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

Contents

* Language of the case: English.

In Case T-7/89,

S. A. Hercules Chemicals N. V., a company incorporated under Belgian law, having its registered office at Beringen (Belgium), represented by Mario Siragusa, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Messrs Elvinger & 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 national civil servant seconded to its Legal Service, Wagner Centre, Kirchberg,

defendant,

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

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

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

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

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

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

gives the following

Judgment

Facts and background to the action

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

raffia, homopolymer injection moulding, copolymer injection moulding, high-impact copolymer and film. The undertakings to which the Decision is addressed are all major petrochemical producers.

2 The west European market for polypropylene is supplied almost exclusively from European-based production facilities. Before 1977, that market was supplied by ten producers, namely Montedison (now Montepolimeri SpA), Hoechst AG, Imperial Chemical Industries PLC and Shell International Chemical Company Limited (called 'the big four'), which together account for 64% of the market, Enichem Anic SpA in Italy, Rhône-Poulenc S. A. in France, Alcudia in Spain, Chemische Werke Hüls and BASF AG in Germany and 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 S. A. and Solvay et Cie S. A. in France, SIR in Italy, DSM N. V. in the Netherlands and Taqsa in Spain. Saga Petrokjemi AS & Co, a Norwegian producer, came on stream in the middle of 1978, and Petrofina S. A. in 1980. The arrival of the new producers, with nameplate capacity of some 480 000 tonnes, brought a substantial increase in installed capacity in western Europe which for several years was not matched by the increase in demand in that market. This led to low rates of utilization of production capacity, which, however, rose progressively between 1977 and 1983, increasing from 60% to 90%. According to the Decision, supply and demand were roughly in balance from 1982. However, during most of the period covered by the investigation (1977-1983), the polypropylene market was reported to be characterized by either low profitability or substantial losses, owing in particular to the extent of the fixed costs and to the increase in the cost of the raw material, propylene. According to the Decision (point 8), in 1983 Montepolimeri SpA held 18% of the European polypropylene market, Imperial Chemical Industries PLC, Shell International Chemical Company Limited and Hoechst AG each held 11%, Hercules Chemicals N. V. slightly below 6%, ATO Chimie S. A., BASF AG, DSM N. V., Chemische Werke Hüls, Chemie Linz AG, Solvay et Cie S. A. and Saga Petrokjemi AS & Co from 3 to 5% and Petrofina S. A. about 2%. The Decision states that there was a substantial trade in polypropylene between Member States because each of the then EEC producers supplied the product in most, if not all, Member States.

3 Hercules Chemicals N. V. is one of the new producers which appeared on the market in 1977. Its position on the West European market was that of a medium -sized producer whose market share was between approximately 5 and 6.8%. However, Hercules is the largest producer on the American market.

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

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

BASF AG ('BASF'),

DSM N. V. ('DSM'),

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

Hoechst AG ('Hoechst'),

Chemische Werke Hüls ('Hüls'),

Imperial Chemical Industries PLC ('ICI'),

Montepolimeri SpA, now Montedipe ('Monte'),

Shell International Chemical Company Limited ('Shell'),

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

BP Chimie ('BP').

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

Enichem Anic SpA ('Anic').

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

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

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

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

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

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

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

12 By another letter of the same date the Commission replied to the argument raised by the lawyers that it had not clearly defined the legal nature of the alleged cartel

under Article 85(1) and invited the undertakings to submit written and oral observations.

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

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

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

(c) agreed various measures designed to facilitate the implementation of such target prices, including (principally) temporary restrictions on output, the exchange of detailed information on their deliveries, the holding of local

meetings and from late 1982 a system of "account management" designed to implement price rises to individual customers;

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

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

Article 2

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

Article 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 4

. . .

Article 5

. . .'

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

Procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 31 July 1986, the applicant brought this action seeking annulment of the Decision. Thirteen of the fourteen other addressees of the Decision have also brought actions for its annulment (Cases T-1/89 to T-4/89, T-6/89 and T-8/89 to T-15/89).

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

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

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

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

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

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

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

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

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

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

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

Forms of order sought by the parties

29 Hercules Chemicals N. V. claims that the Court should:

(i) annul in whole or in part Articles 1 and 3 of the decision of the Commission of the European Communities of 23 April 1986 (IV/31.149 — Polypropylene) in so far as they pertain to Hercules;

(ii) subsidiarily, modify Article 3 of the decision as it pertains to Hercules so as to annul or substantially reduce the fine imposed on Hercules therein; and

(iii) order the Commission to pay all 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 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 it (1) based the Decision on documents having no evidentiary value and (2) did not communicate to the applicant certain documents used against it in the Decision and even refused to disclose to it certain documents which the applicant had requested from it; *secondly*, the grounds of challenge relating to proof of the infringement concerning (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty, whereby it is contended that the Commission (A) did not correctly define the infringement, (B) did not correctly assess the restrictive effect on competition or (C) did not correctly assess how trade between Member States was affected, and (D) imputed collective responsibility to the applicant; *thirdly*, the grounds of challenge relating to an alleged breach of the principle of equal treatment; *fourthly*, the grounds of challenge relating to the reasoning of the Decision, impugning (1) the insufficiency of the reasoning and (2) the absence of reference to the hearing officer's report; 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. *The evidentiary value of certain documents used in the Decision*

31 The applicant submits that, apart from price instructions given by Hercules (Appendices to the Commission's letter of 29 March 1985, hereinafter referred to as 'letter of 29 March 1985, Appendices') and a small number of other internal

documents of very limited evidentiary value, the Commission based its conclusions on documents which were not created by the applicant and were not found in the applicant's possession. Some of those documents are partially illegible, their meaning obscure or ambiguous, their authorship unknown; the statements in such documents constitute second or third order hearsay. Because of the unknown origin of those documents, Hercules claims that it was unable to investigate their validity or the context in which its name came to be mentioned in them.

32 Hercules submits that the Commission, which, according to the case-law of the Court of Justice (judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging Suiker Unie UA and Others* v *Commission* [1975] ECR 1663, paragraph 164 et seq.), is required to base its decisions on reasonable grounds drawn from credible evidence, did not even carry out a proper inquiry, and that it did not evaluate critically the documents which it used, as it ought to have done (judgment in *Suiker Unie* v *Commission*, cited above, paragraph 396 et seq.). Such a critical approach was all the more necessary since, in view of the circumstances, the instigators of the initiatives in question, the authors of the documents in question, had every interest in giving a false impression with regard to the position of the producers who were absent from the meetings in question so as to encourage those who were present to adopt their line. By reference to examples, Hercules claims to show that, even if, considered as a whole, the documents could prove the general tenor of the discussions which took place between the producers, it is not possible to draw from them precise conclusions with regard to the conduct of any individual producer, especially when that producer was not present at those meetings.

33 In its reply Hercules observes that the Commission cannot take refuge behind the fact that at the hearings held before the Commission pursuant to Article 19 of Regulation No 17 the undertakings put forward persons who could not give first-hand testimony with regard to the facts alleged by the Commission. According to Hercules, the Commission should have used its powers to require the evidence of such persons if it wished to use it. For its part, Hercules allowed the Commission's inspectors to interview its employee who was present at the meetings.

34 Finally, Hercules observes that the Commission systematically interpreted the documents in its possession in a way unfavourable to Hercules and discounted certain statements in those documents which could have been in its favour.

35 The Commission, for its part, points out that Hercules passes over in silence damning documents some of which were found at its premises or were sent by the company to the Commission, such as Appendices 2, 23, 45 and 88 to the main statement of objections (hereinafter referred to as 'main statement of objections, Appendices'). It states that it had reason to consider the evidence, in particular the ICI documents, as clear and reliable in view of their content and the fact that they supported one another. For example, in its reply to the request for information (main statement of objections, Appendix 8), ICI explained its internal notes, in particular their authorship and genesis.

36 The Commission further points out that Hercules stated in its reply to the statement of objections that it seemed reasonable to accept the accuracy of the lists of meetings given by ICI in its reply to the request for information. Likewise, Hercules wrongly contends that the statements in the documents are only second or third order hearsay. In the Commission's view, they are documents constituting clear and consistent proof of the existence of a cartel over a long period.

37 The Commission considers that, once the documents are accepted as being generally credible and accurate, their credibility cannot be impugned in relation to aspects that happen to affect particular producers. It objects, however, that Hercules has not identified the pieces of evidence which it ought not to have found 'credible' and it points out that Hercules quotes only one precise document in this regard, the report of a meeting held on 1 June 1983 (main statement of objections, Appendix 40), but gives it a wrong interpretation, isolating it from its context which shows that the statement mentioned in that document was followed by price instructions.

38 Moreover, the Commission considers that it cannot be asserted, on the basis of the judgment in *Suiker Unie* (cited above, paragraph 164), that the Commission is required to hold hearings on the credibility of hearsay statements. In any event, the Commission did carry out such enquiries as were necessary — for example it interviewed the Hercules employee who attended the meetings (Appendix 7 to the statement of objections raised specifically against Hercules, hereinafter referred to as 'particular objections, Hercules') and in the course of the administrative procedure it satisfied itself as to the credibility of the evidence upon which it relied.

39 It also points out that at the hearings Hercules delegated its managing director, preferring perhaps not to send a person who could have given first-hand testimony in relation to the case being made against the undertakings, contrary to the request made in that regard by the hearing officer.

40 Finally, the Commission contends that its treatment of the evidence was not one-sided and unfair. If it preferred one view to another, it was because the weight of evidence pointed one way rather than the other. It refers to the last paragraph of point 78 of the Decision to show that it changed its approach when its original view was not sufficiently supported by the evidence.

41 The Court notes first of all that the identity of the authors of most of the reports of meetings originating from ICI is known since ICI identified them in its reply to the request for information (main statement of objections, Appendix 8).

42 Next, the content of those reports is confirmed by various documents, such as the meeting reports drawn up by an executive of the applicant — like the report of the meeting held on 13 May 1982 (particular objections, Hercules, Appendix 3) which confirms the report of the same meeting drawn up by ICI (main statement of objections, Appendix 24), such as a number of tables relating to the sales volumes

of the various producers, price instructions matching, both in their amount and their date of entry into force, the target prices mentioned in those meeting reports, and the replies of the various producers to the requests for information addressed to them by the Commission. Furthermore, documents confirming as a whole the content of the meeting reports originating from ICI were in fact discovered at the applicant's premises or were furnished by the applicant (main statement of objections, Appendices 2, 23, 45 and 88).

43 Consequently, the Commission could reasonably take the view that the meeting reports found at the premises of ICI objectively reflected the matters discussed at the meetings. These meetings were chaired by different members of ICI's staff, which made it even more necessary for them to prepare written reports on them so as to give members of ICI's staff not attending particular meetings accurate information about the matters discussed at them.

44 In those circumstances, the burden is on the applicant to provide a different explanation of what occurred at the meetings it attended by advancing exact information, such as the notes taken by its employee during the meetings in which it took part or the testimony of members of its staff who attended the meetings. The applicant has not put forward, or even offered to put forward, any such evidence before the Court.

45 The questions whether the documents used by the Commission against the applicant were such as to prove not only the general tenor of the discussions which took place between the producers but also the applicant's precise conduct, and whether the Commission interpreted those documents in a way which was systematically unfavourable to the applicant are indissociable from the question whether the findings of fact made by the Commission in the Decision are supported by the evidence which it has produced. Since this is a question of substance related to proof of the infringement, it must be examined at a later stage together with the other questions relating to proof of the infringement.

2. *Non-disclosure of, or refusal to disclose, certain documents*

46 Hercules observes that after the statement of objections had been served the Commission allowed the respondents to inspect its file. However, according to Hercules, that file did not contain a certain number of documents favourable to it. By letter of 30 August 1984 it requested the Commission, without success, to disclose those documents which, according to Hercules, should have enabled it to establish the particular status of its employee, Mr B., at the meetings. Likewise, the Commission refused, by a letter of 13 September 1984, to allow Hercules, after it had made its request by letter of 30 July 1984, the right to have access to the other producers' replies to the statement of objections, which could have contained evidence favourable to Hercules and would have enabled it to prepare for the hearings and for any eventual appeal.

47 Hercules challenges the reasons given by the Commission for those refusals, namely that it had disclosed in the appendices to the statement of objections all the information that was necessary and sufficient to enable Hercules to prepare its defence, that it had a duty to take into account all evidence, including that favourable to Hercules, and that, consequently, there was no need for Hercules to have access to the documents it had requested. In the applicant's view, the Court of Justice has recognized in its decisions (judgment in Joined Cases 56 and 58/64 *Établissements Consten Sàrl and Grundig-Verkaufs-GmbH* v *Commission* [1966] ECR 299; judgment in Case 48/69 *Imperial Chemical Industries Limited* v *Commission* [1972] ECR 619; judgment in Case 17/74 *Transocean Marine Paint Association* v *Commission* [1974] ECR 1063; judgment in Case 85/76 *Hoffmann-La Roche & Co. AG* v *Commission* [1979] ECR 461) that observance of the rights of the defence means that the undertakings concerned must be informed of the essential factual elements on which the Commission's objections are based and given the opportunity to make their points of view known. However, the objections are based not only on the documents annexed to the statement of objections but also on documents which the person responsible for drafting that statement decided to disregard. Thus, Hercules was prevented from proving that the presence of its employee, Mr B., at certain meetings did not constitute evidence that it had taken part in an infringement. The defence must be able to draw attention to the importance of any information in the Commission's possession which is favourable to its case but which may have been overlooked by the Commission or given too little weight.

48 Hercules further argues that this violation of the rights of the defence committed by the Commission during the administrative procedure cannot be cured by the production of the relevant documents in the course of proceedings before the Community Court.

49 In its reply Hercules further states that the Commission is not justified in claiming that it could not identify any document to support Hercules' allegations since of course Hercules could not identify documents whose existence might not have been disclosed. Nor can the Commission reproach Hercules for having concluded that certain documents which would have been helpful to Hercules had been omitted from the file since it would have been easy for it to dispel doubts on this issue by allowing Hercules access to the documents emerging from the investigation but not included in the file.

