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

Summary

* Language of the case: French.

In Case T-12/89,

Solvay et Compagnie SA, a company incorporated under Belgian law, having its registered office at Brussels, represented by L. Simont, Advocate, with a right of audience before the Cour de Cassation of the Kingdom of Belgium, and by P. A. Foriers and B. Dauwe, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 8 Rue Zithe,

applicant,

v

Commission of the European Communities, represented by A. McClellan, Principal Legal Adviser, acting as Agent, assisted initially by L. Gyselen, a member of its Legal Service, acting as Agent, and subsequently by N. Coutrelis, of the Paris Bar, with an address for service in Luxembourg at the office of R. Hayder, a 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 of the Chamber, 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 SA in France, Alcudia in Spain, Chemische Werke Hüls and BASF AG in Germany and the nationalized Austrian producer Chemie Linz AG. Following the expiry of the controlling patents held by Montedison, seven new producers came on stream in western Europe in 1977: Amoco and Hercules Chemicals N. V. in Belgium, ATO Chimie SA and Solvay et Cie SA in France, SIR in Italy, DSM N. V. in the Netherlands and Taqsa in Spain. Saga Petrokjemi AS & Co, a Norwegian producer, came on stream in the middle of 1978, and Petrofina SA in 1980. The arrival of the new producers, with nameplate capacity of some 480 000 tonnes, brought a substantial increase in installed capacity in western Europe which for several years was not matched by the increase in demand in that market. This led to low rates of utilization of production capacity, which, however, rose progressively between 1977 and 1983, increasing from 60% to 90%. According to the Decision, supply and demand were roughly in balance from 1982. However, during most of the period covered by the investigation (1977-1983), the polypropylene market was reported to be characterized by either low profitability or substantial losses, owing in particular to the extent of the fixed costs and to the increase in the cost of the raw material, propylene. According to the Decision (point 8), in 1983 Montepolimeri SpA held 18% of the European polypropylene market, Imperial Chemical Industries PLC,

Shell International Chemical Company Limited and Hoechst AG each held 11%, Hercules Chemicals N. V. slightly below 6%, ATO Chimie SA, BASF AG, DSM N. V., Chemische Werke Hüls, Chemie Linz AG, Solvay et Cie SA and Saga Petrokjemi AS & Co from 3 to 5% and Petrofina SA about 2%. The Decision states that there was a substantial trade in polypropylene between Member States because each of the then EEC producers supplied the product in most, if not all, Member States.

3 Solvay et Compagnie SA is one of seven new producers which appeared on the market in 1977. Its position on the polypropylene market was that of a medium-sized producer whose market share was between approximately 3.1 and 4%.

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

ATO Chimie SA, now Atochem ('ATO'),

BASF AG ('BASF'),

DSM N. V. ('DSM'),

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

Hoechst AG ('Hoechst'),

Chemische Werke Hüls ('Hüls'),

Imperial Chemical Industries PLC ('ICI'),

Montepolimeri SpA, now Montedipe ('Monte'),

Shell International Chemical Company Limited ('Shell'),

Solvay et Cie SA ('Solvay'),

BP Chimie ('BP').

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

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

Amoco,

Chemie Linz AG ('Linz'),

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

Petrofina SA ('Petrofina'),

Enichem Anic SpA ('Anic').

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

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

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

commercial services of the undertakings. The lawyers of a number of undertakings refused to accept those conditions and returned the documentation before the oral hearing.

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

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

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

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

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

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

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

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2

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

Article 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 4

...

Article 5

...'

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

The procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 5 August 1986, the applicant brought this action seeking annulment of the Decision. Thirteen of the fourteen other addressees of the Decision have also brought actions for its annulment (Cases T-1/89 to T-4/89, T-6/89 to T-11/89 and T-13/89 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 The Solvay company claims that the Court should:

(i) annul the Commission's decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene);

(ii) in the alternative, annul the contested decision in so far as it imposes a fine of ECU 2 500 000;

(iii) in the further alternative, set the fine at a symbolic amount or at the very least reduce the fine in a substantial and equitable manner;

(iv) order the Commission to pay the costs.

The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

Substance

30 The Court considers that it is necessary to examine, *first,* the applicant's grounds of challenge relating to a breach of the rights of the defence allegedly committed by the Commission in so far as it (1) did not communicate to the applicant documents on which it based the Decision, (2) based a presumption of guilt on the absence of the applicant's marketing executives from the hearings, (3) did not set out in the statement of objections all the objections which it then maintained in the Decision, and (4) the final minutes of the hearings were not communicated to the members of the Commission or to those of the Advisory Committee; *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 and (B) did not correctly assess the restrictive effect on competition; *thirdly,* the grounds of challenge relating to the reasoning of the Decision; and *fourthly,* the grounds of challenge relating to the determination of the fine, which is alleged to be (1) disproportionate to the duration of the alleged infringement and (2) disproportionate to the gravity of the alleged infringement.

The rights of the defence

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

31 The applicant contends that when the Commission notified it of the statement of objections it did not send it certain documents on which it based the Decision and that the Commission thus made it impossible for it to explain their contents. The

documents concerned consist of notes of the meeting of 10 March 1982 and of the meeting of 13 May 1982 made by a Hercules executive (Decision, point 15b), a document of 6 September 1977 allegedly found at the premises of Solvay (Decision, point 16, fifth paragraph), two notes of Shell internal meetings held on 5 July and 12 September 1979 respectively (Decision, points 29 and 31), an internal Solvay document (Decision, point 32), a reminder sent by Solvay to its sales offices of 17 July 1981 (Decision, point 35), an internal ICI note relating to the 'firm climate' (Decision, point 46), a Shell document headed 'PP W. Europe-Pricing' and 'Market quality report' (Decision, point 49), an internal note found at the premises of ATO dated 28 September 1983 (Decision, point 50), the note of the meeting of 10 March 1982 made by an ICI executive (Decision, point 58), an undated ICI note made in preparation for a meeting with Shell scheduled for May 1983 (Decision, point 63, second paragraph) and a working document relating to the first quarter of 1983 found at the premises of Shell (Decision, point 63, third paragraph).

32 It contends that observance of the rights of the defence means that undertakings which are the subject of a proceeding under Article 85(1) of the EEC Treaty should be informed of the objections which the Commission raises against it and of the documents on which the Commission bases its objections, at least when those documents are important documents, as in the present case (judgment of the Court of Justice in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25).

33 It is futile for the Commission to claim that the documents in question were made available to Solvay during the access-to-file procedure since simply making available voluminous files to parties does not enable them to make their comments effectively if they do not know the conclusions which the Commission intends to draw from those documents.

34 Finally, it contends that this procedural defect cannot be made good before the Court since the Court's task is to conduct a review of legality which must lead it to annul the Decision once it is vitiated by a breach of the rights of the defence.

35 The Commission states that the applicant is complaining of a possible discrepancy between the final Decision and the statement of objections which was due to the insertion in the Decision of references to documents to complete the arguments of the Commission. According to the case-law of the Court of Justice (judgment in Case 41/69 *ACF Chemiefarma N. V.* v *Commission* [1970] ECR 661, paragraphs 91 to 93; judgment in Joined Cases 209 to 215 and 218/78 *Heintz Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 68, and order in Joined Cases 142 and 156/84 *British American Tobacco Company and Reynolds Industries* v *Commission* [1986] ECR 1899, paragraph 14), the Decision is not necessarily required to be a replica of the notice of complaints and the Commission may either abandon complaints or supplement and amend its arguments both in fact and in law without acting in breach of the rights of the defence. According to the Commission, the documents which appear for the first time in the final Decision are intended to amend or refine the argument developed in the statement of objections and to confirm the content of the documents disclosed.

36 It adds that the ICI note on the 'firm climate', which the applicant contends was not disclosed to it, it appended to the main statement of objections (main statement of objections, Appendix 35).

37 The Commission further states that the other documents were all accessible to the undertakings during the access-to-file procedure in June 1984; the Commission was thus going beyond the requirements which the Court had laid down in this matter in its judgment in the *VBVB* case (judgment in Joined Cases 43 and 63/82, cited above, paragraph 25). Only the ICI note of a meeting of 10 March 1982 was not made accessible owing to an error. However, it contends that this note does not constitute the basis of any new objection made against the undertakings but simply enables a table appended to the main statement of objections to be identified (main statement of objections, Appendix 71).

38 Finally, it points out that the non-disclosure of documents cannot affect the Decision as a whole if it relates only to secondary documents, which is the position in this case (judgment of the Court of Justice in Joined Cases 100 to 103/80 *Musique Diffusion Française SA and Others* v *Commission* ('Pioneer') [1983] ECR 1825, paragraph 30).

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

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

41 It follows from the foregoing considerations that, of the documents referred to by the applicant, only the internal ICI note on the 'firm climate' (Decision, point 46) may be used as evidence against the applicant since that document is mentioned in point 71 of the main statement of objections addressed to the applicant, of which it forms, moreover, Appendix 35. The other documents referred to by the applicant may not be regarded as evidence which may be used against the applicant in the present case.

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

2. *Presumption of guilt based on the absence of marketing executives at the hearings*

43 In the reply, the applicant contends that the rights of the defence were infringed by the Commission which, in the defence, pointed out with great emphasis that the undertakings were not represented at the hearings by the managers or marketing executives who participated in the activities in question. Thus, from the way in which the undertakings chose to organize their defence at the hearings, the Commission drew a presumption of guilt. However, undertakings are at liberty to decide whether or not to participate in the hearings and to be assisted or represented at them by the person of their choice. The Commission may not therefore presume from the way in which an undertaking organizes its defence that it is guilty. Moreover, at no time in the administrative procedure did the Commission indicate to the undertakings that it intended to base a presumption of guilt on their choices in this regard. By basing the Decision on this ground, which was not made clear, without allowing Solvay to defend itself, the Commission acted in breach of the rights of the defence.

44 Since this breach did not become apparent until the statement of defence was studied, the objection based on the breach of the rights of the defence is admissible.

45 The Commission contends that this objection is inadmissible and in any event ill-founded. First of all it is a new plea in law which, under Article 42(2) of the Rules of Procedure of the Court of Justice, incorporated in Article 48(2) of the Rules of Procedure of the Court of First Instance, is inadmissible. The applicant cannot contend that this plea is based on matters of fact or of law emerging during the written procedure since it was must have been aware that it was not represented by its marketing executives at the hearings.

46 According to the Commission, this plea is in any event without foundation. The absence from the hearings of the marketing executives of the undertakings was not a matter forming the basis of the Decision and the Commission did not make a 'presumption of guilt' based on that circumstance. On the contrary, it based its findings on abundant documentary evidence and confined itself in the defence to

stating that the undertakings — which were naturally at liberty to choose their method of defence — had refrained from challenging that documentary evidence with the oral testimony of the persons concerned.

