JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber)
10 March 1992 *

Contents

* Language of the case: English.

In Case T-11/89,

Shell International Chemical Company Limited, a company incorporated under English law, having its registered office in London, represented by Jeremy F. Lever QC, Kenneth B. Parker, Barrister, and John W. Osborne, Solicitor, with an address for service in Luxembourg at the Chambers of Jean Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by Anthony McClellan, Principal Legal Adviser, and Karen Banks, a member of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of R. Hayder, a representative of 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 the Shell group (called 'the big four'), which together account for 64% of the market, Enichem Anic SpA in Italy, Rhône-Poulenc SA in France, Alcudia in Spain, Chemische Werke Hüls and BASF AG in Germany and the nationalized Austrian producer Chemie Linz AG. 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 SA and Solvay et Cie SA 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 SA 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, the Shell group and Hoechst AG each held 11%, Hercules Chemicals N. V. slightly below 6%, ATO Chimie SA, BASF AG, DSM N. V., Chemische Werke Hüls, Chemie Linz AG, Solvay et Cie SA and Saga Petrokjemi AS & Co from 3 to 5% and Petrofina SA about 2%. The Decision states that there was a substantial trade in polypropylene between Member States because each of the EEC producers operating at that time supplied the product in most, if not all, Member States.

3 The Shell group was one of the producers supplying the market before 1977 and is one of the 'big four'. Its position on the market was that of a large producer whose market share was between about 10.7 and 11.7%.

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 SA, 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 SA ('Solvay'),

BP Chimie ('BP').

No investigations were carried out at the premises of Rhône-Poulenc SA ('Rhône-Poulenc') or at the premises of Enichem Anic SpA.

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 SA ('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 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 SA, Rhône-Poulenc SA, 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 SA, a fine of 600 000 ECU, or Bfrs 26 306 100;

(xii) Rhône-Poulenc SA, 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, was sent to them.

Procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 5 August 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, T-6/89 to T-10/89 and T-12/89 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.

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

Forms of order sought by the parties

9 Shell International Chemical Company Limited claims that the Court should:

(i) annul the Commission's decision of 23 April 1986 (IV/31.149 — Polypropylene), in so far as it relates to the applicant; or

(ii) cancel or substantially reduce the fine; and

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

The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

Substance

30 The Court considers that 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 failed to fulfil its duty of impartiality in drawing up the Decision, (2) it failed to disclose to the applicant documents on which it based the Decision, and (3) not all the matters found against the applicant in the Decision were set out in the statement of objections; *secondly*, the grounds of challenge relating to proof of the infringement, which concern (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty; *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 statement of reasons; 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. *Lack of impartiality in drawing up the Decision*

31 The applicant states that until 1985 the Commission was internally organized in a manner which reduced the risk of bias and unfairness in its deliberations since from the preliminary stage of the proceedings the investigating function was separated from the prosecutorial function. During the administrative procedure conducted in the present case, the Directorate-General for Competition was reorganized so that the same official had to act as both investigator/inspector and examiner/rapporteur. The guarantees of impartiality and fairness thus disappeared.

32 In the reply, it further states that, contrary to the Commission's contention, the new system does not necessarily offer all the desirable guarantees, that since it was established in 1985 it may not have been applied in the present case and that in any event it could not make good the lack of separation of functions from the preliminary stage. The applicant cites examples taken from the Decision from which, in its view, it is clear that the disadvantages of the reorganization are not simply theoretical since they show that the Commission in particular interpreted certain documents in a partial or biased manner. Finally, it states that the Commission does not claim that the new system was applied throughout the procedure in question.

33 The applicant states that, in view of the reorganization of the Directorate-General for Competition, it attached particular importance to its ability to obtain an effective oral hearing in the administrative proceedings. But the hearing officer responsible for ensuring the proper conduct of the hearings warned the undertakings that, according to the instructions which he had received, he could not effectively intervene after the oral hearing if he felt that the draft decision was mistaken or that it had gone too far and that he could intervene after the oral hearing only on procedural matters. He had sought clarification of his role but none had been forthcoming; he was, he said, in 'a very poor position'. From those statements Shell concluded that the hearing officer was not in a position effectively to protect the rights of the defence and to fulfil his role of impartial mediator, that is to say effectively to carry out his functions as laid down in his terms of reference which are set out in the Commission's *Thirteenth Report on Competition Policy* (1983). Accordingly, the applicant, although it had made all the arrangements to participate in the hearings, had to decide against participating because it was afraid there was a serious risk that its statements might be badly interpreted or used against it by an administration whose objectivity had been compromised. Finally, it points out that the Commission does not contest the accuracy of its account of the statement made by the hearing officer.

4 The Commission explains that the reorganization of the Directorate-General for Competition carried out in 1985 was designed to produce an optimum combination of efficiency and fairness. Thus, the guarantees of objectivity, impartiality and coherence were increased by the creation of another new directorate responsible for coordinating decision-making and ensuring that decisions dealing with the same type of anti-competitive behaviour in the different sectors were dealt

with in a consistent manner. This reorganization was described in the Fourteenth and Fifteenth Reports on Competition Policy.

35 The Commission states in the rejoinder that it is wrong to say that the present case was dealt with by the same officials from the beginning to the end of the administrative procedure since more than 20 persons were involved in the investigation of the case. Taking up the examples cited by the applicant to illustrate the Commission's alleged lack of impartiality, the Commission points out that those examples refer to a stage of the procedure subsequent to the statement of objections and, consequently, cannot be used to support the argument that the lack of separation of the functions of investigator and rapporteur is harmful. It adds that from those examples it cannot be concluded that the Commission made a wrong analysis of the facts or of the documents nor that such an analysis was due to the organization of the Commission's work.

36 The Commission recalls the purpose of the creation of the post of hearing officer and sets out in detail his terms of reference. In view of those considerations, it observes that the applicant adduces no evidence to show that the procedure followed in the present case was not correct. It points out that the applicant's assertion that everything which it could have said at the hearing would have been 'used against it' and the suggestion that the information it might have supplied verbally at the hearing would not have been used objectively are gratuitous and unfair assumptions. It adds that since the applicant chose not to take advantage of the opportunity of having a hearing, it ill behoves it to complain that there are errors in the Decision which could have been avoided by the intervention of the hearing officer.

37 The Court observes, as a preliminary point, that in its application the applicant contends that its rights of defence were adversely affected by the changes in the internal organization of the Commission's departments and by the abandonment of the guarantees of impartiality afforded by the old procedure under that organization. In the reply, the applicant contends that it is uncertain whether the new organization and the new procedure offer all the guarantees of impartiality which the Commission attributed to them in the defence; it now asserts, however, that it was unable to benefit from the guarantees afforded by the new procedure since that procedure was not applied in the present case.

38 In order to overcome the apparent contradiction in the arguments of the applicant, which complains first of all that the old procedure was not applied in its case and that it did not benefit from the new procedure either, it must be borne in mind that the applicant considers that its rights of defence were infringed because, since the reorganization of the Commission's departments occurred during the course of the administrative procedure which led to the adoption of the contested decision, the old and the new procedures were each in turn applied in its case, which, in its view, had the effect of depriving each of those procedures of guarantees which they afford separately when applied throughout a case.

39 The Court holds that the fact that certain Commission officials acted in the administrative procedure both as investigators and rapporteurs does not render the Decision unlawful. It is clear from the case-law of the Court of Justice that the Commission cannot be described as a 'tribunal' within the meaning of Article 6 of the European Convention for the Protection of Human Rights. However, during the administrative proceedings before the Commission, the latter is obliged to observe the procedural guarantees laid down by Community law. It is for that reason that Article 19(1) of Council Regulation No 17 requires the Commission, before taking any decision, to give the parties concerned the opportunity of being heard on the matters to which the Commission has taken objection. It is also for that reason that, in Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 of Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47), the Commission instituted a procedure of an adversary nature. Under that procedure the Commission must notify its objections to the undertakings concerned, which may then reply in writing within a stated period. Where appropriate, and particularly in cases where the Commission proposes to impose fines, the undertakings may be afforded an oral hearing. Under the terms of Article 4 of Regulation No 91/63, the Commission may, in its decisions, deal only with those objections raised against undertakings in respect of which they have been afforded the opportunity of making known their views. The abovementioned provisions are an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings, even those of an administrative nature, and which means in particular that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the EEC Treaty (judgment of the Court of Justice in Joined Cases 100 to 103/80 *Musique Diffusion Française* v *Commission* ('Pioneer') [1983] ECR 1825, paragraphs 7 to 10).

40 This Court holds that the procedural guarantees provided for by Community law do not, however, require the Commission to adopt an internal organization precluding the same official from acting as investigator and rapporteur in the same case.

41 It follows that, although the complaint relating to the Commission's internal organization cannot be upheld as such, Community law provides all the criteria necessary for examining the complaints alleging breaches of the applicant's rights of defence and upholding them if appropriate.

42 In any event, the applicant has not been able to explain how the alleged breaches of its rights of defence and the factual errors which it contends were committed should be attributed to the reorganization of the Directorate-General for Competition in question.

43 The Court further notes that the relevant terms of reference of the hearing officer, which were 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.'

4 The statements which the applicant attributes to the hearing officer simply impute intentions to the Commission and therefore exceeded his terms of reference. The applicant cannot justify its refusal to take part in the oral hearings by relying on those imputations and then claiming that its rights of defence have been infringed.

45 This objection must therefore be dismissed.

2. *Non-disclosure of documents upon notification of the statement of objections*

46 In its pleadings the applicant refers to a number of documents or series of documents to which the Commission allegedly failed to draw its attention at the time when the statement of objections was served and on which it allegedly based the Decision. The applicant considers that the Commission thus deprived it of the possibility of explaining the contents of those documents and thus infringed the rights of the defence.

47 Among those documents, the applicant points out that a document allegedly found at the premises of Solvay dated 6 September 1977 providing an account of a meeting between a Solvay employee and an employee of the applicant (Decision, point 16, penultimate paragraph) and a series of documents found at ATO relating to the exchange of information on deliveries by the French producers and the operation of quotas on the French market in 1979 (Decision, point 15(h)) are neither mentioned in the statements of objections addressed to it nor appended to them.

48 It further states that two other documents which Shell provided to the Commission as appendices to its reply to the statement of objections were used against it in the Decision without its being able to explain their contents since it did not know that they might be used against it. The documents concerned are two sets of minutes of Shell internal meetings held on 5 July and 12 September 1979 (Decision, points 29 and 31).

49 The applicant concludes that, since the Commission did not allow it to make observations on the evidentiary weight of those documents, it drew erroneous conclusions from them, in particular by failing to take into consideration evidence in its favour which those documents might contain. In this regard, it observes that the documents found at the premises of ATO do not mention Shell Chimie (France) and contends that this fact proves that the Shell companies did not

participate in the quota arrangements. It then states that the document found at the premises of Solvay contains no reference to price agreements and that this proves that no such agreements were concluded in 1977.

50 It also contends that, in the Decision, the Commission uses two documents in support of objections different from those which they were supposed to support in the statement of objections. The two documents concerned are a Shell internal note dated 20 October 1982 containing an account of a Shell internal meeting of 7 September 1982, which was allegedly used in the specific statement of objections addressed to the applicant, of which they form Appendix 30, in order to prove the existence of a price agreement at the end of 1982, whereas the Decision refers to that document in the second paragraph of point 68 in asserting that the applicant was one of the 'leaders' of the cartel and that it concluded a price and/or quota agreement with the three other so-called 'leaders' at the end of 1982, and, secondly, a Shell internal document headed 'PP W. Europe Pricing' (specific objections, Shell, Appendix 49), to which the Commission referred in the specific statement of objections addressed to the applicant in order to prove its participation in a quota agreement for 1983, whereas in point 49 of the Decision it used that document in order to prove Shell's participation in a price agreement in July 1983. The applicant maintains that, since it is impossible for an undertaking accused by the Commission of having infringed Article 85(1) of the EEC Treaty to go through every document annexed to a statement of objections and set out every conclusion which, in its submission, could not be drawn from that document, the Commission cannot, in the Decision, use the documents mentioned in the statement of objections in support of objections different from those in support of which they were relied upon in that statement of objections.

The Commission contends that it allowed the applicant a satisfactory opportunity to state its position on all of the documents which concerned it and which could be used against it. Thus, the documents found at the premises of ATO either merely confirmed documents found at ICI and were disclosed to it or did not concern Shell and therefore did not have to be disclosed to it.

52 It states that the Solvay document mentioned in the fifth paragraph of point 16 of the Decision was made available to the applicant during the access-to-file procedure and that it took a copy of it on that occasion. It adds that this document is used in the Decision principally in order to prove the date on which Solvay began to participate in discussions on prices and that incidentally it confirms that discussions took place on this matter at that time.

53 As regards the two internal Shell documents of 5 July and 12 September 1979, the Commission observes that the first document only confirms a detail of the timetable of 1979 price initiatives and that, since it was produced by the applicant itself, it should have realized the importance of the document and therefore commented on it spontaneously; the same applies to the second of those documents.

54 Finally, with regard to the use of the document headed 'PP W. Europe Pricing' in support of objections other than those in support of which it was mentioned in the statement of objections, the Commission states that it is true that this document was specifically referred to in the statements of objections addressed to the applicant only in relation to the fixing of quotas for 1983, whereas in the Decision it is used to prove the applicant's participation in the price initiative of July 1983. It considers, however, that because these two matters are so closely linked, the applicant should have realized that the reference in that document to a 'July target' could be used against it.

55 The Court notes that, according to the case-law of the Court of Justice, the important point is not the documents as such but the conclusions which the Commission has drawn from them, and if those documents were not mentioned in the statement of objections, the undertaking concerned was entitled to take the view that they were of no importance for the purposes of the case. By not informing an undertaking that certain documents would be used in the Decision, the Commission prevented it from putting forward at the appropriate time its view of the probative value of such documents. It follows that these documents cannot be regarded as admissible evidence as far as that undertaking is concerned (judgment in Case 107/82 *AEG-Telefunken AG* v *Commission* [1983] ECR 3151, paragraph 27, and see most recently the judgment of 3 July 1991 in Case C-62/86 *AKZO Chemie* v *Commission* [1991] ECR I-3359, paragraph 21).

56 In this instance, only the documents mentioned in the main or particular statements of objections or in the letter of 29 March 1985, or those appended to them without being specifically mentioned therein, may be treated as admissible evidence as against the applicant in the present case. As far as the documents which are appended to the statements of objections but which are not mentioned therein are concerned, they may be used in the Decision as against the applicant only if the applicant could reasonably deduce from the statements of objections the conclusions which the Commission intended to draw from them.

57 Consequently, the Court considers that the document found at the premises of Solvay dated 6 September 1977, mentioned in the penultimate paragraph of point 16 of the Decision, and the documents obtained at ATO, mentioned in point 15(h) of the Decision, cannot be used in evidence against the applicant. However, this does not prevent the applicant from using them as evidence in its favour.

58 The question whether those last-mentioned documents provide the essential support for the findings of fact made by the Commission against the applicant in the Decision falls to be considered by the Court in its examination of the question whether those findings are well founded.

59 On the other hand, the minutes of two internal Shell meetings which Shell had appended to its reply to the statement of objections and which are mentioned in points 29 and 31 of the Decision must be regarded as evidence which may be relied upon as against the applicant in the present case. The applicant must have known that in producing those documents during the administrative proceedings it ran the risk that the Commission might use them as evidence against it. The Court of Justice has in fact held (judgment in Joined Cases 209 to 215 and 218/78 *Heintz Van Landewyck SARL and Others* v *Commission* [1980] ECR 3125, paragraph 68) that the decision is not necessarily required to be a replica of the notice of objections: the Commission must take into account the factors emerging from the administrative procedure in order either to abandon such objections as have been shown to be unfounded or to supplement and re-draft its arguments both in fact and in law in support of the objections which it maintains; this latter

possibility does not conflict with the principle of the rights of the defence protected by Article 4 of Regulation No 99/63.

60 Consequently, the Commission was perfectly entitled to use, in support of objections of which the applicant had already been made aware, documents which the applicant had furnished in the course of the administrative procedure.

61 As regards the use made in the Decision of Appendix 30 to the specific statement of objections addressed to the applicant in support of objections different from those which they were supposed to support in that statement of objections, it is to be observed that the first of those documents forms Appendix 100 to the main statement of objections and that that appendix is used in the main statement of objections (point 124) to support objections relating to the special role played by the 'big four', as is also the case in the second paragraph of point 68 of the Decision.

62 Appendix 49 to the specific statement of objections, which is mentioned in point 49 of the Decision in support of the objection relating to the conclusion of a price agreement in July 1983 whilst in the specific statement of objections it was used in order to prove Shell's participation in a quota agreement, may be used in the Decision as against the applicant only if the applicant could reasonably deduce from the statements of objections and the contents of the documents the conclusions which the Commission intended to draw from them. In the present case, the specific statement of objections addressed to the applicant refers to Shell's participation in the price initiative of June and July 1983 (p. 8, (h)) and the main statement of objections refers to this in point 74. The first two sentences of the document enabled the applicant reasonably to deduce the conclusions which the Commission intended to draw from it in support of the objections which it had set out. In the document it was stated:

'Despite 100% loading of W. European PP effective industrial production capacity, prices have generally fallen from 1.85/1.95 DM/kg ("marker" grade — tape, raffia) in December 1982 to approx 1.70 DM (gross) in May, June 1983.

This paper provides data on PP supply, demand and pricing to show the cost to the Group of failing to use the present opportunity for a general increase of prices.'

63 It follows that the Commission could use that document in support of the objection relating to the conclusion of a price agreement in July 1983.

3. *New objections*

64 In its argument concerning proof of the matters in question, the applicant contends that the Commission set out in the Decision a number of objections which had not been set forth in the statements of objections which had been addressed to it. This is said to be the case as regards Shell's alleged participation in a price initiative in July 1979 (Decision, point 30) and its participation in meetings in 1981, to which the Commission refers in order to support its objection concerning the role played by the four major producers of which the applicant was one (Decision, points 19, 57, 67, 68, 78 and 109).

65 The Commission, on the other hand, maintains that all the objections relied upon in the Decision had been set forth either in the main statement of objections, in the specific statement of objections addressed to the applicant, or in the letter of 29 March 1985.

66 The Court finds that the objection expressed in point 30 of the Decision was mentioned in Appendix A to the letter of 29 March 1985 which the Commission addressed to the applicant in order to clarify and supplement the previous statements of objections.

67 As regards the reference in points 19, 57, 67, 68, 78 and 109 of the Decision to Shell's participation in meetings with ICI and Monte in 1981, which the Commission makes in order to demonstrate the special role played by the applicant in the leadership of the cartel, this is not new at all since such participation is expressly mentioned, under the heading 'Special Role of the Four Majors', in point 118 of the main statement of objections, which is applicable to the applicant individually, and in point 2(a) of the specific statement of objections which was addressed to it.

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

Proof of the infringement

69 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. The Decision further states that 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. 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 (point 87, third and fourth paragraphs).

70 It is therefore necessary to verify first of all whether the Commission has established to the requisite legal standard its findings of fact relating to (A) the 1977 floor-price agreement, (B) the applicant's contacts with the participants in the 'bosses" and 'experts" meetings, (C) the price initiatives, the measures designed to facilitate the implementation of the price initiatives and the fixing of target tonnages and quotas for (C1) the years 1979 and 1980, (C2) the year 1981, (C3) the year 1982, and (C4) the year 1984, 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 (D) to assess whether the applicant's general arguments regarding those findings of fact are well founded and, finally, it will be necessary to review the application of Article 85(1) of the EEC Treaty to those facts.

1. *The findings of fact*

A. The floor-price agreement

(a) The contested decision

71 The Decision (point 16, first, second and third paragraphs; see also point 67, first paragraph) states that during 1977, after seven new polypropylene producers came on stream in western Europe, the established producers initiated discussions with a view to avoiding a substantial drop in price levels and attendant losses. As part of those discussions the major producers, Monte, Hoechst, ICI and Shell, initiated a 'floor-price agreement' which was to be in operation by 1 August 1977. The original arrangement did not involve volume control but if it proved successful tonnage restrictions were envisaged for 1978. That agreement was to run for an initial period of four months and details of it were communicated to other producers, including Hercules, whose marketing director noted as the basis for floor-prices for the major grades for each Member State a raffia grade market price of DM 1.25/kg.

72 According to the Decision (point 16, fifth paragraph), ICI and Shell admit that there were contacts with other producers as to how the price slide could be checked. According to ICI, a price level may have been suggested below which prices should not be permitted to fall. It is confirmed by ICI and Shell that discussions were not limited to the 'big four'. A document dated 6 September

1977, found at the premises of Solvay, indicates that a meeting was held on 30 August 1977 between Solvay and Shell. The Decision states that although Hercules was well informed of the outcome of the price discussions, the identity of other producers involved in those discussions could not be established. In the third paragraph of point 78 it adds, however, that the 1 December 1977 initiative taken by Monte, Hoechst, ICI and Shell had the express 'support' of at least five other producers. Precise details of the operation of the floor-price agreement could not be ascertained. However, by November 1977, when the raffia price was reported as having fallen to around DM 1.00/kg, Monte announced an increase to DM 1.30/kg due to take effect on 1 December, and on 25 November the trade press quoted the other three majors as expressing their support for the move, with similar increases planned from the same date or later in December.

