JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
24 October 1991 *

Contents

* Language of the case: French.

In Case T-1/89,

Rhône-Poulenc S.A., a company incorporated under French law, having its registered office at Courbevoie (France), represented by R. Saint-Esteben, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 8 Rue Zithe,

applicant,

v

Commission of the European Communities, represented by A. McClellan, Principal Legal Adviser, acting as Agent, assisted initially by L. Gyselen, a member of the Commission's Legal Service, acting as Agent, and subsequently by N. Coutrelis, of the Paris Bar, 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. 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 15 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 t, 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 Rhône-Poulenc S.A. (hereinafter referred to as 'Rhône-Poulenc') was one of the producers supplying the market before 1977. Its position on the polypropylene market was that of a small producer whose market share was between 2.8 and 3%. It abandoned the market at the end of 1980 by selling its polypropylene business to BP Chimie.

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's officials then carried out investigations at the premises of Anic and Saga Petrochemicals UK Ltd, the United Kingdom subsidiary of Saga, and of the selling agents of Linz established in the United Kingdom and in the Federal Republic of Germany. No request for information was sent to Rhône-Poulenc.

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

7 On 24 October 1984, the hearing officer appointed by the Commission met the legal advisers of the addressees of the statements of objections in order to agree certain procedural arrangements for the hearing provided for as a part of the administrative procedure, which was to begin on 12 November 1984. At that meeting the Commission announced, as a result of the arguments advanced by the undertakings in their replies to the statement of objections, that it would shortly send them further material complementing the evidence already served on them regarding the implementation of price initiatives. On 31 October 1984, the Commission sent to the legal advisers of the undertakings a bundle of documents consisting of copies of the price instructions given by the producers to their sales offices together with tables summarizing those documents. In order to ensure the

protection of business secrets, the sending of that material was made subject to certain conditions; in particular, the documents were not to be made known to the commercial services of the undertakings. The lawyers of a number of undertakings refused to accept those conditions and returned the documentation before the oral hearing.

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

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

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

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

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

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

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

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

'Article 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2

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

Article 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 4

. . .

Article 5

. . .'

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

Procedure

17 Those are the circumstances in which, by application lodged at the Registry of the Court of Justice on 18 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-2/89 to T-4/89 and T-6/89 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 Rhône-Poulenc claims that the Court should:

'1. annul the Commission's decision of 23 April 1986 (IV/31.149 — Polypropylene);

2. in the alternative, annul that decision in so far as it imposed a fine on Rhône-Poulenc;

3. in the further alternative, reduce that fine.'

The Commission contends that the Court should:

'1. dismiss the application;

2. order the applicant to pay the costs.'

Substance

30 The Court considers that it is necessary to examine, *first*, the applicant's grounds of challenge relating to proof of the infringement concerning (1) the findings of fact made by the Commission and (2) their legal characterization; *secondly*, the applicant's grounds of challenge relating to the reasoning of the Decision which allege that it is (1) common to several undertakings, (2) insufficiently reasoned and (3) contradictory; *thirdly*, the grounds of challenge relating to the allegation of a breach of the principle of equal treatment; and, *fourthly*, the grounds of challenge relating to the determination of the fine, which is alleged to be (1) disproportionate to the duration of the alleged infringement and (2) disproportionate to the gravity of the alleged infringement.

Proof of the infringement

31 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.

32 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 meeting of a customers' trade association, the European Association for Textile Polyolefins (EATP) held on 22 November 1977, (B) the system of regular meetings of polypropylene producers, (C) the price initiative from July to December 1979 and (D) the fixing of target tonnages and quotas, taking into account (a) the contested decision, (b) the arguments of the parties, before going on to (c) an assessment of

them; it will then be necessary to review the legal characterization of those facts by the Commission.

1. *The findings of fact*

A — The EATP meeting of 22 November 1977

(a) The contested decision

33 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'.

34 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.

35 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.

36 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

37 The applicant contends that the minutes of the EATP meeting of 22 November 1977 (main statement of objections, Appendix 6) cannot be used in so far as it cannot reasonably be argued that that meeting was the framework for the conclusion of an agreement on prices. In the first place, it is difficult to believe that undertakings would be so bold as to subscribe to an agreement constituting an unlawful cartel in the presence of their customers and, in the second place, the statements made by the participants at that meeting reveal no commitment on prices on the part of the undertakings but simply awareness of the objective necessity to increase their prices in view of the difficulties affecting the sector in question. Although Rhône-Poulenc declared its support for Monte's action with a view to raising its prices, the announcement made concerned an individual decision which had already been taken independently.

38 The Commission maintains that its finding that Rhône-Poulenc began to participate in the alleged cartel in November 1977 is based on the fact that this undertaking supported the initiative, announced publicly by Monte, of a price increase as from December 1977. That initiative and the support which it found was not parallel conduct due to chance or to market forces but concerted action. The minutes of the EATP meeting of 22 November 1977 show that the fixing of the price for raffia at DM 1.30/kg, as announced by Monte, had already been accepted beforehand as a common target price, since according to those minutes, Rhône-Poulenc stated:

'1977 saw in France and in Europe the drop in prices of polypropylene for extrusion-stretching speed up, and this drop has influenced in no small way, as one of my colleagues said previously, the price of other polypropylene applications.

The lowest prices indicated in our opinion for all polypropylene producers hardly reach the level of the variable cost of polypropylene, a situation which can no longer be accepted.

On Friday we learnt in the press, as previously mentioned, that a rise had been announced by one of the main European polypropylene producers.