17 The Court considers that this plea is admissible since, although it is true that the applicant was not unaware that its marketing executives had not taken part in the hearings, the fact remains that it was only in the defence that the Commission first referred to this fact in the present proceedings.

18 As regards the substance of the plea, the Court finds that the statements made by the Commission in the defence about the absence of any marketing executives of the applicant and other undertakings at the hearings amount to no more than an observation that the applicant did not use oral testimony in order to challenge the content and significance of the documentary evidence adduced by the Commission. In the first paragraph of point 70, the Decision also took note of this fact, stating that: 'While offering various alternative interpretations of the nature and purpose of the meetings, the undertakings have not produced any documentary account of meetings or any oral evidence which might cast doubt on the accuracy of the ICI notes'. Consequently, the Commission's statement of defence merely clarified the reasoning of the Decision.

19 Moreover, it must be observed that at the meeting of 24 October 1984 the hearing officer had invited the applicant to equip itself with the means to enable it to have recourse to such testimony at the hearing.

20 The applicant's ground of challenge must therefore be dismissed.

3. *New objections*

51 The applicant complains that during the proceedings the Commission changed its position on the question of the characterization of the infringement and that it finally concluded that the question was immaterial. In the applicant's view, the evidence to be produced is different in the case of an agreement than in the case of a concerted practice.

52 It points out that in the statement of objections the Commission relied primarily on the existence of agreements and alternatively on the existence of concerted practices. The aim of those agreements and concerted practices was allegedly threefold: the joint setting and application of sale prices, the setting and application of quotas, and the misuse of the Fides data exchange system for the purposes of the exchange of information. At the preparatory meeting prior to the hearings, the Commission changed its position, explaining that it had not meant to argue that the agreed target prices had been applied on the marketplace but that it regarded the issue by the undertakings in question of parallel price instructions to their sales offices as a concerted practice. In its letter of 29 March 1985, the Commission stated that 'in substance little turns on the precise form which the alleged collusion took, and ... the producers participated in a prohibited cartel which presents the aspects of both "agreements" and "concerted practices"'. According to the applicant, this was the argument which came to be adopted in the Decision. However, in the argument it presented to the Court the Commission went one step further, now basing its argument on a wrong analysis of the case-law and essentially deducing from it that the concept of a concerted practice is associable with the concept of consultation or of making contact consisting, for example, in an exchange of information.

53 The Commission disputes the applicant's contentions concerning the alleged changes in its position on the objections raised against members of the cartel.

54 It contends that from the time of notification of the statement of objections it had maintained that the producers sought to control the market and that continuous, institutionalized cooperation at a high level replaced the normal operation of

competition. Thus, what it was alleging was the existence of an overall agreement under which were implemented multifarious agreements and concerted practices which had an anti-competitive purpose and in which the members of the cartel could participate in different ways and with varying enthusiasm. That position was adopted by the Commission throughout the administrative procedure and was the basis of the Decision. It is that same position which the Commission is defending before the Court in explaining that there was a core agreement concerning a system of regular and institutionalized meetings at which prices and quotas were discussed and that this core agreement was supplemented by specific measures in which the applicant had taken part. Thus, in no event was a breach of the rights of the defence committed.

5 The Court notes that the applicant accepts in the reply (paragraph 22) that the Commission adopted in the Decision the argument which it had set out in its letter of 29 March 1985. Consequently, there can be no question of a new objection being raised in the present case. The purpose of the letter of 29 March 1985 was indeed to supplement the main statement of objections on the question of the legal characterization of the infringement since it states:

'By letter dated 28 November 1984 the legal representatives of a number of the polypropylene producers involved in the present proceedings maintained that in its objections the Commission had not clearly expressed the legal position against which the producers had to defend themselves and had exacerbated the situation by shifting its position during the hearing. As a result (it was argued) the rights of defence were substantially impaired.

I do not accept that argument. The facts were treated *in extenso* in the objections and the legal issues, although succinctly expressed, were clearly delineated.

... for the avoidance of any doubt, and at the risk of repetition, I will set out the following matters for your consideration' (there then follow eight pages of explanation of which two are devoted to the question of legal characterization)

and the letter ends as follows:

'You may submit your written observations on the matters covered by this letter within six weeks from the date of receipt. A further oral hearing is foreseen in the near future for three undertakings which were not in a position to make their

presentation in November, and if you wish to attend, the opportunity may be given for you then to expand your written comments not only on this matter but also on my separate letter to you of today's date dealing with certain other issues.'

56 There can therefore be no question of the existence of a new objection and of a breach of the rights of the defence.

57 In any event, even on the assumption that it is established, the fact that in the written pleadings submitted to the Court the Commission has adduced arguments going further than the arguments contained in the Decision is irrelevant since the present case is concerned with the review of the legality of the Decision challenged by the action brought by the applicant.

58 Consequently, this ground of objection cannot be upheld.

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

59 The applicant contends that Articles 1 and 9(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) and Article 19(1) and (2) of Regulation No 17 require the Commission to hold a hearing of the undertakings concerned so as to enable them to make known their point of view and to set down the essential content of the statements made by each person heard in minutes which are then submitted for that person's approval. Since the members of the Commission and those of the Advisory Committee do not attend the hearings, they can only become acquainted with the undertakings' arguments through a reading of the minutes. They must therefore have available duly approved minutes of the hearings in order to be able to come to a decision with full knowledge of the facts. However, this was not the case in this instance, since the final minutes were sent to the applicant only on 8 July 1986, that is to say more than two months after the adoption of the Decision.

0 According to the applicant, that irregularity vitiates the legality of the Decision since there is no reason for excluding the possibility that the Decision might have been different if the members of both of the aforementioned bodies had been in the possession of the minutes of the hearings incorporating the numerous amendments made by Solvay to the provisional version of those minutes concerning its statements at the hearing.

1 The Commission replies that Article 9(4) of Regulation No 99/63 does not state the period within which the undertakings must approve the minutes nor the bodies to which the provisional and final minutes must be submitted.

2 It goes on to state that the amendments of the draft minutes requested by the applicant were insignificant and that the Decision could have been no different if the final minutes had been provided to the members of the Advisory Committee and to the members of the Commission and that therefore, if there had been any procedural irregularity, it was not necessary to examine it (judgment of the Court of Justice of 10 July 1980 in Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, at paragraph 26).

3 As regards the Advisory Committee, the Commission points out that although its members did not have the provisional minutes, the Member States were represented at the hearings, with the exemption of Greece and Luxembourg which did not attend the second session of hearings. The minutes therefore simply serve as a reminder for the authorities of the Member States. In this regard, it matters little that the official present at the hearings was a person other than the member of the Advisory Committee.

4 As regards the members of the Commission, they had not only the provisional minutes but also the observations which the undertakings had made on those minutes.

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

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

67 As regards the provisional minutes forwarded to the Advisory Committee, it must be pointed out that the applicant has not indicated how those minutes did not record the hearings in a faithful and correct way and that it has confined itself to referring in general to the amendments which it had addressed to the Commission. It has not therefore established that the minutes in question were drawn up in such a way as to mislead the members of the Advisory Committee on an essential issue.

68 This ground of challenge must therefore be dismissed.

Proof of the infringement

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

It is therefore necessary to verify first of all whether the Commission has established to the requisite legal standard its findings of fact relating to (A) the meeting of the European Association for Textile Polyolefins (EATP) on 22 November 1977, (B) the system of regular meetings of polypropylene producers, (C) the price initiatives, (D) the measures designed to facilitate the implementation of the price initiatives and (E) 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*

A. The EATP meeting of 22 November 1977

(a) The contested decision

In the Decision (point 17, fourth paragraph; point 78, third paragraph; point 104, second paragraph) the Commission asserts that the applicant, like Hercules, Hoechst, ICI, Linz, Rhône-Poulenc and Saga, stated that it would be supporting the announcement made by Monte in an article which appeared on 18 November 1977 in the trade press (*European Chemical News*, hereinafter referred to as 'ECN') of its intention to raise the price for raffia to DM 1.30/kg as from 1 December. The various statements made in this regard at the EATP meeting held on 22 November 1977, as recorded in the minutes, showed, according to the Decision, that the DM 1.30/kg level set by Monte had been accepted by the other producers as a general industry 'target'.

According to the Decision (point 16, first and second paragraphs), that declaration of support was made in the context of discussions initiated between the producers with a view to avoiding a substantial drop in price levels and attendant losses, discussions in which the major producers, Monte, Hoechst, ICI and Shell, initiated a 'floor-price agreement' which was to be in operation by 1 August 1977 and the details of which were communicated to the other producers, including Hercules.

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

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

(b) Arguments of the parties

75 The applicant maintains that it never participated in, or supported in any way, the floor-price agreement, as the Commission accused it of doing in its letter of 29 March 1985. If an attempt was made in this regard on the initiative of the 'big four', it was in order to limit the consequences for the established producers of the arrival on the market of new producers such as Solvay. The applicant had no interest in following a price increase since at that time it had the sole aim of using its production capacity to the full.

76 According to the applicant, those claims are not contradicted by the statements made on 22 November 1977 by its representative at the meeting of the EATP, the consumer association. When the problem of polypropylene prices was raised, the representative complained about the collapse in prices, which, in his view, was just as unfavourable to producers as to consumers. Neither the record of that meeting nor any other document proves that Solvay participated in any initiative designed to set the price at DM 1.30/kg for 1 December 1977. The comments of Solvay's representative were perfectly in line with the policy of bluff and double-dealing

adopted at the meetings by the applicant whose interests lay in having the other producers increase their prices so that it could penetrate the market more quickly.

77 In the reply, the applicant points out the hesitation shown by the Commission in its statement of defence in which it states: 'It may be' that the other producers (which included Solvay) subscribed to that agreement.

78 The Commission replies that the aim of the cartel was to lay open the way, in a concerted fashion, for the entry onto the market of new producers by reconciling their interests with those of the established producers, the new producers wishing to acquire market share whilst the others wished to maintain their existing market shares, in a situation in which prices were clearly below the 'break-even point', as is shown by the statements made by the applicant at the EATP meeting of 22 November 1977, that is to say in the presence of customers.

79 The Commission states that those statements must be considered in the context of the central agreement on floor prices made in mid-1977 between the four main producers: Monte, Hoechst, ICI and Shell (main statement of objections, Appendix 2). Following that agreement, an initiative was implemented in November 1977 and at least five other producers (Rhône-Poulenc, Hercules, Linz, Saga and Solvay) subscribed to it by announcing their support for that initiative at the EATP meeting of 22 November 1977 (main statement of objections, Appendix 6). However, it was not possible to establish whether they became parties to the central agreement or whether they acted only as part of a concerted practice. A discussion on prices took place between Shell and Solvay at a meeting of 30 August 1977.

(c) Assessment by the Court

80 The Court notes as a preliminary point that the Commission has no direct evidence of contacts between Solvay and other producers before the EATP meeting of 22 November 1977 since it may not use in evidence against the applicant the note dated 6 September 1977 of the meeting which was held

between Shell and Solvay on 30 August 1977 since that document was not properly disclosed to the applicant. Consequently, any such contacts should not be considered in examining the statements made by the applicant at that EATP meeting.

