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

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* Languages of the case: T-68/89: Italian; T-77/89: French; T-78/89: English.

In Cases T-68/89,

Società Italiana Vetro SpA, a company incorporated under Italian law, having its registered office in San Salvo (Italy), represented by Luigi Citarella, of the Rome Bar, and Crisanto Mandrioli, of the Milan Bar, with an address for service in Luxembourg at the Chambers of Ernst Arendt, 4 avenue Marie-Thérèse,

T-77/89,

Fabbrica Pisana SpA, a company incorporated under Italian law, having its registered office in Milan (Italy), represented by Pierre van Ommeslaghe and Bernard van de Walle de Ghelcke, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Jean-Claude Wolter, 8 rue Zithe,

and T-78/89,

PPG Vernante Pennitalia SpA (formerly Vernante Pennitalia SpA), a company incorporated under Italian law, having its registered office in Genoa (Italy), represented by Gianni Manca and A. J. Manca Graziadei, of the Rome Bar, and by Michel Waelbroeck and Alexandre Vandencasteele, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernst Arendt, 34 rue Philippe II,

applicants,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by J. E. Collins of the Treasury Solicitor's Department, acting as Agent, assisted by Stephen Richards, Barrister of Gray's Inn, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt, with regard to the applicants' submissions in so far as they concern the application of Article 86 of the EEC Treaty,

intervener,

v

Commission of the European Communities, represented by Enrico Traversa, Julian Currall and during the written procedure, Hendrik van Lier, members of its Legal

Service, acting as Agents, assisted by Alberto Dal Ferro, of the Vicenza Bar, and Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Centre Wagner, Kirchberg,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by J. E. Collins, of the Treasury Solicitor's Department, acting as Agent, assisted by Stephen Richards, Barrister of Gray's Inn, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt, with regard to the Commission's submissions in so far as they concern the application of Article 85 of the EEC Treaty,

intervener,

APPLICATION for the annulment of Commission Decision 89/93/EEC of 7 December 1988 (Official Journal 1989 L 33, p. 44), relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.906, flat glass).

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

composed of: D. A. O. Edward, President, R. García-Valdecasas, K. Lenaerts, H. Kirschner and R. Schintgen, Judges,

Registrar: H. Jung

having regard to the written procedure and further to the oral procedure held from 12 to 15 November 1991,

gives the following

Judgment

Facts

1 This case concerns a decision of the defendant, the Commission of the European Communities (hereinafter referred to respectively as 'the decision' and 'the Commission'), fining the three applicants, Italian flat-glass producers, for infringing Article 85(1) of the EEC Treaty, and finding that they infringed Article 86 of the Treaty. The three companies to which the decision is addressed are: firstly, Società Italiana Vetro ('SIV'), whose majority shareholder is the Ente Finanziamento Industria Manifatturiera ('EFIM'); secondly Fabbrica Pisana SpA ('FP'), a subsidiary of the Saint-Gobain group 'SG'); and thirdly Vernante Pennitalia ('VP'), a subsidiary of PPG-Industries Inc. of Pittsburg ('PPG').

2 In the decision (point 2), the product at issue is defined as being 'flat glass in all its varieties'. Three types of flat glass are distinguished: drawn glass, cast glass and, the most important type, plate glass. It is stated that at present, more than 90% of flat glass is manufactured using the so-called float-glass process, a modern production method which requires an investment of approximately ECU 100 million for each production line.

3 Within the flat-glass industry in general, the Commission distinguishes two markets (point 5): the transport, and in particular the automotive, market (hereinafter referred to as 'the automotive market'), and, secondly, the market in glass intended for other industries, in particular the construction and furnishing industries (hereinafter referred to as 'the non-automotive market'). In the automotive market, motor vehicle manufacturers are supplied directly by the glass producers, who process the flat glass themselves in accordance with the requirements of the motor vehicle manufacturers. In the non-automotive market, flat-glass may be used unprocessed (for example, window panes) or processed. In this market, customers may be supplied either directly by producers or indirectly through wholesalers, processing wholesalers or independent processors.

4 On 28 September 1981, the Commission addressed to FP, SIV and VP, to an association of Italian undertakings specializing in flat-glass wholesaling and to the members of two similar associations which had already been wound up, a decision (81/881/EEC, Official Journal L 326 p. 32, hereinafter referred to as 'the 1981 decision') which found that they had infringed the provisions of Article 85(1) of the EEC Treaty. Firstly, the Commission accused the wholesalers' associations of having adopted in their articles of association, implementing rules and decisions, clauses under which:

— members were under an obligation to purchase through the association;

— members were prohibited from importing and were required to share out any products imported, with prior authorization from the association, from State-trading countries;

— a common price list was to be adopted and complied with.

Secondly, the Commission accused the producers and wholesalers, secondly, of having concluded agreements relating to the:

— establishment of sales quotas;

— the granting of a special rebate;

— the monitoring of the operations of the members of the associations.

The 1981 decision became definitive.