We think that it is impossible to return, in one go, to the economically acceptable level which is around FF 3.50, but we, at Rhône-Poulenc have decided to follow this announcement. We have, therefore, informed our commercial agencies of the new price level of Napryl polypropylene, our brand, which as from 28th November 1977 next, will be FF 3.00'.

39 In the Commission's view, the fact that Rhône-Poulenc's statement was made four days after the publication of Monte's price increases in ECN (on 18 November 1977) does not weaken that conclusion since it later appeared that ECN was used as an instrument for the cartel (as is shown by the record of a producers' meeting of 1 June 1983 in which it is stated: 'Shell was reported to have committed them-

selves to the move and would lead publicly in ECN' (main statement of objections, Appendix 40).

40 The Commission adds that, if account is taken of the fact that the first contacts between the producers had already taken place at the time when that announcement was made publicly, it is simply not credible that Rhône-Poulenc supported that initiative without having had previous contacts.

41 As indirect support for its argument that contacts between producers must have taken place before the EATP meeting of 22 November 1977 the Commission refers to a note recording a telephone conversation which a Hercules executive had with an employee of one of the 'big four' (main statement of objections, Appendix 2), since it considers that if Hercules was informed of the conclusion of that agreement, all the other producers (including Rhône-Poulenc) must also have been informed.

42 At the hearing, the Commission pointed out that the objective of the parallel statements made by the various producers at the EATP meeting on 22 November 1977 was to present a united front to their customers and to convince them of the inevitability of a price increase of the order announced by Monte.

(c) Assessment by the Court

43 This Court finds that the statements made by the applicant at the EATP meeting on 22 November 1977 (general statement of objections Appendix 6) were an expression of general support for the policy of increasing prices initiated by Monte and formed a precise indication to its competitors of the conduct which it had decided to adopt on the market. Those findings are borne out by the minutes of the following EATP meeting, of 26 May 1978 (main statement of objections, Appendix 7), which the applicant also attended; in those minutes are recorded the assessments made by the various producers of the results obtained on the market following the meeting of 22 November 1977. The fact that the Commission admitted at the hearing that, besides the EATP meeting of 22 November 1977 and another later meeting of 26 May 1978, it had no direct evidence of the existence

of contacts between Rhône-Poulenc and the other producers is not of such a nature as to shake those findings.

44 It follows from the foregoing that the Commission has proved to the requisite legal standard that the applicant, in the presence of its competitors, expressed general support for the policy of increasing prices initiated by Monte (Decision, point 17, fourth paragraph, first sentence, and point 78, third paragraph, second sentence) and that the applicant gave them a precise indication as to the conduct it had decided to adopt on the market.

B — The system of regular meetings

(a) The contested decision

45 According to the Decision (point 18, first paragraph), during the course of 1978 at least six meetings were held 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') (reference is made to ICI's reply to the request for information under Article 11 of Regulation No 17, general statement of objections, Appendix 8). In the Decision (point 18, third paragraph, and point 19, first paragraph) the Commission asserts that the applicant was a regular participant at those meetings until it transferred its polypropylene interests to BP at the end of 1980.

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

(b) Arguments of the parties

47 The applicant states that ICI's reply to the request for information (main statement of objections, Appendix 8) — in which ICI states that Rhône-Poulenc, Anic and SIR participated regularly in the meetings between 1979 and 1983 when they were active in the polypropylene sector in western Europe — is not sufficient in itself to prove its attendance at the meetings. It adds that the note of the meeting of 26 and

27 September 1979 (main statement of objections, Appendix 12) is a handwritten note which is difficult to interpret and which does not mention the name of the participants in that meeting and does not therefore enable its participation to be proved.

48 The Commission considers that ICI's reply to the request for information proves that Rhône-Poulenc participated in the meetings between 1979 and 1980. It adds that the evidentiary value of ICI's reply is corroborated by the fact that Rhône-Poulenc has never categorically denied that it attended the meetings during that period.

49 The Commission goes on to argue that Rhône-Poulenc's presence at the meetings implies that it concurred in the purpose of those meetings which was in particular to fix target prices and quotas.

50 The Commission admits, however, that the notes in its possession relate for the most part to meetings held from the middle of 1982 but it considers that it is quite legitimate to conclude that the meetings in the previous period concerned the same subjects of discussion and led to the same results. In this regard, it points out that the note of the meeting of 26 and 27 September 1979 confirms that the meetings held in 1979 had the same purpose as the meetings held in the subsequent period.

(c) Assessment by the Court

51 The Court finds that it is clear from a combined reading of the first sentence of the first paragraph of point 18 of the Decision and from the statement of objections addressed to the applicant (point 74, last paragraph) that the complaint made against the applicant is not that it participated in the six meetings which took place during 1978 between senior managers responsible for the overall direction of the polypropylene business of some of the producers. The statement of objections states that: 'it is not established whether the representatives of Rhône-Poulenc attended those meetings in 1978'. It follows that the applicant's conduct is called in question only as from the period which immediately followed (Decision, point 18, first paragraph, second sentence), which, according to ICI's reply to the request for information (main statement of objections, Appendix 8), to which reference is made in the Decision, began at the end of 1978 or the beginning of 1979, that is to

say the period during which the system of 'bosses" meetings was supplemented by 'experts" meetings.

52 In ICI's reply to the request for information, the applicant, unlike two other producers, was described as being among the regular participants at the 'bosses" and 'experts" meetings from 1979 until the sale of its polypropylene business to BP. That reply must be interpreted as meaning that the applicant's participation went back to the start of the system of 'bosses" and 'experts" meetings established at the end of 1978 or the beginning of 1979.