81 It must be noted in this regard that the statements made by the applicant at the EATP meeting of 22 November 1977 (main statement of objections, Appendix 6) constitute an expression of general support for the policy of increasing prices initiated by Monte and a precise indication, intended for its competitors, of the conduct which it decided to adopt on the market. The following passage occurs in the record of those statements:

'On the subject of sale price, Solvay associates itself with the opinion expressed by the other producers. (...) Solvay will fall into line with the prices already quoted by the main producers. The level of these prices still does not seem at all sufficient to ensure a normal profitability for the PP manufacturers.'

Those findings are borne out by the note of the following EATP meeting, of 26 May 1978 (main statement of objections, Appendix 7), which records the assessments made by the various producers of the results obtained on the market following the meeting of 22 November 1977. The applicant stated that:

'Re-reading the Minutes of the last meeting which was held in Paris on 22nd November, 1977, everyone knew that the polypropylene price situation in Europe was absolutely catastrophic. Today, six months later, we can confirm that the situation has improved slightly, even if the price levels have not reached the desired level.'

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

B. The system of regular meetings

(a) The contested decision

33 According to the Decision (point 18, first paragraph), at least six meetings were held during 1978 between senior managers responsible for the overall direction of the polypropylene business of some of the producers ('bosses'). This system soon evolved to include a lower tier of meetings attended by managers possessing more detailed marketing knowledge ('experts') (reference is made to ICI's reply to the request for information under Article 11 of Regulation No 17, main statement of objections, Appendix 8). The Decision accuses the applicant of having attended those meetings regularly until at least the end of September 1983 (point 105, fourth paragraph).

34 The Decision (point 21) states that the purpose of those regular meetings of polypropylene producers was, in particular, to set price and sales volume targets and to monitor their observance by the producers.

(b) Arguments of the parties

85 The applicant admits to having participated quite regularly in the 'bosses' and 'experts' meetings but contends that the Commission may not deduce from this fact that Solvay entered into anti-competitive agreements. In this regard, it advances two arguments relating to the nature of its participation in the meetings and to the different interests of the various producers which prevented any agreement on prices or quotas from being reached.

86 In the present case, it states that it was not possible for the Commission to deduce an intention to enter into commitments on the part of the participants in the meetings from the mere fact that they expressed their agreement, without examining the interests and the particular situation of each undertaking. Solvay participated in the meetings not in order to enter into any commitment but solely in order to obtain technical and commercial information which, as a newcomer on the market, it did not have and which was necessary for its future development. In order to be able to continue participating in the meetings without committing itself, Solvay engaged in double-dealing and provided inaccurate information to the other undertakings.

87 The applicant further states that its conduct on the market was not consistent with the outcome of the meetings, as its competitors repeatedly noted at meetings, in particular at the meeting of 15 June 1981 which it did not attend (main statement of objections, Appendix 64). When in 1982 Solvay was finally using its production capacity to the full, the information it obtained became useless and at the meeting of 13 May 1982 (main statement of objections, Appendix 24) it proposed to end the producers' meetings.

88 It also argues that the lack of commitment is apparent from the major differences of interest which existed between the producers. The aim of the newcomers was rapidly to bring their production capacity on to full stream by adopting an aggressive pricing policy whereas the established producers wished to maintain their market share. Those differences of interest made the conclusion of any real comprehensive agreement between all the producers impossible. It does not, however, rule out the possibility that the 'big four' attempted to conclude an agreement in order to maintain their market share.

89 The Commission, for its part, states that where the existence of a cartel is established by a whole body of evidence, as it is in the present case, the argument that one particular party to the cartel had no intention to commit itself cannot negate the evidence of the existence of the cartel.

90 It states that, similarly, the object of the general agreement, which was to restrict competition, should not be confused with the intention of a particular party at a particular meeting. Such intention does not have to be taken into account in determining whether the undertaking participated in the general agreement, since such participation is manifested through the undertaking's presence at the meetings at which target prices and the quota targets were set. The individual case of each undertaking cannot therefore be separated from the overall context, since the cartel in the polypropylene sector constituted a complex whole in which the undertakings participated, each one for itself, in a specific way according to their own situation and interests.

91 The Commission observes that discussions on the key parameters of competition, in particular on the level to be reached by sale prices and on the allocation of sale quotas, have nothing to do with discussions allowing a newcomer to familiarize itself with the operation of a market which it still does not know very well. It was not because it no longer needed to gather information that Solvay proposed, in May 1982 (main statement of objections, Appendix 24), that the system of meetings should be abandoned, but rather because it considered that the price cartel had lost its raison d'être owing to the restoration of the price level following the re-establishment of the balance between supply and demand. The Commission also points out that the other producers did not share its point of view and that all of them, including the applicant, reached an agreement to take advantage of that situation so as to bring about a further price increase.

92 The Commission repeats that the purpose of the meetings was to reconcile the different interests of the producers. The participants in the cartel are undertakings which are all in competition with one another and which at a given moment decided that it was in their interests to participate in the cartel. This does not

exclude the possibility that from time to time a particular undertaking may have had 'mental reservations' or engaged in double-dealing but without ever giving this expression. However, common sense made the Commission interpret the terms or phrases contained in the meeting notes as meaning what they say, namely that agreements were concluded at the meetings. Solvay was not a mere observer. Furthermore, it is not remotely possible that in the meetings producers who were prepared to commit themselves to agreements sat side by side with others who erected a wall of obstinate silence and showed an unhealthy interest in those negotiations. The Commission concludes that the applicant did not confine itself to being a mere observer but that it committed itself like the other participants.

(c) Assessment by the Court

93 The Court notes that, in its application, the applicant admits 'having taken part [from 1979] quite regularly in meetings of all the European polypropylene producers. At those meetings, which were chaired by Monte and then by ICI, technical and commercial information was exchanged. At the initiative of the established producers, discussions took place on the setting up of a common pricing policy and, at certain times, on the elaboration of a sales quota system. It is conceivable in this regard that the producers established on the market were attempting to come to an agreement in order to maintain their market shares'.

94 That statement is confirmed by ICI's reply to the request for information (main statement of objections, Appendix 8), which classifies the applicant, unlike two other producers, amongst the regular participants of the 'bosses' and 'experts' meetings.

95 The Court considers that the Commission was fully entitled to take the view, based on information provided by ICI in its reply to the request for information and which was confirmed by numerous notes of meetings, that the purpose of the

meetings was, in particular, to set target prices and sales volumes. That reply contains the following passages:

'Generally speaking however, the concept of recommending "Target Prices" was developed during the early meetings which took place in 1978';

"'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'.

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

97 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.

98 Faced with that evidence, the applicant claims that it took part in the meetings without any anti-competitive intention since, as a newcomer on the market, it needed to obtain information in order to acquire a share of that market. In this regard, it should be observed that since it has been established that the applicant took part in those meetings and that their purpose was *inter alia* to fix price and sales volume targets the applicant at least gave its competitors the impression that it was participating in them in the same spirit as the others.

99 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 showing that it had indicated to its competitors that it was participating in the meetings in a spirit which was different from theirs.

100 It must be observed that the applicant's arguments based on its conduct on the market and designed to show that its participation in the meetings had the sole purpose of enabling it to obtain information on foreseeable market trends do not form evidence of such a kind as to prove that it had no anti-competitive intention, since the applicant puts forward no evidence capable of proving that it had informed its competitors that its conduct on the market would not be governed by what occurred at the meetings. Even if its competitors had been told this, the mere fact of exchanging with them information which an independent operator keeps strictly secret as confidential business information is sufficient to demonstrate that it had an anti-competitive intention.

101 It follows that the Commission has established to the requisite legal standard that the applicant participated in the system of regular meetings of polypropylene

producers between 1978 and September 1983, that the purpose of those meetings was, in particular, to fix price and sales volume targets, that they were part of a system and that the applicant's participation in those meetings was not without anti-competitive intention.

C. The price initiatives

(a) The contested decision

102 According to the Decision (points 28 to 51), six price initiatives, forming part of a system for fixing price targets, 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.

103 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 has price instructions from certain producers showing that those producers had given orders to their sales offices to apply this price level or its equivalent in national currencies from 1 September, in most cases before the planned price increase was announced in the trade press (Decision, point 30).

104 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).

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

106 The Decision (point 33) refers to Solvay's participation in two meetings 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. Documentation obtained from various producers shows in particular that they took steps to introduce the targets set for February and March.

107 According to the Decision (point 34), the plan to move to DM 2.00/kg on 1 March 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.

108 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, significantly, an experts' meeting was planned for 28 July 1981). The original plan to go for DM 2.30/kg in September 1981 was revised (probably at this meeting) with the planned level for August back to DM 2.00/kg for raffia. The September price was to be DM 2.20/kg. A handwritten note obtained at the premises of Hercules and dated 29 July 1981 (the day after the meeting, which Hercules probably did not attend) lists these prices as the 'official' prices for August and September and refers in cryptic terms to the source of the information. More meetings were held in Geneva on 4 August and in Vienna on 21 August 1981. Following these sessions, new instructions were given by producers to go for a price of DM 2.30/kg on 1 October. BASF, DSM, Hoechst, ICI, Monte and Shell gave virtually identical price instructions to implement these prices in September and October.

109 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%.

110 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 Solvay 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).

111 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.

112 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, in so far as it was present at the majority, and in most cases, all the meetings held between July and November 1982 at which that initiative was planned and monitored (Decision, point 45). At the meeting of 20 August 1982, the increase planned for 1 September was postponed to 1 October and that decision was confirmed at the meeting on 2 September 1982 (Decision, point 41).

113 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).

114 According to the Decision (point 44), at the meeting on 21 September 1982 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.

115 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).

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

117 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.

118 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, which did not include the applicant, reaffirmed complete commitment to the DM 1.85/kg increase. On that occasion, it was agreed that Shell would lead publicly in a trade publication, *European Chemical News* (hereinafter referred to as 'ECN').

119 The Decision (point 49) states that after the meeting of 20 May 1983, ICI, DSM, BASF, Hoechst, Linz, Shell, Hercules, ATO and Petrofina issued instructions to their sales offices to apply from 1 July a price table based on DM 1.85/kg for raffia. Solvay was also behind the other producers in notifying its sales offices of the increase but its internal documentation, dating from 26 July, set immediate minimum prices for each country identical with the DM 1.85/kg raffia target and gave new minima applicable from 1 September based on the DM 2.00 which had been agreed by the producers. 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.

120 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.

121 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.

122 The Decision (point 51, second and third paragraphs) states that while ATO and Petrofina were present at all relevant meetings, they both claim that if any internal price instructions were given for the period covering the price initiative of July-November 1983, they were given by word of mouth. However, 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 various countries prices for September and October for the three main grades of polypropylene which are identical to those of BASF, DSM, Hoechst, Hüls, ICI, Linz, Monte and Solvay. During the investigation at the premises of ATO in October 1983 the representatives of the undertaking confirmed that these prices were communicated to sales offices.

