission has proved to the requisite legal standard that the applicant made known its aspirations.

175 The key evidence put forward by the Commission on this point is a handwritten note made by an ICI employee and dated 28 October 1982 (main statement of objections, Appendix 76), which according to a computerized summary found at the premises of ICI (main statement of objections, Appendix 85, p. 2) sets out the applicant's sales volume 'aspirations' and its proposals regarding the quotas to be allocated to other producers.

176 The mere fact of providing its sales volume 'aspirations' and its proposals regarding the quotas to be allocated to other producers on the request of an employee of a competing undertaking who acts as chairman of meetings whose purpose is *inter alia* to fix sales volume targets must be deemed to be an act of participation in the negotiations with a view to fixing quotas for the first quarter of 1983. Although it is not established that the applicant was taking part in the meetings at that time or that it was in permanent contact with the other producers, it must nevertheless be held that in making known its aspirations the applicant attempted, before selling its polypropylene sector assets to Monte, to increase their value by incorporating an increased sales volume 'aspiration'.

177 The Court therefore holds that the applicant informed ICI of its sales volume aspirations at the end of October 1982 with a view to fixing quotas for the first quarter of 1983 although it had ceased to participate in the system of regular meetings in mid-1982.

178 Having regard to the foregoing considerations, it must be concluded that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom common purposes emerged in relation to sales volume targets for 1979 and 1980 and to the restriction of their monthly sales by reference to a previous period for 1981 and the first half of 1982 which are mentioned in the Decision and which formed part of a quota system, and that at the end of October 1982 the applicant informed ICI of its sales volume aspirations for the first quarter of 1983. However, the Commission has not established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom there emerged a common purpose concerning the restriction of their monthly sales by reference to a previous period for the second half of 1982.

2. *The application of Article 85(1) of the EEC Treaty*

A. Legal characterization

(a) The contested decision

179 According to the Decision (point 81, first paragraph), the whole complex of schemes and arrangements decided on in the context of a system of regular and institutionalized meetings constituted a single continuing 'agreement' within the meaning of Article 85(1).

180 In the present case, the producers, by subscribing to a common plan to regulate prices and supply on the polypropylene market, participated in an overall framework agreement which was manifested in a series of more detailed sub-agreements worked out from time to time (Decision, point 81, third paragraph).

181 The Decision (point 82, first paragraph) goes on to state that in the detailed working out of the overall plan express agreement was reached in many areas,

such as individual price initiatives and annual quota schemes. In some cases the producers may not have reached a consensus on a definitive scheme, such as quotas for 1981 and 1982. However, their adoption of stopgap measures including exchange of information and the monitoring of actual monthly sales against achievements in some previous reference period not only involved an express agreement to set up and operate such measures but also indicated an implied agreement to maintain as far as possible the respective positions of the producers.

182 The conclusion that there was one continuing agreement was not altered by the fact that some producers inevitably were not present at every meeting. Any 'initiative' took several months to plan and to implement and it would make little difference to the involvement of a producer if it was absent on occasion (Decision, point 83, first paragraph).

183 According to the Decision (point 86, first paragraph), the operation of the cartel, being based on a common and detailed plan, constituted an 'agreement' within the meaning of Article 85(1) of the EEC Treaty.

184 The Decision states (in point 86, second paragraph) that the concepts of 'agreements' and 'concerted practices' are distinct, but cases may arise where collusion presents some of the elements of both forms of prohibited cooperation.

185 A concerted practice relates to a form of cooperation between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation for the risks of competition (Decision, point 86, third paragraph).

186 According to the Decision (point 87, first paragraph), the object of the Treaty in creating a separate concept of concerted practice was to forestall the possibility of undertakings evading the application of Article 85(1) by colluding in an anti-competitive manner falling short of a definite agreement by, for example,

informing each other in advance of the attitude each intends to adopt, so that each could regulate its commercial conduct in the knowledge that its competitors would behave in the same way (see the judgment of the Court of Justice in Case 48/69 *Imperial Chemical Industries Ltd* v *Commission* [1972] ECR 619).

187 In its judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (*Suiker Unie* v *Commission* [1975] ECR 1663) the Court of Justice held that the criteria of coordination and cooperation laid down by its case-law, which in no way require the working out of an actual plan, 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 commercial policy which he intends to adopt in the common market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors but it does strictly preclude any direct or indirect contact between them 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 (Decision, point 87, second paragraph). Such conduct may fall under Article 85(1) as a 'concerted practice' even where the parties have not reached agreement in advance on a common plan defining their action in the market but adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour (Decision, point 87, third paragraph, first sentence).

188 The Decision also points out (point 87, third paragraph, third sentence) that, in a complex cartel, some producers at one time or another might not express their definite assent to a particular course of action agreed by the others but nevertheless indicate their general support for the scheme in question and conduct themselves accordingly. In certain respects, therefore, the continuing cooperation and collusion of the producers in the implementation of the overall agreement may display the characteristics of a concerted practice (Decision, point 87, fourth paragraph, second sentence).

189 According to the Decision (point 87, fifth paragraph), the importance of the concept of a concerted practice does not thus result so much from the distinction between it and an 'agreement' as from the distinction between forms of collusion

falling under Article 85(1) and mere parallel behaviour with no element of concertation. Nothing therefore turns in the present case upon the precise form taken by the collusive arrangements.

