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

Contents

* Language of the case: German.

In Case T-10/89,

Hoechst AG, a company incorporated under German law, having its registered office in Frankfurt am Main (Germany), represented by H. Hellmann, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 8 Rue Zithe,

applicant,

v

Commission of the European Communities, represented by Anthony McClellan, Principal Legal Adviser, and B. Jansen, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of R. Hayder, a representative of its Legal Department, 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),

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

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

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

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

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

gives the following

Judgment

Facts and background to the action

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

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

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

3 Hoechst AG was one of the producers supplying the polypropylene market before 1977 and is one of the 'big four'. Its market share was between about 10.5% and 12.6%.

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

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

BASF AG ('BASF'),

DSM N. V. ('DSM'),

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

Hoechst AG ('Hoechst'),

Chemische Werke Hüls ('Hüls'),

Imperial Chemical Industries PLC ('ICI'),

Montepolimeri SpA, now Montedipe ('Monte'),

Shell International Chemical Company Limited ('Shell'),

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

BP Chimie ('BP').

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

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

Amoco,

Chemie Linz AG ('Linz'),

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

Petrofina S. A. ('Petrofina'),

Enichem Anic SpA ('Anic').

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

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

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

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

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

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

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

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

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

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

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

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2

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

Article 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 4

...

Article 5

...'

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

Procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 2 August 1986, the applicant brought this action seeking annulment of the Decision. Thirteen of the fourteen other addressees of the Decision have also brought actions for its annulment (Cases T-1/89 to T-4/89, T-6/89 to T-9/89 and T-11/89 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 Hoechst claims that the Court should:

(i) annul the Commission's decision of 23 April 1986 relating to a procedure under Article 85(1) of the EEC Treaty (IV/31.149 — Polypropylene) in so far as it concerns the applicant, and in the alternative reduce the fine imposed;

(ii) order the defendant 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 Tribunal 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) failed to disclose to the applicant documents on which it based the Decision, (2) failed to give the applicant access to the whole of the file and (3) raised certain objections against the applicant for the first time in the Decision; *secondly*, the grounds of challenge relating to proof of the infringement concerning (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty whereby it is contended that the Commission (A) did not correctly define the infringement, (B) did not correctly assess its anti-competitive effect; *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) partially time-barred, (2) disproportionate to the duration of the alleged infringement and (3) disproportionate to the gravity of the alleged infringement.

The rights of the defence

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

The applicant contends that under Article 4 of Regulation No 99/63 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) the Commission may in its decisions deal only with those objections in respect of which the undertakings have had the opportunity of making known their views. In the applicant's view, that presupposes that the Commission should, in the statement of objections, provide a sufficient account of the factual circumstances and the legal conclusions which it draws from them, and should attach to that statement or make available to the undertakings the documents on which it intends to base its final decision.

32 In this case, it states that the Commission has based the decision on 28 documents or sets of documents which were not provided to it. The documents concerned consist of the note of a meeting of 13 May 1982 drawn up by an employee of Hercules (Decision, points 15(b) and 70), the note of a meeting of 10 March 1982 drawn up by an employee of ICI (Decision, point 15(b)), a document allegedly found at the premises of Solvay dated 6 December 1977 (Decision, point 16, penultimate paragraph), Shell's reply to the statement of objections (Decision, point 17), the replies of Amoco, ATO, BASF, DSM, Hüls, Linz, Monte, Petrofina, Rhône-Poulenc, Saga and Solvay (Decision, point 18), circular letters sent by national sales offices to customers concerning price increases (Decision, point 25), two sets of minutes of Shell internal meetings held on 5 July and 12 September 1979 (Decision, points 29 and 31), a Solvay internal document (Decision, point 32), a reminder sent by Solvay to its sales offices on 17 July 1981 (Decision, point 35), articles from the trade press concerning polypropylene prices at the end of 1981 (Decision, point 36, third paragraph), an ICI internal note referring to the 'firm climate' (Decision, point 46), a Shell document headed 'PP W. Europe — Pricing' (Decision, point 49), Shell documents concerning the United Kingdom and France (Decision, point 49), an internal ATO note dated 28 September 1983 (Decision, point 51), an undated ICI note intended as a briefing for a meeting with Shell in or about May 1983 (Decision, point 63, second paragraph), a planning document relating to the first quarter of 1983 found at the premises of Shell (Decision, point 63, third paragraph) and, finally, documents from ATO, DSM and Shell concerning the conduct of meetings (Decision, point 70).

33 The applicant maintains that according to the case-law of the Court of Justice (judgments in Joined Cases 100 to 103/80 *Pioneer* v *Commission* [1983] ECR 1825, paragraph 29, and Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 27) it is not sufficient, in order for evidence to be used against an undertaking, that it should have been made aware of it during the access-to-file procedure. The evidence must not only be disclosed to the undertakings by the Commission; it must also mention the probative force and the importance which it proposes to attach to them for the purposes of the decision to be made.

34 It adds that even documents which simply provide confirmation may have decisive importance for the purposes of proof and that it is not for the Commission to decide that certain documents are irrelevant to one or other of the undertakings

when it asserts that each undertaking bears unrestricted liability for the conduct of other undertakings.

35 The applicant concludes that the items of evidence which were not disclosed to it cannot be used against it.

36 The Commission states that the applicant's assertions concerning certain documents with which it claims not to have been able to acquaint itself are in part false and, for the rest, irrelevant in law.

37 It states first that the documents mentioned in point 25 of the Decision were disclosed to the applicant as appendices 19, 42, 46, 50 and 52 to the main statement of objections and as appendices to the letter of 29 March 1985 (Appendices I6 to I9), that the document mentioned in point 46 of the Decision is appendix 35 to the main statement of objections and that the ATO documents mentioned in point 70 of the Decision appear as appendices 60 and 72 to the main statement of objections.

38 The Commission goes on to state that the document mentioned in points 15(b) and 70 of the Decision, the replies of the undertakings to the Commission's request for information mentioned in point 18 of the Decision, the document mentioned in point 40 of the Decision and the DSM and Shell documents mentioned in point 70 were made available to the applicant during the access-to-file procedure in June 1984. It adds that the document mentioned in points 15(b) and 70 of the Decision merely confirmed a document which constituted appendix 24 to the main statement of objections.

39 The Commission states that the other documents listed by the applicant were not provided to it either because they were of no relevance to the proceedings against it, since they concerned only the undertakings expressly mentioned in them, or because they merely confirmed other documents of which the applicant was already aware. It concludes that as regards the applicant the Decision is not based on those documents.

40 It acknowledges that as the result of an error an ICI note concerning an 'experts" meeting of 10 March 1982, mentioned in the Decision (point 58), was not disclosed but states that that note merely confirmed a note drawn up by Hercules of the same meeting which was attached to the main statement of objections (Appendix 23).

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

42 In this instance, only the documents mentioned in the main or specific 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.

43 It follows that, of the documents mentioned by the applicant, only the circular letters sent by national sales offices to their customers (Decision, point 25), the ICI internal note on the 'firm climate' (Decision, point 46) and the documents found at the premises of ATO concerning questions discussed at meetings (Decision, point 70) may be used as evidence against the applicant, since they were mentioned respectively in the tables contained in the letter of 29 March 1985, in points 71, 94 and 102 of the main statement of objections, to which they also form Appendices A to I as regards the letter of 29 March 1985 and Appendices 35, 60 and 72 as regards the main statement of objections. The other documents referred to by the applicant may not be considered to be evidence admissible against it in the present case.

44 The question whether the last-mentioned documents provide essential support for the findings of fact made by the Commission against the applicant in the Decision falls to be considered by the Court in its examination of the question whether those findings are well founded. The Court also observes that the applicant has not alleged that those documents may contain material exculpating it.

2. *Insufficient access to the file*

45 The applicant contends that the restricted access which it was able to have to the file was contrary to the principle of a fair hearing. The applicant's legal representatives consulted the Commission's files in June 1984, but, as the responsible rapporteur of the Commission himself admitted, they were only provided with the items of evidence on which the Commission relied in the statement of objections in order to establish unlawful conduct or might rely in the subsequent proceedings. The Commission cannot rely on the judgment of the Court of Justice in Joined Cases 43 and 63/82 (*VBVB and VBBB* v *Commission* [1984] ECR 19) to justify such a restriction on access to the file since it concerned a different situation, namely the application of Article 85(3) of the EEC Treaty.

46 According to the applicant, such a restriction on the consultation of the file to the inculpatory items of evidence and the selection of documents which it presupposes cannot be accepted. They prevent the undertakings' lawyers from evaluating the importance of inculpatory and exculpatory evidence and determining whether the Commission has correctly assessed them. Since the Court itself generally does not have the opportunity of seeing the whole of the file, exculpatory documents which the Commission has not or not sufficiently used or assessed may remain buried in the Commission's files.

47 Since it was unable to consult the file thoroughly, the applicant, like the Court, cannot know whether there were in fact exculpatory documents among those withheld from its consultation of the file. The very incomplete nature of the evidence put forward in this case not only requires the utmost care in weighing all the items of evidence but also arouses the suspicion that the Commission may have evaluated it in a biased manner.

48 It adds that even if the Commission is correct in its assertion that all the documents were made available with the exception of those containing confidential information, it is for the Court to ensure that those documents do not contain material exculpating undertakings.

49 The Commission states that it is not obliged to disclose the whole of the file to the parties concerned, as the Court of Justice has held in analogous circumstances (judgment in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission*, cited above). In this case, moreover, although it was not obliged to do so the Commission granted access to virtually all the documents in its possession (with the exception of documents containing business secrets) at the time of the statement of objections and its additional letter of 29 March 1985. It gave access to other documents in the course of the access-to-file procedure in June 1984.

50 The Commission further maintains that it is not true that it used only inculpatory documents and withheld exculpatory documents. It points out that the applicant has not identified any document as a basis for its assertions.

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

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

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

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

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

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

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

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

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

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

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

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

55 The Court observes that the Commission categorically denies that its officials failed to make available to the applicant all the documents which might contain material exculpating it.

56 In response to the Commission's denials the applicant has not put forward any evidence to show that the Commission made only selected documents available to the applicant in order to prevent it from refuting the evidence advanced by the Commission to prove its participation in the infringement. It refers to statements made by the Commission's rapporteur to its lawyer but has not proved or offered to prove that such statements were made and had the meaning which it attributes to them.

57 Consequently, this ground of challenge must be dismissed.

3. *New objections*

58 The applicant contends that the Decision (Article 1 and point 81) accuses the undertakings of having subscribed to a framework agreement which was implemented through a series of more detailed sub-agreements or a single continuing agreement for the purposes of Article 85(1) of the EEC Treaty, although there was no suggestion of a single general agreement in the statement of objections, which refers instead to a complex of agreements and concerted practices. In respect of certain specific matters and certain periods the statement of objections went so far as expressly to exclude the existence of agreements. In its letter of 29 March 1985 the Commission did envisage the existence of a 'central agreement' but left that point hanging and provided no further details. Finally, it maintained without restriction its original accusation, which was again confirmed during the second series of hearings. Accordingly, the main accusation made in the Decision is new both in fact and in law, and the parties to the proceedings had no opportunity to state their position on that accusation.

59 It adds that the Commission cannot validly object that the accusation of an infringement contained in the statements of objections was simply replaced, having regard to the outcome of the administrative procedure, by a second accusation alleging the conclusion of a framework agreement without that entailing any change in the assessment of the material in the file. Those two accusations are entirely different in fact and in law. According to the judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 (*Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 68) objections may only be re-drafted or supplemented. The completely new nature of the accusation resides in the concept of a 'framework agreement' itself, which is totally separate from that of a 'continued infringement'.