123 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.

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

(b) Arguments of the parties

125 The applicant repeats that from the fact that it attended the meetings of producers it cannot be deduced that it participated in price agreements and insists that it participated in the meetings only in order to gather information, that it engaged in double-dealing and that its conduct on the market was not consistent with the outcome of the meetings. This conduct led to Solvay being called a 'permanent troublemaker' in June 1981 (main statement of objections, Appendix 64) whilst Shell, in December 1981 (Solvay reply, statement of objections, Appendix 3) and in February 1982 (Solvay reply, statement of objections, Appendix 2), pointed out the aggressiveness of Solvay's pricing policy. In February 1983, ATO observed that Solvay had settled down somewhat (Solvay reply, statement of objections, Appendix 2 bis). Hoechst did likewise in February 1982 (Solvay reply, statement of objections, Appendix 4), as did ICI in December 1982 (main statement of objections, Appendix 35). The applicant concludes that its participation in the meetings lacked any real intention to align its prices with those of its competitors. The only other evidence mentioned by the Commission to demonstrate that Solvay had the intention of committing itself concerned two isolated meetings of 2 September 1982 (main statement of objections, Appendix 29) and 1 June 1983 (main statement of objections, Appendix 40). However, that evidence is not relevant since the Commission accuses Solvay of having been a party to a general agreement since 1977 and disregards the fact that Solvay did not attend the meeting of 1 June 1983.

126 It points out that differences of interest between the producers which were established on the market before 1977 and the newcomers, such as the applicant, made the conclusion of price agreements impossible because some wished to maintain their market share whilst pursuing a high-price policy whilst others wished to increase their market share by means of an aggressive pricing policy.

127 The applicant goes on to state that the more detailed reasoning contained in the Decision as regards the price initiatives is likewise irrelevant in an assessment of the applicant's situation. It is based on a *petitio principii*, namely that at the outset there was a general agreement even if it was not always carried out. According to Solvay, however, the question was first whether there was an agreement and then whether that agreement bound each undertaking.

128 As regards the 1981 initiatives, the applicant explains that the prices which it charged on the market differed considerably from the target prices and that this proves that it did not participate in that year's initiatives.

129 As regards the 1982 initiatives, it states that the different changes in the target prices and the prices charged by Solvay on the market clearly show that the former had no effect on the latter. The note on which the Commission relies is not conclusive (main statement of objections, Appendix 78) because although it records that Solvay was claiming a higher quota in order to compensate for the disadvantage which it had suffered through its firm price policy, that claim was made more out of bluff.

130 As regards the 1983 initiatives, the applicant explains that its price instructions for July post-dated the announcement of a price increase which appeared in ECN on 13 June 1983 (main statement of objections, Appendix 41). Consequently, it was simply following, with some delay, an initiative announced publicly as a result of the improved state of the market. It also points out that it was absent from the meeting of 1 June at which, according to the Commission, the target price was set. As regards the October 1983 initiative, the scenario was the same.

131 It concludes that in the Decision, the Commission reached conclusions by means of generalization and raised against all the producers objections which were perhaps well founded only in the case of some of them.

132 The Commission replies that, as far as the various price initiatives are concerned, Solvay's participation in the setting of target prices is established by its regular participation in the meetings at which those prices were agreed.

133 It maintains that, although Solvay was described as a 'troublemaker', this was only on one very specific occasion, at a meeting in June 1981 (main statement of

objections, Appendix 64), when the market was greatly out of balance and Solvay, taking advantage of the lack of any agreement on quotas for 1981, had doubled its production capacity and sought to sell the maximum of its production at prices temporarily lower than the target prices. That conduct is not representative of the whole period.

134 In the Commission's view, temporarily disruptive price setting, the holding of unexpressed 'mental reservations', an occasional lack of the determination needed to resist the demands of customers and not grant them lower prices are just so many typical characteristics of a price cartel operating on a real market which is therefore constantly subject to some pressure from within (the participants) and from without (the customers).

135 As regards the implementation of those agreements in the form of price initiatives, the Commission states that, as far as the year 1981 is concerned, it is not surprising that in the absence of a quota agreement, Solvay was able to pursue an aggressive pricing policy, perhaps in order to obtain additional quotas later. Although the cartel operated less well in 1981, it still did not cease to exist. At all events, Solvay's participation in the price initiative is demonstrated by its participation in the meetings for which notes are available, such as those of January 1981 (main statement of objections, Appendix 17), as well as by two internal Solvay notes indicating that it compared its prices with the target prices and that on 17 July 1981 it knew that an increase, the amount of which remained to be determined, was to come into effect in September.

136 As regards 1982, the Commission points out that Solvay admits having participated in the negotiations on prices. It continued to participate in the discussions, even though it expressed doubts about their usefulness (main statement of objections, Appendix 24). In fact, it gave firm support to the price initiatives, as is shown by a meeting note (main statement of objections, Appendix 32) pointing out the firmness shown by Solvay in Belgium and also the quota proposal made by Solvay for 1983 in which Solvay itself emphasized its own firmness on prices (main statement of objections, Appendix 78).

137 As regards 1983, the Commission states that it has price instructions issued by Solvay to its sales offices (particular objections, Solvay, Appendices 4 and 5). Those instructions correspond to the target prices agreed by the producers (main statement of objections, Appendix 40 and Appendices 42 to 52). The target prices were set at meetings at which Solvay was present (main statement of objections, Appendices 37 and 38), even though it was absent from the subsequent meeting at which those prices were simply 'reaffirmed' (main statement of objections, Appendix 40). If they were published in the trade press, this was because of a decision adopted at a cartel meeting.

138 The Commission considers that there was a link between the target prices implemented in the form of instructions to sales departments and the target prices discussed at the meetings. The suggestion that this was a mere coincidence (the price instructions being the result of decisions taken individually by the producers) is not credible and is not borne out by the available evidence.

139 It contends that the difference between the price instructions and the prices obtained on the market, even if proved, does not affect the existence of the infringement, since Article 85 of the EEC Treaty prohibits agreements having the distortion of competition as their object and not necessarily as their effect. However, the Commission contends that the target prices served as the basis for negotiations with customers and that changes in the prices achieved reflected parallel changes in the target prices. The Commission recognizes, as it did in the Decision (point 74), that the target prices were not always obtained, although the gap between the target prices and the prices obtained is exaggerated by the applicant.

140 The Commission adds that it was entitled to consider that the price instructions, even though internal to the undertakings, formed part of the implementation of the price initiatives since in substance they corresponded to the guides arising from the cartel meetings and that the instructions concerned were destined for the sales offices.

(c) Assessment by the Court

141 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'.

142 Confronted with those meeting notes, the applicant claims that differences of interests between the producers made it impossible to take pricing measures. It must be observed in this regard that, although the producers did have some differences of interest, they had a common interest in seeing a rise in the general level of prices. The established producers would thus be able to improve their output whilst the newcomers could achieve their sales volume ambitions at less cost. Consequently, the differing interests of the various producers did not hinder the taking of price initiatives designed to raise the general price level.

143 Since it has been established to the requisite legal standard that the applicant participated in the meetings at which the price initiatives were agreed, 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.

44 In this regard, it must be noted that the applicant has referred to two arguments designed to show in general that it did not subscribe to the price initiatives agreed at the regular meetings of polypropylene producers. It has submitted, first, that its participation in the meetings had no anti-competitive intention and, secondly, that it took no account of the outcome of the meetings when determining its market pricing policy, as is shown by the important differences observed between the prices allegedly agreed at the meetings and the prices which it charged on the market.

45 None of those arguments can be accepted as evidence capable of corroborating the applicant's assertion that it did not subscribe to the agreed price initiatives. The Court repeats that the Commission has established to the requisite legal standard that the applicant's participation in the meetings was not without anti-competitive intention so that the applicant's first argument has no foundation in the facts.

46 As regards the second argument, it must be observed first of all that, even if it were factually well founded, it is not of such a nature as to refute the applicant's participation in the setting of target prices at the meetings but at the most demonstrates that the applicant did not implement the decisions reached at those meetings. The Decision does not assert in any way that the applicant charged prices which always corresponded to the target prices agreed at the meetings, which indicates that the contested decision is likewise not based on the implementation by the applicant of the outcome of the meetings in order to prove its participation in the setting of those target prices.

47 The Court finds that the only price initiative in respect of which the applicant advances arguments other than those referred to above is the initiative of July-November 1983. In regard to this initiative, it states that it did not participate in the meeting of 1 June 1983 at which that initiative was decided on and that its price instructions post-dated the announcement of price increases in the trade press.

148 It must be pointed out first of all that the price initiative of July 1983 was not decided on at the meeting of 1 June 1983 which the applicant did not attend but at a previous meeting held on 20 May 1983 which the applicant did attend. It is apparent from the note of a meeting of the 'big four' held on 19 May (main statement of objections, Appendix 101) that they were going to propose an initiative at the 'bosses' meeting which was to be held the following day, since it is stated in that note:

'19 May: Big 4 premeeting: S. Hoechst, Z. M. P., L. Shell, D. WSHB. ER. ICI. 3 German collectively: determined move ... July — MP + ICI committed. L. in principle only. DSM + Solvay essential 20 May proposal'.

This is borne out by the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40), according to which 'Those present reaffirmed complete commitment to the 1.85 move to be achieved by 1st July', and which therefore shows that the initiative had already been decided on previously.

149 The Court considers that the applicant cannot rely on the public announcement of prices in ECN to explain the fact that its prices were identical with those of its competitors on 26 July 1983 (letter of 29 March 1985, Annex Sol. H1) since it is clear from the note of the meeting of 1 June 1983 that, at that time, when a price initiative was decided it was announced in the trade press. That note states: 'Shell was reported to have committed themselves to the move and would lead publicly in ECN'. Moreover, it must be noted that the price instruction given by the applicant to the *Benelux*, even if it was considerably later than those of most of the other producers which corresponded to the target confirmed at the meeting of 1 June 1983, does not correspond to the price announced in ECN which was slightly higher (DM 1.90/kg instead of DM 1.85/kg).

50 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.

51 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.

52 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 statements of objections or which it had not disclosed to the applicant.

53 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 the effects of those price initiatives lasted until November 1983.

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

(a) The contested decision

154 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.

155 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.

156 The Decision (point 20) also asserts that Solvay attended local meetings held to discuss implementation on a national level of arrangements agreed in the full sessions.

(b) Arguments of the parties

57 The applicant does not advance any specific arguments to refute its participation in the measures designed to implement the price initiatives, which it denies took place.

58 The Commission maintains that many pieces of evidence indicate that Solvay took an active part in the system of 'account leadership' the existence of which is evidenced by the notes of the meetings of 2 September and 2 December 1982 and by the note of a meeting held in spring 1983 (main statement of objections, Appendices 29, 33 and 37).