73 According to the Decision (point 17, first and second paragraphs), it was at about this time that the system of regular meetings of the polypropylene producers began, and ICI claims that meetings were not held until December 1977 but has admitted that contact was occurring between producers before that date, probably by telephone and on an *ad hoc* basis. Shell says that its executives 'may have had discussions concerning price with Montedison in or about November 1977 and Montepolimeri may have suggested the possibility of increasing prices and may have sought (Shell's) views on its reactions to any increase'. From this the conclusion is drawn in the Decision that Shell was one of the producers which, in the wake of the floor-price agreement, took an initiative for 1 December 1977 (point 78, third paragraph). In the third paragraph of point 17 of the Decision it is stated that, while there is no direct evidence of any group meetings being held to fix prices before December 1977, the producers were already informing meetings of a trade association of customers, the European Association for Textile Polyolefins (EATP), held in May and November of 1977, of the perceived need for common action to be taken to improve price levels. In May 1977 Hercules had stressed that the 'traditional industry leaders' should take the initiative, while Hoechst had indicated its belief that prices needed to rise by 30 to 40%.

74 It is in that context that the complaint is made (Decision, point 17, fourth paragraph; point 78, third paragraph; and point 104, second paragraph) that a number of producers, which did not include the applicant, stated that they would be supporting the announcement made by Monte in an article appearing in the

trade press (*European Chemical News*, hereinafter referred to as 'ECN') on 18 November 1977 of its intention to raise the price of raffia to DM 1.30/kg as from 1 December. The various statements made in this regard at the EATP meeting held on 22 November 1977, as recorded in the minutes, show that the DM 1.30/kg level set by Monte had been accepted by the other producers as a general industry 'target'.

(b) Arguments of the parties

75 The applicant points out that in order to prove the existence of the alleged floor-price agreement the Commission relies on a single handwritten note prepared by the marketing director of Hercules in the first half of 1977 (main statement of objections, Appendix 2). That note, which at the hearing the applicant described as a 'scrappy handwritten note', cannot be used as evidence given the circumstances of its preparation, the ambiguity of its contents and the uncertainty of its interpretation. In its reply to the Commission's request for information (specific objections, Hercules, Appendix 1), Hercules indicated that the author of the note no longer remembered the circumstances in which he prepared the document but believed that it reflected notes made during a telephone call from another producer, 'possibly ICI'. Furthermore, the allegations contained in that note are reported only second hand without any possibility of identifying the intermediaries, who might have been completely mistaken, repeating no more than wishful market gossip or inventing a tale in an effort to persuade Hercules, a volume-hungry new entrant, not to undercut prevailing market price levels.

76 The applicant claims that in any event the minutes of Shell internal meetings demonstrate that companies in the Shell group were pursuing at that time a marketing policy of 'key accounts' that was wholly incompatible with the making or operation of any price agreement. Moreover, there is no evidence that the producers sought to implement the alleged 'floor price'.

77 The applicant points out that the document found at the premises of Solvay indicating that Solvay and Shell SA, its Belgian operating company, met on 30 August 1977 to discuss the price of polypropylene cannot be used against it in the present proceedings and that, furthermore, it does not demonstrate the existence of unlawful price agreements. Its contents even prove the contrary, since the document contains no reference to such agreements. It further contends that it is by selective and partial citation from Shell's reply to the statement of objections that the Commission purports to deduce Shell's participation in the alleged floor-price agreement.

78 It also points out that, unlike the statement of objections, the Decision no longer relies on the statements made by Shell at the meetings of the EATP but only on discussions concerning prices which may have taken place between Shell and Monte and on a statement of Shell in ECN (main statement of objections, Appendix 3) in which it expressed support for a price increase following a price increase announced in November 1977. Those two matters are manifestly insufficient, in the applicant's view, to support a finding that the Shell companies infringed Article 85(1) in November 1977.

79 Finally, in the reply, the applicant contends that the Commission cannot argue before the Court that the November 1977 agreement represented only a belated implementation of the alleged floor-price agreement concluded in the middle of 1977. Such an allegation was never made, either in the administrative proceedings or in the Decision, and is in any event without foundation since the alleged mid-1977 agreement fixing prices at DM 1.25/kg was a 'stop-loss' and was to be implemented on 1 August, whereas the alleged November agreement was aimed at increasing prices to DM 1.30/kg by 1 December. In this regard, the Commission has, according to Shell, failed to adduce evidence of a connection between those two alleged agreements.

80 The Commission explains that the note prepared by the marketing director of Hercules (main statement of objections, Appendix 2) is not the only document on which it relies in order to prove the existence of the floor-price agreement and that that note has to be read in the context of Shell's contacts with other producers on

the setting of prices, those contacts having been admitted by Shell in its reply to the statement of objections (points 3.10 to 3.15). Given that context, the Commission could take the view that the note provided reliable, accurate and detailed proof of the existence of a floor-price agreement, even if it was not ICI but another producer which had informed Hercules. As regards the document found at the premises of Solvay, the Commission points out that it is used in the Decision mainly to establish the date on which Solvay began to participate in the discussions on pricing and that it confirms that discussions did take place on that subject, as the applicant has indeed admitted.

81 The Commission maintains that the documents supposed to prove Shell's competitive behaviour are not relevant since the Commission considers that it is entitled to use material tending to indicate a cartel agreement, even if this is accompanied by denials and material tending to show a state of considerable competition.

82 The Commission further contends that, as far as the November 1977 agreement is concerned, the Decision, after establishing that Shell had participated in the 'floor-price' agreement, does not proceed to find that there was a separate price initiative in November 1977 but simply finds that the floor-price agreement was implemented in several stages. As proof, it points out that the Decision (points 16 and 17) deals with the original floor-price agreement and the November 1977 initiative under one heading, 'The original "Floor Price Agreement"' and that it did not therefore separate them.

83 Finally, the Commission explains the difference in target (DM 1.25/kg for the summer and DM 1.30/kg for November) by the fact that, having noted that prices had fallen to DM 1.00/kg, Monte realized in the meantime that considerable efforts would be needed to achieve the desired level. That is why it fixed a target somewhat higher than the price it actually hoped to achieve.

(c) Assessment by the Court

84 The Court notes that, in its reply to the statement of objections, the applicant stated that:

'SICC/SCITCO has made enquiry of executives concerned with polypropylene in 1977. There is no record or recollection of such agreement [the alleged "floor price" agreement in June 1977]. On the basis of these enquiries, it appears likely that views were exchanged in 1977 with other producers, including Montepolimeri (then Montedison), Hoechst and ICI as to how the sharp fall in prices might be checked. SICC may have urged operating companies not to sell below a price level corresponding with variable cost. Shell operating companies however, were not prepared to lose market share to give effect to any such recommendation, for at that time they were following a policy of "Key Accounts" ... SICC does not accept that any discussions between producers in mid-1977 were limited to the "Big Four"; ... [main statement of objections, Appendix 2] itself makes clear that other companies were involved. Any such discussions were not in any way connected with subsequent multilateral meetings in the period 1978-1982, which SICC/SCITCO did not attend. With the flood of new capacity in 1977, market conditions were chaotic and producers were incurring serious financial losses. SICC does not know what level of prices may have been considered in any discussions in mid-1977, but the price of 1.25 DM/kg referred to in the Hercules

note cited ... would have barely covered variable production costs. In any event, as the Commission fairly acknowledges (paragraph 34 of the Statement of Objections), any attempt by producers to implement any such "stop-loss" floor price agreement wholly failed in the face of the continuation of unbridled price competition ... [Concerning] the alleged price initiative of November 1977, again, the same difficulties in reconstructing events many years ago arise as in the case of the alleged floor price agreement. However, SICC's researches indicate that executives from the service company may have had discussions concerning price with Montepolimeri in or about November 1977 and Montepolimeri may have suggested the possibility of increasing prices and may have sought SICC's views on its reactions to any increase. Shell companies continued to lose heavily on this polypropylene businesses; SICC's policy was to recommend the operating companies to support any moves towards increasing prices that would enable losses to be reduced but it recognized that other producers, particularly new entrants, would be likely to hold prices at uneconomic levels to win market share. In that event, Shell operating companies were obliged to meet competitors' offers to retain their market share and to ensure a minimum acceptable loading of the Shell polypropylene plants in Western Europe. For that reason and because of the Shell Group structure SICC could not give Montepolimeri or any producer a commitment that operating companies would sell at increased prices.'

85 It is in the light of those circumstances that the note written by Hercules' marketing director (main statement of objections, Appendix 2), in which the

Commission sees the expression of a common purpose between the 'big four', must be examined. That note reads as follows:

'Major producers have made agreement (Mont., Hoechst, Shell, ICI) 1. No tonnage control; 2. System floor prices — DOM less for importers; 3. Floor prices from July 1. definitely Aug. 1st when present contracts expire; 4. Importers restrict to 20% for 1000 tonnes; 5. Floor prices for 4 month period only — alternative is for existing; 6. Com.[panies] to meet Oct. to review progress; 7. Subject [of the] scheme working — Tonnage restrictions would operate next year.'

[There then follows a list of prices for three grades of polypropylene in four national currencies, including DM 1.25/kg for raffia.]

86 The Court finds that the evidence which the applicant puts forward in order to diminish the evidentiary weight of that note made by Hercules' marketing director cannot contradict the conclusions which the Commission drew from the note. The note itself is free of ambiguity and the fact that it is badly written, unsigned and undated is quite normal since it is a note taken during a conversation, probably over the telephone, and the anti-competitive object of the note was a reason for its author to leave the least trace possible. The author's imprecise recollection of the circumstances in which the note was drawn up does not impugn its evidentiary value since the contents of the note indicate that the information which it contains was provided by one of the 'big four', and it is not necessary to identify which of the 'big four'. Furthermore, the fact that the information is reported second hand is immaterial since the Commission expressly uses the note as written, contemporaneous evidence of the facts, and as evidence that producers other than the

author of the note had concluded an agreement. Finally, the precise, detailed nature of that information makes it wholly unlikely that it simply reflected market gossip, was completely wrong or invented.

87 Moreover, since the applicant has admitted that the producers were discussing prices at that time, the Court considers that the Commission was entitled to find that a common purpose concerning the fixing of floor prices emerged between a number of producers, including the applicant, without there being any need to establish whether producers other than the 'big four' agreed to those prices.

88 The fact that the agreed floor prices could not be achieved does not tell against the applicant's agreement to those prices, since the Court considers that, even if that fact is assumed to be established, it would at the most tend to show that the floor prices were not implemented. However, far from asserting that the floor prices were achieved, the Decision (point 16, last paragraph) states that the price of raffia had fallen to around DM 1.00/kg in November 1977.

89 As regards the question whether the Decision alleges that there was a link between the floor-price agreement and the price initiative of December 1977, it is to be observed that it is clear from points 16 and 17 of the Decision, read together with point 78, that the floor-price agreement and the price initiative at the end of 1977

are considered in the Decision to form a whole. This view is based on the fact that Shell had admitted that its executives 'may have had discussions concerning price with Montedison in or about November 1977 and Montepolimeri may have suggested the possibility of increasing prices and may have sought (Shell's) views on its reactions to any increase', from which it is deduced (point 78, third paragraph) that Shell was one of the producers which, in the wake of the floor-price agreement, launched an initiative for 1 December 1977.

90 In this regard, the Court finds that the Commission rightly inferred from Shell's reply to the statement of objections combined with its participation in the floor-price agreement that Shell had taken that initiative with Monte, ICI and Hoechst in continuation of that agreement. It is safe to conclude from Shell's reply that between the time of the conclusion of the floor-price agreement and Monte's announcement in ECN of its intention to increase prices from 1 December 1977 Shell had contacts with Monte on price increases, since it is stated in that reply:

'However, SICC's researches indicate that executives from the service company may have had discussions concerning price with Montepolimeri in or about November 1977 and Montepolimeri may have suggested the possibility of increasing prices and may have sought SICC's views on its reactions to any increase.'

91 In view of that evidence, the applicant has not demonstrated that in the course of those contacts it indicated to its competitors that it refused to participate in any cooperation of that type.

92 It follows that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers which arrived at a common purpose concerning floor prices in mid-1977 and, in furtherance of that purpose, a target price of DM 1.30/kg for 1 December 1977.

B. The applicant's contacts with participants in the 'bosses" and 'experts" meetings

(a) The contested decision

93 In the Decision (points 18, 19, third paragraph, and 78, first three paragraphs) the Commission admits that Shell did not attend the plenary meetings of polypropylene producers attended by, on the one hand, senior managers responsible for the overall direction of the polypropylene business of some of the producers ('bosses') and, on the other hand, lower-ranking managers possessing more detailed marketing knowledge ('experts'), those meetings having as their object in particular the setting of target prices and sales volumes and the monitoring of their observance by the producers. The Decision states, however, that Shell was involved in both the original floor-price agrement and the discussions surrounding it and that it took part in *ad hoc* meetings with the other major producers. On Shell's own admission, prior to bosses' and experts' meetings its views were sometimes sought on the feasibility of price increases, and after such meetings it was informed by Monte or ICI that particular 'targets' had been proposed and passed on the information to its operating companies. Shell's internal documents confirm that it knew of and was participating in price 'initiatives', sometimes even as the acknowledged leader. Furthermore, from the end of 1982 onwards, Shell's representative regularly attended 'pre-meetings' of the four major producers which took place the day before each 'bosses" meeting.

94 According to the Decision (point 68, second and third paragraphs), these so-called 'pre-meetings' provided a forum in which the four major producers could agree a position between themselves prior to the full meeting in order to encourage moves towards price stability by adopting a united approach. ICI admitted that the topics discussed in pre-meetings were the same as those dealt with by the bosses' meetings which followed, but Shell denied that the 'big four' meetings were in any sense preparatory to a plenary meeting or involved coordination on a common stance before the next meeting. The Decision states, however, that the records of

some of those meetings (in October 1982 and May 1983) disprove this claim of Shell.

95 Finally, the Decision (point 78, second paragraph) states that Shell operating companies took part in local meetings devoted to discussing implementation on a national level of arrangements agreed in the full sessions (Decision, point 20). Even before it began to attend 'pre-meetings' of the 'big four' in October 1982, it was meeting other major producers in detailed discussions on the matters covered by the regular bosses' and experts' sessions (Decision, point 109, fourth paragraph).

96 In points 16, 17, 19, 30, 31, 35, 45, 47, 48, 57, 62, 63, 67 and 109, the Decision makes further reference to various contacts between Shell and producers participating in the 'bosses" and 'experts" meetings.

(b) Arguments of the parties

97 The applicant points out that the Decision places decisive emphasis on the existence of meetings of producers at which various measures of collusion were agreed. However, it is not denied by the Commission that the Shell companies did not take part in any of those meetings. Therefore, those companies did not take part in the discussions which led in particular to the fixing of target prices or sales volumes or to the adoption of accompanying measures. Shell's situation is thus identical to that of Amoco and BP, in respect of which the Commission found no infringement of Article 85(1) of the EEC Treaty (Decision, point 78, last paragraph).

98 The applicant explains that it was in fact in the following position: it knew that meetings were taking place; its views on general market conditions were sometimes sought prior to meetings; it was sometimes informed, not invariably, that particular

'targets' had been proposed; it passed that information to the operating companies, occasionally giving them advice on the action to be taken, but those companies were free to make their own decision.

99 It admits that a Shell representative did participate in certain meetings which were held on the evenings before 'bosses" meetings and at which representatives of ICI, Monte and Hoechst were present. However, according to the applicant, those preliminary meetings were held only during the last 10 months of the period in question and Shell attended only about half of them. That circumstance cannot therefore be validly relied on as proof that Shell companies participated in unlawful arrangements.

00 It further points out that in 1981 there were only two isolated meetings at which only ICI, Shell and Monte, but not Hoechst — which was after all one of the 'big four' — attended. At the end of those meetings, no agreement, arrangement or understanding was reached, as is attested by the note of the meeting of 15 June 1981 (main statement of objections, Appendix 64b). The Commission conveyed a misleading impression as to the regularity and nature of those meetings and, in the overall context of the alleged unlawful arrangements, attached an importance to them which they did not have. In so far as the Commission refers in its pleadings to regular contacts which the applicant allegedly had with the other 'major' producers after 1977 and throughout the period, that is a new argument which in any event describes in excessive terms a few very sporadic contacts which could not alter Shell's peripheral situation in relation to any alleged unlawful arrangement.

01 As regards its participation in a number of pre-meetings held between the end of 1982 and the middle of 1983, the applicant observes that those meetings began only some ten months before the end of the seven-year period of the alleged cartel, that it attended pre-meetings preceding only about half of the 'bosses" meetings during that period, that the exchange of views did not lead the applicant to participate in any unlawful arrangement and, finally, that those meetings were not intended to enable an alleged 'directorate' to prepare for later 'bosses" meetings.

102 The Commission takes the view that the importance to the Decision of what are called the 'institutionalized' meetings should not be exaggerated. Nor is it clear to the Commission why the applicant does not include in the 'institutionalized' meetings those which took place between the 'big four'. However, the applicant, either itself or through SCITCO (a division of Shell), participated in those preliminary meetings, whose importance and object are proved by notes of telephone conversations between the applicant and ICI (main statement of objections, Appendices 95 and 96) or of one of those meetings (main statement of objections, Appendix 101).

103 The Commission states that even before pre-meetings began to be held regularly towards the end of 1982, the applicant had regular contacts with the other 'majors', as Shell admitted in its reply to the statement of objections (point 3.19). It adds that those regular contacts were mentioned both in the statement of objections and in the Decision (point 109, fourth paragraph). More specifically, the Commission states that a note relating to a meeting of the 'big four' of 15 June 1981 (main statement of objections, Appendix 64b) clearly shows that their shared responsibility on the market was recognized and that they considered that it was up to them to take the lead in adopting initiatives.

104 It further states that, on Shell's own admission (main statement of objections, Appendix 9, Annex 2), Shell group operating companies in the Member States had attended the so-called 'local' meetings which were devoted to detailed arrangements for applying the agreements reached at the 'bosses" and 'experts" meetings. For those various reasons, Shell's situation is not comparable to that of Amoco or BP.

105 The Commission contends that the applicant participated in all the pre-meetings of which it is aware and that the common attitude adopted by the 'big four' with a view to raising prices was linked to those meetings, in which the discussions were quite concrete. It maintains that the two documents on which the Decision relies in this regard, the 'ICI document headed 'Polypropylene Framework' (main statement of objections, Appendix 87) and the Shell note of 20 October 1982 (main statement of objections, Appendix 100, and specific objections, Shell, Appendix 30), are perfectly relevant, provided that they are interpreted in the

context of the meetings and that they are not separated from one another. It notes in passing that the meeting of October 1982 was attended by the 'big four' and constituted a pre-meeting and that the final note of 20 October 1982 (referred to in point 68 of the Decision) was relied on in the main statement of objections (point 124 of the main statement of objections).

06 The Commission therefore considers that the fact that the applicant did not attend the 'bosses" and 'experts" meetings is not relevant and that it is safe to conclude that the applicant contributed to the fixing of prices and applied them in concert with the Shell group companies and that it cooperated in the quota system.

(c) Assessment by the Court

07 The Court finds that the Commission was fully entitled to deduce from the various pieces of evidence mentioned in the Decision — in particular, ICI's reply to the request for information (main statement of objections, Appendix 8), the various meeting notes and the tables setting out the previous sales figures and quotas for various producers — that a system of regular meetings of polypropylene producers was developed from December 1977, that 'bosses" and 'experts" meetings were held from the end of 1978 or the beginning of 1979, that the purpose of those meetings, initially chaired by Monte and then by ICI, was, in particular, to fix price and sales volume targets and to adopt various measures designed to facilitate the implementation of the target prices and that at those meetings there emerged common purposes concerning those targets and measures.

08 Moreover, it is to be noted that the allegation made against the applicant in the Decision is not that it participated in 'bosses" and 'experts" meetings but that it was in close contact with participants in those meetings, supplying information relating to its commercial policy, sending its national companies to local meetings devoted to implementing at the national level measures agreed at 'bosses" and 'experts" meetings, participating in meetings with certain participants in those meetings and having bilateral contacts with them.

109 The question is, therefore, whether the Commission has proved to the requisite legal standard that there were contacts between the applicant and the participants in the 'bosses" and 'experts" meetings between the end of 1977 and September 1983.

110 As regards more specifically the period between the end of 1977 and 1978, the applicant, in continuation of the common purpose which emerged in 1977, attended two EATP meetings, the minutes of the first of which, held on 22 November 1977 (main statement of objections, Appendix 6), show that various producers expressed their support for the announcement made publicly by Monte that it would be increasing its prices and that the applicant made this statement:

'any opportunity to achieve more realistic polypropylene prices will have the full support of Shell. We also noticed the moves in Italy and I feel certain that these are going to spread across Europe'.

