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

Contents

* Language of the case: German.

In Case T-9/89,

Hüls Aktiengesellschaft, a company incorporated under German law, having its registered office in Marl (Federal Republic of Germany), represented by H.-J. Herrmann, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 8 Rue Zithe,

applicant,

Commission of the European Communities, represented by A. McClellan, Principal Legal Adviser, acting as Agent, and B. Jansen, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of R. Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

defendant,

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

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

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

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

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

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

gives the following

Judgment

Facts and background to the action

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

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

terized 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 Chemische Werke Hüls was one of the producers supplying the market before 1977. Its position on the polypropylene market was that of a medium-sized producer whose market share was between about 4.5 and 6.5%.

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 750 000 ECU, or Lit 1 103 692 500;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 4

...

Article 5

...'

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

Procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 2 August 1986, the applicant brought this action seeking

annulment of the Decision. Thirteen of the fourteen other addressees of the Decision have also brought actions for its annulment (Cases T-1/89 to T-4/89, T-6/89 to T-8/89 and T-10/89 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 Hüls claims that the Court should:

1. annul the Commission's decision of 23 April 1986 (IV/31.149 — Polypropylene), notified on 27 May 1986;

2. alternatively, reduce the fine imposed on it;

3. order the defendant to pay the costs.

The Commission contends that the Court should:

1. dismiss the application;

2. order the applicant to pay the costs.

Substance

10 It is necessary to examine, *first*, the applicant's grounds of challenge relating to a breach of the rights of the defence allegedly committed by the Commission in so far as (1) the Commission failed to disclose to the applicant documents on which it based the Decision, (2) the applicant had insufficient access to the file, (3) all the objections raised against it in the Decision were not the subject of the statement of objections, (4) the investigation was insufficient, (5) the final minutes of the hearings were not communicated either to the members of the Commission or to those of the Advisory Committee, and (6) the hearing officer's report was not communicated to the applicant; *secondly*, the grounds of challenge relating to proof of the infringement concerning (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty whereby it is contended that the Commission (A) did not correctly define the infringement, (B) did not correctly assess the restrictive effect on competition and (C) did not correctly assess how trade between Member States was affected, and (D) imputed collective responsibility to the applicant; *thirdly*, the grounds of challenge relating to the reasoning of the Decision, which is considered to be (1) insufficient and (2) contradictory; *fourthly*, the grounds of challenge relating to the determination of the fine, which is alleged to be (1) partially time-barred, (2) disproportionate to the duration of the alleged infringement and (3) disproportionate to the gravity of the alleged infringement.

The rights of the defence

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

31 The applicant contends that Regulation No 17 and the observance of the rights of the defence require that the Commission should base its decision only on matters of fact and of law to which it has previously referred in the statement of objections and on which the undertaking has been given the opportunity to comment.

32 That principle also applies to the production of evidence: evidence may be used as the basis of the Decision only if it was mentioned in the statement of objections (judgment of the Court of Justice in Case 107/82 *AEG-Telefunken AG* v *Commission* [1983] ECR 3151, paragraph 27). The applicant lists 69 documents which it claims were not disclosed to it and form part of what the Commission itself described in the Decision as the main evidence. The documents in question are: the note of the meeting of 13 May 1982 made by a Hercules executive (Decision, point 15; see also point 37), the note of the meeting of 10 March 1982 made by an ICI executive (Decision, point 15; see also point 58); documents relating to the floor-price agreement (Decision, points 16 and 17), a document allegedly found at the premises of Solvay dated 6 September 1977 (Decision, point 16, penultimate paragraph), Shell's reply to the statement of objections (Decision, point 17), the replies of other undertakings to the request for information (Decision, point 18), the note of the meeting of 20 August 1982 drawn up by an ICI executive (Decision, point 19), circulars addressed to customers by national sales offices relating to price changes (Decision, points 24 to 27), two notes of Shell internal meetings held on 5 July and 12 September 1979 (Decision, points 29 and 31), forty-eight price instructions addressed by other producers to their sales offices and an internal Solvay document (Decision, points 32 to 36), an internal ICI note relating to the 'firm climate' (Decision, point 46), Shell documents relating to the United Kingdom and France and a Shell document headed 'PP W. Europe-Pricing' and 'Market quality report' (Decision, point 49), various ATO documents, in particular an internal note of 28 September 1983 (Decision, point 51), articles which appeared in *European Chemical News* (hereinafter referred to as 'ECN') (Decision, point 51, last paragraph), an undated ICI note made in preparation for a meeting with Shell planned for May 1983 (Decision, point 63, second paragraph), statements by Amoco and BP (Decision, point 53), document found at the premises of ATO relating to a scheme for the sharing of the French market between French producers (Decision, point 54) and,

finally, a working document relating to the first quarter of 1983 found at the premises of Shell (Decision, point 63, third paragraph).

33 The applicant submits that the access-to-file procedure can be no proper substitute for the disclosure of documents upon notification of the statement of objections since if that procedure became the general practice the situation could be reached where the Commission no longer communicated any document as an appendix to the statement of objections.

34 The applicant disputes that the Commission has the power to choose between the documents it considers relevant and those it considers irrelevant and thus to disclose some but not others, especially when it is a matter of proving a comprehensive cartel involving several undertakings. It also objects to the Commission's playing down of the importance of documents which it acknowledges were not communicated to the applicant whereas in the Decision it considers them to be essential evidence.

35 The Commission acknowledges that, as a result of an error, the ICI note of the 'experts" meeting of 10 March 1982 referred to in the Decision (point 58) was not communicated but it adds that the note merely confirmed a note of the same meeting made by Hercules which was appended to the main statement of objections (main statement of objections, Appendix 23) and only served to identify a table which was also disclosed (main statement of objections, Appendix 71). The same applies to an ICI note mentioned in point 63 of the Decision which was not disclosed to the applicant because it contained business secrets and only concerned Shell's participation in the quota system for 1983 and did not therefore concern Hüls.

6 As regards the other documents referred to by Hüls, the Commission provides the following explanations: the ICI note relating to the 'firm climate' (main statement of objections, Appendix 35), the circulars to the sales offices (main statement of

objections, Appendices 19, 42, 46, 50 and 52), the note of the meeting of 20 August 1982 made by an ICI executive (main statement of objections, Appendix 28) and the various documents relating to the floor-price agreement (main statement of objections, Appendices 2 to 7) were set out in the Appendices to the main statement of objections; the 48 price instructions relating to the price initiatives of January-May 1981 and August-December 1981 were appended in their entirety to the Commission's letter of 31 October 1984 and, partly in the form of a summary, to the Commission's letter of 29 March 1985, those letters relating to the price initiatives. The Commission adds that if the applicant refused to examine those documents owing to the restrictions imposed on their disclosure to its sales departments, it has only itself to blame. As regards the other documents, they were documents which were of no importance for the matters alleged against the applicant because they only concerned other undertakings, documents which were already summarized in other documents which had already been duly disclosed, documents which were made available to the applicant in the access-to-file procedure, or even unknown documents.

37 In this regard, the Commission states that the very purpose of the access-to-file procedure is to allow undertakings to examine all the evidence in its possession which might be used against them. The documents in question here are documents which confirm those appended to the statement of objections and whose communication with the statement of objections would be unnecessary or even damaging for the defence of the undertakings themselves.

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

39 In this instance, only the documents mentioned in the main or specific statements of objections or in the letters of 31 October 1984 or 29 March 1985, or those appended to them without being specifically mentioned therein, may be treated as admissible evidence as against the applicant in the present case. As far as the documents which are appended to the statements of objections but which are not mentioned therein are concerned, they may be used in the Decision as against the applicant only if the applicant could reasonably deduce from the statements of objections the conclusions which the Commission intended to draw from them.

40 It follows that, of the documents mentioned by the applicant, only the various documents relating to the floor-price agreement (Decision, points 16 and 17), ICI's and Shell's replies to the request for information (Decision, point 18), the note of an ICI executive relating to the meeting of 20 August 1982 (Decision, point 19), the circulars addressed to customers by the national sales offices (Decision, point 25) and the internal ICI note on the 'firm climate' (Decision, point 46) may be used as evidence against the applicant since they were mentioned in, respectively, points 33 to 38 in the case of the first set of documents, point 39 and 47 in the case of ICI's and Shell's replies, points 65, 80 and 103 in the case of the note of the meeting of 20 August 1982, points 58 and 75 in the case of the circulars and in point 71 in the case of the ICI note, of the main statement of objections addressed to the applicant, of which they also form Appendices 2 to 7; 8 and 9; 28; 19, 42, 46, 50 and 52; and 35. To those documents must be added the forty-eight price instructions issued by the various producers which were appended to the Commission's letter of 31 October 1984 and which are referred to in a summary and in the tables appended to the letter of 29 March 1985, in a context from which the applicant could reasonably deduce the conclusions which the Commission drew from them. The other documents referred to by the applicant cannot be regarded as evidence admissible against the applicant in the present case.

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

2. *Insufficient access to the file*

42 The applicant states that since it did not have access to the whole of the Commission's file during the access-to-file procedure, despite its request for such access which it had made in its letter of 8 November 1984 (Appendix 21 to the application), it was unable to verify whether the documents not made available to it contained evidence in its favour or to consider fully the Commission's assessment of the evidence.

43 It considers, however, that observance of the rights of the defence requires that any measure of an authority directed against a person or an undertaking should be capable of review by means of complete access to the file by the person concerned. In support of this argument Hüls refers to the judgment of the Court of Justice in Case 107/82 (*AEG* v *Commission*, cited above, paragraph 24) in which it held that it was not for the Commission to judge whether a document or a part thereof was or was not of use for the defence of the undertaking concerned. That ruling relating to a specific document applied *a fortiori* to whole sections of a file.

44 It states that the Commission's administrative practice is similar since it recognizes the right of the undertakings concerned to inspect the whole of the relevant files (*Twelfth Report on Competition Policy*, p. 40), a right which can be restricted only in exceptional circumstances (business secrets, internal plans, and so forth). It points out that the legislation of the Member States also recognizes the right to general inspection of the files. Therefore, undertakings must be made aware of all the results of the investigation, including those which the Commission does not intend to use against the undertakings. That requirement is confirmed by the judgment of the Court of Justice in Joined Cases 43 and 63/82 (*VBVB and VBBB* v *Commission* [1984] ECR 19, at paragraph 25; see also the judgment in Case 107/82 *AEG* v *Commission*, cited above, paragraph 27), referred to by the Commission, which excludes from the right to disclosure the Commission's internal documents, but not those obtained by the Commission from the undertakings.

45 The Commission states that, according to the most recent case-law (judgment of the Court of Justice in Joined Cases 43 and 63/82 *VBVB and VBBB* v

Commission, cited above), it is sufficient for the parties to have access to the documents which form the basis of the decision in question. In the present case, the Commission allowed the applicant to inspect all the documents in its possession during the access-to-file procedure in June 1984, with the exception of the documents containing business secrets.

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

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

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

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

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

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

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

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

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

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

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

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

50 The Court notes that the Commission categorically denies that its officials failed to make available to the applicant documents which might contain evidence in its favour.

51 In the face of such denials from the Commission, the applicant has not put forward any evidence to prove that the Commission made selected documents available to the applicant in order to prevent it from refuting the evidence adduced by the Commission to prove its participation in the infringement.

52 By its letter of 8 November 1984 the applicant merely requested the Commission for access to the file for a second time on the ground that the Commission's letter

of 31 October 1984 for the first time revealed to it the relevance of the price instructions issued by various producers, contained in the file made available in June 1984; however, it did not claim that this file had been incomplete. The relevance of those price instructions is nevertheless quite clear from the main statement of objections, in particular points 58 and 75 and Appendices 19 and 42 to 52 thereto, so that during the access-to-file procedure the applicant was made aware that it was useful to examine all those documents with a view to using them, if necessary, in its defence. Consequently, the applicant has not proved that the Commission had prevented it from having access to the documents containing exonerating material.

53 The Court also points out that only the documents mentioned in the general or specific statements of objections or in the letters of 31 October 1984 or 29 March 1985 and those appended to them could be used in the Decision as evidence against the applicant.

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

3. *Fresh objections*

55 The applicant states that in the statement of objections the Commission explained that it did not consider it necessary to determine whether the arrangements in question were to be categorized as agreements or as concerted practices. However, the statement of objections gave the strong impression that in the final analysis the Commission considered that there was no agreement but only concerted practices. In its reply to that statement of objections and at the first session of hearings the applicant therefore focussed its argument on showing that there had been no concerted practices. In its supplementary letter of 29 March 1985 the Commission again emphasized the existence of concerted practices as far as small producers like Hüls were concerned. In that same letter the Commission was then at pains to show that in any event either an agreement or a concerted practice existed, but that in the event of doubt the assumption had to be that the case involved a concerted practice. Hüls therefore directed its defence, particularly during the second session of hearings, towards refuting that argument of the Commission.

56 It notes that the Commission, in a complete departure from the objections which it had previously addressed to the undertakings, accuses them in the Decision of having participated in an 'single continuous agreement', in a 'framework agreement' and in a 'overall plan'. Those are fresh, serious objections against which the applicant was unable to defend itself properly since they were made for the first time in the Decision.

57 According to the applicant, the raising of these fresh objections in this belated way constitutes a breach of the rights of the defence and of Article 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition, 1963-1964, p. 47), since the Commission may not base its decisions on objections, that is to say factual and legal matters, on which the undertakings concerned have not been afforded the opportunity of making known their views before the decision is adopted.

58 The Commission denies that it acted in breach of the rights of the defence during the administrative procedure. It considers that it acted in complete accordance with the case law of the Court (judgment in Case 41/69 *ACF Chemiefarma N. V.* v *Commission* [1970] ECR 661, paragraphs 91 to 93, and judgment in Joined Cases 209 to 215 and 218/78 *Heintz Van Landewyck S.à r. l. and Others* v *Commission* [1980] ECR 3125, paragraph 68), according to which it is quite permissible for it to take account of the factors emerging from the administrative procedure in order to supplement and redraft its arguments both in fact and in law in support of the objections which it maintains. Referring to the wording of the statement of objections and its subsequent letter of 29 March 1985, which, with regard to the small producers, refers to the possibility that an agreement was involved, referring to 'continuous, institutionalized cooperation', the Commission considers that it allowed the question of the true nature of the cartel to be fully argued during the administrative procedure.