50 The Commission observes that, according to the case-law of the Court of Justice (judgment in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25), the Commission is not required to divulge the contents of its files to the parties. In any event, the only documents which it did not make available to the applicant during the access-to-file procedure were, in the present case, those containing genuine business secrets, its own internal documents and the replies of the other producers to its statements of objections. Thus, it denies that it refused to disclose the documents which did not suit its case. Hercules is in any event unable to identify a single document in support of its allegation that the Commission selected those documents which suited its case best and did not use or disclose the others. It also considers that it is not obliged to give access to the replies of the other producers to the statements of objections.

51 The Court observes that regard for the rights of the defence requires that an applicant must have been put in a position to express, as it sees fit, its views on all the objections raised against it by the Commission in the statement of objections addressed to it and on the evidence which is to be used to support those objections and is mentioned by the Commission in the statement of objections or annexed to it (judgment of the Court of Justice in Case 322/81 *Nederlandsche Banden-Industrie Michelin N. V.* v *Commission* [1983] ECR 3461, paragraph 7 at p. 3498).

52 However, regard for the rights of the defence does not require that an undertaking involved in a procedure pursuant to Article 85(1) of the EEC Treaty must be able to comment on all the documents forming part of the Commission's file since there are no provisions requiring the Commission to divulge the contents of its files to the parties concerned (judgment of the Court of Justice in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission*, cited above, paragraph 25 at p. 59).

53 It must be observed, however, that in establishing a procedure for providing access to the file in competition cases, the Commission imposed on itself rules exceeding the requirements laid down by the Court of Justice. According to those rules, which are explained in the Twelfth Report on Competition Policy (pages 40 and 41), the Commission

'... permits the undertakings involved in a procedure to inspect the file on the case.

... Undertakings are informed of the contents of the Commission's file by means of an annex to the statement of objections or to the letter rejecting a complaint, listing all the documents in the file and indicating documents or parts thereof to which they may have access.

They are invited to come and consult these documents on the Commission's premises. If an undertaking wishes to examine only a few of them the Commission may forward copies.

However, the Commission regards the documents listed below as confidential and accordingly inaccessible to the undertaking concerned:

(i) documents or parts thereof containing other undertakings' business secrets;

(ii) internal Commission documents, such as notes, drafts or other working papers;

(iii) any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality.'

The Commission may not depart from rules which it has thus imposed on itself (judgments of the Court of Justice in Case 81/82 *Commission* v *Council* [1973] ECR 575, paragraph 9 at p. 584, and in Case 148/73 *Louwage* v *Commission* [1974] ECR 81).

54 It follows that the Commission has an obligation to make available to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved.

55 The Court considers that in the present case there is nothing to show that the Commission selected the documents to be made available to the applicant in order to prevent it from demonstrating that it had not taken part in the infringement on account of the status of its employee at the meetings of polypropylene producers. Faced with the Commission's denials, the applicant has not advanced any evidence to establish the Commission's bad faith, as it could have done had it demonstrated before the Court what it claimed in its letter of 30 August 1984 to suspect, namely that documents found by the Commission on its premises had not been included in the file to which it was given access.

56 As regards more particularly the Commission's refusal to grant the applicant access to the replies of the other producers to the statements of objections, the Court considers that it is not necessary to examine whether this refusal constitutes a breach of the rights of the defence. Such an examination would be necessary only if in the absence of that refusal the administrative proceedings could have led to a different result (judgment of the Court of Justice in Case 30/78 *Distillers Company Ltd* v *Commission* [1980] ECR 2229, paragraph 26 at p. 2264, and judgment of the Court of First Instance in Case T-7/90 *Kobor* v *Commission* [1990] ECR II-721, paragraph 30). That is not so here. Following joinder of the cases for the purposes of the oral procedure before the Court, the applicant had access to the replies of the other undertakings to the statements of objections and it has not drawn from those replies any exonerating evidence on which it could have relied during the oral procedure. It is safe to conclude that those replies contained no exonerating evidence and therefore that the fact that the applicant was unable to have access to them during the administrative procedure could not have affected the result reached in the Decision.

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

Proof of the infrnigement

58 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.

59 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 contacts between the producers and the EATP meeting on 22 November 1977, (B) the system of regular meetings of polypropylene producers, (C) the price initiatives, (D) the measures for implementing the price initiatives and (E) the fixing of target tonnages and quotas, taking into account (a) the contested decision, (b) the arguments of the parties, before going on to (c) an assessment of them; it will then be necessary to review the application of Article 85(1) of the EEC Treaty to those facts.

1. *The findings of fact*

A. The contacts between producers and the EATP meeting of 22 November 1977

(a) The contested decision

60 In the Decision (point 17, fourth paragraph; point 78, third paragraph; point 104, second paragraph) the Commission asserts that the applicant, like Hoechst, ICI, Linz, Saga and Solvay, stated that it would be supporting the announcement made by Monte in an article which appeared on 18 November 1977 in the trade press (*European Chemical News*, hereinafter referred to as 'ECN') of its intention to raise the price for 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, showed, according to the Decision, that the DM 1.30/kg level set by Monte had been accepted by the other producers as a general industry 'target'.

61 According to the Decision (point 16, first and second paragraphs), that declaration of support was made in the context of discussions initiated between the producers with a view to avoiding a substantial drop in price levels and attendant losses, discussions in which the major producers, Monte, Hoechst, ICI and Shell, initiated a 'floor-price agreement' which was to be in operation by 1 August 1977 and the details of which were communicated to the other producers, including Hercules, whose marketing director noted that the 'floor-prices' for the major grades of polypropylene were based on a raffia grade market price of DM 1.25/kg.

62 The Decision (point 16, fifth and sixth paragraphs) further states that ICI and Shell admit that there were contacts with other producers as to how the price slide could be checked. However, the Commission acknowledges that, with the exception of the 'big four' (Hoechst, ICI, Monte and Shell) and Hercules and Solvay, it was not able to establish the identity of the producers involved in discussions at that time or to obtain details of the operation of the floor-price agreement.

63 The Decision (point 17, first paragraph) states once more that it was about the time of Monte's announcement of its intention to increase prices that the system of regular meeting of polypropylene producers began. It points out, however, that on ICI's own admission contact was occurring between producers before that date, probably by telephone and on an ad hoc basis.

(b) Arguments of the parties

64 The applicant submits that there is no evidence that it had regular communications with its competitors other than those which it had with them during the producers' meetings. Thus, the note of a telephone call (main statement of objections, Appendix 2) probably received early in 1977 by Hercules' marketing manager, on which the Commission relies for its assertion that the 'major producers' had made an agreement among themselves and which was furnished voluntarily by Hercules to the Commission, proves at the most — and this has never been denied by

Hercules — that Hercules received occasional information orally by telephone from other producers regarding meetings that had taken place among them. But neither that note, nor any other document, proves that Hercules took the initiative in making such contacts, which it never did.

65 Moreover, Hercules contends that the Commission believes that it can conclude from documents not relating to Hercules that some producers decided on an initiative to fix prices in December 1977 and it is only by relying on the note of the statements made by Hercules' executives at the EATP meetings in May and November 1977 (main statement of objections, Appendices 5 and 6) that it asserts that Hercules was a party to that agreement. However, Hercules points out that the statements made in May predated the first evidence of any arrangements made between the four major producers and their contents were not objectionable in any way. The November statements which supported the idea of price increases for polypropylene following the increase in production costs do not provide any proof at all of the existence of illegal collusion. Moreover, it is improbable that such collusion would emerge in an EATP meeting in the presence of customers. The November statements could equally have been no more than a normal public reaction of a producer to his competitors' public actions, such as, for example, Monte's announcement in ECN of an increase in its prices (main statement of objections, Appendix 3). For the same reason, when Hercules, at an EATP meeting in May 1978 (main statement of objections, Appendix 7) stated that prices were not yet at a satisfactory level, such a statement cannot establish the applicant's participation in pricing agreements, especially since the Commission states that those agreements were concluded at producer meetings which it is not proved that Hercules attended. Thus, all the available evidence suggests that in the course of 1977 until some time in 1979 Hercules was an occasional passive recipient of information about whatever discussions may have been going on among other producers.

66 The applicant also maintains that the Commission does not have matching price instructions emanating from Hercules for that period and that consequently its situation is identical to that of BP, which also had contacts with the other producers, and to that of Amoco, which, besides those contacts, also spoke at the EATP meeting in May 1978. It also points out that the Commission has admitted that it is not able to establish with certainty that Hercules became a party to a core agreement at that time.

67 The Commission bases its arguments, first, on Hercules's awareness of the conclusion by the 'big four' of the floor-price agreement, as is shown by the note of a Hercules telephone conversation dating from mid-1977 (main statement of objections, Appendix 2) describing the details of that agreement and, secondly, on the statements made by Hercules at three EATP meetings in May 1977 (main statement of objections, Appendix 5), November 1977 (main statement of objections, Appendix 6) and May 1978 (main statement of objections, Appendix 7). At the first, it stated:

'Hercules is not happy with the current price levels, but feels it will be up to the traditional industry leaders to bring some order out of the present chaos.'

At the second meeting, it stated:

'Since the first alternative does not appear likely, I was happy to learn on Friday from Mrs T. of European Chemical News that Montedison had announced to her that they had made the first move in announcing the new European prices for their grades of polypropylene',

thereby expressing its support for a Monte initiative reported in the trade press (main statement of objections, Appendix 3, referring to a previous article). It is probable that Hercules knew that this initiative resulted from an illegal agreement (main statement of objections, Appendix 2). During the third meeting, it stated:

'Although prices for polypropylene have increased significantly since the fourth quarter of last year, they are not yet at a satisfactory level. It may not have been realistic to think that an increase to DM 1.30/kg could have been reached in one step, but the need to get to this minimum level has not and will not diminish'.

68 As regards telephone contacts with other producers, the Commission states that Hercules itself stated in its reply to the statement of objections that occasionally Mr B. received telephone calls informing him about what went on at meetings he did not attend.

69 The Commission states that it made no finding with regard to Hercules' attendance at meetings of producers other than those of the EATP before 1979. It notes with interest the statement made by Hercules in its reply that it received communications about the results of meetings which took place 'during the earlier period when Mr B. was attending such meetings initially not at all and later only very occasionally'. It is thus clearly referring to the 1978 period and indicates that support for higher prices at EATP meetings was at least based on knowledge of underlying collusion and an intention to join in.

70 As regards the discrimination which the applicant allegedly suffered in relation to Amoco and BP, the Commission points out that point 78 of the Decision clearly states that it is because 'on the totality of the evidence the proof against them of participation in an infringement of Article 85(1) is not conclusive' that Amoco and BP are not addressees of the Decision.

(c) Assessment by the Court

71 The Court finds that the applicant has admitted, both in its reply to the request for information (particular objections, Appendix 1) and in its application, that it occasionally received information from other producers by telephone concerning discussions or meetings which had taken place between them, even though it denies having taken the initiative in making such contacts. Furthermore, it has not limited in time the existence of those contacts.

72 In view of the existence of those contacts in 1977 and 1978 and the statements made by the applicant at the EATP meeting held on 27 May 1977, the question is whether the statements made by the applicant at the EATP meeting of 22 November 1977 constitute the expression of a common purpose with other producers regarding a target price of DM 1.30/kg for 1 December 1977, the existence of which is borne out by the statements made by the applicant at the EATP meeting on 26 May 1978.

73 The Court considers that this is indeed so. At the EATP meeting on 27 May 1977 (main statement of objections, Appendix 5), the applicant suggested that the traditional market 'leaders' (that is to say, the 'big four') should bring some order out of the chaos on the market; in mid-1977 (main statement of objections, Appendix 2), it learned by telephone that the 'big four' had made an agreement on floor-prices (DM 1.25/kg); at the EATP meeting on 22 November 1977 (main statement of objections, Appendix 6), it publicly welcomed the news in ECN that Monte had taken the first step by announcing new European prices for polypropylene (DM 1.30/kg), knowing that an agreement on floor-prices had been concluded and that Monte was a party to that agreement; at the EATP meeting on 26 May 1978 (main statement of objections, Appendix 7), it noted that prices had increased — but not sufficiently — and that it had not been realistic to believe that the increase to DM 1.30/kg could be achieved in one step.

74 The Court considers, moreover, that the case of Amoco is different from that of the applicant in so far as there is no evidence that that undertaking had contacts with other polypropylene producers before the EATP meeting of 26 May 1978 and in so far as it did not participate in the EATP meetings of 27 May 1977 and

22 November 1977, during the last of which a common purpose emerged amongst various polypropylene producers. As for BP, it did not participate in any of those meetings.

75 It follows that the Commission has established to the requisite legal standard, first, that the applicant was informed of the outcome of the discussions about prices and that it was in contact with other producers, in particular during 1977 and 1978, on an ad hoc basis and, secondly, that the statements made by the applicant, as they appear in the minutes of the EATP meeting of 22 November 1977, constituted the expression of a common purpose between the applicant and other producers regarding the fixing of a target price of DM 1.30/kg.

B. The system of regular meetings

(a) The contested decision

76 According to the Decision (point 18, first paragraph), at least six meetings were held during 1978 between senior managers responsible for the overall direction of the polypropylene business of some of the producers ('bosses'). This system soon evolved to include a lower tier of meetings attended by managers possessing more detailed marketing knowledge ('experts') (ICI's reply to the request for information under Article 11 of Regulation No 17, main statement of objections, Appendix 8). The Decision states that before mid-1982 Hercules claimed to have attended only irregularly but from May of that year admits taking part in meetings more frequently than before (point 18, third paragraph).

77 According to the Decision (point 78, tenth paragraph), Hercules, the only American-owned producer represented at meetings, claimed to have been present as an 'observer' and then only irregularly. It admits attending meetings from May 1979 as well as being informed of what had transpired at meetings at which its representative was not present. From mid-1982, despite a threat to withdraw because the German producers did not 'accept' him, the Hercules representative went to some 15 out of 30 known plenary meetings. These included several bosses' sessions, and the ICI record shows that he took an active part in discussions, to the

extent of proposing the 'account leadership' system. He also took part in local meetings covering Benelux at least. While receiving detailed information on the monthly sales of the other producers, the Hercules representative does not appear to have communicated his firm's own figures to the others.

78 In the eleventh paragraph of point 78 of the Decision it is stated that Hercules attempted to present the attendance of its representative as an unofficial venture by a relatively junior employee. Its own documents, however, show that he occupied a responsible position in the company as the marketing manager for polypropylene, and that as early as 1977, when the floor-price agreement was made, and later in 1981, his superiors were themselves in contact with other producers on price arrangements. It is therefore inconceivable that they did not know the real purpose of his business trips which they authorized from May 1979 onwards.