The minutes of the second of those meetings, held on 26 May 1978 (main statement of objections, Appendix 7), disclose the various producers' assessments of the results obtained on the market following the first meeting of 22 November 1977. At the meeting on 26 May 1978, the applicant stated:

'We have heard most people, both in the informal discussions and around the table this morning plead for stability and cooperation in the economic situation of slow growth in which we find ourselves and with the situation of low demand for our products and surplus capacity [...] Last November, I mentioned that the losses being incurred by the polymer producers, by the chemical producers of the world were reaching very large proportions. We have seen further company reports in the last 6 months which have confirmed this, and I put it to you that the magnitude of the sums of money being lost by the chemical industry and by the polymer producers over the coming years are going to lead to some fundamental thinking as [...].'

11 Furthermore, in its reply to the statement of objections the applicant stated that, as regards the period from 1978 to September 1983,

'SICC/SCITCO knew that multilateral meetings between producers were taking place from time to time and that the subject matter of the discussions at such meetings included "target" prices. Prior to meetings SICC/SCITCO's views were sometimes sought on general market conditions including as to the feasibility of price increases. After multilateral meetings had taken place, the service company was sometimes informed (by ICI or Montepolimeri) that particular price "targets" had been proposed, and passed this market information to the operating companies. SICC/SCITCO's support might be sought for the proposed move, and in response the service company would make it clear that it could not commit the Shell operating companies even to work towards the goal of attaining the "target" prices. [...] SICC/SCITCO informed the operating companies of the "target"

price as part of a general market intelligence service that it provided to the operating companies. It did not ordinarily tender advice as to the appropriate action the operating companies should take. On occasions, however, it would commend to the operating companies moves towards higher prices as a means of reducing losses; but on other occasions SICC/SCITCO would agree with operating companies that they should hold current prices so as to retain volume and market share. The operating companies would make their own pricing decision on their evaluation of the local market, bearing in mind their volume objectives.'

112 It is to be noted that the applicant has confirmed those facts in its pleadings to the Court and that ICI's reply to the request for information (main statement of objections, Appendix 8) also confirms their truth since ICI there states:

'The relationship between these producers [Alcudia, Amoco, BP, Hercules and Shell] and producers which participated was simply one whereby these producers would usually be advised of the upshot (if any) of meetings.'

13 Furthermore, that evidence is confirmed by contemporaneous documentary evidence of the matters alleged.

14 Thus, the Court finds that the existence of contacts between the applicant and the participants in the 'bosses" and 'experts" meetings is confirmed by the fact that the applicant's sales figures for various months and years appear beside its name in various tables (main statement of objections, Appendix 55 et seq. and main statement of objections, Appendices 23, 25, 28 and 32). 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. 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 data relating to Shell contained in those tables had been provided by Shell itself.

15 That conclusion is confirmed by ICI's reply to the request for information since that document does not contain with regard to Shell the same qualification expressed in regard to Amoco, Hercules and BP on the matter of the origin of the sales figures for it appearing in those tables, that qualification being, as far as those producers were concerned, that they

'did not report as a group, they did not report individually, and they were not represented at the meetings. In passing it should be stated that even when Hercules did attend meetings they would not report their figures.

By way of explanation, Amoco/Hercules/BP are "grouped" together in the table because, in the absence of any specific data relating to their sales volume, their sales volume was calculated by deducting from known total sales for West Europe (derived from FIDES data) the total of sales made by other producers which had declared details of their sales volume.'

116 Besides that evidence, it must be pointed out first of all that it is clear from the applicant's reply to the statement of objections that the Shell group operating companies participated in local meetings for the United Kingdom (six a year), for Belgium (every four to six weeks), for Italy (regularly), for Denmark (occasionally) and for the Netherlands (in September 1983). Although the applicant claims that the purpose of participation in those meetings was to obtain general information about the market, the only two notes of those meetings which are available show that the purpose of the meetings was to discuss at the local level the measures decided on at 'bosses" and 'experts" meetings. The note of the local meeting for the United Kingdom of 18 October 1982 (main statement of objections, Appendix 10), in which Shell UK participated, shows that the producers which attended exchanged information on sales which they had made above and below the target price, examined certain anomalies of the market and analysed the situation in relation to their respective customers. The purpose of those meetings is borne out by the note of the 'experts" meeting of 9 June 1982 (main statement of objections, Appendix 25), in which it is stated that:

'From this it was felt that it was impossible to reach the target level of 36 Bfr/kg etc. in June, ICI & DSM pressed for a major push in Belgium as it would have beneficial effects on the surrounder countries + bring Shell back into the fold without any producers having to put too much at stake in terms of volume. After a lot of discussions DSM agreed to call a meeting on 16th June to be attended by some marketing managers as well as local representatives. The objectives would be to quote the target levels absolutely rigidly for July.'

It is apparent from the applicant's reply to the statement of objections that it participated in the meeting which was held on 16 June.

117 Secondly, it must be stated that in 1981 the applicant participated in two meetings, the first, held on 27 May 1981, being between Shell and ICI, and the second, held on 15 June 1981, between Shell, ICI and Monte (main statement of objections, Appendix 64), in 1982 in two meetings attended by representatives of the 'big four' held on 13 October and 20 December 1982, and in 1983 in five such meetings. In this regard, it is to be noted that the applicant's contention that those meetings formed only a part of the meetings of the 'big four' lacks foundation since the applicant has stated in reply to a question from the Court that it has no knowledge of any other pre-meeting between ICI, Hoechst and Monte on any other occasion.

118 The applicant claims that the purpose of those meetings was independent of that of the 'bosses" and 'experts" meetings. However, on the basis of the notes relating to the contacts between the applicant and the other 'majors', the Court considers that the purpose of those meetings was closely linked to that of the 'bosses" and

'experts" meetings. The notes of the two 1981 meetings show that their purpose was to discuss the level of prices and quota systems, since in the first note (main statement of objections, Appendix 64a) it is stated

'This meeting was arranged to review the polypropylene scene and to seek SICC's views on the volume scheme put forward by Montepolimeri in Rome [...] Current price levels were compared and Shell seemed to have much the same view as ourselves'

(there then follows a price list) and in the second note (main statement of objections, Appendix 64b) it is stated:

'Possible solutions included (a) sanctions (not a great success so far on PVC), (b) control production which is within the power of the bosses (L. [the applicant's representative] thought propylene availability might scupper this), (c) quotas which Z. favoured but L. discounted, (d) new initiative by the 4 majors whereby they accommodated the hooligans in Europe and made up the loss by sales in ROW markets. Given that W European sales would probably not exceed 105 kt/month for the next few months and then not over 125 kt for the remainder of the year say 115 kt average for July-Sept and exports continued at 30 kt/month there would still be a surplus of capacity of 10 kt/month. Shared by the Big Four each would have to drop 2.5 kt/m in Europe equivalent to 30 kt/yr of say 2.3% market share. I said that despite L."s contention about ROW prices that such a proposal

would be totally unacceptable to us, (e) a flat price increase of say 20 pf/kg wef 1st July — this avoids unrealistic requirements for the lowest priced business.'

19 The Court considers that the purpose of the meetings of the 'big four' which took place the day before the 'bosses" meetings was to determine the steps which they could take together in order to raise prices, as is shown by a summary note prepared by an ICI employee in order to inform one of his colleagues about what had transpired at a pre-meeting on 19 May 1983 which the 'big four' had attended (main statement of objections, Appendix 101). That note mentions a proposal to be submitted to the 'bosses" meeting on 20 May. With regard to that note, ICI states in its reply to the request for information:

'A meeting of the "Big Four" which had taken place on 19 May 1983 immediately prior to a "Bosses" meeting held on 20 May. The "Big Four Pre-meeting" took place in Barcelona. [...] the outcome of the meeting was a proposal for a "Target Price" for raffia of DM 1.85/kg with effect from 1 July 1983.'

It is also to be noted that the note of the 'experts" meeting on 1 June 1983 (main statement of objections, Appendix 40), which followed that of 20 May, states:

'those present reaffirmed complete commitment to the 1.85 move to be achieved by 1 July. Shell was reported to have committed themselves to the move and would lead publicly in ECN'.

In the aforementioned summary note it is stated: 'Shell to lead — ECN article 2 weeks. ICI informed'.

120 This is also apparent from the note of telephone conversations which the applicant had with ICI on 9 and 10 September 1982, in which it is stated:

'I spoke to L. to get his reaction to the sugges[tion] that the 4 majors might operate a compensation scheme amongst themselves whilst the price initiative was being forced through' (main statement of objections, Appendix 95).

121 The Court therefore considers that the applicant's absence from the 'bosses" and 'experts" meetings was not accidental. It was part of a deliberate strategy on the applicant's part to benefit from the anticipated advantages of those meetings without taking the risks involved in participation in meetings attended by such a large number of producers, remaining in contact with them without actually participating. This is apparent from an internal note of the applicant of 15 February 1982 (main statement of objections, Appendix 94), in which, after remarking on the ineffectiveness of the price initiatives of the 'big four', it states that:

'SCITCO will NOT participate in any poly-competitor meetings, but will try to keep informed of their activities & ambitions through CITP bilateral contacts.'

In the context of the whole of the document in question the phrase 'poly-competitor meetings' must be interpreted not as meaning 'polypropylene competitor meetings' but as meaning 'multi-competitor meetings', for two reasons. First, everywhere else in this and the other documents the word 'polypropylene' is abbreviated as 'PP', not 'poly', and the phrase 'poly-competitor meetings' must be understood as expressing a distinction in relation to the phrase 'bilateral meetings' which appears four lines later in the document. Secondly, that reading of the document is corroborated by another document from ICI dated 18 October 1982 (main statement of objections, Appendix 96), in which it is stated:

'L. of SCITCO said that [...] he would be willing to attend meetings of the big four but not wider gatherings.'

22 Furthermore, the presence of Shell operating companies at the local meetings and the applicant's presence at the meetings of the 'big four' assisted in the setting of target prices and sales volumes at the 'bosses" and 'experts" meetings.

23 The Court accordingly finds that the applicant maintained regular contacts with the participants in the 'bosses" and 'experts" meetings and that those contacts had the same purpose as those meetings.

124 The Court considers that those findings are not weakened by the fact that the Commission did not make the same findings against Amoco and BP, whose names also appear in the abovementioned tables. The cases of those undertakings differ from the applicant's case in so far as Amoco and BP did not participate in any of the producers' meetings whose purpose was, in particular, to fix price and sales volume targets, whereas Shell group operating companies participated in the local meetings and the applicant participated in the meetings attended by the major producers which were held in 1981, 1982 and 1983. Consequently, the Commission could justifiably take the view that it did not have sufficient evidence of Amoco's or BP's participation in cooperation having an anti-competitive purpose (Decision, point 78, last paragraph). The existence of such cooperation constitutes, however, the basis of the mode of proof used in the Decision. Furthermore, neither Amoco nor BP was among the producers which in 1977 arrived at common purposes concerning floor-prices or a price initiative from 1 December of that year. Consequently, the differences in situation ascertained between those undertakings and the applicant justified different treatment.

125 It follows that the Commission has established to the requisite legal standard that between 1977 and September 1983 the applicant maintained regular contacts with other polypropylene producers who were involved in a system of regular meetings, that those contacts had the same purpose as those meetings, that the Shell operating companies participated in local meetings whose purpose was an extension of that of the 'bosses" and 'experts" meetings in which the applicant did not participate and that the applicant participated in meetings with other major producers in 1981, 1982 and 1983.

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

126 According to the Decision (points 28 to 51), a system for fixing price targets was implemented through price initiatives of which six could be identified, 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, the fifth from September to November 1982 and the sixth from July to November 1983. It was allegedly agreed (Decision, point 26, second paragraph) that if the price initiatives were to be sustained, conditions favourable to a price increase had to be

created. Accordingly, various measures to assist the implementation of a planned initiative were recommended or agreed upon from time to time in meetings. Furthermore, it was generally recognized that in order to achieve market conditions favourable to the success of agreed price initiatives some permanent system of volume control was required (Decision, point 52, first paragraph).

C.1. 1979 and 1980

(a) The contested decision

27 With regard to the first price initiative, the Commission (Decision, point 29) states that it has no detailed evidence of any meetings held or price initiatives undertaken in the first part of 1979. However, a note of a meeting held on 26 and 27 September 1979 shows that a price initiative had been planned based on a raffia grade price of DM 1.90/kg applicable from 1 July and DM 2.05/kg from 1 September. That, it says, is confirmed by the minutes of a Shell internal meeting held on 5 July 1979, in which it is stated: 'the price target for 1 July 1979 was DM 1.90/kg but this level was not being achieved particularly in France or Germany'. Monte was reported in the trade press as planning to increase prices to the DM 2.05/kg level on 1 September, with Shell and ICI supporting the move. The Commission has price instructions from certain producers other than ICI and Shell showing that those producers had given orders to their sales offices to apply that price level or its equivalent in national currencies from 1 September, in most cases before the planned price increase was announced in the trade press (Decision, point 30).

28 The Decision (point 31) states that by the end of September 1979 the raffia price had reached between DM 1.70 and 1.75/kg, somewhat short of the target. The minutes of a Shell polypropylene business group meeting held on 12 September 1979 records that: 'The chairman noted that the price target for September of DM 2.05/kg had not been achieved and this was particularly damaging to Shell in view of our high level of overheads ... It was difficult to get further price increases without the push which would be provided by monomer price increases particularly when some competitors were profitable at the current selling price levels.'

129 Accordingly, since it was difficult to get further price increases, the producers decided at the meeting held on 26 and 27 September 1979 to postpone the date for implementing the target by several months until 1 December 1979, the new plan being to 'hold' the existing levels over October with the possibility of an immediate step increase to DM 1.90 or 1.95/kg in November (Decision, point 31, first and second paragraphs).

130 Whilst admitting (in point 32 of the Decision) that no meeting notes were found for 1980, the Commission states that at least seven producers' meetings were held in that year (reference is made to Table 3 of the Decision). Although at the beginning of the year producers were reported in the trade press as favouring a strong price push during 1980, a substantial fall occurred in market prices to a level of DM 1.20/kg or less before they began to stabilize in about September of that year.

131 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.

132 The Decision (point 52) 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 that 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.

133 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 to 1979 compared with actual tonnage sales achieved during that period in western Europe (Decision, point 54).

134 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 too 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.

(b) Arguments of the parties

135 The applicant denies having taken part in the price initiatives which, according to the Decision, were decided on at 'bosses" and 'experts" meetings in which it did not participate.

136 The applicant points out that during the administrative procedure the Commission never mentioned an alleged price initiative in July 1979 or the participation of Shell companies in any such agreement, and that in the Decision the Commission refers to a note of a Shell internal meeting held on 5 July 1979 (Shell reply to the statement of objections, Appendix 9) on which Shell was never asked by the Commission to provide its comments. Accordingly, there is no proof on the basis of which Shell companies can be accused of participating in a price agreement in July 1979, especially when the particularly competitive situation on the market is examined.

137 As regards 1979, the applicant observes that the Commission is simply relying on the fact, which is not conclusive, that once Shell learned from the trade press of the price increase planned by Monte it expressed its support for that increase in an article which appeared in ECN on 30 July 1979. It further points out that if the Commission also intends to rely on the note of a Shell internal meeting held on 12 September 1979 (Shell reply to the statement of objections, Appendix 10), the previous remarks concerning the note of the meeting of 5 July 1979 also apply. Moreover, that document is misquoted and therefore misinterpreted by the Commission.

138 It states that there is no evidence whatsoever that it contributed to the postponement of a target from September to December 1979 or that it ever took any measures to implement a September target. On the contrary, the contemporary evidence shows that at that time it set its prices in an independent manner after normal negotiations with customers.

139 As regards quotas, the applicant submits that in its reply to the statement of objections it rebutted all the Commission's allegations, pointing out in particular that the Shell group companies independently determined their own volume targets; that the establishment of their budgets and plans regarding production and sales generally preceded the meetings and were not subsequently revised in the light of the outcome of those meetings, even where the market share allocated to Shell by the other producers was higher than the target set for itself by Shell; that the companies' planned figures and their realized sales volumes differed substantially from those allowed for Shell by the other producers and, finally, that Shell companies did not attend the meetings and Shell had no knowledge of the quotas ascribed to other producers and did not exchange information with them. According to the applicant, therefore, the Shell companies pursued their own policy, determined in complete independence, as regards the volume of sales.

140 It submits in particular that the reference to 'targets' for Shell in various documents from other producers has no probative value, first of all because those figures could have been allocated to the applicant by other producers without its

consent on the basis of available market figures and secondly because those figures corresponded neither to Shell's internal targets nor to the sales which it achieved on the market.

141 The Commission, for its part, explains that as regards the July-December 1979 price initiative it made no separate finding of the existence of an agreement in July 1979; it took the view that there had been an agreement and a concerted practice and that the July-December 1979 initiative formed part of it.

142 As regards September 1979, the Commission points out that all the evidence on which it relies clearly shows that Shell had information about the actions of the other producers which could not be gleaned from the press and that it adopted a common objective, since it gave price instructions for the United Kingdom (Appendix A, letter of 29 March 1985) which corresponded exactly to the price instructions given by ICI following a producers' meeting (main statement of objections, Appendix 12) and the price instructions of other producers. In its rejoinder, the Commission concedes that the applicant's price instructions bear the same date as Monte's announcement in ECN of a price increase but considers that unimportant, since the promptness shown by the applicant indicated earlier contacts.

143 It adds that it has never claimed that there was a new price agreement for December 1979 (or even an initiative) but simply that the target for September was put back to December.

144 The Commission considers that the applicant's participation in the quota agreements for 1979 is established by an undated table found at the premises of ICI (main statement of objections, Appendix 55) headed 'Producers' Sales to West Europe', which sets out for all the polypropylene producers in western Europe the sales figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual' and 'revised target'. Shell was allocated a 'revised target' of 150.3

kilotonnes and a '1979 actual' of 144.8 kilotonnes. That table contains information which must be kept strictly secret as confidential business information and could not have been drawn up without Shell's participation.

145 It adds that the minutes of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12) confirms that the question of quotas was the subject of producers' meetings held at that time.

146 The Commission contends that an agreement on quotas was also made in respect of 1980. It bases that contention essentially on a table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60) and headed 'Polypropylene — Sales target 1980 (kt)', which compares for all the producers of western Europe a '1980 target', 'opening suggestions', 'proposed adjustments' and 'agreed targets 1980'. That document shows the process whereby quotas were drawn up. According to the Commission, ICI stated in relation to that document in its reply to the request for information (main statement of objections, Appendix 8) that 'the source of information for actual historic figures in this table would have been the producers themselves'. That analysis is confirmed, in the Commission's view, by the note of the two January 1981 meetings (main statement of objections, Appendix 17) at which sales volume targets were compared with the quantities actually sold by producers.

147 The Commission emphasizes that the aim of the quota system was to stabilize market shares. That is why, in its view, the agreements related to market shares, which were then converted into tonnages for use as reference figures, since if they had not been converted it would not have been possible to determine from what moment a participant in the cartel was obliged to restrain its sales in order to comply with the agreements. For that purpose it was essential to forecast the total volume of sales. Since the initial forecasts for 1980 proved to be too optimistic, the total volume of sales originally anticipated had to be adjusted several times, leading to adjustments in the tonnages allocated to each of the undertakings.

(c) Assessment by the Court

148 The Court considers that it is necessary to examine the applicant's participation in the July-December 1979 price initiative and the quota system for 1979 and 1980 in the light of the applicant's contacts with the participants in the 'bosses" and 'experts" meetings, contacts for which the Commission has proved to the requisite legal standard to have occurred.

149 On 30 July 1979 Shell sent its national companies an internal memorandum entitled 'Polypropylene increase — 1st September, 1979' (Appendix Shell A1, letter of 29 March 1985). That memorandum sets out prices identical to those of Shell's competitors which were to come into force on 1 September 1979. It refers expressly to an ECN article of 30 July 1979 which reports the announcement by Monte of an increase in its prices at the end of August and the support given by ICI and Shell to that initiative. The memorandum followed a telex message sent by Shell to the group operating companies on 24 July 1979 (Appendix A1, Shell's reply to the letter of 29 March 1985) which states:

'ECN have advised us that Montedison have issued a statement to the effect that they will be raising their polypropylene prices in Europe w. e. f. 27/8/79 to DM 2.05 kg [. . .] for homopolymer. This will be published in this week's ECN. Monte also indicated that there will need to a further increase before the end of 1979 [. . .].'

Consequently, the Court considers that ICI, Monte and Shell acted in concert to raise prices to DM 2.05/kg at the end of August or beginning of September, either directly or indirectly through ECN, and that that concerted action resulted in a common intention between those three producers which was made public on

30 July 1979 in ECN and by a Shell internal memorandum of the same day which was widely distributed. Those are the only matters alleged against the applicant in points 29 to 31 of the Decision.

150 That finding is not affected by the fact that in the various documents sent out by the applicant the price increase decided upon is justified by a reference to various economic factors such as the price of raw materials or wage costs, or the fact that it was not possible to achieve that increase on the market. Although the economic factors to which reference is made do justify a price increase, they do not justify an increase of an equal amount, to the last pfennig, for all the undertakings or a virtually identical date for its introduction. Even if it were established that it was not possible to implement the price increase decided upon, that fact could not disprove the applicant's participation in the fixing of price targets; it might at most show that the applicant had not implemented them. Indeed, the Decision in no way asserts that the prices charged by the applicant always corresponded to the price targets agreed upon, which shows that the contested measure does not rely on the implementation of those targets by the applicant in order to establish that it participated in fixing them.