59 It also points out that Solvay participated in local meetings in Belgium, France, Italy and the United Kingdom. At one of those meetings in the United Kingdom, on 18 October 1982 (main statement of objections, Appendix 10), it was noted that the great majority of sales were made at prices equal or higher than the target prices (see also the main statement of objections, Appendix 32).

(c) Assessment by the Court

60 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.

61 It must be concluded that in participating in the meetings during which that set of measures was adopted (in particular those of 13 May, 2 and 21 September 1982

(main statement of objections, Appendices 24, 29, 30], the applicant subscribed to it, since it has not adduced any evidence to prove the contrary. In this regard, the adoption of the system of 'account leadership' is clear from the following passage appearing in the record of the meeting of 2 September 1982:

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

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

162 As regards the question of 'account leadership', the Court finds that it is clear from the notes of the meetings of 2 September 1982 (main statement of objections, Appendix 29), 2 December 1982 (main statement of objections, Appendix 33) and of spring 1983 (main statement of objections, Appendix 37),

which were all attended by the applicant, that during those meetings the producers present at them agreed to that system. As far as the note of the meeting held on 2 December 1982 is concerned, it confirms that the system had already been adopted at the meeting in September since it states: 'The idea of account management was proposed for more general adoption & a list of customers/account leaders drawn up'.

53 The implementation of this system is evidenced by the note of the meeting of 3 May 1983 (main statement of objections, Appendix 38), in which it is stated:

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

Such implementation is confirmed by the applicant's own reply to the request for information (main statement of objections, Appendix 8), in which it is stated in relation to that meeting note:

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

after at most two months of partial and ineffective operation. The method by which Hüls and ICI should have protected BASF was by quoting a price of Dkr 6.75 for the supply of raffia grade polypropylene to Jacob Holm until the end of June.'

164 Finally, the Court notes that the applicant does not dispute that it took part in local meetings and that the purpose of those meetings is evidenced in particular by the note of the meeting of 12 August 1982 (main statement of objections, Appendix 27), which shows that those meetings were intended to ensure the implementation, at local level, of a particular price initiative and by the note of the local meeting held in the United Kingdom on 18 October 1982 (main statement of objections, Appendix 10).

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

E. Target tonnages and quotas

(a) The contested decision

6 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.

7 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.

8 Volume targets (in tonnes) were set for 1979 based in part at least on sales in the preceding three years. Tables found at the premises of ICI show the 'revised target' for each producer for 1979 compared with actual tonnage sales achieved during that period in Western Europe (Decision, point 54). The existence of a market-sharing scheme for 1979 is confirmed by documents found at the premises of ATO which show the targets of the four 'French' producers (ATO, Rhône-Poulenc, Solvay and Hoechst France) for each national market (Decision, point 54).

9 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.

170 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).

171 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 of the medium-sized producers, such as Solvay, had reached a

relative equilibrium (described by ATO as a 'quasi-consensus') and, for the majority of producers, remained stable compared with the previous years.

72 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.

73 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).

(b) Arguments of the parties

174 The applicant points out that during the procedure before the Commission it had stated that no quota agreement had been implemented and that in any event it never had the intention to commit itself under such an agreement. As a newcomer on the market, it had no interest in limiting its sales. On the contrary, its aim was to use its production capacity to the full. Thus, in 1979, 1980, 1981, 1982 and 1983, its market shares always exceeded the quotas which had been allocated to it and the geographical distribution of its sales changed quite considerably.

175 It also points out that it was in the matter of quotas that the clash of interest between the 'big four' and the newcomers was the greatest. The Decision does not point to any evidence to contradict this argument. Although the Commission does refer to the existence of plans and contacts, these were established by the 'big four'. At the most, Solvay may be accused of having exchanged information in a questionable way.

176 As regards 1979, the applicant states that the Commission makes no reply to the observations which it had made with regard to the existence of a plan to share the French market alleged by the Commission (letter of 3 April 1985, Appendix). The applicant had contended that all that was involved were internal ATO statistics drawn up by an employee of that undertaking, who had used the term 'quotas' in the sense of targets and simply wished to ascertain the extent to which the target which ATO had set for itself had been attained. The applicant also points out that the quota attributed to it was almost equal to its production capacity and that any quota system presupposes that the undertakings concerned agree to limit their production or their sales.

177 As regards 1980, the applicant points out that the quota which was originally allocated to it was higher than its production capacity, a fact which cannot be explained by the alleged 'dynamic character of the cartel', and that its revised quota was much lower than its actual production.

78 As regards 1981, it points out that the Decision admits that there was no agreement on quotas but seems to indicate that the producers maintained the 1980 scheme. The applicant points out that it exceeded by 50% the quota which was allocated to it the previous year.

79 As regards 1982, the applicant points out that it still exceeded its alleged quota and that, although its market share remained stable, it was producing at almost full capacity following a considerable increase in absolute figures.

80 As regards 1983, it states that the Decision is based on the fact that a Solvay employee made a quota proposal (main statement of objections, Appendix 78). However, that proposal was of no value since it was so excessive. Furthermore, the quota which was finally allocated was greatly exceeded.

81 The Commission, for its part, points out that, as far as the difference of interests between the producers is concerned, the cartel was intended to ensure each producer its place on the market according to a dynamic system based on a sharing of the market which was as equitable as possible. If the newcomers gradually increased their market shares, the quota agreements assisted this development in some way since the quotas allocated to them on the whole followed that development. The quota agreements were essentially intended to serve as a support for the price cartel and all the producers, established or new to the market, had a common interest in seeing prices reach a profitable level. Finally, although Solvay contends that a quota agreement presupposes a degree of stability in the division of the market between geographical areas and customers, the Commission replies that an attempt to achieve such stability was made through the adoption of the 'account leadership' system in which Solvay participated actively.

82 The Commission maintains that the applicant's participation in the setting of sales volume targets for the years 1979 and 1980 is apparent from the fact that its name appears in a number of tables of figures setting out for the various producers previous sales volumes and quotas. Among those documents, the Commission refers specifically to four.

183 The first document is an undated table headed 'Producers' Sales to West Europe', found at the premises of ICI (main statement of objections, Appendix 55), setting out for all the polypropylene producers of western Europe the sale figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual' and 'revised target 79'. Solvay was allocated a revised target of 37.3 kilotonnes. According to the Commission, this document proves that Solvay participated in a market sharing scheme for 1979 since it defines the quotas for each producer for that year.

184 The second document consists of a series of tables found on the premises of ATO (annex to the letter of 3 April 1985) setting out for the four French producers (ATO, Rhône-Poulenc, Solvay and Hoechst France) their sales figures in various countries of western Europe for each of the last four months of 1979. In some of those tables there is a comparison between the achieved figures and the quotas: '85% des quotas' (85% of the quotas) or '84.7% des quotas' (84.7% of the quotas). That document proves Solvay's participation not only in a market-sharing scheme for 1979 but also in the monitoring of the implementation of that scheme by the four French producers. The Commission points out that in that year Solvay achieved a market share very close to that which had been allocated to it, even though it slightly exceeded it (38.2 kilotonnes compared with a quota of 37.3 kilotonnes).

185 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.

6 According to the Commission, the fact that the market share allocated to Solvay corresponded to its maximum production capacity cannot constitute proof that no concertation took place.

7 The Commission recognizes that no definitive quota agreement could be reached for 1981. It states, however, that the producers reached agreement at the beginning of 1981 on a temporary scheme limiting monthly sales to 1/12 of 85% of the targets which had been agreed for 1980, as is evidenced by the note of the January 1981 meetings (main statement of objections, Appendix 17). Secondly, the producers monitored each other's actual sales on a monthly basis, as is shown in particular by a table dated 21 December 1981 found at the premises of ICI, setting out the monthly sales of the various producers in 1981 (main statement of objections, Appendix 67).

8 According to the Commission, the absence of such an agreement allowed Solvay to double its production capacity and to achieve a market share of 4.11%, much higher than the purely theoretical allocation based on 1980, which was 3%.

9 As regards 1982, the Commission states that no definitive agreement could be reached, despite the efforts made in this direction which, in its view, are proved by the various quota schemes discovered. However, a provisional solution was found in the form of a specific orientation of sales according to the figures for the previous year. The Commission states that the existence of discussions on the setting of quotas emerges from a large number of documents. Among those documents, reference must be made above all to the meeting notes drawn up by ICI, from which it is clear that information was exchanged on the quantities sold and that the applicant participated in them (main statement of objections,

Appendices 24 to 26 and 31 to 33). Reference should also be made to various schemes found at the premises of ICI (main statement of objections, Appendices 69 and 71) and a fairly comprehensive proposal for 1982 originating from ICI (main statement of objections, Appendix 70). According to the Commission, the note of the meeting of 2 November 1982 (main statement of objections, Appendix 32) shows that when the producers wished to obtain an increase in their market shares they had to give reasons. It adds that, for that year, an adjusted quota of 4%, taking account of the break in 1981, was allocated to the applicant. Solvay slightly exceeded that quota (4.25%).

190 As regards 1983, the Commission considers that a quota agreement could have been made. It bases that assertion on notes of telephone conversations between ICI and other producers (main statement of objections, Appendices 74 to 84) which show that ICI invited each producer to communicate its own ambitions as well as its view of the percentage which the others should be allowed, on documents relating to the processing of the information thus collected (main statement of objections, Appendix 85) and on schemes drawn up by ICI (main statement of objections, Appendices 86 and 87). A number of meeting notes describe the course of the negotiations on a proposal limited to the first quarter of 1983 (main statement of objections, Appendices 32 to 34). An internal Shell document (main statement of objections, Appendix 90) shows that such a system was agreed for the first two quarters of 1983. This is corroborated by the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40), which, while not referring to quotas, describes exchanges of information on the tonnages sold by each producer in the previous month of May.

191 As regards 1983, the Commission states that Solvay proposed a market share of 4.7% be allocated to it (main statement of objections, Appendix 78), maintaining that that share would have been much higher if it had charged prices equal to those of its competitors. However, Solvay finally accepted a quota of 4.22% of the market (main statement of objections, Appendix 33, Table 2; particular objections, Solvay, Appendix 18).

(c) Assessment by the Court

192 It has already been found that from the outset the applicant regularly participated in the periodic meetings of polypropylene producers at which discussions relating to the sales volumes of the various producers were held and information exchanged on that subject.

193 Concurrently with Solvay's participation in the meetings, its name appears in various tables found on its premises (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 those tables on the basis of the statistics available under the Fides system. In fact, 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 Solvay is concerned, been provided by Solvay in the course of the meetings in which it participated.

194 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.

195 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.