60 According to the applicant, a 'framework agreement' constitutes a very precise legal concept which it defines as a legal act by which the parties commit themselves in advance and lay down rules which determine the content of future legal acts or transactions or set general conditions to be specified in each case. The essential element of a 'framework agreement' thus resides in a general prior consensus, which presupposes the will to be bound in respect of specific future acts. The existence of a framework agreement is thus necessarily prior to the agreements and concerted practices. However, the Commission has made no finding of fact and still less has it adduced any evidence from which it may be

concluded that such a framework agreement was concluded in 1977. Indeed, the grounds of the Decision seem rather to refute than to support the idea of a framework agreement. In its account of the facts in relation to 1977 the Decision does not speak of a framework agreement and contains no finding of fact to that effect. On the contrary, the Decision seeks to prove a specific understanding on prices (the original floor-price agreement), without attributing it to a framework agreement. It does not even indicate the undertakings alleged to have concluded that framework agreement.

61 The applicant submits that it is not possible to conclude retrospectively, in the light of possible subsequent specific agreements, that a framework agreement existed. Since the essence of a framework agreement is to agree in advance on certain rules governing subsequent specific acts, the existence of a framework agreement can be inferred *a posteriori* from specific agreements only if the specific acts cannot be explained in any way other than by the prior conclusion of a framework agreement. The Commission made no such allegation before its defence and the facts found do not indicate that the various acts alleged to have been committed in 1977 and later years uniformly or regularly followed a previously arranged scheme of conduct. For example, the Commission speaks of a 'system of regular meetings', but that assessment is not confirmed by the evidence, which does not reveal the slightest regularity in the holding of meetings.

62 The applicant submits that if the Commission now alleges the existence of a framework agreement it is in order to remedy, by a devious legal ploy, its inability to prove the existence of specific agreements or concerted practices, as is shown by the fact that it states in its defence that 'it is reasonable to suppose that the meetings on whose subject-matter no details are known (essentially those held between the end of 1977 or the beginning of 1978 and the end of 1981) generally had the same purpose as those on which it does know the details.'

63 Similarly, it states that it is in vain that, for the same reason, the Commission seeks to rely on the concept of a continuing infringement. Since that concept is intended

to group together in a single general offence a series of separate offences each of which fulfils all the conditions of the infringement, it does not relieve the Commission of the obligation of adducing specific evidence, for each period concerned and each accusation, of an infringement of competition law.

64 The applicant concludes that as regards both the framework agreement and the continuing infringement the Commission should have specified in respect of which particular acts it considered that an agreement within the meaning of Article 85(1) of the EEC Treaty had been established before going on to group the various infringements together on that basis. Instead, it took the opposite course, by concluding from all the facts that there was a general 'framework agreement' or a 'single continuing agreement' without proving the existence of separate infringements, as is shown by point 81 of the Decision.

65 It argues that this error of law, which affects the factual elements and the legal basis of the Decision and even reaches its operative part, cannot be rectified before the Court and must therefore entail the annulment of the Decision. In theory, of course, the Court can itself examine the various acts in respect of which it considers the infringement to be established, but in that event the rights of the defence would be disregarded since the undertakings concerned would be made to defend themselves against accusations which the authorities prosecuting them have not yet made.

66 The Commission considers that it complied in every way with the case-law of the Court of Justice (judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission*, cited above), according to which it is entitled to use the results of the administrative procedure to 'supplement and re-draft its arguments both in fact and in law in support of the objections which it maintains'. The Commission refers to the terms of the statement of objections and its subsequent letter of 29 March 1985 and considers that it enabled a thorough discussion of the real nature of the cartel to be held during the administrative procedure. The Decision contains the conclusions which it drew from that debate.

67 It adds that the original statement of objections referred in several places (points 128 and 132) to 'continuing and institutionalized cooperation'. Moreover, in its letter of 29 March 1985 the Commission indicated that it did not exclude the possibility of a 'core' agreement among the four major producers (p. 3) and that in relation to the other participants in the meetings the agreements stemmed from 'a sufficiently detailed plan to amount to an "agreement" or "agreements" under Article 85' (p. 4).

68 According to the Commission, the framework agreement may be seen in the decision to establish an institutionalized system of producers' meetings in order to discuss the sales strategy to be adopted. That framework agreement was supplemented, where necessary, by specific agreements on concrete measures. What was involved was an overall plan implemented by increasingly intensive activities intended to have an influence on market forces by means of cooperation among polypropylene producers on prices, sales targets, market shares and related measures. That overall plan retained the same basic characteristics throughout, despite differences in its implementation owing to the mutual distrust of the participants.

69 The Commission denies having 'invented' a framework agreement in order to cover the gaps in its evidence, as the applicant alleges.

70 The Court observes that the passages in the Decision which are criticized by the applicant correspond in their content to the objections made by the Commission in relation to the applicant and the other undertakings to which the Decision is addressed in the statements of objections which were sent to them.

71 Contrary to the assertions of the applicant, the Decision does not simply state baldly in point 81 that the undertakings in question 'participated in an overall framework agreement which was manifested in a series of more detailed sub-agreements worked out from time to time' and that this was thus 'a single continuing "agreement" within the meaning of Article 85(1)', since the first of

those phrases is preceded by the words 'In the present case the producers, by subscribing to a common plan to regulate prices and supply in the polypropylene market . . . ' and the second is introduced by the words 'The Commission considers that the whole complex of schemes and arrangements decided in the context of a system of regular and institutionalized meetings constituted . . . '. It follows that in the Decision the terms 'framework agreement' and 'single continuing "agreement"' are merely means of expressing the fact that the Commission found the undertakings to which the Decision was addressed guilty of a single infringement whose various elements made up an integrated complex of systems of regular meetings of polypropylene producers, of the fixing of price targets and quotas, which had a single economic purpose, namely to distort the normal movement of prices on the polypropylene market.

72 That is precisely the purport of the whole of the main statement of objections sent to the applicant and to the other undertakings to which the Decision was addressed, in particular points 1, 5, 128, 132 and 151(a). For example, point 1 is worded as follows:

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

The last sentence of point 132 states:

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

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

74 Consequently, the Court considers that in its Decision the Commission merely re-drafted and clarified from the point of view of the law the arguments on which it bases the objections which it has maintained and therefore has not prevented the applicant from stating its position on the objections before the Decision was adopted.

75 It follows that the applicant is wrong to accuse the Commission of having infringed the rights of the defence by raising new objections against it in the Decision.

Proof of the infringement

76 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.

77 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 floor-price agreement, (B) the system of regular meetings, (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 floor-price agreement

(a) The contested decision

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

79 According to the Decision (point 16, fifth paragraph), ICI and Shell admit that there were contacts with other producers as to how the price slide could be checked. According to ICI, a price level may have been suggested below which prices should not be permitted to fall. It is confirmed by ICI and Shell that discussions were not limited to the 'big four'. Precise details of the operation of the floor-price agreement could not be ascertained. However, by November 1977, when the raffia price was reported as having fallen to around DM 1.00/kg, Monte announced an increase to DM 1.30/kg due to take effect on 1 December, and on 25 November the trade press quoted the other three majors as expressing their support for the move, with similar increases planned from the same date or later in December.

80 According to the Decision (point 17, first and second paragraphs), it was at about this time that the system of regular meetings of the polypropylene producers began, and ICI claims that meetings were not held until December 1977 but has admitted that contact was occurring between producers before that date, probably

by telephone and on an *ad hoc* basis. Shell says that its executives 'may have had discussions concerning price with Montedison in or about November 1977 and Montepolimeri may have suggested the possibility of increasing prices and may have sought (Shell's) views on its reactions to any increase'. In the third paragraph of point 17 of the Decision it is stated that while there is no direct evidence of any group meetings being held to fix prices before December 1977, the producers were already informing meetings of a trade association of customers, the EATP, held in May and November of 1977, of the perceived need for common action to be taken to improve price levels. In May 1977 Hercules had stressed that the 'traditional industry leaders' should take the initiative, while Hoechst had indicated its belief that prices needed to rise by 30 to 40%.

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

(b) Arguments of the parties

82 The applicant states that in support of its assertion that an agreement on floor prices was reached in 1977 the Commission adduces only one piece of evidence, namely a handwritten note drawn up by an employee of Hercules (main statement of objections, Appendix 2), who was not a direct witness of the discussions reported in that note. It has not, moreover, been proved that Hercules was a party to that agreement.

83 It adds that the word 'agreement' as used in that note is ambiguous inasmuch as it might merely represent a convergence of views.

84 The applicant draws further comfort from the fact that the price increase provided for in the note did not take place and that there is no evidence that it was postponed. It states that a postponement of that increase can certainly not be inferred from the note of the meeting of EATP on 22 November 1977 (main statement of objections, Appendix 6). The announcement by Monte of a price increase which is reported in that note does not support such an assertion, for two reasons: first, the public announcement of price increases is not prohibited by Article 85(1) of the EEC Treaty and, secondly, there is no basis for the assertion that the announcement was the result of an agreement, especially since Monte was not a member of EATP in 1977. It adds that the announcement by Monte at another meeting of EATP held on 26 May 1978 (main statement of objections, Appendix 7) of a price increase that had already been decided on is entirely irrelevant.

85 It repeats that the document found at the premises of Solvay which is mentioned in point 16, last paragraph, of the Decision cannot be used against it because it was not disclosed to it.

86 The Commission replies that the applicant has put forward no argument casting doubt on the content of the Hercules note describing the agreement on floor prices (main statement of objections, Appendix 2). It stresses that that note is entirely consistent with the announcements of uniform price increases made simultaneously by various producers at the EATP meetings on 22 November 1977 and 26 May 1978 (main statement of objections, Appendices 6 and 7).

(c) Assessment by the Court

87 The Court observes that the text of the note made by the Hercules employee to which the Commission refers is clear and unambiguous. It states:

'Major producers have made agreement (Mont., Hoechst, Shell, ICI) 1. No tonnage control; 2. System floor prices — DOM less for importers; 3. Floor prices from July 1. definitely Aug. 1st when present contracts expire; 4. Importers restrict

to 20% for 1000 tonnes; 5. Floor prices for 4 month period only — alternative is for existing; 6. Com.[panies] to meet Oct. to review progress; 7. Subject [of the] scheme working — Tonnage restrictions would operate next year.'

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

88 Faced with that evidence the applicant has simply maintained that there is no proof of the conclusion of an agreement since the author of the note was not a party to the agreement and the note is therefore unreliable, and the word 'agreement' used in it merely reflects the identity of the undertakings' views regarding the need for a price increase.

89 The Court considers that the applicant's submissions are not such as to weaken the evidentiary value given by the Commission to that note. The fact that Hercules was not a party to the original agreement on floor prices is irrelevant since the Commission expressly uses that note as a written contemporary account of the facts, showing that the producers other than Hercules reached an agreement.

90 Similarly, although the word 'agreement' may in some cases refer to an identity of views it should be observed that in the note it is part of the expression 'made agreement', which can only mean 'concluded an agreement' and thus refers to something more than identity of views, a common intention among the applicant and three other producers on floor prices.

91 Nor does the fact that the agreed floor prices could not be achieved tell against the applicant's participation in the floor-price agreement, since even if that fact is assumed to be established, it would at the most tend to show that the floor prices were not implemented, not that they were not agreed. However, far from asserting that the floor prices were achieved, the Decision (point 16, last paragraph) states that the price of raffia had fallen to around DM 1.00/kg in November 1977.