5 In March 1986, Industria Vetraria Alfonso Cobelli (hereinafter referred to as 'Cobelli'), a glass wholesaler based in Reggio Calabria, brought an action before the Tribunale (District Court) of Reggio Calabria against FP and SIV, accusing them of having contributed to the ruin of the company by behaviour which it considered to be unfair and an abuse of a dominant position. In particular, Cobelli accused them of having 'a tacit agreement', also involving VP, 'to maintain the market stability through the adoption of price-lists for the sale of their products'. On 25 June 1986, VP's lawyer sent to Cobelli a letter stating that the allegation was incorrect in so far as it concerned VP. On 15 July 1986 Cobelli's lawyer sent a reply expressing its 'amazement, since Industria Vetraria Cobelli and its owner have never called into question the correct attitude and the accessibility which Vernante Pennitalia has shown towards it'.

6 In July and October 1986, the Commission, acting pursuant to Article 14(2) of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87 — hereinafter referred to as 'Regulation No 17'), carried out investigations both at the premises of FP, SIV and VP and at the premises of an undertaking specializing in the wholesale flat-glass trade, Socover SpA (hereinafter referred to as 'Socover'), which had been one of the addressees of the 1981 decision.

7 By a document dated 31 October 1986, received at the Commission on 6 November 1986, Alfonso Cobelli, the owner of Cobelli, made an application to the Commission, pursuant to Article 3 of Regulation No 17, for a finding that SIV, FP and VP had acted in breach of the rules on competition. According to Cobelli, there was a long-standing agreement between the three producers which was 'intended to control and stabilize the market and to eliminate all competition between them by means of the adoption of agreed price lists for the sale of their products; those lists, which prescribed not only identical prices for homogenous categories of products, but also identical conditions of sale and payment, classified customers into distinct categories according to their commercial importance based on turnover and field of activity, charging each group a different price by applying a "scale of discounts" with a difference of approximately 9% between the first group and the last'. Cobelli then accused FP and SIV (but not VP) of having implemented, since about 1982, a 'business strategy intended to achieve full control not only of the production but also of the distribution of glass, by excluding from the market the majority of existing distributing wholesaler-distributors'.

8 On 13, 14 and 15 of January 1987, acting pursuant to Article 14(3) of Regulation No 17, the Commission again carried out investigations at the premises of FP, SIV and VP.

9 By letter of 20 February 1987, VP submitted to the Commission's Directorate-General for Competition (hereinafter referred to as 'DG IV') its observations on Cobelli's complaint, of which it had just learned for the first time, putting forward in its defence, in particular, the denial which had been sent to it by Cobelli's lawyer on 15 July 1986.

10 On 3 April 1987, Cobelli sent to DG IV a memorandum, received at the Commission on 10 April 1987, in reply to the observations submitted by FP, SIV and VP following communication of its complaint. In that memorandum, Cobelli claimed that FP, SIV and, 'on a number of occasions also' VP had participated in regular meetings with the wholesalers, 'sometimes under the aegis of the category associations, sometimes initiated directly by the manufacturers', and that the three producers

'always appeared with positions which were perfectly attuned vis-à-vis the distributors' demands: the lists of products marketed, which were always absolutely identical and published simultaneously, or almost simultaneously, by the three undertakings, were sent to the distributors and subsequently clarified at the meetings, without, however, the slightest opportunity of discussing them being given: in fact, whenever [the other participants] attempted to influence the manufacturers' decisions or to propose agreements which would have taken account of their own business requirements, the manufacturers presented a "common front"...

Just by way of example, it is possible to mention a few of the numerous meetings which took place before 1984 and 1986, at most of which the undersigned was present: on 19 March 1984 at Naples, on the initiative of SIV, at Barbato; on 10 October and 31 October 1984 in Rome, at the Sheraton Hotel, on 19 October 1984 in Caserta, at Fontana; on 31 October 1984, another meeting in Bologna, at VIC SpA; other important meetings between the commercial directors of the three undertakings are known to have taken place on 28 February and 2 March 1985; on 2 May 1985 in Rome, at the Sheraton Hotel; on 18 February 1986 in Catania,

only between Tortorici, Donato, Fontana, Milletti (FP), Baldi (SIV) and Bilotta of Callipo Vetro. Of course, there were many more meetings than those mentioned above, which are the ones that spring to mind, and what is more, they continue to be held to this day, although the undersigned is strictly excluded from them for having dared to take action against the manufacturers.

To find support for what has just been said and for proof of the existence of specific agreements among the manufacturers, intended to harmonize prices and conditions of sale, one need only examine the enclosed invoices on which absolutely identical prices are quoted on the same date and for the same products; . . . '.

After commenting at length on the conduct of FP and SIV, Cobelli then expressly exempted VP,

'which, while it certainly participated in the agreements with the other manufacturers as regards the price lists and discounts agreed upon, just as indisputably maintained absolutely correct commercial behaviour, in particular vis-à-vis the undersigned, and which has never been responsible for abuses or clandestine agreements intended to favour one economic operator to the detriment of the others . . . '.

11 On 15 October 1987, the Commission decided to implement the procedure laid down in Article 3(1) of Regulation No 17. On 28 October 1987, it sent to FP, SIV and VP the written statement of objections provided for in Article 19(1) of Regulation No 17 and in Article 2(1) of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47, hereinafter referred to as 'Regulation No 99/63'). That statement of objections accused the undertakings to which it was addressed of infringing Articles 85 and 86 of the EEC Treaty both in the automotive market, in relation to the Italian undertakings Fiat and Piaggio, and in the non-automotive market. FP, SIV and VP replied in writing to that statement.