59 The Court observes that it is clear from the established case-law of the Court of Justice that 'the decision is not necessarily required to be a replica of the Commission's notice of objections'. ... 'The Commission must take into account the factors emerging from the administrative procedure in order either to abandon such objections which have proved to be unfounded or to supplement and redraft its arguments both in fact and in law in support of the objections it maintains. This latter possibility does not conflict with the principle of the rights of the defence

protected by Article 4 of Regulation No 99/63' (judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission*, cited above, paragraph 68).

60 In the present case, it is clear from an examination of the main statement of objections and the letter of 29 March 1985 supplementing that statement, which must both be regarded as a whole (judgment in *Van Landewyck* v *Commission*, cited above, point 72), that the objection made against the applicant that it participated in a 'single continuous agreement', a 'framework agreement' and 'overall plans', that objection being made in the first and third paragraphs of point 81 and the first paragraph of point 83 of the Decision, had already been expressed in the main statement of objections.

61 Contrary to the applicant's assertions, the Decision does not simply find in point 81 that the undertakings in question 'participated in an overall framework agreement which was manifested in a series of more detailed sub-agreements worked out from time to time' and that therefore 'a single, continuous "agreement" within the meaning of Article 85(1)' existed; the first of those sentences is preceded by the words: 'In the present case the producers, by subscribing to a common plan to regulate prices and supply in the polypropylene market...', and the second by the words: 'The Commission considers that the whole complex of schemes and arrangements decided in the context of a system of regular and institutionalized meetings constituted...'. It follows that the expressions 'framework agreement' or 'single continuing "agreement"' as well as the term 'overall plans' (point 83) used in the Decision had no other meaning than that the Commission charged the undertakings to which the Decision was addressed with committing a single infringement whose various elements constituted a complex of integrated systems of regular meetings of polypropylene producers for setting price and quota targets characterized by a single economic purpose, which was to distort normal price movements on the polypropylene market.

62 This is precisely the tenor of the whole statement of objections addressed to the applicant and the other undertakings to which the Decision is addressed, and in particular of its points 1, 5, 128, 132 and 151(a). Point 1, for example, is worded as follows:

'The present statement of objections concerns the application of Article 85(1) of the EEC Treaty to a complex of agreements and/or concerted practices by which from about 1977 to October 1983 the producers supplying the bulk thermoplastic polypropylene in the common market coordinated their sales and pricing policy on a continuing and regular basis by setting and implementing "targets" and/or minimum prices, controlling the tonnages supplied to the market by means of agreed "targets" and/or quotas and meeting regularly in order to monitor the progress of the said restrictive arrangements.'

And the last sentence of point 132 reads as follows:

'Effectively the producers were aiming to control the market and a continuing and institutionalized cooperation at a high level was substituted for the normal play of competitive forces.'

63 It must be added that this tenor of the objections addressed to the applicant and the other undertakings to which the Decision was addressed is confirmed by the letter which was addressed to them on 29 March 1985 in which it is stated, on page 4: 'Such arrangements constituted a sufficiently detailed plan to amount to an "agreement" or "agreements" under Article 85, at least as far as the producers involved in the meetings were concerned'.

64 Consequently, the Court considers that in the Decision the Commission merely supplemented and clarified in law the arguments on which it bases its objections and that it did not therefore prevent the applicant from expressing its views on those objections before the Decision was adopted.

65 It follows that the applicant is not justified in accusing the Commission of having acted in breach of its rights of defence by raising fresh objections in the Decision.

4. *Inadequate investigation of the facts*

66 The applicant contends that the Commission acted in breach of the principle of proper investigation under which it was obliged to investigate the claims of the undertakings concerned and to reply to them (a principle which it deduces from the judgment of the Court of Justice in Joined Cases 56 and 58/64 *Etablissements Consten S.à r. l. and Grundig-Verkaufs-GmbH* v *Commission* [1966] ECR 299 and the judgment in Case 27/76 *United Brands Company and Another* v *Commission* [1978] ECR 207, paragraph 271). The Commission failed to investigate the economic effects of the cartel, the distortion of competition caused on the polypropylene market by illegal State aid, Hüls' marketing strategy which was based on special products, and the losses incurred by the producers.

67 The Commission states that this objection concerns proof of the infringement or the determination of the fine and that it must therefore be examined at the same time as those matters.

68 The Court considers that the question whether the Commission carried out sufficient investigations during the administrative procedure — particularly with regard to the economic effects of the cartel, the distortions of competition caused on the polypropylene market by illegal State aid, Hüls' marketing strategy which was based on special products and the losses incurred by producers — is indissociable from the assessment of the finding that the applicant was guilty of an infringement and of the amount of the fine which was imposed upon it and that it is therefore necessary to examine this objection at the same time as those matters.

5. *Non-disclosure of the minutes of the hearings*

69 The applicant refers to Article 9(4) of Regulation No 99/63, which states that: 'The essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him'. According to the applicant, neither the members of the Commission nor the members of the Advisory Committee received the final minutes of the hearings. They could not therefore obtain a precise idea of the arguments exchanged, since they had not all attended the hearings and could not study all the written submissions of the under-

takings concerned. Thus, the Decision was not adopted in the full knowledge of the facts.

70 The applicant points out that, according to the preamble to Regulation No 99/63, the Advisory Committee must be consulted once the investigation is completed therefore after the minutes have been approved, and the participation of the Member States in the hearings can be no substitute for the final minutes which must be forwarded to the Advisory Committee.

71 It states that the provisional minutes did not take account of the purely internal character of its price instructions or of the fact that it denied the charges made against it and that those minutes were amended substantially as a result of its comments.

72 It contends that it is for the Commission to prove that the Decision would have not been different if that procedural irregularity had not been committed. According to the case-law of the Court of Justice (judgment in Case 45/69 *Boehringer Mannheim GmbH* v *Commission* [1970] ECR 769, paragraph 17, and judgment in Case 51/69 *Farbenfabriken Bayer AG* v *Commission* [1972] ECR 745, paragraph 17), a decision based on such draft minutes is void.

73 The Commission points out that Article 9(4) of Regulation No 99/63 does not indicate the bodies to which the Commission must submit the provisional or final minutes of the hearings. It is true that the members of the Advisory Committee only had the provisional minutes, but the competent authorities of all the Member States were represented in the hearings, with the exception of Greece and Luxembourg in the second session. It is unimportant in this regard that the official present at the hearings was not necessarily the representative of the State on the Advisory Committee.

74 It adds that in any event the amendments sought by the applicant appear to be minimal in the overall context since the provisional minutes already contained the main observations of the applicant.

75 It points out that for the purpose of adopting the Decision the members of the Commission had in their possession the provisional minutes and all the comments made by the parties on those minutes.

76 In any event, the Commission considers that the Decision would have been no different if the definitive minutes of the hearings had been available (judgment of the Court of Justice in Case 30/78 *Distillers Company Ltd* v *Commission* [1980] ECR 2229, paragraph 26, Opinion at p. 2290, and judgment in Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 28 to 32).

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

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

79 As regards the minutes forwarded to the Advisory Committee, the Court observes that, contrary to the applicant's assertions, the minutes in question were not drawn up in a way so as to mislead the Committee in a material respect. The provisional minutes forwarded to the Advisory Committee consisted of two parts, one relating to the hearing of 12 November 1984 and the other relating to the hearing of 25 July 1985. A combined reading of the two parts of the provisional minutes of the hearings shows that the requests for amendments of the provisional minutes made by the applicant relate either to one or the other part of those minutes but that they lose their significance when they are considered in the light of one another. Thus, the applicant's criticism that the provisional minutes did not take account of the purely internal character of its price instructions cannot be accepted since, although the first part does contain the incorrect reference to Hüls' price instructions sent to its customers, the second part contains the record of a discussion between the Commission representative and the applicant's representative which specifically concerned the purely internal character of the price instructions issued by Hüls, which does not contest the contents of that record. Similarly, the applicant's criticism that the provisional minutes did not take account of the fact that it denied the various charges is irrelevant since in reality it only concerns the second part of the provisional minutes, whereas the denials in question were contained in the first part.

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

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

81 The applicant states that it asked to be allowed to inspect the hearing officer's report but without success. According to the applicant, there is every reason to believe that the report was not taken into consideration in the Decision although the hearing officer had undoubtedly assessed Hüls' counterarguments more moderately than the Commission. That refusal was not in accord with the purpose of the establishment of the hearing officer's office and his terms of reference. It also restricted the applicant's scope for defending itself by preventing it from checking whether the hearings and their result had been taken into consideration in an objective and reviewable way in the process leading to the adoption of the Decision. Hüls reserves the right to request the Court to order the Commission to produce that report.

82 According to the Commission, there is no provision which provides for the hearing officer's opinion to be disclosed to the addressees of the Commission's decision. It considers that the hearing officer plays an important role in the internal decision-taking process of the Commission and that the undertakings cannot be entitled to be involved in that process since this would compromise the frankness and independence of the hearing officer. The Court confirmed this view in its order in Case 212/86 R (*ICI* v *Commission*, not published in the Reports of Cases before the Court, paragraphs 5 to 8).

83 The Court further notes that the relevant terms of reference of the hearing officer, which were appended to the *Thirteenth Report on Competition Policy*, are as follows:

'*Article 2*

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

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

Article 5

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

Article 6

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

Article 7

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

84 It is clear from the actual terms of reference of the hearing officer that it is not a requirement for his report to be made available to either the Advisory Committee or the Commission. No provision provides for the forwarding of the report to the Advisory Committee. Although it is true that the hearing officer must report to the Director-General for Competition (Article 5) and that he may, if he deems it appropriate, refer his observations directly to the member of the Commission with special responsibility for competition (Article 6), who may himself, at the hearing officer's request, attach the hearing officer's final report to the draft decision submitted to the Commission (Article 7), there is no provision requiring the hearing officer, the Director-General for Competition or the member of the Commission with special responsibility for competition to forward the hearing officer's report to the Commission.

85 Consequently, the applicant cannot rely on the fact that the hearing officer's report was not forwarded to the members of the Advisory Committee or to the members of the Commission.

86 This Court holds that the rights of the defence do not require that undertakings involved in proceedings under Article 85(1) of the EEC Treaty should be able to comment on the hearing officer's report, which is a purely internal Commission document. On this question the Court of Justice has held that the hearing officer's report is in the nature of an opinion for the Commission, which is in no way bound to follow it, and that the report does not therefore constitute a decisive factor which must be taken into account by the Community court in performing its judicial review (order of 11 December 1986 in Case 212/86-R, cited above, paragraphs 5 to 8). Respect for the rights of the defence is ensured to the requisite legal standard if the various bodies involved in drawing up the final decision have been properly informed of the arguments put forward by the undertakings in response to the objections notified to them by the Commission and to the evidence presented by the Commission in support of those objections (judgment of the Court of Justice in Case 322/81 *Nederlandsche Banden-Industrie-Michelin N. V.* v *Commission* [1983] ECR 3461, paragraph 7 at p. 3498).

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

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

89 Consequently, this ground of challenge must be dismissed.

Proof of the infringement

90 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.

91 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 (I) the period from 1977 to the end of 1978 or the beginning of 1979 and (II) the period from the end of 1978 or the beginning of 1979 to November 1983 as far as concerns (A) the scheme of regular meetings, (B) the price initiatives, (C) the measures intended to facilitate the implementation of the price initiatives and (D) the fixing of target tonnages and quotas, taking into account (a) the contested decision and (b) the arguments of the parties before going on to (c) an assessment of them; it will then be necessary to review the application of Article 85(1) of the EEC Treaty to those facts.

1. *The findings of fact*

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

A. The contested decision

92 The Decision (point 78, fourth paragraph, and point 104, third paragraph) states that the system of regular meetings began at about the end of 1977 but that it is not possible to identify the precise date on which each individual producer began to attend those meetings. It states that Hüls, which is one of the producers in respect of which it is not proved that they 'supported' the December 1977 initiative, states that it participated in only one meeting before the second half of 1982.

93 However, the Decision (point 105, first and second paragraphs) states that the precise date on which each producer began to attend regular plenary meetings cannot be established with certainty. The date on which Anic, ATO, BASF, DSM and Hüls began to participate in the arrangements cannot have been later than

1979 since all these five producers are shown to have been involved in the market-sharing or quota systems which were first in force in that year.

B. Arguments of the parties

94 The applicant points out that, although in its reply to the request for information (main statement of objections, Appendix 8) ICI described it as a regular participant in the meetings, this was only in respect of the period 1979 to 1983. It cannot therefore be inferred from that statement that the applicant participated in the meetings before 1979, still less that it participated in them from 1977 onwards. In actual fact, the evidence available shows at the most that it participated irregularly from 1981 and more regularly from 1982.

95 The Commission refers to ICI's reply to the request for information to support its assertion that the applicant participated regularly in the meetings from some time between 1977 and 1979. ICI classified Hüls as one of the regular participants in the meetings without any qualification as to the starting point for its participation, unlike that of other producers which was restricted to the period from 1979 to 1983. However, according to another passage in that reply, the meetings began at the end of 1977 and acquired some regularity in 1978. That information therefore indicates that the applicant was one of the 'founding members' of the cartel.

C. Assessment by the Court

96 The Court finds that the only evidence put forward by the Commission to prove Hüls' participation in the meetings during the period in question is ICI's reply to the request for information (main statement of objections, Appendix 8).

97 The Court observes in this regard that ICI's reply to the request for information classifies the applicant among the regular participants in the 'experts" and 'bosses" meetings without indicating from what date. In that reply it is stated:

'The regular participants at meetings of "Experts" and "Bosses" were as follows: ATO, BASF, Chemie Linz, DSM, Hoechst, Hüls, ICI, Montepolimeri, Petrofina, Saga, Solvay. The following producers participated regularly during those periods between 1979 and 1983 while they were engaged in the West European polypropylene industry: Anic — polypropylene business taken over by Montepolimeri; SIR — believed to be no longer in business; Rhône-Poulenc — polypropylene business sold to BP. In addition, Alcudia and Hercules attended meetings on an irregular basis.'