79 The Decision concludes in the third paragraph of point 85 that Hercules cannot escape responsibility for the infringement by arguing that the attendance of its representative was 'unofficial' or that he withheld certain information from the other producers.

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

(b) Arguments of the parties

81 Hercules maintains that the Commission cannot infer that it committed an infringement from the fact that one of its employees, Mr B., took part in a few meetings of polypropylene producers since his participation was sporadic, passive, unknown to his superiors and unofficial and since the rank of that employee was insufficient to allow him to bind the company.

82 It states first of all that its employee attended five meetings out of the twenty-four mentioned in Table 3 of the Decision in respect of the period prior to May 1982, six 'bosses' meetings out of sixteen and nine 'experts' meetings out of fifteen between May 1982 and the end of August 1983 and that he did not attend any of the three meetings which were held after 23 August 1983. It further maintains that the sporadic nature of his attendance at meetings is borne out by ICI's reply to the request for information (main statement of objections, Appendix 8) and Monte's reply to the request for information (Appendix 3 to the statement of objections addressed to Monte).

83 The applicant states, secondly, that this sporadic attendance at meetings was purely passive, as is indicated by ICI's reply to the request for information and as is indeed recognized by the Commission in the Decision (point 78, tenth paragraph), which states that the Hercules representative 'does not appear to have communicated his firm's own figures to the others'. In the applicant's view, this point is very important in so far as the communication of those figures was indispensable for the operation of the cartel since the exchange of information on achieved sales was the means by which the producers believed they could monitor the implementation of the agreed arrangements.

84 The applicant contends, thirdly, that the presence of its employee at the meetings had not received the approval of his superiors, who were unaware of it, and that it was contrary to company policy. In this regard, it explains that although at the beginning of the period covered by the Commission's decision some of its executives were contacted by other producers and made aware of the existence of producer meetings and understandings on prices, this does not mean that its senior executives knew that one of its more subordinate employees was attending those meetings. When they became aware that that employee was receiving information similar to that which they themselves were receiving and had been invited to attend meetings, his superiors reminded him that attendance at meetings of producers would be contrary to company policy. According to the applicant, it was reasonable to assume thereafter that their instructions were being followed. Since the duties of the employee in question involved frequent travel to a large number of European cities and such travel required neither the prior approval of his superiors nor any explanation on his part, there was no hint — not even from his travel vouchers, whose purpose was solely to reimburse his travel expenses — to enable his superiors, who, moreover, did not know the place and date of the meetings, to find out whether he went to them, if only sporadically. Contrary to

what the Commission states in its defence, that conclusion is not contradicted by the report by the Counsel of Hercules Incorporated (particular objections, Hercules, Appendix 6), which simply stated that its employee's role 'may have been known' to his superiors and not that it was known. On the contrary, that conclusion is confirmed by the fact that on 29 July 1981 the superior of that employee informed him of what had transpired at a meeting which had just taken place (particular objections, Hercules, Appendix 18), which demonstrated that he was not aware of his subordinate's attendance. According to the applicant, the motive for the secret attendance of its employee was to obtain information in order to be well judged by his superiors.

85 That having been said, the applicant recognizes that the question whether an undertaking may be held liable for infringements of Community competition rules when it has taken reasonable precautions to prevent them from occurring and, notwithstanding its efforts, an undisciplined employee has taken actions contrary to the orders of his superiors has not yet been resolved.

86 The applicant states, fourthly, that its employee was not a full participant in the meetings and that he participated only as an observer and that the other participants at the meetings were aware of this because he made his unofficial observer status known, as is shown by the note of a meeting held in March 1983 (particular objections, Hercules, Appendix 11), which states that: 'B., marketing manager attends unofficially'. According to the applicant, this unofficial participation irritated the German and Netherlands producers, as is indicated by the note of the meeting held on 2 December 1982 (main statement of objections, Appendix 33) and the note of a telephone conversation between that employee and an ICI executive dated 3 December 1982 (main statement of objections, Appendix 88).

87 Finally, it states that the level of responsibility of its employee within the company prevented him from entering into agreements relating to target prices or restrictions of output and sales. According to the applicant, the employee was not a senior executive of the company despite his title. He had no management responsibilities and did not have the necessary powers to bind the company. In particular, he had no authority to control production or overall sales policy and his

decisions as to pricing guidance to be given to area sales managers were subject to approval by his superiors.

88 The Commission explains that it did not treat frequency of attendance at the meetings as a relevant factor once it was satisfied that an undertaking subscribed to the common plan to regulate prices and supply (see the Decision, point 83, first paragraph). Nevertheless it points out that Hercules admitted, in its reply to the statement of objections, that its employee went 'fairly frequently' to the meetings from February 1982 to March 1983. Furthermore, the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) counts Hercules amongst the usual participants at the meetings.

89 It disputes that the applicant's participation in the meetings was passive, relying on two very brief notes, one stating 'B. — Account leadership' (particular objections, Hercules, Appendix 10) and the other 'B.: Originator of "account leadership" concept (not working)' (particular objections, Hercules, Appendix 11) from which it deduces that the applicant's employee was at the origin of the system of 'account leadership'. It also relies on the note of a meeting held in March 1982 (particular objections, Hercules, Appendix 43), which, according to the Commission, shows that Mr B. had requested the adjustment of the quota allocated to it. It also states that the fact that the applicant's employee did not give its sales figures during the meetings is irrelevant since he knew that the other producers were able to work out those figures from the data available under the Fides data exchange system.

90 As regards the claim that the applicant's employee was forbidden to attend the meetings, the Commission points out that on at least two occasions, in 1977 (main statement of objections, Appendix 2) and on 29 July 1981 (particular objections, Hercules, Appendix 18), he received from his superiors information on the price agreement that had been made. The information received on 29 July 1981 about the meeting held on 28 July does not contradict the Commission's arguments because the applicant's employee was not present at that meeting. Therefore, it is hardly possible to believe that the employee was supposed to understand that the company disapproved of those agreements and that he was prohibited from

attending the meetings. The Commission further points out that no documentary trace of such a prohibition has been produced. Nor is it conceivable, according to the Commission, that Mr B."s superiors were not aware of his attendance at the meetings. Moreover, a report drawn up by the Counsel of Hercules Incorporated in the weeks following the Commission's investigations (particular objections, Hercules, Appendix 6) expressly stated that: 'It appears that Mr B."s non-participant observer role may have been known to several of his immediate superiors'. The Commission further argues that, even if Mr B."s activities were not known to his superiors and were a breach of discipline, which it claims is not the case, this cannot enable Hercules to escape its own responsibility.

91 The Commission further considers that the attendance of the applicant's employee at the meetings was no different in nature from that of the other producers, as is shown, in its view, by the active part which he took in discussions and the commitments which he entered into on behalf of the company. It points out in this regard the role which he played in the establishment of the system of 'account leadership' and his acceptance, at the meeting of 2 December 1982 (main statement of objections, Appendix 33, Table 2) and during a telephone conversation of 3 December 1982 (main statement of objections, Appendix 88), of the quota allocated to the applicant and the adjustment of that quota at a meeting held in March 1982.

92 Finally, the Commission argues that it is futile to attempt to show that the applicant's employee had no decision-making authority in the company since the fact that the price instructions given by the applicant after the meetings reflected the target prices agreed at the meetings unambiguously demonstrates the contrary.

(c) Assessment by the Court

93 The Court notes that, as far as the commencement of the applicant's attendance of the meetings of producers is concerned, the particular objections addressed to Hercules state that: 'Mr F. B., . . . , attended a number of "Bosses" and "Experts" meetings from 1979 . . . '.

94 According to the replies of ICI, Monte and the applicant to the requests for information (main statement of objections, Appendix 8; particular objections, Monte, Appendix 3; and particular objections, Hercules, Appendix 1), Hercules was an irregular participant in meetings in 1979, 1980 and 1981. It admits having participated in one or two meetings in 1979, in one meeting in 1980 and in two meetings in 1981. It should, however, be noted that it is clear from the record of the interview of Hercules' employee, Mr B., by Commission officials (particular objections, Hercules, Appendix 7, annex A) that the employee stated that he had perhaps participated in two other meetings in 1979, in two other meetings in 1980 and in one other meeting in 1981. It is also apparent from the applicant's reply to the statement of objections that the applicant frequently participated in meetings from February 1982, which suggests that it participated in the meetings held in February, March and April 1982 (five meetings in all). Consequently, its participation in the meetings during those years was not so irregular as it contends since, according to its own statements, it is possible that before May 1982 it took part in fifteen meetings out of twenty-nine (that is to say the twenty-four meetings mentioned in Table 3 of the Decision covering the period in question, plus the meetings held during that same period which are mentioned in the record of Mr B."s interview but are not referred to in Table 3 of the Decision), and not five meetings out of twenty-four.

95 The relative irregularity with which the applicant participated in the meetings which took place at this period are not the only factor which must be taken into account for the purpose of examining its participation in the system of regular meetings of polypropylene producers; account must also be taken of the contacts which it could have had with other producers. In this regard, it should be noted that the applicant indicated in its reply to the request for information (particular objections, Hercules, Appendix 1) that:

'Mr B. was informed on a number of occasions that meetings were scheduled to occur and was invited to attend. It does not appear that Mr B. was informed in such conversations about any action which it was proposed to take at such meetings. Mr B. did not make any commitment with respect to prices, volumes, or related matters, and did not authorize anyone to represent or act on behalf of Hercules at such meetings. On a number of occasions, but not invariably, Mr B. was informed after meetings as to what had transpired. On such occasions Mr B. did not make any commitments or express any intention, to follow or support any

price changes that may have been agreed upon at such meetings. On occasion, Mr B. may have made general statements indicating Hercules' desire for higher polypropylene prices'.

96 In view of those contacts, by which Mr B. was able to supplement the large amount of information which he had obtained during the meetings regarding the commercial policies which the applicant's competitors were going to adopt, the Court finds the relative irregularity with which the applicant's employee participated in the meetings before May 1982 does not belie its participation in the system of regular meetings of polypropylene producers during that period.

97 The Court finds that the applicant was a regular participant in the meetings from May 1982 until the end of August 1983, as is shown by its reply to the request for information, its reply to the statement of objections and the notes of the meetings of 3 May and 1 June 1983 (main statement of objections, Appendices and 38 and 40), the first of which mentions 'a fairly full attendance with only Hercules missing among usual participants' and the second of which refers to the 'usual participants except for Solvay + Hercules'. In this regard, it must be observed that some notes of meetings, such as the notes of the bosses' meeting of 21 September 1982 (main statement of objections, Appendix 30), indicate that the applicant was present at them whereas those meetings are not mentioned in the reply to the request for

information and that, consequently, that reply must be considered to be incomplete.

98 The Commission was fully entitled to take the view, based on ICI's reply to the request for information, which is borne out by numerous notes of meetings, that the purpose of the meetings was, in particular, to fix target prices and sales volumes. Indeed, that reply contains the following passages:

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

and

'A number of proposals for the volume of individual producers were discussed at meetings'.

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

100 Besides the foregoing passages, the following statement appears in ICI's reply to the request for information: 'Only "Bosses" and "Experts" meetings came to be held on a monthly basis'. The Commission was fully entitled to deduce from that reply, as well as from the identical nature and purpose of the meetings, that they were part of a system of regular meetings.

101 It must also be noted that the allegedly passive participation of the applicant's employee in the meetings is belied by various pieces of evidence. These consist first of all of two handwritten notes, cited by the Commission, the second one of which is dated March 1983 (particular objections, Hercules, Appendices 10 and 11), which refer to 'B. — Account leadership' and 'B.: Originator of "account leadership" concept (not working)', from which it may be deduced that Mr B. proposed the system of 'account leadership'. Next, there is the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) and the note of a telephone conversation between the applicant and an ICI employee dated 3 December 1982 (main statement of objections, Appendix 88), which together show that that employee communicated to ICI Amoco's, BP's and Hercules' views on the quotas which had been allocated to them at the meeting held on 2 December 1982, even though Mr B. did not disclose Hercules' sales figure.

102 The applicant's contentions that Mr B."s superiors did not know that he was participating in the meetings and had told him that his participation was against company policy lack credibility in view of the following factors. No documentary trace of the prohibition against participating in the meetings has been produced by the applicant. The superiors of the employee in question had contacts with other participants in the meetings; this is shown by the fact in June 1977 and on 29 July 1981 those persons informed Mr B. of what was said during a telephone conversation (main statement of objections, Appendix 2) and of what had transpired at a meeting which he had not attended (particular objections, Hercules, Appendix 18). The report drawn up by Hercules Incorporated states that Mr B."s role may have been known to several of his immediate superiors (particular objections, Hercules, Appendix 6). Finally, the fact that the applicant has stated before the Court that Mr B."s decisions as to pricing guidance to be given to area sales managers were

subject to approval by his superiors suggests that he had to justify his decisions by explaining to his superiors the data on which he based them and the origin of those data.

103 Furthermore, the nature of the participation of the applicant's employee in the meetings, which was described by ICI as 'unofficial' in the aforesaid note of March 1983, was no different from that of the other participants, as is shown by the active part which he took in the discussions and the fact that the price instructions given by the applicant following the meetings corresponded to a large extent, as regards their amount and their date of entry into force, to the target prices fixed at those meetings. The fact that ICI described Mr B."s participation in the meetings as 'unofficial' is not apt to weaken those findings, since the use of that description does not prove that the other producers knew that the applicant's employee was attending without his superiors' knowledge, or even against their wishes, or that he did not have the necessary authority to be there. That description merely shows that he did not wish his participation in those meetings to become known outside them.

104 As regards the level of the duties performed by the employee in question within the applicant company, the fact that the price instructions given by the applicant match the results of the meetings indicates either that Mr B. had the authority to make the applicant's pricing policy directly reflect the results of the meetings which he attended, which demonstrates that he had the necessary authority to bind the company, or, if that was not the case, that he had been instructed to do so.

105 It follows that the Commission has established to the requisite legal standard that the applicant participated in the system of regular meetings of polypropylene producers from the beginning of 1979 until at least the month of August 1983, which it was entitled to infer from the applicant's participation in the meetings and the contacts which the applicant had in relation to those meetings; secondly, that the purpose of those meetings was, in particular, to fix price and sales volume targets; and, thirdly, that the applicant's participation in those meetings had the significance attributed to it in the Decision.