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

197 As regards the year 1980, the Court finds that it is clear from the table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60), which contains a column headed 'agreed targets 1980' and from the note of the January 1981 meetings (main statement of objections, Appendix 17) at which producers, not including the applicant, compared the quantities actually sold ('Actual kt') with the targets set ('Target kt'), that sales volume targets were set for the whole of the year. Those documents are further supported by a table dated 8 October 1980 (main statement of objections, Appendix 57) comparing two columns, one setting out the '1980 Nameplate Capacity' and the other the '1980 Quota' for the various producers.

198 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.

199 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').

200 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.'

The applicant cannot claim that such a precise indication constitutes a general exhortation.

201 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.

202 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.

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

204 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.

205 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 analyses 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).

206 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. In this regard, the theoretical nature of the quota serving as a reference for the comparison with actual monthly sales is due to the fact that no quota could be agreed for the whole of 1981, yet it does not deprive that comparison of its signif-icance as a method of monitoring the restriction of monthly sales by reference to the previous year.

207 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'.

208 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.

209 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 those discussions took place, that on those occasions it supplied data relating to its sales and that on 25 October 1982 it made a proposal (main statement of objections, Appendix 78) relating to the quotas to be allocated to the other producers as well as to the quota to be allocated to itself, justifying the increase in its own quota in the following terms:

'The increase of Solvay (from 4.2% in 1982 to 4.7% in 1983) is based on: our large product mix (...); the development of our captive uses (faster than the average growth of the market); the fact that our market share in 1982 has been significantly penalized by our firm behaviour in pricing. Should we have quoted prices equal to the competition (including the major European producers), we would have certainly reached a level equal (if not higher) to the market share asked for 1983 (4.7%).'

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

211 As regards the question whether those negotiations actually succeeded as far as the first two quarters of 1983 are concerned, as is asserted in the Decision (point 63, third paragraph, and point 64), it is clear from the note of the meeting on 1 June 1983 (main statement of objections, Appendix 40), which the applicant did not attend, that 10 producers indicated at that meeting the sales figures for May. 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'.

212 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.

213 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).

214 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.

215 For the rest, the Court finds that the applicant's arguments tend not to prove directly that it did not participate in the fixing of sales volume targets but to demonstrate that those targets were not adhered to by the producers, a fact which, in the applicant's view, invalidates any conclusion that such targets were set.

216 It is to be observed in this regard that the Decision acknowledges that the sales volume targets were not adhered to, which shows that the Decision does not rely on implementation by the applicant of the decisions reached in the discussions on sales volume targets in order to prove that the applicant participated in the fixing of those targets. Thus, the applicant's argument that it increased its market share,

that it used its production capacity to the full and exceeded the alleged quotas cannot refute the assertions of the Commission which in the Decision states that sales quotas were agreed but not that they were observed. Moreover, the agreed quotas were sales quotas and not production quotas. The fact that the applicant's production capacity was utilized to the full is not therefore relevant.

217 The Court further considers that the Decision took proper account of the diverging interests of the established producers and the newcomers. In the fourth paragraph of point 89 it states that: 'The various quota systems and other mechanisms designed to accommodate the divergent interests of the established producers and the newcomers all had as their ultimate objective the creation of artificial conditions of "stability" favourable to price rises'. It adds, in point 91, in reply to the producers who argued that changes in the market share of some producers since 1977 were evidence of 'unrestricted' competition, that 'this argument overlooks the fact that quotas or targets were agreed so as to take account of the ambitions of the newcomers and the larger firms were willing to accept some reduction in their market shares in the interests of increasing price levels'.

218 It must also be pointed out that the fact that in 1980 the applicant was allocated an initial quota which was higher than its production capacity does not disprove that it participated in the quota system since that excessive allocation must be attributed to its policy of 'bluff', which confirms the importance of the reduction made in the applicant's quota after revision.

219 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.

220 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

221 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).

222 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).

223 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.

224 As regards more specifically the December 1977 initiative, the Decision states (in the third paragraph of point 82) that even in front of customers at the EATP meetings producers like Hercules, Hoechst, ICI, LINZ, Rhône-Poulenc, SAGA and Solvay were stressing the perceived need for concerted action to increase prices. There was further contact on pricing between the producers outside the EATP meetings. In the light of these admitted contacts the Commission considers that behind the device of one or more producers complaining of inadequate levels of profitability and suggesting joint action while the others expressed 'support' for such moves lay on existing agreement on pricing. It adds that even in the absence of further contacts such a device might still indicate a sufficient consensus for an agreement within the meaning of Article 85(1).

225 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).

226 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.

227 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.

228 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).

229 According to the Decision (point 87, first paragraph), the object of the Treaty in creating a separate concept of concerted practice was to forestall the possibility of undertakings evading the application of Article 85(1) by colluding in an anti-competitive manner falling short of a definite agreement by, for example, informing each other in advance of the attitude each intends to adopt, so that each could regulate its commercial conduct in the knowledge that its competitors would behave in the same way (see the judgment of the Court of Justice in Case 48/69 *Imperial Chemical Industries Ltd* v *Commission* [1972] ECR 619).

230 In its judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (*Suiker Unie* v *Commission* [1975] ECR 1663) the Court of Justice held that the criteria of coordination and cooperation laid down by its case-law, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the competition provisions of the Treaty according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors but it does strictly preclude any direct or indirect contact between them the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (Decision, point 87, second paragraph). Such conduct may fall under Article 85(1) as a 'concerted practice' even where the parties have not reached agreement in advance on a common plan defining their action in the market but adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour (Decision, point 87, third paragraph, first sentence).

231 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).

232 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.

233 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

234 The applicant contends that the Commission's argument that the characterization of the infringement does not matter leads to the result that the mere fact that the producers met in order to exchange certain information on prices and sales volumes constitutes *per se* a concerted practice having as its object, if not as its effect, the restriction of competition. The purpose of this argument is to enable the Commission to compensate for the weaknesses contained in the Decision as regards the actual effects of the meetings in question on the market and to avoid the question as to the extent to which purely internal conduct can constitute the element of practice in a concerted practice. That argument is not consonant with

Article 85 of the EEC Treaty and, contrary to the Commission's contentions, cannot be based on the case-law of the Court of Justice (judgment in Case 48/69 *ICI* v *Commission,* cited above; judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission,* cited above; and judgment in Case 172/80 *Züchner* v *Bayerische Vereinsbank AG* [1981] ECR 2021).

235 It argues that any agreement implies that two or more parties have the intention to enter into commitments with regard to one another. The existence of an agreement cannot therefore be deduced from mere declarations of intention made by various persons; it must be ascertained whether those statements are accompanied by a real intention to enter into binding commitments.

236 It considers that, unlike an agreement which, having as its purpose the distortion of competition, may be punished before even having been carried out, a concerted practice implies both the existence of a practice and the existence of concertation forming the genesis of that practice. It therefore presupposes the implementation and the externalization of the concertation. The applicant emphasizes that it does not thus seek to argue the extreme case that a concerted practice having as its sole objet the distortion of competition and having no such effect would be inconceivable.

237 Thus, the applicant accepts that a concerted practice must not necessarily have an anti-competitive effect but nevertheless considers that, besides the existence of concertation, the concept of a concerted practice implies the existence of implementing measures in the undertakings' external environment, that is to say on the market.

238 It therefore contends that the existence of a concerted practice may not be deduced from undertakings' internal conduct having no effect on the market. If this were not so, it would be possible for mere unlawful intentions which are not followed up by any implementing measures to be penalized under Article 85(1), which would constitute an unacceptable breach of the principle of legal certainty.

239 According to the applicant, however, the Commission does not succeed in showing that the meetings or exchanges of information which it calls in question had a real effect on the market. It confines itself to estimations which have in the meantime been invalidated by an audit carried out by an independent firm of auditors, Coopers & Lybrand (hereinafter referred to as 'the Coopers & Lybrand audit') and by an econometric study of the German market carried out by Professor Albach of the University of Bonn. It is true that the Commission has, in Solvay's case, referred to certain internal price instructions. However, those instructions constitute at the most only a purely internal manifestation and do not therefore enable the existence of concerted practices to be proved. Furthermore, the Commission's reliance on the existence of letters addressed to customers is sterile. Like most of the undertakings, Solvay did not advise its customers by letter of price-list changes.

240 Finally, it contends that the contested Decision is contradictory or, at the very least, ambiguous in so far as it is not clear whether it holds Solvay guilty of having participated in an agreement, in a concerted practice or in undefined collusive conduct. The Commission was not entitled to take the view that it did not matter what form the collusive conduct took in the present case and it ought to have examined whether the elements of a particular infringement were present in this case. In the present case the significance of the question of the characterization and definition of the infringement resides in the fact that, if, like the applicant, one considers that a concerted practice presupposes the actual adoption of coordinated conduct on the market, the Commission has not adduced evidence of Solvay's participation in either an agreement or a concerted practice.

241 In the applicant's view, therefore, the definition of the concept of 'concerted practice' has special importance. That importance is even greater in so far as it is the first time that this question has arisen in these terms before the Community Court. In the cases which have come before the Court hitherto (Case 48/69 *ICI* v *Commission,* cited above; Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission,* cited above; Case 172/80 *Züchner* v *Bayerische Vereinsbank AG,* cited above), the actual fact of conduct on the market was not disputed and the question was whether it was sufficient to presume the existence of concertation.

242 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.

243 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).

244 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.

245 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.

246 The Commission goes on to argue that if the two requirements — concerted action and conduct on the market — were required for the existence of a concerted practice, as Solvay suggests, 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.

247 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.

248 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.

249 From that analysis the Commission deduces that, whatever the real state of the market was, the infringement is established since it resides in the adoption of concertation with a view to acting on that market. It thus replies to the criticism that it did not undertake an analysis of the market since such an analysis was irrelevant as a means of proof in view of the documents in its possession.

(c) Assessment by the Court

250 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'.

251 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.

252 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], cited above, 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 floor prices in 1977, price initiatives, measures designed to facilitate the implementation of the price initiatives, sales volume targets for the years 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.

253 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 SA* v *Agence et Messagerie de la Presse SA* [1985] ECR 2015, paragraph 17).

254 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).

255 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.

6 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.

7 The Commission was therefore justified, in the alternative, having regard to their purpose, in categorizing the EATP meeting of 22 November 1977 and 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.

8 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.

259 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.

260 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.

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

B. Restrictive effect on competition

(a) The contested decision

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

(b) Arguments of the parties

3 The applicant accuses the Commission of carrying out an 'armchair' analysis of the documents without investigating what the real intentions of each producer could have been or examining the real effect on competition of the meetings in question. That effect is essential for the determination of the existence of a general agreement and for the assessment of the gravity of the infringement. The applicant takes issue with the interpretation placed by the Commission on the proposal to end the meetings which Solvay made at the meeting held on 13 May 1982 (main statement of objections, Appendix 24). According to the Commission, that proposal demonstrates *a contrario* that Solvay considered that the meetings had achieved their objective and that they had therefore had the anticipated effect on the market.