98 Since it has no precise information regarding the beginning of the applicant's participation in those meetings, the Commission refers to a second passage in ICI's reply:

'Because of the problems facing the polypropylene industry ... a group of producers met in about December 1977 to discuss what, if any measures could be pursued in order to reduce the burden of the inevitable heavy losses about to be incurred by them .... It was proposed that future meetings of those producers who wished to attend should be called on an "*ad hoc*" basis in order to exchange and develop ideas to tackle these problems.'

It infers from that passage that the applicant's participation in the meetings began in December 1977. The Commission considers that that interpretation of ICI's reply to the request for information is corroborated by the fact that if ICI stated the period during which the undertakings had participated in the meetings (1979-1983) only in respect of the undertakings named in the second sentence of the first passage quoted, it was in order to make it apparent that the undertakings named in the first sentence of that passage participated in the meetings from the start.

99 The Court observes that the passage of ICI's reply to the request for information in which it classifies the applicant among the regular participants in the meetings expressly refers to its participation in 'bosses" and 'experts" meetings. The passage cited by the Commission in support of the assertion that the applicant participated in the meetings from December 1977 onwards concerns '*ad hoc*' meetings and not the 'bosses" and 'experts" meetings, in respect of which another passage in ICI's reply to the request for information, in which it is stated:

'By late 1978/early 1979 it was determined that the "ad hoc" meetings of Senior Managers should be supplemented by meetings of lower level managers with more marketing knowledge. This two-tier level of representation became identified as (a) "Bosses" ... and (b) "Experts"',

indicates that they began in late 1978 or early 1979 as a result of the addition of 'experts" meetings'to the'*ad hoc*' 'bosses" meetings.

100 That interpretation of ICI's reply to the request for information is confirmed if the first two sentences in the first passage quoted above are read on equal terms. Such

a reading is justified by the fact that the distinction to be drawn between the undertakings mentioned in the first sentence and those mentioned in the second is not the beginning but the end of their participation in the meetings, since all the undertakings mentioned in the second sentence left the market before the end of the infringement. Those two sentences must therefore be interpreted in the light of each other, regard being had to the fact that the 'bosses" and 'experts" meetings did not begin before late 1978 or early 1979.

101 The Court would also point out that the Commission expressed doubt in the Decision as to the applicant's participation in the meetings before 1979 since in the second paragraph of point 105 it states that the date on which Hüls began to participate in the arrangements cannot have been later than 1979.

102 It follows that the Commission cannot put forward any evidence to prove Hüls' participation in the infringement before the end of 1978 or the beginning of 1979 and that it has therefore not proved such participation to the requisite legal standard.

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

A. The system of regular meetings

(a) The contested decision

103 The Decision (point 78, fourth paragraph) states that Hüls states that it attended only one meeting before mid-1982. It concludes (point 105, second paragraph) that the date on which Hüls began to participate in the arrangements cannot have been later than 1979 since Hüls is shown to have been involved in the market-sharing or quota systems which were first in force in that year.

104 The Decision (point 104, third paragraph, and point 105, second and fourth paragraphs) asserts that ICI has stated that Hüls was a regular participant in the meetings and that the system of regular meetings of polypropylene producers continued until at least the end of September 1983. It finds that Hüls participated in that system (point 18, first and third paragraphs).

105 According to the Decision (point 21), the purposes of the regular meetings of polypropylene producers included the fixing of price and sales volume targets and the monitoring of their observance by producers.

(b) Arguments of the parties

106 The applicant states that there was no 'institutionalized system of regular meetings'. The meetings, in which Hüls did not participate regularly in any event, took place only on an *ad hoc* basis, as is indicated in ICI's reply to the request for information (main statement of objections, Appendix 8). The holding of a number of successive meetings does not justify the conclusion that all the undertakings had agreed to meet regularly from 1977. In any event, the applicant categorically denies having participated in such an agreement.

107 It states that the evidence available shows at the most that it participated in the meetings irregularly from 1981 onwards and more regularly from 1982. The tables established in 1979 setting out 'revised targets' for sales volumes for certain undertakings including the applicant do not refute that conclusion. The proposals mentioned in them concern the whole west European polypropylene market and should therefore cover all the producers, irrespective of their participation in the meetings.

108 The applicant further states that as a small producer it was obliged to attend the meetings and that at the meetings it practised a combination of disinformation and mental reservation in order not to weaken its strategy by disclosing sensitive infor-

mation to its competitors. Moreover, its strategy of abandoning base products in order to move towards special products had the consequence that its interests were different from those of the other producers to such an extent that its participation in the meetings could not have the object of restricting competition.

109 Finally, it states that it was the Commission's inaction on French and Italian State aid in the polypropylene sector which made the meetings of producers, anxious to face up to the crisis affecting the sector, essential.

110 The Commission does not dispute that the regularity and frequency of the meetings increased during the course of time. They became more structured. The purpose was to implement an overall plan which consisted of increasingly intensive actions intended to modify market forces through cooperation between polypropylene producers in the matter of pricing, sales volume targets and ancillary measures. According to the Commission, this overall plan, which was developed gradually, consisted of a framework agreement providing for a system of institutionalized meetings for the joint elaboration of market strategies and which was supplemented by particular sub-agreements concerning specific measures. The common denominator of this framework agreement subsisted throughout the period covered by the Decision. Hüls' commitment in the overall plan or the framework agreement is clear in particular from its regular participation in the periodic meetings.

111 The Commission contends that the applicant's regular participation in the meetings is apparent from ICI's reply to the request for information which mentions Hüls as one of the regular participants in the meetings. That evidence is corroborated by the fact that the applicant's name is mentioned in an undated table headed 'Producers' Sales to West Europe' (main statement of objections, Appendix 55) setting out for all the polypropylene producers of western Europe sales figures in kilotonnes for 1976, 1977 and 1978 and figures mentioned under the headings '1979 actual' and 'revised target'. This table, containing business information

which had to be kept strictly secret as confidential business information, could not have been drawn up without Hüls' participation. The note of a meeting held on 26 and 27 September 1979 (main statement of objections, Appendix 12) indicates that the sales volume targets set out in the previous table were the subject of meetings.

112 The Commission also points out that a policy of disinformation such as that which the applicant claims to have pursued would inevitably have been discovered by the other producers through the cross-checking which they could carry out using the Fides data exchange system; this would have had more serious consequences for Hüls than non-participation in the meetings. It points out, secondly, that the cartel covered not only basic products but also special products and that Hüls' strategy of specialization did not therefore preclude it from participating in the meetings.

113 Finally, the Commission considers that French and Italian State aid are not factors which could justify the applicant's participation in the meetings.

(c) Assessment by the Court

114 The Court finds that ICI's reply to the request for information (main statement of objections, Appendix 8) classifies the applicant, unlike two other producers, amongst the regular participants in the 'bosses" and 'experts" meetings without any limitation in time. That reply must be interpreted as dating the applicant's participation in the meetings from the beginning of the system of 'bosses" and 'experts" meetings, which was established at the end of 1978 or the beginning of 1979.

115 ICI's reply to the request for information is borne out by the fact that in various tables found at the premises of ICI, ATO and Hercules (main statement of objections, Appendices 55 to 62) there appear beside the applicant's name its sales 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 statistical 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', which renders invalid the applicant's argument that all the producers were mentioned in those tables without exception.

116 To that evidence must be added the fact that the applicant's reply to the request for information is incomplete in so far as it omitted to mention its participation in a meeting in January 1981 the note of which (main statement of objections, Appendix 17) shows that Hüls was one of the participants.

117 Moreover, the applicant admitted before the Court that it had participated regularly in the meetings during 1982 and 1983 whereas in its reply to the request for information it stated that it had not participated in the meetings before mid-1982, which is contradicted in particular by the note of the meeting held on 13 May 1982 (main statement of objections, Appendix 24), which clearly indicates that Hüls took part in that meeting.

118 In those circumstances the Commission was entitled to consider that the applicant participated regularly in the periodic meetings of polypropylene producers from the end of 1978 or the beginning of 1979 until September 1983.

119 The Commission was therefore entitled to take the view, based on the material provided by ICI in its reply to the request for information, which is borne out by numerous notes of meetings, that the purpose of the meetings was, in particular, to fix target prices and sales volumes. That reply states:

"'Target prices" for the basic grade of each principal category of polypropylene as proposed by producers from time to time since 1 January 1979 are set forth in Schedule . . . '; and 'A number of proposals for the volume of individual producers were discussed at meetings'.

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

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

122 Moreover, the arguments put forward by the applicant to show that its participation in the meetings could not be regarded as offensive, cannot be accepted.

123 The applicant cannot claim that as a small producer it could not afford to stay away from the meetings; after all, since it could have reported them to the Commission and asked it to order them to be brought to an end.

124 The applicant's strategy of withdrawing from basic products in order to concentrate on special products and the conflict of interests which allegedly arose between itself and the other producers as a result of that strategy are likewise not capable of excusing the applicant's participation in the meetings since the discussions relating to the fixing of sales volume targets concerned not only basic products but also special products. In its application the applicant stated that in 1983 its total polypropylene sales, all grades included, was 64 349 tonnes for the Federal Republic of Germany, Belgium, France, Great Britain, Italy and the Grand Duchy of Luxembourg, the only western European countries in which it had significant sales of polypropylene, of which only 45% concerned basic products. However, according to various documents, the quota allocated to the applicant for that same year was between 65 000 tonnes, on a market estimated at 1 470 kilotonnes (Saga's proposal, main statement of objections, Appendix 81) and 77 910 tonnes (5.3% of the same market, proposal of the German producers, main statement of objections, Appendix 83). Consequently, the discussions relating to sales volumes concerned special products as well as basic products.

125 As regards the strategy of disinformation and mental reservation adopted by the applicant at the meetings which, it argues, shows that Hüls was not motivated by any anti-competitive intention, it must be observed that since it is not disputed that the applicant took part in those meetings and it is established that their object was in particular to fix price and sales volume targets, the applicant at least gave its competitors the impression that it was participating in the meetings in the same spirit.

126 In those circumstances, it is for the applicant to adduce evidence to show that its participation in the meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit which was different from theirs.

127 The applicant's arguments founded on its conduct on the market and designed to show that the sole aim of its participation in the meetings was to enable it to obtain information do not constitute evidence proving that it had no anti-competitive intention since those explanations do not show that the applicant had

indicated to its competitors that its conduct on the market was independent of what occurred at the meetings. Even on the assumption that its competitors knew this, the mere fact that it exchanged with them information which an independent operator would keep strictly confidential as business secrets is sufficient to show that it acted in an anti-competitive spirit.

28 Finally, it must be stated that if it is considered proved that State aids existed which distorted competition, such aid cannot justify the participation of competing undertakings in meetings having as their object in particular the fixing of price and sales volume targets. Rather than participating in those meetings, the applicant could have requested the Commission at the material time to exercise its powers under Article 93 of the EEC Treaty, which it does not claim to have done.

29 It follows that the Commission has established to the requisite legal standard that the applicant participated regularly in the system of regular meetings of polypropylene producers from the end of 1978 or the beginning of 1979 until September 1983, that the purpose of those meetings was, in particular, to fix price and sales volume targets and that they were part of a system.

B. The price initiatives

(a) The contested decision

30 According to the Decision (points 28 to 51), a system for fixing price targets was implemented through price initiatives of which six could be identified, the first lasting from July to December 1979, the second from January to May 1981, the third from August to December 1981, the fourth from June to July 1982, the fifth from September to November 1982 and the sixth from July to November 1983.

131 With regard to the first of those price initiatives, the Commission (Decision, point 29) states that it has no detailed evidence of any meetings held or price initiatives undertaken in the first part of 1979. However, a note of a meeting held on 26 and 27 September 1979 shows that a price initiative had been planned based on a raffia grade price of DM 1.90/kg applicable from 1 July and DM 2.05/kg from 1 September. The Commission possesses price instructions from certain producers, which do not include the applicant, which show 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 and, in the case of most of them, before the trade press had announced the planned increase (Decision, point 30).

132 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).

133 As regards the second price initiative, the Commission, whilst admitting (in point 32 of the Decision) that no meeting notes were found for 1980, states that at least seven producers' meetings were held in that year (reference is made to Table 3 of the Decision). Although at the beginning of the year producers were reported in the trade press as favouring a strong price push during 1980, a substantial fall occurred in market prices to a level of DM 1.20/kg or less before they began to stabilize in about September of that year. Price instructions issued by a number of producers — DSM, Hoechst, Linz, Monte, Saga and ICI — indicated that in order to re-establish price levels targets were set for December 1980 — January 1981 based on raffia at DM 1.50/kg, homopolymer at DM 1.70/kg and copolymer DM 1.95 to DM 2.00/kg. A Solvay internal document includes a table comparing 'achieved prices' for October and November 1980 with what are referred to as 'list prices' for January 1981 of DM 1.50/1.70/2.00. The original plan was to apply these levels from 1 December 1980 (a meeting was held in Zurich on 13 to 15 October) but this initiative was postponed to 1 January 1981.

34 The Decision (point 33) mentions that Hüls participated in one of the two meetings held in January 1981, at which it was decided that a price increase, fixed in December 1980 for 1 February 1981, was required in two stages on the basis of DM 1.75/kg for raffia: the 1 February target was to remain at DM 1.75/kg and a target of DM 2.00/kg was to be introduced 'without exception' from 1 March. A table was drawn up in six national currencies of the target prices for six principal grades, to come into effect on 1 February and 1 March 1981.

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

36 As regards the third price initiative, the Decision (point 35) states that Shell and ICI had already foreseen a further price initiative in September/October 1981 in June of that year when the slowing down of the first-quarter price rise had become apparent. Shell, ICI and Monte met on 15 June 1981 to discuss methods of implementing higher prices in the market. Within a few days of this meeting both ICI and Shell instructed their sales offices to prepare the market place for a major rise in September based on a plan to move the raffia price to DM 2.30/kg. Solvay also reminded its Benelux sales office on 17 July 1981 to warn customers of a substantial price increase due to take effect on 1 September, the exact amount of which was to be decided in the last week of July, when an experts' meeting was planned for 28 July 1981. The original plan to go for DM 2.30/kg in September 1981 was revised, probably at this meeting, with the planned level for August back

to DM 2.00/kg for raffia. The September price was to be DM 2.20/kg. A hand-written note obtained at the premises of Hercules and dated 29 July 1981 (the day after the meeting, which Hercules probably did not attend) lists these prices as the 'official' prices for August and September and refers in cryptic terms to the source of the information. More meetings were held in Geneva on 4 August and in Vienna on 21 August 1981. Following these sessions, new instructions were given by producers to go for a price of DM 2.30/kg on 1 October. BASF, DSM, Hoechst, ICI, Monte and Shell gave virtually identical price instructions to implement these prices in September and October.