151 As regards the applicant's participation in the quota system during the years in question, it must be observed that its name appears in various tables (main statement of objections, Appendices 55 to 61) whose content clearly indicates that they were intended to be used in setting sales volume targets; the applicant participated actively in drawing up those tables (see paragraphs 114 and 115 above).

152 The terms used in the tables relating to the years 1979 and 1980 (such as 'revised target', 'opening suggestions', 'proposed adjustments', 'agreed targets') justify the conclusion that common intentions regarding those sales volume targets emerged between the participants in the meetings and that the applicant contributed to them by providing its own sales figures and was informed of them, since ICI stated in its reply to the request for information (main statement of objections, Appendix 8)

that Shell and other producers 'would usually be advised of the upshot (if any) of meetings'.

153 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 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 upon 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.

154 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, not including the applicant, compared quantities actually sold ('Actual kt') with the targets which had been 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) which compares two columns, one setting out the '1980 Nameplate Capacity' and the other the '1980 Quota' for the various producers.

155 It follows from the foregoing 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 a price target of DM 2.05/kg for 1 September 1979 under the July-December 1979 price initiative and sales volume targets for 1979 and 1980.

C.2. 1981

(a) The contested decision

156 As regards the January-May 1981 price initiative, price instructions issued by a number of producers — DSM, Hoechst, Linz, Monte, Saga and ICI — allegedly indicate that in order to re-establish price levels targets were set for December 1980 to January 1981 based on raffia at DM 1.50/kg, homopolymer at DM 1.70/kg and copolymer DM 1.95 to 2.00/kg. A Solvay internal document includes a table comparing 'achieved prices' for October and November 1980 with what are referred to as 'list prices' for January 1981 of DM 1.50/1.70/2.00/kg. The original plan was to apply these levels from 1 December 1980 (a meeting was held in Zurich on 13 to 15 October) but this initiative was postponed to 1 January 1981 (Decision, point 32, third paragraph).

157 The Decision (point 33) states that two producers' meetings were held in January 1981, at which it was decided that a price increase agreed on in December 1980 for 1 February 1981 on the basis of DM 1.75/kg for raffia should be carried out in two stages: the 1 February target was to remain at DM 1.75/kg and a target of DM 2.00/kg was to be introduced 'without exception' from 1 March. A table was drawn up in six national currencies of the target prices for six principal grades, to come into effect on 1 February and 1 March 1981. Documents obtained at the premises of Shell show *inter alia* that it took steps to introduce the target prices set for February and March.

158 According to the Decision (point 34), the plan to move to DM 2.00/kg on 1 March does not, however, appear to have succeeded. The producers modified their expectations and now hoped to reach the DM 1.75/kg level by March. An experts' meeting, of which no record survives, was held in Amsterdam on 25 March 1981 but immediately afterwards at least BASF, DSM, ICI, Monte and Shell gave instructions to raise target (or 'list') prices to the equivalent of DM 2.15/kg for raffia, effective on 1 May. Hoechst gave identical instructions for 1 May but was some four weeks behind the others in doing so. Some of the producers allowed their sales offices flexibility to apply 'minimum' or 'rock bottom' prices somewhat below the agreed targets. During the first part of 1981 there was a strong upward movement in prices, but despite the fact that the 1 May increase was strongly promoted by the producers momentum was not maintained. By mid-year the producers anticipated either a stabilizing of price levels or even some downward movement as demand fell during the summer.

159 As regards the August-December 1981 price initiative, the Decision (point 35) states that Shell and ICI had already foreseen a further price initiative in September/October 1981 in June of that year when the slowing down of the first quarter price rise had become apparent. Shell, ICI and Monte met on 15 June 1981 to discuss methods of implementing higher prices in the market. Within a few days of this meeting both ICI and Shell instructed their sales offices to prepare the market place for a major rise in September based on a plan to move the raffia price to DM 2.30/kg. Solvay also reminded its Benelux sales office on 17 July 1981 to warn customers of a substantial price increase due to take effect on 1 September, the exact amount of which was to be decided in the last week of July, when an experts' meeting was planned for 28 July 1981. The original plan to go for DM 2.30/kg in September 1981 was revised, probably at this meeting, with the planned level for August back to DM 2.00/kg for raffia. The September price was to be DM 2.20/kg. A handwritten note obtained at the premises of Hercules and dated 29 July 1981 (the day after the meeting, which Hercules probably did not attend) lists these prices as the 'official' prices for August and September and refers in cryptic terms to the source of the information. More meetings were held in Geneva on 4 August and in Vienna on 21 August 1981. Following these sessions, new instructions were given by producers to go for a price of DM 2.30/kg on 1 October. BASF, DSM, Hoechst, ICI, Monte and Shell gave virtually identical price instructions to implement these prices in September and October.

160 According to the Decision (point 36), the plan now was to move during September and October 1981 to a 'base price' level of DM 2.20 to 2.30/kg for raffia. A Shell document indicates that originally a further step increase to DM 2.50/kg on 1 November had been mooted but was abandoned. Reports from the various producers showed that during September prices increased and the initiative continued into October 1981 reaching achieved market prices of some DM 2.00 to 2.10/kg for raffia. A Hercules note shows that during December 1981 the target of DM 2.30/kg was revised downwards to a more realistic DM 2.15/kg, but reports that 'general determination got prices up to DM 2.05, the closest ever to published (sic) target prices'. By the end of 1981, the trade press was reporting polypropylene market prices as raffia DM 1.95 to 2.10/kg, some 20 pfennig below the producers' targets. Capacity utilization was said to be running at a 'healthy' 80%.

161 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. In the course of those negotiations ICI and Shell met at least twice, on 27 May and 15 June 1981, and Monte was present at one of those meetings. Shell showed some scepticism in relation to the proposals made at those discussions, since in its view the proposals were based on over ambitious estimates of the market, but it nevertheless stated that it would be content with a market share of 11 to 12%. The Decision (point 87, third paragraph) states that the scepticism expressed by Shell concerning quota schemes at the same time as it was indicating to ICI what allocation was acceptable to it may be viewed in perspective; in a complex cartel some producers at one time or another may not express their definite assent to a particular course of action agreed upon by the others but nevertheless indicate their general support for the scheme in question and conduct themselves accordingly. 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 at 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).

(b) Arguments of the parties

162 The applicant denies that it took part in the two 1981 price initiatives, that is to say that of January to May 1981 and that of September to December 1981. As regards January 1981, the applicant points out in its pleadings submitted to the Court that the Commission accuses it of participation in a pricing agreement, although no such charge appears to be made in the Decision. That charge is not justified, because the similarity between the price recommended by the applicant to the Shell group operating companies and the price allegedly agreed upon is to be observed only in the case of raffia. Indeed, the lack of similarity between the price allegedly agreed upon and the price charged for copolymer shows that the similarity in respect of raffia was not the result of collusion.

163 As regards February 1981, it considers that the Commission is wrong to assert that Shell group operating companies took steps to achieve price targets fixed at a producers' meeting. On the contrary, the price 'instructions' issued by Shell subsequent to the meeting on 26 January 1981 (Appendix C1, Shell reply to the letter of 29 March 1985) led the operating companies to invoice prices lower than those target prices.

164 As regards March 1981, the applicant points out that one of the Shell group operating companies (Shell UK) attempted to obtain prices appreciably lower that the target prices (Shell UK memorandum of 23 February 1981, Appendix C2, Shell reply to the letter of 29 March 1985). It further states that although the operating companies tried to move prices towards a level which happened to correspond to the target price, it cannot be inferred from that, without misinterpreting the documents (Appendices C2 and C2, letter of 29 March 1985), that it sought thus to implement the target price.

165 As regards May 1981, it states that in a telex message of 10 April 1981 (Appendix Shell D3, letter of 29 March 1985) it recommended prices lower than the target prices to the operating companies, that several of those companies adopted even lower price objectives and indicated that the target prices could not be reached (Shell UK memorandum of 29 and 30 April 1981, Appendix Shell D2, letter of 29 March 1985, and Appendix D1, Shell reply to the letter of 29 March 1985) and, finally, that the actual prices were substantially lower.

166 With regard to the September-December 1981 price initiative, the applicant refers to its replies to the statement of objections and to the letter of 29 March 1985.

167 With regard to quotas, the applicant states that if an executive of the applicant company indicated that Shell could be content with a market share of 11 to 12% (main statement of objections, Appendix 64), that statement cannot be regarded as conclusive evidence, because the other producers knew that it could not bind the Shell companies. The notes of the meetings in May and June 1981 (main statement of objections, Appendix 64) show clearly that those discussions were not intended to achieve an agreement on quotas. If there were exchanges of information *ex post facto* on sales volumes, they were simply intended to gather commercial information in order to be able to compete more effectively and not in order to verify compliance with a quota agreement.

168 The Commission, for its part, states that the applicant's participation in the 1981 price initiatives is clear from the evidence that it has adduced. Accordingly, as regards January 1981, the prices recommended by Shell were the same as those contained in the price instructions of the other producers for the 'key' grade (raffia) and for homopolymer. Although the Commission admits that they were different for copolymer, it nevertheless considers that that cannot be sufficient to prove that Shell was conducting an entirely independent pricing policy.

169 As regards February 1981, the Commission states that the targets had been fixed in December 1980. At that time Shell issued recommendations incorporating those targets, although it is true that subsequently it sent out new recommendations revised downwards.

170 According to the Commission, that same intention to follow the agreed prices is also to be observed in relation to March and May 1981. For example, ICI and Shell gave identical instructions for April and May 1981 (Appendices C3 and D1 et seq. letter of 29 March 1985).

171 The Commission stresses that the fact that one or other of the Shell group operating companies may have decided to apply a price lower than the target price set does not mean that Shell had not begun by accepting a target price; that approach may be explained by an intention to 'cheat'.

172 The Commission recognizes that no definitive quota agreement could be reached for 1981. It states, however, that the producers reached agreement at the beginning of 1981 on a temporary scheme limiting monthly sales to one twelfth of 85% of the targets which had been agreed for 1980, as is shown by the note of the January 1981 meetings (main statement of objections, Appendix 17). Secondly, the producers monitored each other's actual sales on a monthly basis, as is shown in particular by a table dated 21 December 1981 found at the premises of ICI which sets out the monthly sales of the various producers in 1981 (main statement of objections, Appendix 67). Thirdly, ICI, Shell and Monte met twice on 27 May and 15 June 1981 in order to discuss proposals for quota agreements (main statement of objections, Appendix 64).

(c) Assessment by the Court

173 The Court considers that the applicant's participation in the price initiatives and the quota system in 1981 must be examined in the light of its contacts with the participants in the 'bosses" and 'experts" meetings, its participation in the meetings

on 27 May and 15 June 1981 (main statement of objections, Appendix 64) and the contents of an internal Shell memorandum of 15 February 1982 (main statement of objections, Appendix 94) entitled 'Market Quality PP.', in which it is stated:

'Price initiatives by PP majors (Hoechst, M-E, ICI, Shell) unlikely to have much effect (as usual: there are too many PP producers with differing objectives & perceptions).'

174 As regards the January-May 1981 price initiative, the Court observes that, contrary to the applicant's assertions, it is accused in the Decision (Table 7B) of taking part in fixing a price target for 1 January 1981. That accusation is based on the fact that the prices contained in a telex message sent by Shell to the Shell group operating companies on 17 December 1980 (Appendix Shell B/C1, letter of 29 March 1985) are identical to the price instructions sent by five other producers between 29 October and 15 December 1980 for raffia and homopolymer and to those of three of those producers for copolymer. In that regard it should be observed first of all that it is apparent from ICI's price instruction of 1 December 1980 (Appendix ICI B2, letter of 29 March 1985) that ICI had learned through the market that Shell had decided to increase its prices in November, that is to say before the meeting of 16 December 1980 referred to by the Commission, and, secondly, contrary to what appears in Table 7B of the Decision, Shell's price instruction of 17 December 1980 does not correspond to that of any other producer as regards copolymer, since the applicant shows a price of DM 1.80/kg while three other producers show a price of DM 2.00/kg and two a price of DM 1.95/kg, significantly higher prices. Consequently, Table 7B of the Decision gives a deceptive impression of similarity between the applicant's price and that of other producers as regards that grade of polypropylene. Since the Commission has not produced any other document showing the applicant's prices to be identical to those of other producers for that grade, the Court considers that the Commission cannot rely solely on the applicant's telex of 17 December 1980 in order to assert that Shell took part in fixing a price target for 1 January 1981.

75 As regards February 1981, the Commission seeks to implicate the applicant on the basis of Shell's telex of 17 December 1980 (Appendix Shell B/C1, letter of 29 March 1985) and the Shell UK internal memorandum of 21 January 1981 (Appendix Shell C2, letter of 29 March 1985), both of which show a price increase corresponding to that envisaged by its competitors. In response to that evidence the applicant has produced a Shell telex dated 26 January 1981 (Appendix C1, Shell reply to the letter of 29 March 1985) indicating prices for 1 February 1981 which differ both from the previous instructions and the instructions of the other producers and from the price targets set in the January 1981 meetings (main statement of objections, Appendix 17). It adds that, contrary to the Commission's assertions, the Shell UK memorandum of 21 January 1981 (Appendix Shell C2, letter of 29 March 1985) seeks a price increase for March 1981 and not for 1 February 1981. The Court considers first of all that the document produced by the applicant does not refute the conclusions drawn by the Commission from the previous documents. It was quite usual for the Shell group operating companies, after giving price instructions corresponding strictly to those of their competitors, to alter those instructions a few days before their entry into force when they considered that the price initiative decided upon had little chance of success. That is why the price initiatives frequently failed and the prices charged by the applicant on the market were frequently lower than the price targets which had been set, as the Commission acknowledged in the Decision. Secondly, the Court considers that, contrary to the applicant's assertions, the Shell UK memorandum of 21 January 1981 refers separately to its intention to follow the announcement of a price increase for February by the European producers, leading to the price mentioned both in its telex of 17 December 1980 and in the note of the January 1981 meetings (DM 1.75/kg for raffia), and to the price increase planned for 3 March. The applicant's argument cannot be squared with the various figures cited in the memorandum, since it refers to a price for January of DM 1.50/kg (UK £315/tonne) and a target for February of DM 1.75/kg (UK £360 to 370/tonne) and envisages a price increase of UK £20/tonne on 3 March.

76 As regards March 1981, the Court observes that in maintaining that Shell was involved in this part of the price initiative in question the Commission relies on a Shell UK internal memorandum of 21 January 1981 (Appendix Shell C2, letter of 29 March 1985) and on a Shell memorandum of 28 January 1981 (Appendix Shell C3, letter of 29 March 1985) which refers to a price target of DM 2.00/kg, corresponding strictly to the target price set at the January 1981 meetings and to its competitors' price instructions. In response to that evidence the applicant points

out that a Shell UK memorandum of 23 February 1981 (Appendix C2, Shell reply to the letter of 29 March 1985) indicates a price sharply lower than that price. The Court finds that the Commission correctly concluded from the abovementioned documents that the applicant had participated in this part of the price initiative in question, since it was quite normal for Shell to alter prices previously set a few days before their entry into force. It should be stressed that in a memorandum of 27 March 1981 (Appendix Shell D1, letter of 29 March 1985) Shell UK referred implicitly to its own memorandum of 21 January 1981 as the basis for calculating a price target for 1 April 1981, a price identical to those of Hoechst and Monte, and did not in any way refer to its memorandum of 23 February 1981.

177 As regards the price increase which was to come into force on 1 May 1981, the Court observes that in order to implicate the applicant the Commission relies on the Shell UK memorandum of 27 March 1981 and on a Shell telex of 10 April 1981 (Appendix Shell D3, letter of 29 March 1985), which both refer to a target price of DM 2.15/kg, the latter adding a minimum price of DM 2.00/kg. It points out that the Shell UK memorandum bears the same date as the price instructions of BASF, ICI and Monte, a day to two days after a producers' meeting which was held on 25 March. In response to that evidence the applicant states that the Shell UK memoranda of 29 April (Appendix Shell D2, letter of 29 March 1985) 30 April and 13 May (Appendices D1 and D2, Shell reply to the letter of 29 March 1985) indicated that the price levels previously cited could not be achieved. The Court finds that the Commission was fully entitled to infer from the Shell UK memorandum of 27 March 1981 and the Shell telex of 10 April 1981, viewed together with the meeting of 25 March 1981 and the price instructions issued by BASF, ICI and Monte, that Shell had taken part in a price initiative intended to come into force on 1 May. The fact that the telex of 10 April 1981 contained a target price and a minimum price only the first of which corresponded to the price instructions given by the other producers cannot refute that finding.

178 As regards the August-December 1981 price initiative, the Court finds that the Commission was correct to consider that the applicant took part in the preparation of that initiative with Monte and ICI at the meetings of 27 May and 15 June 1981. It appears from the note of the first of those meetings (main statement of objections, Appendix 64a) that the participants in that meeting, including Shell and

ICI, considered that the average price for raffia was DM 1.80/kg at the end of May. It appears from the note of the second meeting (main statement of objections, Appendix 64b) that the participants, including Shell, ICI and Monte, envisaged an increase of 20 pfs/kg on 1 July as a possible solution to the excessively low price level, and that it was on the basis of the outcome of that meeting that Shell determined the prices which it communicated to its operating companies on 17 June 1981 (Appendix Shell E1, letter of 29 March 1985), that is to say DM 2.00/kg applicable on 1 July (DM 1.80/kg + DM 0.20/kg).

79 As regards 1 September, the Court observes that the Commission bases its allegations once again on the Shell telex of 17 June 1981, which also refers to an initial target of DM 2.30/kg for September. According to the Commission, that target was probably reviewed at the meeting on 28 July 1981. The Commission goes on to refer to a Shell UK memorandum of 4 August 1981 (Appendix Shell E3, letter of 29 March 1985) which speaks of an increase of UK £40/tonne for homopolymer and copolymer from 5 September onwards. To that evidence it adds a Shell telex of 28 August 1981 (Appendix Shell E2, letter of 29 March 1985) which refers to a price target of DM 2.20/kg for the month of September, DM 0.20/kg 'higher than existing target of DM 2.00/kg'. The Commission considers that consideration of those price instructions together with the meetings of 4 and 21 August 1981 supports the conclusions which it reached. In response to that evidence, the applicant states that a Shell UK telex of 16 July 1981 and a Shell France telex of 17 July 1981 (Appendices E2 and E3, Shell reply to the letter of 29 March 1985) mention target prices different from those alleged by the Commission to have been fixed. It adds that Shell telexes of 4 and 20 August 1981 (Appendices E4 and E5, Shell reply to the letter of 29 March 1985) also mention different price targets for the month of September. The Court considers that the Commission has proved Shell's participation in the fixing of a price target for 1 September to the requisite legal standard inasmuch as the price contained in Shell's initial telex of 17 June 1981 manifestly constituted a very long-term objective ('we suggest you start discussions with your customers indicating a floor PP ff level of DM 2.30/kg') which was therefore subject to revision, the Shell UK memorandum of 4 August 1981 and the Shell telex of the same day show that at that point the September target had been lowered to DM 2.00/kg and the Shell telex of 28 August 1981 shows that on that date 'new business/orders should be based on a minimum of DM 2.20 for kg, DM 0.20/kg higher than existing target of DM 2.00 per kg'. Those findings are reinforced by the fact that producers'

meetings took place on 28 July and 4 and 21 August 1981 and that it appears from ICI's reply to the request for information (main statement of objections, Appendix 8) that the applicant was informed of upshot of producers' meetings.

180 As regards 1 October, the Court observes that in order to implicate Shell in this part of the price initiative the Commission relies on the Shell telex of 28 August 1981 (Appendix Shell E2, letter of 29 March 1985) which indicates a price target of DM 2.30/kg for 1 October and on a Shell UK memorandum of 8 September 1981 (Appendix Shell E4, letter of 29 March 1985) which announces an increase of UK £60/tonne for the beginning of October. In response to that evidence the applicant refers to the record of a Shell internal meeting of 24 September 1981 (Appendix E6, Shell reply to the letter of 29 March 1985) at which the Shell group operating companies indicated that they hoped to achieve a minimum price significantly lower than the targets. The applicant adds that the prices actually achieved on the market were sharply lower than the targets. The Court considers that the applicant's arguments do not shake the Commission's findings, inasmuch as reference is made in the note of 24 September 1981 to a price target for 1 October of DM 2.20/kg which was raised to DM 2.30/kg, which corresponds to the price target pursued by the other producers. Furthermore, it should be pointed out that the Shell UK memorandum of 8 September 1981 was written the day after BASF and ICI gave their price instructions and only four days after Monte and DSM did likewise.

181 It follows from the foregoing that the Commission has proved to the requisite legal standard that the applicant supported in the two initiatives which took place in 1981 and are described in points 32 to 36 of the Decision and in Tables 7B and 7G, except as regards the beginning of the first of these initiatives.

182 With regard to the applicant's participation in the quota system, 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 years 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.

83 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 probably 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').

184 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 notes of the January 1981 meetings, 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.'

185 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.

186 The first table shows that the producers exchanged their monthly sales figures information which an independent operator would keep strictly secret as

confidential business information, and that they compared those figures with the figures for 1980, as is indicated by the two other tables covering the same period.