4 The applicant maintains that it was therefore left to the undertakings, faced with the Commission's failure to carry out the necessary analyses, to take the initiative and have specific market studies carried out (Coopers & Lybrand audit and the study of Professor Albach) and that the Commission did not carry out any similar analyses of its own in order to refute the results of the aforementioned studies.

5 At times the Commission seems to accept that the situation on the market would have been the same in the absence of any agreement and that it is possible that the producers simply tried to influence competition without actually succeeding (Decision, points 72 and 73); at other times it considers that competition was overtly affected and that the argument that the normal operation of supply and demand would have led to a result similar to that observed is not to be accepted (Decision, points 90 to 92).

6 The applicant maintains that, according to the specific market studies mentioned above, its commercial policy, both with regard to prices and sales volumes, was entirely unaffected by what went on at the meetings which it attended. Those studies demonstrate that the meetings had no effect on the market and that they did not cause any damage to customers.

267 The Commission replies that the anti-competitive object of the agreements and concerted practices constituting the infringement is established in any event and that it is not therefore necessary to demonstrate that they had a restrictive effect on competition. For the rest, it refers to the text of the Decision.

268 It further states that the Coopers & Lybrand audit was carried out before the statement of objections had even been notified. There was absolutely no assertion in the statement of objections to the effect that the net prices achieved systematically corresponded to the agreed target prices. Thus, the undertakings were attempting to refute, by means of the audit, an objection which was never raised against them.

269 The Commission concludes that Solvay's conclusion that the Decision is contradictory is based on either a misinterpretation or a truncated quotation from the passages in question (points 72, 74, 90 to 92 and 108).

(c) Assessment by the Court

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

271 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.

2 The Court repeats that it is clear from its assessments relating to the findings of fact made by the Commission that the purpose of the regular meetings which the applicant attended together with competitors was to restrict competition within the common market, in particular by the fixing of price targets and sales volumes 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.

3 It follows that this ground of challenge cannot be accepted.

The statement of reasons

1. *The adoption of a single decision*

4 The applicant states that the contested Decision determines the case of all the undertakings in question in a general way, 'submerging' each of the undertakings in a wider context. In taking this approach, the Commission does not reply specifically to the arguments based on Solvay's special situation and dispenses with investigating whether, in the case of each undertaking, the factors constituting the infringements with which it was charged were present. That approach has an effect on the formal validity of the Decision.

The Commission replies that the Decision sufficiently individualized the various objections raised against Solvay so that Solvay was quite able to understand the purport of the accusations made against it. In this regard, the Commission also points out that the Decision is also based on the specific statement of objections addressed to each undertaking.

The Court notes that it is apparent from 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, at paragraph 111 and judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission*, cited above, at paragraph

77) that there is no reason at all why the Commission should not make a single decision covering several infringements provided that the decision permits each addressee to obtain a clear picture of the complaints made against it.

277 In this regard, the Court's assessments relating to proof of the infringement demonstrate that the applicant, like the Court, was able to obtain a sufficiently clear picture of the complaints made against it.

278 Similarly, it must be stressed that the fact that the Decision is a single one did not have the effect of extending to the applicant accusations based on the conduct of other producers, since the Commission has proved to the requisite legal standard all the objections made against the applicant in the Decision.

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

2. *Insufficient reasoning*

280 The applicant sets out the requirements which, according to the case-law of the Court of Justice (judgment in Case 16/61 *Acciaierie Ferriere e Fonderie di Modena* v *High Authority of the ECSC* [1962] ECR 289; judgment in Case 158/80 *REWE-Handelsgesellschaft Nord mbH and Another* v *Hauptzollamt Kiel* [1981] ECR 1805 at p. 1833; judgment in Case 8/83 *Officine Fratelli Bertoli* v *Commission* [1984] ECR 1649), the statement of reasons for a decision must meet. It points out that those requirements are all the more strict in the present case since the Decision is quasi-judicial in nature and results in the imposition of penalties similar to criminal penalties. Therefore, the Commission ought at least to have examined the undertakings' main submissions, if not discussed all the points of fact and of law raised by them. That obligation arises directly from the adage 'Justice must not only be done, it must also be seen to be done', which, with regard to courts of law, has been reinforced by the European Court of Human Rights.

1 It points out that the Decision has not replied to four major arguments which it had put forward during the administrative procedure relating to its specific situation as a newcomer on the market, the divergence of interests between the producers already established on the market and the newcomers, which made the conclusion of an agreement impossible, the fact that it had absolutely no intention to bind itself, which is not incompatible with its participation in the meetings, and, finally, its conduct on the market which disproves the existence of any commitment on its part. In Solvay's opinion, the Decision gives no reply to those arguments and is therefore vitiated by insufficient reasoning.

2 Solvay points out that it was only in the observations which it submitted to the Court that the Commission explained that the purpose of the cartel was to reconcile the diverging interests of the established producers and the newcomers and that all the producers thus sought to achieve the same aim. That belated reply to the applicant's specific arguments cannot, however, fill the lacuni in the Decision. Moreover, the Commission may not rely on the statement of objections addressed to Solvay in order to support its contention that Solvay was able to understand the purport of the individual accusations made against it.

3 The Commission points out that, according to the case-law of the Court of Justice, the statement of reasons should make possible a review by the Court and enable the persons concerned to have knowledge of the conditions under which the Community institutions have applied the provisions of the EEC Treaty (judgment in Case 158/80 *REWE* v *Hauptzollamt Kiel,* cited above, paragraph 25). Furthermore, the requirements which the statement of reasons for a measure must meet depends on the nature of that measure and on the context in which it was adopted (judgment in Case 8/83 *Bertoli* v *Commission,* cited above, paragraphs 13 to 17). Finally, in decisions adopted in competition matters, the Commission is not obliged to refute the arguments of the parties in a detailed manner and it may put forward an independent argument setting out in general terms the reasons for the decision (judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission,* cited above, paragraph 65 and judgment in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, paragraphs 16 to 18).

284 In view of those principles laid down in decisions of the Court of Justice, the Commission considers that the Decision is sufficiently and correctly reasoned. In particular, contrary to the applicant's contentions, the Decision replies to the arguments which the applicant put forward in order to explain the reasons for its participation in the meetings and to highlight the diverging interests of the undertakings and the problems posed by the emergence of newcomers on the market (Decision, point 10 et seq.). Similarly, in the Decision the Commission stated reasons for the measures taken in the matter of fines and the conditions under which it took account of the specific circumstances of each undertaking.

285 The applicant is not therefore justified in claiming that the Commission replies to its arguments only in its defence observations, that is to say at a belated stage. In actual fact, the Commission had already set out the facts in its statement of objections as well as the interpretation which it placed upon them. During the administrative procedure, Solvay did not challenge that interpretation of the facts; it either referred to other facts or gave what it considered to be a more probable explanation of those facts. Consequently, the Commission considers that in adopting the Decision on the basis of the facts as it had interpreted them ever since notification of the statement of objections and in explaining the reasons for that interpretation, it was able to maintain its interpretation and that it replied to the arguments raised by Solvay during the procedure. It also states that the clarification in the defence of certain passages contained in the Decision must not be misconstrued as constituting the production of fresh submissions.

286 The 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* v *Commission*, 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 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.

87 As regards the first two arguments to which the Decision allegedly does not reply, it must be observed that in points 10, 11 and 16 the Decision mentions the arrival of new producers on the market and the consequences which this had in direct relation to the beginnings of the cartel. It must also be pointed out that in the fourth paragraph of point 89 the Decision refers to the diverging interests of the established producers and the newcomers. It also mentions that the cartel had as its purpose in particular to reconcile those diverging interests by taking account of the ambitions of the newcomers (point 91, last paragraph). Consequently, it must be stated that the Decision did take account of the two arguments put forward by the applicant.

88 As regards the point that the applicant had no intention to bind itself, which is allegedly not disproved by its participation in the meetings, it must be pointed out that the Commission replied to this point in point 71 of the Decision.

89 Finally, as regards its conduct on the market, the Commission replied to this point in point 72 et seq. of the Decision.

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

3. *Contradictory reasoning*

91 The applicant contends that the Decision is vitiated by a contradiction in its reasons in so far as it claims, on the one hand, that the prices were determined by the operation of competition (points 72 and 73) and, on the other hand, that the cartel produced an appreciable effect on competition (points 90 to 92 and 108).

92 The Commission maintains that the Decision is not vitiated by any contradiction in its reasons regarding the effects of the cartel and that the perceived contradictions are due to the applicant's selective reading of the Decision.

293 The Court considers that the applicant's argument is based on a reading of the Decision which artificially separates some of the reasons stated in the Decision when, since the Decision should be read as a whole document, each of the reasons stated must be read in the light of other reasons in order to overcome the apparent contradictions between passages taken out of their context.

294 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).

295 It is clear from the assessment of this Court relating to the findings of fact and the application of Article 85(1) of the EEC Treaty by the Commission in the contested measure that the Commission took full account of the applicant's argument regarding the effects of the cartel on the market and that it stated conclusively in the Decision (points 72 to 74 and 89 to 92) the reasons which led it to consider that the conclusions drawn by the applicant from the Coopers & Lybrand audit and Professor Albach's study were unfounded.

296 Consequently, this ground of complaint must be dismissed.

The fine

97 The applicant complains that the Decision contravened Article 15 of Regulation No 17 by not properly assessing the duration and gravity of the infringement which it was found to have committed.

1. *Duration of the infringement*

98 The applicant contends that if the Decision were to be annulled on the ground of the duration of its participation in the alleged cartel, the fine would have to be reduced accordingly.

99 The Commission maintains that it correctly assessed the duration of the infringement.

100 The Court would point out that it has already found that the Commission properly assessed the duration of the period during which the applicant infringed Article 85(1) of the EEC Treaty and that it was therefore entitled to consider that it amounted to a single infringement.

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

2. *The gravity of the infringement*

A. The applicant's limited role

102 The applicant maintains that the Commission ought to have taken into consideration the degree of participation in the cartel of each of the undertakings. Even if the conclusion had to be drawn that Solvay did intend to participate in the cartel, account must be taken of the fact that it dissociated itself from it many times.

303 As regards Solvay's degree of participation, the Commission observes that this undertaking confines itself to repeating arguments which have already been examined, namely the lack of market analysis, the applicant's rapid penetration of the market, its role as a mere observer anxious to obtain information and its role as a 'troublemaker' and so forth.

304 The Court finds that it is clear from its assessments relating to proof of the infringement that the Commission has correctly established the role played by the applicant in the infringement and that it was therefore entitled to consider in the Decision that the passive nature of that role was not established.

305 Consequently, this ground of challenge cannot be upheld.

B. The Commission's new fining policy

306 The applicant contends that in the present case the Commission could not apply the new policy on fines since this had been laid down in its Thirteenth Report on Competition Policy, that is to say, after the period in question. The same complaint may also be made as regards the Commission's reference to the judgments in the 'Pioneer' and *AEG* cases (judgments of the Court of Justice in Joined Cases 100 to 103/80 and in Case 107/82, cited above), which were likewise delivered after the time of the infringements alleged by the Commission.