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

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

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

40 According to the Decision (paragraph 40), the applicant also participated in the fifth price initiative of September-November 1982 decided upon at the meeting on 20 and 21 July 1982, the aim of which was to achieve a price of DM 2.00/kg by 1 September and DM 2.10/kg by 1 October, since it was present at the majority if not all of the meetings held between July and November 1982 in which this initiative was planned and monitored (Decision, point 45). At the meeting on 20 August 1982, the increase planned for 1 September was postponed until 1 October, and that decision was confirmed at the meeting on 2 September 1982 (Decision, point 41).

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

42 According to the Decision (point 44), at the meeting on 21 September 1982, in which the applicant participated, an examination of the measures taken to achieve the target previously set was undertaken and the undertakings expressed general support for a proposal to raise the price to DM 2.10/kg by November-December 1982. That increase was confirmed at the meeting on 6 October 1982.

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

144 Like ATO, BASF, DSM, Hercules, Hoechst, ICI, Linz, Monte and Saga, the applicant supplied the Commission with price instructions issued to its local sales offices, which corresponded not only with each other in terms of amount and timing but also with the target-price table attached to ICI's account of the experts' meeting held on 2 September 1982 (main statement of objections, Appendix 29) (Decision, point 45, second paragraph).

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

146 Finally, according to the Decision (point 47), the applicant participated in the sixth price initiative of July-November 1983. At the meeting on 3 May 1983, it was agreed that the producers would try to apply a price target of DM 2.00/kg in June 1983. However, at the meeting on 20 May 1983, the target previously set was postponed until September and an intermediate target was fixed for 1 July (DM 1.85/kg). Subsequently, at a meeting on 1 June 1983, the producers present reaffirmed complete commitment to the DM 1.85/kg increase. On that occasion, it was agreed that Shell would lead publicly in ECN.

147 The Decision (point 49) states that after the meeting of 20 May 1983, ICI, DSM, BASF, Hoechst, Linz, Shell, Hercules, ATO, Petrofina and Solvay issued instructions to their sales offices to apply from 1 July a price table based on DM 1.85/kg for raffia. The Decision concludes that, with the exception of Hüls, for which the Commission found no price instructions for July 1983, all the producers which had attended the meetings or had promised support for the new price target of DM 1.85/kg are shown to have given instructions to implement the new price.

148 The Decision (point 50) also points out that further meetings, in which all the regular participants took part, took place on 16 June, 6 and 21 July, 10 and

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

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

150 The Decision (point 51, third paragraph) states that an internal note obtained at the premises of ATO and dated 28 September 1983 shows a table headed 'Rappel du prix de cota (sic)' giving for different countries prices for September and October for the three main grades of polypropylene, those prices being identical to those of BASF, DSM, Hoechst, Hüls, ICI, Linz, Monte and Solvay. During the investigation at the premises of ATO in October 1983 the representatives of the undertaking confirmed that these prices were communicated to sales offices.

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

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

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

(b) Arguments of the parties

154 The applicant states that during the administrative procedure the Commission did not express any objection relating to Hüls' participation in price initiatives prior to May 1982. Although Tables 7A to 7G to the Decision do not refer to price instructions issued by the applicant, their existence in all the price initiatives is implied in the reasons stated for the Decision. That accusation is unacceptable procedurally and in substance.

155 It points out that in relation to a period of investigation governing the period from mid-1977 to November 1983, that is to say a period of 77 months, the Commission grouped the periods of infringement of the price competition rules into six price initiatives stretching over a period of several months. According to the applicant, this means that, in relation to the parts of the investigation period which the price initiatives do not concern, that is to say a period of 51 months, there is no evidence of the existence of an agreement on target prices.

156 It adds that the Commission's argument that the price instructions concerning specific periods must be used as evidence that an agreement on prices was also in operation during other periods cannot be accepted.

157 The applicant states that it did not commit itself or consider itself committed in any way at all at the meetings. In its view, that conclusion is to be drawn from the clear discrepancies between the target prices and the prices actually charged on the market by the applicant and from the statements made at meetings which show that all the participants had come to a mutual agreement to leave the freedom of decision of each intact and that all the participants knew that the actual conduct of the undertakings was not in line with the target prices discussed at the meetings. The undertakings' conduct on the market shows that the competition took place at the level of prices and was evident in significant switches of customers between the various producers on the market. It also repeats that, unlike other participants, at the meetings it pursued a policy of combining mental reservation with deliberate disinformation.

158 It also points out that the Commission failed to examine its conduct on the market and raises the question whether that conduct was anti-competitive or whether it could be explained otherwise than by prior concerted action (see the judgment of the Court of Justice in Joined Cases 29 and 30/83 *Compagnie Royale Asturienne des Mines S. A. and Rheinzink GmbH* [1984] ECR 1679, paragraph 16). Thus, the Commission has failed to prove that the applicant's conduct on the market was in line with the decisions adopted at the meetings of producers.

159 The applicant also contends that its price instructions were purely internal instructions, which were not binding and which were addressed to its sales offices. Those offices approached the market with the prices which they thought they could charge. The econometric study carried out by Professor Albach of Bonn University and the analysis carried out by an independent firm of auditors concerning the net sales prices (after deduction of any discounts) charged by the producers during the reference period (hereinafter referred to as 'the Coopers & Lybrand audit') show that those prices were never the same as the target prices and were not and could not be influenced by them.

160 According to the applicant, those expert reports show that there was not even any parallel conduct by the undertakings. They show, on the contrary, that the under-

takings always conducted an independent pricing policy on the market. It was not therefore possible to establish the presence on the market of the effects of any agreements. However, in so far as certain matching factors could sometimes be ascertained on the market, they are to be explained exclusively by the particular features of that market and by the narrowness of the price band which the market tolerated. The ruinous competition often had the effect that the undertakings were compelled, in order not to lose clients, to align their prices with those of their competitors, no matter how low they were. It is not admissible, by referring to such similarities in prices, to conclude that there was some causal link between the prices charged on the market and the target prices discussed at meetings, those similarities having quite natural explanations not constituting any breach of the rules of competition.

161 Finally, the applicant states that in producing such experts' reports it has gone further than its obligations require it to do since the burden is on the Commission to establish by economic analyses that the alleged cartel produced effects on the market.

162 The Commission states that the evidence in its possession constitutes direct evidence of the existence of agreements on prices in respect of the periods to which they refer. As regards the other periods, they constitute evidence which, combined with other evidence, could also prove indirectly the existence of agreements. Since contacts between producers took place throughout the period covered by the Decision, as ICI indicated in its reply to the request for information (main statement of objections, Appendix 8), and the purpose of those contacts was in particular to raise the level of prices, the Commission considers the existence of an agreement on prices whose detail and binding character varied throughout the period to be established.

163 The Commission states that it has direct evidence of the applicant's participation in a meeting in January 1981 (main statement of objections, Appendix 17) and of its participation in the price initiatives from May 1982 (letter of 29 March 1985, Appendix H). As regards the previous periods, the Commission has only indications (Hüls' price instructions for those periods not being available) but those indications, considered with the direct evidence of the aforesaid initiatives, justifies the conclusion that Hüls participated in the cartel as a whole from some time

between 1977 and 1979 until at least November 1983. The Commission accepts, however, that the agreements on prices did not always achieve their objective.

164 As regards the expert evidence of Professor Albach, it points out that the possibilities at present offered by economic science do not enable competitive prices to be calculated or simulated (a balanced price could be calculated for teaching purposes as part of university studies but could not be used as evidence in legal proceedings). Those experts' reports are also distorted by the fact that they relate solely to the German market and that they use for comparison purposes a calculation of the cost price for polypropylene which has no evidential value since it is impossible to give a precise breakdown of the overheads of the undertakings in question between polypropylene and their other products.

165 In the rejoinder, the Commission states that in the Decision (points 88 to 94) it gave full explanations of the effects of the cartel on the market. In rejecting the suggestion, made by Solvay at the meeting of 13 May 1982 (main statement of objections, Appendix 24), that the meetings should be brought to an end, the undertakings themselves considered the results of the cartel to be positive. This was also the opinion of ICI in December 1982 as it indicated in an internal note (main statement of objections, Appendix 35).

(c) Assessment by the Court

166 The Court notes first of all that the objections raised in the Decision against the applicant as regards its participation in the price initiatives of July-December 1979, January-May 1981 and August-December 1981 do not constitute new objections in relation to the statement of objections addressed to the applicant. The main statement of objections states in point 41 that the applicant regularly attended meetings of polypropylene producers which, according to points 39 and 40, had begun at the end of 1978 and, according to point 50, concerned the fixing of target prices. The objection raised is therefore that the applicant participated in the six price initiatives found in the Decision by participating in the meetings at which those initiatives were decided on, organized and monitored.

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

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

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

169 In order to show that it did not subscribe to the price initiatives agreed at the regular meetings of polypropylene producers, the applicant contends in this regard that it took no account of the outcome of the meetings when determining its pricing conduct on the market, as is shown by its aggressive pricing policy on the market, which is attested both by the Coopers & Lybrand audit and the economic study carried out by Professor Albach. It adds that the purely internal and non-binding nature of its pricing instructions confirms that it took no account of the outcome of the meetings and that they therefore had no effect on the market.

170 Those arguments cannot be accepted as evidence to support the applicant's assertion that it did not subscribe to the agreed price initiatives. Even if those arguments were supported by the facts, they would not be such as to disprove the applicant's participation in the fixing of target prices at the meetings but would at the most demonstrate that the applicant did not implement the decisions reached at the meetings. In any event, the Decision does not assert that the applicant charged prices which always matched the target prices agreed at the meetings, which indicates that the contested decision does not rely on the applicant's implementation of the decisions reached at the meetings in order to prove its participation in the fixing of those target prices.

171 In this same context it must be observed that the Commission does not dispute the Coopers & Lybrand audit in so far as it seeks to demonstrate that there were considerable differences between the prices actually charged and the target prices. However, it must be pointed out that the analyses which the producers themselves made at the meetings of 21 September, 6 October, 2 November and 2 December 1982 as regards the effect of their price initiatives on the prices charged on the market seem to indicate that they considered their results to be positive on the whole (main statement of objections, Appendices 30 to 33). Furthermore, the note of the meeting of 13 May 1982 (main statement of objections, Appendix 24), in which Hüls participated, shows that the producers judged the effects of their meetings to be positive since they rejected a Solvay proposal to end the meetings on the ground that

'it was always better to talk than not and that if supply + demand were so closely in balance we should be taking active steps to move prices up rather than let them find their own level'.

172 In any event, the Court considers that the applicant's implementation of the decisions reached at the meetings was more substantial than it claims, at least after 1982, the time from which the Commission was able to produce price instructions issued by the applicant and matching the target prices set at the meetings and those issued by other producers.

173 As regards the purely internal nature of the applicant's price instructions and the target prices which it set, the Court observes that although those instructions were internal in the sense that they were sent by the head office to the sales offices, they were sent with a view to being implemented and thus having external effects, as is confirmed by the telex of 20 September 1983 sent by Hüls' head office (letter of 29 March 1985, Hüls, Appendix I 14), which states:

'zu ihrer information teilen wir ihnen mit, dass unsere vb's und vertretungen ueber folgende vestolen-preiserhoehungen in kenntnis gesetzt wurden: am 01.11.83 treten folgende mindestpreise in kraft'

('For your information we would inform you that the following increases in price for vestolen have been notified to our sales offices and agencies: the following minimum prices will enter into force on 01.11.83').

Consequently, the applicant's arguments are not such as to refute the finding that it participated in the successive price initiatives.

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

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

that those initiatives were part of a system of fixing target prices which continued to exist even when the discussions between the producers did not lead to the fixing of a precise target. For that reason, the applicant's argument that the price initiatives covered only 26 months of the 77 months during which the infringement lasted cannot be accepted.

175 Finally, although the last meeting of producers proved by the Commission to have taken place was that held on 29 September 1983, the fact remains that between 20 September and 25 October 1983 various producers (BASF, Hercules, Hoechst, Hüls, ICI, Linz, Monte, Solvay and Saga) sent out matching price instructions (letter of 29 March 1985, Appendix I) scheduled to enter into force on 1 November 1983, and the Commission could therefore reasonably take the view that the meetings of producers had continued to produce their effects until November 1983.

176 Moreover, in order to support the foregoing findings of fact, the Commission did not need to use documents which it had not mentioned in its statement of objections or which it had not disclosed to the applicant.

77 It follows that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom there emerged common intentions concerning the price initiatives mentioned in the Decision, that those initiatives were part of a system and that those price initiatives continued to have effects until November 1983.

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

(a) The contested decision

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

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

180 The Decision accuses Hüls in point 20 of having attended local meetings held to discuss implementation at the national level of arrangements agreed in the full sessions, of maintaining close contacts with BASF and Hoechst and adopting a common position on some matters such as quotas.

(b) Arguments of the parties

181 The applicant points out that the notes of the meetings of 2 September and 2 December 1982 and of 4 March and of 3 May 1983 (main statement of objections, Appendices 29, 33, 37 and 38), to which the Commission refers in order to prove the existence of an 'account leadership' system shows in fact that the producers never reached agreement on the establishment of such a system. At the meeting of 2 September 1982, 'account management' plans were indeed discussed but the obligation to provide the necessary information and differences of view between the undertakings prevented an agreement from being reached. At the meeting of 2 December 1982, it was likewise not possible to reach an agreement, even though a number of schemes were drawn up by a large number of producers. For example, table 3 in the note of that meeting is only a proposed scheme which was never agreed upon. This is shown by ICI's reply to the request for information (main statement of objections, Appendix 8); secondly, by the fact that the customers mentioned beside the name of Hüls were either not supplied by the applicant (Westphalia) or were supplied chiefly by other producers (such as Baumhüter, Spohn and Billermann); thirdly, by the fact that several producers were envisaged as 'account leader' for the same customer; fourthly, by the fact that Hüls' name appears in brackets; and, fifthly, by the fact that the customers mentioned in respect of the various producers, including Hüls, are very different in the table appended to the note of the meeting of 2 September 1982 (main statement of objections, Appendix 29) and in the table appended to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33). The same is true of the meetings held in spring 1983.