C. The price initiatives

(a) The contested decision

106 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.

107 With regard to the first of those price initiatives, 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.

108 However, 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).

109 As regards the second price initiative, the Commission, whilst admitting (in point 32 of the Decision) that no meeting notes were found for 1980, 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. Price instructions issued by a number of producers — DSM, Hoechst, Linz, Monte, Saga and ICI — indicated that in

order to re-establish price levels targets were set for December 1980 — 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. 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.

110 In the Decision (point 33, third paragraph) it is stated that is not known whether Hercules was at the meetings held in January 1981, at which it was decided that a price increase, fixed in December 1980 for 1 February 1981, was required in two stages on the basis of DM 1.75/kg for raffia: 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. The Decision states, however, that Hercules was present at the previous meeting, on 16 December 1980.

111 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.

112 As regards the third 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 hand-written 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.

113 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%.

114 The fourth price initiative of June to July 1982 took place as supply and demand returned into balance on the market. That initiative was decided upon at the producers' meeting of 13 May 1982, at which Hercules participated and 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).

115 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.

116 According to the Decision (paragraph 40), the applicant also participated in the fifth price initiative of September-November 1982 decided upon at the meeting on 20 and 21 July 1982, the aim of which was to achieve a price of DM 2.00/kg by 1 September and DM 2.10/kg by 1 October, since it was present at the majority if not all of the meetings held between July and November 1982 in which this initiative was planned and monitored (Decision, point 45). 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).

117 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).

118 According to the Decision (point 44), at the meeting on 21 September 1982, in which the applicant participated, an examination of the measures taken to achieve the target previously set was undertaken 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.

119 Following the meeting on 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).

120 Like ATO, BASF, DSM, Hoechst, Hüls, ICI, Linz, Monte and Saga, the applicant supplied the Commission with price instructions issued to its 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 (main statement of objections, Appendix 29) (Decision, point 45, second paragraph).

121 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.

122 Finally, according to the Decision (point 47), the applicant participated in the sixth price initiative of July-November 1983. 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 complete commitment to the DM 1.85/kg increase. On that occasion, it was agreed that Shell would lead publicly in ECN.

123 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. It goes on to state that only fragmented price instructions were obtained from ATO and Petrofina but these confirmed that these 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 are shown to have given instructions to implement the new price.

124 The Decision (point 50) also points out that further meetings, in which all the regular participants, including Hercules, 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, whilst a Shell internal note of 11 August, relating to 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.

125 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. It is further stated (point 51, first paragraph) that BASF, Hoechst, Hüls, ICI, Linz, Monte and Solvay each sent instructions to their sales offices setting identical prices for October and November, with Hercules initially fixing slightly lower prices.

126 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.

127 In the Decision (point 76, second paragraph) the Commission applies itself to replying in detail to Hercules, which had criticized it for (it claimed) unfairly treating price instructions of different producers as contemporaneous when they were not. Similarly, in the Decision (point 76, third paragraph), the Commission refuses to accept that the survey produced by Hercules in order to show that there was no pattern of relationship between its own price guidelines and the target prices fixed in meetings has any evidentiary value.

128 In the Decision (point 77, first paragraph) the Commission further points out that some producers did not supply the Commission with a full set of price instructions from 1979 onwards as they had been requested. Thus, for Hercules, documentation was available only in relation to 1982 and 1983.

(b) Arguments of the parties

129 The applicant maintains that the Commission was wrong to conclude, from documents emanating from other producers, that it had supported the 'target price' system. Even when its employee attended some of the meetings at which prices were discussed, neither the minutes of those meetings nor any other direct evidence shows that he gave his assent to those prices or that he undertook to apply them. The evidence available, in particular the evidence of other producers, according to which Mr B. did not enter into any commitment, and his lack of authority to bind the company, proves the contrary.

130 It contends that the Commission was wrong to base its findings on the terminology used in the internal price instructions of the undertaking, since this was the terminology habitually used in the trade press.

131 The applicant complains that the Commission did not take into account the actual performance in the market place of the accused undertakings and based the Decision entirely on an analysis of pricing instructions internal to the undertakings and an assumption that those instructions necessarily distorted competition. In the applicant's view, that analysis on the part of the Commission is incorrect. The applicant explains that its pricing system operated in such a way that it could not be used to give effect to an agreement on prices with other producers. First, the guidance given to area sales managers left them with broad authority to deviate from suggested price goals. During a large part of the 1982-1983 period, such guidance was in the form of average price goals. In view of the flexibility of that pricing system, the Commission's argument that the agreed prices were a starting point in negotiations with customers is inapplicable to Hercules. Secondly, the purpose of the general guidelines was to maintain production at a maximum level and to that end to maximize sales even if profit margins had to be reduced.

132 It states that this policy of 'maximizing' production and sales made it impossible for it to adhere to an agreed system of 'target prices'. The prices which it actually charged in the market place did not conform to the 'targets' to which it had allegedly agreed. According to Hercules, this emerges in particular from an analysis of 850 individual transactions effected by Hercules in 1982 and 1983 in four countries in which it had significant sales (Federal Republic of Germany, United Kingdom, France and Italy). Similarly, the Commission took no account of the study by Professor Albach and the audit conducted by Coopers & Lybrand. The simple comparison of the 'target' prices with the prices reported in the trade press from September 1981 to December 1983, to which the Commission confined itself (Table 9 annexed to the Decision), is not self-evident proof of unlawful effects in the market place. On the contrary, that comparison confirms the producers' contentions that prices charged were well below the alleged 'target' prices and varied across a wide band, in particular in the case of non-raffia grades, in which the vast majority of Hercules' sales were made.

133 Hercules states that, contrary to what the Commission asserts, it did not selectively interpret price instructions since it used the last instruction actually given, unlike the Commission, which chose inconsistently from among multiple instructions. Similarly, it contends that it did not use 'notional' figures for grades other than raffia instead of 'targets', as the Commission claims. The comparison which it made involved each 'target' figure for each grade of polypropylene in each currency. The simple fact was that since the number of 'targets' for products other than raffia were too small Hercules calculated, for comparison purposes, additional 'notional targets' but did so in a perfectly consistent manner. It states that it is, on the contrary, the Commission that has used defective and unreliable methods in its attempts to show simultaneity and identity of price instructions given by different producers and to relate those instructions to producers' meetings.

134 In this regard, it contends that for the price initiative of August-December 1981 the Commission took into account as the price instruction for Hercules a note which was purely internal (particular objections, Hercules, Appendix 18).

135 It argues that for the price initiative of June/July 1982 the Commission failed to take into account the fact that ten out of the seventeen price instructions it issued do not correspond to the target price allegedly fixed, that the Commission took into account from amongst the applicant's price instructions the list prices in order to compare them with other producers' minimum prices when it ought to have considered the minimum price fixed by the applicant, which was lower than that of the other producers, and that it failed to take into account its instructions in DKR, which were lower than the target prices as far as homopolymer and copolymer are concerned.

136 It contends that, as far as the price initiative of September-November 1982 is concerned, its price instruction dated 26 July 1982 cannot be related to the meeting of 2 September 1982, which postdated it. It also points out that its price instruction for October 1982 was given on 20 October, a long time after the date of entry into force of the other producers' new prices and after ECN had

published the target price sought. Here again, it states, the Commission confused its list prices and its minimum prices and failed to take account of other price instructions which it had furnished to the Commission and which did not support its case.

137 As regards the price initiative of July-November 1983, the applicant explains that it issued its price instruction on 29 June 1983, four weeks after the meeting at which the Commission contends that a target price was set and well after the other producers had issued their own price instructions. It also points out that its price instructions differ from those of other producers and from the target prices allegedly fixed as far as the months of September and October 1983 are concerned, because it issued its price instructions after the other producers following an independent analysis of their behaviour on the market.

138 According to the applicant, that analysis is borne out by the fact that even the other producers took the view that it was not cooperating with price initiatives and was disrupting the market by price cutting, as is shown in particular by the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33). That attitude shows, in its view, not only that its internal instructions did not conform to the 'targets' but also how irrelevant in any event those instructions were to what the sales force actually did.

139 Finally, the applicant states that 'Article 1(d) of the Decision must be interpreted as a finding that Hercules agreed to and did give price guidance to its sales affiliates . . . without reference to the outcome of such instructions'.

140 The Commission explains that it has already answered the arguments presented under this heading and that, moreover, Hercules has nothing to say about the fact that Article 1(b) of the Decision deals with the fixing of 'target' prices and not their application.

141 In the Commission's view, the only argument of any relevance put forward by Hercules in this regard concerns the flexibility of its pricing system. However, the Commission rejects that argument by pointing out that it has never contended that uniform prices were actually charged; what matters is that instructions corresponding to the 'target' prices were given by headquarters as a basis for negotiation with customers. If the applicant's sales offices were asked to observe average prices to be charged on different grades of polypropylene, those averages were calculated on the basis of 'target' prices and the price instructions specified current prices and floor prices.

142 The Commission points out that, if no assent had been manifested by Hercules during the meetings, the other producers would not have tolerated the presence of its representative if they had reasons to doubt his assent to the price fixing which was the purpose of those meetings.

143 It emphasizes again the unequivocal nature of telexes sent by Hercules to its sales offices (Appendices, Hercules, E — I, to the Commission's letter of 29 March 1985), in which it is stated:

'Hence on for October exclusively quoting full list price without exception and lower our presence in the market' . . .

'Book soonest possible business at regular accounts which currently are at or practically at list prices. Initiate soonest list price negotiations on regular accounts which current too far away from list price. Thereby assuming competition going at similar list price levels' (G 8, pages 1 and 2)

and

'Will not refuse further volume provided it is at above list prices . . . In case of serious enquiry/biz opportunity from a typical historical prime customer where list for competitive reasons not obtainable we ready to discuss but don't assume flexibility beforehand' (G 9).

The Commission notes that those telexes were both sent in the 1982-1983 period during which Hercules says that its average price system was in operation. According to the Commission, it is therefore clear that this system did not deprive target prices of significance.

(c) Assessment by the Court

144 The Court finds that the records of the regular meetings of polypropylene producers show that the producers which participated in those meetings agreed to the price initiatives mentioned in the Decision. For example, the note of the meeting on 13 May 1982 (main statement of objections, Appendix 24) states:

'everyone felt that there was a very good opportunity to get a price rise through before the holidays + after some debate settled on DM 2.00 from 1st June (UK 14th June). Individual country figures are shown in the attached table'.

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

146 In this regard, it must be noted that the applicant does not specifically deny participating in any particular price initiative but contends that it never undertook to observe the target prices; that, it claims, is borne out by the status of its employee both at the meetings and within the Hercules company and by its internal and external pricing policy which was independent of alleged target prices and not capable of being influenced by them.

147 None of those arguments can be accepted as evidence capable of corroborating the applicant's assertion that it did not subscribe to the agreed price initiatives.

148 As regards the first of those arguments, the Court observes first of all, that for the reasons which led it to hold that the applicant's deductions from Mr B."s status within the company were not apt to prove that it could not be criticized for his

attendance at the meetings, those same deductions are likewise not apt to prove that the applicant did not subscribe to the price initiatives agreed at those meetings.

149 As regards the second argument, in so far as it relates to Hercules' internal pricing policy — that is to say to its price instructions of 1982 and 1983 and to its system of fixing prices —, the applicant's criticisms made during the administrative procedure, to which it refers in its application, as regards the similarity and simultaneity of its price instructions in relation to those of other producers and to the target prices set at meetings during 1982 and 1983, were partly taken into account in the Decision. In Tables 7A to 7N the Decision records both the similarities and the differences between those instructions and the instructions of other producers or the target prices set at the meetings. Consequently, the Commission correctly described the applicant's situation. In this regard, it must be added that the selection made by the Commission between the various price instructions of the applicant did not falsely portray the applicant's actual situation but is inherent in the synthesis undertaken in the tables annexed to the Decision.

150 For example, the criticism of the Commission's analysis relating to the applicant's prices in September 1981 was taken into account in the second paragraph of point 35 of the Decision and Table 7F, which expressly indicate that price instructions were not made available by Hercules to the Commission for that period but that an internal note of 29 July 1981 setting out the target prices is available (particular objections, Hercules, Appendix 18).

151 Similarly, the applicant's criticisms relating to the price initiative of September-November 1982 are misdirected since the applicant's price instructions of 26 (actually 27) July 1982 (letter of 29 March 1985, Appendices, Hercules, G2 to G6) are to be related not to the meeting of 2 September 1982 but to that of 20 and 21 July 1982 (main statement of objections, Appendix 26) at which the target price of DM 2.00/kg for 1 September had been fixed, as the Commission indicates in a footnote to Table 7I.

152 Furthermore, the Court considers that the applicant cannot rely on the public announcement of prices in ECN to explain its price instructions since it is clear from the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) that at that time when a price initiative was decided it was announced in the trade press. That note states: 'Shell was reported to have committed themselves to the move and would lead publicly in ECN'.

153 As regards the consequences which the applicant seeks to draw from the partial lack of simultaneity of its price instructions for 1982 and 1983, the Court considers that, in the present case, the length of time separating the applicant's price instructions from those of other producers and from the meeting at which the target price was fixed is likewise not apt to weaken the evidence advanced by the Commission. The length of that delay does not lead to the conclusion that the applicant issued its instructions on the basis of an independent assessment of the market, since it had learned at the meetings the prices which its competitors had in view.

154 As regards the similarity of the price instructions issued by the applicant in 1982 and 1983 with the target prices and its competitors' instructions, the Court finds that the fact that the applicant only partially implemented the agreed price initiative cannot alter the fact that it subscribed to them at the meetings, especially when the notes of those meetings reveal no difference of view between the applicant and the other participants at the meetings on those initiatives, and the partial implementation of the initiative attracted criticism from other producers, as is shown by the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33), which refers to criticisms raised by the German and Netherlands producers against the applicant. The applicant points out that in ICI's reply to the request for information (main statement of objections, Appendix 8) those criticisms were stated to be due to its pricing policy.