190 In the Decision (paragraph 88, first and sentence paragraphs) it is stated that most of the producers, having argued during the administrative procedure that their conduct in relation to alleged price initiatives did not result from any 'agreement' within the meaning of Article 85 (see the Decision, point 82), went on to assert that it could not form the basis of a finding of concerted practice either. The latter concept, they argued, required some 'overt act' in the market, which was claimed to be wholly absent from the present case: no price lists or 'target prices' were ever communicated to customers. This argument is rejected in the Decision: were it necessary in the present case to rely on proof of a concerted practice, the requirement for some steps to be taken by the participants to realise their common object was fully met. The various price initiatives were a matter of record. It was also undeniable that the individual producers took parallel action to implement them. The steps taken by the producers both individually and collectively were apparent from the documentary evidence: meeting reports, internal memoranda, instructions and circulars to sales offices and letters to customers. It was wholly irrelevant whether or not they 'published' price lists. The price instructions themselves provided not only the best available evidence of the action taken by each producer to implement the common object but also by their content and timing reinforced the evidence of collusion.

(b) Arguments of the parties

191 The applicant admits that the distinction between agreements and concerted practices may not be important, since it is collusion in all forms that is prohibited under Article 85(1) of the EEC Treaty. However, where the question is no longer that of establishing a breach of that provision but that of determining the type and degree of liability resulting from such a breach, the applicant considers that a distinction must be made between agreements and concerted practices.

192 In the case of an agreement, once the adherence of the participants to the general plan which is the subject matter of the agreement has been proved, some liability is conceivable, even in respect of activities in which certain of the participants in the agreement did not directly and necessarily take part.

193 However, the applicant contends that in the case of concerted practices, where there is no proof of adherence to a general plan, the concerted practice is proved only in respect of acts and conduct which are proved to be the result of concertation. It is thus within the limits of those acts and conduct that the concerted practice itself is carried out. Consequently, in the case of a concerted practice, it is not possible to ascribe responsibility to participants going beyond the acts and conduct which are directly and actually proved and can be attributed to concertation.

194 In relation to the consequences which the applicant wishes to draw from the classification of the offence as an agreement or as a concerted practice, the Commission observes that the applicant is seeking to break down a single infringement, that is to say the cartel intended to support polypropylene prices, into a series of separate infringements in order to limit its liability. It is thus attempting artificially to dissociate the various activities which were undertaken in the context of the cartel although those activities formed a single whole. The fact of having adhered to the cartel — by participating in the meetings in question — necessarily involves Anic in the liability which attaches to the whole of the activities which were undertaken.

195 It further states that a concerted practice does not necessarily require proof of conduct on the market. The mere fact of taking part in contacts, in so far as their purpose is the restriction of the autonomy of the undertakings, is sufficient to constitute a breach of Article 85(1) of the EEC Treaty.

(c) Assessment by the Court

196 The Commission characterized each factual element found against the applicant as either an agreement or a concerted practice for the purposes of Article 85(1) of the EEC Treaty. It is apparent from the second paragraph of point 80, the third paragraph of point 81 and the first paragraph of point 82 of the Decision, read together, that the Commission characterized each of those different elements primarily as an 'agreement'.

197 It is likewise apparent from the second and third paragraphs of point 86, the third paragraph of point 87 and point 88 of the Decision, read together, that the Commission in the alternative characterized the elements of the infringement as 'concerted practices' where those elements either did not enable the conclusion to be drawn that the parties had reached agreement in advance on a common plan defining their action on the market but had adopted or adhered to collusive devices which facilitated the coordination of their commercial behaviour, or did not, owing to the complexity of the cartel, make it possible to establish that some producers had expressed their definite assent to a particular course of action agreed by the others, although they had indicated their general support for the scheme in question and conducted themselves accordingly. The Decision thus concludes that in certain respects the continuing cooperation and collusion of the producers in the implementation of an overall agreement may display the characteristics of a concerted practice.

198 Since it is clear from the case-law of the Court of Justice that 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 (see the judgment in Case 41/69 *ACF Chemiefarma N. V.* v *Commission* [1970] ECR 661, paragraph 112, and the judgment in Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck Sàrl* v *Commission* [1980] ECR 3125, paragraph 86), this Court holds that the Commission was entitled to treat the common intentions existing between the applicant and other polypropylene producers, which the Commission has proved to the requisite legal standard and which related to price initiatives, sales volume targets for 1979 and 1980 and measures for restricting monthly sales by reference to a previous period for 1981 and the first half of 1982, as agreements within the meaning of Article 85(1) of the EEC Treaty.

99 For a definition of the concept of concerted practice, reference must be made to the case-law of the Court of Justice, which shows that the criteria of coordination and cooperation previously laid down by that Court 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 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 (judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission*, cited above, paragraphs 173 and 174).

200 In the present case, the applicant participated in meetings concerning the fixing of price and sales volume targets during which information was exchanged between competitors about the prices they wished to see charged on the market, the prices they intended to charge, their profitability thresholds, the sales volume restrictions they judged to be necessary or their sales figures. Through its participation in those meetings, it took part, together with its competitors, in concerted action the purpose of which was to influence their conduct on the market and to disclose to each other the course of conduct which each of the producers itself contemplated adopting on the market.

201 Accordingly, not only did the applicant pursue the aim of eliminating in advance uncertainty about the future conduct of its competitors but also, in determining the policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, its competitors were bound to take into account, directly or indirectly, the information disclosed to them by the applicant about the course of conduct which the applicant itself had decided upon or which it contemplated adopting on the market.