182 It adds that the studies which it has provided, such as the Coopers & Lybrand audit, show that, contrary to what would have happened if an 'account leadership' system had been introduced, customers all bought from a number of suppliers and at prices which often differed considerably. In reality, no undertaking was prepared to have its position on the market impaired at the expense of another undertaking.

183 The applicant also disputes that the notes of the meetings of 21 September and 2 December 1982 (main statement of objections, Appendices 30 and 33) and the note of a bilateral meeting between Shell and ICI of 27 May 1981 (main statement of objections, Appendix 64) support the Commission's assertion that at the

meetings pressure was exerted on producers whose prices and sales figures indicated that they were not observing the agreements. Such criticisms never reached the undertakings that were the subject of them and could not therefore influence them. The documents produced by the Commission are either purely internal notes not disclosed to the undertakings subject to the criticism or notes of meetings at which the undertakings which were the target of the criticism did not participate. Furthermore, the Commission was unable to demonstrate that the undertakings became the subject of criticism for not observing the agreements allegedly concluded rather than for their refusal to conclude such agreements.

184 Finally, the applicant states that it never participated in local meetings concerning specific countries or specific regions of the Community and did not therefore participate in the agreements which were concluded at them. The document on the basis of which the Commission claims to be able to prove Hüls' participation in a meeting in the United Kingdom (main statement of objections, Appendix 10) shows, on the contrary, that it was absent from that meeting. The sales figures of the undertakings were classified according to two categories of undertakings: those which were represented at the meeting ('those present') and those which were not ('those not represented'). Hüls' figures were not included in the figures of 'those present'.

185 The Commission considers that it is apparent from ICI's reply to the request for information (main statement of objections, Appendix 8) not only that the 'account leadership' system was discussed — as the notes referred to by the applicant show — but also that that system was the subject of an agreement which led to implementing action with which the applicant was associated. This is further corroborated, first, by the notes of the meetings of 2 September 1982, 2 December 1982 and 3 May 1983 (main statement of objections, Appendices 29, 33 and 38), which, in its view, show that 'account leaders' and/or 'contenders' were designated for certain customers and, secondly, by an undated ICI document in which ICI assesses the attitude of certain undertakings towards the cartel and in which it is stated with regard to the applicant 'Good supporters of the club + in account leadership' (main statement of objections, Appendix 14a, particular objections, Hüls).

186 The Commission admits, however, that this system did not operate for longer than two months. As regards the studies taking the opposite line, provided by Hüls, they are, according to the Commission, incomprehensible and unusable owing to the abbreviations which they contain and the fact that it is not stated whether the prices mentioned represent offers or achieved sales.

187 According to the Commission, the notes of meetings, in particular of 9 June and 21 September 1982 (main statement of objections, Appendices 25 and 34) show that the prices and sales volumes actually achieved were permanently compared with the 'target' prices and volumes and that a failure to observe the agreements which had been made attracted very severe criticism. This is borne out by ICI's reply to the request for information and by the notes of the meeting of 2 December 1982 and of a bilateral meeting between Shell and ICI of 27 May 1981 (main statement of objections, Appendices 33 and 64). On various occasions it was even decided to exert pressure on the producers in order to make them observe the target prices, as was the case at the meeting of 21 September 1982 (main statement of objections, Appendix 30). Hüls, which supported those actions by participating in the meetings, must bear individual responsibility for those actions.

188 As regards the local meetings, the Commission states that a meeting note (main statement of objections, Appendix 10) proves that Hüls participated in those local meetings which concerned the United Kingdom and that in its reply to the request for information (particular objections, Hüls, Appendix 1) it admitted having participated in the meetings concerning Scandinavia.

(c) Assessment by the Court

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

190 It must be concluded that in participating in the meetings during which that set of measures was adopted (in particular those of 13 May, 2 and 21 September 1982 (main statement of objections, Appendices 24, 29, 30)), the applicant subscribed to it, since it has not adduced any evidence to prove the contrary.

191 As regards the 'account leadership' system, the Court finds that the applicant participated in the four meetings (those of 2 September 1982, 2 December 1982, March 1983 and 3 May 1983) at which that system was discussed by producers and that it is apparent from the notes of those meetings that the applicant provided at them certain information relating to its customers (main statement of objections, Appendices 29, 33, 37 and 38). In this regard, the adoption of the system of 'account leadership' is clear from the following passage appearing in the record of the meeting of 2 September 1982:

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

Similarly, at the meeting of 21 September 1982, in which the applicant participated, it was stated: 'In support of the move, BASF, Hercules and Hoechst

said they would be taking plant off line temporarily' and at the meeting of 13 May 1982 Fina stated: 'Plant will be shut down for 20 days in August'.

192 The implementation of that system is attested by the note of the meeting of 3 May 1983 which states:

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

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

'In the Spring of 1983 there was a partial attempt by some producers to operate the "Account Leadership" scheme... Since Hercules had not declared to the "Account Leader" its interest in supplying Jacob Holm, the statement was made at this meeting in relation to Jacob Holm that "Hercules were definitely in and should not have been so". It should be made clear that this statement refers only to the Jacob Holm account and not to the Danish market. It was because of such action by Hercules and others that the "Account Leadership" scheme collapsed after at most two months of partial and ineffective operation.

The method by which Hüls and ICI should have protected BASF was by quoting a price of DK 6.75 for the supply of raffia grade polypropylene to Jacob Holm until the end of June'.

193 Those various items of evidence are not weakened by the arguments presented by the applicant.

194 Even if it is assumed that the Coopers & Lybrand audit proved that significant switches of supplier by customers took place during 1982 and 1983, this fact matters little. The fact that the applicant was not the principal supplier of undertakings beside whose name it was mentioned is not relevant either, since the Decision is not based on the assumption that the 'account leadership' system had been implemented successfully. Furthermore, it must be pointed out that, contrary to the applicant's assertions, in 1983 it was the main supplier of its customer Baumhüter, as is shown by the Coopers & Lybrand audit.

195 Secondly, the fact that the applicant's name appears in brackets in table 3 annexed to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) does not have the significance attributed to it by the applicant, namely that, unlike the producers whose names do not appear in brackets, it did not express its agreement to the system proposed, since the name of ICI, whose representative drew up the table, also appears in brackets for its customers in the United Kingdom.

196 Thirdly and finally, the foregoing findings are not refuted by the differences existing between the table annexed to the note of the meeting of 2 September 1982 and that annexed to the note of the meeting of 2 December 1982 since all the evidence indicates that the discussions relating to 'account leadership' did evolve in time but nevertheless did not lead to contradictory results.

197 The Court also notes that the applicant admitted in its reply to the request for information (particular objections, Hüls, Appendix 1) that it had participated in local meetings in Denmark and that the object of those meetings is attested by the note of the meeting of 2 November 1982 (main statement of objections, Appendix 32) which shows that those meetings were intended to ensure that the agreed measures were applied at the local level. In that meeting note it is stated:

'*Scandinavia.* Saga reiterated their request for a larger share of the market — Claimed they needed to have price freedom to buy their way back into lost accounts but nevertheless were trying to follow the party line. Agreed we would call special meetings of Ho[echst], Hü[ls], M[onte] P[olimeri] + Saga to try + find way forward'.

Those findings are not weakened by the fact that the content of the document produced by the Commission in order to prove the applicant's participation in local meetings in Great Britain (main statement of objections, Appendix 10) does not enable the conclusion which the Commission draws from it to be reached.

198 As regards the exertion of pressure on certain producers, the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33), combined with ICI's reply to the request for information, proves without doubt that Hercules, which participated in that meeting, was criticized by the German producers for its pricing policy. The meeting note states that. 'Hercules said that they would not attend in the future in view of criticism from the Dutch + Germans' and ICI's reply states that the reference made to the '"criticism from the Dutch and Germans" related to criticism levelled at Hercules by Dutch and German producers for its pricing policy'. It must also be noted that at the meeting of 21 September 1982 the producers had already exerted pressure on certain recalcitrant producers since it was stated that 'pressure was needed', particularly on Anic (main statement of objections, Appendix 30).

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

D. Target tonnages and quotas

(a) The contested decision

200 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.

201 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.

202 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).

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

204 According to the Decision (point 56), the sharing of the market for 1981 was the subject of prolonged and complex negotiations. At the meetings in January 1981, it was agreed that as a temporary measure to help to achieve the February/March price initiative each producer would restrict monthly sales to one-twelfth of 85% of the 1980 'target'. In preparation for a more permanent scheme, each producer

communicated to the meeting the tonnage it hoped to sell during 1981. However, added together, those 'aspirations' largely exceeded total forecast demand. In spite of various compromise schemes put forward by Shell and ICI, no definitive quota agreement was reached for 1981. As a stopgap measure the producers took the previous year's quota of each producer as a theoretical entitlement and reported their actual sales each month to the meeting. In this way actual sales were monitored against a notional split of the available market based on the 1980 quota (Decision, point 57).

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

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

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

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

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

(b) Arguments of the parties

209 The applicant points out that the objection that it participated in an agreement or a concerted practice concerning a system for allocating quotas and quantity targets

is refuted by the fact that since 1979 its market share in western Europe has never ceased to diminish. The Commission's argument that changes in market shares do not prove the absence of any restriction on competition because it is necessary to take account of the newcomers would be relevant only if all the undertakings had lost market share in the same proportion, which is not the case.

210 It maintains that, contrary to the Commission's allegations, it has never admitted that in order to create conditions necessary for the success of price agreements a permanent volume regulation system had to be introduced. It is true that the plans of individual undertakings were sometimes discussed at meetings but there was never any agreement on a volume regulation system. The documents produced by the Commission, in particular the various tables (main statement of objections, Appendices 55 to 62) prove only that proposals were made and that discussions on such a system took place. Although Hüls recognizes that during occasional exchanges of information concerning the past the undertakings sometimes communicated information concerning their sales volumes for the previous months, it considers that the Commission cannot conclude from those exchanges of information that unlawful agreements were made.

211 The applicant also criticizes the way in which the Commission drew up Table 8 to the Decision, basing it on documents which contained merely a comparison between past sales volumes and the quotas planned under the proposed quota system (main statement of objections, Appendices 17, 59, 60 and 65).

212 For each individual period the applicant seeks to disprove the documents on which the Commission bases its objections.

213 As regards 1979, the applicant disputes the probative value of the table written in German (main statement of objections, Appendix 56) and of the table entitled 'Producers' Sales to West Europe', found at the premises of ICI (main statement of objections, Appendix 55). It considers, first, that the fact that Hüls' name is

mentioned in those tables does not justify the conclusion that it was present at the meetings and, secondly, that those documents contain only figures relating to the sales in 1976 to 1979 and that the 'revised target' column in the first table may represent the sales forecasts of the undertakings as well as quota proposals. It is nothing more than an internal document for drawing up a quota proposal for 1980. Furthermore, the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12), according to which the undertakings 'recognized that tight quota system essential', shows that no agreement could be reached at that time.

214 In the reply it rejects the Commission's assertion that the table headed 'Producers' Sales to West Europe' (main statement of objections, Appendix 55) could not have been drawn up without the assistance of the various producers. It states that that table as well as others were drawn up on the basis of estimates made with the help of Fides statistics, as is indicated by the differences pointed out by the author of the tables between the figures mentioned in them and the Fides statistics.

215 As regards 1980, the fact that various tables (main statement of objections, Appendices 56 to 59), which are merely proposals, are generally based on a 'target quota' of 80 kilotonnes for Hüls, do not prove either the existence of a corresponding agreement or the applicant's adherence to such an agreement. The fact that it was always the same quota which was proposed for the applicant suggests, on the contrary, that the applicant did not participate in those discussions. The quota put down for the applicant thus became an order of magnitude for calculation purposes used by the other participants. Furthermore, Hüls would never have accepted a quota which would have required it to give up a disproportionate market share to the advantage of its competitors. The applicant disputes in particular the probative value of a table headed 'Polypropylene — Sales target 1980 (kt)' dated 26 February 1980 (main statement of objections, Appendix 60). The Commission assumes that all the undertakings mentioned in the table agreed to the quotas. However, it is clear from the tables themselves that some undertakings expressed reservations about the quotas which had been allocated to them since the figure which follows their name is market 'to be rechecked'. Consequently, since a quota system could have functioned only if all the producers had given their agreement, it may be assumed that an agreement could not be concluded for that year. This is also confirmed by the table appended to the note of two producer meetings of January 1981 (main statement of objections, Appendix 17), which conflicts with the quota allegedly allocated to the applicant in

the table mentioned above (main statement of objections, Appendix 60) in so far as it mentions for the applicant a target of 69.6 kilotonnes.

216 As regards 1981, the applicant disputes that a stop-gap solution was adopted failing an agreement. In this regard, it disputes the probative value of the table appended to the note of the January 1981 meetings (main statement of objections, Appendix 17), the wording of which shows that here again only a proposal was involved:

'In the meantime monthly volume would be restricted to 1/12 of 85% of the 1980 target'.

It also denies that in 1981 a permanent system for monitoring volumes marketed by the various producers existed. The exchanges of information which took place concerned the quantities sold in the past and not the future, as is shown by the table appended as Annex 61 to the main statement of objections.

217 As regards 1982, the applicant also denies that a stop-gap solution was adopted. The document on which the Commission relies in order to support that assertion, an ICI note of 10 March 1982, has not been disclosed to it. Furthermore, the Commission's assertion that the market shares of the various producers remained practically unchanged in 1982 is contradicted by Table 1 to the Decision itself. Moreover, an ICI note of December 1982 (main statement of objections, Appendix 35) shows that the 'absence of a volume agreement' also related to 1982. This is also confirmed by discrepancies existing in the proposals made by the various producers as regards the quotas to be allocated to the other producers (main statement of objections, Appendices 79 to 83).