155 The flexibility of the applicant's own system for fixing prices is not a factor capable of weakening the Commission's findings either, since although the price instructions given to the sales offices left them broad freedom which could even go

so far as allowing them to regard those instructions as average monthly target prices, the fact remains that the target prices set at the meetings were used as a basis for the sales offices' assessments or for the setting of the average monthly target prices and thus served as a basis for negotiations with customers, as the telexes quoted by the Commission (letter of 29 March 1985, Appendices, Hercules, E to I), which date from the period in which the applicant's system of average prices operated, show. Moreover, the fact that the language used in those telexes was similar to that used in the trade press is not one which can weaken that finding.

156 It is because of that flexibility of its system for fixing prices that the applicant cannot complain that in its analysis of its price instructions the Commission sometimes took into account its list prices and sometimes its minimum prices, even though in the case of other producers it took into account their minimum prices only, since that system left a wide margin of discretion to its sales offices.

157 Furthermore, the applicant cannot effectively argue that its price instructions were purely internal since, although they were indeed purely internal inasmuch as they were sent by headquarters to the sales offices, they were nevertheless sent with a view to their being carried out and therefore in order to produce directly or indirectly external effects, which negates their internal character.

158 As regards the second argument, in so far as it relates to Hercules' external pricing policy — that is to say the prices which it charged on the market — the Decision does not contain any assertion to the effect that the applicant charged prices which always corresponded to the target prices agreed at the meetings, which shows that the contested decision likewise does not rely on the applicant's implementation of the outcome of meetings in order to establish that it participated in the fixing of those target prices. Any difference between the prices actually obtained on the market by the applicant and the target prices fixed at the meetings, even if actually proven, would not gainsay the applicant's participation in the fixing of target prices at the meetings but would at most tend to show that the applicant did not

put the decisions reached in those meetings into effect, as is again shown by the criticism which the applicant encountered at the meetings for its pricing policy.

159 Consequently, in the present case, the applicant cannot derive any favourable argument from its pricing policy, either internal or external, in order to establish that it did not subscribe to the price initiatives decided on, organized and monitored at the meetings in which it participated.

160 Furthermore, the Commission was fully entitled to deduce from ICI's reply to the request for information (main statement of objections, Appendix 8), in which it is stated that "'Target prices" for the basic grade of each principal category of polypropylene as proposed by producers from time to time since 1 January 1979 are set forth in Schedule . . . ', that those initiatives were part of a system of fixing target prices.

161 It follows that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom there emerged common intentions concerning the price initiatives mentioned in the Decision and that those initiatives were part of a system.

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

(a) The contested decision

162 In the Decision (Article 1(c) and point 27; see also point 42) the Commission asserts that the applicant agreed with the other producers various measures designed to facilitate the implementation of target prices, such as temporary restrictions on output, exchanges of detailed information on their deliveries, the

holding of local meetings and, from the end of September 1982, a system of 'account management' designed to implement price rises to individual customers.

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

164 The Decision (point 20) also asserts that Hercules attended local meetings, at least those covering the Benelux countries (point 78, tenth paragraph), held to discuss implementation on a national level of arrangements agreed in the full sessions.

(b) Arguments of the parties

165 The applicant denies that it participated in any exchange of information on deliveries and points out that this was expressly noted by the Commission in point 78 of the Decision. Its obstinate refusal, as well as that of Amoco and BP, to

disclose market share figures which, when added together, represented a large overall share of the EEC market must have had the effect of limiting the confidence which others could have in the fruits of such exchanges of information which were only partial.

166 It claims that there is no evidence that it agreed to restrict output or to divert sales away from the EEC or that it carried out such actions. In the statement of objections, the Commission had stated that during a meeting on 21 September 1982 (main statement of objections, Appendix 30), the applicant's representative had agreed to take the plant off line in order to support a price initiative. However, that contention is contradicted by the operating reports for the plant and by the fact that Hercules' representative had no authority to control the production of the plant. Furthermore, the note of the meeting of 13 May 1982 (main statement of objections, Appendix 24) is not borne out on this point by the note of the same meeting drawn up by Hercules (particular objections, Hercules, Appendix 3).

167 The applicant further contends that none of its production was diverted to overseas markets despite the fact that during the period covered by the Commission's decision profit margins on overseas sales were better than on sales in the EEC. It also states that its market share within the EEC increased.

168 It asserts that the Commission bases its findings on unidentified documents of unexplained origin and doubtful reliability in order to establish its participation in the system of 'account management'. It points out, however, that ICI stated in its reply to the request for information that it was Hercules that was responsible for the failure of the system (main statement of objections, Appendix 8). It further claims that it was not the originator of the system of 'account management', which was mentioned for the first time at a local meeting, as was indicated by its employee during his interview (particular objections, Hercules, Appendix 7).

169 The applicant states that it took no part in the compiling of the tables annexed to the notes of the meetings of 2 September 1982 and 3 May 1983 (main statement of objections, Appendices 29 and 38). In its view, this is proved by the fact that it is not mentioned as 'account leader' for its main customers in the United Kingdom and the Federal Republic of Germany. The fact, however, that it is mentioned in those tables as 'account leader' for another customer proves nothing since all the producers knew that it was its main supplier.

170 The applicant further asserts that the presence of its employee at the local meetings was sporadic and limited to Belgium and did not justify the Commission's conclusion that Hercules participated in the implementation of the arrangements in question.

171 The applicant concludes that since it is not realistic to imagine that it participated in an agreement without participating in the measures designed to facilitate its implementation, this casts doubt on its participation in the agreement.

172 The Commission points out that it clearly did not find that Hercules had participated in exchanges of its sale figures, as it clearly indicated in the tenth paragraph of point 78 of the Decision. It considers that Hercules participated in an infringement which involved an agreement on various measures designed to facilitate the implementation of target prices but it never found that those measures were implemented.

173 The Commission contends that its finding was not that Hercules agreed to restrict output, much less that such restrictions actually occurred. However, the notes of certain meetings, such as those of 13 May 1982 (main statement of objections, Appendix 24) and 21 September 1982 (main statement of objections, Appendix 30), show that this was one of the matters on which general agreement was reached and that Hercules was prepared to restrict its output or divert any surplus output to overseas markets.

174 It states that Hercules does not appear to dispute that a system of 'account management' was the subject of an agreement, as is shown by the notes of the meetings of 2 September and 2 December 1982 and spring 1983 (main statement of objections, Appendices 29, 33 and 37). As regards the nature of its participation in that system, its reply to the request for information, the record of the interview held with its employee by the officials of the Commission and two handwritten notes (particular objections, Hercules, Appendices 1, 7, 10 and 11) show that Mr B. was the first to propose such a system.

175 As regards the local meetings, the Commission states, finally, that its main argument is based on the fact that it was agreed to hold such meetings and that it asserts only in the alternative that such meetings took place and that Hercules admitted in its reply to the request for information that it occasionally took part in them.

(c) Assessment by the Court

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

177 It must be concluded that in participating in the meetings during which that set of measures was adopted (in particular those of 13 May, 2 and 21 September 1982 (main statement of objections, Appendices 24, 29, 30)), the applicant subscribed to it, since it has not adduced any evidence to prove the contrary. In this regard, the adoption of the system of 'account leadership' is clear from the following passage appearing in the record 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 customer 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'.

Similarly, at the meeting of 21 September 1982, in which the applicant participated, it was stated: 'In support of the move, BASF, Hercules and Hoechst said they would be taking plant off line temporarily' and at the meeting of 13 May 1982 Fina stated: 'Plant will be shut down for 20 days in August'.

178 As regards the question of 'account leadership', the Court finds that 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 of spring 1983 (main statement of objections, Appendix 37), which were all attended by the applicant, that during those meetings the producers present at them agreed to that system.

179 Furthermore, it is clear from a note found at the premises of ICI which, according to the applicant, dates from about March 1983 (particular objections, Hercules,

Appendix 11) that its employee was regarded as the 'Originator of "account leadership system" concept'.

180 The fact that the applicant was not designated 'account leader' for its biggest customers is in any event irrelevant. The relevant question is not whether the customer is important from the supplier's point of view but whether the supplier, in this case Hercules, is important from the customer's point of view. Indeed, the applicant has neither contended nor demonstrated that it was in fact the principal supplier of these 'prime customers' for whom it was not designated 'account leader'.

181 As regards the allegation that the applicant restricted its output and diverted production to overseas markets, the Court further finds that, contrary to its contentions, its own note of the meting of 13 May 1982 (particular objections, Hercules, Appendix 3) does not weaken but corroborates ICI's note of the same meeting (main statement of objections, Appendix 24) on the discussions which took place on this point, even though it is true that in Hercules's note its own statements are not reproduced. In this regard, it is stated in the ICI note:

'Hercules — Export demand expected to continue strongly + would put any surplus overseas despite losing ground in W. Europe over last 2 months'.

182 Finally, the Court notes that the applicant does not dispute that it took part in local meetings and that the purpose of those meetings is borne out by the note of the meeting of 12 August 1982 (main statement of objections, Appendix 27), which shows that those meetings were intended to ensure the implementation, at local level, of a particular price initiative.

183 It must be added that it is plain from the tenth paragraph of point 78 of the Decision that the Decision was not based on a finding that the applicant exchanged information relating to its sales.

184 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 the measures designed to facilitate the implementation of the price initiatives mentioned in the Decision.

E. Target tonnages and quotas

(a) The contested decision

185 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.

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

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

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

189 According to the Decision (point 56), the sharing of the market for 1981 was the subject of prolonged and complex negotiations. At the meetings in January 1981, it was agreed that as a temporary measure to help to achieve the February/March price initiative each producer would restrict monthly sales to one-twelfth of 85% of the 1980 'target'. In preparation for a more permanent scheme, each producer communicated to the meeting the tonnage it hoped to sell during 1981. However, added together, those 'aspirations' largely exceeded total forecast demand. In spite of various compromise schemes put forward by Shell and ICI, no definitive quota agreement was reached for 1981. As a stopgap measure the producers took the previous year's quota of each producer as a theoretical entitlement and reported their actual sales each month to the meeting. In this way actual sales were monitored against a notional split of the available market based on the 1980 quota (Decision, point 57).

190 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 and were stable in comparison with previous years in the case of the majority of producers.

191 According to the Decision (point 60), for 1983 ICI invited each producer to indicate its own quota ambitions and suggestions for what percentage each of the others should be allowed. Monte, Anic, ATO, DSM, Linz, Saga and Solvay, as well as the German producers via BASF, submitted their own detailed proposals. The various proposals were then processed by computer to obtain an average which was compared with the individual percentage 'aspirations' of each producer. Those steps enabled ICI to propose guidelines for a new framework agreement for 1983. Those proposals were discussed at the meetings of November and December 1982. A proposal initially restricted to the first quarter of the year was discussed at the meeting on 2 December 1982. The note of that meeting drawn up by ICI shows that ATO, DSM, Hoechst, Hüls, ICI, Monte and Solvay, as well as Hercules, found their allocated quota 'acceptable' (Decision, point 63). Those facts are borne out by the ICI note of a telephone conversation with Hercules of 3 December 1982.

192 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, relates to exchanges of details of the tonnages sold by each producer in the previous month, which would indicate that some quota system was in operation (Decision, point 64).

193 According to the Decision (point 66, last paragraph; point 78, tenth paragraph; point 109, fifth paragraph), the records of meetings from June 1982 onwards show that it became the practice for each producer to report its sales in the previous month for comparison with the target which had been fixed for it. For Amoco, BP and Hercules, however, only a global estimate was available. BP and Amoco did not attend meetings and Hercules appears to have been reticent about communicating its own individual figures. However, Hercules had the benefit of the individual data of the other producers, and internal documents show that it possessed accurate information on the deliveries in each Member State and the market shares of each of the other producers for 1981 and 1982.

(b) Arguments of the parties

194 The applicant points out first of all that in a number of documents, such as the records of the meetings or tables of figures (main statement of objections, Appendices 25, 28, 31 to 33, 59, 65, 69, 70 and 87), the name of Hercules appears together with the names of Amoco and/or BP where sales figures and the targets allocated are concerned. It considers that this proves that it did not disclose its sale figures, which consequently had to be evaluated by the other producers on the basis of estimations.

195 Next, it contends that the table headed 'Producers' Sales to West Europe', which comprises an 'agreed targets 1979' column (main statement of objections, Appendix 55), contains errors concerning the estimate of its sales figures, that it was compiled by an unknown person and that it contains handwritten alterations which could have been added later. Furthermore, the note of the meeting of January 1981 (main statement of objections, Appendix 17) itself indicates, in the applicant's view, that the figures appearing there for Hercules are projections made by other producers.

196 The applicant further contends that a number of documents do not concern it, since they are internal documents of other producers, sometimes giving accounts of bilateral discussions to which it was not a party (main statement of objections, Appendices 62, 63, 67, 68 and 93) or quota proposals from other producers (main statement of objections, Appendices 75 and 76).

197 Finally, it claims that its sales figures have always widely exceeded the so-called quotas which were allegedly allocated to it (main statement of objections, Appendices 28, 32, 33, 59 and 65).

198 More generally, the applicant states that the Commission's objections cannot be sustained in the light of the evidence previously adduced that Hercules refused to participate in exchanges of information relating to sales figures which were necessary for concluding and carrying out the quota arrangements. The Commission bases its finding on documents which seem to be drafts or reflections of market allocation schemes. However, it overlooked the fact that there is uncontroverted testimony and documentary evidence that Hercules did not participate (main statement of objections, Appendix 8) and that in the documents relied on by the Commission allocations of quotas are made not for Hercules alone but for Hercules together with Amoco and/or BP, companies in respect of which the Commission had admitted that there was an insufficient basis to accuse them of an infringement of Article 85(1) of the EEC Treaty.

199 At the hearing, the applicant further argued, first, that the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) bears the word 'amended' next to the names of Amoco, Hercules and BP, which would again indicate that the producers had wrong information about the production capacity of those three undertakings, and, secondly, that it may not be inferred from Appendix 43 to the particular objections addressed to Hercules that in March 1982 Hercules had the quota allocated to it corrected since the correction appearing there (125 kilotonnes instead of 100 kilotonnes) did not relate to a quota but to Hercules's nameplate capacity. That request for a correction did not, moreover, constitute a commitment on Hercules's part to increase or reduce its capacity but was only a reference to wrong information which was already contained in two other tables dating from 8 and 9 October 1980 (main statement of objections, Appendices 57 and 58).