202 The Commission was therefore justified, in the alternative, having regard to their purpose, in categorizing the regular meetings of polypropylene producers in which the applicant participated between the end of 1978 or the beginning of 1979 and mid-1982 and its communication to ICI of its sales volume aspirations for the first quarter of 1983 as concerted practices within the meaning of Article 85(1) of the EEC Treaty.

203 As regards the question whether the Commission was entitled to find that there was a single infringement, described in Article 1 of the Decision as 'an agreement and concerted practice', the Court points out that, in view of their identical

purpose, the various concerted practices followed and agreements concluded formed part of systems of regular meetings, target-price fixing and quota-fixing.

204 Those schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. It would thus be artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of a number of separate infringements. The fact is that the applicant took part — over a period of years — in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.

205 The Commission was also entitled to characterize that single infringement as 'an agreement and a concerted practice' since the infringement involved at one and the same time factual elements to be characterized as 'agreements' and factual elements to be characterized as 'concerted practices'. Given such a complex infringement, the dual characterization by the Commission in Article 1 of the Decision must be understood not as requiring, simultaneously and cumulatively, proof that each of those factual elements presents the constituent elements both of an agreement and of a concerted practice, but rather as referring to a complex whole comprising a number of factual elements some of which were characterized as agreements and others as concerted practices for the purposes of Article 85(1) of the EEC Treaty, which lays down no specific category for a complex infringement of this type.

206 Furthermore, it follows from the Court's assessments regarding the findings of fact made by the Commission that in the applicant's case the Commission has proved to the requisite legal standard each of the aspects of the infringement for the duration of its participation in the system of regular meetings of polypropylene producers and that it did not therefore attribute to the applicant's liability for the conduct of other producers.

207 In view of the foregoing considerations, the applicant's ground of challenge must be dismissed.

B. Restrictive effect on competition

(a) The contested decision

208 The Decision states (point 90, first and second paragraphs) that it is not strictly necessary, for the application of Article 85(1), given the overtly anti-competitive object of the agreement, for an adverse effect upon competition to be demonstrated. However, in the present case, the evidence shows that the agreement did in fact produce an appreciable effect upon competitive conditions.

(b) Arguments of the parties

209 The applicant contends that its sales policy, in respect both of prices and of sales volumes, was entirely independent of what went on at the meetings in which it participated. It points out that the other producers regarded it as a problem and a troublemaker and thought it necessary to bring pressure to bear on it.

210 It states that the Commission has acknowledged that no price instructions sent to sales offices could be found in respect of Anic. However, it states that it provided the Commission with information on its system of price formation and the price policy which it pursued. It has thus shown that the prices it charged were always different from the price 'targets', that it never had a list price for polypropylene and that it always produced at its maximum effective production capacity.

211 The applicant goes on to argue that its alleged participation in the cartel was so minimal, because of its small market share, that it could not have any restrictive effect on competition, if it is compared with the domination of the 'big four', which between them accounted for more than 50% of the market. It states that with a market share of 3% it was absolutely impossible for it to oppose the conduct of the major producers or influence it in any way.

212 The Commission states that it has already replied to the bulk of the applicant's arguments. However, it categorically rejects the applicant's plea based on the insig-

nificant size of its market share, from which the applicant concludes that its participation could not have had any restrictive effect on competition. The Commission replies that for the purposes of the application of Article 85 the necessary restrictive effects are those which can be ascribed to the cartel as a whole and not to the participation of a single undertaking. If that were not the case, in a market composed of several small firms, a cartel which covered 100% of the producers would escape the prohibition because of the insignificant contribution of each participant taken individually.

(c) Assessment by the Court

213 The applicant's line of argument seeks to demonstrate that its participation in the regular meetings of polypropylene producers was not caught by Article 85(1) of the EEC Treaty since its competitive conduct on the market showed that that participation had no anti-competitive object or effect.

214 Article 85(1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which consist in directly or indirectly fixing purchase or selling prices or any other trading conditions and in sharing markets or sources of supply.

215 The Court repeats that it is clear from its assessments relating to the findings of fact made by the Commission that the purpose of the regular meetings which the applicant attended together with competitors was to restrict competition within the common market, in particular by fixing price and sales volume targets, and that consequently its participation in those meetings did have an anti-competitive object within the meaning of Article 85(1) of the EEC Treaty.

216 Moreover, the applicant's argument that its own activities could not have restricted competition must be rejected since the relevant question is not whether the

applicant's individual participation was capable of restricting competition but whether the infringement in which it participated with others could have had that effect. The undertakings which took part in the infringement held in the Decision to have been committed account for nearly the whole of that market, which would clearly indicate that the infringement which they committed together could restrict competition.

217 It follows that this ground of challenge must be dismissed.

C. Effect on trade between Member States

(a) The contested decision

218 The Decision states (point 93, first paragraph) that the agreement between the producers was apt to have an appreciable effect upon trade between Member States.

219 In the present case, the pervasive nature of the collusive agreement, which covered virtually all trade throughout the EEC (and other western European countries) in a major industrial product, must automatically have resulted in the diversion of trade from the channels which would have developed in the absence of such an agreement (Decision, point 93, third paragraph). Fixing prices at an artificial level by agreement rather than by leaving the market to find its own balance impaired the structure of competition throughout the Community. The undertakings were relieved of the immediate need to respond to market forces and deal with the claimed excess capacity problem (Decision, point 93, fourth paragraph).