218 As regards 1983, the consensus which, according to the Commission, was reached on a quota agreement for 1983 is disproved by Table 2 appended to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33). That table is headed 'proposal' and is congruent with an internal ICI note (main statement of objections, Appendix 35) in which the absence of an agreement is expressly deplored as the Commission itself recognizes. It is evident from the use of square brackets in that table that some undertakings refused to agree to that quota proposal. Since such a system could work only if all the producers participated in it, it must be assumed that there was no agreement on a quota system for the first quarter of 1983.

219 The applicant also denies that there was any quota agreement for the second quarter of 1983. Appendix 84 to the main statement of objections does not have the probative value attributed to it by the Commission. That document appears to date from 1982 and only contains a proposal for the first half of 1983. However, in 1982, even the Commission considers that there was still no agreement on a quota system for 1983. Moreover, in that document there is no trace of an agreement for the second quarter of 1983. According to the applicant, the note of a meeting held in June 1983 (main statement of objections, Appendix 40) does not prove that it participated in an agreement on quotas for the second quarter of 1983 or that it assisted in monitoring such quotas. That document merely proves that some undertakings indicated their sales volumes in the month of May. It is impossible to deduce from such as document that a quota agreement including a monitoring scheme was concluded and implemented. It also disputes the probative value of a Shell note (main statement of objections, Appendix 90) which, owing to its internal character, cannot prove that an agreement was reached by other undertakings.

220 The Commission, on the other hand, claims that quota agreements were concluded for the years 1979, 1980 and 1983. As regards the years 1981 and 1982, it considers that no definitive agreement could be concluded but that stop-gap solutions were adopted.

221 As regards 1979, the Commission considers that it is clear without any possible doubt from the table headed 'Producers' Sales to West Europe' (main statement of

objections, Appendix 55) that Hüls participated in a quota system. That table contains, for the various producers, their sales for the years 1976, 1977 and 1978 which were taken as the basis for the allocation of market shares for 1979. That table also contains a column relating to a 'revised target' for that same year. The Commission considers that the target quotas for 1979 were drawn up in 1979 and not in 1980. Furthermore, that document is also borne out by the note of a meeting of producers held on 26 and 27 September 1979 (main statement of objections, Appendix 12), which, in its view, shows that the question of target tonnages was discussed at that meeting and that the participants recognized that a strict quota system was essential.

222 In the rejoinder the Commission points out that the observations made by the applicant on the discrepancies exhibited by the figures in the table in relation to the Fides statistics indicates that the data was provided by the producers themselves and did not originate solely from the Fides system. Otherwise, it is not clear what could have led to the acceptance of figures different from the Fides statistics. Nor is there any evidence that the figures concerned were only estimates.

223 As regards 1980, the Commission contends that an agreement on quotas was made. It bases this contention essentially on a table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60) and headed 'Polypropylene — Sales target 1980 (kt)', which compares for all the producers of western Europe a '1980 target', 'opening suggestions', 'proposed adjustments' and 'agreed targets 1980'. That document shows the process whereby quotas were drawn up. This analysis is confirmed, in the Commission's view, by the note of the two January 1981 meetings (main statement of objections, Appendix 17) at which sales volume targets were compared with the quantities actually sold by the producers. It emphasizes that the aim of the quota system was to stabilize market shares. That is why, in its view, the agreements related to market shares, which were then converted into tonnages for use as reference figures, since if they were not converted it would not have been possible to determine from which point in time a participant in the cartel had to restrain his sales in order to comply with the agreements. For that purpose, it was essential to forecast the total volume of sales. Since the initial forecasts for 1980 proved to be too optimistic, the total volume of sales originally anticipated had to be adjusted several times, leading to adjustments in the tonnages allocated to each of the undertakings. In support of that explanation, the Commission produces a table comparing the market shares of the

various producers from which it is apparent that the figures cited in the two documents are based on exactly the same market shares for each producer. According to the Commission, conclusive evidence of an agreement on quotas for 1980 has thus been adduced.

224 As regards 1981, the Commission acknowledges that there was no agreement covering the whole of the year. However, as a stop-gap measure, the producers came to an agreement to limit their monthly sales volumes for the month of February and March to 1/12 of 85% of the targets agreed for the previous year, as is shown by the note of the two meetings held in January 1981. During the the months of the year, a permanent system for monitoring volumes marketed by the various producers was in operation.

225 As regards 1982, the situation was the same as in 1981. Although no agreement on quotas was concluded, the monitoring of the market shares for various producers was continued at the meetings of 9 June and 20 August 1982 (main statement of objections, Appendices 25 and 28) and at the meetings held in October, November and December 1982 (main statement of objections, Appendices 31 to 33). The Commission maintains that in that period market shares were relatively stable. This is made clear in an ATO document (main statement of objections, Appendix 72), which describes the situation as 'quasi-consensus'. The Commission rejects the applicant's arguments based on ICI's internal note (main statement of objections, Appendix 35) the context of which indicates that what was deplored, during the preparation for the meetings of December 1982, was the absence at that stage of an agreement on quotas for 1983 and not for 1982. The Commission also refers to the findings made in points 58 and 59 of the Decision.

26 The Commission goes on to state that it has sales figures that the various producers wished to achieve and proposals which they made for this purpose, for themselves and for the other producers, at ICI's request and which were communicated to ICI with a view to concluding a quota agreement for 1983 (main statement of objections, Appendices 74 to 84). According to the Commission, the proposals were processed by computer in order to obtain an average which was then compared with each producer's aspirations (main statement of objections,

Appendix 85). Besides those documents, the Commission also refers to an internal ICI note, headed 'Polypropylene framework 1983' (main statement of objections, Appendix 86), in which ICI outlines a future agreement on quotas and to an internal ICI note headed 'Polypropylene framework' (main statement of objections, Appendix 87) showing that ICI considered that an agreement on quotas was essential.

227 The Commission maintains that there is consistent evidence of the existence of an agreement on quotas for the first quarter. It bases this assertion first of all on table 2 appended to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33). That table indicates for each producer a quota which, for most producers, is marked by an asterisk referring to the word 'acceptable' which appears at the bottom of the table. The conclusion can be drawn that a significant step towards a quota agreement had been achieved since all the producers approved the principle of such an agreement and most of them accepted the individual quota which had been allocated to them. It is also apparent from an ICI internal note of December 1982 (main statement of objections, Appendix 35) that from the beginning of 1983 the drawing up of an agreement on quotas was considered by ICI to be essential for the proper functioning of the agreement. Those documents show that considerable efforts were made in order to reach a quota agreement for the first quarter of 1983.

228 The Commission contends that the proposals led to an agreement, basing this view, as regards the first quarter, on an internal Shell document (main statement of objections, Appendix 90) which, in its view, proves that Shell subscribed to a quota agreement for 1983 since it instructed its subsidiaries to reduce their sales in order to observe its quota ('This compares with W. E. Sales in 1Q of 43 kt: and would lead to a market share of approaching 12% and well above the agreed SHELL target of 11%'). However, in order to work and in order to attract the agreement of all the undertakings concerned, such a quota agreement had to apply to all the undertakings in a sector. Consequently, Hüls had to participate in that agreement, even though it was not possible for the Commission to ascertain its individual quota.

229 As regards the second quarter of 1983, the same reasoning also applies and is borne out by the minutes of the meeting of 1 June 1983 (main statement of objections, Appendix 40) and by a table defining '1983 aspirations' on the basis of sales figures for the first half of 1982 (main statement of objections, Appendix 84), which, according to the Commission, show that the exchange of information relating to the quantities sold was undertaken for the purpose of monitoring quotas.

230 On the question of the loss of market share suffered by the applicant, the Commission explains that this question is irrelevant in the present case and that in any event that loss was relatively limited and is not sufficient to disprove the existence of quota agreements which is borne out by the remarkable stability of the producers' market shares during the period covered by those agreements.

(c) Assessment by the Court

231 The Court has already found that, starting from the end of 1978 or the beginning of 1979, the applicant participated regularly in the periodic meetings of polypropylene producers at which discussions relating to the sales volumes of the various producers were held and information on that subject exchanged.

232 Concurrently with Hüls' participation in the meetings, its name appears in various tables (main statement of objections, Appendices 55 to 61) 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 data contained in those tables had, as far as it was concerned, been provided by Hüls in the course of the meetings in which it participated. Consequently, the applicant's argument to the effect that the aforementioned tables are internal documents drawn up on the basis of Fides statistics cannot be accepted.

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

234 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.

235 Consequently, the applicant's argument that the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12) shows that there was no quota system for 1979 cannot be accepted.

236 As regards the year 1980, the Court finds that it is clear from the table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60), which contains a column headed 'agreed targets 1980' and from the note of the January 1981 meetings (main statement of objections, Appendix 17) at which producers, including the applicant, compared the quantities actually sold ('Actual kt') with the targets set ('Target kt'), that sales volume targets were set for the whole of the year. It must be pointed out in this regard that the fact that the figures set out for the applicant as a 'target' for 1980 are different in so far as the figure in the table of 26 February 1980 is 80 kilotonnes and in the note of the January 1981 meetings 69.6 kilotonnes cannot refute that finding since during the course of 1980 the producers' forecasts of the market for that year had to be revised downwards, which led to a corresponding downward adjustment of the quotas allocated to the applicant and to the other producers. In February 1980, the quotas determined were based on a market of 1 390 kilotonnes in the 'agreed targets 1980' column whereas in January 1981 it turned out that the market took only 1 200 kilotonnes.

237 Similarly, the fact that the 'targets' allocated to the applicant are identical in the various tables for the years 1980 and 1981 does not prove that the figure was one in the determination of which the applicant was not involved.

238 Finally, the comment 'to be rechecked' added to the table of 26 February 1980 does not call in question the existence of a common purpose borne out by the table of 8 October 1980 (main statement of objections, Appendix 57) but merely indicates that at that time checks were still to be carried out.

239 It must be added that it is apparent from the note of the meetings held in January 1981, in the second of which Hüls participated, that Hüls provided its sales figures for 1980 in order to compare them with the sales volume targets determined and accepted for 1980.

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

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

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

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

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

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

243 The fact that the producers each took their previous year's quota as a theoretical entitlement for the rest of the year and monitored whether sales matched that quota by exchanging their sales figures each month is established by the combination of three documents: first, a table dated 21 December 1981 (main statement of objections, Appendix 67) setting out for each producer its sales broken down by month, the last three columns, relating to the months of November and December and the annual total, having been added by hand; secondly, an undated table written in Italian entitled 'Scarti per società' ('Differences company by company')

and found at the premises of ICI (main statement of objections, Appendix 65), comparing for each producer for the period January-December 1981 the 'actual' sales figures with the 'theoretic' figures; and finally, an undated table found at the premises of ICI (main statement of objections, Appendix 68) comparing for each producer for the period January-November 1981 sales figures and market shares with those for 1979 and 1980 and making a forward projection to the end of the year.

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

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

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

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

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

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

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

249 The measures adopted for the second half are proved by the note of the meeting of 6 October 1982 (main statement of objections, Appendix 31), which states: 'In October this would also mean restraining sales to the Jan/June achieved market share of a market estimated at 100 kt' and then 'Performance against target in September was reviewed'. Attached to that note is a table entitled 'September provisional sales versus target (based on Jan-June market share applied to demand est[imated] at 120 kt)'. The continuation of those measures is confirmed by the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) to which is attached a table comparing, for November 1982, the 'Actual' sales with the 'Theoretical' figures calculated from the 'J-June % of 125 kt'. In this regard, the internal ICI note of December 1982 (main statement of objections, Appendix 35) deploring the absence of a quota agreement cannot refute that finding since what was deplored was the absence of an agreement for 1983, which is apparent from the following passage:

'I feel it is essential for the meeting to decide on the first quarter volume as any delay until January would mean that a very significant part of the agreement period will already have been committed . . . Also, the agreement must start in January if any benefits accruing from it will be recognized before the end of March.'

250 The Court finds that, as regards the year 1981 and the two halves of 1982, the Commission was entitled to conclude from the mutual monitoring, conducted at the regular meetings, of the implementation of a system for restricting monthly

sales by reference to a previous period that that system had been adopted by the participants at the meetings.

251 As regards 1983, the Court finds that it is clear from the documents produced by the Commission (main statement of objections, Appendices 33, 85 and 87) that at the end of 1982 and the beginning of 1983 the polypropylene producers discussed a quota system for 1983, that the applicant participated in the meetings at which the discussions took place, that on those occasions it supplied data relating to its sales and that, in Table 2 appended to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33), the word 'acceptable' appears beside the quota put down beside the applicant's name.

252 It follows that the applicant participated in the negotiations held with a view to arriving at a quota system for 1983.

253 As regards the question whether those negotiations actually succeeded as far as the first two quarters of 1983 are concerned, as is asserted in the Decision (point 63, third paragraph, and point 64), it is clear from the note of the meeting on 1 June 1983 (main statement of objections, Appendix 40) that the applicant indicated at that meeting its sales figures for May, as did nine other undertakings. Moreover, the following passage appears in the record of an internal meeting of the Shell group on 17 March 1983 (main statement of objections, Appendix 90):

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

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

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

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

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

256 It is clear from the foregoing considerations that ICI's fears, expressed in its internal note of December 1982 (main statement of objections, Appendix 35), that no quota system would be established for 1983 were unfounded and that, despite negotiating positions which were quite different at the outset (main statement of objections, Appendices 74 to 84), the producers managed to establish such a system since the compromise proposals considered acceptable by a number of

producers (main statement of objections, Appendix 33, table 2) were finally accepted by all the producers.

257 The applicant's argument that its market share fell, that the market shares of other producers fluctuated and that the alleged quotas were exceeded cannot weaken the finding that it participated in the fixing of sales volume targets. In the Decision, the producers are charged not with having observed quotas but only of having agreed them.

258 The Court also points out that both the comparison of the applicant's sales figures and of the other producers with the sales volume targets allocated to them and the fact that they reported their sales during specific periods show that, contrary to the applicant's assertions, the quota system related not only to basic grades but to all polypropylene grades.

259 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.

260 It is also to be observed that, in order to support the foregoing findings of fact, the Commission had no need to use documents which it had not mentioned in its statements of objections or which it had not disclosed to the applicant, in particular it had no need to refer to ICI's note of the meeting of 10 March 1982.