200 The Commission, on the other hand, claims that Hercules participated with other producers in an agreement under which they shared out the market, in particular by allocating to each producer a quota or sales target. It does not matter whether or not Hercules disclosed its monthly sales figures since it participated in the

overall arrangement of which those figures are only one aspect. The extent of Hercules's participation in that type of overall plan is defined in point 52 *in fine* and the third paragraph of point 53 of the Decision, according to which each producer taking part was allocated a quota or target expressed either in tonnes or in percentages. In arriving at a quota scheme allowance had to be made for producers which, not having attended meetings, had not participated in the detailed discussions.

201 The Commission points out that in 1979, a period in respect of which Hercules has admitted having participated in meetings, Hercules had its own individual quota, as is shown by the table headed 'Producers' Sales to West Europe' (main statement of objections, Appendix 55).

202 As regards the period 1980-1982, it points out that the figures relating to Hercules were grouped together with those for BP and/or Amoco in the various tables (main statement of objections, Appendices 17, 59, 62, 68 and 93).

203 The Commission again points out that the same Monte planning document for a 1982 quota scheme as that which had been found at the premises of ICI was also found at the premises of Hercules. It states that Hercules' representatives claimed they did not understand what the reference to a 'quota' contained therein could relate to (main statement of objections, Appendix 71).

204 At the hearing, the Commission pointed out that although Table 2 annexed to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33), headed '1983 Quarter 1 Proposal', mentions a quota of 53 kilotonnes for Amoco, Hercules and BP together, it also provides for a 21/21/11 split. From this the Commission deduces that at the meetings Hercules was careful to defend its own interests. It also points out that the figures which are set out in those documents are also to be found in the note of a telephone conversation of 3 December 1982 between ICI and Hercules' employee (main statement of objections, Appendix 88). As regards the note of a meeting held in March 1982 (particular objections, Hercules, Appendix 43), the Commission considers that it

shows the active part taken by Hercules in the drawing up of the quotas. In its view, it proves that in order to obtain a larger quota Hercules saw to it that the nameplate capacity which had been ascribed to it and which was to be used as the basis for calculating the quotas was altered.

205 Finally, the Commission considers that the fact that Hercules may not have disclosed its production figures or sales figures to the other producers does not exonerate it since it knew perfectly well that the other producers were capable of calculating those figures (as well as those of Amoco and BP) by using the Fides data. Thus, Hercules was able to square the circle by withholding information whilst knowing that this did not hinder a proper evaluation of a realistic quota for it. The Commission also points out that where the evaluation was incorrect Hercules had it altered, as was the case in March 1982.

(c) Assessment by the Court

206 It has already been found that from the beginning of 1979 the applicant participated in the system of regular meetings of polypropylene producers at which discussions relating to the sales volumes of the various producers were held and information exchanged on that subject.

207 In this regard, it is to be noted at the outset that in the Decision (point 66, last paragraph; point 78, tenth paragraph; point 109, fifth paragraph) the Commission recognized that the applicant had not disclosed figures relating to its sales volumes but found also that, owing to its participation in the meetings, the applicant possessed detailed information on the monthly sales of the other producers.

208 In these circumstances, examination of the applicant's involvement in the system for fixing volume targets should begin by analysing the operation of the whole of that system.

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

210 As regards the year 1979 in particular, having regard both to the whole of the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12) and to the undated table taken from the premises of ICI (main statement of objections, Appendix 55) headed 'Producers' Sales to West Europe', which sets out for all the polypropylene producers of western Europe the sales figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual', 'revised target' and '79', it is apparent that the need to tighten the quota system agreed for 1979 for the last three months of that year was recognized at that meeting. The term 'tight', read in conjunction with the restriction to 80% of one-twelfth of planned annual sales, indicates that the scheme originally planned for 1979 had to be made tighter for those last three months. That interpretation of the note is borne out by the abovementioned table because it contains, under the heading '79' in the last column to the right of the column headed 'revised target', figures which must correspond to the quotas initially fixed. These had to be circumscribed because they had been drawn up on the basis of an over-optimistic market evaluation, as was also the case in 1980. The reference in the third paragraph of point 31 of the Decision to a scheme 'proposed or agreed in Zurich to limit monthly sales to 80% of the average achieved during the first eight months of the year' does not tell against these findings. That reference, read in conjunction with point 54 of the Decision, is to be taken as meaning that sales volume targets had already been set initially for the monthly sales of the first eight months of 1979.

211 During his interview with the officials of the Commission (particular objections, Hercules, Appendix 7, A) Mr B. stated that he may have attended a meeting in Zurich on 19 June 1979. The note of the meeting on 26 and 27 September 1979 (main statement of objections, Appendix 12) states:

'Recognized that tight quota system [is] essential. Volume/go for 80% scheme an[d] for recent Zurich note'.

212 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', that sales volume targets were set for the whole of the year. Those documents are supported by a table dated 8 October 1980 (main statement of objections, Appendix 57) comparing two columns, one setting out the '1980 Nameplate Capacity' and the other the '1980 Quota' for the various producers.

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

214 The existence of negotiations between the producers in order to achieve the establishment of a quota system and the communication of their 'aspirations' during those negotiations are attested by various pieces of evidence such as tables setting out, for each producer, its 'actual' figures and 'targets' for the years 1979 and 1980 and its 'aspirations' for 1981 (main statement of objections, Appendices 59 and 61); a table written in Italian (main statement of objections, Appendix 62) setting out, for each producer, its quota for 1980, the proposals of other producers as to the quota to be allocated to it for 1981 and its own 'aspirations' for 1981, and an ICI internal note (main statement of objections, Appendix 63) describing the progress of those negotiations in which it is stated:

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

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

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

'In the meantime (February-March) monthly volume would be restricted to $^1/_{12}$ of 85% of the 1980 target with a freeze on customers'.

216 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.

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

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

219 The existence of negotiations between the producers with a view to introducing a quota system and the communication of their aspirations during those negotiations are evidenced, first, by a document entitled 'Scheme for discussions "quota system

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

220 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.

221 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 Kt)'. 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 Kt'.

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

223 As regards 1983, the Court finds, in the first place, that it is clear from the documents produced by the Commission (main statement of objections, Appendices 33 and 74 to 87) that at the end of 1982 and the beginning of 1983 the polypropylene producers discussed a quota system for 1983.

224 As regards the question whether those negotiations actually succeeded as far as the first two quarters of 1983 are concerned, as is asserted in the Decision (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'.

225 The Court finds in this 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.

226 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).

227 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.

228 As far as the question of the applicant's participation in that system is concerned, it denies any participation and refers in this regard, first, to the last paragraph of point 66, the tenth paragraph of point 78 and the fifth paragraph of point 109 of the Decision and, secondly, to ICI's reply to the request for information (main statement of objections, Appendix 8), according to which Hercules 'refused even to consider any quota system', 'even when Hercules did attend meetings they would not report their figures' and 'the sales volume [of Amoco/Hercules/BP] was calculated by deducting from known total sales for West Europe (derived from Fides data) the total sales made by other producers which had declared detail of their sales volume'. The applicant considers that such evidence is corroborated by the errors contained in the table headed 'Producers' Sales to West Europe' (main statement of objections, Appendix 55) as regards its sales figures, by the fact that the notes of the meetings of January 1981 (main statement of objections, Appendix 17) indicate that the figures stated for Hercules are approximations, by the fact that in the documents its figures appear together with those of Amoco and BP and, finally, by the fact that it always exceeded its alleged quotas.

229 The Commission, whilst not disputing those facts, did not consider them sufficient to weaken the evidence that Hercules did participate in the quota system, having regard, in particular, to the fact that Hercules had the figure for its nameplate capacity adjusted at a meeting held in March 1982 (particular objections, Hercules, Appendix 43) and to the fact that Table 2, entitled '1983 Quarter 1 Proposal', annexed to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33), which the applicant attended, contains, next to the names 'Am./Herc./BP', the remark 'seems O. K. to Herc. on 20/20/13 split. Subsequently amended to 21/21/11'. In the Commission's view, that last extract is even clearer evidence of Hercules's active role in the negotiations on quotas than is indicated by the note of a telephone conversation between the applicant's employee, designated by his initials, and ICI dated 3 December 1982 (main statement of objections, Appendix 88):

'F. B. phoned to say he has spoken to Geneva and they are willing to play along with 21 kt for 1st quarter, so are Hercules provided BP accepts the balance proposed. As far as the total for the whole year is concerned, Amoco feel that their share is a bit low if their cop. line is included . . . F. B. also narked by German Dutch attitude to his presence. Quite prepared to stay away unless he is accepted'.

In addition to that evidence, the Commission points out that a 1982 Monte market-sharing scheme was found at the applicant's premises (main statement of objections, Appendix 71), something that Hercules could not explain.

230 As regards the period prior to March 1982, the Court finds, first, that in participating in the system of regular meetings of polypropylene producers from 1979 the applicant took part in the negotiations which led to the fixing of sales volume

targets and, secondly, that without any objection on its part it was allocated a quota calculated on the basis of figures available through the Fides system.

231 As regards the period subsequent to March 1982, the Court finds that the applicant took an active part in the discussions concerning quotas, even though its name does not appear in the document headed 'Scheme for discussions "quota system 1982"' (main statement of objections, Appendix 69). Indeed, there was found upon its premises Monte's plan for a general market-sharing scheme for 1982 (main statement of objections, Appendix 71) which it had amended at a meeting in March 1982 in order to eliminate errors relating to its nameplate production capacity, which could only have served the purpose of obtaining a more favourable quota (particular objections, Hercules, Appendix 43). The Court also finds that at the meetings of 13 May and 21 September 1982 (main statement of objections, Appendices 24 and 30) the applicant provided information relating to its future production and that, at the meeting on 2 December 1982 (main statement of objections, Appendix 33), in which it participated, it gave the impression that it might agree to a joint quota for itself, BP and Amoco (the author of the note writes 'seems O. K.'). Finally, the Court observes that on the day after that meeting it contacted ICI in order to relay the reactions of BP and Amoco to the proposed quota and to confirm its agreement (main statement of objections, Appendix 88).

232 Having regard to those various detailed findings, it must be concluded that the Commission has established to the requisite legal standard that the applicant participated in a quota system in so far as, even though it may not have expressly subscribed to the quota which had been allocated to it by the other producers for the years 1979 and 1980 or to a restriction of its monthly sales in relation to a previous period for the years 1981 and 1982, it obtained information on the sales volume restrictions which its competitors considered necessary, on their past sales figures and on the sales volume targets which they were allocating to one another and, by its presence at the meetings and its lack of objection to the quota which had been allocated to it, gave its competitors the impression that it would take account of all that information and of that quota in determining the policy which it intended to follow on the market and thus supported the common purposes which emerged between the participants at the meetings. The Commission has further established to the requisite legal standard that the applicant took an active part in the negotiations concerning quotas from March 1982 and was one of the polypropylene producers amongst whom there emerged a common purpose concerning the fixing of sales volume targets for the first part of 1983.

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

A. Legal characterization

(a) The contested decision

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

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

235 The Decision (point 82, first paragraph) goes on to state that in the detailed working out of the overall plan express agreement was reached in many areas, such as individual price initiatives and annual quota schemes. In some cases the producers may not have reached a consensus on a definitive scheme, such as quotas for 1981 and 1982. However, their adoption of stopgap measures including exchange of information and the monitoring of actual monthly sales against achievements in some previous reference period not only involved an express agreement to set up and operate such measures but also indicated an implied agreement to maintain as far as possible the respective positions of the producers.

236 As regards more specifically the December 1977 initiative, the Decision states (in the third paragraph of point 82) that even in front of customers at the EATP meetings producers like Hercules, Hoechst, ICI, LINZ, Rhône-Poulenc, SAGA and Solvay were stressing the perceived need for concerted action to increase prices. There was further contact on pricing between the producers outside the EATP meetings. In the light of these admitted contacts the Commission considers that behind the device of one or more producers complaining of inadequate levels of profitability and suggesting joint action while the others expressed 'support' for

such moves lay an existing agreement on pricing. It adds that even in the absence of further contacts such a device might still indicate a sufficient consensus for an agreement within the meaning of Article 85(1).

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

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

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

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

241 According to the Decision (point 87, first paragraph), the object of the Treaty in creating a separate concept of concerted practice was to forestall the possibility of undertakings evading the application of Article 85(1) by colluding in an anti-competitive manner falling short of a definite agreement by, for example, informing each other in advance of the attitude each intends to adopt, so that each

could regulate its commercial conduct in the knowledge that its competitors would behave in the same way (see the judgment of the Court of Justice in Case 48/69 *Imperial Chemical Industries Ltd* v *Commission*, cited above).

242 In its judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (*Suiker Unie* v *Commission*, cited above) the Court of Justice held that the criteria of coordination and cooperation laid down by its case-law, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the competition provisions of the Treaty according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors but it does strictly preclude any direct or indirect contact between them the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (Decision, point 87, second paragraph). Such conduct may fall under Article 85(1) as a 'concerted practice' even where the parties have not reached agreement in advance on a common plan defining their action in the market but adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour (Decision, point 87, third paragraph, first sentence).

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

244 According to the Decision (point 87, fifth paragraph), the importance of the concept of a concerted practice does not thus result so much from the distinction

between it and an 'agreement' as from the distinction between forms of collusion falling under Article 85(1) and mere parallel behaviour with no element of concertation. Nothing therefore turns in the present case upon the precise form taken by the collusive arrangements.

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

(b) Arguments of the parties

246 The applicant claims that it did not participate in any agreement or in any concerted practice and seeks to demonstrate that the factors constituting both the agreement and the concerted practice are absent in its case.

247 First, it claims that it did not participate in any agreement. In its view, in order for a party to incur obligations under an agreement, it must have the intention to be bound, it must have expressed consent to be bound, it must be competent to do so and, finally, there must have been a meeting of minds.

248 Second, it contends that it did not engage in concerted practices either. Although employees of the company did have contact with competitors, those contacts did not have the object or the effect of influencing the conduct on the market of a competitor or of disclosing Hercules' course of conduct. Hercules' conduct did not meet the criteria defining a concerted practice, namely a 'practice', coordination and cooperation (judgment of the Court of Justice in *Suiker Unie*, cited above, paragraphs 173 and 174), parallelism of behaviour not being capable by itself of constituting a concerted practice (judgment of the Court of Justice in Case 48/69 *ICI* v *Commission*, cited above, paragraph 66).