220 In point 94 of the Decision the Commission finds that the fixing of target prices for each Member State, although needing to take some account of the prevailing local conditions — discussed in detail in national meetings — must have distorted the pattern of trade and the effect on price levels of differences in efficiency

between producers. The system of account leadership, in directing customers to particular named producers, aggravated the effect of the pricing arrangements. The Commission acknowledges that in setting quotas or targets the producers did not break the allocation down by Member State or by region. However, the very existence of a quota or target would operate to restrict the opportunities open to a producer.

(b) Arguments of the parties

221 The applicant reiterates its argument that because of its insignificant size its participation in the alleged cartel could not have affected trade between Member States.

222 The Commission repeats that that argument is unacceptable since it is not the applicant's participation which must be capable of affecting trade between Member States but the cartel as a whole.

(c) Assessment by the Court

23 The Commission was not required to demonstrate that the applicant's participation in an agreement and a concerted practice had had an appreciable effect on trade between Member States. All that is required by Article 85(1) of the EEC Treaty is that anti-competitive agreements and concerted practices should be capable of having an effect on trade between Member States. In this regard, it must be concluded that the restrictions on competition found to exist were likely to divert trade patterns from the course which they would otherwise have followed (see the judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission*, cited above, paragraph 172).

24 It must also be reiterated that the applicant cannot rely on its small market position in order to argue that its activities could not have any influence on trade between Member States, since the infringement which it committed together with others is capable of affecting trade between Member States.

225 It follows that the Commission has established to the requisite legal standard, in points 93 and 94 of its Decision, that the infringement in which the applicant participated was apt to affect trade between Member States, and it was not necessary for it to demonstrate that the applicant's individual participation affected trade between Member States.

226 This ground of challenge must therefore be dismissed.

3. *Conclusion*

227 It follows from all the foregoing considerations, first, that since the findings of fact made by the Commission in relation to the applicant for the period prior to the end of 1978 or the beginning of 1979 and the period after the end of October 1982 have not been proved to the requisite legal standard, Article 1 of the Decision must be annulled in so far as it finds that the applicant participated in the infringement during those periods. Secondly, since the findings of fact made by the Commission in relation to the applicant for the period after mid-1982 concerning its participation in the regular meetings of polypropylene producers, in the price initiatives and in the restriction of monthly sales by reference to a previous period have not been proved to the requisite legal standard, Article 1 of the Decision must be annulled in so far as it finds the applicant to have participated in them. Thirdly, since the findings of fact made by the Commission in relation to the applicant as regards the measures designed to facilitate the implementation of the price initiatives have not been proved to the requisite legal standard, Article 1 of the Decision must be annulled in so far as it finds that the applicant participated in those measures. For the rest, the applicant's grounds of challenge relating to the findings of fact and to the application of Article 85(1) of the EEC Treaty by the Commission in the contested decision must be dismissed.

The question whether or not the applicant is answerable for the infringement

228 The applicant maintains that the Commission is wrong to hold it answerable for the infringement, since it should have been attributed in part to SIR and in part to Monte. It begins by describing the background of the polypropylene sector in Italy, in which until the beginning of 1982 three Italian producers (Monte, Anic and SIR) engaged in vigorous competition. The sector was then restructured twice. First of all, on 9 December 1981 SIR's facilities were transferred to SIL, a company wholly owned by Anic. In June 1982 the shares in SIL were 'girate per procura' to Enoxy Chimica and then transferred to that company on 31 December 1982. On that date the whole of the polypropylene sector in Italy came under

Monte's control. Anic left the sector definitively. Having regard to those developments it is necessary to determine precisely which undertaking is answerable for the infringements in question.

229 The applicant observes that in the Decision the Commission proceeds on the basis that it is undertakings that are the persons subject to the law as regards the application of the Community competition rules. That concept of undertakings is not to be confused with the concept of legal personality used in company law and tax law. Anic acknowledges the validity of that principle, which is in accordance with the case-law of the Court of Justice and which the Commission applied in the Decision in respect of the Norwegian undertakings Saga Petrokjemi and Statoil (points 97 et seq.).

230 The applicant submits that that principle was not correctly applied in the case of the Italian undertakings. First of all, it was not to Anic but to SIR that the Commission should have attributed the facts relating to that company, which continues to exist, although it is in liquidation. The Commission consistently confused the two companies, which has allowed SIR to escape all prosecution. Secondly, that approach is contrary to that adopted by the Decision as regards the transfer of Anic's polypropylene business to Monte. The Commission considers that since Anic continues to exist as an entity it is responsible for the infringements committed by the polypropylene undertaking which it owned before transferring it to Monte. In so doing the Commission is using the concept of an undertaking as an entity which enjoys legal personality and not as an operational economic entity.

231 It argues that that distinction, which is made possible by the fact that the transferor continued to exist after the transfer of the undertaking, leads to absurd and arbitrary consequences. The liability of the transferor for infringements committed by the transferred undertaking comes to depend exclusively on the questions whether the transferor has other business activities and how those acti-

vities are organized. In order for Anic to escape all liability it need merely have transferred its business in other sectors to other companies after transferring its polypropylene business to Monte.

232 In order to justify the different approach taken in relation to the Norwegian undertakings, the Commission states that in the Norwegian case the 'legal package' had disappeared, whereas in the case of Anic it continued to exist. The applicant rejects that argument and submits that the relevant question is what factor must take precedence: the undertaking or the 'legal package'. Once that question has been resolved, the factor chosen must be applied consistently. The Commission's argument that in Anic's case there was no transfer of an undertaking because the concept of an undertaking is not coterminous with that of a product or a sector of activities is equally unacceptable. According to the applicant, the polypropylene business was itself an economic unit within Anic. It was that economic unit, and thus the corresponding undertaking with all its tangible and intangible assets, that was transferred.