261 Having regard to the foregoing considerations, it must be concluded that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom common purposes emerged in

relation to sales volume targets for 1979, 1980 and the first half of 1983 and to the restriction of their monthly sales by reference to a previous period for the years 1981 and 1982 which are mentioned in the Decision and which formed part of a quota system.

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

A. Legal characterization

(a) The contested decision

262 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).

263 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).

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

265 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).

266 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.

267 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.

268 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).

269 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).

270 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).

271 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).

272 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.

273 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

274 The applicant submits that the Commission wishes to bring the concept of 'agreement' and 'concerted practice' under the overall concept of 'collusion' and that in the operative part of the Decision it even equates those two concepts. Thus the Commission considers that even the exchange of information between undertakings about their future conduct on the market is to be regarded as a breach of Article 85(1) of the EEC Treaty.

275 It objects to the Commission's view that it may remain an open question whether the breach of Article 85(1) of the EEC Treaty took the form of an agreement or a concerted practice since in the present case the collusion exhibits elements of both forms of unlawful cooperation. It considers that the Commission must classify the infringement as either an agreement or a concerted practice since those two offences do not have the same constituent elements. In the reply, the applicant complains that by considering that the constituent elements of both an agreement and concerted practice were present the Commission did not make an 'alternative finding' but a 'cumulative finding'.

276 That view is wrong both in fact and in law and the underlying intention is to punish an attempted restriction of competition. This is contrary to the principle *nulla poena sine lege*, since such an attempt is not prohibited by Community competition law.

277 In the applicant's view, in order for an agreement within the meaning of Article 85(1) of the EEC Treaty to exist, a *consensus ad idem*, in addition to direct or indirect contact, must be proved.

278 In points out 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*, cited above, paragraphs 172 to 180 and in Case 48/69 *ICI* v *Commission*, cited above, Opinion at page 674, a concerted practice arises from the combination of cooperation (subjective element) and corresponding market behaviour (objective element), between which there must be a causal relationship. The Commission is not therefore entitled to consider that concertation on restricting competition is sufficient *per se* to constitute a concerted practice (judgment of the Court of Justice in Case 48/69 *ICI* v *Commission*, cited above, paragraph 66). It is necessary to examine the conduct on the market and then to ascertain whether that conduct can be explained only by prior cooperation between the undertakings or whether it may also be explained by other factors.

279 In the present case, the Commission ought therefore to have distinguished between an agreement and a concerted practice in the case of each of the alleged infringements. In the first case, it ought to have established the extent to which Hüls had subscribed to anti-competitive agreements. In the second case, since the mere existence of concertation is not sufficient, it was necessary to prove that there had been corresponding conduct on the market. However, such evidence has not been adduced by the Commission, either in the matter of prices or in the matter of quotas. As regards prices, the internal price instructions referred to by the Commission as evidence are not relevant for three reasons: first of all, as is clear from Table 7 to the Decision, they were not issued at the same time; secondly, they were purely internal instructions and could not therefore be used to prove the undertakings' external conduct and, finally, they related to only a small part of the period in question.

280 Even if the Commission's view that a mere exchange of information must be penalized is assumed to be correct, the Decision is nevertheless defective. The Commission has not proved that such information related not to the past conduct of the undertakings but to their future conduct. Secondly, the alleged infringements could at the most be characterized as concerted practices, which removes the foundation for the Commission's objection relating to the existence of a 'framework agreement', an 'overall plan', or 'an overall agreement', which the Commission was not able to prove.

281 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.

282 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).

283 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.

284 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 put forward by ICI 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.

285 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, 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 frustrated. Furthermore, that view 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* [1981] ECR 2021, 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.

286 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.

287 From this the Commission concludes that, as far as the question of evidence is concerned, the agreement and the concerted practice may be proved by means of both direct evidence and circumstantial evidence. In the present case, it had no need to use circumstantial evidence, such as parallelism of conduct on the market, since it possessed direct evidence of the collusion consisting in particular of the meeting notes.

288 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 is necessary, as a concerted practice.

(c) Assessment by the Court

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

290 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.

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

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

293 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).

294 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.

295 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.

296 The Commission was therefore justified, in the alternative, having regard to their purpose, in categorizing the regular meetings of polypropylene producers in which the applicant participated from the end of 1978 or the beginning of 1979 until September 1983 as concerted practices within the meaning of Article 85(1) of the EEC Treaty.

297 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.

298 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.

299 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.

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

B. Restrictive effect on competition

(a) The contested decision

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

(b) Arguments of the parties

302 The applicant maintains that the various studies which it has produced show that the alleged agreements and concerted practices did not have any effect on competition which was in full play during their duration and that its conduct on the market was competitive.

303 The Commission disputes that the polypropylene producers which participated in the cartel did not adapt their conduct to the market in the light of the agreements and contacts established between them and that these had no effect on competition. Thus, all the applicant's price instructions which are available match perfectly the agreements concluded in the meetings and there is no evidence to suggest that this was not the case as regards the periods in respect of which no such instructions are available. It is possible that such conduct did not always achieve the expected result but, even in those cases, the producers based their negotiations with customers on the agreed prices. The essential matter is not so much the success of the agreed initiatives but the aim of restricting competition which those initiatives were meant to achieve. The same applies to the quota agreements, as is apparent from Table 8 to the Decision. Although the Commission recognizes that the cartel did not always have the effect of restricting competition, it considers that this does not matter for the purposes of the application of Article 85(1) of the EEC Treaty since it is sufficient that the cartel had the object of achieving a restriction of competition.

(c) Assessment by the Court

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

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

306 The Court repeats that it is clear from its assessments relating to the findings of fact made by the Commission that the purpose of the regular meetings which the applicant attended together with competitors was to restrict competition within the common market, in particular, through the fixing of price and sales volume targets and that consequently its participation in those meetings was not without an anti-competitive object within the meaning of Article 85(1) of the EEC Treaty.

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

C. Effect on trade between Member States

(a) The contested decision

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

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

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

(b) Arguments of the parties

311 The applicant argues that the alleged cartel could not have affected trade between Member States since it was not implemented, as is demonstrated, in its view, by its spectacular market penetration in different Member States.

312 The Commission replies that even if the applicant's spectacular market penetration in different Member States is proved, it was still legitimate for it to conclude that interstate trade and the structure of competition were affected to the extent that the cartel distorted trade patterns from the course which they would have otherwise have followed (judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission*, cited above, paragraph 172).

(c) Assessment by the Court

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

314 It must be noted in this regard that the undertakings which participated in the infringement found by the Decision to have been committed hold virtually all the market, which clearly indicates that the infringement jointly committed by them was capable of affecting trade between Member States.

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

316 This ground of challenge must therefore be rejected.

D. Collective responsibility

(a) The contested decision

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

if it was absent on occasion. In any case, the normal practice was for absentees to be informed of what had been decided in meetings. All the undertakings to which the Decision is addressed took part in the conception of overall plans and in detailed discussions and their degree of responsibility is not affected by reason of their absence on occasion from a particular session (or in the case of Shell, from all plenary sessions).

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

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

(b) Arguments of the parties

320 The applicant submits that there is no collective responsibility in competition law. It may therefore be held responsible only for its own conduct. Since the alleged overall agreement does not exist, it considers that it was necessary to prove that it participated in specific agreements or in specific concerted practices, which the Commission has been unable to do. It points out in particular that its participation in the meetings was only limited, as the Commission itself recognized in the

Decision (point 105, second paragraph) when stating that there was no evidence of Hüls' participation in the meetings before 1979. The Commission may not therefore, except by making the applicant answerable for the actions of third parties, consider that its infringement 'dates from mid-1979' since participation is not possible in the absence of acts of participation.

321 It contends that even if it is assumed that the overall plan adopted in 1977 and covering all the period of the alleged cartel existed, as the Commission alleges, Hüls could not be held jointly responsible for infringements committed before its participation in the meetings, that is to say before 1981, unless it had taken part in the meetings with the intention of assuming responsibility also for specific acts forming part of a continuous breach of the competition rules, which is not even alleged by the Commission. In actual fact, the Commission considers that it can deduce from participation after 1981 that the applicant bore joint responsibility as regards the period prior to 1981.

322 In the Commission's view, an agreement or a concerted practice necessarily requires joint action on the part of a number of participant undertakings. In order for there to be participation in a cartel, it is not therefore necessary for the parties concerned to be associated with each individual action of the cartel.

323 It considers that, as a regular participant in the meetings from some time between 1977 and 1979, Hüls bears joint responsibility for the decisions adopted at those meetings. It took part in the price initiatives, in the agreements on quotas and contributed to the 'account leadership' system.

324 The Commission has no intention to hold the applicant responsible for infringements committed before its participation in the meetings, that is to say before some time between 1977 and 1979.

(c) Assessment by the Court

325 It follows from the Court's assessments relating to the findings of fact and the legal characterization by the Commission that in the applicant's case the Commission has proved to the requisite legal standard each of the aspects of the infringement found against it in the Decision from the end of 1978 or the beginning of 1979 and that it did not therefore attribute to the applicant liability for the conduct of other producers.

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

327 Consequently, this ground of challenge must be dismissed.

3. *Conclusion*

328 It follows from all the foregoing considerations that since the findings of fact made by the Commission against the applicant as regards the period prior to 1978 or the beginning of 1979 have not been established to the requisite legal standard, Article 1 of the Decision must be annulled in so far as it finds that the applicant's participation in the infringement dates from some time in that period. For the rest, the applicant's grounds of challenge relating to the findings of fact and to the application of Article 85(1) of the EEC Treaty by the Commission in the contested decision must be dismissed.

The statement of reasons

1. *Insufficient reasoning*

329 The applicant contends that the Commission dealt with the two experts' reports, the report by Professor Albach and the Coopers & Lybrand audit, only superficially and in a general way. Its refutation is insufficient and not reasoned in a substantiated and intelligible way, as Article 190 of the EEC Treaty and the case-law of the Court of Justice (judgment in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission*, cited above, paragraph 22) require. Such a refutation does not enable the Court to carry out its review (judgment in Joined Cases 296 and 318/82 *Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek B. V.* v *Commission* [1985] ECR 809, paragraph 19). The reasons stated for the Decision do not disclose the considerations which guided the Commission or why in the end one or other of those considerations was given decisive weight. The Commission did not therefore provide a statement of reasons which satisfied the requisite legal standard and it therefore contravened Article 190 of the EEC Treaty as interpreted by the Court of Justice (see in particular the judgment in Case 18/57 *I. Nold KG* v *High Authority of the ECSC* [1959] ECR 41).

330 In the Commission's view, the Decision is sufficiently reasoned since the arguments put forward by the applicant are either irrelevant or are refuted in the Decision. As regards its refutation by the experts' reports produced by the applicant, the Commission refers in this regard to points 72 et seq. of the Decision.

331 The Commission observes that part of the reasoning of the Decision is devoted to a detailed assessment of the defence arguments submitted by the various producers and of their participation in the cartel. The points made by the various applicants in this regard largely overlapped so that the Commission dealt with them together. Since the arguments put forward by Hüls were not substantiated to any degree, the Commission saw no reason to consider them even more closely.

332 This Court observes that the Court of Justice has consistently held (see in particular its judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck*, cited above, paragraph 66, and its judgment in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831, paragraph 88) that, although under Article 190 of the EEC Treaty the Commission

is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and of law raised by every party during the administrative proceedings. It follows that the Commission is not obliged to answer those points of fact and law which it considers irrelevant.

333 It must be pointed out that the Commission has replied to the two experts' reports, Professor Albach's report and the Coopers & Lybrand audit, in points 72 to 74 of the Decision.

334 Furthermore, it is clear from the assessments of the Court relating to proof of the infringement that the Commission has replied to the relevant arguments put forward by the applicant.

335 Consequently, this ground of challenge must be dismissed.

2. *Contradictory reasons*

336 The applicant also contends that Article 190 of the EEC Treaty has been infringed by the existence of an irremovable contradiction between individual reasoned points of the Decision or between the reasoning and the operative part. This is the case with the 'alternative finding' between an agreement and a concerted practice which the Commission made during the procedure. In the Decision, the Commission appears to take the view that the undertakings' offensive conduct consists simultaneously of an agreement and a concerted practice but the charge is not clear and the reasoning is not therefore convincing. The reasoning set out in the Decision suggests that the Commission did not wish to commit itself on the point whether the conduct for which the undertakings were being prosecuted was to be classified in one or the other of those categories of infringement. Such indecision is not compatible with the obligation to state reasons.

337 According to the applicant, another contradiction exists in so far as the operative part concerns the whole of the polypropylene sector whereas the reasoning of the Decision deals only with one part of that sector, namely the basic product sector.

338 Finally, it points out that the Commission itself states that it possesses evidence of Hüls' participation at least from 1979; however, the operative part of the Decision states that it participated 'from some time between 1977 and 1979'.

339 The Commission, on the other hand, argues that the applicant does not make it clear in what respect the Decision, which is fully reasoned in great detail, exhibits contradictions.

340 It emphasizes that the infringement of which the applicant is charged is a complex infringement and that it contains elements of both an agreement and a concerted practice. It did not therefore make any 'alternative' finding.

341 The Court finds that it is apparent from its assessments relating to proof of the infringement that the reasons stated for the Decision are not contradictory *inter se* or in conflict with its operative part as far as the characterization of the infringement and its application to all the grades of polypropylene are concerned. Moreover, it is apparent from its assessments relating to the findings of fact that the applicant's ground of challenge has lost its purpose in so far as it concerns events prior to the end of 1978 or the beginning of 1979.

342 Consequently, this ground of challenge must be dismissed.

The fine

343 The applicant objects that the Decision infringes Article 15 of Regulation No 17 for not properly assessing the duration and gravity of the infringement which it was found to have committed.

1. *The limitation period*

344 The applicant contends that conduct prior to 13 October 1978 is covered by the limitation rule. Since there is no 'continuity link' between the various agreements or concerted practices which are the subject of the Decision, the five-year limitation period laid down by Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (Official Journal L 319, p. 1) should apply to the facts in question since the first act interrupting the limitation period was the notification of the investigation decision on 13 October 1983.

345 The Commission contends that owing to the continuous nature of the infringement which the applicant was found to have committed, limitation did not apply at the time of the first act interrupting the limitation period.