7 The applicant's participation in those various activities must be inferred, first of all, from its contacts with the participants in the 'bosses" and 'experts" meetings. According to ICI's reply to the request for information (main statement of objections, Appendix 8), the applicant was informed of the decisions reached at those meetings, which, as the notes of the meetings of 27 May and 15 June 1981 (main statement of objections, Appendix 64) show, concerned volume arrangements. The first of those notes states that:

'this meeting was arranged to review the polypropylene scene and to seek SICCs' views on the volume scheme put forward by Montepolimeri in Rome. (. . .) As expected, Shell were unimpressed by the volume proposals as basically they are unconvinced that they work'.

In the second note it is stated:

'L. repeated his comments about quotas and Z. said only DSM, Saga and ICI had commented on his proposals. Possible solutions included (a) sanctions (not a great success so far on PVC), (b) control production which is within the power of the bosses (L. thought propylene availability might scupper this), (c) quotas which Z. favoured but L. discounted . . . '

Although those notes show that Shell expressed reservations regarding the quota system, they also show that it participated in the discussions concerning the implementation of such a system.

188 The applicant's participation must be inferred, secondly, from the fact that its name appears in the various documents mentioned above. Indeed, those documents contain figures which, it may be recalled, were provided by the applicant itself (see paragraphs 114 and 115 above).

189 The Court holds that the Commission was entitled to conclude from the mutual monitoring, at the 'bosses" and 'experts" meetings, of the implementation of a system for restricting monthly sales by reference to a previous period, monitoring which the applicant made possible by providing its sales figures, that that system had been adopted by the polypropylene producers.

190 It follows from the foregoing that the Commission has proved to the requisite legal standard, except as regards the beginning of the January-May 1981 price initiative, that the applicant was one of the polypropylene producers amongst whom emerged common purposes concerning that price initiative, the August-December 1981 price initiative and a limitation of their monthly sales for 1981 by reference to a previous period.

C.3. 1982

(a) The contested decision

91 According to the Decision (points 37, 38 and 39, first paragraph), the June-July 1982 price initiative took place as the market returned to balanced supply and demand. The initiative was decided upon at the producers' meeting of 13 May 1982, during which a detailed table of price targets for 1 June was drawn up for various grades of polypropylene in various national currencies (DM 2.00/kg for raffia) (Decision, points 37, 38 and 39, first paragraph).

92 The meeting of 13 May 1982 was followed by price instructions from ATO, BASF, Hoechst, Hercules, Hüls, ICI, Linz, Monte and Shell, corresponding, with a few insignificant exceptions, to the target prices set at the meeting (Decision, point 39, second paragraph). At the meeting on 9 June 1982, the producers were able to announce only modest increases.

93 According to the Decision (paragraph 40), a price initiative for September-November 1982 was decided upon at the meeting on 20 and 21 July 1982 and sought to achieve a price of DM 2.00/kg by 1 September and DM 2.10/kg by 1 October. At the meeting on 20 August 1982 the increase planned for 1 September was postponed until 1 October, and that decision was confirmed at the meeting on 2 September 1982 (Decision, point 41).

94 Following the meetings of 20 August and 2 September 1982, ATO, DSM, Hercules, Hoechst, Hüls, ICI, Linz, Monte and Shell gave price instructions in accordance with the price target set at those meetings (Decision, point 43).

95 According to the Decision (point 44), at the meeting on 21 September 1982 the measures taken to achieve the target previously set were examined and the undertakings expressed general support for a proposal to raise the price to DM 2.10/kg by November-December 1982. That increase was confirmed at the meeting on 6 October 1982.

196 Following the meeting of 6 October 1982, BASF, DSM, Hercules, Hoechst, Hüls, ICI, Linz, Monte, Shell and Saga gave price instructions applying the increase decided upon (Decision, point 44, second paragraph).

197 ATO, BASF, DSM, Hercules, Hoechst, Hüls, ICI, Monte and Saga provided the Commission with price instructions issued to their local sales offices which corresponded not only with each other in terms of amount and timing but also with the target price table attached to ICI's account of the 'experts" meeting held on 2 September 1982. The applicant admits attending a 'big four' meeting at Heathrow on 13 October (one week before the October 'bosses" meeting) and during September it was in regular contact with ICI regarding the October price initiative (Decision, point 45).

198 According to the Decision (point 46, second paragraph), the December 1982 meeting resulted in an agreement that the level planned for November-December was to be established by the end of January 1983.

199 Furthermore, 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 intended 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 the end of September 1982, a system of 'account management' designed to implement price rises to individual customers.

200 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 named 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 named 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 its 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.

The Decision (point 58) states that for a 1982 scheme complicated quota 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 (described by ATO as a 'quasi-consensus'); among the majors, ICI and Shell remained at about 11% with Hoechst slightly below (10.5%). Monte, always the largest producer, had advanced slightly to take a 15% market share compared with 14.2% the previous year.

(b) Arguments of the parties

202 In its pleadings submitted to the Court the applicant does not specifically deny participating in the 1982 price initiatives, but it considers that its criticisms concerning the 1977, 1979, 1981 and 1983 price initiatives are put forward simply as examples. For the rest, it refers to the written submissions it made during the administrative proceedings.

203 It argues — and the Commission does not contradict it on this point — that it did not take part in the meetings of 2 September 1982 (main statement of objections, Appendix 29) and 2 December 1982 (main statement of objections, Appendix 33), at which the 'account leadership' system was canvassed, although according to the Commission 'all the producers which participated in meetings at this time [from September 1982] (including Shell) were named as coordinators or leaders for at least one major customer' (Decision, point 27, last paragraph). Moreover, in Shell's view, it is not established that the producers which were present agreed to implement the system. In any event, Shell was not informed of it and the fact that other producers canvassed the possibility of Shell companies acting as 'account leaders' is not sufficient to demonstrate that those companies agreed to participate in the system.

204 According to the applicant, the Commission is wrong in believing that it can infer from the note of a producers' meeting in spring 1983 (main statement of objections, Appendix 37) that the applicant communicated individualized information about its customers which could have no relevance except in the context of the 'account leadership' system. No one in the Shell group knew what went on at that meeting and no Shell company participated in it or provided information to anyone for use at that meeting. A comparison of the note with the true facts demonstrated that the references to Shell were based upon surmises, in fact inaccurate, of other companies' sales forces and not upon a report of the actual position by any Shell company. BIHR, for which Shell was allegedly 'account leader', had its prices fixed according to the average of the prices of its other suppliers, which prevented Shell from leading a price up at BIHR or from indicating the prices it would apply in its regard; those prices could only be fixed *a posteriori.*

Finally, the applicant submits that the Commission cannot rely on the note of a Shell internal meeting of 17 March 1983 (main statement of objections, Appendix 53), because that note does not prove the company's participation in the system. Moreover, the Commission fails to mention the note of another Shell internal meeting on 14 March 1983 (particular objections, Shell, Appendix 42), which shows that Shell believed that as a major supplier it could not lead prices up at a sensitive account such as BIHR. Finally, Shell's participation in such a system would have been contrary to its policy which was based at that time on volume.

As regards quotas, the applicant argues that when Shell refused to participate in a compensation scheme, the scheme collapsed and no quota agreement was concluded. It is true that during those discussions a Shell executive indicated that Shell would be content with a market share of between 11% and 12%, but in view of the structure of the Shell group, under which Shell could not enter into commitments on behalf of the operating companies, the other undertakings could not possibly have understood that as the acceptance of a quota. In 1982 Shell had a market share in excess of 12% and operated at 98% of its effective production capacity; the other producers could not have been unaware of that.

For its part, the Commission refers to the evidence set out in the Decision in order to implicate the applicant in the 1982 price initiatives.

It considers that the evidence is indisputable that Shell companies attended meetings of the 'big four' and local meetings and they could not have remained ignorant for long about the 'account leadership' system and the role which they were to play in it (main statement of objections, Appendices 29 and 33), since they were informed of the outcome of the meetings, as ICI stated in its response to the request for information (main statement of objections, Appendix 8). It was only because they had good reason to believe that Shell was prepared to participate in the system that the other producers mentioned Shell as a possible 'account leader'.

209 According to the Commission, the note of a meeting in spring 1983 (main statement of objections, Appendix 37), confirmed by the internal note of a meeting of 17 March 1983 (main statement of objections, Appendix 53) shows that Shell supplied the other producers with specific information on customers in its role of 'account leader', in particular with regard to BIHR.

210 The Commission further points out that the system of 'account leadership' represented only one aspect of the agreements made between the producers.

211 As regards 1982, it states that no definitive quota agreement could be reached, despite the efforts made in this direction which, in its view, are proved by the various quota schemes discovered. However, a provisional solution was found in the form of a specific orientation of sales according to the figures for the previous year. The Commission states that the existence of discussions on the setting of quotas emerges from a large number of documents. Among those documents, reference must be made above all to the meeting notes drawn up by ICI, from which it is clear that information was exchanged on the quantities sold (main statement of objections, Appendices 24 to 26 and 31 to 33). Reference should also be made to various schemes found at the premises of ICI (main statement of objections, Appendices 69 to 71) and a fairly comprehensive proposal for 1982 originating from ICI (main statement of objections, Appendix 70).

212 The Commission states that the information on Shell contained in those documents must have been provided by Shell itself, as ICI's reply to the request for information indicates.

(c) Assessment by the Court

213 The Court considers that the applicant's participation in the price initiatives, the measures intended to facilitate the implementation of those initiatives and the quota system must be examined in the light of its contacts with the participants in the 'bosses" and 'experts" meetings, its participation in the meetings of the 'big four' and the participation of Shell group operating companies in local meetings.

14 As regards the June-July price initiative setting a price target for 14 June in the United Kingdom, which was decided on at an 'experts" meeting on 13 May 1982 (main statement of objections, Appendix 24), the Commission relies on a Shell UK memorandum of 17 June 1982 (Appendix Shell F1, letter of 29 March 1985), which refers to a price increase of UK £50/tonne corresponding to the target price set for 21 June. In response to that evidence, the applicant states that since the Commission has admitted that that initiative was not implemented, all it can add is that its prices in June remained the same as in May. The Court finds that although the Shell memorandum dates from more than a month after the meeting of 13 May 1982 and three days after the date of entry into force of the target price for June, it is nevertheless dated the day after a local meeting of 16 June 1982 which was convened in Belgium by DSM at the request of the other producers made at the meeting of 9 June 1982 (main statement of objections, Appendix 25). The objective of that meeting, in which Shell took part, was 'to quote the target levels absolutely rigidly for July'. That decision was taken following the realization by the producers that:

'it was impossible to reach the target level of 36 Bfr/kg etc. in June. ICI & DSM pressed for a major push in Belgium as it would have beneficial effects on the surrounding countries + bringing Shell back into the fold [without any producers having to put too much at stake in terms of volume]'.

Consequently, the Court considers that the result of the local meeting of 16 June 1982 was that Shell accepted the current price initiative, and the fact that that initiative was unsuccessful is irrelevant.

15 In order to demonstrate the applicant's participation in the September-December 1982 price initiative the Commission relies on a Shell UK note of 26 August 1982 (Appendix Shell G1, letter of 29 March 1985) asking the sales office to inform

United Kingdom customers of an increase with effect from 1 October 1982 and setting 'target levels' which corresponded precisely to those listed in the note of the 'experts" meeting of 2 September 1982 (main statement of objections, Appendix 29). A note dated 1 November on 'polyolefin commercial policy' recommends the retention of the existing floor-price structure, with an increase of UK £20/tonne in the United Kingdom as and when the Benelux and Scandinavian markets consolidated their prices at DM 2.00/kg and the Europeans started to ask for a further 10 pfennigs in November and December (Appendix Shell G2, letter of 29 March 1985). The Commission further refers to a note of 25 November 1982 recommending the introduction of the increase of UK £20/tonne in December, with the 'floor levels' moving to UK £490/tonne for raffia as soon as practicable in early December (Appendix Shell G3, letter of 29 March 1985). In addition, the note of a meeting chaired by SCITCO on 30 November, which the other Shell companies attended, mentions 'December targets' of DM 2.10/kg for raffia, DM 2.30/kg for homopolymer and DM 2.50/kg for copolymer (Appendix Shell G4, letter of 29 March 1985). Finally, a note made by ICI on the price movements resulting from the December producers' meetings contains a significant remark: 'Shell & ourselves have made good progress towards the £490 December levels . . .' (main statement of objections, Appendix 34). Shell had, however, expressed to ICI reservations about a further initiative, leading the writer to add: 'The most I could persuade them to consider was + £20/t in February to £510/t'. The note of the Shell meeting of 30 November shows that Shell UK's target for 1 February 1983 was indeed UK £510. In reply to that evidence the applicant argues that the Shell UK memorandum of 26 August 1982 was written a week before the meeting of 2 September 1982 at which, according to the Commission, the target price for October was fixed, and does not constitute a price instruction. It adds that its assertions are confirmed by the minutes of a Shell internal PIM meeting of 7 September 1982 (particular objections, Shell Appendix 30), at which it was stated that it would be difficult to achieve the target because of the refusal of certain Shell group operating companies to lose market share in order to pursue an unreasonable price policy, and by documents from other producers according to which Shell pursued a very competitive price policy. The applicant goes on to assert that the note of 1 November does not mention any price increase on Shell's part and that the note of 25 November contains an explanation of the need to increase prices in December, that is to say the weakness of the pound. Finally, it refers to a Shell UK note of 14 December (Appendix G1, Shell reply to the letter of 29 March 1985) according to which that increase was cancelled, which is confirmed by an ICI note entitled 'W. European Polypropylene situation December 1982' (main statement of objections, Appendix 34) which refers to Shell's aggressive price policy. Shell's prudence in relation to price increases is, it says, further shown by the note of the meeting of 30 November 1982. The Court finds that although the memorandum of 26 August 1982 was written before the meeting of 2 September 1982, it follows the 'bosses" meeting of 20 August 1982

and the local meeting for Belgium of 23 August 1982 in which one of the applicant's operating companies took part. It was at the meeting of 20 August 1982 (main statement of objections, Appendix 28) that the objective of DM 2.00/kg for 1 October 1982 was set. As regards the note of the internal meeting of 7 September 1982 (particular objections, Shell, Appendix 30), it should be pointed out that it states that while the economic circumstances are favourable to a price increase, the level of DM 2.00/kg can only be achieved in certain cases. For the rest, the Court observes that the applicant's arguments are directed simply at demonstrating that it was not able to implement the target prices on the market and not that it did not adhere to the agreement setting those target prices.

16 It follows from the foregoing that the Commission has established to the requisite legal standard that the applicant concurred in the two price initiatives which took place in 1982 and are described in points 37 to 46 of the Decision and in Tables 7H and 7J.

17 As regards the applicant's participation in the 'account leadership' system, the Court observes that the applicant denies not only that it took part in the system but also that the system was adopted and implemented by other producers. It is clear from the notes of the meetings of 2 September 1982 (main statement of objections, Appendix 29), 2 December 1982 (main statement of objections, Appendix 33) and spring 1983 (main statement of objections, Appendix 37) that during those meetings the producers present at them agreed to that system. The adoption of the 'account leadership' system is clear from the following passage in the note of the meeting of 2 September 1982:

'about the dangers of everyone quoting exactly DM 2.00 A."s point was accepted but rather than go below DM 2.00 it was suggested & generally agreed that others than the major producers at individual accounts should quote a few pfs higher. Whilst customers' tourism was clearly to be avoided for the next month or two it was accepted that it would be very difficult for companies to refuse to quote at all when, as was likely, customers tried to avoid paying higher prices to the regular suppliers. In such cases producers would quote but at above the minimum levels for October.'

218 The fact that that system was at least partially implemented is borne out by the note of the meeting of 3 May 1983 (main statement of objections, Appendix 38), in which it is stated:

'A long discussion took place on Jacob Holm who is asking for quotations for the 3rd quarter. It was agreed not to do this and to restrict offers to the end of June, April/May levels were at Dkr 6.30 (DM 1.72). Hercules were definitely in and should not have been so. To protect BASF, it was agreed that CWH[üls] + ICI would quote Dkr 6.75 from now to end June (DM 1.85) . . . .'

That implementation is confirmed by ICI's reply to the request for information (main statement of objections, Appendix 8), in which states in relation to that meeting note:

'In the Spring of 1983 there was a partial attempt by some producers to operate the "Account Leadership" scheme ... Since Hercules had not declared to the "Account Leader" its interest in supplying Jacob Holm, the statement was made at this meeting in relation to Jacob Holm that "Hercules were definitely in and should not have been so". It should be made clear that this statement refers only to the Jacob Holm account and not to the Danish market. It was because of such action by Hercules and others that the "Account Leadership" scheme collapsed after at most two months of partial and ineffective operation. The method by which Hüls and ICI should have protected BASF was by quoting a price of DK 6.75 for the supply of raffia grade polypropylene to Jacob Holm until the end of June.'

219 The Court considers that, contrary to the applicant's assertions, the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) shows that the system of 'account leadership' had been adopted at the meeting of 2 September (main statement of objections, Appendix 29), since it is stated that on 2 December 'the idea of account management was proposed for more general adoption', which indicated that the system had already been adopted previously in a more restricted guise. As to the probative value of the fact that the applicant's name is mentioned in the tables attached to the notes of those two meetings, in

which it did not take part, it should be pointed out that the applicant's name appears beside those of its largest customers in the United Kingdom both in the table attached to the first note and that attached to the second, but that the number of customers is reduced in the second and the name of its largest customer in France is added. Between those two meetings a Shell group operating company took part in local meetings for the United Kingdom on 13 September, 18 October and 15 November 1982, and the applicant took part in a meeting of the 'big four' on 13 October 1982. In the light of that evidence, the Court does not find it credible that the applicant was not informed by its competitors during those four meetings of the adoption at the meeting of 2 September 1982 of the 'account management' system. Consequently, the fact that Shell's name was retained in the list of 'account leaders' for others of its major customers in the table attached to the note of the meeting of 2 December 1982 indicates at least that it had not put forward any objection in principle to its participation in the system and that it was not therefore only after the meeting of 2 December 1982 that the applicant was informed of the existence of proposals for 'account leadership', as it asserts. By not formally refusing to participate in the system, the applicant at least gave the impression to its competitors that it agreed to take part.

220 On the question whether, at a local meeting held for the United Kingdom in January 1983, the applicant's United Kingdom operating company objected to participation in such a system, the Court considers that the applicant's assertions are unsupported by any evidence, since it has not produced the note of the local meeting at which the refusal is said to have been given.

221 As regards the applicant's assertion that it was impossible for it to play the role of 'account leader' for its biggest customers in the United Kingdom because it could not take the risk of being the first to increase its prices to its biggest customers, it must be pointed out that that argument only has any force if it is assumed that competition on price was operating freely at the time. The Court has found, however, that the polypropylene producers were coordinating their pricing policies and that they had agreed to the 'account leadership' system. It follows that the applicant could increase its prices to its biggest customers without any risk, since it knew that its competitors would do likewise.

22 As regards the new price policy allegedly pursued by the applicant from January 1983 onwards, seeking to obtain additional sales volumes by fixing prices for its major customers in relation to the prices charged during a previous period, on condition that those customers maintained or increased the volume of their orders, a policy which, according to the applicant, is evidenced by two Shell UK internal notes of 26 January 1983 and 16 March 1983 (Appendices 18 and 19 to Shell's reply to the statement of objections), the Court considers that although the two notes produced by the applicant indicate an intention to pursue a policy focused on sales volumes, they give no indication as regards the fixing of prices in relation to a previous period. Consequently, the applicant's argument must be rejected.

23 With regard to the applicant's argument seeking to show that it could not have been the 'account leader' for its customer BIHR in France and its denial of the probative value of the combination of the Shell internal note of 17 March 1983 (particular objections, Shell, Appendix 41) and the note of a meeting in spring 1983 (main statement of objections, Appendix 37), the Court considers that the whole of the applicant's argument is directed at showing that it was impossible for it to play the role of 'account leader' for BIHR — first of all because it would have been too great a risk for it to be the first to increase its prices to that customer, on which it was highly dependent, and secondly because the prices which BIHR was charged were fixed in accordance with the average price paid by it to its other suppliers during the previous quarter. That argument could be accepted in the context of a market where competition was not restricted. However, the Court must point out once again that price objectives were set by the polypropylene producers and they had adopted a system of 'account leadership' whose result was to protect the principal supplier of a customer when it raised its prices to that customer. Moreover, the system by which prices to BIHR were set was identical in its result to the system of 'account leadership', since it was understood that the other suppliers of that customer would demand prices at or above the target price sought. Accordingly, the prices paid by that customer to the applicant were increased by reason of the price increase demanded by its competitors. Consequently, there is no reason to consider that the applicant was not named 'account leader' for BIHR.

24 Finally, the Court considers that the fact that information contained in the note of a meeting held in spring 1983 (main statement of objections, Appendix 37) is

partly incorrect as regards in particular the prices which the applicant charged certain customers is to be explained not by the fact that that information was not provided by the applicant but by the fact that the applicant had frequently been criticized by its competitors for its price policy, in particular towards certain customers for which it had been named 'account leader' (see the note of the Shell internal meeting of 14 March 1983, particular objections, Shell, Appendix 42), and it therefore attempted to give its competitors the impression that it was charging prices closer to the targets agreed upon and thus higher than it was in fact charging.