53 ICI's reply to the request for information is borne out on this point by the fact that in various tables found at the premises of ICI and ATO (main statement of objections, Appendices 55 to 61, and Annex to the letter of 3 April 1985) there appear beside the applicant's name its sale figures for various months and years, whereas, as most of the applicants admitted in their replies to a written question put to them by this Court, it would not have been possible to draw up the tables found at the premises of ICI, ATO and Hercules on the basis of the statistics available under the Fides data exchange system. Moreover, in its reply to the request for information, ICI stated, with regard to one of those tables, that 'the source of information for actual historic figures in this table would have been the producers themselves'. Furthermore, during the procedure before this Court, the applicant, when confronted with this highly significant evidence presented by the Commission, has never denied that it was present at the meetings or that those meetings took place.

54 So the Commission was fully entitled to take the view, based on ICI's reply to the request for information, which was borne out by the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12), that the purpose of the meetings which took place at the time when the applicant was still present on the market was, in particular, to fix target prices and sales volumes. In that

reply, reference is made to '"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 it is stated that: 'A number of proposals for the volume of individual producers were discussed at meetings'.

55 In addition, in explaining the organization of marketing 'experts" and '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 price and sales volume targets became increasingly concrete and precise whereas in 1978 the 'bosses' had confined themselves to developing the actual concept of target prices.

56 Besides the previous passage, the following extract 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.

57 It follows from the foregoing considerations that the Commission has established to the requisite legal standard that the applicant regularly participated in periodic meetings of polypropylene producers between the end of 1978 or the beginning of 1979 and the end of 1980, that the purpose of those meetings was in particular to fix price and sales volume targets and that they were part of a system.

C — The price initiative of July to December 1979

(a) The contested decision

58 According to the Decision (point 28), a system for fixing price targets was implemented through price initiatives. The first which could be identified was that lasting from July to December 1979.

59 The Decision (point 29) acknowledges that no detailed evidence is available 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. The Commission has in its possession price instructions from some producers showing that those producers had given orders to their national sales offices to apply this price level or its equivalent in national currencies from 1 September, in almost all cases before the announcement in the trade press of the planned increase (Decision, point 30).

60 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).

61 The Decision (point 83, third paragraph) acknowledges that no pricing instructions could be found at the premises of Rhône-Poulenc but this is unimportant since the applicant attended those meetings and its participation in the fixing of volume targets and in quota schemes can be established from the documentary evidence.

(b) Arguments of the parties

62 The applicant contends that the lack of evidence of its attendance of the meetings disproves that it participated in the fixing of target prices especially since the Commission acknowledged at the hearing that it looked without success for pricing instructions from Rhône-Poulenc on its premises.

63 The Commission states that, in ICI's reply to the request for information (main statement of objections, Appendix 8), ICI stated that 'generally speaking the concept of recommending "target prices" was developed during the early meetings

which took place in 1978' and that the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12) indicates that an initiative for obtaining DM 2.05/kg by 1 September 1979 was postponed until 1 December 1979. In addition to that evidence, the Commission points to the existence of matching price instructions from various producers which, in its view, prove that the agreed target prices were actually implemented.

64 Consequently, the Commission contends that Rhône-Poulenc's participation in the fixing of target prices may be inferred from its participation in those meetings which had the fixing of target prices as their purpose.

(c) Assessment by the Court

65 This Court finds that it is clear from the matching price instructions given by ATO, BASF, Hoechst, ICI, Linz and Shell (Annex A, letter of 29 March 1985) that the initiative intended to achieve a price of DM 2.05/kg by 1 September 1979 had been decided on and announced at the end of July. The existence of that initiative and the postponement of its implementation until 1 December 1979 are established by the note of the meeting held on 26 and 27 September 1979 (main statement of objections, Appendix 12) in which it is stated that: '2.05 remains the target. Clearly 2.05 not achievable in Oct., not in Nov. Plan now is 2.05 on 1/12'.

66 Since it has been established to the requisite legal standard that the applicant regularly participated at the meetings of polypropylene producers from the end of 1978 or the beginning of 1979 and therefore that it participated in the meeting held on 26 and 27 September 1979, the note of which indicates that the participants at the meeting agreed on the steps to implement the price initiative in question, the applicant cannot assert without providing corroborating evidence that it did not support that initiative. In the absence of such evidence, there is no reason to believe that the applicant, unlike other participants at the meeting, did not support the initiative. The applicant has provided no evidence whatsoever pointing in that direction.

67 Even though the Commission was unable to obtain any price instructions originating from the applicant and did not therefore have evidence proving the implementation by the applicant of the price initiative in question, this does not in any way invalidate the finding that the applicant participated in that initiative since it took part in the meeting held on 26 and 27 September 1979.

68 The Commission was also entitled to infer from ICI's reply to the request for information, in which it is stated that '"Target prices" for the basic grade of each principal category of polypropylene as proposed by producers from time to time since 1 January 1979 are set forth in Schedule . . . ', that that initiative formed part of a system of fixing target prices.

69 It must therefore be concluded that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom there emerged at the meeting held on 26 and 27 September 1979 a common purpose concerning the price initiative mentioned in the Decision relating to the period from July to December 1979 and that this initiative was part of a system.

D — Target tonnages and quotas

(a) The contested decision

70 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.

71 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.

72 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). The existence of a market-sharing scheme for 1979 is confirmed by documents found at ATO which show the targets ('objectifs') of the four French producers — ATO, Rhône-Poulenc, Solvay and Hoechst France — for each national market (Decision, point 54).

73 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 t. 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 t. Except for ICI and DSM, the sales achieved by the various producers were largely in line with their targets.