12 The hearings provided for in Article 19(1) and (2) of Regulation No 17 and in Articles 7, 8 and 9 of Regulation No 99/63 were held on 9 and 10 March 1988. FP, SIV, VP and Cobelli were represented and heard. The draft minutes of the hearings, together with the relevant documents, were sent to the members of the Advisory Committee on Restrictive Practices and Dominant Positions. It was sent to the undertakings on 25 August 1988. The definitive minutes incorporating the corrections, additions and deletions requested by the undertakings, were sent to them subsequently.

13 It emerges from the abovementioned minutes that, called on by the representative of the Portuguese Republic to state whether the Commission had contacted Fiat, a DG IV official replied:

'The Commission intends to reply to that question later'.

When the representative of the Italian Republic insisted on knowing whether the Commission had carried out investigations at Fiat, the same official replied:

'I have nothing to add to what I said earlier'.

The minutes also show that when Mr Cobelli was called on to specify the meetings at which, according to him, VP was present, he mentioned a single meeting in Tropea in 1986, and that that was a glass-makers' festivity attended by 500 people, including family members.

14 At the end of that procedure, the Commission adopted the contested decision on 7 December 1988. The decision is divided into two parts: an examination of the facts (points 1 to 58, hereinafter referred to as 'the factual part') and a legal assessment (points 59 to 84, hereinafter referred to as 'the legal part'), followed by the operative part of the decision. In essence, the decision reproduces the content of the statement of objections.

5 In the factual part, the decision first of all examines the flat-glass market from the point of view, in turn, of the product, supply and demand. It then examines the behaviour of the undertakings in relation, firstly, to the market in non-automotive glass, secondly, to the market in automotive glass, and thirdly, to exchanges of glass between them.

6 With regard to the non-automotive market, the decision examines the alleged behaviour of the undertakings under five headings:

(a) identical prices;

(b) identical discounts;

(c) identical classification of the main customers;

(d) elements of concerted practices between producers, and;

(e) relations between producers and wholesalers.

7 The decision finds that 'the three Italian producers communicated identical price lists to their Italian customers on dates which were close to one another and in some cases on the same days' (point 18), that 'identical discounts on the listed prices were granted in accordance with the categories or levels in which customers were classified' (point 20), and that 'the main customers . . . were classified in the same category or level, whenever they obtained their supplies from any of the producers [the classification being dependent on] each customer's total purchases from all producers' (point 22). The decision then states that 'the uniformity of prices and of discount scales and the uniform classification of the main customers by category or level are the result of concerted practices between the producers

agreed on directly during talks, meetings or contacts or through the intermediary of the spokesman of the main customers [Socover]' (point 24). There follows 'the documentary evidence of such concerted practices' (points 25 to 32). The decision also finds that 'the exchanges of products between the three Italian manufacturers also provide an opportunity for knowing the prices charged by competitors or for agreeing on the conduct to be pursued on the market.... The prices of the products exchanged were always set and subsequently adjusted on the basis of the price adjustments of the transferring producers' (point 33). Finally, the decision finds that 'the prices and discounts agreed on under the concerted practices were actually applied. Examination of certain invoices shows that one and the same customer who purchased widely differing quantities from the three producers was charged identical prices and granted identical discounts'. A list of the invoices examined is then given (point 34).

18 As regards relations between the producers and the wholesalers, the decision states that 'the three producers took care to ensure that their prices and discounts were also applied downstream'. It accepts that it does not have any direct evidence of the meetings alleged by the complainant Cobelli 'with wholesalers in order to get them to accept and pass on the price increases', but it insists that 'certain documents show, firstly, that some meetings between wholesalers were arranged on the initiative of the producers and that, given their identical prices and discounts, the producers managed to guide the commercial choices of the wholesalers and, secondly, they confirm that the customers expected producers' prices to be identical' (point 35). There then follows a discussion concerning certain documents (points 36 to 42). The decision finds, in particular, on the basis of one of those documents, that 'Socover is the channel for passing messages from the wholesalers to the producers and from the producers to the wholesalers' (point 36).

19 With regard to the automotive market, the decision states that 'the company documents discussed below indicate that SIV and FP agreed on prices and the allocation of quotas at least as from 1982. VP also participated in these restrictive practices from 1983 at least, albeit less strictly than the other two producers' (point 43). The decision then examines the evidence which the Commission regards as proof of the agreements and concerted practices concerning the Fiat group (points 44 to 51) and the Piaggio group (point 52), respectively. In the case of the Fiat group, after considering the question of prices and quotas, it states that 'the three producers carried out reciprocal sales or purchases of products... with the objective of maintaining their respective penetration quotas or of achieving the

quotas agreed with their competitors' (point 48) and, referring to the producer's argument that Fiat was a 'dominant buyer', that 'at all events, whatever the types of relationships that develop between a dominant buyer and its supplier, it is established that SIV, FP and VP collaborated in order to decide on the attitude to be adopted towards the Fiat group' (point 51, iii), second paragraph). In the case of the Piaggio group, the decision finds that 'SIV and FP reached agreement, at least as from 1983, on the sharing of supplies and on prices charged to Piaggio' (point 52). No objection is made against VP in its relations with the Piaggio group.