249 Finally, the applicant takes the view that in order for the terms 'cooperation' and 'coordination' to have any meaning they must imply a measure of mutual expectation of performance, even if such expectations fall short of an 'agreement' (judgment in Case 48/69 *ICI* v *Commission*, cited above, paragraph 118). In the present case, the evidence makes clear that the other producers neither had any such expectation nor reasonably could have formed any such expectation, in view of the conduct of Hercules' employee at the meetings and Hercules' conduct in the market place. Likewise, the behaviour of other producers in the market place gave no expectation that the targets set during the discussions would actually be observed. This phenomenon, which Mr B. was able to observe, served to deprive him of any expectation that other producers would coordinate their behaviour with his.

250 The Commission refers to what it stated previously about the participation of the applicant's employee in the meetings. However, as regards Hercules' participation in a concerted practice, it also states that as long as the evidence shows that Hercules participated in meetings and had other contacts during which prices and quotas were discussed, thereby signifying its interest in, and support of, such discussions, it is not open to it to seek to escape its responsibility, even by asserting that it never, or rarely, gave a certain type of information to the other producers, or that it never sought in express terms to persuade its competitors to act in any particular way in the market place.

251 In the Commission's view, there is a concerted practice as soon as there is concerted action having as its purpose the restriction of the autonomy of the undertakings in relation to one another, even if no actual conduct has been found on the market. In its view, the argument revolves around the meaning of the word 'practice'. It opposes the argument advanced by the applicant that the word has the narrow meaning of 'conduct on the market'. In its view, the word can cover the mere act of participating in contacts, provided that they have as their purpose the restriction of the undertakings' autonomy.

252 The Commission goes on to argue that if the two requirements — concerted action and conduct on the market — were required for the existence of a concerted practice, as the applicant maintains, a whole gamut of practices having as their purpose, but not necessarily as their effect, the distortion of competition on the common market would not be caught by Article 85. Part of the purpose of Article 85 would thus be thwarted. Furthermore, that view of the applicant is not in accordance with the case-law of the Court of Justice concerning the concept of concerted practice (judgment in Case 48/69 *ICI* v *Commission*, cited above, paragraph 66; judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission*, cited above, paragraph 26; and judgment in Case 172/80 *Züchner* v *Bayerische Vereinsbank AG*, cited above, paragraph 14). Although those judgments each mention practices on the market, they are not mentioned as an element constituting the infringement, as the applicant maintains, but as a factual element from which the concerted action may be deduced. According to that case-law, no actual conduct on the market is required. All that is required is contact between economic operators, characteristic of their abandonment of their necessary autonomy.

253 In the Commission's view, it is not therefore necessary, in order for there to be an infringement of Article 85, for the undertakings to have put into practice that which they have discussed together. The offence under Article 85(1) exists in full once the intention to substitute cooperation for the risks of competition has materialized in cooperation, without there necessarily being, after the event, conduct on the market which may be found.

(c) Assessment by the Court

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

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

256 Since it is clear from the case-law of the Court of Justice that in order for there to be an agreement within the meaning of Article 85(1) of the EEC Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (see the judgment in Case 41/69 *ACF Chemiefarma N. V.* v *Commission* [1970] ECR 661, paragraph 112, and the judgment in Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck Sàrl* v *Commission* [1980] ECR 3125, paragraph 86), this Court holds that the Commission was entitled to treat the common intentions existing between the applicant and other polypropylene producers, which the Commission has proved to the requisite legal standard and which related to price initiatives, measures designed to facilitate the implementation of price initiatives and sales volume targets for the first half of 1983, as agreements within the meaning of Article 85(1) of the EEC Treaty.

257 Furthermore, having established to the requisite legal standard that the effects of the price initiatives continued to last until November 1983, the Commission was fully entitled to take the view that the infringement continued until at least November 1983. It is clear from the case-law of the Court of Justice that Article 85 is also applicable to agreements which are no longer in force but which continue to produce their effects after they have formally ceased to be in force (judgment in Case 243/83 *Binon & Cie S. A.* v *Agence et Messagerie de la Presse S. A.* [1985] ECR 2015, paragraph 17).

258 For a definition of the concept of concerted practice, reference must be made to the case-law of the Court of Justice, which shows that the criteria of coordination and cooperation previously laid down by that Court must be understood in the light of the concept inherent in the competition provisions of the EEC Treaty according to which each economic operator must determine independently the policy which he intends to adopt on the common market. Although this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission*, cited above, paragraphs 173 and 174).

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

260 Accordingly, not only did the applicant pursue the aim of eliminating in advance uncertainty about the future conduct of its competitors but also, in determining the

policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, its competitors were bound to take into account, directly or indirectly, the information disclosed to them by the applicant about the course of conduct which the applicant itself had decided upon or which it contemplated adopting on the market.

261 The Commission was therefore justified, in the alternative, having regard to their purpose, in categorizing the regular meetings of polypropylene producers in which the applicant participated between the beginning of 1979 and August 1983 and its participation in fixing sales volume targets for the years 1979 to 1982 as concerted practices within the meaning of Article 85(1) of the EEC Treaty.

262 As regards the question whether the Commission was entitled to find that there was a single infringement, described in Article 1 of the Decision as 'an agreement and concerted practice', the Court points out that, in view of their identical purpose, the various concerted practices followed and agreements concluded formed part of systems of regular meetings, target-price fixing and quota-fixing.

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

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

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

B. Restrictive effect on competition

(a) The contested decision

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

(b) Arguments of the parties

267 The applicant contends that the acts with which it is charged could not by themselves restrict competition. It claims that the Commission chose to presume that there was a significant distortion of competition without taking into account the evidence that the so-called price initiatives never had any effect on the market and that consequently the effects on purchasers were negligible or non-existent. Furthermore, even supposing that parallel price instructions existed, the condition requiring that there must be an effect on competition could not be fulfilled, since there is no causal link between the meetings and the parallel price instructions, on

the one hand, and a change in the prices charged, on the other hand (judgments of the Court of Justice in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm GmbH* [1966] ECR 235 and in Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission*, cited above).

268 The Commission replies that Hercules' participation in the infringement did affect competition, in particular prices; however, it is not Hercules' activities which must have an appreciable effect on competition but the activities of the cartel as a whole, to which Hercules contributed in no small way.

(c) Assessment by the Court

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

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

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

272 Moreover, the applicant's argument that its activities could not have had any effect on the market must in any event be rejected since the relevant question is not whether the applicant's individual participation was capable of having an effect on the market but whether the infringement in which it participated could have had an effect on the market. The undertakings which took part in the infringement held in the Decision to have been committed represent nearly the whole of that market, which would clearly indicate that the infringement which they committed together must have had an effect on the market.

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

C. Effect on trade between Member States

(a) The contested decision

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

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

276 In point 94 of the Decision the Commission finds that the fixing of target prices for each Member State, although needing to take some account of the prevailing local conditions — discussed in detail in national meetings — must have distorted the pattern of trade and the effect on price levels of differences in efficiency between producers. The system of account leadership, in directing customers to particular named producers, aggravated the effect of the pricing arrangements. The Commission acknowledges that in setting quotas or targets the producers did not break the allocation down by Member State or by region. However, the very existence of a quota or target would operate to restrict the opportunities open to a producer.

(b) Arguments of the parties

277 The applicant contends that the acts with which it is charged could not by themselves have affected trade between Member States (judgments of the Court of Justice in Case 48/69 *ICI* v *Commission*, cited above, paragraph 64, and in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission*, cited above, paragraphs 172 and 173).

278 The Commission refers in this regard to what it stated in points 93 and 94 of the Decision.

(c) Assessment by the Court

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

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

281 The applicant's ground of challenge cannot therefore be upheld.

D. Collective responsibility

(a) The contested decision

282 According to the Decision (point 83, first paragraph), the conclusion that there is one continuing agreement is not altered by the fact that some producers inevitably were not present at every meeting. Any 'initiative' took several months to plan and to implement and it would make little difference to the involvement of a producer if it was absent on occasion. In any case, the normal practice was for absentees to be informed of what had been decided in meetings. All the undertakings to which the Decision is addressed took part in the conception of overall plans and in detailed discussions and their degree of responsibility is not affected by reason of their absence on occasion from a particular session (or in the case of Shell, from all plenary sessions).

283 The Decision goes on to state (point 83, second paragraph) that the essence of the present case is the combination over a long period of the producers towards a common end, and each participant must take responsibility not only for its own direct role but also for the operation of the agreement as a whole. The degree of involvement of each producer is not therefore fixed according to the period for which its pricing instructions happened to be available but for the whole of the period during which it adhered to the common enterprise.

284 That consideration applies also to Anic and to Rhône-Poulenc, which left the polypropylene sector before the date of the Commission's investigations. No pricing instructions to sales offices were available at all from either of these two undertakings. Their attendance at meetings and their participation in the volume target and quota schemes can, however, be established from the documentary evidence. The agreement must be viewed as a whole and their involvement is established even if no price instructions from them were found (Decision, point 83, third paragraph).

(b) Arguments of the parties

285 According to the applicant, the conclusions which the Commission draws from the available evidence are, to a large extent, wrong. In its view, there is no justification for the Commission to adopt a 'guilt by association' approach, and it should therefore prove Hercules' participation in each of the infringements described in Article 1 of the Decision, as the Court of Justice indicated in its judgment in the *ACNA* case, in which it recognized the special role played by that undertaking in the cartel and therefore reduced the fine which had been imposed upon it (judgment in Case 57/69 *Azienda Colori Nazionali — ACNA S. p. A.* v *Commission* [1972] ECR 933, paragraph 75 at page 955). The applicant further argues that the Commission cannot create a new offence under Article 85(1) consisting simply of knowledge of infringements committed by others. It must therefore prove Hercules' concrete participation and not simply 'passive acquiesence' in the infringements committed by others.

286 The Commission replies that the Decision does not accuse each of the undertakings of having participated in each aspect of the infringement described in Article 1. The Decision finds each undertaking to have infringed Article 85(1) of the EEC Treaty by participating in one continuous agreement and concerted practice whereby the producers generally carried out the activities described in Article 1, as is shown by a proper reading of Article 1 of the Decision in conjunction with the third paragraph of point 81 and point 83 of the Decision. The polypropylene cartel should be treated as an overall 'framework agreement' with complementary aspects. An undertaking cannot therefore split the cartel arrangements into their component parts and argue over its involvement in each one.

287 According to the Commission, the comprehensive evidence shows that the various things done in the context of the cartel are only facets of a single whole linked together by a framework of systematic, regular and frequent meetings at different levels. As long as Hercules was implicated in the 'framework agreement', it cannot escape responsibility and it is consequently futile for it to attempt to show that it was less implicated than other producers in a particular aspect of the infringement. Each participant must therefore, according to the Commission, bear the responsibility, not only for its own immediate part in it, but also for the execution of the agreement as a whole. The reference to the *Dyestuffs* case made by Hercules is not relevant because there is a difference between not participating at all in certain initiatives, as was the case with ACNA, and participating actively only in certain aspects of them, as with Hercules.

288 Finally, the Commission maintains that Hercules is wrong to believe that it can say that the Commission essentially accuses it of having knowledge of infringements committed by others or of having shown 'passive acquiesence'. Hercules concedes that one of its employees attended meetings at which prices and quotas were discussed. It also agrees that it obtained important information from its 'competitors', although it claims that it gave little or even no information itself. It gave price instructions consistent with the outcome of the meetings. Finally, none of its arguments by which it seeks to show that it was less helpful than others in relation to the quota scheme can relieve it of its share of responsibility for the overall plan, since the quota system was no more than a support mechanism for the pricing efforts and was therefore a subsidiary matter.

(c) Assessment by the Court

289 It follows from the Court's assessments relating to the findings of fact and the application of Article 85(1) of the EEC Treaty by the Commission that in the applicant's case the Commission has proved to the requisite legal standard each of the aspects of the infringement found against it in the decision and that it did not therefore attribute to the applicant liability for the conduct of other producers.

290 The second and third paragraphs of point 83 of the Decision do not contradict that finding, since it is mainly concerned with justifying the finding of the infringement in the case of undertakings in respect of which the Commission discovered no price instructions for the entire period during which they participated in the system of regular meetings.

291 Consequently, this ground of challenge must be dismissed.

3. *Conclusion*

292 It follows from all the foregoing considerations that all the applicant's grounds of challenge relating to the findings of fact and to the application of Article 85(1) of the EEC Treaty by the Commission in the contested decision must be dismissed.

The principle of equal treatment

293 The applicant maintains that the mere fact that one of its employees was occasionally present at meetings is not sufficient to establish that it infringed Article 85(1) of the EEC Treaty when Amoco and BP, which also had contacts with other producers, have not been held guilty of the infringement. In the applicant's view, the clearly established refusal of those three companies to support market-sharing schemes should have led the Commission to the conclusion that none of the three companies had consented to or participated in pricing arrangements.

294 The Commission points out that point 78 of the Decision clearly indicates that the reason for which Amoco and BP were not included amongst the addressees of the Decision was that 'on the totality of the evidence the proof against them of participation in an infringement of Article 85(1) is not conclusive'. The fact that there was no evidence to show that those two undertakings ever attended the meetings was naturally important since it made it more difficult to prove that they participated in the cartel. According to the Commission, Hercules stands accused

not only of having participated in meetings or having received information about meetings in which it had not taken part; it is the whole of its conduct, as it is clearly to be seen from the numerous pieces of evidence showing that it participated in the cartel (in particular, by giving price instructions reflecting the target prices fixed at meetings), to which objection is taken. It is therefore futile for Hercules, in order to minimise its responsibility, to point out the occasions when its representative did not attend meetings, even though the Commission has never even alleged that he had taken part in them.

295 The Court would observe that in order for there to be a breach of the principle of equal treatment comparable situations must have been treated differently. In the present case, however, the applicant's situation is different from that of Amoco and BP in so far as, unlike those two undertakings, Hercules took part in the system of regular meetings in which price and sales volume targets were fixed and extensive information was exchanged between competitors about their future conduct. Consequently, there cannot have been any breach of the principle of equal treatment.

The statement of reasons

1. *Insufficient reasoning*

296 The applicant points out that any decision taken in breach of the obligation to state reasons laid down in Article 190 of the Treaty must be annulled. In its view, the decision in question is inadequately supported, owing to the Commission's failure to pursue its investigations fully and because it based its conclusions on insufficient evidence. In particular, the defect in reasoning relates to the failure to investigate the relevant facts and the failure to investigate the impact of the alleged conduct of the producers on the market and also to the Commission's refusal to take into account information of prime importance and to the fact that it selected, in an unfair and inconsistent manner, only evidence which appeared to support its point of view.