92 It follows that the Commission has established to the requisite legal standard that in mid-1977 a common purpose emerged among several polypropylene producers, including the applicant, concerning the fixing of floor prices and that in order to do so it did not need to rely on documents which it did not mention in its statements of objections or did not disclose to the applicant.

B. The system of regular meetings

(a) The contested decision

93 The Decision (point 17) states that the system of regular meetings of polypropylene producers began at about the end of November 1977. It goes on to state that ICI claims that meetings were not held until December 1977 (that is to say, after Monte's announcement) but admitted that contact was occurring between producers before that date.

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

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

96 According to the Decision (point 68, second and third paragraphs), at the end of 1982 the 'big four' began to meet in restricted session the day before each bosses' meeting. These so-called 'pre-meetings' provided a forum in which the four major producers could agree a position between themselves prior to the full meeting in order to encourage moves towards price stability by adopting a united approach. ICI admitted that the topics discussed in pre-meetings were the same as those dealt with by the bosses' meetings which followed, but Shell denied that the 'big four' meetings were in any sense preparatory to a plenary meeting or involved coordination on a common stance before the next meeting. The Decision states, however, that the records of some of those meetings (in October 1982 and May 1983) disprove this claim of Shell.

(b) Arguments of the parties

97 The applicant submits that the Commission has not adduced any evidence at all to support its reference to 'a system of regular meetings'. The evidence in the Commission's possession does not show the slightest regularity in the holding and conduct of meetings or the names of participants. For example, according to table 3 of the Decision only six meetings were held in 1978, none in 1979, only one in 1980 and ten in 1981.

98 It repeats that it is in order to remedy the gaps in the evidence that the Commission alleges the existence of a framework agreement, as is shown by the fact that it indicates in its defence that 'it is reasonable to suppose that the meetings on whose subject-matter no details are known (essentially those held between the end of 1977 or the beginning of 1978 and the end of 1981) generally had the same purpose as those on which it does know the details'. That also shows that the Commission has no proof of its allegations concerning the purpose of the meetings held in the years from 1977 to 1981.

99 The applicant submits that in order to determine the purpose of the meetings the Commission relies on notes made by an ICI employee concerning certain producers' meetings, in which the result of the meetings is sometimes described as 'agreed'. It points out, first, that that description may mean that there was unanimity of opinion and, secondly, that the notes cannot objectively reflect the results of the meetings because, for example, of the personal interest of their author in making the results appear better than they were in fact.

100 The Commission states that it is clear from ICI's reply to the request for information (main statement of objections, Appendix 8) that the meetings began in 1977 and that it was suggested that they be pursued on an *ad hoc* basis. Subsequently the meetings became more highly structured, more frequent and more regular. ICI stated in its reply that Hoechst was one of the regular participants in the meetings.

101 It adds that the applicant's participation in the meetings is also attested by several notes of meetings found at the premises of ICI, which are themselves corroborated by various tables found at the premises of ICI and ATO (main statement of objections, Appendices 55 to 61), which include *inter alia* the sales figures of various producers. ICI stated in its reply to the request for information that those figures were provided by the producers themselves.

102 The Commission states that the purpose of those meetings was to agree on target prices, price initiatives and sales volume targets, to compare market shares and to adopt related measures, such as the 'account leadership' system. The meetings were thus concerned with the harmonization of the participants' sales strategies.

103 It adds that the applicant has not given any valid reason to doubt the reliability of the documents produced by the Commission, in particular the notes of meetings drawn up by ICI's employees.

(c) Assessment by the Court

104 The Court observes that ICI's reply to the request for information (main statement of objections, Appendix 8) numbers the applicant, unlike two other producers, among the regular participants in the 'bosses" and 'experts" meetings. That reply must be interpreted as meaning that the applicant participated in meetings from the beginning of the system of 'bosses" and 'experts" meetings, which was instituted in late 1978 or early 1979.

105 ICI's reply to the request for information is corroborated on this point by the mention, next to the applicant's name, in various tables found at the premises of ICI, ATO and Hercules (main statement of objections, Appendices 55 to 61), of its sales figures for various months and years. Most of the applicants admitted in their replies to a written question put by the Court that the tables found at the premises of ICI, ATO and Hercules could not have been drawn up on the basis of statistics from the FIDES data exchange system. Indeed, in its reply to the request for information ICI stated in relation to one of the tables that 'the source of information for actual historic figures in this table would have been the producers themselves'. Moreover, in the course of the proceedings before the Court the applicant, in the face of this serious evidence, never specifically denied being present at the meetings, and it did not deny that they took place.

106 As regards the question whether the applicant participated in the meetings in 1978, the Court should point out that it is clear from a reading of point 18 of the Decision together with the particular objections addressed to Hoechst that it is accused of having participated in them.

107 The Court notes that rather than denying participation in the meetings held between 1978 and 1982 the applicant argues that the Commission has no proof that they were held or of their purpose.

108 The existence of producers' meetings in 1978 is established by ICI's reply to the request for information, which states:

'During the first year (1978) about six *"ad hoc"* meetings took place at about two-monthly intervals between the Senior Managers responsible for the polypropylene business of some producers.'

That reply also indicates that the meetings began in about December 1977:

'Because of the problems facing the polypropylene industry . . . , a group of producers met in about December 1977 to discuss what, if any, measures could be pursued in order to reduce the burden of the inevitable heavy losses about to be incurred by them',

that is to say, immediately after the EATP meeting of 22 November 1977, in which Hoechst participated.

109 The Court further observes that the meetings held in 1978 had the same purpose as the EATP meetings, namely to discuss measures to be taken in order to stifle the losses incurred by the polypropylene producers. ICI's reply to the request for information states:

'It was felt to be essential for producers to consider appropriate means of alleviating this impending crisis which could, unless controlled in some way, lead eventually to the collapse of the polypropylene industry. It was proposed that future meetings of those producers who wished to attend should be called on an "*ad hoc*" basis in order to exchange and develop ideas to tackle those problems .... Generally speaking, however, the concept of recommending "Target Prices" was developed during the early meetings which took place in 1978 ...'.

110 At the EATP meeting on 22 November 1977 the producers indicated that prices were too low and that they could not tolerate them indefinitely. Hoechst made the following statement:

'Yesterday morning, Hoechst announced a European wide modest price increase. The price increase will not bring us to a level which suits us, but we hope that it is going to improve our critical situation.

We hope that this move will not be misinterpreted. We think that it cannot be in the interests of both polymer makers and processors to go on in the way in which we have been during recent months.'

The producers also stressed the need to increase prices and supported Monte's announcement of a price increase.

111 Consequently, the Court considers that the meetings held in 1978 and subsequent years were a continuation for the producers of their statements at the EATP meeting on 22 November 1977.

112 It must also be pointed out that ICI's reply to the request for information shows that those meetings were the point of departure, in terms both of their organization and their purpose, for the system of 'bosses" and 'experts" meetings in which the applicant participated from the end of 1978 or the beginning of 1799 onwards. That reply states that:

'By late 1978/early 1979 it was determined that the "*ad hoc*" meetings of Senior Managers ["Bosses"][of 1978] should be supplemented by meetings of lower level managers with more marketing knowledge ["Experts"].'

and it should be recalled that the idea of recommending target prices, implemented through the system of 'bosses" and 'experts" meetings was developed during the 1978 meetings.

113 Consequently, the Court finds that since the applicant participated in both the EATP meeting of 22 November 1977 and the system of 'bosses" and 'experts" meetings the Commission was entitled to take the view that the applicant had participated in the meetings in 1978 which constituted for the producers a continuation of their statements made at the meeting of 22 November 1977 and enabled them to institute the system of 'bosses" and 'experts" meetings.

114 The Court considers that the Commission was fully entitled to take the view, based on the information which was provided by ICI in its reply to the request for information and was borne out by numerous meeting notes, that the purpose of the meetings was, in particular, to fix 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'.

15 The Court observes that the contents of the notes of meetings made by ICI are confirmed by various documents, such as a number of tables relating to the sales volumes of the various producers and price instructions broadly corresponding in their amount and date of entry into force to the target prices mentioned in those meeting notes. Similarly, the replies of the various producers to the requests for information addressed to them by the Commission bear out in the aggregate the contents of those notes.

16 Consequently, the Commission was able to take the view that the meeting notes found at the premises of ICI reflected fairly objectively what went on at the meetings which were chaired by different members of ICI's staff, which increased the need for them properly to inform those members of ICI staff who did not attend particular meetings about what had transpired at them by making notes of them.

117 In those circumstances it is for the applicant to provide another explanation of the subject-matter of the meetings in which it participated, by putting forward specific evidence such as notes taken by its own employees at meetings which they attended or the testimony of those persons. It must be observed that the applicant has not put forward or offered to put forward such material before the Court.

118 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.

119 Besides the passages set forth above, 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.

120 As regards the particular role played by the 'big four' in the system of meetings, it must be noted that Hoechst does not deny that meetings between the 'big four' took place on 15 June 1981 in the absence of Hoechst, on 13 October and 20 December 1982, and on 12 January, 15 February, 13 April, 19 May and 22 August 1983 (Decision, Table 5, and main statement of objections, Appendix 64).

121 After December 1982, those meetings of the 'big four' took place the day before the 'bosses" meetings, and their purpose was to determine the steps which they could take together in order to bring about a rise in prices, as is shown by the summary note prepared by an ICI employee in order to inform one of his colleagues about what had transpired at a pre-meeting on 19 May 1983 which the

'big four' had attended (main statement of objections, Appendix 101). That note mentions a proposal to be submitted to the 'bosses" meeting on 20 May.

22 It follows that the Commission has established to the requisite legal standard that the applicant participated regularly in the regular meetings of polypropylene producers between the end of 1977 and September 1983, that the purpose of those meetings was, in particular, to set price and sales volume targets and that they were part of a system.

C. The price initiatives

(a) The contested decision

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

24 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, including Hoechst, 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).

125 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).

126 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.

127 The Decision (point 33) then refers to Hoechst'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.

28 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.

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

130 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%.

131 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 in which Hoechst 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).

132 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.

133 According to the Decision (paragraph 40), the applicant also participated in the fifth price initiative of September-November 1982 decided upon at the meeting on 20 and 21 July 1982, the aim of which was to achieve a price of DM 2.00/kg by 1 September and DM 2.10/kg by 1 October, since it was present at the majority

if not all of the meetings held between July and November 1982 in which this initiative was planned and monitored (Decision, point 45). At the meeting on 20 August 1982, the increase planned for 1 September was postponed until 1 October, and that decision was confirmed at the meeting on 2 September 1982 (Decision, point 41).

34 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).

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

36 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).

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

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.

139 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, including Hoechst, reaffirmed complete commitment to the DM 1.85/kg increase. On that occasion, it was agreed that Shell would lead publicly in *European Chemical News* (ECN).

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

141 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.

42 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.

43 The Decision (point 51, third paragraph) states that an internal note obtained at the premises of ATO and dated 28 September 1983 shows a table headed 'Rappel du prix de cota (sic)' giving for 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.

44 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.

45 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

46 The applicant submits in essence that the Commission has failed to prove its participation in the price initiatives. It considers that the evidence put forward by

the Commission does not support its objections, and these are further contradicted by the applicant's actual conduct on the market.