As regards the exchanges of glass between the producers, the decision states that 'large quantities of glass are exchanged under contracts between the three producers. The purpose of the exchanges is to enable each producer to have available a full range of products, even those which it does not manufacture, and to maintain its market quotas. They also provide a means of sharing markets and customers and of knowing the prices charged by competitors ...' (point 53). There then follows an examination of documents (points 54 to 56) and of the arguments of the producers (points 57 to 58). The decision states that it 'does not intend to call into question exchanges of products to help out firms facing temporary shortages (renewal of production plant, shutdown for maintenance of furnaces, fulfilling occasional orders), but ... only the systematic exchanges of products agreed over long periods and which are the result of industrial and commercial policy decisions made by the manufacturers in the context of other agreements restricting competition' (point 58 i), first paragraph). From the economic point of view, the decision finds that 'the exchanges cancel out the advantage of specialization and artificially place all the producers on an equal footing, thus preventing customers from benefiting economically from the production and commercial edge enjoyed by individual producers. As the uniformity of the price lists and discounts of the three producers shows, the exchanges result in practice in a flat and uniform market' (point 58 i) third paragraph). Finally, the decision insists that the exchanges are 'systematic' and 'apply not to marginal quantities, but to considerable tonnages' (point 58 iii).

Coming now to the legal assessment, the decision examines the behaviour of the undertakings in relation to Article 85 of the Treaty (points 59 to 73) and Article 86 (points 74-82).

22 In the non-automotive market, the decision finds that 'the publication of identical price lists within a short period of time, or indeed on the same date, and the existence of identical discount scales and of identical lists of categories of customers qualifying for such terms are the result of agreements and concerted practices between producers in question. The documents and notes ... show that FP, SIV and VP agreed or at any rate colluded, at least from 1983 and up to 1986, in charging uniform prices and applying uniform terms of sale' (point 61). After examining the arguments put forward by the undertakings in relation to the concept of agreement, the decision considers that 'even if it is not wished to describe the content of [the] notes and documents ... as amounting to agreements, there is no doubt that the notes and documents reflect collusion between the three producers, whatever the precise form which the collusion took ...' (point 63, fourth paragraph). With regard to relations between the producers and the wholesalers, the decision considers that 'the meetings between the principal wholesalers that were instigated and/or organized by the producers are the result of agreements or concerted practices between FP, SIV and VP designed to orientate, along lines that suited their concerted interests the purchasing and sales policies of the wholesalers, who, because of their economic dependence, are unable to assert themselves against the power and manipulations of the producers' (point 64).

23 Finally, with regard to the non-automotive market, the decision concludes as follows:

'These agreements and concerted practices between firms manufacturing identical products constitute serious restrictions of competition within the meaning of Article 85(1). Through the agreements and concerted practices, the undertakings in question have committed themselves to restricting substantially their independence of conduct vis-à-vis their customers, and they have acted in such a way as to ensure that their principal customers fall into line with their decisions and are unable to take their own business decisions freely. The effects of these restrictions are all the more appreciable as FP, SIV and VP control some 79% of the Italian home market. Through the conduct at issue, the undertakings have reduced the scope for purchasers to benefit from competition between the local producers, given their overall market share even after imports are taken into account. In addition, in view of the risks involved in not being able to rely on regular supplies, it is difficult for the main purchasers, wholesalers and processors to dispense with supplies from the producers established in Italy' (point 66).

4 In the automotive market, with regard to relations with the Fiat group, the decision finds that 'FP and SIV, from 1982 to 1986, and FP, SIV and VP, from 1983 to 1986, entered into agreements or at least concerted their behaviour on the prices to be charged to the Fiat group and, from 1982 to 1987, on the sharing of the market, thus removing any uncertainty as to their mutual conduct. The agreements and concerted practices between FP and SIV ... constitute much more serious infringements than those committed through the cooperation with VP. However, VP's conduct also constitutes an infringement [in so far as] VP participated in the agreements or concerted practices relating to prices, ... applied the price list changes without fail, ... participated in the agreements relating to the apportionment of supplies ... and ... actively produced and continues to produce non-processed and processed products on behalf of its competitors' (point 67).

5 As regards relations with the Piaggio group, the decision finds that 'FP and SIV agreed or collaborated, from the end of 1982 to 1986, on the prices to be charged to Piaggio and on the quantities and items which each of them would supply. Through these agreements and practices, which constitute clear infringements, the two producers developed a long-term strategy designed to get the customer in question to apportion its orders in accordance with what they had decided, thus depriving Piaggio, through the system of differentiated prices, of any economic scope for choosing its own sources of supply. Such conduct is all the more serious as FP and SIV actually put their agreements into effect, adapted them to changing circumstances in the course of their implementation and extended them beyond the period initially provided for' (point 68).