(b) Arguments of the parties

74 The applicant contends that the Commission was wrong to characterize as quotas what, in the absence of any evidence of commitment on the applicant's part, could only constitute internal 'sales objectives'. In this regard, the applicant argues in particular that the term 'target' which appears in certain tables means the volume which each undertaking expected to achieve during the year in question. This explains the 'amendments' made during the year, since the undertakings adapted their aspirations to the realities of the market. Such amendments would be without significance in a quota system since the essence of such a system is not to make adjustments to meet the realities of the market but to adjust the quantities placed on the market to accord with the quotas previously set.

75 The applicant goes on to point out that the fact that its name appears in a series of tables of figures (main statement of objections, Appendices 56 to 61, and annex to the letter of 3 April 1985), found on the premises of certain competitors, relating to the years 1979 and 1980 and setting out for each undertaking data relating to its commercial activities, cannot be sufficient in itself to prove its participation in a quota agreement. The circumstances in which those tables were drawn up are entirely unknown.

76 The applicant also considers that the fact that its name appears in the tables beside the names of undertakings in whose case the Commission found no infringement proves that the defendant itself considered that this factor was insufficient to prove participation in a cartel.

77 The Commission contends that the applicant's participation in the fixing of sales volume targets may be inferred from the fact that its name appears in a number of tables of figures setting out for the various producers previous sales volumes and quotas. Among those documents the Commission refers more specifically to four.

78 The first is an undated table headed 'Producers' Sales to West Europe' found at the premises of ICI (main statement of objections, Appendix 55) setting out for all the polypropylene producers in western Europe the sales figures in kilotonnes for 1976, 1977 and 1978 as well as figures under headings '1979 actual' and 'revised target 79'. In that document Rhône-Poulenc is assigned a revised target of 37.3 kilotonnes. According to the Commission, this document proves Rhône-Poulenc's participation in a market-sharing scheme for 1979 since it defines the quotas for each producer for that year.

79 The second document consists of a series of tables found on the premises of ATO (annex to the letter of 3 April 1985) setting out for the four French producers (ATO, Rhône-Poulenc, Solvay and Hoechst France) their sales figures in various countries of western Europe for each of the last four months of 1979. In some of those tables there is a comparison between the achieved figures and the quotas: '85% des quotas' (85% of the quotas) or '84.7% des quotas' (84.7% of the quotas). That document proves Rhône-Poulenc's participation not only in a

market-sharing scheme for 1979 but also in the monitoring of the implementation of that scheme between the four French producers.

80 The third document is a table dated 26 February 1980 headed 'Polypropylene — Sales target 1980 (kt)' found at the premises of ATO (main statement of objections, Appendix 60), which compares for all the producers of western Europe a '1980 target', 'opening suggestions', 'proposed adjustments' and 'agreed targets 1980'. That document shows the process by which quotas were drawn up.

81 That evidence is borne out by a fourth table found at the premises of both ATO and ICI (main statement of objections, Appendices 59 and 61) comparing for all the producers their sales in terms of tonnages and market shares under the following headings: '1979 actual', '1980 target', '[1980] actual' and '1981 aspirations'. The Commission points out that in ICI's reply to the request for information (main statement of objections, Appendix 8), ICI stated with regard to that document that 'the source of information for actual historic figures in this table would have been the producers themselves'.

82 According to the Commission, those documents show that the producers reached an agreement on sales volumes for each producer, using as a basis for negotiation figures reflecting each producer's aspirations. The variation in the tonnages allocated to the various producers was due to the fact that, owing to an initially over-optimistic assessment of the size of the market, it proved necessary to adjust the tonnages corresponding to the agreed quotas in terms of market shares on the basis of the new assessment of the total market.

83 Furthermore, the figures set out in the various tables show that in 1980 Rhône-Poulenc kept very closely to the market share which had originally been allocated to it (2.98% instead of the agreed 2.97%).

84 Finally, the Commission contends that, unlike Rhône-Poulenc, Amoco and BP did not attend the meetings of producers, which would not be without importance as regards their participation in the drawing up of the abovementioned tables. It goes on to assert that a number of pieces of evidence (main statement of objections, Appendices 8, 17, 33, 55, 59, 73 to 87 and 88) prove that the figures contained in the various tables concerning Amoco constitute broad estimates of its position. The Commission accordingly deduces that Amoco never disclosed individualized data to undertakings involved in the cartel, which is confirmed by ICI's reply to the request for information. The mentioning in the various tables of Rhône-Poulenc's name, on the one hand, and of Amoco's name, on the other hand, are not of the same nature.

(c) Assessment by the Court

85 It has already been found that as from the end of 1978 or the beginning of 1979 the applicant regularly participated in the periodic meetings of polypropylene producers at which the various producers discussed sales volumes and exchanged information on that subject.

86 Concurrently with Rhône-Poulenc's participation in the meetings, its name appears in various tables (main statement of objections, Appendices 55 to 61 and Annex to the letter of 3 April 1985) whose contents clearly show that the tables were drawn up for the purpose of determining sales volume targets. Most of the applicants have admitted in their replies to a written question from the Court that it would not have been possible to draw up the tables found at the premises of ICI, ATO and Hercules on the basis of the statistics available under the Fides system. In its reply to the request for information (main statement of objections, Appendix 8) ICI stated with reference to one of those tables that 'the source of information for actual historic figures in this table would have been the producers themselves'. The Commission was therefore entitled to take the view that the date contained in those tables had been provided by Rhône-Poulenc in the course of the meetings in which it participated.

87 The terms used in the tables relating to 1979 and 1980 (such as 'revised target', 'opening suggestions', 'proposed adjustments', 'agreed targets') justify the conclusion that the producers arrived at a common purpose.

88 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.