233 Finally, the applicant states that the fact that SIR is not itself held answerable for the acts which it committed may constitute a contradiction in the Decision. Every time the Commission found in the documents a joint reference to Anic and SIR it attributed the relevant conduct to the applicant. However, it is equally plausible that in certain cases it was SIR and not Anic that was responsible for particular conduct. The Commission should therefore have taken account, at least in setting the amount of the fine, of the possibility that not all the conduct reflected in the documents which refer jointly to Anic and SIR was attributable to the applicant.

234 The Commission considers that the Norwegian case is different from that of Anic. In the Norwegian case the 'legal package' of the undertaking had disappeared, whereas the latter continued to exist in a different form but with its economic and functional characteristics essentially unchanged. Where the applicant is in error is in believing that in the Norwegian case the Commission proceeded on the basis that the concept of an undertaking was coterminous with that of a product or a sector of activities. On the contrary, the concept of an undertaking is a complex concept involving human and physical components joined in the pursuit of a single economic activity which the opinion of competitors and of customers may help to identify. Both the Norwegian undertaking and Anic corresponded to that concept. Anic is not made up of several undertakings, one for each production sector. It has

a single purpose as an undertaking. Accordingly, it remained the same undertaking before and after the transfer of its polypropylene production business. There is therefore no reason not to hold the legal person coresponding to that undertaking answerable for the infringement.

235 The Court considers that in prohibiting undertakings *inter alia* from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, 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.

236 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.

237 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.

238 In the case of the applicant, the legal person responsible for the operation of the undertaking when the infringement was committed continued to exist until the adoption of the Decision. The Commission was therefore entitled to hold it answerable for the infringement.

239 It should be added that the case of Saga Petrokjemi is different because the legal person responsible for the operation of the undertaking when the infringement was committed ceased to exist following its merger with Statoil.

240 Moreover, the Court considers that it is not necessary to reply to the question what would happen if the undertaking which had committed the infringement disappeared as an economic entity made up of a combination of physical and human elements or what company must answer for an infringement committed by an undertaking which belongs to a group of companies.

241 As regards the alleged attribution to the applicant of acts committed by SIR, it follows from the Court's assessments regarding the findings of fact made by the Commission that the infringement has been proved in relation to the applicant on the basis of its own actions alone.

242 Furthermore, it should be observed that the Commission stated before the Court that it would have been necessary to hold SIR itself answerable for any infringement committed by it, since the legal person which was responsible for the operation of that undertaking when any infringement was committed continues to exist, even though it is in liquidation, but that for reasons of expediency it did not consider it appropriate to initiate proceedings against that undertaking.

243 This ground of challenge must therefore be dismissed.

The Statement of reasons

244 The applicant submits that the Decision is vitiated by a breach of the Article 190 of the EEC Treaty inasmuch as no reference is made to the opinion which by virtue of his terms of reference the hearing officer must send to the Director General for Competition.

245 It argues that there is no reason to countenance the Commission's view that Article 190 concerns only opinions issued by bodies other than the body making the decision.

246 The Commission considers that Article 190 cannot be applied to the report tendered by the hearing officer to the Director General for Competition since it is a report made by an official of the Commission and is generally made orally, that it forms part of an internal Commission decision-making procedure and that it cannot be considered equivalent to an opinion, especially an opinion which must be obtained.

247 According to the Commission, the sole purpose of Article 190 of the EEC Treaty is to provide for review of the regularity of the procedure followed, by making it possible, in cases where the Treaty requires the participation in the decision-making procedure of bodies other than the body responsible for making the decision, to check whether that participation has in fact taken place.

248 The Court notes first of all that the relevant provisions of the hearing officer's terms of reference, which are appended to the Thirteenth Report on Competition Policy, are as follows:

'*Article 2*

The Hearing Officer shall ensure that the hearing is properly conducted and thus contribute to the objectivity of the hearing itself and of any decision taken subsequently. He shall seek to ensure in particular that in the preparation of draft Commission decisions in competition cases due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned.

In performing his duties he shall see to it that the rights of the defence are respected, while taking account of the need for effective application of the competition rules in accordance with the regulations in force and the principles laid down by the Court of Justice.

Article 5

The Hearing Officer shall report to the Director-General for Competition on the hearing and the conclusions he draws from it. He may make observations on the further progress of the proceedings. Such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections.

Article 6

In performing the duties defined in Article 2 above, the Hearing Officer may, if he deems it appropriate, refer his observations direct to the Member of the Commission with special responsibility for competition, at the time when the preliminary draft decision is submitted to the latter for reference to the Advisory Committee on Restrictive Practices and Dominant Positions.

Article 7

Where appropriate, the Member of the Commission with special responsibility for competition may decide, at the Hearing Officer's request, to attach the Hearing Officer's final report to the draft decision submitted to the Commission, in order to ensure that when it reaches a decision on an individual case it is fully apprised of all relevant information.'

249 It is clear from the very wording of the hearing officer's terms of reference that it is not mandatory for his report to be passed on to either the Advisory Committee or the Commission. There is no provision which provides for the report to be forwarded to the Advisory Committee. Although it is true that the hearing officer must report to the Director-General for Competition (Article 5) and that he may, if he deems it appropriate, refer his observations direct to the Member of the Commission with special responsibility for competition (Article 6), who himself may, at the hearing officer's request, attach the hearing officer's final report to the draft decision submitted to the Commission (Article 7), there is no provision requiring the hearing officer, the Director-General for Competition or the Member of the Commission with special responsibility for competition to forward the hearing officer's report to the Commission.