147 As regards the 1979 price initiative, the applicant states that the only item of proof that the Commission has been able to produce is the note of a meeting held on 26 and 27 September 1979 (main statement of objections, Appendix 12) whose text does not reveal whether the DM 2.05/kg price target which it mentions was the individual target fixed by the author of the note, whether it represented the general view or whether, as the Commission maintains, it was the result of agreement among the producers. The applicant points out, however, that the author of the note also observes that it is not possible to achieve that price on 1 October or 1 November. In spite of that, the Commission alleges that there was a price increase on 1 September agreed upon at that meeting.

148 It states that for 1980 the Commission has no evidence of the existence of an agreement on prices.

149 As regards the 1981 price initiatives the applicant argues that the Commission has produced only one piece of evidence, a note of two meetings held in January 1981 (main statement of objections, Appendix 17) which simply contains an indication of a target price which the Commission has been obliged to acknowledge (Decision, point 34) was not achieved.

150 As regards the price initiatives in 1982 and 1983, it points out that the Commission has produced a number of notes made by representatives of certain producers concerning the meetings. It reiterates that it has already stated the reasons why those notes are unreliable and that the word 'agreed' which appears in some of them has several senses and is not necessarily to be understood as meaning an actual agreement, since it may refer simply to a convergence of views. It adds that ICI's reply to the request for information (main statement of objections, Appendix

8) does not reveal the existence of agreements between the participants in the meetings. Finally, it observes that in order to confirm the existence of agreements on price increases the Commission relies on allegedly parallel price instructions issued by the various producers to their sales offices, but that when those price instructions were disclosed to the undertakings they were not told that they might be used as evidence in these proceedings. The applicant considers that they are therefore inadmissible and must be excluded.

51 The applicant states that in view of the disputable and incomplete nature of the evidence on the price agreements the Commission should have verified, by observing the market, whether the undertakings engaged in collective conduct corresponding to the agreements, and in particular whether it can be inferred that the undertakings concerned had the intention to commit themselves. In Hoechst's view the existence of such an intention to commit themselves is contradicted by the fact that for several years the undertakings acted on the market in a way which did not correspond to the alleged agreements.

2 It submits in that regard that although the Commission refused to do so, it is necessary to take into account the actual conduct on the market of the undertakings involved in the proceedings, and in particular the continued price competition. The net sales proceeds broken down by customer and by month in the studies carried out by an independent firm of auditors, Coopers & Lybrand (hereinafter referred to as 'the Coopers & Lybrand audit') is evidence of price formation which differed so much according to the individual case that it decisively refutes the Commission's assertions of uniform collective conduct on the market, as regards both the application of single price targets or minimum prices and the alleged concerted price increases.

3 On the basis of tables showing Hoechst's business relations with three customers in 1982 the applicant concludes that its net prices diverged from the list prices to a degree which varied according to the customer but was very significant, going as far as — 30.7%, and that its net prices fell despite rising list prices and the alleged

concerted price increases, since for every increase in price of DM 0.10, that is to say 4.5%, its net prices fell by from 2.5% to 19.7% depending on the customer.

154 It submits further tables from which it draws the following conclusions: less than 3% of all the quantities concerned were sold at the current list price; slightly less than 23% was sold at a price above the list price, while nearly 75% had to be sold at a price below the current list price. Those tables also show that, of the quantities sold at above list prices, 6.8% were sold at more than 5% above list price, whereas more than half the quantities were sold at prices more than 5% below the current list price and more than a quarter were sold at prices more than 10% below list price.

155 According to the applicant, the micro-economic results of the Coopers & Lybrand audit correspond to the results of a competitive market which a macro-economic analysis would predict, having regard to the relevant basic data, general conditions and economic indicators. It appears from the study carried out by Professor Albach of the University of Bonn that the market results are no different from what could be expected in the event of effective competition on the polypropylene market. On the contrary, those results were for several years the consequence of ruinous competition on price and quantities. That study has been confirmed by a further study by the same professor covering a longer period and more undertakings, in which he also replies to the Commission's objections to his initial study.

156 The applicant concludes from all those studies that the undertakings at no time entered into an agreement on price formation and that the existence of price agreements restricting competition is therefore not proved.

157 It submits that those circumstances make it impossible to regard the alleged uniformity of price instructions as conduct resulting from an agreement. Those

instructions were merely internal circulars intended to inform sales subsidiaries of list prices. The applicant never sent them to customers. Because of the vigorous competition which prevailed on the market, that information which was internal to the undertaking had as little external effect on the competitive process as the alleged agreement.

58 It concludes that in the absence of parallel conduct, Hoechst's conduct was governed exclusively by the competition on the market. The necessary conclusion is thus that there was no conduct resulting from a prohibited agreement or concerted action (see the judgment of the Court of Justice in Joined Cases 29 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraphs 16 to 20).

9 The Commission states that the applicant was one of the regular participants in the meetings of polypropylene producers and that the notes of those meetings show that the price initiatives described in the Decision were agreed upon at them. It adds that the applicant has omitted to mention, alongside the notes of the meetings, the manner in which the price instructions issued after the meetings by Hoechst and the other producers correspond to each other. It considers that that correspondence constitutes additional evidence of the existence of price agreements. The Commission criticizes the manner in which the applicant has discussed the various items of evidence submitted to the Court; these, it says, should not be examined separately but in the context of the system of meetings.

) As regards the applicant's participation in the various price initiatives, the Commission refers to the evidence set out in the Decision. However, it supplements its assertions concerning 1981 by referring to handwritten comments in the margin of a Linz note of 15 May 1981 (main statement of objections, Appendix 21) in which it is stated 'Hoechst und BP und CL[inz] haben in Rom schon begonnen die übrigen Halbzeug-natur Hersteller in Richtung 1.95-2, — zu bewegen! !' ('Hoechst, BP and Linz have already begun in Rome to push the other producers of semi-finished products towards 1.95 — 2') and, as regards the

beginning of 1982, to a Hercules internal note from spring 1982 (main statement of objections, Appendix 22) in which it is stated 'general determination got prices up to DM 2.05 — the closest ever to published target prices'.

161 By way of example the Commission refers to the notes of the meetings of 2 September 1982 and 1 June 1983 (main statement of objections, Appendices 29 and 40) in order to show that the participants in the meetings ensured that each of them was committed to complying with the decisions adopted at those meetings.

162 The Commission states that it cannot accept the applicant's argument that the fact that the cartel had no effect on the market shows that there was no cartel on that market. It reiterates that the agreements made under the cartel were implemented mainly by means of price initiatives and that the applicant has given a distorted impression of the objection raised by the Commission. The Commission states that it has never alleged that all the price initiatives and the related measures decided on by the producers achieved their objectives. On the contrary, the Commission expressly stressed in points 74, 91 and 92 of the Decision the difficulties encountered by the producers when they sought to impose price targets on the market. The applicant's assertions denying that the cartel had any effect on the market and thus concluding that there was no cartel agreement are incorrect for two reasons: first, there may very well be ineffective cartels, which nevertheless fall under the prohibition laid down in Article 85(1) of the EEC Treaty; secondly, the cartel found by the Commission to exist did not have as few repercussions as the applicant asserts.

163 It submits that the price tables taken from the Coopers & Lybrand audit in no way contradict the Commission's findings; on the contrary, they confirm those findings. The Commission considers that the 1982 price initiatives were in fact successful. The discrepancies between the applicant's price instructions and the prices actually achieved in 1982 do not contradict the Commission's findings. The reasons for that are set out in detail in point 74 of the Decision. So long as there were no price initiatives, there were considerable variations in the price instructions

('list prices') of different producers in different circumstances. At that time those instructions had no significance for the cartel; it was only in connection with the price initiatives that they took on significance. As regards 1982, the Commission has been able to establish the existence of only two price initiatives: an unsuccessful one in June and a partly successful one in October.

64 Finally, the Commission denies that the second study prepared by Professor Albach is conclusive, for the reasons stated in the Decision and for three further reasons: its excessively restricted geographic scope, the limits to the possibilities offered by econometric methods as regards the simulation of competitive prices and the impossibility of determining the share of general overheads borne by each product.

(c) Assessment by the Court

65 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'.

66 Since it has been established to the requisite legal standard that the applicant participated in those meetings, it cannot assert that it did not support the price

initiatives which were decided on, planned and monitored at those meetings, without providing any evidence to corroborate that assertion. In the absence of such evidence, there is no reason to believe that the applicant would not have supported those initiatives, unlike other participants at the meetings.

167 In this regard, it must be noted that the applicant has raised two arguments to show in general that it did not, at the regular meetings of polypropylene producers, subscribe to the price initiatives agreed upon. It argues first that it took no account of the outcome of the meetings in determining its conduct on the market as regards prices, which was entirely competitive, and, secondly, that the purely internal nature of its price instructions means that they cannot be regarded as conduct on the market, especially since it is proved that they had no effect.

168 Neither 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. Even if the first argument were supported by the facts it would not gainsay the applicant's participation in the fixing of price targets at the meetings but would at most tend to show that the applicant did not put into effect the results of those meetings. Indeed, the Decision in no way asserts that the applicant charged prices which always corresponded to the price targets agreed upon at the meetings, which shows that the contested decision does not rely on the applicant's implementation of the outcome of meetings in order to establish that it participated in the fixing of those price targets.

169 As regards the second argument put forward by the applicant, the Court considers that the text of the price instructions issued by the applicant (letter of 29 March 1985, Appendices Hoechst I6, I7, I8 and I9) unambiguously show that they were intended for customers. They include, for example, the following: 'Bitte informieren Sie Ihre Kunden umgehend und teilen Sie uns die Marktreaktion mit. Wir sind z. Zt. praktisch ausverkauft' ('Please inform your customers immediately and let us know the market reaction. For the moment we are practically sold out').

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

171 The Court also observes that the price instructions issued by the various producers were mentioned in the Commission's letter of 29 March 1985 which was sent to the applicant and supplemented the main statement of objections. The disclosure of those instructions, attached to the letter, put the applicant on notice that they could be used as evidence for the objections raised against it.

172 As regards the applicant's participation in the July-December 1979 price initiative, the Court has already held that the Commission has proved to the requisite legal standard the applicant's participation in the meetings held in 1979. It is also apparent from the concordant price instructions issued by the applicant and by ATO, BASF, ICI, Linz and Shell that the initiative intended to achieve DM 2.05/kg on 1 September 1979 was decided on and announced at the end of July. The existence of that initiative and its postponement to 1 December 1979 are proved by the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12), in which it is stated: '2.05 remains the target. Clearly 2.05 not achievable in Oct., nor in Nov. Plan now is 2.05 on 1/12'.

173 It must be added that the Decision does not accuse the applicant or other producers of having participated in price initiatives in 1980. The applicant's remarks to the effect that the Commission has no proof of such initiatives is therefore irrelevant.

174 The Court further observes that by participating in the meetings in 1980 and the January 1981 meetings at which the price initiative for the beginning of 1981 was decided on, organized and monitored the applicant took part in that price initiative. The note of the two meetings in January 1981 (main statement of objections, Appendix 17) states:

'Whilst all the evidence pointed to actual prices not reaching the previous target levels in February it was agreed that the DM 1.75 target should remain and that DM 2.00 should be introduced without exception in March.'

175 It should also be observed that the manner in which the price instructions of different producers correspond to each other permits the conclusion that those price initiatives were implemented by the producers.

176 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.

177 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.

178 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.

179 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 continued until November 1983.

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

(a) The contested decision

180 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.

181 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.

182 Although it recognizes that there were no local meetings in Germany, the Decision (point 20) asserts that Hoechst remained in close contact with BASF and Hüls and adopted with them a common position in some matters such as quotas.