6 On the automotive market in general, the decision concludes as follows:

'The above agreements and concerted practices constitute restrictions of competition within the meaning of Article 85(1). Through these agreements and concerted practices, the producers in question created a market situation such as would exclude or, at the very least, reduce to a minimum any form of competition between them. The agreements and concerted practices allowed those concerned to seek and achieve an equilibrium in prices and outlets at a different level than that which would have occurred in a normal competitive situation and to crystallize their respective market positions. The effects of the restrictions applied by the producers in question are appreciable, since FP and SIV control more than

80% of the Italian automotive glass market and since FP, SIV and VP control some 95% of that market. Because of the conduct at issue, consumers were deprived of the possibility of benefiting from competition between local producers, in view of the preponderance of sales by local producers on the market in question even after imports are taken into account. In addition, it must be borne in mind that, in order to be able to rely on regular supplies, consumers are unable to dispense with supplies from producers established in Italy' (point 69).

27 On the exchanges of glass, the decision concludes as follow:

'The agreements and contracts ... relating to systematic exchanges of glass between the three producers constitute appreciable restrictions of competition within the meaning of Article 85(1), since they deprive the parties of their independence of conduct and of their ability to adjust individually to circumstances. Through the agreements and contracts, each producer gives up the right to take advantage, through increased direct sales to customers, of the other manufacturers' lack of products, of its own productive capacity, its specialization and its technical processing capacity, being in turn protected from such a risk where the situation is reversed. ... The ultimate purpose of the agreements and contracts is to share markets and customers between the producers and to prevent any change in their respective positions in the various market segments and any pressure from the consumers. In the automotive glass sector, the sharing of the market and customers is sometimes very far-reaching: certain producers perform subcontracting work for their competitors, which have the appropriate technology and processing facilities, simply in order to achieve a given apportionment of supply quotas for each customer' (point 70).

28 The decision then finds that the restrictions of competition at issue are liable to have an appreciable effect on intra-Community trade since 'the agreements on prices also concern products imported by SIV from other Member States, by FP from other companies belonging to the Saint-Gobain group and by VP from its fellow group member Boussois'; since 'the agreements relating to exchanges of glass also involve products from the three firms intended for export'; since those agreements 'influence sales achievable in Italy through imports of articles produced in neighbouring countries'; since 'the practices in question establish a structure of uniform business terms differing from the structure of differentiated conditions

that would normally have obtained if competition had not been restricted, and they therefore deflect flows of trade between countries from the course they would otherwise have followed'; and since 'the agreements appreciably affect trade between Member States by consolidating national compartmentalizations which obstruct the economic interpenetration desired by the Treaty' (point 71).

After finding that Article 85(3) of the Treaty cannot be applied to the present case (points 72-73), the decision begins examination of the conditions for the application of Article 86 by first of all defining the market at issue. It states, from the point of view of the product, that flat glass must be considered to be a specific market and, from the point of view of geography, that the Italian market must be considered to be the relevant geographical market in which to assess competition. The decision considers that 'the geographical location of production facilities is a vital factor in the glass industry'; that the cost of transport 'is certainly a very important factor'; and 'if the profitability of the firm is to be maintained, only quantities produced at marginal cost can be sold for export'; and that 'local producers ... remain the masters over most of the home market' (point 77, first paragraph). According to the decision, it follows that 'the logistic and economic importance of the geographical location of production facilities means that, in order to have regular supplies, customers are essentially forced to rely on local producers' (point 77, second paragraph).

The decision then goes on to examine the existence of a 'collective dominant position'. It states that 'FP, SIV and VP, as participants in a tight oligopoly, enjoy a degree of independence from competitive pressures that enables them to impede the maintenance of effective competition, notably by not having to take account of the behaviour of the other market participants' (point 78).

It states that 'the collective dominant position of FP, SIV and VP' derives from the fact that 'the joint market shares of some 79% for non-automotive glass and some 95% for automotive glass are sufficient in themselves to give FP, SIV and VP a dominant position on the Italian market in flat glass'; that 'their direct control of

domestic supply and their indirect control of supply from abroad enable the three undertakings to pursue a commercial policy that is not dependent on market trends and the conditions of competition'; that 'despite their efforts, competing undertakings have not managed to weaken the position of the three undertakings on the Italian market'; that 'the undertakings present themselves on the market as a single entity and not as individuals'; that 'the three producers jointly maintain special links with a group of wholesalers who are the main glass distributors in Italy, they instigate the meetings, and they do everything possible to get them to accept price list changes and to ensure that the changes are passed on down-stream'; that 'the business decisions taken by the three producers display a marked degree of interdependence with regard to prices and terms of sale, relations with customers and business strategies'; and that 'the three undertakings have in addition established among themselves structural links relating to production through the systematic exchange of products' (point 79).

32 The decision concludes that the conduct of the undertakings, as described, constitutes an abuse of a collective dominant position, first of all 'because it restricts the consumers' ability to choose sources of supply and limits the market outlets of the Community's other flat-glass producers' (point 80) and, secondly, 'since it is incompatible with the objective enunciated in Article 3(f) of the Treaty, which provides for a system of undistorted competition within the common market' (point 81, first paragraph). The decision finds, in particular, that 'the three producers prevented customers from getting the suppliers to compete with one another on prices and terms of sale and limited outlets through the setting of sales quotas for automotive glass, thus crystallizing established market positions and restricting competing producers' access to the markets' (point 81, second paragraph).