250 It follows that that report is not an opinion which the Commission is required to obtain when taking a decision.

251 Consequently, the objection alleging a breach of Article 190 of the EEC Treaty must be dismissed.

The fine

252 The applicant complains that the Commission infringed Article 15 of Regulation No 17 by not properly assessing in the Decision the duration and gravity of the infringement it was found to have committed.

1. *The limitation period*

253 The applicant claims that conduct prior to 5 December 1978 is covered by the rules on limitation of actions. In view of the absence of any 'factual and circumstantial links' between the various agreements and concerted practices which are the subject-matter of the Decision, the five-year limitation period laid down in Regulation (EEC) No 2988/74 of the Council must apply to the abovementioned conduct since the first act stopping time from running was the request for information, which was notified to the applicant on 5 December 1983.

254 The Commission points out that the infringement with which the applicant is charged was a single infringement which continued from November 1977 until the end of 1982 or the beginning of 1983. The limitation period thus had not expired when the first act stopping time from running took place, that is to say the request for information dated 29 November 1983.

255 The Court observes that, since it has held that the Commission has not proved to the requisite legal standard the applicant's participation in the infringement before the end of 1978 or the beginning of 1979, the applicant's arguments are nugatory.

2. *Duration of the infringement*

256 The applicant argues that the Commission incorrectly assessed the duration of its participation in the infringement, since it took the view that it began in November 1977 and ended at the end of 1982 or the beginning of 1983.

257 It also considers that the indication of the end of 1982 or the beginning of 1983 is too imprecise.

258 The Commission states that it correctly assessed the duration of Anic's participation in the infringement and that the difference between the end of 1982 and the beginning of 1983 constitutes an imprecision of only a few days.

259 The Court observes that it follows from its assessments regarding the proof of the infringement that the duration of the infringement found to have been committed by the applicant was shorter than was held in the Decision, since it began at the end of 1978 or the beginning of 1979, not in November 1977, and it came to an end at the end of October 1982, not at the end of 1982 or the beginning of 1983.

260 It should be added in that regard that it follows from those same assessments that from mid-1982 the applicant ceased to take part in the regular meetings of polypropylene producers and in the common purposes which emerged from them.

261 It follows that in that respect the amount of the fine imposed on the applicant must be reduced.

3. *The gravity of the infringement*

A. The applicant's limited role

262 The applicant argues that, contrary to what is asserted in point 109 of the Decision, it does not appear plausible that the Commission took into consideration

the role played by the various undertakings in fixing the fines to be imposed on each of them. Whereas the Decision refers constantly to proposals, initiatives or plans, no initiative is attributed to Anic. Moreover, the Commission failed to take into account the fact that Anic was not present on a regular basis at meetings and the absence of evidence as regards the objections other than those concerning its presence at the meetings. It concludes that its conduct did not constitute a deliberate breach of Article 85 of the EEC Treaty.

263 The Commission replies that it correctly took into account the role played by the various undertakings and that it is for that reason that much higher fines were imposed on the 'big four'. It adds that the applicant has not indicated in what way its conduct did not constitute a deliberate breach of Article 85 of the EEC Treaty.

264 The Court finds that it is clear from its assessments relating to proof of the infringement that the Commission correctly established the role played by the applicant in the infringement during the period of its participation and that the Commission was thus entitled to take account of that role in determining the amount of the fine to be imposed on the applicant.

265 The Court also finds that the facts established show, by their intrinsic gravity — in particular the fixing of price and sales volume targets — that the applicant did not act rashly or even through lack of care but intentionally.

266 Consequently, this ground of challenge must be dismissed.

B. The applicant's size on the polypropylene market

267 The applicant argues that the Commission did not correctly take account of its size on the polypropylene market, particularly in ascribing SIR's market share to

it. In the Decision and in tables 1 and 8 attached to it the Commission took Anic's market share and SIR's jointly. To confuse the two undertakings in that way is incorrect because of the competition between them, and may vitiate the Decision since the market shares indicated by the Commission in table 1 were taken as the basis for its assessment of the effect on the market of the infringements of which Anic was accused and of the amount of the fine.

268 The Commission replies that although in the Decision it indicated a single figure for the two undertakings, under both names (Anic/SIR), that was because the information was presented in that way in the documents which it seized. However, it cannot be inferred from that that the Commission ascribed SIR's market share to Anic for the purpose of determining the effect that the infringements of which Anic was accused could have had on the market. Among the criteria taken into account in determining the amount of the fines were the market shares for 1982, and the Commission took into account only Anic's; SIR's market share was, moreover, minimal.

269 The Court considers that in order to assess this argument it is necessary to examine the way in which the Commission determined the amount of the fine imposed on the applicant. The Commission first defined the criteria for setting the general level of the fines imposed on the undertakings to which the Decision is addressed (point 108 of the Decision) and then defined the criteria for achieving a fair balance between the fines imposed on each of those undertakings (point 109 of the Decision).

270 The Court considers that the criteria set out in point 108 of the Decision amply justify the general level of the fines imposed on the undertakings to which the Decision is addressed. In this regard, particular emphasis must be placed on the clear nature of the infringement of Article 85(1) of the Treaty and in particular of points (a), (b) and (c) of that provision, whose terms were known to the polypropylene producers, which acted in the greatest secrecy.