89 Furthermore, the French producers, including the applicant, systematically exchanged their sales figures on a monthly basis during the last four months of 1979 and compared them with 'quotas' (Annex to the letter of 3 April 1985). It is therefore safe to conclude that the French producers at least attempted to check that the agreed targets were being observed.

90 As regards the year 1980, the Court finds that it is clear from the table dated 26 February 1980 found at the premises of ATO (main statement of objections,

Appendix 60) which contains a column headed 'agreed targets 1980', and from the note of the January 1981 meetings (main statement of objections, Appendix 17), at which producers, not including the applicant, compared the quantities actually sold ('Actual kt') with the targets set ('Target kt'), that sales volume targets were set for the whole of the year. Moreover, 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.

91 Those findings are not refuted by the fact that the Commission did not make the same findings against Amoco whose name also appears in the abovementioned tables. Amoco's case differs from the applicant's case inasmuch as Amoco did not participate in the meetings of producers having as their purpose, in particular, the fixing of sales volume targets. The Commission could therefore take the view that the figures set out in the various tables concerning Amoco were simply broad estimates of its position made by the other producers in the absence of individualized data from that undertaking. Moreover, ICI's reply to the request for information confirms that conclusion since it in that reply states that: 'However figures for Amoco/Hercules . . . would have been estimated from industry figures generally available from FIDES'.

92 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.

93 In view of the foregoing considerations it must be concluded that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom there emerged common purposes concerning the sales volume targets for 1979 and 1980 mentioned in the Decision and which formed part of a quota system.

2. *Legal characterization*

(a) The contested decision

94 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).

95 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). 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 (Decision, point 82, first paragraph).

96 In the Decision (point 82, second paragraph) the Commission considers that even before 1979 the various initiatives reported as being 'led' by one or other producer and 'followed' by the others also resulted from an agreement between them.

97 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).

98 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).

99 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.

100 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.

101 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).

102 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).

103 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).

104 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).

105 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.

106 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

107 The applicant complains that the Commission did not clearly describe the infringement as an 'agreement' or a 'concerted practice' and considered that the precise description of a cartel matters little, whereas the case law requires a precise description (judgment in Case 243/83 *S.A. Binon & Cie* v *S.A. Agence et Messageries de la Presse* [1985] ECR 2015, paragraphs 14 to 16). The description of the cartel is essential inasmuch as the constituent elements whose existence must be shown are different in the cases of an 'agreement' and 'a concerted practice'. In the case of an 'agreement', the infringement exists once the undertakings have committed themselves, even if the commitment is simply mental on the part of the undertakings' representatives and even if it is not reflected on the market by anti-competitive conduct. A 'concerted practice' on the other hand, requires joint parallel or coordinated action on the market on the part of the undertakings. In the case of undertakings which have assumed no obligations, only such conduct on the market can constitute the manifestation of their anti-competitive cooperation and therefore the actual implementation of the cartel.

108 According to the applicant, in the absence of any anti-competitive commitment, undertakings cannot be censured for having participated in a concerted practice unless they acted in an anti-competitive manner on the market itself. It is necessarily at the level of conduct on the market that the concerted practice having the object of affecting competition takes place, even if that practice, unlike a concerted practice having the effect of affecting competition, does not achieve its anti-competitive object.

109 Thus, the applicant contends that a concerted practice necessarily requires as a constituent element the actual adoption by the participating undertakings of coordinated conduct on the market. To reduce the concept of concerted practice to what is only one constituent element (concertation) whilst ignoring the second element (conduct), as the Commission does, would enable the Commission to censure an undertaking on the ground that it had had contacts with its competitors in circumstances where such contacts do not even have the slightest effect on its conduct or it did not even have the intention of allowing them to have such effect. In the view of the applicant, a correct analysis of the case law of the Court of Justice supports its argument (judgment in Case 48/69 *ICI* v *Commission*, cited above, paragraph 65; judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission*, cited above; judgment in Case 172/80 *Züchner* v *Bayerische Vereinsbank AG* [1981] ECR 2021, paragraph 12; judgment in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, paragraph 24 et seq.; judgment in Joined Cases 29 and 30/83 *Compagnie Royale Asturienne des Mines S.A. and Rheinzink GmbH* v *Commission* [1984] ECR 1679; judgment in Case 243/83 *S.A. Binon & Cie* v *S.A. Agence et Messageries de la Presse*, cited above, paragraph 11 et seq.) in so far as it requires conduct on the market. That is also the case as regards the Decision in point 88.

110 The applicant points out that in the present case the question of the characterization and definition of the infringement is relevant because the Commission has not adduced evidence of its participation either in an agreement or in a concerted practice if the view is taken, as it is by Rhône-Poulenc, that a concerted practice presupposes the actual adoption of coordinated conduct on the market. In the applicant's view, the definition of the concept of 'concerted practice' therefore has particular importance. That importance is even greater since this is the first time that this question has arisen in such terms before the Community court. In the cases previously submitted to the Court, the actual conduct on the market was not denied and the question was simply one of ascertaining whether it was sufficient to presume that concertation had taken place.

111 According to the Commission, on the other hand, the question whether collusion or a cartel is to be described for legal purposes as an agreement or concerted practice within the meaning of Article 85 or whether the collusion has elements of both is of negligible importance. In its view, the terms 'agreement' and 'concerted practice' subsume the various types of arrangements by which competitors, instead of determining their future competitive conduct in complete independence, mutually accept a limitation of their freedom of action on the market as a result of direct or indirect contacts between them.