225 With regard to quotas, the Court observes that in relation to 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, they attempted to restrict their monthly sales to the same percentage of the overall market achieved in the first six months of that year.

226 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, Appendix 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 should 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 of point 58 of the Decision).

227 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. The theoretical nature of the quota serving as a reference for the comparison with actual monthly sales results from the fact that no quota could be agreed for the whole of 1981, but it does not deprive that comparison of significance as a method of monitoring the restriction of monthly sales by reference to the previous year.

228 The measures adopted for the second half are proved by the note of the meeting of 6 October 1982 (main statement of objections, Appendix 31), which states: 'In October this would also mean restraining sales to the Jan/June achieved market share of a market estimated at 100 kt' and then 'Performance against target in September was reviewed'. Attached to that note is a table entitled 'September provisional sales versus target (based on Jan-June market share applied to demand est[imated] at 120 k)'. The continuation of those measures is confirmed by the note of the meeting of 2 December 1982 (main statement of objections, Appendix

33), to which is attached a table comparing, for November 1982, the 'Actual' sales with the 'Theoretical' figures calculated from the 'J-June % of 125 k'.

229 In the Court's view, it must be inferred from the applicant's frequent contacts with the participants in the 'bosses" and 'experts" meetings, particularly through the participation of Shell group operating companies in very many local meetings — the few available notes of which show that they concerned the monitoring of sales volumes of various producers in the Member States — and its participation in bilateral meetings with other producers that the applicant was involved in the quota system. It may be noted that at a bilateral meeting with ICI on 26 November 1982 it was stated that the applicant's representative 'was quick to pick up that in October only Shell's market share was in line with their Jan-June performance' (main statement of objections, Appendix 99).

230 A further piece of evidence is the fact that the applicant's figures appear in the notes of meetings held to monitor the implementation of the quota system (see the notes of the meetings of 10 March, 9 June, 12 August, 20 August and 2 November 1982, main statement of objections, Appendices 23, 25, 26, 28 and 32 respectively). The probative value of those figures is reinforced by the fact that in the notes of the meetings of 12 August, 6 October and 2 December (main statement of objections, Appendices 27, 31 and 33) the applicant's figures are replaced by the letters 'N. A.', which shows that when the applicant did not supply its figures to the other producers they were not able to assess them on the basis of Fides statistics. It should be added that the applicant's figures were supplied by it (see paragraphs 114 and 115, above).

231 Further evidence is to be found in the fact that at the meeting of 13 May 1982 mention was made of the reopening of Shell facilities; that at the meeting of 9 June 1982 (main statement of objections, Appendix 25), mention was made of the need to bring Shell back into the scheme; that the note of the meeting of 20 and 21 July 1982 (main statement of objections, Appendix 26) states that it is

necessary to enter into contact with the producers which were absent; and that the note of the meeting of 21 September 1982 (main statement of objections, Appendix 30) states that:

'pressure was needed on Shell Italy to restrain themselves to the agreed levels for October. SCIT + SCUK were reported to be fully supportive + good meeting had been held by ICI, DSM with Shell Netherlands. It was reported that SCIT had agreed to attend a "big four" meeting subsequently fixed for 13 October'.

232 The Court finds that the Commission was entitled to conclude from the mutual monitoring, at 'bosses" and 'experts" meetings, of the implementation throughout 1982 of a system for restricting monthly sales by reference to a previous period — monitoring which the applicant made possible by supplying its sales figures — that that system had been adopted by the polypropylene producers.

233 It follows from the foregoing that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers which arrived at a common purpose concerning the June-July 1982 and September-November 1982 price initiatives, the measures intended to facilitate the implementation of their price initiatives and the limitation of their monthly sales by reference to a previous period.

C.4. 1983

(a) The contested decision

234 According to the Decision (point 47), the applicant participated in the July-November 1983 price initiative. At the meeting on 3 May 1983, it was agreed that

the producers would try to apply a price target of DM 2.00/kg in June 1983. However, at the meeting on 20 May 1983, the target previously set was postponed until September and an intermediate target was fixed for 1 July (DM 1.85/kg). Subsequently, at a meeting on 1 June 1983, the producers present reaffirmed their complete commitment to the DM 1.85/kg increase. On that occasion, Shell allegedly 'committed (itself) to the move and would lead publicly in ECN'. The Decision also states that Hercules, which was reported as 'very supportive', was to announce new prices in June. All participants in the meeting had warned their sales forces to inform customers of the proposed increase.

235 The Decision (point 48) states that, echoing the mention of Shell leading 'publicly', an article appeared in ECN on 13 June 1983 which reported that the producers were looking for higher prices, with Shell planning an increase to a minimum of DM 1.90/kg on 1 July and a further increase in September. The article stated that ICI and Montepolimeri were implementing similar increases. The Decision states that since October 1982 Shell had been participating in most months in so called 'pre-meetings' of the 'big four'. The ECN article reported the market as 'increasingly tight' and a somewhat telegraphic note made by ICI at about the end of May reads 'June volume — restrict 122 1/12 = June market assumed cf 130 + likely'. It continues: 'Shell to lead. ECN article two weeks. ICI informed'.

236 The Decision (point 49) states that after the meeting of 20 May 1983, ICI, DSM, BASF, Hoechst, Linz, Shell, Hercules, ATO, Petrofina and Solvay issued instructions to their sales offices to apply from 1 July a price table based on DM 1.85/kg for raffia. Shell documentation for the United Kingdom and France shows that it knew of the agreed levels to be applied from 1 July and was basing its sales policy on those prices. Specific reference is made in a Shell paper entitled 'PP W. Europe-Pricing' to a 'July target' of DM 1.85/kg or UK £480/tonne. A Shell 'market quality' report of 14 June 1983 also reports that 'in western Europe the integrated [Shell] companies are holding (indeed slipping back in Holland, United Kingdom) market shares as an aid to price stability'. The Decision adds that only fragmented price instructions were found at the premises of ATO and Petrofina, but these confirm that those producers were implementing the new price levels, somewhat belatedly in the case of Petrofina and Solvay. The Decision concludes

that with the exception of Hüls, for which the Commission found no price instructions for July 1983, all the producers which had attended the meetings or had promised support for the new price target of DM 1.85/kg were shown to have given instructions to implement the new price.

237 The Decision (point 50) goes on to state that further meetings, in which all the regular participants took part, took place on 16 June, 6 and 21 July, 10 and 23 August and 5, 15 and 29 September 1983. At the end of July and beginning of August 1983, BASF, DSM, Hercules, Hoechst, Hüls, ICI, Linz, Solvay, Monte and Saga all issued price instructions to their various national sales offices for application from 1 September based on raffia at DM 2.00/kg, while a Shell internal note of 11 August concerning its prices in the United Kingdom indicated that its United Kingdom subsidiary was 'promoting' basic prices to be in force on 1 September corresponding to the targets fixed by the other producers. By the end of the month, however, Shell was instructing the United Kingdom sales office to postpone the full increase until the other producers had established the desired basic level. The Decision states that, with minor exceptions, those instructions were identical by grade and currency.

238 According to the Decision (point 50, last paragraph), the instructions obtained from the producers show that it was later decided to maintain the impetus of the September move with further steps based on raffia at DM 2.10/kg on 1 October, rising to DM 2.25/kg on 1 November. The Decision (point 51, first paragraph) further states that BASF, Hoechst, Hüls, ICI, Linz, Monte and Solvay all sent instructions to their sales offices setting identical prices for October and November, with Hercules initially fixing slightly lower prices.

239 The Decision (point 51, third paragraph) states that an internal note dated 28 September 1983 obtained at the premises of ATO includes a table headed 'Rappel du prix de cota (sic)' giving for various countries prices for September and October for the three main grades of polypropylene which are identical to those of

BASF, DSM, Hoechst, Hüls, ICI, Linz, Monte and Solvay. During the investigation at the premises of ATO in October 1983 the representatives of the undertaking confirmed that these prices were communicated to sales offices.

240 According to the Decision (point 105, fourth paragraph), whatever the date of the last meeting, the infringement lasted until November 1983, since the agreement continued to produce its effects at least until that time, November being the last month for which it is known that target prices were agreed and price instructions issued.

241 Finally, the Decision (point 51, last paragraph) states that, according to the trade press, by the end of 1983 polypropylene prices had 'firmed' to reach a raffia market price of DM 2.08 to 2.15/kg (compared with the reported target of DM 2.25/kg).

242 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, each 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. ICI considered it crucial to the success of any new plan that the 'big four' should present a united front to the other producers. Shell's view as communicated to ICI was that Shell, ICI and Hoechst ought each to have a quota of 11%. The ICI proposal for 1983 would have given the Italian producers 19.8%, Hoechst and Shell 10.9% each and ICI itself 11.1% (Decision, point 62). Those proposals were discussed at the meetings in 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, IC, 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. The

note of that meeting does not record Shell's reaction to the proposal, but Shell was present at a meeting of the 'big four' on 20 December 1982, and an undated ICI note intended as a briefing for a meeting with Shell in or about May 1983 states that Shell had 'accepted west European quota levels of 39.5 kt/qtr for Q1 and Q2 1983'.

243 The Decision (point 63, third paragraph) states that a document found at the premises of Shell confirms that an agreement was made, since it endeavoured not to exceed its quota. That document also confirms that a volume control scheme was continued into the second quarter of 1983 since, in order to keep its market share in the second quarter close to 11%, national sales companies in the Shell group were ordered to reduce their sales. The existence of that agreement is confirmed by the note of the meeting on 1 June 1983, which, although not mentioning quotas, reports an exchange of details between 'experts' of the tonnages sold by each producer in the previous month, which would indicate that some quota system was in operation (Decision, point 64).

244 The Decision (point 65) states that although no system of penalties for exceeding quotas was ever instituted, the system under which each producer reported in the meetings the tonnage which it had sold in the previous months, with the risk of facing criticism from the other producers if it was considered unruly, provided an inducement to observe its allocated target.

(b) Arguments of the parties

245 In the applicant's view, the Decision accuses the Shell companies not only of having participated in a price initiative in July 1983 but of being the prime mover in that initiative. The applicant considers that in its reply to the statement of

objections it has already stated that that accusation is not based on any objective evidence. Although a meeting of the 'big four' (main statement of objections, Appendix 101) was held on 19 May 1983, the applicant had already fixed its own price target before that meeting; furthermore, it did not commit itself at that meeting to take a price initiative — indeed, it was not in a position to do so, since it had not yet had discussions with the operating companies (it had meetings with them only during the month of June, that is to say after the date of the producers' meeting). It did not participate in the producers' meeting of 1 June 1983 at which the price initiative objected to by the Commission is said to have been decided upon, and the note of that meeting (main statement of objections, Appendix 40) cannot correctly reflect its position, which was incorrectly stated by another producer. Although one ICI note mentions the applicant's support for that initiative (main statement of objections, Appendix 40), it is contradicted by another ICI note recording discussions which took place between the 'big four' on 19 May (main statement of objections, Appendix 101), which the Commission has ignored because it undermined its argument. Furthermore, the article on polypropylene prices which the applicant was independently considering proposing to ECN (main statement of objections, Appendix 41) was a general article in which Shell did not intend to refer to any specific price. Although it did finally contain, at ECN's request, more precise indications, the price target which Shell suggested achieving was higher than that which had allegedly been agreed between the producers.

246 The applicant further argues that it had demonstrated the independence of its pricing behaviour.

247 As regards quotas, the applicant submits that the reductions in volumes decided on in 1983 were the result not of agreements between producers but of an independent decision of the Shell companies aimed at increasing prices. In reply to the Commission's assertion that if Shell had really pursued an independent policy of reducing its sales, its sales targets would have been fixed in terms of tonnages and not in terms of market shares (particular objections, Shell, Appendices 50 to 54), it replies that if its targets had been determined in terms of absolute value it would have been induced, in the event of a contraction in total demand in relation to forecasts, to increase its market share at the risk of triggering a price war with other producers. It invites the Commission to bring the evidence of an independent expert economist to prove the economic 'theory' advanced in the defence. It adds

that the fact that it hoped — but did not expect — that other producers would, like itself, adopt a policy of market share stabilization does not mean that it was party to an arrangement.

248 It maintains that there was never any question of quotas during the 'pre-meetings' or local meetings which the applicant or other companies in the Shell group may have attended. The Commission is not justified in asserting, in the light of an ICI note (main statement of objections, Appendix 87), that the applicant had stated to ICI that in its view Shell, ICI and Hoechst should each have a quota of 11% for 1983. In fact, no Shell company communicated such an aspiration to anyone, and a careful analysis of that ICI note will show that this aspiration was ascribed to Shell by another producer, as is indicated by the fact that the figure ascribed to Shell appears in a box. The same applies in the case of an ICI table relating to the aspirations of each producer for 1983 (main statement of objections, Appendix 84), in which a question mark appears beside the figure allocated to Shell. Furthermore, the Commission took the word 'have' appearing in a handwritten ICI document concerning the same period (main statement of objections, Appendix 99) to mean 'L.', an employee of SCITCO.

249 The applicant states that the quotas were to be established only in the event of the adoption of a compensation scheme. Since the Shell companies refused to participate in such a scheme, it could not be adopted.

250 According to the applicant, the Commission has persisted in the error of treating Shell companies' internal volume targets as quotas collectively agreed with other producers. At the relevant time, Shell companies had independently set themselves the objective of achieving a west European market share of 11%. The plans and corresponding budgets for the first quarter of 1983 were drawn up before the sales targets allocated to the Shell companies at the meetings were known, and they were subsequently adhered to.

251 In respect of the second quarter of 1983 it states that although a sales reduction was planned within the Shell group (main statement of objections, Appendices 90

and 94; particular objections, Shell, Appendices 53 and 54), that was in order to observe the volume target agreed independently within the group and not in order to observe alleged quotas agreed with other producers.

252 The Commission replies that it matters little whether Shell had already fixed a price target before the meeting of 19 May 1983, since it is established that at the end of that meeting the 'big four' had arrived at an agreed position, as is shown by ICI's reply to the request for information (main statement of objections, Appendix 8). At the producers' meeting on 1 June 1983 the 'big four' were informed of Shell's intentions and in particular of the article which it proposed to publish in ECN to announce its price increase intentions (main statement of objections, Appendix 40). The fact that the target announced by Shell in the article was slightly higher than the target price agreed at the end of the meeting on 1 June must be assessed, in the Commission's view, by taking into account the fact that the announcement of a price somewhat higher than that actually hoped for is a common commercial practice.

253 The Commission further points out that the possibility of contacts between Shell and the operating companies before 1 June is not to be ruled out, and that in any case the operating companies were in favour of a price increase, provided that this did not result in a reduction of sales volumes (Appendix 15, Shell reply to the statement of objections).

254 The Commission points out that in spite of its scepticism about quota schemes (main statement of objections, Appendix 64) the applicant did take part in 'big four' pre-meetings and that Shell group operating companies took part in local meetings in certain countries (main statement of objections, Appendix 10; particular objections, Shell, Appendix 18). However, numerous documents (main statement of objections, Appendices 8, 64, 95 to 97 and 99 to 101) show that at those meetings the discussions concerned subjects inextricably linked to quotas. The applicant told ICI in 1983 (main statement of objections, Appendices 87 and 99) that it would be content with a market share of 11 to 12% and suggested a quota of 11% for ICI, Shell and Hoechst for that year (main statement of objections, Appendix 87). That suggestion was made not in the context of a compensation scheme but in relation to a 'framework' agreement on quotas for

1983. The Commission observes that the applicant asserts that the compensation scheme failed because of Shell's refusal to participate in it, which shows that the cartel could not function without Shell's participation. The Commission maintains that in the handwritten note (main statement of objections, Appendix 99) it is necessary to read 'L.' and not 'have' for grammatical reasons and also because the contents of the documents are similar to those of another document (main statement of objections, Appendix 87) in which L."s name indisputably appears. The applicant made the operating companies accept and apply this policy of volume restraint (main statement of objections, Appendices 90 and 94; particular objections, Shell, Appendices 53 and 54). Although Shell was well aware that it was dealing with a cartel (main statement of objections, Appendix 37) it nevertheless gave information to other participants in the cartel and received information from them. Finally, it was aware of the 'experts" assessment of the 1983 market for the first and second quarters and adapted its own market goals in the light of the quota allocated to it.

(c) Assessment by the Court

55 The applicant's participation in the price initiatives and the quota system in 1983 must be examined in the light of its contacts with the participants in the 'bosses" and 'experts" meetings and in particular in the light of the frequent participation of Shell group operating companies in local meetings and the applicant's regular attendance at meetings of the 'big four' preparing for 'bosses" and 'experts" meetings.

56 As regards the July-November 1983 price initiative, the Court observes that the price objective of DM 1.85/kg for 1 July 1983 was not fixed but simply confirmed at the meeting of 1 June 1983, as is indicated by the note of that meeting, according to which 'those present reaffirmed complete commitment to the 1.85 move to be achieved by 1 July. Shell was reported to have committed themselves to the move and would lead publicly in ECN' (main statement of objections, Appendix 40). That price objective was agreed upon at the meeting of the 'big four' on 19 May 1983, as is shown by the note of that meeting and that of the meeting of 1 June 1983. The note of the meeting of 19 May includes the comment 'Shell to lead — ECN 2 weeks. ICI informed/S. Shell B. (L.'s boss) — commitment — but not absolute' (main statement of objections, Appendix 101). That objective was then proposed to the 'bosses" meeting on 20 May 1983, at which it was adopted by all the producers. Following that meeting, a Shell France memorandum of 25 May 1983 (Appendix Shell C1, letter of 29 March 1985) shows prices identical to the price objectives set at the meeting of 20 May

and to the price instructions issued the same day by DSM, two days earlier by ICI and two days later by BASF for raffia, homopolymer and copolymer. A Shell UK memorandum of 24 June 1983 (Appendix Shell C2, letter of 29 March 1985) also indicates identical prices except as regards copolymer, for which a price of UK £550/tonne is stated, while the other producers show a price of UK £560/tonne. The Court considers that the fact that in the memorandum of 24 June 1983 alone the price for copolymer was slightly lower than that charged by other producers does not call in question the applicant's participation in that price initiative, since that reduction in the target for that product appears once again in the week preceding the date of implementation of the increase decided upon. Furthermore, the fact that the price announced in the issue of ECN of 13 June 1983 was slightly higher than the agreed target price (DM 1.90/kg instead of DM 1.85/kg) results from the same intention as that expressed by Shell in its note of 24 June 1983, that is to say, to announce to customers larger increases than those actually expected.

257 It follows from the foregoing that the applicant has not put forward evidence of such a kind as to impugn the findings of fact made by the Commission in points 47 to 49 of the Decision.

258 On the question whether the applicant was the driving force behind this price initiative, the Court observes that the note of the meeting of the 'big four' of 19 May 1983 (main statement of objections, Appendix 101), read together with the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40), permits the inference that the July 1983 price initiative was instigated by the 'big four' and that they agreed that it would be Shell that made the initiative public through an article to appear in ECN. It should be stressed that the fact that the note of the meeting of 19 May 1983 contains the words 'L. in principle only' cannot controvert that finding inasmuch as a note is attached which states: 'B. (L."s boss) — commitment — but not absolute', which means that the applicant committed itself but needed to discuss the matter with the Shell group operating

companies in order to be able to give its definite agreement. The price instructions issued by the applicant and the article which appeared in ECN show that the applicant subsequently obtained the agreement of the operating companies, even though it asserts the contrary, without putting forward any evidence. The applicant's assertion that what it originally intended to publish in ECN was a general article not referring to any specific price is irrelevant since the article which actually appeared referred to a specific price.

59 It follows that the applicant pursued the July 1983 price initiative with the three other major producers.

60 As regards the applicant's participation in the drive towards a target price for September 1983, the Court considers that the Commission was entitled to infer such participation from the fact that the prices contained in the Shell UK memorandum of 11 August 1983 (Annex Shell I, letter of 29 March 1985) corresponded to the price instructions issued by other producers for 1 September 1983. That memorandum was written the day after an 'experts" meeting and during the week which followed corresponding instructions from BASF, Hercules, ICI, Linz and Saga. It must be pointed out that, contrary to the applicant's assertions, that memorandum contemplates a price for 1 September identical to that of most of the producers (Shell is confusing its price for August with that for September). The fact that Shell UK corrected those instructions on 31 August, the day before their entry into force, cannot controvert its participation in that initiative, for the reasons set out above.

61 As regards the end of that price initiative, the Court observes that it appears from Table 7M point 50 and the operative part of the Decision that the applicant is accused of having participated in that initiative during the months of October and November 1983. The applicant was one of the producers at whose premises price instructions were discovered showing that it had been decided to maintain the

impetus of the September move with further steps based on DM 2.10/kg for raffia on 1 October rising to DM 2.25/kg on 1 November, since its name appears in Table 7M of the Decision, which compares the price instructions issued by the various producers for the month of October. That interpretation of the last paragraph of point 50 of the Decision is corroborated by its operative part, which states that Shell infringed Article 85(1) of the EEC Treaty until at least November 1983, since for the months of October and November the only conduct of which the undertakings to which the Decision is addressed are accused is participation in that price initiative.