(b) Arguments of the parties

183 The applicant submits that the Commission has not proved the existence of a system of 'account leadership' or its participation in such a system. The evidence adduced by the Commission does not support those objections. For example, the note of the meeting of 2 September 1982 (main statement of objections, Appendix 29) speaks at most of a proposal, like the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33), the text of which itself indicates that it was no more than a proposal since it states that 'the idea of account leadership was proposed'. It adds that the conclusions which the Commission seeks to draw from the fact that the names of certain customers are mentioned in that document

are unfounded since only very few customers are mentioned and they are not the applicants most important customers.

184 It also disputes the evidentiary value of the note of a meeting which it states was held on 3 May 1983 (main statement of objections, Appendix 37), stating that it involved an exchange of information on the period from March to April 1983, which had already passed, and thus is not reprehensible from the point of view of competition law.

185 Finally, the applicant argues that a study entitled 'Overlapping Customers' carried out by Coopers & Lybrand shows that the 'account leadership' system was never implemented, especially as regards its customer Steen, since it shows that the latter obtained supplies from different producers at varying prices. It concludes that the Coopers & Lybrand audit further indicates that the movements in sales and prices in relation to 'key customers' does not reveal the application of target prices by means of an 'account leadership' system.

186 The Commission submits that, contrary to the applicant's assertions, the note of the meeting of 2 September 1982 (main statement of objections, Appendix 29) shows that the 'account leadership' system was indeed adopted by the producers, since it is stated that the system was 'generally agreed' and a table is attached showing the 'account leaders' for various customers; in that table the applicant appears as the 'account leader' for its customer Steen.

187 According to the Commission, the adoption of that system is corroborated by the note of a meeting which it says was held on 3 May 1983 (main statement of objections, Appendix 37), in which the applicant is once again mentioned as Steen's main supplier. The implementation of the system is confirmed by ICI's reply to the request for information (main statement of objections, Appendix 8), which indicates that the system operated for two months.

188 Finally, the Commission points out that instead of disputing the accuracy of the facts it has put forward the applicant simply relies on the Coopers & Lybrand studies, which show at most that for a certain period the applicant was faced with attacks from a competitor which was offering lower prices to its customer Steen, which does not show that there was no agreement on the system but merely that its implementation met with difficulties, which the Commission has never denied.

(c) Assessment by the Court

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

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

191 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.

192 It should be added that the applicant's argument that it was not involved in the system because it was not designated 'account leader' for many of its customers is irrelevant. The relevant question is not whether the customer is important from the supplier's point of view but whether the supplier, in this case Hoechst, is important from the customer's point of view. By simply asserting that it was not named 'account leader' for several of its most important customers the applicant has not refuted the Commission's assertion that it was the main supplier of its customer Steen, for which it was named 'account leader' (see main statement of objections, Appendix 33, table 3). Moreover, the applicant has neither contended nor demonstrated that it was the principal supplier of one of its important customers for which it was nevertheless not designated 'account leader'.

193 The implementation, at least in part, 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 *inter alia*:

'*Belgium.* A long discussion took place on the 5 Belgian A/Cs. (...) Generally speaking raffia prices appeared to be from [BFR] 32.50 to 34.50 and fibre prices from 37 to 37.50. The point was made that some other accounts were lower than the target customers. It was agreed that contenders would quote BFr 36 in May with non-contenders offering 38'.

'*Denmark.* 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 ICI's reply to the request for information (main statement of objections, Appendix 8), in which it is stated in relation to the latter passage:

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

94 The Court further observes that the applicant does not specifically deny having taken part in other decisions concerning measures designed to facilitate the implementation of the price initiatives.

195 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

196 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.

197 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.

198 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).

199 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.

200 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).

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

market shares had reached a relative equilibrium, described by ATO as a 'quasi-consensus', and, among the majors, ICI and Shell remained at about 11% with Hoechst slightly below at 10.5%). Monte, always the largest producer, had advanced slightly to take a 15% market share compared with 14.2% the previous year.

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

203 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).

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

(b) Arguments of the parties

205 The applicant claims that the documents produced by the Commission do not prove the existence of a quota system. It is quite clear that many of those documents were drawn up after the expiry of the period to which they relate, on the basis of information available *a posteriori*. That is the case of the documents on which the Commission relies in order to establish the existence of quota agreements for 1979 and 1980 (main statement of objections, Appendices 17, 55 and 59). Moreover, the use of the word 'proposal' in a number of documents shows unambiguously that they were proposals and not agreements. That is true of the tables for 1980, 1981 and 1983 (main statement of objections, Appendices 56, 62 and 33). The word 'agreed' used in various notes of meetings and tables is ambiguous inasmuch as it may refer not to actual agreement but instead to a convergence of views, as the applicant has already pointed out. Similarly, the word 'acceptable' which appears in a table attached to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) does not mean 'accepted'. Finally, in order to establish the existence of quota agreements for certain periods the Commission has produced documents which in fact relate to other periods (main statement of objections, Appendices 17, 40, 55 and 59).

206 The applicant concludes that since there are no documents which constitute valid proof as regards 1979 and 1980 and since the Commission does not allege the existence of quota agreements for 1981 and 1982, all it needs do is establish that no agreement has been proved for the first half of 1983. In that regard it has already indicated why the note of the meeting of 2 December 1982 has no

evidentiary value. It adds that the Shell internal document produced by the Commission (main statement of objections, Appendix 90) does not prove the existence of a quota agreement because it is an internal document. The note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) does not provide evidence of a quota agreement for the second quarter of that year either, since it was drawn up at the end of that period and the figures disclosed at that meeting relate exclusively to the period which had passed.

207 The applicant states that in view of the weakness of the evidence produced by the Commission, the Commission should have verified whether the undertakings pursued collective conduct on the market which corresponded to the alleged quotas agreed upon at the meetings. Tables 1 and 8 of the Decision themselves show that the conduct of the undertakings diverged from the allegedly agreed quotas, and producers often remained below their alleged quota.

208 The applicant thus observes that the movement in market shares between 1979 and 1983 illustrated in table 1 of the Decision shows the extent to which it is unlikely that the alleged quota agreement was concluded. It is apparent from that table that the applicant lost 2.1% of the market between 1979 and 1983, which represents a loss of 17% in relation to its market share in 1979. For the period from 1977 to 1983 the losses of market share are even greater. Contrary to the Commission's view (point 91 of the Decision), those losses cannot be explained by concessions made to new entrants. It would be illogical and contrary to the interests in issue to conclude that Hoechst unilaterally gave up market share whereas ICI and Shell largely maintained their position or limited their loss to a maximum of 0.5%, while Monte, the largest producer, even increased its market share, again according to the information given by the Commission itself in table 1 of the Decision.

209 Similarly, it points out by way of example that table 8 of the Decision, which sets out the producers' actual sales for 1980, shows that all the producers but one remained well below the quota allegedly agreed. It adds that in none of the tables

do actual sales correspond to the targets allegedly agreed, and the market shares of the various undertakings fluctuated constantly. The Court of Justice has held that the divergence between actual market shares and the quotas allegedly agreed has considerable evidentiary value where the accusation concerns quota arrangements (judgment in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 150 et seq.).

210 The applicant concludes from that analysis that the conclusions drawn by the Commission from tables 1 and 8 of the Decision are incorrect, since those tables show that no quota agreement was in fact made.

211 Finally, the applicant seeks to show, mainly on the basis of the Professor Albach's study, that the market was extremely competitive. Since there was very vigorous price competition, Hoechst sees no reasonable ground which could have led it spontaneously to give up market share without at the same time taking advantage of that to reduce price competition. Instead, the loss of market share by the applicant represented the abandonment of certain market positions under the pressure of competition.

212 The Commission, on the other hand, maintains that quota agreements were concluded for 1979, 1980 and 1983. For 1981 and 1982 it considers that no final agreement was reached but that provisional solutions were adopted.

213 As regards 1979, the Commission considers that it is clear beyond doubt from the table headed 'Producers' Sales to West Europe' (main statement of objections, Appendix 55) that Hoechst participated in a quota system. That table sets out for the various producers the sales in 1976, 1977 and 1978 which were used as the basis for the allocation of market shares for 1979. The table also contains a column showing a 'revised target' for that year. The Commission thinks that the target quotas for 1979 were drawn up in 1979, not in 1980. That document is also

corroborated by a note of a producers' meeting held on 26 and 27 September 1979 (main statement of objections, Appendix 12) which shows that the question of target tonnages was discussed and that the participants recognized that a strict quota system was essential.

214 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. According tom the Commission, that constitutes proof of a quota agreement for 1980.

215 The Commission recognizes that there was no quota agreement covering the whole of 1981. It states, however, that the producers agreed as a temporary measure to limit their monthly sales for February and March to one twelfth of 85% of the targets which had been agreed for the previous year, as is shown by the note of the two January 1981 meetings. During the rest of the year there was a system of continuous monitoring of the volumes placed on the market by the producers.

216 In 1982 the situation was the same as in 1981. Although no quota agreement was reached, the producers' market shares were monitored at the meetings on 9 June and 20 August 1982 (main statement of objections, Appendices 25 and 28) and at the meetings in October, November and December 1982 (main statement of objections, Appendices 31 to 33). The Commission maintains that market shares were relatively stable during that period. That is made clear in an ATO document (main statement of objections, Appendix 72) which describes the situation as one of 'quasi-consensus'. The Commission also refers to the findings made in points 58 and 59 of the Decision.

217 The Commission goes on to assert that it has the sales figures which the various producers sought to achieve and their proposals in that respect for themselves and other producers which they prepared at ICI's request and provided to it with a view to the conclusion of an agreement on quotas for 1983 (main statement of objections, Appendices 74 to 84). The various proposals were then processed by computer to obtain an average which was compared with the aspirations of each producer (main statement of objections, Appendix 85). To those documents the Commission adds an ICI internal note headed 'Polypropylene framework 1983' in which ICI outlines a future agreement on quotas and another ICI internal note headed 'Polypropylene framework' (main statement of objections, Appendix 87), which show that that company considered a quota agreement indispensable.

218 The Commission submits that there are several consistent indications of the existence of an agreement for the first quarter. In that regard it refers first of all to table 2 attached to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33). That table indicates a quota for each producer, marked, in most cases, with an asterisk referring to the note 'acceptable' at the foot of the table. It may be inferred that an important step had been taken in the direction of an agreement on quotas since all the producers had approved the principle of such an agreement and most of them had accepted the individual quota allocated to them. It also appears from an ICI internal note of December 1982 (main statement of objections, Appendix 35) that from the beginning of 1983 an agreement on quotas was regarded by ICI as indispensable for the proper functioning of the cartel. Those documents show that considerable efforts were made in order to reach agreement on quotas for the first quarter of 1983.

219 The Commission maintains that those proposals resulted in an agreement; in respect of the first quarter it relies on a Shell internal document (main statement of objections, Appendix 90) which shows that the latter subscribed to a quota agreement for 1983 since it instructed its subsidiaries to reduce their sales in order to comply with its quota ('This compares with W. E. sales in 1Q of 43 kt: and would lead to a market share of approaching 12% and well above the 'aagreed Shell target of 11%'). In order to function and to obtain the agreement of all the undertakings concerned such a quota agreement must, says the Commission, apply to all the undertakings in a sector. Consequently, Hoechst must necessarily have participated in the agreement.