112 The Commission submits that the purpose of using the various terms found in Article 85 is to prohibit the whole gamut of collusive devices and not to prescribe a different treatment for each of them. It is therefore irrelevant where the line of demarcation is to be drawn between terms designed to encompass the whole range of prohibited behaviour. The *ratio legis* of the inclusion in Article 85 of the term 'concerted practice' is to cover, besides agreements, those types of collusion which merely reflect a form of *de facto* coordination or practical cooperation but which are nevertheless capable of distorting competition (judgment in Case 48/69 *ICI* v *Commission*, cited above, paragraphs 64 to 66).

113 It states that, 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 *Suiker Unie* v *Commission*, cited above, paragraphs 173 and 174), it is a matter of precluding any direct or indirect contact between 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. A concerted practice therefore exists wherever there is contact between competitors prior to their behaviour on the market.

114 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.

115 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.

116 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.

117 The Commission concludes by stating that it was entitled to describe the infringement found in the present case primarily as an agreement and, alternatively and in so far as necessary, as a concerted practice.

(c) Assessment by the Court

118 It must be stated first of all that the question whether the Commission was obliged to characterize each factual element found against the applicant either as an agreement or a concerted practice within the meaning of Article 85(1) of the EEC Treaty is irrelevant. 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'.

119 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.

120 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 target prices for the period from July to December 1979 and sales volume targets for 1979 and 1980, as agreements within the meaning of Article 85(1) of the EEC Treaty.

121 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).

122 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.

123 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.

124 The Commission was therefore justified, in the alternative, having regard to their purpose, in categorizing the EATP meeting of 22 November 1977 in which the applicant participated and the regular meetings of polypropylene producers in which the applicant participated between the end of 1978 or the beginning of 1979 and the end of 1980 as concerted practices within the meaning of Article 85(1) of the EEC Treaty.

125 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 schemes of regular meetings, target-price fixing and quota fixing.

126 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.

127 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.

128 It follows from all the foregoing that all the applicant's grounds of challenge relating to the findings of fact and the legal characterization of them by the Commission in the contested decision must be dismissed.

The statement of reasons

1. *The adoption of a single decision*

129 The applicant complains that the Commission reached its determination by a decision common to all the undertakings concerned. Although it acknowledges that the Commission is entitled to adopt a single decision, it considers that this is subject to the condition that each undertaking should be able to find in the decision the factors demonstrating the substance of the objections raised against it (judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission*, cited above, paragraph 111; judgment in Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck Sàrl and Others* v *Commission*, cited above,

paragraph 77). That is not the case in this instance. The aggregation of the objections seriously concealed the particular situation of Rhône-Poulenc, which was essentially determined by the fact that it left the polypropylene sector at the time (the end of 1980) when, according to the Decision, the alleged cartel was in the process of formation. That aggregation thus hid the lack of any strong evidence against Rhône-Poulenc since almost all the evidence related to the period subsequent to Rhône-Poulenc's departure from the polypropylene market.

130 The Commission replies that the applicant has not succeeded in showing that it was not in a position to obtain from the single decision a clear picture of the complaints made against it. Moreover, the argument that the cartel was organized only after Rhône-Poulenc's departure from the market is wrong. The Commission had, at the most, recognized that, although the infringement dated from mid-1977, the mechanism by which it was to operate was not completely established until about the beginning of 1979 (see the Decision, point 105, last paragraph).

131 The Court considers that the fact that it was able to review the substance of the complaints made against the applicant in the Decision demonstrates that the applicant was able, like the Court, to obtain a sufficiently clear picture of the complaints made against it. The fact that only a single decision was adopted did not have the purpose or the effect of hiding the lack of any strong evidence against Rhône-Poulenc. Although in the enumeration of the main evidence on which the Decision is based, contained in point 15 of the Decision, only a very small number of items of that evidence concerns Rhône-Poulenc, as it has indeed pointed out, those items of evidence were nevertheless sufficient to support, to the requisite legal standard, the findings of fact made by the Commission against the applicant. Furthermore, the Court notes that the applicant was quite able to identify and discuss those items of evidence in its pleadings submitted to the Court. It follows that this ground of challenge cannot be accepted.

2. *Insufficient reasoning*

132 The applicant complains that in the Decision the Commission did not reply adequately to its submissions and arguments. It contends that the purpose of Article 190 of the EEC Treaty is to oblige the Commission to state sufficient reasons for its decisions so as to enable the Community Court to review their legality and to provide the undertakings with details sufficient to allow them to ascertain whether the decision is vitiated by a defect which will allow its legality to be contested (judgment in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 37; see also the judgment in Case

42/84 *Remia B.V. and Others* v *Commission* [1985] ECR 2545, paragraph 26, the judgment in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22, and the judgment in Case 6/72 *Europemballage Corporation and Continental Can Company* v *Commission* [1973] ECR 215, paragraph 6). In the present case, that requirement was disregarded since the Commission, by replying in general to the producers, did not take account of the applicant's specific situation. For example, it did not reply specifically to the applicant's arguments concerning the absence of any pricing instructions issued by it, the evolutive character of the cartel and the market situation, the lack of any real analysis of market prices before the end of 1980 and the fact that evidence used by the Commission did not apply to Rhône-Poulenc.

133 The Commission considers that it is not obliged to refute all the submissions put forward by the undertakings concerned and that it is entitled to refrain from replying to those it considers irrelevant (judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission*, cited above, paragraph 66).

134 The Court notes first of all that in its application the applicant complains that the Decision addressed a number of submissions and argument which did not concern it, such as those relating to the accuracy of the meeting notes, the study of the German market and the Coopers & Lybrand audit concerning the prices charged.

135 That complaint must be dismissed since the Commission cannot be criticized for having replied to the various submissions and arguments advanced by other undertakings which it considered relevant once it was entitled to adopt a single decision common to a number of undertakings.