262 The Court observes that the only piece of evidence put forward by the Commission to prove the applicant's participation in that initiative is a Shell UK memorandum of 21 September 1983, which is mentioned in Table 7M of the Decision. In that table that price instruction is set against price instructions issued by other producers either for 1 October (BASF, Hoechst, Hüls and ICI) or for October without any further detail (ATO, Hercules, Linz, Monte and Solvay). The column devoted to the applicant contains two prices, the second corresponding exactly to the price charged by the other producers and the first significantly lower, without any further explanation. Perusal of that document shows, however, that the first price is a price instruction for 1 October whilst the second, which is the only one which corresponds to the price charged by the other producers for the month of October 1983, is to enter into force on 31 October. Consequently, it must be concluded that the Decision gives a deceptive impression of concordance between the applicant's price instruction and those issued by other producers. Moreover, the Court observes that in Table 7N, which sets out the price instructions of the various producers intended to come into force either on 1 November (BASF, Hoechst, Hüls) or in November (Hercules, ICI, Linz, Monte and Solvay), the Commission has not included any price instruction from the applicant, although the part of the applicant's price instruction which was intended to come into force on 31 October should have been compared with the price instructions issued by other producers for 1 November. Such a comparison shows that the prices asked by the applicant for 31 October are significantly lower than those asked by other producers for 1 November 1983. Consequently, by failing to mention the applicant's price instruction of 21 September 1983 in Table 7N the Commission has failed to show the divergence between the applicant's price instructions and those of the other producers.

263 It follows that the Commission has failed to establish to the requisite legal standard the applicant's participation in the July-November 1983 price initiative during the months of October and November.

264 It must be pointed out, however, that the Commission has established to the requisite legal standard the applicant's participation in the 'account leadership' during the closing months of 1982 and the first half of 1983.

265 As regards quotas, the Court observes that it appears from the documents produced by the Commission (main statement of objections, Appendices 33, 85 and 87) that in late 1982 and early 1983 the polypropylene producers discussed a quota system for 1983 and that the applicant supplied information on its sales at those meetings and thus participated in the negotiations directed at introducing a quota system for 1983.

266 As regards the question whether those negotiations actually succeeded in relation to the first two quarters of 1983, as the Decision asserts (point 63, third paragraph, and point 64), it is clear from the note of the meeting on 1 June 1983 (main statement of objections, Appendix 40), which the applicant did not attend, that at that meeting ten producers indicated their sales figures for May. Moreover, the following passage appears in a note of an internal meeting of the Shell group on 17 March 1983 (main statement of objections, Appendix 90):

'... and would lead to a market share of approaching 12% and well above the agreed Shell target of 11%. Accordingly the following reduced sales targets were set and agreed by the integrated companies'.

The new tonnages are given, after which it is noted that:

'this would be 11.2 Pct of a market of 395 kt. The situation will be monitored carefully and any change from this agreed plan would need to be discussed beforehand with the other PIMS members'.

267 The Court holds in that regard that the Commission was entitled to conclude from the combination of those two documents that the negotiations between the producers had led to the introduction of a quota system. The internal note of the Shell group shows that that undertaking was asking its national sales companies to reduce their sales, not in order to reduce the overall sales volume of the Shell group but in order to restrict the group's share of the overall market to 11%. Such a restriction expressed in terms of market share can be explained only in connection with a quota system. Furthermore, the note of the meeting on 1 June 1983 constitutes additional evidence of the existence of such a system, since an exchange of information on the monthly sales of the various producers has the primary purpose of monitoring compliance with the commitments made.

268 Finally, the 11% figure for Shell's market share appears not only in the Shell internal note but also in two other documents, namely an ICI internal note in which ICI states that Shell is proposing this figure for itself, Hoechst and ICI (main statement of objections, Appendix 87) and the note drawn up by ICI of a meeting held on 29 November 1982 between ICI and Shell at which the previous proposal was referred to (main statement of objections, Appendix 99).

269 It follows from the foregoing that the Commission has established to the requisite legal standard, except as regards the months of October and November 1983, that

the applicant was one of the polypropylene producers amongst whom there emerged a common purpose concerning the July-November 1983 price initiative, the measures intended to facilitate the implementation of the price initiatives and the sales volume objectives for the two first quarters of 1983.

D. Assessment of the general arguments

70 The applicant's general contention is that the Commission cannot dismiss the arguments relating to a particular initiative by relying on an alleged overall agreement since it is precisely a question of proving the existence of that overall agreement by establishing that the Shell companies participated in particular initiatives. In the reply, it states that the Commission fails completely to support its conclusion that the Shell operating companies accepted and implemented the prices proposed or participated in a quota system the existence of which is not proved, either directly or indirectly, but on which the Commission had to rely in order to make up for its weak evidence regarding the various alleged infringements.

71 Thus, in its view, where the Commission states that the producers all instructed their sales forces to achieve the price targets agreed upon at meetings (Decision, point 74), the Commission had no regard to the structure of the Shell group. The applicant points out that the group operating companies which produce or supply polypropylene in the EEC enjoy a high degree of autonomy and Shell advises and recommends courses of action but has no power of constraint over them; that the views of Shell and the operating companies are liable to differ, for example, the latter may prefer to maintain volume at the expense of price and that these factors had consequences for Shell's relations with other polypropylene producers. Shell was not in a position to direct the operating companies in the Shell group to implement any specific price target and unable to give any commitment on behalf of those companies.

2 Moreover, when describing the price initiatives, the Commission refers to Shell as if all the Shell group operating companies had accepted and implemented the agreed prices and given price instructions to that effect, whereas in nearly all cases

it is referring only to communications made by Shell UK or occasionally by Shell to their sales staff. It cannot be deduced, at the risk of excessive generalization, that all the operating companies in the Shell group acted in the same way.

273 The applicant further argues that, since the Decision accuses the producers of having 'introduced simultaneous price increases implementing the targets', the Commission cannot contend in the defence that it is sufficient that Shell communicated prices to operating companies, even if those companies neither accepted nor implemented such communications. Such an argument conflicts with Article 1(d) of the Decision where it is stated that '[they] introduced simultaneous price increases implementing the set targets'.

274 It further contends that the differences between the prices which it actually charged on the market and the alleged target prices show that its conduct was determined in complete independence.

275 The applicant points out that in its reply to the statement of objections it rebutted the Commission's allegation that Shell companies were party to the quota agreements, having pointed out in particular that those companies determined their own volume targets, that the establishment of their budgets and plans regarding production and sales generally preceded the meetings and these were not subsequently revised in the light of the outcome of those meetings, even when the market share attributed to Shell by the other producers exceeded the target share set by Shell itself; that the companies' planned figures and their realized sales volumes differed substantially from those allowed for Shell by the other producers and, finally, that Shell companies did not attend the meetings and that Shell had no knowledge of the quotas ascribed to other producers and did not exchange information with them. According to the applicant, therefore, the Shell companies pursued their own policy, determined in complete independence, as regards their sales volume.

6 The Commission replies by stating first of all that it does not accuse Shell of having engaged in each of the activities described in paragraphs (a) to (e) of Article 1 of the Decision. It was involved, however, according to the Commission, in the overall framework agreement under which the producers engaged in the abovementioned activities, and it cannot escape responsibility by showing that it was less enthusiastic or helpful about some aspects than about others or that it did not attend certain types of meeting (Decision, points 81 and 83).

According to the Commission, it is irrelevant whether Shell could 'compel' the operating companies or only 'give advice' to them which they could not lightly ignore. The decentralized structure of the Shell group was no obstacle to the conclusion and implementation of the cartel, as is shown by a document showing the channel of instructions linking Shell to the operating companies in the Shell group (main statement of objections, Appendix 96). In claiming that the Commission ignored the exact structure of the Shell group the applicant gives too much significance to individual expressions taken out of context. The documents provided by the Commission show that the applicant orientated its pricing policy by reference to the targets fixed in meetings of which it was fully aware from its contacts with ICI and that it addressed recommendations to that effect to the operating companies, which could not regard them as null and void.

The Commission points out that the fact that one company in the Shell group finally decided to apply a lower price does not mean that Shell had not begun by accepting the target price; 'cheating' might explain this. In this regard, the Commission states generally that it is not seeking to demonstrate that the price targets were always imposed on the market or always accepted by operating companies but simply that they were fixed and applied in concert, which is what is meant by Article 1(d) of the Decision, which accuses the producers of having introduced simultaneous price increases 'as a target'. According to the applicant, in so far as the autonomy of the sales offices causes differences in the prices charged, this renders the agreements concluded between the central organs of the various undertakings irrelevant with regard to Community law.

279 The Commission states that Shell addressed to the operating companies recommendations designed to limit their sales and concedes that it matters little that this restriction was expressed in volumes or in market shares. This proves that the applicant had the certainty or could at least expect — and not only hope — that other producers would pursue the same policy of restraint, especially since Shell itself asserts that its operating companies based their policy on quantities rather than on prices.

280 The Court considers that the structure of the Shell group and the applicant's place in that structure could not form an obstacle to its participation in price initiatives, in the 'account leadership' system or in the quota system. An analysis of the structure of the Shell group shows that the applicant essentially has two tasks: first, to chair meetings of the Polyolefins Strategic Business Unit (PSBU), which are also attended by the operating companies of the Shell group (Appendix 5, p. 3), the PSBU being responsible for elaborating (long-term) strategy in the context of which the group operating companies define their own strategy on their own responsibility, and, second, to advise the operating companies in relation to the market situation.

281 Consequently, the Court considers that the applicant was involved both in the elaboration of the long-term policy of the operating companies and in their short-term policy. Although the applicant could not impose decisions in any particular area, the fact remains that, given the globally convergent interests of the various group operating companies *inter se* and the convergent interests of the Shell group and of the other producers — namely in securing a rise in the general price level even at the expense of concessions at the sale volume level — there was no need for the applicant to have a power of coercion over the operating companies in order for it to impose its views on them, especially since those companies knew that the 'advice' given to them by the applicant was based on targets agreed by the polypropylene producers. Indeed, the applicant stated in its reply to the request for information:

'ICI often communicated to SCITCO "target prices" for certain polypropylene grades in the local currencies of the Western European market. It was understood by SCITCO that such "target prices" were those which had been prepared at "bosses" or "experts" meetings — SCITCO do not know which.'

Moreover, the operating companies in the Shell group participated in local meetings with representatives of other producers, those meetings being devoted to the implementation of the price targets agreed upon.

282 That analysis is borne out, and not rebutted, by the difficulties which the applicant may have had on occasions when it came to discussing a compensation scheme, a matter which necessitated large concessions by operating companies in the Shell group. Faced with such difficulties in October 1982, the applicant mentioned them to its competitors and indicated how it intended to resolve them. Thus, an ICI noted dated 18 October 1982, headed 'Polypropylene Compensation Scheme' (main statement of objections, Appendix 96), reads:

'L. of SCIT Co. said that he & his colleagues were under pressure to improve margins on PP and that he would be willing to attend meetings of the big four but not wider gatherings. The problems of the Shell organisation were discussed and whilst the local companies were autonomous L. requested that approaches should be channelled through SCIT Co. He had not been able to meet J., V. L. etc. before this meeting but had agreement to talk about a compensation scheme. L. would be meeting with J. & others on 20/10/82. (...)

L. raised the problem of not having any centralised profit centre but after discussion accepted that it was really up to Shell to agree internally who would draw or conversely provide any compensation.'

It is to be noted in this regard that the meeting of 20 October 1982 did actually take place, even though the applicant has not produced the record of it, since the record of the meeting of 7 September 1982 was approved at that meeting, as is attested by the date '20/10/1982' appearing on the latter record.

283 It follows that the internal organization of the Shell group was no obstacle to the applicant's participation in the price initiatives, in the 'account leadership' or in the quota system.

284 As regards the prices which the applicant charged on the market, it is to be noted that the Decision does not in any way assert that the applicant charged prices which always corresponded to the target prices that the producers had set, which shows that the Decision likewise does not rely on the applicant's implementation of those targets on the market in order to prove that it participated in the price initiatives.

285 The Court finds that the applicant has asserted but not proved that the Shell companies determined their policy on sales volumes in complete independence. It is clear from the findings of fact reached above that the applicant was aware of the

quotas ascribed to the other producers, exchanged information with them and had regular contacts with them concerning in particular the fixing of sales volume targets. The fact that the applicant's sales did not always correspond to the quotas allocated to it is irrelevant since the contested decision does not rely on actual implementation of the quota system on the market by the applicant in order to prove its participation in that system. In any event, the Court finds in this regard that the applicant has not substantiated its assertion that the Shell companies generally drew up their budgets, production plans and sales plans before the meetings took place and that those budgets and plans were not subsequently called in question by the outcome of those meetings, even if the market share allocated to Shell by the other producers was higher than the target market share which Shell had set for itself. As far as the years 1979 and 1980 are concerned, since the Commission has not been able to state when a quota system was adopted, the applicant cannot claim that the Shell companies had already finalized their plans and budgets before the meetings at which agreements on quotas were made. As far as the years 1981 and 1982 are concerned, the Commission does not contend that a quota system covering the whole of the year was adopted, but that only a temporary monthly system was agreed. As far as 1983 is concerned, the applicant's argument rests on the incorrect premise that the figure of 11% appearing as Shell's share quota in the internal Shell note of 17 March 1983 (main statement of objections, Appendix 90) was determined in complete independence by Shell itself. However, the Court has already found that this was not the case.

It follows, first of all, that the Commission has established to the requisite legal standard that the applicant was one of the producers amongst whom there emerged common purposes concerning the floor-prices and the various price initiatives mentioned in the Decision, with the exception of the beginning of the January-May 1981 initiative and the end of the July-November 1983 initiative.

Furthermore, the Commission was fully entitled to deduce from ICI's reply to the request for information, 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.

288 It follows, secondly, that the Commission has established to the requisite legal standard that the applicant was one of the producers amongst whom there emerged common intentions concerning the measures designed to facilitate the implementation of the price initiatives mentioned in the Decision.

289 It follows, thirdly, that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom there emerged common purposes concerning the sales volume targets for 1979, 1980 and the first half of 1983 and the restriction of their monthly sales by reference to a previous period for the years 1981 and 1982 mentioned in the Decision.

290 It must be added that, 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.

291 It is also to be observed that, in order to support the foregoing findings of fact, the Commission had no need to use either the document found at the premises of Solvay dated 6 September 1977, mentioned in the penultimate paragraph of point 16 of the Decision, or the documents found on the premises of ATO, mentioned in point 15(h) of the Decision, which were not communicated to the applicant by the Commission.

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

(a) The contested decision

292 According to the Decision (operative part, Article 1), the applicant infringed Article 85(1) of the EEC Treaty by participating from about mid-1977 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 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 increases implementing those 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).

(b) Arguments of the parties

93 The applicant denies having committed the various infringements set out in Article 1(a), (b), (c), (d) and (e) of the Decision and considers that the Commission is not entitled, by reason of the allegedly unitary nature of the infringement, to refrain from proving Shell's participation in each of those infringements. It argues that the concept of a framework agreement can be of no assistance to the Commission since it has no evidence of the conclusion of such an agreement as distinct from the specific infringements which it alleges.

94 It submits that even assuming the findings of fact contained in the Decision to be established, those findings in no way justify the conclusion that there was an infringement of Article 85(1) of the EEC Treaty.

95 For its part, the Commission points out that it does not accuse Shell of having engaged in each of the activities described in Article 1(a) to (e) of the Decision, but of having been involved in the overall framework agreement under which the producers engaged in those activities. Those activities should be regarded not as a series of separate infringements but as incidents in a continuing infringement. All

the evidence should thus be regarded as forming a whole which establishes Shell's participation in an overall framework agreement.

296 Finally, the Commission states that even if it were necessary to admit that the applicant did not wholly accept that agreement in all its aspects, it was in close contact with the other major producers over a long period, gave its general support to the various schemes, even to the point of making specific proposals, and conducted itself accordingly, thereby more than fulfilling the criteria of coordination and cooperation laid down by the Court in the *Suiker Unie* judgment (Joined Cases 40 to 48, 50, 54 to 56, 11, 113, and 114/73 *Suiker Unie* v *Commission* [1975] ECR 1663, at paragraph 173) which must be met for there to be a concerted practice.

(c) Assessment by the Court

297 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 these different elements primarily as an 'agreement'.

298 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 justify the conclusion 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.

99 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, at paragraph 112, and the judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission*, cited above, at 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 established to the requisite legal standard and which related to floor prices in 1977, price initiatives, measures designed to facilitate the implementation of the price initiatives, sales volume targets for 1979 and 1980 and the first half of 1983 and measures for restricting monthly sales by reference to a previous period for 1981 and 1982, as agreements within the meaning of Article 85(1) of the EEC Treaty.

00 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 that 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* v *Commission*, cited above, at paragraphs 173 and 174).

01 In the present case, the applicant was in contact with other producers and took part in meetings of the 'big four', and its operating companies took part in local 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, their sales figures or the identity of their customers. Through those contacts and 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.

302 Thus, 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 through those contacts or during 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.

303 The Commission was therefore justified, in the alternative, having regard to their purpose, in categorizing the applicant's contacts and meetings with other polypropylene producers in which it participated between 1977 and September 1983 as concerted practices within the meaning of Article 85(1) of the EEC Treaty.

304 As regards the question whether the Commission was entitled to find that there was a single infringement, the Court points out that, in view of their identical purpose, the various concerted practices followed and agreements concluded formed part of schemes of target-price fixing and quota fixing.

305 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 applicant took part, over a period of years, in an integrated set of schemes constituting a single infringement of Article 85(1) of the Treaty, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.

306 Consequently, the applicant's ground of challenge must be dismissed.

3. *Conclusion*

307 It follows from all the foregoing that, first, since the findings of fact made by the Commission in relation to the applicant as regards the period after September 1983 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 took part in the infringement during that period; and secondly, that since the findings of fact made by the Commission in relation to the applicant as regards its participation in the beginning of the January-May 1981 price initiative have not been proved to the requisite legal standard, Article 1 of the Decision must be annulled in so far as — read together with the grounds of the Decision — it finds that the applicant took part in that part of that price initiative. For the rest, the applicant's grounds of challenge concerning the findings of fact and 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

A. The contested decision

308 The Decision (point 102) states that within the Shell group the undertaking responsible for coordination and strategic planning in the thermoplastics sector is the 'service' company Shell International Chemical Company. It was that undertaking which, it is alleged, participated in the meetings with the other major producers and acted as the channel of communication between the cartel and the various Shell group operating (manufacturing and sales) companies in the EEC; those companies took part in the national or local meetings. Since Shell has overall responsibility for the planning and coordination of the activities of the Shell group companies in the polypropylene sector, the Commission considered itself entitled to regard it as the appropriate addressee of the Decision.

B. Arguments of the parties

309 The applicant maintains that the Commission is wrong to ascribe the infringement to it. Within the Shell group, Shell, which is the addressee of the Decision, is neither a producer nor a supplier of polypropylene on the Community market but one of the Shell group service companies which advises companies operating in western Europe on short-term trading matters and is concerned with international trade. Since the applicant is not a producer which can set prices and sales volumes for polypropylene, the Commission could not hold it responsible for the infringement described in the Decision. It adds that because of the high degree of autonomy enjoyed by the Shell group operating companies, the applicant was not in a position to impose any decision whatsoever on them or to make any commitment on their behalf.

310 The Commission replies that Shell was the Shell group's representative at the international level and that it was it that took part in the meetings of the 'big four' and had contact with ICI. It was also one of its senior executives that chaired the Shell internal working groups which coordinated group policy in the polypropylene sector. In those circumstances it is irrelevant whether Shell had a power of constraint over the operating companies or only gave them advice which they could not lightly ignore.

C. Assessment by the Court

311 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 which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision.

312 The Court holds that Shell and the Shell group operating companies which produce and market chemical products constitute a single unitary organization of personal, tangible and intangible elements which pursues, on a long-term basis, the objective *inter alia* of producing and selling polypropylene with a view to maximizing profits, even, in some cases, to the detriment of the individual profits of its various components. In that organization, each company plays a specific role. The operating companies produce or sell polypropylene, while the applicant plays a stimulating and coordinating role between the various operating companies of the group. Consequently, Shell and the Shell group operating companies constitute a single undertaking.

313 The applicant's role in that undertaking is attested by at least five documents; the first is dated 15 February 1982 and is entitled 'Market quality PP' (main statement of objections, Appendix 94), the second is a note of telephone conversations between a representative of the applicant and ICI on 9 and 10 September 1982 (main statement of objections, Appendix 95), the third is a document entitled 'Polypropylene compensation scheme' dated 18 October 1982 (main statement of objections, Appendix 96), the fourth is the note of a telephone conversation between an employee of the applicant and ICI on 8 November 1982 (main statement of objections, Appendix 97) and the fifth is the note of a bilateral meeting between employees of the applicant and ICI on 26 November 1982 (main statement of objections, Appendix 99). The first of those document includes the following passage:

'Integrated companies (SCUK, SNC, SC) plus SCITCO have met in group chaired by CITP, and agreed:

a) Will meet regularly (approx. quarterly) to review current state of market & formulate marketing/pricing policies for Shell PP in Europe;

b) CITP/2 will collect & disseminate market intelligence (Demand, Competition, prices) approximately monthly;

c) SCITCO will *NOT* participate in any poly-competitor meetings, but will try to keep informed of their activities & ambitions through CITP bi-lateral contacts;

[...]