271 The Court also considers that the four criteria mentioned in point 109 of the Decision are relevant and sufficient for the purpose of achieving a fair balance between the fines imposed on each undertaking.

272 In that regard, first of all, the applicant's argument to the effect that table 1 attached to the Decision was used as the basis for calculating the amount of the fine imposed on the applicant must be rejected. Neither point 108 nor point 109 refers to 'Market Shares in Western Europe (by Producer)'. That table is referred to only in point 8 of the Decision, in the description of the polypropylene market in western Europe.

273 In determining the amount of the fine to be imposed on each of the undertakings the Commission referred, in point 109 of the Decision, to their size on the Community polypropylene market; among the criteria intended to give a fair weighting to the fines imposed on each of the undertakings it included their respective deliveries of polypropylene within the Community.

274 Although it would certainly have been preferable had the Commission mentioned in the Decision the figures which it took into account in that respect, the fact that it did not do so could not vitiate the Decision in any way in relation to the applicant, since during the proceedings before the Court the Commission submitted the relevant figures and the applicant did not contest their accuracy.

275 It follows that in calculating the amount of the fine to be imposed on the applicant the Commission correctly assessed the aspplicant's size on the Community polypropylene market and this ground of challenge must be dismissed.

C. Failure to take proper account of the effects of the infringement

276 The applicant submits that the Commission should have taken into account Anic's actual conduct on the market as regards both prices and volume, conduct which may be explained independently of any participation in agreements or concerted practices.

277 In the alternative, it argues that any participation by it in agreements or concerted practices had no effect on competition or on trade between Member States.

278 The Commission replies that it took into account as a mitigating circumstance the fact that the price initiatives generally did not achieve their objective in full; for the rest, it refers to its findings of fact and its arguments regarding the effect of the infringement on competition and on trade between Member States.

279 The Court notes that the Commission distinguished two types of effect produced by the infringement. The first type of effect consisted in the fact that following the agreement in meetings of target prices the producers all instructed their sales offices to implement that price level; the 'targets' thus served as the basis for the negotiation of prices with customers. This led the Commission to conclude that in the present case the evidence showed that the agreement did in fact produce an appreciable effect upon competitive conditions (Decision, point 74, second paragraph, with a reference to point 90). The second type of effect consisted in the fact that the movements in prices charged to individual customers as compared with the target prices set in the course of particular price initiatives was consistent with the account given in the documentation found at the premises of ICI and other producers concerning the implementation of the price initiatives (Decision, point 74, sixth paragraph).

280 The first type of effect has been proved to the requisite legal standard by the Commission from the many price instructions given by the various producers which are consistent with one another as well as with the target prices fixed at the meetings, which were manifestly meant to serve as the basis for the negotiation of prices with customers. The fact that the Commission did not find price instructions issued by the applicant does not undermine that finding, since the effects taken into account by the Commission in setting the general level of fines are not those resulting from the actual conduct which an undertaking claims to have adopted but those resulting from the whole of the infringement in which the undertaking participated.

281 As regards effects of the second type, it should be observed that the Commission indicated in the last indent of point 108 of the Decision that it took into account, in mitigation of the penalties, the fact that price initiatives generally had not

achieved their objective in full and that in the last resort there were no measures of constraint to ensure compliance with quotas or other measures.

282 Since the grounds of the Decision relating to the determination of the amount of the fines must be read in the light of the other grounds of the Decision, it must be concluded that the Commission rightly took full account of the first type of effect and that it took account of the limited character of the second type of effect. In this regard, it must be noted that the applicant has not indicated in what way the limited character of the second type of effect was not sufficiently taken into account in mitigation of the amount of the fines.

283 The Court has also rejected the applicant's argument to the effect that it could have had no influence on the market or on trade between Member States because of its small size on the polypropylene market.

284 It follows that the applicant's ground of challenge must be dismissed.

D. Failure to take proper account of the adverse market conditions

285 The applicant states that the fine imposed on it is much higher than the fines imposed by the Commission in its decision of 8 August 1984, *Zinc Producer Group* (Official Journal 1984 L 220), in which it took into account the difficult situation in the sector concerned. From that fact the applicant deduces that in the present case the Commission did not take account of the situation of crisis affecting the producers of polypropylene.

286 The applicant goes on to argue that the fine is also excessive in comparison with the fines imposed by the Commission in its decision of 2 November 1984, *Peroxide* (Official Journal 1985 L 35), in so far as, first, the undertakings concerned at the time were not in a situation of crisis and the sole purpose of the conduct of which they were accused by the Commission could only be increased

profits and, secondly, much lower fines were imposed even though the decision was made after the Commission's policy on fines had become more severe.

287 The Commission states that when imposing the penalties in this case it acted in accordance with its established policy and with the fining principles enunciated by the Court of Justice. It points out that since 1979 it has applied a consistent policy of enforcing competition rules by imposing heavier fines, in particular for the categories of infringements well established in Community law and for particularly serious infringements, as in the present case, so as to reinforce the deterrent effect of penalties. That policy has been approved by the Court of Justice (judgment in Joined Cases 100 to 103/80 *Musique Diffusion Française S. A. and Others* v *Commission* (the *Pioneer* case) [1983] ECR 1825, paragraphs 106 and 109), which has also accepted on many occasions that the determination of penalties involves the assessment of a complex array of factors (judgment in the *Pioneer* case, cited above, paragraph 120, and judgment in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ International Belgium N. V. and Others* v *Commission* [1983] ECR 3369, paragraph 52).