136 Next, the Court finds that the applicant's complaint that the Commission did not state its reasons in the Decision for rejecting its argument concerning the lack of price instructions must also be dismissed. The last paragraph of point 77 and the last paragraph of point 83 of the Decision contain a sufficient statement of reasons for the rejection of that argument since those points indicate that the Commission referred to other evidence in order to prove the infringement as against the applicant. Here again, it must be noted that the applicant was quite able to identify and discuss that evidence in the pleadings which it submitted to the Court.

137 As regards the argument that the Commission failed to take account of the evolutive nature of the cartel which Rhône-Poulenc claims was formed only after it had left the market and that, in order to implicate Rhône-Poulenc, the Commission was therefore compelled to make a retroactive presumption, deducing from evidence relating to a period subsequent to Rhône-Poulenc's departure from the market the object of the cartel alleged to have existed when it was present on the market, it must be observed first of all that the notes of meetings subsequent to 1980 were used by the Commission only in order to corroborate evidence relating to 1979 and 1980, as the final paragraph of point 70 of the Decision shows, and, secondly, that it is clear beyond question from a combined reading of first paragraph of point 18 and the last paragraph of point 105 of the Decision that the mechanism by which the infringement operated was completely established towards the beginning of 1979, that is to say two years before the applicant left the market. Consequently, this argument is ill-founded and must be rejected.

138 As regards the alleged failure to refute the applicant's argument that the evolutive character of the market situation precluded the Commission from relying, as against the applicant, on the current state of the market, the applicant is wrong in complaining that the Commission relied on the current state of the market as against it since in the analysis of the evolution of the market which it made in points 11 to 13 of the Decision the Commission, far from associating the market situation experienced by the applicant with that prevailing after its departure from the market, distinguished between them. The Commission must be considered to have treated the applicant in the same way as the other producers as far as this first period is concerned. consequently, this ground of challenge is unfounded.

139 As regards the alleged failure to refute the applicant's argument that the Commission did not carry out any real analysis of market prices in the period which concerns it, since Table 9 to the Decision covers only the years 1981 to 1983, the Court notes that, as far as the years 1977 to 1979 are concerned, the analysis contained in the final paragraph of point 17 and the final paragraph of point 31 of the Decision is of the same nature as that contained in Table 9 to the Decision and that the applicant has not specifically refuted that analysis of the prices which were charged at that time. This complaint is therefore unfounded.

3. *Contradictory statement of reasons*

140 The applicant contends that the reasons on which the Decision is stated to be based are, first, contradictory *inter se*, inasmuch as on two occasions (on the one hand, in the second paragraph of point 74 and the third paragraph of point 90, and, on the other hand, in point 18 *in fine*) the Decision makes assertions relating to 'all' the producers whereas elsewhere in the Decision (on the one hand, the last paragraph of point 77 and the last paragraph of point 83 and, on the other hand, point 14, *a contrario*) Rhône-Poulenc is expressly excluded from the whole group of producers. Secondly, it contends that the reasons stated in the Decision stand in contradiction to the operative part, inasmuch as they relate to the existence of agreements between undertakings, whereas the operative part distinguishes between 'agreements' and 'concerted practices' so as to place them on the same footing and accuse the applicant of participating in them.

141 According to the Commission, that argument arises from a misreading of the Decision and from a difference of interpretation of the Decision as regards the legal qualification of the cartel in question.

142 The Court considers that the applicant's argument is based on a reading of the Decision which artificially separates some of the reasons stated in the Decision when, since the Decision should be read as a whole document, each of the reasons stated must be read in the light of other reasons in order to overcome the apparent contradictions contained in the Decision. Thus, the last paragraph of point 77 and the last paragraph of point 83 of the Decision must be considered to clarify the last paragraph of point 74 and the third paragraph of point 90 of the Decision. Similarly, point 14 of the Decision clarifies point 18 *in fine* of the Decision.

143 Moreover, according to the Court's assessment relating to the legal characterization of the findings of fact made by the Commission, the reasons stated in the Decision do not stand in contradiction with its operative part.

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

The principle of equal treatment

145 The applicant claims that the principle of equal treatment was not observed by the Commission in so far as it did not penalize Amoco or BP when it had as much, if not more, evidence against those two undertakings than against itself. In its view, the Decision shows that the Commission had a larger body of evidence against those two undertakings than against the applicant (contacts concerning prices and quotas, support for ICI and the finding of a degree of alignment of their conduct to that of the parties to the cartel) but this evidence was not considered to be conclusive (Decision, point 78, last paragraph). Moreover, the applicant claims that the Commission assessed the strength of one item of evidence, namely the reference in the tables relating to quotas (Table 8 to the Decision) differently with regard to Rhône-Poulenc than in the case of Amoco and BP without explaining that difference of assessment.

146 The Commission argues first of all that the applicant cannot rely on the principle of equal treatment in order to clear itself of the infringement found against it. As for Amoco and BP, the Commission states that it gave them the benefit of the doubt because they did not participate in any regular meeting of polypropylene producers (Decision, point 78, last paragraph, first sentence). The sole fact that those two undertakings had telephone contacts with other participants in the cartel was not held to be sufficient since not all 'contact' constitutes in itself a concerted practice. In this instance, the 'contacts' amounting to a concerted practice consisted of participation in the meetings having anti-competitive measures as their object. Proof of Amoco's and BP's participation in those meetings is, however, lacking. Moreover, the tables showing quotas for each undertaking were not the only evidence used to prove participation in a concerted practice. Consequently, Amoco's and BP's conduct on the market, which occasionally reflected quota observance and the alignment of their prices with those of other producers, cannot, in the absence of conclusive evidence of their participation in concerted action, suffice as a basis for penalizing those two undertakings under Article 85(1) of the Treaty.