33 Finally, the decision sets out the factors to which regard was had in fixing the amount of the fines. It states that no fines should be imposed under Article 86 because 'only the fines for the more serious infringement should be imposed on the undertakings' and 'the concept of collective dominant position is being used for the first time' (point 84, (a)). It finds that 'the infringements have been of relatively long duration' (point 84 (b)), that they 'are of the traditional type and ... are

clearly covered by Article 85' and that they are 'particularly serious' (point 84 (c)). However, 'as a factor making for a reduction in the amount of the fines, [it] has taken account of the fact that ... there were periods when demand fell and that, consequently, the undertakings suffered losses' (point 84 (d)). Finally, the decision finds that 'the role played by VP [was] much less important than that played by FP and SIV' (point 85).

Having regard to those considerations, the Commission adopted the following decision:

'Article 1

Fabbrica Pisana SpA, Società Italiana Vetro-SIV SpA, and Vernante Pennitalia SpA have infringed the provisions of Article 85(1) of the EEC Treaty by participating in the following agreements and restrictive practices:

(a) Fabbrica Pisana, SIV and Vernante Pennitalia, from 1 June 1983 to 10 April 1986, in agreements and concerted practices on prices and terms of sale and in agreements and concerted practices designed to influence the purchasing and selling policies of the main wholesalers in the non-automotive flat-glass sector;

(b) Fabbrica Pisana and SIV, from 26 October 1982 to 1 December 1986, and Fabbrica Pisana, SIV and Vernante Pennitalia, from 11 May 1983 to 1 December 1986, in agreements and concerted practices on the prices to be charged to the Fiat Group in the automotive flat-glass sector;

(c) Fabbrica Pisana, SIV and Vernante Pennitalia, from 1 January 1982 to 30 June 1987, in agreements and concerted practices relating to the apportionment of quotas for supplies to the Fiat group in the automotive flat-glass sector;

(d) Fabbrica Pisana and SIV, from 1 January 1983 to 1 May 1986, in agreements and concerted practices relating to the prices to be charged and supply quotas to be applied to the Piaggio group in the automotive flat-glass sector;

(e) Fabbrica Pisana, SIV and Vernante Pennitalia, from 1 January 1982 to 31 December 1986, in product exchange agreements in the flat glass sector designed to achieve market sharing.

Article 2

Fabbrica Pisana, SIV and Vernante Pennitalia, have infringed the provisions of Article 86 of the EEC Treaty by abusing their collective dominant position through conduct whereby they deprived customers of the opportunity of getting suppliers to compete on prices and terms of sale and whereby they limited outlets through the setting of quotas for automotive glass:

(a) Fabbrica Pisana, SIV and Vernante Pennitalia from 1 June 1983 to 10 April 1986 in respect of non-automotive flat glass;

(b) Fabbrica Pisana and SIV from 26 October 1982 to 1 December 1986 and Fabbrica Pisana, SIV and Vernante Pennitalia from 11 May 1983 to 1 December 1986 in respect of prices for automotive flat-glass intended for the Fiat group;

(c) Fabbrica Pisana, SIV and Vernante Pennitalia from 1 January 1982 to 30 June 1987, in respect of supply quotas for automotive flat glass intended for the Fiat group;

(d) Fabbrica Pisana and SIV, from 1 January 1983 to 1 May 1986, in respect of prices and supply quotas for automotive flat glass intended for the Piaggio group.

Article 3

Fabbrica Pisana, SIV and Vernante Pennitalia shall immediately put an end to the practices established in Articles 1 and 2 (if they have not already done so) and shall in future refrain, in their flat-glass activities, from entering into any agreement or concerted practice that may have an identical or similar object or effect, including any exchange of information of a type generally covered by professional secrecy such as would allow them to monitor the implementation of any express or tacit agreement or any concerted practice relating to practices or to market sharing.

Article 4

The following fines are hereby imposed on the undertakings to which this decision is addressed, on the grounds of the infringements established in Article 1:

— Fabbrica Pisana SpA, a fine of ECU 7 million,

— Società Italiana Vetro-SIV SpA, a fine of ECU 4.7 million,

— Vernante Pennitalia SpA, a fine of ECU 1.7 million.

Articles 5 and 6

[Omissis]'

Procedure

35 These are the circumstances in which, by applications lodged on 10 March 1989 (SIV), 22 March 1989 (FP) and 23 March 1989 (VP), the applicants brought before the Court of Justice these actions for the annulment of the decision. The actions were registered at the Court Registry under Nos 75/89 (SIV), 97/89 (FP) and 98/89 (VP).

36 By an application lodged at the Registry of the Court of Justice on 8 September 1989, the United Kingdom requested leave to intervene in support of the form of order sought by the Commission in so far as it relates to the application of Article 85 of the Treaty, and in support of the forms of order sought by the applicants in so far as they relate to the application of Article 86 of the EEC Treaty.

37 By order of 4 October 1989, the Court of Justice granted the United Kingdom leave to intervene in the three cases: 75/89, 97/89 and 98/89. The Court of Justice did not impose any restriction on that intervention.