ALSO SCITCO/CITP/2 is taking the following actions to try & improve European PP market quality:

e) continental liaison with Shell QUIMICLY POLIBRAZIL to . . . move exportation surplus PP in . . . through Shell MKT2 . . . in LATIN AMERICA & S. E. ASIA: and prevent its export to W. Europe . . .'

In the second document, the applicant indicated:

'I spoke with L. again today to give him the elements of the proposed scheme. His reaction was to say that he felt the group should meet to talk the scheme through & that he would be willing to join in. Particular points raised were:

1) The group as a whole should agree the point at which they would react i. e. if x% market share was lost the scheme would be abandoned.

2) Any target for Shell might have to be broken down territorially to make it organisationally operable . . . '

The third document states that:

'L. of SCITCO said that he & his colleagues were under pressure to improve margins on PP and that he would be willing to attend meetings of the big four but

not wider gatherings. The problems of the Shell organisation were discussed and whilst the local companies were autonomous L. requested that approaches should be channelled through SCITO. He had not been able to meet with J., V. L., etc. before this meeting but had agreement to talk about a compensation scheme. L. would be meeting with J. & others on 20/10/82. (...)

L. raised the problem of not having any centralised profit centre but after discussion accepted that it was really up to Shell to agree internally who would draw or conversely provide any compensation.'

In the fourth document it is stated:

'P. said L. would be back in the office on Mon. 15th November. In the meantime he passed on the following information on the reaction of the various Shell units to the proposed compensation arrangements.'

In the fifth document it is stated that:

'John L. was very interested in the new organisation within P & P Divis[ion] & in particular the responsibilities on polyolefins [...] Compensation will be discussed with the local Shell companies at a meeting with J. E. L. [an employee of the applicant] on 30 November. I said the scheme was not dead by any means & that it was Shell who were holding things up. J. E. L. was quick to pick up that in October only Shell's market share was in line with their Jan-June performance.'

314 The unitary nature of the organization of the various personal, tangible and intangible elements is further corroborated by the fact that in all the documents produced by the Commission the sales figures included for the applicant relate to all the Shell companies.

315 For that reason, the Commission was entitled to consider that the applicant was responsible for the coordination of the Shell group's action in the context of the infringement and thus hold it answerable for the infringement.

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

The statement of reasons

317 The applicant argues that it has demonstrated its independent conduct in relation to prices and that the Commission has not explained why it rejected that demonstration, other than by referring to the length of the Decision.

318 For its part, the Commission considers that it has stated sufficiently clearly in the Decision the evidence on the basis of which it concluded that Shell had participated in a price agreement. It takes the view that it was not obliged to refute the arguments put forward by the applicant in order to demonstrate the alleged independence of its pricing policy.

319 The Court of Justice has consistently held (see in particular its judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck*, cited above, at paragraph 66, and its judgment in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831, at paragraph 88) that, although under Article 190 of the EEC Treaty the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and of law raised by every party during the administrative proceedings. It follows that the Commission is not obliged to answer those points of fact and law which it considers irrelevant.

320 It must be observed in that regard that in points 74 to 76 of the Decision the Commission has replied to the applicant's arguments concerning the prices which it actually charged on the market.

321 It follows that this ground of challenge cannot be upheld.

The fine

322 The applicant complains that the Commission infringed Article 15 of Regulation No 17 by failing properly to assess in the Decision the duration and gravity of the infringement it was found to have committed.

1. *The limitation period*

323 The applicant argues in its reply that in the absence of any connection between the 1977 floor-price agreement and the later meetings, the infringements allegedly committed in 1977 are in any event covered by the five-year limitation period laid down in Council Regulation No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (Official Journal 1974 L 319, p. 1).

324 The Commission argues that the applicant's reliance on the limitation period is a new submission within the meaning of Article 42 of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to proceedings before the Court of First Instance pursuant to Article 11, third paragraph, of the Council Decision of 24 October 1988, and is therefore inadmissible. For the rest, it maintains that this was a continued infringement in respect of which the limitation period began to run only on the day on which the infringement terminated.

325 The Court notes that under Article 1(2) of Regulation No 2988/74 the five-year limitation period on the Commission's power to impose fines begin to run, in the case of continuing or repeated infringements, on the day on which the infringement ceases.

326 In the present case, it follows from the Court's assessments relating to proof of the infringement that the applicant participated without interruption in a single infringement which began in mid-1977, when it subscribed to the floor-price agreement, and continued until November 1983.

327 Consequently, the applicant cannot rely on the limitation period relating to the imposition of fines.

2. *Duration of the infringement*

328 The applicant argues that the Commission is wrong to regard the conclusion in mid-1977 of an agreement on floor prices or the price discussions which took place at that time as the beginning of its participation in the infringement.

329 The Commission states that the applicant participated in the 1977 floor-price agreement. It adds, however, that in determining the amount of the fine it considered that 'while the infringement dated from mid-1977, the mechanism by which it was to operate was not completely established until about the beginning of 1979' (Decision, point 105, last paragraph).

330 It follows from the Court's assessments relating to proof of the infringement that the duration of the infringement held to have been committed by the applicant was shorter than was found to be the case in the Decision, since the infringement ceased at the end of September 1983 and not November 1983.

331 Consequently, the amount of the fine imposed on the applicant must be reduced in that respect.

3. *The gravity of the infringement*

A. The applicant's role

332 The applicant states that the Commission has exaggerated to a very large extent the role played by the applicant in the infringement, since the Commission wrongly alleges that because Shell was one of the 'big four' it was at the centre of the arrangements in question, that each of them in turn took the lead in the price initiatives and that Shell was thus necessarily one of the 'leaders' in the drawing up and implementation of the unlawful agreements.

333 As regards point 68 of the Decision, which refers to an alleged 'common understanding' shared by the 'big four', it draws attention to the fact that the ICI note relied on by the Commission (main statement of objections, Appendix 64) did not itself give any indication of the understanding referred to and that in its reply to the request for information to which point 68 of the Decision refers ICI explained that that understanding amounted to a 'recognition that if prices were to be increased, then the big four producers would *have to* give a strong lead, even at the expense of their own sales volumes'. The applicant considers that that explanation rested on the belief that a compensation arrangement between those four producers might have made it easier for them to contemplate the possibility of a commitment on target prices. The applicant refused to participate in any such compensation arrangement (and that is not disputed by the Commission) or in any arrangements that ICI may have set up or intended to set up. It adds that its statements in ECN to the effect that Shell companies would be seeking price increases were based on an independent assessment of market conditions and were not referrable to any arrangement with ICI, Monte and Hoechst.

334 It argues that in order to contend nevertheless that the 'big four' sought to agree on a common position and to adopt a united approach, the Commission relies on

an ICI document (main statement of objections, Appendix 87) which is not a note of a 'pre-meeting' but records abortive discussions about a quota compensation scheme in October 1982. The Commission also relies on a Shell note of 20 October 1982 (main statement of objections, Appendix 100; particular objections, Shell, Appendix 30) but interprets it incorrectly (the note merely illustrated the functioning of the laws of the market, stating that the fact that the 'big four' held 51% between them ought to allow a move towards price stability). The Commission did not rely on that document in the statement of objections to support the allegation that the applicant was a member of the 'directorate' of the 'cartel' or even to support the lesser charge that Shell had entered into a price or quota arrangement with the other three members of the alleged 'directorate' at the end of 1982. The statement of objections used the document only to show that, while Shell companies were not willing to lose further market share by following unreasonably tough pricing policies, they 'were aware of target price levels and [allegedly] adopted their commercial policy to take account of them'. With regard to both the ICI document and the Shell note of 20 October 1982, the Commission, says the applicant, states that it did not draw from them the conclusion that the 'big four' were adopting a united approach but only that it was realized that if they could adopt such an approach that would be helpful. Finally, the Commission relies on notes allegedly relating to pre-meetings (main statement of objections, Appendices 64, 100, 101) which, according to the applicant, are not conclusive and are contradicted by other documents.

335 The applicant submits that, far from assisting in orchestrating the activities of the alleged cartel, Shell companies were at the extreme peripheries of any unlawful arrangements that might have taken place. Since Shell companies had not participated in the 'bosses" and 'experts" meetings, they did not actively take part in efforts to carry out concerted price increases and to establish concerted restriction of volumes. They did not act as 'account leaders' but occupied only a peripheral position, which the Commission failed to take into account when determining the fine. The applicant points out that the Commission asserts, in its observations submitted to the Court, that it did not accuse Shell of having participated in all the infringements listed in Article 1(a) to (e) of the Decision, and it argues that the Commission is not entitled to amend, before the Court, the charges made in the operative part of the Decision, particularly when those charges were the main factor determining the amount of the fine.

336 It concludes that the fine imposed upon it could not have been more severe if it had participated in all the infringements described in the Decision.

337 The Commission replies that the documentary evidence shows that the arrangements which started in mid-1977 were orchestrated by the 'big four', that it was always one or other of them that led an increase (that was the case with Shell in February 1981 and July 1983) and that from September 1982 onwards the 'big four' met in pre-meetings which were held the day before 'bosses" meetings.

338 The Commission points out that the applicant participated in all the pre-meetings of which the Commission is aware and that the common attitude adopted by the 'big four' with a view to raising prices was linked to those meetings, in which the discussions were quite concrete. It concludes, therefore, that Shell took part in the activities constituting the nub of the infringement.

339 According to the Commission, it is hard to understand documents such as the notes of telephone conversations between Shell and ICI (main statement of objections, Appendix 95) on any basis other than that there was an understanding that the 'big four' shared a particular responsibility for the market; that is also consistent with the position of ICI, which could not continue to organize a cartel without Shell's participation.

340 The Court observes that the applicant's participation in the preparatory meetings of the 'big four' is one of the elements in the light of which the role played by the applicant in the infringement must be assessed.

341 In that regard, a note relating to the meeting of representatives of ICI, Shell and Monte on 15 June 1981 (main statement of objections, Appendix 64b) shows that

those producers studied possible solutions with a view to resolving the difficulties encountered on the market. Similarly, a note written by an ICI employee entitled 'Sharing the pain', which dates from the beginning of the second half of 1982 (main statement of objections, Appendix 98), states that the introduction of a compensation scheme for reductions in sales volumes 'might provide useful elements for the understanding between the "Big Four"'. In its reply to the request for information (main statement of objections, Appendix 8), ICI stated with regard to that document that:

'The "understanding" between the "Big Four" was recognition that if the prices were to be increased then the "Big Four" producers would have to give a strong lead, even at the expense of their own sales volume. It was thought that a "Compensation Arrangement" between these four producers might have made it easier for them to contemplate the possibility of a commitment on "Target Prices".'

Those pieces of evidence show that the 'big four' were aware of the special role which they had to play in the initiatives intended to secure a rise in prices. Thus, a Shell internal note dated October 1982 (main statement of objections, Appendix 94) again refers to the price initiatives of the 'big four'.

342 The Court finds that it is clear from the evidence set out above and from its assessments relating to proof of the infringement that except as regards the beginning of the January-May 1981 price initiative the Commission has correctly established the role played by the applicant in the infringement and that it indicated in the first paragraph of point 109 of the Decision that it took account of that role when determining the amount of the fine.

343 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.

344 It follows that the fine must be reduced in so far as it reflects participation by the applicant in the beginning of the January-May 1981 price initiative; for the rest, the ground of challenge must be dismissed.

B. The claim that insufficient account was taken of the situation of economic crisis

345 The applicant maintains that in fixing the amount of the fine, the Commission took insufficient account of the considerable losses suffered by the producers, and did so in an unreviewable manner. Furthermore, it failed to take into account the fact that the producers had no grounds for hope that the normal operation of the laws of competition would within any reasonable period restore a normal competitive equilibrium to the market. The applicant is not satisfied with the Commission's reply that to take that into account would encourage breaches of the law, since, says the applicant, such an objection could be made about any matter that is put forward in mitigation.

346 The Commission replies that it accepted, in mitigation of the fines, that the undertakings concerned had incurred substantial losses on their polypropylene operations over a considerable period, although it takes the view that it is not bound to take account of unfavourable economic conditions in a sector when fines for an infringement of the competition rules are to be assessed. As regards the producers' lack of grounds for hoping that normal competitive forces would within a reasonable period restore a normal competitive equilibrium to the market, it states that the need to rationalize the market and the impossibility of achieving this in the immediate future cannot justify infringements of competition law. Were it otherwise, the temptation would be great for undertakings to respond with anti-competitive measures in difficult situations when there is a particularly pressing need for the forces of competition to rationalize the market.

347 The Court considers that in order to assess this argument it is necessary to examine first of all the way in which the Commission determined the amount of the fine imposed on the applicant.

348 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).

349 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 that regard, particular emphasis must be placed on the clear nature of the infringement of Article 85(1) of the EEC Treaty and in particular of points (a), (b) and (c) of that provision, whose terms were known to the polypropylene producers, which acted intentionally and in the greatest secrecy.

350 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.

351 It must be stated in this context that the Commission was not obliged to individualize or to explain the way in which it had taken into account the substantial losses incurred by the various producers in the polypropylene industry, since this was one of the factors mentioned in point 108 of the Decision which contributed to the determination of the general level of the fines, which the Court has found justified. The Commission expressly indicated in the last indent of point 108 of the Decision that it took account of the fact that the undertakings had incurred substantial losses on their polypropylene operations over a considerable period, which demonstrates not only that the Commission took account of the losses but also that it thereby took account of the unfavourable economic conditions prevailing in the sector with a view to determining, having regard also to the other criteria mentioned in point 108, the general level of the fines.

352 It follows that this ground of challenge put forward by the applicant cannot be upheld.

C. The alleged failure to take proper account of the effects of the infringement

353 The applicant contends that even supposing that some producers sought to obtain from their customers prices equivalent to the 'target prices', that does not demonstrate that the price achieved was materially different by virtue of those attempts. In reality, both the level of prices and the volume of sales was determined by market forces during the period from 1977 to 1984.

354 It points out that in its reply to the statement of objections it produced evidence confirming that prices were in fact at competitive levels. It is clear from studies and comparisons made by Shell that the prices realized by the Shell companies on the Community market were consistently below the 'target' prices, that they were always very close to world competitive prices, that the prices realized by the Shell companies in western Europe were on average lower than their export prices and, finally, that the average prices realized in the USA from the start of 1977 to the end of 1982 were practically the same as the average prices realized by Shell UK.

355 The applicant submits that although the Commission did not challenge that evidence at any stage in the administrative proceedings or in the Decision (or indeed in its pleadings before the Court), it totally failed to consider the implications of the proved facts. Nevertheless, it states in the Decision that the alleged unlawful arrangements had an 'appreciable effect' (point 90). It does not explain what is to be understood by 'appreciable' but press reports reflect estimates made by the Commission according to which the price rise due to the cartel was large (from 15 to 40% depending on the period). The applicant concludes that either the Commission reached that finding by disregarding Shell's contrary evidence and on the basis of no evidence at all, or the Commission relied on facts and matters not disclosed in the Decision.

356 It considers that it is even more important to clarify that question inasmuch as from a study set out in the Commission's *Thirteenth Report on Competition Policy* (1983) the Commission concluded that the thermoplastics industry (including polypropylene) was subject to intense competition and that it was characterized in particular by surplus production capacity 'which leads to intense price competition'. The applicant therefore requests the Court to order measures of enquiry in order that the Commission disclose the grounds upon which it rejected the evidence provided by the applicant and produce itself the documents on which it relied in order to determine the effects of the cartel. If those grounds and documents were not adequate, as the applicant believes, the Court could, if necessary, order an expert's report.

357 The applicant states that since the cartel had no effect, consumers suffered no detriment. Moreover, the Commission failed to take into account the considerable effort made by the producers to reduce their costs and the technical progress achieved by them during the period covered by the cartel.

358 The Commission replies that points 90 to 92 of the Decision are sufficiently clear as regards the effects of the cartel on the market and that it is not obliged to answer each of the arguments made by each undertaking. The evidence on which the Commission relied is contained in the Decision. As the Court of Justice accepted in its order of 11 December 1986 (Case 212/86 R *ICI* v *Commission*, not published in the Reports of Cases before the Court, at paragraphs 5 to 8), the Commission did not take into account other evidence. Consequently, no measure of enquiry or expert's report is necessary.

359 The Commission considers that the target prices agreed by the producers served as the basis for negotiations with their customers and that a regular pattern of close parallel movement of target and actual prices is to be observed (Decision, Table 9). Even if gaps between target prices and actual prices did continue to exist, owing to market conditions (customer pressure, fluctuations in the price of the raw material, national price regulations and so forth) the producers nevertheless succeeded to some degree in levelling out the price fluctuations which would have occurred but

for the cartel and in consolidating a level of prices which was for the most part fairly close to the agreed target prices. Similarly, the deliveries of most producers in the years when there was a system in force aimed at stabilizing their market shares did generally correspond to the agreed quotas or targets.

0 It concludes that the cartel was not without effect on the market, but states nevertheless that in assessing the fines it took into account the fact that the price initiatives did not generally achieve their objective in full (Decision, point 108). That was already more than it was obliged to do.

1 The Court observes 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. That 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 were 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).

2 The first type of effect has been proved by the Commission to the requisite legal standard from the many price instructions given by the various producers, which are consistent with one another and with the target prices fixed at the meetings, which were manifestly meant to serve as the basis for the negotiation of prices with customers.

363 As regards effects of the second type, the Commission had no reason to doubt the accuracy of the analyses carried out by the producers themselves during their meetings (see in particular the notes of the meetings of 21 September, 6 October, 2 November and 2 December 1982, main statement of objections, Appendices 30 to 33). These show that the target prices set at the meetings were largely achieved on the market and that, even if an audit carried out by an independent firm of accountants, Coopers & Lybrand, and the economic studies commissioned by certain producers were to prove that the analyses made by the producers themselves at their meetings were wrong, that fact is not conducive to a reduction of the fine, since 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.

364 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.

365 The Court considers, moreover, that the statements made at the press conference held following the adoption of the Decision, according to which the effect of the infringement consisted in an increase of the general level of prices of 15 to 50%, are not to be taken into consideration on this issue in so far as they contradict the grounds of the Decision itself. For that reason they may be used only as evidence of the fact that the Decision is based in reality on grounds other than those indicated in it, which would amount to a misuse of powers (see the order of the Court of Justice of 11 December 1986 in Case 212/86 R *ICI* v *Commission*, cited above, at paragraphs 11 to 16). This Court has held, in the exercise of its unlimited jurisdiction, that the general level of the fines was justified having regard to the grounds of the Decision (point 108, read together with all the grounds of the Decision). Consequently, there can be no question of misuse of powers in this case.

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

D. The absence of any previous infringement

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

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

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.

It follows that this ground of challenge must be rejected.

It follows from all the foregoing that the fine imposed on the applicant must be reduced by 10% by reason, first, of the reduced duration of the breach of the Community competition rules found to have been committed by the applicant and, secondly, of its less serious nature inasmuch as the applicant did not participate in the beginning of the January-May 1981 price initiative.

The reopening of the oral procedure

372 By a letter lodged at the Court Registry on 6 March 1992 the applicant asked the Court to reopen the oral procedure and order measures of inquiry as a result of the statements made by the Commission at the hearing in Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 and at the press conference held by the Commission on 28 February 1992 after judgement was delivered in those cases.

373 After hearing the views of the Advocate General once again, the Court considers that it is not necessary to order the reopening of the oral procedure in acordance with Article 62 of the Rules of Procedure or to order measures of inquiry as requested by the applicant.

374 It must be stated that the judgment delivered in the abovementioned cases (judgement of 27 February 1992 in Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315) does not in itself justify the reopening of the oral procedure in this case. The Court observes that a measure which has been notified and published must be presumed to be valid. It is thus for a person who seeks to allege the lack of formal validity or the inexistence of a measure to provide the Court with grounds enabling it to look behind the apparent validity of the measure which has been formally notified and published. In this case the applicants have not put forward any evidence to suggest that the measure notified and published had not been approved or adopted by the members of the Commission acting as a college. In particular, in contrast to the PVC cases (judgement in Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89, cited above, paragraphs 32 et seq.), the applicants have not put forward any evidence that the principle of the inalterability of the adopted measure was infringed by a change to the text of the Decision after the meeting of the college of Commissioners at which it was adopted.

Costs

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, the applicant must pay, in addition to its own costs, two thirds of the Commission's costs, and the Commission must bear one third of 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 L 230, p. 1) in so far as it holds that Shell**

   — took part in the infringement after September 1983,

   — took part in the beginning of the January-May 1981 price initiative;

2. **Sets the amount of the fine imposed on the applicant in Article 3 of that Decision at ECU 8 100 000, that is to say UK £5 222 855.70;**

3. For the rest, dismisses the application;

4. Orders the applicant to bear its own costs and pay two thirds of the Commission's costs, and orders the Commission to bear the remaining third of its own costs.

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 10 March 1992.

H. Jung
Registrar

J. L. Cruz Vilaça
President