220 The same reasoning also applies in respect of the second quarter of 1983, and is corroborated by the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) and by a table setting out '1983 aspirations' on the basis of sales figures for the first half of 1982 (main statement of objections, Appendix 84), which, in the Commission's view, shows that the exchange of information on quantities sold was used to monitor quotas.

221 As regards Hoechst's arguments concerning the decline in its market share, the Commission considers that they do not cast doubt on its findings since an ICI note (main statement of objections, Appendix 98) clearly shows the strategy of the 'big four' in relation to market share. They explicitly took into account the fact that conclusion of an agreement on sharing the market might not necessarily bring success in all respects. Moreover, table 8 of the Decision shows that the market shares of the western European polypropylene producers were remarkably stable during the period covered by the quota agreements. The fluctuations mentioned in Professor Albach's study on the German market were made up for by corresponding fluctuations on other markets.

(c) Assessment by the Court

122 It has already been found that the applicant participated from the outset 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.

123 Along with Hoechst's participation in the meetings, its name appears in various tables (main statement of objections, Appendices 55 to 61) whose contents clearly show that the tables were drawn up for the purpose of determining sales volume targets. Most of the applicants have admitted in their replies to a written question from the Court that it would not have been possible to draw up the tables found at the premises of ICI, ATO and Hercules on the basis of the statistics available under the Fides system. In 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 Hoechst is concerned, been provided by it in the course of the meetings in which it participated. Consequently, the applicant's argument that the abovementioned tables were internal documents drawn up on the basis of Fides statistics cannot be upheld.

124 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.

125 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.

226 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. The fact that the figures representing the applicant's 1980 target differ between the table of 26 February 1980, where it is 165 kilotonnes, and the note of the meetings in January 1981, where it is 142.8 kilotonnes, does not invalidate that finding since in the course of 1980 the producers' forecasts of market volume for that year had to be revised downwards, which entailed a proportionate downwards revision in quotas allocated to the applicant and the other producers. In February 1980 the quotas were fixed on the basis of a market of 1390 kilotonnes in the column 'agreed targets 1980', whereas in January 1981 it was apparent that the market amounts only to 1 200 kilotonnes.

27 It should be added that it appears from the same note of the meetings in January 1981 that Hoechst provided its sales figures for 1980 so that they could be compared with the sales volume targets fixed and accepted for 1980.

28 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.

29 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').

230 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'.

231 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.

2 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.

3 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 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.

4 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.

235 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).

236 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'.

Moreover, the applicant itself stated at that meeting that:

'Trying to stabilize German market by selling extra tonnage in ROW markets — already have achieved 50% of 1982 target for overseas sales. In 1982 will not sell more in total than in 1981, might possibly be less. Stocks currently 1.5 months + living from hand to mouth on copolymers. Don't expect too much of a

drop in demand in Germany in Summer months + therefore no pressure to seek volume for next 3-5 months or even for remainder of year.'

37 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.

38 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'. The ICI internal note of December 1982 (main statement of objections, Appendix 35)

deploring the absence of a quota agreement does not contradict that finding, since what is deplored is the lack of an agreement for 1983, as appears from the following passage:

'I feel it is essential for the meeting [clearly, the meeting of 21 December 1982] to decide on the first quarter volume as any delay until January would mean that a very significant part of the agreement period will already have been committed .... Also, the agreement must start in January if any benefits accruing from it will be recognized before the end of March.'

239 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.

240 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 in table 2 attached to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) the note 'acceptable' appears beside the quota assigned to the applicant's name.

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

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

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

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

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

243 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.

244 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).

245 The foregoing considerations indicate that ICI's fears, expressed in its internal note of December 1982 (main statement of objections, Appendix 35), that a quota system might not be put in place for 1983 were unfounded and that the producers succeeded, despite divergent initial negotiating positions (main statement of objections, Appendices 74 to 84) in establishing such a system after the compromise proposals considered acceptable by some producers (main statement of objections, Appendix 33, table 2) were eventually accepted by all of them.

246 It should be added that in the case of the applicant the note 'acceptable' which appears opposite its name in table 2 of the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) does express its consent to the quota proposed for the first quarter of 1983, since that note is followed by the words: 'OK for Q1 but 10-88% too low for year as a whole'.

47 The applicant's arguments based on the decline in its market share and the differences between the quotas allegedly allocated to it and its actual sales are not such as to disprove its participation in the fixing of sales volume targets. The Decision does not accuse the producers of having observed the quotas but of having agreed on them.

48 As regards more specifically the decline in the applicant's market share, the Court observes that the 'big four' were prepared to reduce their market share in order to obtain an agreement on quotas. That is apparent from an ICI internal note (main statement of objections, Appendix 63) describing the negotiations for the introduction of a quota system in 1981, according to which:

'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 small producers... also tempered their demands'.

Similarly, the ICI internal note headed 'Polypropylene Framework' (main statement of objections, Appendix 87) states that:

'The Big Four represent some 50% of the total. So it is most important that they are settled + can present a united front to the rest. For this purpose it would be helpful if MP, Anic-SIR + Fina were regarded as a group. Hoechst should not expect to recover all the lost ground in one year + certainly not be ahead of ICI + Shell. L."s view is 11% even for ICI, Shell + Hoechst.'

249 Furthermore, 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.

250 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.

251 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.

F. Conclusion

252 It follows that the Commission has proved, to the requisite legal standard, that all the findings of fact which it made in the contested decision against the applicant are correct and that, consequently, contrary to the applicant's contention, it observed the rules governing the burden of proof. It also follows that the

Commission did not infringe the presumption of innocence laid down in Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

A. Legal characterization

(a) The contested decision

253 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).

254 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).

255 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.

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

257 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).

258 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).

259 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.

260 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.

261 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).

262 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).

263 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).

264 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).

265 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.

266 In the Decision (paragraph 88, first and second 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 realise 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

267 The applicant contends that the Commission has left entirely open in the Decision the question whether the acts of which the undertakings are accused constitute an agreement or a concerted practice and that it has adduced evidence of neither one nor the other in claiming both. The distinction between an agreement and a concerted practice is not, as the Commission maintains, 'an irrelevant classification dispute', since these two concepts constitute two alternative applications of Article 85(1) for which there are different conditions, as was indicated by Advocate General Darmon in his Opinion in Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405 and by Advocate General Reischl in Joined Cases 209 to 215 and 218/78 *Van Landewyck* (cited above).

268 It considers that the Decision is marred by an internal legal contradiction since in respect of a single actual course of conduct it accuses the undertakings of both an agreement and a concerted practice, as if these two possible characterizations of the facts had the same substance and were thus freely substitutable. By doing so the Commission evaded the obligation to adduce evidence of one or other or of both categories of infringement, although their constituent elements are different and they are substantially different manifestations of restrictions on competition.

69 The applicant argues that an 'agreement' presupposes a meeting of minds and a legal or at least quasi-legal intention to be bound on the part of the parties. An agreement is in itself anti-competitive by reason of its aim of restricting competition.

70 It states that the concept of a 'concerted practice' refers to a form of coordination between undertakings which 'knowingly substitutes for the risks of competition practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to

the nature of the products, the importance and number of the undertakings and the size and nature of the said market' (judgment of the Court of Justice in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie*, cited above, paragraph 174). A concerted practice thus consists of two elements, a 'practice' and a 'concert', which have independent meanings. A 'concert' must thus be accompanied by conduct on the market.

271 According to the applicant, there must also be a causal link between the alleged concert and the practices observed. The Court of Justice has held that actual conduct common to the participating undertakings is of the essence of the concept of a concerted practice. A concerted practice cannot therefore be entirely dissociated, in its very conception, from its actual effect on conditions of competition within the common market (judgments in Case 48/69 *ICI* v *Commission*, cited above, paragraphs 65 et seq.; Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie*, cited above, paragraph 180; and Case 172/80 *Züchner* [1981] ECR 2021, paragraph 21).

272 It adds that, contrary to the Commission's view, a finding of parallel conduct does not operate simply to reduce the burden of proof by the Commission of prior collusion. It is clear from the case-law of the Court of Justice (judgments in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie*, cited above, paragraph 180; Case 172/80 *Züchner*, cited above, paragraph 21; and Joined Cases 29 and 30/83 *CRAM and Rheinzink*, cited above, paragraph 20), correctly interpreted, that the undertakings' parallel conduct on the market is an independent constitutive element of a concerted practice. There is no judgment in which the Court of Justice has relied purely on the existence of collusion, without finding corresponding conduct on the market, in order to find concerted practices within the meaning of Article 85(1) of the EEC Treaty. Accordingly, a concerted practice becomes relevant for the purposes of competition law only once it has been implemented on the market. That 'plus' at the level of the market corresponds to a 'minus' from the point of view of the requirements of consensus and intention to be bound, as Advocate General Mayras pointed out in his Opinion in the dyestuffs case (Case 48/69 *ICI* v *Commission*, cited above, p. 671).

273 The applicant argues that the Commission's view that it is not necessary, in order to prove a concerted practice, to find conduct on the market resulting from the concert and that 'contact' with a view to restricting competition, that is to say the mere exchange of information, is sufficient is not consistent with the wording or the intent of Article 85(1). To accept, as the Commission suggests, that that provision prohibits simple consultation among undertakings would render nugatory the special provisions on agreements and decisions of associations of undertakings, which are always preceded by consultation, and would make the mere attempt to organize the conclusion of an agreement restricting competition an offence, by reason of the coordination necessarily attendant on such an attempt. The wording of Article 85(1) of the EEC Treaty, however, requires the conclusion of an agreement restricting competition.

274 It considers that the Commission cannot object that that interpretation makes actual restriction of competition itself the substance of a concerted practice and a precondition for its existence. In the applicant's view, the fact that the agreement or conduct has the object or effect of restricting competition is a supplementary factor which is added to the existence of an agreement or a concerted practice. Accordingly, the conduct on the market itself must have the object of restricting competition.

275 The applicant submits that in this case the Commission committed a fundamental error in concluding from the fact that there was an exchange of information on prices and market shares, organized by way of agreement or collusion, that there was an agreement or a concerted practice regarding prices and market shares. It is highly doubtful whether the information exchanged at the meetings, even in so far as it concerned a future practice, could have been of such a nature as to dispel the parties' uncertainty regarding their competitors' conduct on the market and thus eliminate the risks of competition. Since the actual functioning of the market was characterized by individual and distinct conduct on the part of the producers in response to competition, and each participant in the meetings was conscious of that fact, none of them could at any time have expected or even hoped to substitute 'practical cooperation between them for the risks of competition'. Even if there was a concert in the sense in which that term is understood by the Court of Justice, there was no practice corresponding to that concert. In the absence of any parallel conduct, the applicant's conduct was governed exclusively by competition on the market. The necessary conclusion is therefore that there was no

conduct resulting from a prohibited agreement or concerted practice (judgment of the Court of Justice in Joined Cases 29 and 30/83 *CRAM and Rheinzink*, cited above, paragraphs 16 to 20).

276 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.

277 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).

278 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.

279 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 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.

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

281 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.

282 From this the Commission concludes that, as far as the question of evidence is concerned, the agreement and the concerted practice may be proved by means of

both direct evidence and circumstantial evidence. In the present case, it had no need to use circumstantial evidence, such as parallelism of conduct on the market, since it possessed direct evidence of the collusion consisting in particular of the meeting notes.

283 The Commission asserts that it is clear from the grounds of the Decision that it found that there was a framework agreement accompanied by factors characteristic of individual agreements and concerted practices, all of which made up a complex situation described in Article 1 of the Decision by the terms 'agreement' and 'concerted practice'.