297 The Commission observes that Hercules' application on this point is not properly argued. The few examples on which Hercules relies in order to

show that the Commission's investigations were incomplete are, in its view, not conclusive.

298 The Court finds that it is clear from its assessments relating to the findings of fact made by the Commission in order to prove the infringement that the Commission properly investigated and established the relevant facts, in reliance on sufficient evidence and that it explained to the requisite legal standard the reasons for its Decision.

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

2. *Lack of reference to the hearing officer's report*

300 The applicant further argues that it is clear from the decision taken by the Commission to institute the position of the hearing officer and from the hearing officer's terms of reference that when the Commission adopts its decision it must take account of the opinion of the hearing officer, even though it is not obliged to follow it. In the present case, however, the Decision makes no reference to that opinion, thus infringing Article 190 of the EEC Treaty.

301 The Commission states that the hearing officer's report is not an opinion which is required to be obtained for the purposes of Article 190 of the EEC Treaty, since that provision refers only to opinions required by the Treaty itself or under secondary legislation enacted pursuant thereto; the opinion of the hearing officer is provided for only in the terms of reference drawn up by the Commission.

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

'*Article 2*

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

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

Article 5

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

Article 6

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

Article 7

Where appropriate, the Member of the Commission with special responsibility for competition may decide, at the Hearing Officer's request, to attach the Hearing Officer's final report to the draft decision submitted to the Commission, in order

to ensure that when it reaches a decision on an individual case it is fully apprised of all relevant information.'

303 It is clear from the very wording of the hearing officer's terms of reference that it is not mandatory for his report to be passed on to either the Advisory Committee or the Commission. There is no provision which provides for the report to be forwarded to the Advisory Committee. Although it is true that the hearing officer must report to the Director-General for Competition (Article 5) and that he may, if he deems it appropriate, refer his observations direct to the Member of the Commission with special responsibility for competition (Article 6), who himself may, at the hearing officer's request, attach the hearing officer's final report to the draft decision submitted to the Commission (Article 7), there is no provision requiring the hearing officer, the Director-General for Competition or the Member of the Commission with special responsibility for competition to forward the hearing officer's report to the Commission. It follows that the hearing officer's report is not, for the purposes of Article 190 of the EEC Treaty, an opinion which the Commission is required to obtain when taking a decision pursuant to Article 85(1) of the EEC Treaty.

304 In those circumstances, there are no grounds for granting the applicant's request, made at the reply stage, that the Court should examine the hearing officer's report.

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

The fine

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

1. *The limitation period*

307 The applicant claims that the limitation rule laid down in Regulation (EEC) No 2988/74 of the Council 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 L 319, p. 1) must be applied. The Commission considered that there had been an unbroken course of conduct since the 1977 'floor-price' agreement. However, although it knew about it, Hercules did not participate in that agreement and its conduct thereafter cannot be characterized as constituting part of an unbroken course of conduct beginning in 1977.

308 The Commission again emphasizes that the charge against the applicant is that it participated in a single continuing agreement, which precludes the application of the limitation rules in the present case.

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

310 In the present case, it follows from the Court's assessments relating to proof of the infringement that the applicant participated in a single infringement which began in November 1977, when it subscribed to an agreement fixing a target price for 1 December 1977, and continued until November 1983. In this regard, it should be noted that the continuity of the infringement between the conclusion of that agreement and the agreements and concerted practices found from 1979 onwards is borne out by the contacts with other producers which the applicant maintained without interruption beginning in 1977.

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

2. *Duration of the infringement*

312 The applicant states that the duration of the infringement seems to have played an important role in the determination of the amount of the fine, although the manner of calculation of the fines is not explained by the Commission. No infringement can be found against it before 1979, however.

313 The Commission replies that it has sufficiently established the duration of the infringement and that it stated in the third paragraph of point 107 of the Decision that it considered that the more serious aspects of the infringement did not emerge until the beginning of 1979 and that it took account of this when determining the amount of the fine.

314 The Court would point out that it has already found that the Commission properly assessed the duration of the period during which the applicant infringed Article 85(1) of the EEC Treaty.

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

3. *The gravity of the infringement*

A. The applicant's limited role

316 The applicant contends that the fine imposed on it is excessive in relation to the possible lack of care which may have been proved and that, consequently, it must be annulled or substantially reduced.

317 It argues that, contrary to the Commission's contentions, it cannot be held vicariously responsible for all the activities of the cartel. Therefore, the Commission must not fail to determine whether the applicant became a party to specific sub-agreements, because even if these are carried out within the framework of a general anti-competitive purpose or agreement, each participant should be judged and fined on the basis of its specific actions (judgment of the Court of Justice in the *ACNA* case, cited above, paragraph 75). For the same reason, activities of other producers which occurred prior to the date when the participation of an employee of the applicant in the unlawful arrangements is proven cannot be attributed to the applicant.

318 As regards the gravity of the infringement, the applicant maintains that the Commission wrongly failed to draw a distinction between producers other than the 'big four'. Since it may not be assumed that each producer is legally liable for the behaviour of all, the Commission ought to have examined the specific facts as they applied to each undertaking in order to evaluate the blameworthiness of each party, as the Court of Justice indicated in its judgment in the Suiker Unie case (cited above, paragraph 622).

319 The applicant believes that if the Commission had acted in that way, it would have reduced the fine imposed on it in relation to the fines imposed on the other producers, which, unlike the applicant, attended meetings with greater frequency, more actively and over a longer period, actively participated in local meetings, furnished information about their own sales figures to their competitors and indicated their agreement with 'target prices' or sales quotas.

320 The applicant states that its treatment is particularly unfair if it is compared with the treatment of Amoco and BP, whose conduct was similar and which were linked with Hercules in the minds of other producers as 'non-participants'.

321 The Commission maintains that it has already sufficiently examined the role played by the applicant and that in determining the amount of each individual fine to be imposed it expressly considered the extent of each undertaking's specific participation, taking into account considerations of proportionality (Decision, point 109). In its view, the applicant's participation in the cartel was sufficient to justify the fine imposed on it. The Court of Justice has held that any concrete participation in an infringement — even passive acquiescence which facilitates an infringement — is sufficient to warrant the imposition of a fine (judgments in Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131 and in Joined Cases 32/78 and 36 to 82/78 *BMW Belgium S. A. and Others* v *Commission* [1979] ECR 2435).

322 The Commission contends that it has already answered the allegation of discrimination in relation to Amoco and BP.

323 The Court finds that it is clear from its assessments relating to proof of the infringement that the Commission has correctly established the role played by the applicant in the infringement and that the Commission indicated in point 109 of the Decision that it took account of that role when determining the amount of the fine.

324 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.

325 Moreover, since the situations of the applicant on the one hand and of Amoco and BP on the other are not comparable there can be no question of discrimination against the applicant in relation to those two undertakings.

326 Consequently, this ground of challenge must be dismissed.

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

327 The applicant states that the disregard shown for the real conditions of the market and for the economic difficulties in the polypropylene sector is not consistent with other decisions adopted recently by the Commission in which the amount of the fines was much lower (Decision of 6 August 1984, *Zinc Producer Group*, Official Journal 1984 L 220; Decision of 2 November 1984, *Peroxide*, Official Journal 1985 L 35).

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

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

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

331 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.

332 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).

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

334 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.

335 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.

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

337 It follows that this ground of challenge relied on by the applicant cannot be upheld.

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

338 The applicant claims that the infringement had no effect on the market. According to the case-law of the Court of Justice (judgment in *Suiker Unie* v *Commission*, cited above, point 612), the amount of fines should be related to the economic context in which the infringement occurs.

339 The Commission replies, first of all, that the cartel did have an impact on actual prices and, secondly, that in assessing the amount of the fines it took account of the fact that the price initiatives generally did not achieve their objective in full (Decision, point 108). In its view, this was already more than it was obliged to do,

since not only cartels having anti-competitive effects should be penalized under Article 85(1) of the EEC Treaty but also those with anti-competitive objects.

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

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

342 The fact that the applicant's price instructions did not always strictly correspond to the target prices set at the meetings is not such as to undermine that finding, since the effects taken into account by the Commission in setting the general level of fines are not those resulting from the actual conduct which a particular undertaking claims to have adopted but those resulting from the whole of the infringement in which the undertaking participated with others.

343 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 the Coopers & Lybrand audit 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.

344 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.

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

D. The absence of any previous infringement

346 The applicant points out that it has never been involved in any other proceedings for breach of competition law. The present case is, it claims, at the most an isolated and unfortunate instance of a misguided employee's violating corporate policy by taking part in a few meetings, as is attested by the rapid and vigorous actions which the applicant took in order to cooperate in the investigation and prevent such infringements.

347 In the Commission's view, the absence of prior infringements cannot be a reason for reducing the amount of the fines, since the applicant cannot deny that it was aware of the illegality of its conduct. However, the Commission leaves it to the Court to increase the fines imposed on undertakings previously found guilty of infringements.

348 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.

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

E. Mitigating factors

350 The applicant further argues that the Commission failed to take into account various mitigating factors. It emphasizes that it voluntarily ceased the infringement. In this regard it contests the Commission's supposition that, without its intervention, the infringements would have continued. That supposition is wrong, at least in Hercules' case, since its employee's participation in the meetings or the contacts between that employee and other producers are proved only until August 1983, before the Commission's intervention.

351 It argues that the measures which it took immediately in order to prevent fresh violations of company policy in the future, such as the participation of one of its employees at producer meetings, deserved to be encouraged in the interests of Community competition policy, as was done by the Commission in the *National Panasonic* case (Decision of 7 December 1982, *National Panasonic*, Official

Journal 1982 L 354). The Commission should have explained in its Decision why it gave no credit for such action in the present case.

352 The applicant claims that the Commission also failed to take into account the fact that it provided more than an ordinary degree of cooperation during the investigation, for example by voluntarily sending decisive documents to the Commission (main statement of objections, Appendix 2, and particular objections, Hercules, Appendix 18). This sincere effort of cooperation deserved to be rewarded rather than disparaged. The Commission's statement that it did take account of the cooperation it received from some producers is insufficient since it never identified the producers in question or the way it took account of such cooperation.

353 The Commission observes first of all that in points 50 and 51 of the Decision it established that Hercules participated in the infringement between June and November 1983, and the Commission's investigations had taken place on 13 and 14 October of that year.

354 As regards the adoption by the applicant of a compliance programme after the discovery of the infringement, the Commission points out that, according to the case-law of the Court of Justice (judgment in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigaretttenindustrie and Others* v *Commission* [1985] ECR 3831, paragraphs 97 and 98), efforts to bring other behaviour into line with competition law do not diminish the justification for imposing fines in relation to an infringement. The Commission further observes that Hercules' previous compliance programme, which should have prevented the improper activities of its employee, failed to do so, or to prevent Hercules from participating in an infringement of Article 85(1) of the EEC Treaty.

355 The Commission states that it did in any event take account of Hercules' cooperation in the investigation when determining the amount of the fine. It also

points out that it is not a denigration of that cooperation to state that it came at a rather later stage in the inquiry, after certain incriminating documents had been discovered by the Commission. No *ex post facto* cooperation can alter the fact that an infringement has occurred.

356 The Court finds first of all that, contrary to the applicant's contentions, it did not cease to be involved in the infringement in August 1983 since on 30 September 1983 it gave to its sales offices price instructions which entered into force as from November 1983, that is to say after the Commission's intervention, and which, in the case of raffia (DM 2.25/kg) and homopolymer (DM 2.35/kg) were identical to those given by BASF, Hüls, ICI, Linz, Monte and Solvay and to that given by Hoechst (for raffia only) (Decision, Table 7N). Consequently, the applicant did not voluntarily bring the infringement to an end in August 1983 or even before the Commission's intervention, since the last price instruction which the applicant gave and which the Commission used in evidence was in the course of being carried out at the very time when the Commission's officials were conducting their investigations on 13 and 14 October 1983. This cannot therefore be considered a mitigating factor which the Commission should have taken into account when determining the amount of the fine to be imposed on the applicant.

357 Secondly, whilst it is indeed important that the applicant took steps to prevent fresh infringements of Community competition law from being committed by members of its staff in the future, that circumstance does not alter the fact that an infringement has been found to have been committed in the present case. Faced with that fact, the Court would point out that it has already held that the criteria set out in point 108 of the Decision justify the general level of the fines imposed and that the criteria for achieving a fair balance between the amount of the fines imposed on the various undertakings concerned, set forth in point 109 of the Decision, are sufficient and well founded. It must be added in this regard that, here again, the fact that in a previous case the Commission considered that, having regard to the factual circumstances, account should be taken of the steps taken by the undertaking in question to prevent fresh infringements of Community competition law from occurring in the future cannot oblige it to take account in the same way of similar measures in the present case, since the Commission emphasized in the Decision (point 108) that the infringement of Article 85(1) of the EEC Treaty was particularly serious and had been committed intentionally and in conditions of great secrecy.

358 Thirdly, the applicant's argument relating to the failure to take account of its cooperation in the investigation cannot be accepted. Even if it would have been preferable to specify which undertakings were referred to in the last paragraph of point 109 of the Decision, the Commission has indicated, during the procedure before the Court, that that paragraph referred only to the applicant and ICI. Neither the applicant nor any other undertaking which has appealed against the Decision has challenged that assurance.

359 However, it does not follow that the Commission was obliged to indicate precisely the extent to which it had taken into account this supplementary criterion for weighting the fines imposed on the various undertakings so as to reduce the fines imposed on the undertakings which had cooperated in its investigation. That criterion had to be considered in conjunction with the other weighting criteria mentioned in point 109 of the Decision. The applicant has not alleged that application of those criteria produced an unfair result in its case, nor has the Court found that this was so.

360 It follows from all the foregoing considerations that the fine imposed on the applicant is appropriate having regard to the duration and gravity of the breach of the Community competition rules which the applicant has been found to have committed.

Costs

361 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. Since the applicant has failed in its submissions and the Commission has applied for costs to be awarded against the applicant, the latter must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Cruz Vilaça Schintgen

Kirschner Lenaerts

Delivered in open court in Luxembourg on 17 December 1991.

H. Jung
Registrar

J. L. Cruz Vilaça
President