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

2. *The duration of the infringement*

347 The applicant contends that when determining the amount of the fine the Commission did not take proper account of the duration of its participation in the infringement, which was much shorter than alleged by the Commission.

348 The Commission states that it took proper account of the duration of the infringement when determining the amount of the fine.

349 The Court finds that it follows from its assessments relating to proof of the infringement by the Commission that the duration of the infringement found in the case of the applicant was shorter than that found in the Decision since it began at the end of 1978 or the beginning of 1979 and not from some time between 1977 and 1979. However, it is clear from those same assessments that the Commission was entitled to consider that the infringement continued until November 1983.

350 It follows that the amount of the fine imposed on the applicant must be reduced on this ground.

3. *The gravity of the infringement*

A. The applicant's limited role

351 The applicant contends that the role which it played in the infringement was far less important than that attributed to it in the Decision. It participated in only one meeting in 1981 and it did not participate in price agreements or quotas, or in the 'account leadership' system.

352 The Commission states that it took proper account of the role played by the applicant in the infringement and that it was normal to determine the fine on the basis of equal participation by all the parties, provided that individual participants did not stand out from others owing to their individual conduct, which was not the case with the applicant.

53 The Court finds that it is clear from its assessments relating to proof of the infringement that the Commission has correctly established the role played by the applicant in the infringement from the end of 1978 or the beginning of 1979 and that it was entitled to base its determination on that role when calculating the fine to be imposed on the applicant.

54 This ground of challenge must therefore be dismissed.

B. Lack of individualization in the criteria for determining the fines

55 The applicant states that, contrary to the Commission's contentions, it is for the Court to review the contested decision in all its aspects, including the aspects concerning the nature and amount of the fines. That review cannot be restricted to correcting only substantial errors of the Commission.

56 The applicant complains that the Decision does not provide any explanation of how the various aspects taken into consideration in determining the fine were weighted. Nor does it contain any explanation of how each individual undertaking was treated and does not disclose the considerations leading to the determination of the amount of the fine. It is thus in breach of the obligation to state reasons (judgment of the Court of Justice in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 37, and in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* v *Commission*, cited above, paragraph 88).

57 It contends that the Commission ought to have taken account, as a mitigating circumstance, the losses suffered by the producers, which were not only substantial but also dramatic, due essentially to unlawful aid granted by some Member States allowing some producers to offset those losses.

358 The Commission states that it does not call in question the Court's powers of unlimited jurisdiction in the matter of fines. It also points out that the Court may use those powers to increase the amount of the fine in the present case.

359 It states that the Decision is correctly reasoned since in points 108 and 109 it enumerates all the mitigating or aggravating circumstances taken into account and since it indicates the role played in the cartel by each of the producers concerned. Moreover, since infringements of Article 85(1) of the EEC Treaty can only be committed by a number of undertakings acting together, it is normal for the reasons for the fines imposed on each of the members of the group to be usually the same.

360 The Commission states that it took account, as a mitigating factor, the losses suffered by the undertakings. However, it considers that the question of the effect of the State aid did not have to be taken into consideration.

361 The Court notes that in order to determine the amount of the fine imposed on the applicant the Commission first defined the criteria for setting the general level of the fines imposed on the undertakings to which the Decision is addressed (point 108 of the Decision) and then defined the criteria for achieving a fair balance between the fines imposed on each of those undertakings (point 109 of the Decision).

362 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.

363 In this context, it must be stated that the Commission was not obliged to individualize, nor to explain the way in which it had taken account of the substantial losses which the various producers in the polypropylene sector had suffered, since this was one of the factors, mentioned in point 108 of the Decision, which was taken into account in the determination of the general level of the fines which the Court has found justified.

364 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.

365 As the Court has already found, the State aid which some undertakings are alleged to have received is not capable of altering the unlawful character of the applicant's conduct since participation in an unlawful cartel cannot be accepted as a legitimate means of protection.

366 In so far as the applicant urges the Court to exercise its powers of unlimited jurisdiction, the Court notes that the applicant has not adduced any facts demonstrating the existence, nature or extent of that aid or of its effect on competition and, in particular, on the applicant's business results. Nor did the applicant request the Commission, at the material time, to exercise its powers under Article 93 of the EEC Treaty. In those circumstances, the Court considers that it does not possess the information essential for the exercise of its powers of unlimited jurisdiction as regards the State aid alleged by the applicant.

367 It follows that the applicant's ground of challenge cannot be upheld.

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

368 The applicant contends that it is apparent from the studies which it has produced that, contrary to the Commission's unsubstantiated assertion, the alleged infringements had no effect on the market and that they did not therefore enable any producer to make excessive profits. That error on the Commission's part must lead to a reduction of the fine since the Commission took account of the effects on the market in determining the amount of the fine and at a press conference it estimated that the effects had increased the general level of prices by 15 to 40%.

369 The Commission points out that it assessed the effects of the cartel on the market in a very differentiated way. Its findings justify the conclusion, however, that a clear restraint of competition was aimed at and at least partially achieved. It points out that if, moreover, the producers continued their meetings on a frequent and regular basis, then it was because they themselves regarded the cartel as not being completely ineffective. The Commission admits that the effects produced by the cartel on the market played a certain role in the determination of the amount of the fines.

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

371 The first type of effect has been proved to the requisite legal standard by the Commission from the many price instructions given by the various producers

which are consistent with one another as well as with the target prices fixed at the meetings, which were manifestly meant to serve as the basis for the negotiation of prices with customers.

72 As regards effects of the second type, the Commission had no reason to doubt the accuracy of the analyses carried out by the producers themselves during their meetings (see in particular the notes of the meetings of 21 September, 6 October, 2 November and 2 December 1982, main statement of objections, Appendices 30 to 33). These show that the target prices set at the meetings were largely achieved on the market and that, even if the Coopers & Lybrand audit and the economic studies commissioned by certain producers were to prove that the analyses made by the producers themselves at their meetings were wrong, that fact is not conducive to a reduction of the fine since the Commission indicated in the last indent of point 108 of the Decision that it took into account, in mitigation of the penalties, the fact that price initiatives generally had not achieved their objective in full and that in the last resort there were no measures of constraint to ensure compliance with quotas or other measures.

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

74 Moreover, the statements made at the press conference which followed the adoption of the Decision, according to which the effects of the infringement consisted in an increase in the general level of prices of 15 to 40%, are not to be taken into consideration on this point since they stand in contradiction to the reasons of the Decision itself. For that reason, they could be relied upon only in order to show that the Decision is in reality based on reasons other than those which it sets out, which would constitute a misuse of power (see the order of the Court of Justice of 11 December 1986 *ICI* v *Commission*, not published in the

Reports of Cases before the Court, paragraphs 11 to 16). In the exercise of its powers of unlimited jurisdiction the Court has, however, reached the conclusion that the general level of the fines was justified having regard to the reasons stated in the Decision (point 108, read in conjunction with all the reasons stated in the Decision). Consequently, there can be no question in this case of a misuse of power.

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

D. Incorrect definition of the relevant market

376 The applicant claims that the Commission defined the relevant market incorrectly. It argues that the operative part of the Decision relates to the whole of the polypropylene market, whereas its grounds refer only to basic products. In fixing the amount of the fines the Commission thus took into account Hoechst's market share and turnover for the entire polypropylene market instead of taking into account only the figures corresponding to the market for basic products, which represent only 29% of Hoechst's sales on the Community market. For that reason the fine is excessive. The applicant maintains, contrary to the Commission, that the market for basic products was independent of that for special products and consequently agreements on the prices of basic products had no influence on the market for special products.

377 The Commission argues that the agreements and concerted practices on prices for basic products also influenced those for special products. It was not only basic products that were covered by the price agreements. For example, a table drawn up following a meeting held on 13 May 1982 (main statement of objections, Appendix 24) contains prices in ten different currencies for ten different grades. As the price instructions of the various producers (letter of 29 March 1985, Appendix C) show, there is a close link from the point of view of price between basic products and special products. The new cartel prices were taken as the basis for negotiations with customers when contracts for special products were extended.

378 It adds that the quota agreements were general in nature and did not relate only to certain types of products. Since the purpose of the agreements was to support the price cartel, it necessarily follows that that cartel covered the whole of the polypropylene market.

379 The Court would point out that it is apparent from its assessments relating to the findings of fact made by the Commission that the quota agreements covered special products as well as basic products.

380 It follows that the Commission was entitled to take into account the whole of the polypropylene market in fixing the amount of the fine imposed on the applicant. This ground of challenge must be dismissed.

381 It follows from all the foregoing that the fine imposed on the applicant is proportionate to the gravity of the infringement of the Community's competition rules which the applicant has been found to have committed but that it must be reduced owing to the shorter duration of the infringement. That reduction must be limited to 15% since in determining the amounts of the fines the Commission has already taken account of the fact that the mechanism by which the infringement was to operate was not completely established until about the beginning of 1979 (Decision, point 105, last paragraph) and that, owing to its doubt about the precise date on which the applicant began to participate in the infringement, it could not take full account of the relevant period when determining the amount of the fine imposed on the applicant.

Reopening of the oral procedure

382 By a separate document dated 4 March 1992, the applicant requested the Court to reopen the oral procedure so that measures of inquiry could be undertaken. In point I(1) of this document, the applicant states that in its judgment of 27 February 1992 in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF AG and Others* v *Commission* ('*PVC*') [1992] ECR II-315) the Court of First Instance held that the defendant's decisions in the *PVC* cases were non-existent on the ground that they were not authenticated by the signatures of the President of

the Commission and of the Executive Secretary. In view of the explanations provided by the Commission in Joined Cases T-79/89 *et al*, it had to be concluded that the same procedural defect, which had to be examined by the Court *ex proprio motu*, had been committed in the present case. In order to clarify this point, it was necessary to order the Commission to produce a copy of the original of the Decision and other documents. In point I(2) the applicant states that there are also grounds for assuming that the Decision was the subject of deliberation in only three languages of procedure, German, English and French. In point I(3), the applicant states that the Commission argued at the hearing in Joined Cases T-79/89 *et al* that it was entitled to make amendments to a decision which had already been adopted; there were therefore grounds for assuming that amendments were made subsequent to the adoption of the Decision in the present case; in order to establish the truth of those facts, which became known only after the conclusion of the oral procedure, the tape recording of the hearing in Joined Cases T-79/89 *et al* had to be heard.

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

384 It must be stated first of all that the judgment of 27 February 1992 in the *PVC* cases does not in itself justify the reopening of the oral procedure in the present case. Furthermore, unlike the argument which it put forward in the *PVC* cases (see paragraph 13 of the judgment), in the present case the applicant did not once argue, even by allusion, in the oral procedure that the Decision was non-existent because of the alleged defects. The question to be examined, therefore, is whether the applicant has adequately explained why in the present case, unlike in Joined Cases T-79/89 *et al*, it did not plead the existence of those alleged defects earlier, since they must in any event have existed before the action was brought. Even though the Community court, in an action for annulment brought under the second paragraph of Article 173 of the EEC Treaty, must of its own motion consider the issue of the existence of the contested measure, that does not mean that in every action brought under the second paragraph of Article 173 of the EEC Treaty the possibility that the contested measure is non-existent must automatically be investigated. It is only in so far as the parties put forward sufficient evidence to suggest that the contested measure is non-existent that the Community court must review that issue of its own motion. In the present case, the arguments put forward by the applicant do not provide a sufficient basis to suggest that the Decision is

non-existent. In point I(2) of its document, the applicant pleads an alleged infringement of the rules on languages laid down in the Commission's Rules of Procedure. Such an infringement cannot, however, entail the non-existence of the contested measure but only its annulment, provided that the argument is received at the proper time. The applicant also contends, in point I(3) of its document, that in view of the circumstances of the *PVC* case there must be a presumption of fact that the Commission also made subsequent amendments to its polypropylene decisions without having the authority to do so. The applicant has not, however, explained why the Commission would have made subsequent alterations to the Decision in 1986, that is to say in a normal situation entirely unlike the special circumstances of the *PVC* case, where the Commission's term of office was about to run out in January 1989. Mere reference to 'unawareness of irregularity' is not sufficient in this regard. The general presumption put forward by the applicant in this respect does not constitute a sufficient ground for ordering measures of inquiry after the reopening of the oral procedure.

385 Finally, the argument put forward by the applicant in point I(1) of its document must be interpreted as asserting, on the basis of the statements made by the Commission's representatives in Joined Cases T-79/89 *et al*, that an original of the contested Decision, authenticated by the signatures of the President of the Commission and the Executive Secretary, is lacking. That allegation, if true, would not in itself entail the non-existence of the Decision. In the present case, unlike in the *PVC* cases, cited above, the applicant has not put forward any concrete evidence to suggest that any infringement of the principle of the inalterability of the adopted measure took place after the adoption of the contested Decision and that the Decision thus lost, to the benefit of the applicant, the presumption of legality arising from its apparent existence. In such a case, the mere fact that there is no duly authenticated original does not in itself entail the non-existence of the contested measure. Therefore, in this respect, too there was no reason to reopen the oral procedure in order to carry out further measures of inquiry. Since the applicant's arguments could not justify an application for revision, its suggestion that the oral procedure be reopened should not be upheld.

Costs

386 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in

the successful party's pleadings. However, under Article 87(3), where each party succeeds on some and fails on other heads the Court may order that the costs be shared or that each party bear its own costs. Since the application has been upheld in part and the parties have each applied for costs, the applicant must pay, in addition to its own costs, one half of the Commission's costs, and the Commission must bear the other half of its costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls the seventh indent of Article 1 of the Commission Decision of 23 April 1986 (IV/31.149 — Polypropylene, Official Journal L 230, p. 1) in so far as it holds that Hüls took part in the infringement from some time between 1977 and 1979, and not from the end of 1978 or the beginning of 1979;**

2. **Sets the amount of the fine imposed on the applicant in Article 3 of that Decision at ECU 2 337 500, that is to say DM 5 013 680.38;**

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

4. **Orders the applicant to bear its own costs and pay one half of the Commission's costs, and orders the Commission to bear the remaining half of its own costs.**

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 10 March 1992.

H. Jung J. L. Cruz Vilaça

Registrar President