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

(c) Assessment by the Court

285 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'.

286 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.

287 Since it is clear from the case law of the Court of Justice that in order for there to be an agreement within the meaning of Article 85(1) of the EEC Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (see the judgment in Case 41/69 *ACF Chemiefarma* v *Commission*, cited above, paragraph 112, and the judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 86), this Court holds that the Commission was entitled to treat the common intentions existing between the applicant and the other polypropylene producers, which the Commission has proved to the requisite legal standard and which related to 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.

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

289 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).

290 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.

291 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.

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

293 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.

294 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.

295 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.

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

B. Restrictive effect on competition

(a) The contested decision

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

(b) Arguments of the parties

298 The applicant maintains that the various studies which it has submitted show that the alleged agreements and concerted practices had no effect on competition, which operated in an entirely normal manner throughout their duration, and that its own conduct on the market was competitive.

299 The Commission denies that the polypropylene producers which participated in the cartel did not adjust their conduct on the market in accordance with the agreements and contacts between them and that these had no effect on competition. All the price instructions available for the applicant correspond perfectly to the agreements made at the meetings, and there is no indication that the situation was different during the periods for which it has no such instructions. That conduct may not always have had the intended result, but even when it did not the producers based their negotiations with customers on the agreed prices. The essential factor is not so much the success of the initiatives agreed upon as the objective of restricting competition which those initiatives were intended to help achieve. The same is true of the quota agreements, as is shown by table 8 of the Decision. Although the Commission acknowledges that the cartel did not always have the effect of restricting competition, it considers that that is of little relevance to the application of Article 85(1) of the EEC Treaty, since it is sufficient that the cartel should have had the purpose of restricting competition.

(c) Assessment by the Court

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

301 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.

302 The Court points out that it is clear from its assessments relating to the findings of fact made by the Commission that the purpose of the regular meetings which the applicant attended together with competitors was to restrict competition within the common market, in particular by fixing price and sales volume targets, and that its participation in those meetings was therefore not free of anti-competitive purpose within the meaning of Article 85(1) of the EEC Treaty.

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

3. *Conclusion*

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

The statement of reasons

305 The applicant observes that under Article 190 of the EEC Treaty the Commission is required to state the reasons for its decisions. The purpose of that obligation is both the protection of the person concerned and the proper administration of justice (judgment of the Court of Justice in Case 18/57 *Nold* v *High Authority* [1959] ECR 41). In order to enable the Community court to exercise its supervisory jurisdiction to the full the statement of reasons must therefore contain a detailed and precise statement of the factual and legal considerations which led to its adoption. The Commission must state clearly why it considers that well-founded and relevant objections should not be upheld.

306 In this case it considers that the Commission has infringed its obligation to state reasons by disregarding the whole of the statement of the facts that the applicant and the other undertakings submitted, which proved, by means of thorough and unassailable experts' reports, that the alleged agreements or concerted practices had no perceptible effect on the market. For example, the Commission did not trouble to refute Professor Albach's study of the German market, on which the applicant operates, a study which contains important information; nor did it refute the Coopers & Lybrand audit and another study carried out by that firm on the deliveries made by various producers to various customers and on the net prices which were invoiced.

307 The applicant considers that since the Commission relied in its Decision on opposite conclusions it cannot have considered that the results of the study were irrelevant. It should therefore have analysed them in its assessment of the evidence and stated on the basis of what findings of fact it considered them to be refuted.

308 According to the applicant, the Commission cannot justify that failure to state reasons by alleging the reports to be irrelevant, since in the Decision the Commission itself, far from regarding the real market prices as irrelevant, makes a comparison between the target prices allegedly agreed upon and the prices achieved (points 74, 90 and 91 and table 9), and attempts to minimize the extent and frequency of the divergences from the target prices.

09 According to the Commission, the applicant's view that in order to constitute a breach of Article 85(1) of the EEC Treaty an infringement must have an effect on the market is based on a fundamentally incorrect conception. The Commission considers that in order for there to be a breach of Article 85(1) of the EEC Treaty it is sufficient that the object of the agreement or concerted practice should be to restrict competition. Accordingly, the analysis of Coopers & Lybrand regarding the effect of the cartel on the market is irrelevant, except in relation to the fines, which explains why the Commission replied to it in points 72 to 74 and 90 to 92 of the Decision.

10 The Commission also considers that it has explained in detail its point of view regarding the study made by Professor Albach (Decision, point 69).

11 Finally, in its rejoinder the Commission points out that the Decision is based on the existence of agreements made in the context of a cartel whose object was to restrict competition but whose effect was only a limited restriction of competition. In so far as the Decision is focused not on the effects of the cartel on the market but on purpose for which the agreements were entered into, those studies are of limited value.

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

313 It is clear from the assessments of this Court relating to the findings of fact and the application of Article 85(1) of the EEC Treaty made by the Commission in the contested measure that the Commission took full account of the applicant's arguments 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.

314 Consequently, this ground of challenge must be dismissed.

The fine

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

1. *The limitation period*

316 The applicant maintains that, if the Commission's investigation began on 13 October 1977, any infringements of Article 85(1) of the EEC Treaty committed before 13 October 1978 are time-barred. It is solely in order to evade the rules on limitation periods that the Commission (wrongly) alleges that there was a single continuous agreement characterized by a framework agreement concluded in 1977.

317 The Commission argues that this was a continuous infringement in respect of which time begins to run only when the infringement is terminated.

18 The Court notes that under Article 1(2) of Regulation No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (Official Journal L 319, p. 1), the five-year limitation period applying to the Commission's power to impose fines begins to run, in the case of continuing or repeated infringements, on the day on which the infringement ceases.

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

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

2. *Duration of the infringement*

21 The applicant maintains that the Commission wrongly assessed the duration of the infringement, in taking the view that it began in the middle of 1977 and came to an end in December 1983. The Commission cannot, it says, include in that duration the period from the end of 1977 to the end of 1979, since in the absence of valid evidence it has not made specific accusations in respect of those two years. Furthermore, even within the period from 1979 to 1983 the applicant considers that account must be taken of the fact that according to the findings made in the Decision itself the price initiatives were observed for only 26 months out of 72.

22 The Commission maintains that it correctly assessed the duration of the infringement and that it was particularly long in the applicant's case. It considers that the infringement continued even when it was not affecting the market and that the determination of its duration should not be confined to the duration of the various price initiatives.

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

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

3. *The gravity of the infringement*

A. The applicant's limited role

325 The applicant claims that the grounds set out by the Commission regarding the fixing of the fine contain no finding relating specifically to it. Hoechst is picked out among the undertakings concerned only as one of the 'big four'. However, the Commission is in error regarding the significance of its membership of that group. Although the 'big four' accounted for about half of all production they had no latitude enabling them to avoid the constraints of competition or giving them decisive influence over the conduct of their competitors. The Commission has no evidence for its assertion that they had parallel interests and acted together.

326 It considers that the Commission cannot conclude, from the false premise that an agreement on floor prices was made in 1977, that the 'big four' took the initiative in a comprehensive cartel. The Commission's assertion that the 'big four' had prior conversations to prepare the subject-matter of subsequent meetings and that they agreed on a common attitude is a simple supposition for which there is no evidence. The few documents concerning those meetings show instead that the 'big four' played no leading role, as is confirmed by the Commission's findings regarding the proposal for a system of 'account leadership', which did not come from one of the 'big four' (Decision, point 27, second paragraph).

27 It further maintains that it did not take part in the 'account leadership' system, which diminishes the gravity of the infringement.

28 In order to justify the variation in the fines imposed on the undertakings the Commission points out that Hoechst was one of the 'big four' who played a particularly active role in the cartel and gave themselves particular responsibility in its operation. The same fine was thus imposed on Hoechst as on Shell, lower than that imposed on ICI and Monte, which played an even more predominant role in the cartel.

29 Finally, the Commission states that it cannot take into consideration the applicant's objection that its participation in the infringement was not sufficient to justify the fine imposed. The Court of Justice has held that any concrete participation in an infringement — even passive acquiescence which facilitates an infringement — is sufficient to warrant the imposition of a fine (judgments in Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131 and in Joined Cases 32/78 and 36 to 82/78 *BMW Belgium S. A. and Others* v *Commission* [1979] ECR 2435). Moreover, in determining the amount of each individual fine to be imposed the Commission expressly considered the extent of each undertaking's participation, taking into account considerations of proportionality (Decision, point 109).

30 The Commission asserts that the breach of Article 85(1) of which the applicant is guilty was a calculated and deliberate one. Horizontal price-fixing and horizontal market-sharing have long been counted among the most serious types of infringement of competition law. It points out that the seriousness of the infringement was increased by the fact that virtually all the polypropylene manufacturers in the Community were involved and that consequently the size, the economic power and the total market share of the participants were exceptionally large.

331 The Court notes that as regards the particular role played by the 'big four' in the infringement Hoechst does not deny that meetings of the 'big four' took place on 15 June 1981 (in its absence), 13 October and 20 December 1982, 12 January, 15 February, 13 April, 19 May and 22 August 1983 (Decision, table 5, and main statement of objections, Appendix 64).

332 Those meetings of the 'big four' took place from December 1982 onwards the day before 'bosses'' meetings; their purpose was to determine the joint action that could be taken in order to raise prices following the floor-price agreement which they had concluded in mid-1977.

333 An ICI note relating to the meeting attended by representatives of ICI, Shell and Monte on 15 June 1981 (main statement of objections, Appendix 64) shows that those producers envisaged the following solutions in order to resolve the difficulties encountered on the market:

'Possible solutions included (a) sanctions (not a great success so far on PVC), (b) control production which is within the power of the bosses (L. thought propylene availability might scupper this), (c) quotas which Z. favoured by L. discounted, (d) new initiative by the 4 majors whereby they accommodated the hooligans in Europe and made up the loss by sales in ROW markets. Given that W European sales would probably not exceed 105 kt/month for the next few months and then not over 125 kt for the remainder of the year say 115 kt average for July-Sept and exports continued at 30 kt/month there would still be a surplus of capacity of 10 kt/month. Shared by the Big Four each would have to drop 2.5 kt/m in Europe equivalent to 30 kt/yr of say 2.3% market share. I said that despite L."s contention about ROW prices that such a proposal would be totally unacceptable to us, (e) a flat price increase of say 20 pf/kg wef 1st July — this avoid unrealistic requirements for the lowest priced business'.

Similarly, a note written by an ICI employee headed 'Sharing the pain' and dated at the beginning of the second half of 1982 (main statement of objections, Appendix 98) states that the introduction of a compensation scheme for reductions in sales volumes 'might provide useful elements for the understanding between the "Big Four"'. In its reply to the request for information (main statement of objections, Appendix 8), ICI stated with regard to that document that:

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

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

334 The Court finds that it is clear from the evidence set out above and from its assessments relating to proof of the infringement that the Commission has correctly established the role played by the applicant in the infringement and that the Commission indicated in the first paragraph of point 109 of the Decision that it took account of that role when determining the amount of the fine. On this point, it is to be noted that there is no contradiction between the first three paragraphs of point 109 and the sixth paragraph of point 109 since the latter paragraph refers only to the smaller producers.

335 The Court also finds that the facts established show, by their intrinsic gravity — in particular the fixing of price and sales volume targets — that the applicant did not act rashly or even through lack of care but intentionally.

336 Consequently, this ground of challenge must be dismissed.

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

337 The applicant argues that in fixing the amount of fines the Commission has no discretion which is not subject to review by the Community courts. In that regard the Commission's assertion that it is particularly well placed to assess the amount of fines.