307 The Commission states that in imposing penalties in the present case it acted in accordance with its well-established policy and with the principles laid down by the Court of Justice in the matter of fines. It points out that after 1979 it adopted a policy of enforcing the competition rules by imposing heavier penalties, in particular for categories of infringements clearly identified in competition law and for particularly serious infringements, so as to increase the deterrent effect of penalties. The attention of undertakings was drawn to this policy in the Thirteenth Report on Competition Policy.

108 It states that this policy was approved by the Court of Justice in particular in the judgments in the 'Pioneer' and *AEG Telefunken* cases (judgment in Joined Cases 100 to 103/80, cited above and in Case 107/82, cited above) and could be validly be applied in the present case.

109 The Court finds that it is clear from the case-law of the Court of Justice that the Commission's power to impose fines on undertakings which intentionally or negligently commit an infringement of the provisions of Article 85(1) of the EEC Treaty is one of the means made available to the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the EEC Treaty and to guide the conduct of undertakings in the light of those principles. Accordingly, the Court of Justice held that, in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission had to take into consideration not only the particular circumstances of the case but also the context in which the infringement occurred and had to ensure that its action had the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community. The Court of Justice also held that it was open to the Commission to have regard to the fact that infringements of a specific type, although they were established as being unlawful at the outset of Community competition policy, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them and that consequently it was open to the Commission to consider that it was appropriate to raise the level of the fines so as to reinforce their deterrent effect. The Court of Justice concluded that the fact that the Commission, in the past, had imposed fines of a certain level for certain types of infringement did not mean that it was estopped from raising that level within the limits indicated in Regulation No 17 if that was necessary to ensure the implementation of Community competition policy (judgment in Joined Cases 100 to 103/80 *Musique Diffusion Française* v *Commission* ('Pioneer'), cited above, paragraphs 105 to 109).

110 In the light of those consideration the Court finds that the Commission was entitled to characterize the setting of price and sales volume targets and the adoption of measures designed to facilitate the implementation of the target prices as a particularly serious infringement intended to distort the normal movement of prices on the polypropylene market.

311 It is clear from the abovementioned case-law of the Court of Justice that the Commission is not under an obligation to put undertakings on notice by warning them of its intention to increase the general level of fines and that consequently the applicant cannot derive any argument from the fact that the infringement found to have been committed took place prior to the pronouncement of that case-law and the publication of the Thirteenth Report on Competition Policy in which the Commission explained the new policy which it intended to adopt in the matter of fines.

312 Moreover, the Court considers that the comparison of the fine imposed on the applicant with those imposed on the other addressees of the Decision does not reveal any discrimination with regard to the duration and particular gravity of the infringement which the applicant was found to have committed.

313 This ground of challenge must therefore be dismissed.

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

314 The applicant submits that the fine should be proportionate to the gravity of the infringement. The effects on competition produced by the infringement are, however, one of the criteria for assessing its gravity. It could undoubtedly be argued that a fine should be imposed on parties to a cartel which had only the object of distorting competition without producing such an effect. However, a general principle of law requires that the determination of the amount of the fine should take account of the degree of harmfulness of the effects produced by the infringement.

315 For this reason, it argues that the Commission was under a duty to carry out an economic study of the market in order to investigate the effects which were actually produced by the meetings in question. In reaching the conclusion — which, moreover, is expressed in contradictory terms — that competitive conditions had been seriously disturbed, it was not sufficient for the Commission to confine itself to an 'armchair' examination of the documents found at the premises of the producers. That conclusion is in fact refuted by the experts' reports (Coopers & Lybrand audit and Professor Albach's study) which demon-

strate that competition on the market was keen. Such a rapid penetration of the market by the newcomers such as Solvay is inconceivable without an aggressive policy on their part. The prices charged by Solvay were thus unaffected by the target prices, except perhaps in 1983 when supply and demand recovered their balance. Moreover, in 1982 Solvay had proposed bringing the meetings to an end on the grounds that the market had recovered its balance (main statement of objections, Appendix 24) and that it had overcome its difficulties, which made the exchange of information unnecessary.

16 The Commission explains that, having regard to the general nature of the cartel, all the undertakings were penalized for their participation in the general agreement which constituted a particularly serious infringement; however, in the evaluation of the exact amount of the fine to be imposed on each undertaking, account was taken of all the specific circumstances of each case. It emphasizes that a 'horizontal' price and quota cartel constitutes one of the clearest and most serious infringements of Article 85, even if no regard is had to its restrictive effects on competition. In the present case, the cartel did, moreover, produce restrictive effects on competition.

17 It also points out that the fact that the price initiatives generally did not achieve their objective in full was taken into account in mitigation of the penalties (Decision, point 108).

18 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).

319 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.

320 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.

321 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.

322 Consequently, this ground of challenge must be dismissed.

D. Wrong definition of the relevant market

323 The applicant contends that in any event the cartel could relate only to the special polypropylene grades which were truly specific to each producer and were removed from competition on the market. Those grades represented 61% of Solvay's total turnover for polypropylene in 1982 and 64% in 1983. Therefore, the fine is excessive with regard to the size of the relevant market too.

324 As regards the distinction between special products and basic products, the Commission considers that it must be concluded that, if the producers agreed target prices for basic grades, it was for reasons of convenience, but this does not mean that all the special grades were not covered by the price cartel. On the contrary, the meeting notes show that the cartel also extended to grades other than the basic grades (main statement of objections, Appendix 24). Subsequently, the price instructions of the producers show that the price initiatives covered all the grades (letter of 29 March 1985, Appendix C).

325 The quota agreements had a general character and did not relate only to certain types of products. Since those agreements served to support the agreement on prices, the latter necessarily covered the whole polypropylene market.

326 The Court finds that the quotas related to all grades of polypropylene. In its reply to a written question asked by the Court, the applicant stated that its sales in western Europe for 1980 were 37 928 tonnes and that its sales in the Community were 68 652 tonnes in 1983, all grades included, of which only less than 40% related to basic products. However, the quota allocated to the applicant for western Europe in 1980 was 42 000 tonnes (main statement of objections, Appendices 57 and 60) and in 1983 was between 71 000 tonnes, for a market estimated at 1 470 kilotonnes (Saga proposal, main statement of objections, Appendix 81), and 51 450 tonnes, being 3.5% of same market — proposal of the German producers (main statement of objections, Appendix 83).

327 The Commission therefore rightly took account of the whole polypropylene market in determining the amount of the fine imposed on the applicant. This ground of challenge must therefore be dismissed.

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

328 The applicant points out that the fines constitute penalties and may therefore be determined only on the basis of concrete factors and the effects of the individual conduct of the undertaking (judgment of the Court of Justice in Case 45/69 *Boehringer Mannheim GmbH* v *Commission* [1970] ECR 769, paragraph 55). The fines must take account of the particular situation of the undertaking and the mitigating circumstances specific to it. Not only does the Decision not take account of the individual situation of the undertakings in adducing proof of the infringements, it contains no reasoning explaining the determination of the amount of the fines in each specific case. In Solvay's opinion, a comparison of the fines and the turnover of the undertakings concerned would not fail to show appreciable differences which are not explained in the Decision. That lack of reasoning inevitably gives the impression of unacceptable arbitrariness.

329 The Commission explains that in determining the amounts of the fines it proceeded from a series of general and specific considerations and that this approach has been approved by the Court of Justice (judgment in Case 45/69 *Boehringer Mannheim GmbH* v *Commission*, cited above, paragraph 55). Having based the Decision on reasons which sufficiently individualized the objections raised with regard to the undertakings, it concluded that it could not accept any significant distinction between the smaller producers on the basis of their level of commitment to the common arrangements.

330 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).

331 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.

332 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.

333 As regards the first two criteria mentioned in point 109 of the Decision — the role played by each of the undertakings in the collusive arrangements and the period of time during which they participated in the infringement — , it must be noted that, since the statement of reasons relating to the determination of the amount of the fine must be interpreted with reference to all the reasons stated in the Decision, the Commission sufficiently individualized the way in which it took account of those criteria in the applicant's case.

334 As regards the last two criteria — the respective deliveries of the various polypropylene producers to the Community and the total turnover of each of the undertakings — , the Court finds, on the basis of the figures which it requested from the Commission, the accuracy of which has not been challenged by the applicant, that those criteria were not applied unfairly when the fine imposed on the applicant was determined in relation to the fines imposed on other producers.

335 The Court also finds that it follows from its assessments relating to the findings of fact made by the Commission in order to prove the infringement that the various arguments to which the Commission has, according to the applicant, not replied lack any factual basis.

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

F. The alleged failure to take account of mitigating circumstances

337 The applicant contends that the Decision does not consider the mitigating circumstances which it referred to, namely that Solvay was a factor which reinforced competition since it was behind the creation of a new undertaking in the sector and had managed to penetrate the market very quickly by means of an aggressive pricing policy, that it had undertaken considerable research and, finally, that it had cooperated openly in the investigation.

338 The Commission points out, first, that the fact that Solvay was a newcomer cannot justify its participation in a price and quota agreement. It took account of the losses in mitigation of the fines and the fact that the cartel did not produce 'abusive profits' is irrelevant. Finally, Solvay's honest cooperation in the investigation was limited to recognizing the truth of the facts, which the undertakings could not avoid.

339 The Court considers that the fact that an undertaking was a newcomer on a market and made a spectacular penetration of that market, owing in particular to investments which it poured into research, cannot mitigate the seriousness of the infringement which it committed in participating in horizontal price fixing over a period of years.

340 As regards the fact that the applicant incurred heavy losses which shows that it could not have made abusive profits from its participation in the infringement, the Court notes that the Commission expressly stated in the last indent of point 108 of the Decision that it took account of the fact that the undertakings had incurred substantial losses on their polypropylene operations over a considerable period, which demonstrates not only that the Commission took account of the losses but

also that, in determining the general level of the fines, it thereby took account of unfavourable economic conditions in the sector (judgment in Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 111 et seq.) as well as of the other criteria mentioned in point 108.

341 Finally, the applicant's cooperation in the investigation did not go further than that which it was required to provide under Article 11(4) and (5) of Regulation No 17.

342 Consequently, the Commission was justified in not taking account of Solvay's cooperation in the investigation as a mitigating circumstance for reducing the amount of the fine which was imposed upon it.

343 This ground of challenge cannot therefore be upheld.

344 It follows that the fine imposed on the applicant is proportionate to the duration and gravity of the infringement of the Community competition rules which the applicant has been found to have committed.

Reopening of the oral procedure

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

346 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 as requested by the applicant.

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

Costs

348 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful is to be order to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has failed in its submissions and the Commission has applied for costs to be awarded against it, the applicant must be order to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 10 March 1992.

H. Jung
Registrar

J. L. Cruz Vilaça
President