38 Before the written procedure had been completed, by an order of 15 November 1989, the Court of Justice referred the three cases to the Court of First Instance, pursuant to Article 3(1) of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, where they are registered under Nos T-68/89 (SIV), T-77/89 (FP) and T-78/89 (VP). The written procedure continued thereafter before the Court of First Instance.

39 In a document lodged at the Registry of the Court of First Instance on 4 February 1990, the intervener submitted its written observations, which are identical in each of the three cases since, according to the intervener, the matters that it wished to

raise were issues of principle which did not vary according to the particular circumstances or arguments of the individual applicants. It stated, moreover, that:

'As regards Article 85, the United Kingdom has intervened with the sole purpose of making clear that its intervention in support of the applicants in relation to Article 86 should not be taken in any way as a token of support for the applicants in relation to Article 85. The United Kingdom accepts the conclusions that the Commission reached in the decision with regard to the application of Article 85. It also accepts the appropriateness of the level of fines imposed. It does not wish to make any additional observations on either subject'.

In its rejoinder in each of the three cases, the Commission asked the Court to call upon the United Kingdom to choose which of the two parties it intended to support.

40 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided, by orders of 7 May 1991, to prescribe measures of inquiry and of organization of procedure and to entrust them to the Judge-Rapporteur. The Judge-Rapporteur chaired an informal meeting with the parties on 29 and 30 May 1991.

41 At that meeting, the Judge-Rapporteur explained that he intended, in order to facilitate examination of the files and the conduct of the hearing, to submit to the Chamber, following the informal meeting, Reports for the Hearing whose content could be accepted by each of the parties as a complete and detailed summary of its position, and a single common file of documents for all the cases containing all the documents which the parties considered important for consideration of their cases. He asked the parties to send him their observations on the draft Reports for the Hearing which he communicated to them, and on the list of documents to be included in the common file. He also asked the Commission to produce, in the original form in its possession, the documentary evidence on which it relied for the adoption of its decision.

42 With regard to the intervention of the United Kingdom, its representative confirmed the position which it had adopted in its memorandum of 4 February 1990, as set out in paragraph 39 above. He stated that the United Kingdom would therefore confine itself in its oral argument to stating its position in support of the applicants' submissions in relation to the application of Article 86 of the EEC Treaty. The Commission stated that in those circumstances it no longer had any objection as to the admissibility of the intervention.

43 As regards the assessment of the market, the parties agreed to place in the common file, by common accord, all the statistics needed for an appreciation of the functioning of the Italian and European flat-glass markets. They agreed that it would not therefore be necessary to commission an expert's report in that regard.

44 With regard to the investigations carried out by the Commission, the Commission stated that the only investigation which had been carried out in relation to wholesalers was the investigation at the premises of Socover, and that all the documents found on that occasion had been identified. It also stated that, as regards the automotive market, it had not made any check or other investigation at the premises of Fiat or Piaggio and that it had not sent them any request for information.

45 With regard to the objection raised by the Commission against certain documents lodged by the parties, the Commission stated that it continued to object to the production of the 'Mazzucca' plan to set up a consortium of wholesalers, but accepted that the Court would be able to rule on that question in the judgment, in so far as might be necessary.

46 With regard to VP's request of the 19 November 1990 to be allowed to lodge an internal document of 25 February 1985 and the list annexed thereto, the Commission and VP agreed that those documents could appear in the file with an indication that they were lodged late and that the Court would decide, in so far as might be necessary, in the judgment whether they could be taken into

consideration. The documents were subsequently sent to the Commission, which submitted written observations on them. The plan to set up a consortium of wholesalers, the two documents lodged by VP and the Commission's observations on them were included in the common file, subject to consideration by the Court of First Instance of their admissibility.

47 Moreover, the Commission confirmed that pages 47 and 50 of FP's reply to the statement of objections which had been sent to it, had not been communicated to VP and SIV during the administrative procedure and could not therefore be used against them.

48 With regard to the requests for the summoning and hearing of witnesses, VP withdrew its request to have Mr Borgonovo, a Socover employee, summoned as a witness for examination as to the meaning of the notes made by him on which the decision relied as evidence against VP. It confined itself to referring to the written statement by Mr Borgonovo (Socover) which it had lodged. VP also withdrew its request for a competent representative of Fiat to be summoned as a witness for examination as to VP's conduct vis-à-vis Fiat.

49 The Commission produced all the handwritten notes of Mr Benvenuti, an FP employee, several extracts from which were already in the file. FP later worked together with the Commission to make the relevant pages accessible to the Court and to the other parties. The parties reached agreement on the transcription of those notes.

50 At the request of the Judge-Rapporteur, the Commission stated that the sentence appearing in the sixth paragraph of point 79 of the decision, 'the undertakings presented themselves on the market as a single entity and not as individuals', constituted an essential element of its position with regard to the application of Article 86 of the Treaty, and that it was for the Commission to substantiate it.

51 The parties agreed to a possible joinder of the three cases for the purposes of the oral procedure.

52 Following that meeting, the parties produced supplementary documents and submitted their observations on the draft Reports for the Hearing. At the request of the Judge-Rapporteur, the Commission sent a list, which was received at the Registry of the Court of First Instance on 14 June 1991, indicating the documents which, in its view, contained an express or implicit reference to VP. The Judge-Rapporteur prepared a definitive Report for the Hearing for each case and a common file containing the documents — including, where appropriate, the transcriptions and translations agreed among the parties — on the basis of which the parties agreed to proceed to the hearing of oral argument. (The documents in the common file are hereinafter cited with the symbol followed by the page number).