147 The Court observes 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 situation of Rhône-Poulenc, on the one hand, and of Amoco and BP, on the other hand, were not comparable since, as those two undertakings

had not participated in any regular meetings of polypropylene producers, the Commission was entitled to consider that it did not have sufficient evidence of their participation in concerted action having an anti-competitive object, which was not the case where the applicant was concerned. The existence of such concerted action constitutes the basis of the mode of proof used in the Decision. Consequently, the Court finds that the difference of situation observed between those undertakings and the applicant justified the different treatment which they received.

148 As regards more particularly the applicant's argument concerning the reference to Amoco in the tables relating to sales volume targets, the Court points out that it has already rejected that argument.

149 Consequently, this ground of challenge cannot be upheld.

The fine

150 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 found against it.

1. *Duration of the infringement*

151 The applicant claims that in determining the amount of the fine which it imposed upon it the Commission did not correctly assess the duration of the infringement, which it considered to date from 1977 whereas its participation dated from 1979 at the earliest.

152 The Commission replies that the complaint against the applicant is that is participated in a single, continuous framework agreement dating from 1977 but that in determining the amount of the fines it took account of the fact that the mechanism for implementing the infringement was not completely established until towards the beginning of 1979.

153 The Court points 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.

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

2. *The gravity of the infringement*

A — The alleged failure to differentiate between the undertakings

155 The applicant claims that in determining the amount of the fine the Commission did not sufficiently differentiate the gravity of the infringements committed by each of the undertakings concerned by leaving out of account the evolutive character of the cartel which became evident in the increased regularity of the meetings (one in 1979, six in 1980 and forty-eight from 1981 to 1983) and in the increased specificity of their purpose.

156 The Commission replies that it has never accepted the evolutive character of the cartel and nowhere has it acknowledged that there was only one meeting in 1979. The fact that the Commission was not able to determine the dates and place of the meetings held in 1979 does not mean that they did not take place. Moreover, the purpose of the meetings during the initial period was not at all uncertain.

157 The Court considers that since it is established that the applicant subscribed to a scheme of regular meetings of polypropylene producers whose object has been established to be anti-competitive, the fact that the Commission was unable to establish the place and date of only a limited number of meetings does not affect the assessment of the gravity of the infringement. It must also be pointed out that it is clear from ICI's reply to the request for information (main statement of objections, Appendix 8) that a 'system' of 'bosses" and 'experts" meetings was established at the end of 1978 or at the beginning of 1979.

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

B — The alleged failure to take sufficient account of the situation of economic crisis

159 The applicant also claims that in determining the amount of the fines the Commission did not take sufficient account of the economic context in which the infringement occurred, namely a situation in which polypropylene production had been a loss-making activity for a long time, whereas in its previous decisions (in particular, its decision of 19 July 1984 (IV/30.863 — BPCL/ICI, Official Journal L 212, p. 1, point 36.2), it admitted that structural over-capacity in a sector could render price rises both necessary and inevitable.

160 The Commission replies that the reference to the economic context is irrelevant since the cartel has nothing to do with a so-called 'crisis' cartel.

161 The Court finds that the reference made by the applicant to the previous decisions of the Commission is irrelevant in so far as they concern the exemption of a so-called 'crisis' cartel under Article 85(3) of the EEC Treaty. In the present case, the infringement found to have been committed was not the subject of any application or exemption under Article 85(3) of the EEC Treaty.

162 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.

163 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).

164 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 intentionally and in the greatest secrecy.

165 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.

166 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.

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

C — The lack of any evidence indicating Rhône-Poulenc's actual policy

168 The applicant complains that in determining the amount of the fine the Commission took no account in the Decision of the lack of any evidence of its actual policy, in particular on prices.

169 The Commission argues that it has already replied to this argument when it stated that in 1980 the applicant's sales figures matched almost perfectly the quotas allocated to it. It considers that this type of 'conduct' indicates that the applicant took seriously the agreements reached at the meetings.

170 The Court considers that if the Commission was unable to produce evidence of Rhône-Poulenc's pricing policy it is because Rhône-Poulenc has not kept any trace of that policy. However, the Commission was able to establish that in 1980 the applicant's policy concerning the volume of its sales corresponded, in terms of market share, to the outcome of the meetings of polypropylene producers in which it had participated. A table setting out the sales achieved by the various producers in the years 1979 and 1980 and comparing them with the sales volume targets agreed for those years (main statement of objections, Appendix 59) shows that the applicant's market share corresponded to the quota which had originally been allocated to it, converted into terms of market share, even though in tonnage terms it remained below that quota owing to a market contraction forecast by the producers (1 207.9 kt instead of 1 382 kt). In those circumstances, the Court concludes that the Commission had sufficient evidence of Rhône-Poulenc's actual policy and that this complaint must therefore be dismissed.

D — The degree of cooperation shown by the applicant

171 The applicant complains that in determining the amount of the fines the Commission took account of the degree of cooperation of the various undertakings in its investigation without having previously asked for its cooperation.

172 The Court considers that the applicant did not need to be asked to cooperate with the Commission in the administrative procedure on its own initiative and notes that in that procedure the applicant confined itself to stating in its reply to the statement of objections that it no longer had any employee familiar with the facts in question or even any document or file concerning the polypropylene sector since when it received that statement of objections it had already left the sector several years earlier. It also notes that it did not take the slightest step to question its former employees or recover those documents.

173 It follows that this complaint must be rejected.

174 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

175 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

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 24 October 1991.

H. Jung
Registrar

J. L. Cruz Vilaça
President