38 It goes on to argue that the grounds of the Decision do not set out the essential considerations of fact and law justifying the calculation of the fine. The Decision does not indicate the criteria on which the distribution of the fines among the undertakings is based. The fine imposed on the applicant was 15.8% of the total amount of the fines and is thus 50% higher than the amount which would result from the allocation of fines in accordance with the market shares defined by the Commission. For two other undertakings the fines are only 28.6% and 41% above their market shares, although the circumstances taken into account for the calculation of the fine were the same for all three undertakings. The failure to state or individualize the criteria for fixing the amount of the fine is particularly serious inasmuch as the Court has unlimited jurisdiction in actions brought against decisions imposing fines. According to the applicant, the Commission should have indicated in the Decision the criteria which governed the assessment of the amount of the fine imposed on each undertaking.

39 The Commission states that it does not dispute the unlimited jurisdiction of the Court in relation to fines. Indeed, it points out that the Court may, in exercise of that jurisdiction, increase the amount of the fine.

0 It states that proper grounds are stated for the Decision since it lists, in points 108 and 109, all the mitigating or aggravating circumstances which were taken into account and indicates the role played in the role by each of the producers concerned. Furthermore, since infringements of Article 85(1) of the EEC Treaty can be committed only by several undertakings acting in concert it is normal that the same reasons should usually be relied on as a basis for the fines imposed on each of the members of the group. It reiterates that it was because it was one of the 'big four', a group which played a particular role in the infringement, that the fine imposed on the applicant was greater than that which would result from a distribution of fines based solely on the respective market shares of the various producers.

1 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).

342 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.

343 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.

344 In that regard it is appropriate to reject the applicant's objection that the weighting of the fines imposed on the various undertakings was inequitable in its respect since its effect was that the fine imposed on it was 50% higher than that which would result from a distribution of the fines in accordance with the market shares set out in table 1 of the Decision, which is not the case of two other undertakings (which it does not identify but which it considers to be in a situation similar to its own in every other respect) whose fines were only 28.6% and 41% higher than their market shares. 'Market Shares in Western Europe (by producer)' (Decision, table 1) are not one of the four criteria for weighting the fines which are set out in the first paragraph of point 109 of the Decision, since neither polypropylene deliveries to the Community nor the individual total turnover of the undertakings corresponds to the data set out in table 1 of the Decision. Accordingly, the criteria used by the applicants in making its comparison are based on an incorrect analysis of the contested measure.

45 It should be added that at the hearing, faced with figures on the polypropylene deliveries to the Community of each of the undertakings to which the Decision is addressed, provided by the Commission at the Court's request, the applicant did not reiterate its objection on the basis of those figures, whose accuracy it did not dispute.

46 Finally, the Court points out that the four criteria set out in the first paragraph of point 109 of the Decision must be taken together in order to arrive at an equitable weighting of the fines imposed on the undertakings, which makes irrelevant the applicant's comparison, on the basis of only one of those criteria, of its own situation and those of two unidentified undertakings, instead of examining the respective situations of the undertakings under comparison specifically and in detail on the basis of the four criteria together. The Court therefore considers that the Commission correctly applied the four criteria in question, particularly in view of the role played by the applicant as one of the 'big four' (Decision, point 109, second paragraph).

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

C. Incorrect definition of the relevant market

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

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

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

351 The Court finds that the quotas related to all grades of polypropylene. The applicant indicated in its reply to written question put by the Court that its 1980 and 1983 sales of all grades in the Community, where it sold most of its products, were 92 713 and 103 912 tonnes respectively, of which only 29% were basic products. The quota allocated to the applicant for western Europe in 1980 was 165 000 tonnes (main statement of objections, Appendix 60) and in 1983 it was between 155 000 tonnes on a market estimated at 1 470 kilotonnes (Saga proposal, main statement of objections, Appendix 81) and 169 050 tonnes (11.5% of a market of the same size, proposal of the German producers, main statement of objections, Appendix 83).

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

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

53 The applicant maintains that the losses which it incurred were not merely heavy but dramatic. That fact, which was largely due to the illegal aid granted by certain States, allowing certain producers to cover their losses should have been taken into account as a mitigating factor. However, the Commission did not even attempt to calculate the losses, which the applicant puts at over DM 250 000 000.

54 The Commission refers to its description in the Decision, which corresponds in the main to the applicant's account of the producers' overcapacity and the losses incurred by them. However, it does not consider Hoechst's remarks concerning State aid to be relevant. Even assuming the applicant's assertions on this point to be correct, they cannot, in the Commission's view, justify an infringement of the competition rules laid down in Article 85(1) of the EEC Treaty.

55 The Commission states that it took account of the losses incurred by the undertakings as a mitigating factor, but that the possible effect of State aid was not a matter to be taken into consideration.

56 The Court finds that, contrary to the applicant's assertions, the Commission expressly indicated in the last indent of point 108 of the Decision that it took account of the fact that the undertakings had incurred substantial losses on their polypropylene operations over a considerable period, which demonstrates not only that the Commission took account of the losses but also that it thereby took account of the unfavourable economic conditions prevailing in the sector (judgment of the Court of Justice in Case 322/81 *Michelin*, cited above, paragraph 111 *et seq.*) with a view to determining, having regard also to the other criteria mentioned in point 108, the general level of the fines.

357 The Court reiterates 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.

358 As regards in particular the State aid alleged to have been received by certain undertakings, the Court considers that they cannot eliminate the unlawful nature of the applicant's conduct, since participation in an unlawful cartel cannot be accepted as a form of self-defence.

359 In so far as the applicant calls for the exercise by the Court of its unlimited jurisdiction, the Court observes that the applicant has no factual evidence of that aid, its nature, its extent and its effects on competition and, in particular, the applicant's results. Furthermore, it should be pointed out that the applicant did not, at the material time, ask the Commission to make use of its powers under Article 93 of the EEC Treaty. Consequently, the Court considers that it does not have the essential information for exercise of its unlimited jurisdiction in relation to the State aid which the applicant alleges the existence.

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

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

361 The applicant maintains that it is apparent from the studies which it has submitted that, contrary to the Commission's assertions, which are based on no evidence, the alleged infringements had no effect on the market and did not enable any producer to make additional profit. That error on the part of the Commission should entail a reduction in the amount of the fine since account must be taken of the fact that there was no conduct on the market contrary to competition law and, consequently, the undertakings did not profit from the cartel at the market's expense.

62 The Commission states that it assessed the effects of the cartel on the market very carefully. It points out, however, that its findings support the conclusion that a distinct restriction of competition was expected and at least partly achieved. For the rest, it observes that if the producers pursued their meetings frequently and regularly, it was because they themselves considered that the cartel was not entirely ineffective. The Commission acknowledges that the effects of the cartel on the market played a role in the calculation of the amount of the fines.

63 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).

64 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.

65 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.

366 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.

367 Consequently, this ground of challenge must be dismissed.

F. The exacerbation of the fine as a result of the application of national law

368 The applicant states that the fine of DM 19 300 000 imposed on it must be paid from its profits after tax. Consequently, that fine in fact represents a charge of about DM 55 000 000 on the undertaking's results, on top of the losses of more than DM 250 000 000 incurred by the applicant in the polypropylene sector.

369 The Court finds that in order to fix the amount of the fine to be imposed on the applicant the Commission must have taken into account the fact that it would be

paid from profits after tax. If the fine was charged on taxable profits the result would be that the fine was paid in part by the State to which the undertaking pays tax, since it would reduce the taxable income of the undertaking. The Commission could not proceed on such a basis in calculating the amount of the fine to be imposed on Hoechst.

170 Consequently, this ground of challenge must be dismissed.

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

The reopening of the oral procedure

172 By a separate document of 2 March 1992 the applicant asked the Court to reopen the oral procedure and order measures of inquiry. It states that in its judgment of 27 February 1992 in Joined Cases T-79/89, T-84/89, T85/89, 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, hereinafter referred to as the PVC case) the Court of First Instance held that there were defects in the decision in issue which entailed its non-existence. It offers to adduce evidence, in the form of the testimony of the Commission's agents in those cases and the recording of the hearing, that the Commission's representatives expressly stated that the procedure found to have been followed in those cases corresponded to the Commission's invariable practice (point II of its document of 2 March 1992). The applicant considers that it has thus established that it is highly likely that in this case too, in accordance with the Commission's normal practice, originals of the contested

Decision duly certified by the signatures of the president and executive secretary of the Commission do not exist in the five authentic languages. The defendant should therefore be ordered to produce all the documents of the Commission relating to the adoption of the Decision and the certified decisions in the authentic languages. In point III of its document of 2 March 1992 the applicant further argues that it is to be presumed that — as in the PVC cases — the Commission did not certify its decision in all the authentic languages and that the decisions were altered after the fact by persons who were not authorized to do so.

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

374 It must be stated first of all that the abovementioned judgment does not in itself justify the reopening of the oral procedure in this case. Furthermore, unlike the arguments which it put forward in Joined Cases T-79 etc./89 (see the judgment of the Court, at paragraph 14), in this case the applicant did not, until the end of the oral procedure, argue even by allusion that the Decision was non-existent because of the alleged defects. It must therefore be asked whether the applicant has adequately explained why in this case, unlike Joined Cases T-79 etc./89, it did not raise those alleged defects earlier, since they must in any event have existed prior to the commencement of proceedings. Even though the Community courts, in an action for annulment under the second paragraph of Article 173 of the EEC Treaty, must of their own motion consider the issue of the existence of the contested measure, that does not mean that in every action under the second paragraph of Article 173 of the Treaty the possible non-existence of the contested measure must automatically be investigated. It is only in so far as the parties put forward sufficient evidence to suggest that the contested measure is non-existent that the court must review that issue of its own motion. In this case the arguments put forward by the applicant do not provide a sufficient basis to suggest that the Decision is non-existent. In point III of its written pleading of 2 March 1992 the applicant simply asserted that there were 'reasonable grounds' to presume that the Commission had infringed certain procedural rules. The alleged infringement of

the language rules laid down in the Rules of Procedure of the Commission cannot, however, entail the non-existence of the contested measure, but only its annulment, if the argument is raised at the proper time. Moreover, the applicant has not explained why the Commission would have made subsequent alterations to the Decision in 1986, that is to say in a normal situation entirely unlike the special circumstances of the PVC case, where the Commission's term of office was about to run out in January 1989. The general presumption put forward by the applicant in this respect does not constitute a sufficient ground to justify the order by the Court of measures of inquiry after then reopening of the oral procedure.

75 In point II of its written pleading, however, the applicant specifically alleged that originals of the contested Decision duly certified by the signatures of the President and the Executive Secretary of the Commission do not exist in all the authentic languages. That alleged defect, if true, would not in itself entail the non-existence of the contested Decision. In this case, unlike the PVC cases, cited above, the applicant has not put forward any concrete evidence to suggest that any infringement of the principle of the inalterability of the adopted measure took place after the adoption of the contested Decision and that the Decision thus lost the presumption of legality attendant upon its appearance, to the benefit of the applicant. In such a case, the mere fact that there is no duly certified original does not in itself entail the non-existence of the contested measure. In this respect too, therefore, there was no reason to reopen the oral procedure in order to carry out further measures of inquiry. Inasmuch as the applicant's arguments could not justify an application for revision, its suggestion that the oral procedure be reopened should not be upheld.

Costs

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

the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs to be awarded against the applicant, the latter must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 10 March 1992.

H. Jung
Registrar

J. L. Cruz Vilaça
President