288 The Commission states that it is in a particularly good position to make such an assessment, which it claims cannot be overturned except in the case of material error of fact or law. Furthermore, the Court of Justice has confirmed that the Commission's judgments about what penalties are necessary may vary from case to case, even if such cases involve similar situations (judgment in Joined Cases 32/78 and 36 to 82/78 *BMW* v *Commission*, cited above, paragraph 53, and judgment in Case 322/81 *Michelin* v *Commission*, cited above, paragraph 111 et seq.).

289 Finally, the Commission states that it accepted, in mitigation of the amount of the fines, that the undertakings concerned had incurred substantial losses on their polypropylene operations over a considerable period of time (Decision, point 108), although it considers that it is not under any obligation to take account of difficult economic conditions when determining the amount of fines for an infringement of competition law.

290 The Court holds that, contrary to the applicant's assertions, the Commission indicated in the last indent of point 108 of the Decision that it had taken into account the fact that the undertakings had incurred substantial losses on their polypropylene operations over a considerable period, which indicates not only that the Commission had taken account of those losses but also that in so doing it had taken account of the unfavourable economic conditions in the sector (judgment of

the Court of Justice in Case 322/81 *Michelin* v *Commission*, cited above) in determining, having regard also to the other criteria mentioned in point 108, the general level of fines to be imposed on the guilty undertakings.

291 Moreover, the fact that in the past the Commission has considered, in view of the factual circumstances, that the crisis affecting the economic sector in question had to be taken into account cannot oblige the Commission to take similar account of such a situation in the present case since it has been proved to the requisite legal standard that the undertakings to which the Decision is addressed committed a particularly serious infringement of Article 85(1) of the EEC Treaty.

292 It follows that this ground of challenge must be dismissed.

E. The absence of any previous infringement

293 The applicant complains that the Commission did not take into account the fact that unlike other producers Anic has never in the past been accused of any infringement of Community competition law.

294 The Commission observes that it was not legally obliged to impose higher fines on undertakings which had already been prosecuted in the past for infringements of competition law.

295 The Court holds that 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 that the absence of any previous infringement is a normal circumstance which the Commission does not have to take into account as a mitigating factor, especially since the present case involves a particularly clear infringement of Article 85(1) of the EEC Treaty.

296 It follows that this ground of challenge must be dismissed.

F. Agreement or concerted practice

297 The applicant states that the distinction between the concepts of agreement and concerted practice is relevant not only to the type of liability but also to the degree of liabilty which results from a breach of Article 85(1) of the EEC Treaty, since in the case of a concerted practice there is no proof of collusion as such.

298 The Commission does not accept that the distinction between those two concepts is relevant to the degree of liability.

299 The Court notes once again that it is clear from its assessments relating to proof of the infringement that the Commission was entitled to treat the infringement found to have been committed both as an agreement and as a concerted practice, since the findings of fact showed that the various agreements which were entered into and the various concerted practices which were pursued formed part of a single scheme to which the applicant adhered through its participation in those agreements and concerted practices. It follows that the Commission proceeded on the basis of that correct characterization of the infringement in calculating the amount of the fine to be imposed on the applicant.

300 Consequently, this ground of challenge cannot be upheld.

301 It follows from all the foregoing considerations that the fine imposed on the applicant is appropriate having regard to the gravity of the breach of the Community competition rules which the applicant has been found to have committed but must be reduced by reason of the shorter duration of that infringement.

302 In that regard the Court observes, first of all, that the duration of the infringement has been reduced by fourteen months out of 62, since the Commission has not

proved that the applicant participated in the infringement during the period from about November 1977 to the end of 1978 or the beginning of 1979. However, the Commission has already taken into account, in determining the amount of the fines, the fact that the mechanism by which the infringement was to operate was not completely established until about the beginning of 1979 (Decision, point 105, last paragraph).

303 Secondly, the duration of the infringement has been reduced by two months since the infringement has not been proved to the requisite legal standard in respect of the period from the end of October 1982 until the end of 1982 or the beginning of 1983. The particular gravity of the infringement during those two months should be borne in mind in that regard.

304 Thirdly, after mid-1982, with the exception of the communication by the applicant to ICI at the end of October 1982 of its sales volume aspirations for the first quarter of 1983, the Commission has not proved that the applicant participated in any of the elements of the infringement.

305 Fourthly, the applicant did not participate in the measures designed to facilitate the implementation of the price initiatives, even those which were adopted during the period prior to mid-1982.

306 It follows from all the foregoing that the amount of the fine imposed on the applicant must be reduced by 40%.

Costs

307 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3), where each party succeeds on some and fails on other heads the Court may order that the costs be shared or that each party bear its own costs. Since the application has been upheld in part and the parties have each applied for costs, each party must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls Article 1 of the Commission Decision of 23 April 1986 (IV/31.149 — Polypropylene, Official Journal 1986 L 230, p. 1) in so far as it holds that Anic took part:**

   — in the infringement before the end of 1978 or the beginning of 1979 and after the end of October 1982;

   — in the system of regular meetings of polypropylene producers, the price initiatives and the restriction of monthly sales by reference to a previous period after mid-1982;

   — in measures designed to facilitate the implementation of the price initiatives;

2. **Sets the amount of the fine imposed on the applicant in Article 3 of that Decision at ECU 450 000, that is to say LIT 662 215 500;**

3. **For the rest, dismisses the application;**

4. **Orders each party to bear its own costs.**

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 17 December 1991.

H. Jung J. L. Cruz Vilaça

Registrar President