53 By order of the Court of First Instance of 4 June 1991, Cases T-68/89, T-77/89 and T-78/89 were joined for the purposes of the oral procedure.

54 The oral argument of the parties and their replies to the questions put by the Court were heard at the hearing which was held from 12 to 15 November 1991.

55 During the oral procedure, the Court requested the parties to submit their observations on a possible joinder of Cases T-69/89, T -77/89 and T-78/89 for the purposes of the final judgment. The parties did not raise any objection to such a joinder.

56 As cases T-68/89, T-77/89 and T-78/89 are connected with regard to their subject-matter, it is appropriate, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance, to join them for the purposes of the final judgment.

The forms of order sought by the parties

57 The applicant SIV claims that the Court of First Instance should:

1. declare void the Commission's decision of 7 December 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.906, flat glass), in so far as it fails to observe the rules of procedure and, in any event, infringes the general principle *audi alteram partem* and, in particular, the rights of defence;

2. annul the Commission decision in so far as it infringes and incorrectly applies Article 85(1) of the EEC Treaty, in conjunction with Article 2 and Article 3(f) of the Treaty;

3. in the alternative, annul the decision in so far as it concerns the alleged infringement of Article 86 of the Treaty;

4. in the further alternative, annul Article 4 of the operative part of the decision, relating to the fines imposed on SIV, in so far as it fails to state the reasons for the criteria used to fix the amount of those fines, and/or having regard to the effects to which payment of those fines could give rise;

5. in the still further alternative, reduce on the basis of equitable principles the amount of the fines imposed on SIV.

58 In reply to the applicant SIV, the Commission contends that the Court of First Instance should:

1. dismiss the application as unfounded;

2. order the applicant to pay the costs.

59 The applicant FP claims that the Court of First Instance should:

1. declare void Articles 1, 2 and 3 of the contested decision in so far as they concern the applicant;

2. declare void Article 4 of the contested decision in so far as it imposes a fine on the applicant or, in the alternative, substantially reduce the amount of the said fine;

3. order the defendant to pay the costs.

60 In reply to the applicant FP, the Commission contends that the Court of First Instance should:

1. dismiss the application as unfounded;

2. order the applicant to pay the costs.

61 The applicant VP claims that the Court of First Instance should:

1. annul the Commission's decision of 7 December 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.906, flat glass) void in so far as it finds that:

   (a) VP participated from 1 June 1983 to 10 April 1986 in agreements and concerted practices on prices and terms of sale and in agreements and

concerted practices designed to influence the purchasing and selling policies of the main wholesalers in the non-automotive flat-glass sector;

(b) VP participated from 11 May 1983 to 1 December 1986 in agreements and concerted practices on the prices to be charged to the Fiat group in the automotive flat-glass sector;

(c) VP participated from 1 January 1982 to 30 June 1987 in agreements and concerted practices relating to the apportionment of quotas for supplies to the Fiat group in the automotive flat-glass sector;

(d) VP participated from 1 January 1982 to 31 December 1986 in product exchange agreements in the flat-glass sector designed to achieve market sharing;

and imposes a fine on VP on those grounds;

2. order the Commission to pay the costs.

62 In reply to the applicant VP, the Commission contends that the Court of First Instance should:

1. dismiss the application as unfounded;

2. order the applicant to pay the costs.

63 In each case, the intervener contended that the Court of First Instance should:

1. annul Article 2 of the contested decision, together with Article 3 in so far as it refers to Article 2;

2. dismiss the remainder of the application as unfounded, in so far as it concerns the application of Article 85 of the Treaty and the level of fines imposed.

The objections raised by siv relating to the procedure and to the statement of the grounds upon which the decision is based

A — *Arguments of SIV*

64 Before setting out its pleas in law on the substance of the case, SIV raises a number of objections concerning observance of the rules of procedure, in particular compliance with the principle *audi alteram partem* and, more generally, the rights of defence.

65 SIV criticizes the fact that the Commission laid down very short time-limits for SIV to make its observations, whereas the Commission's preparation took place over a very long period of time. In that regard, it relies on the judgments in Joined Cases 100 to 103/80 (*Musique Diffusion Française* v *Commission* [1983] ECR 1825) and in Case 85/76 (*Hoffmann-La Roche* v *Commission* [1979] ECR 461), in which the Court emphasized the importance of the right of the defence to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty.

66 SIV emphasizes the active and decisive influence that Cobelli could have had on the Commission's conduct and alleges that the Commission kept secret the documents relating to Cobelli. Consequently, SIV asks the Court to order the Commission to produce in the course of the proceedings all notes, correspondence and instruments concerning the relations between Alfonso Cobelli and/or his

undertaking and lawyers and the Commission, in connection with the procedure which took place before the Commission.

67 According to SIV, the Commission gathered information at the premises of Fiat concerning its commercial relations with the glass-producers which it communicated neither to the parties concerned nor to the members of the Advisory Committee. SIV requests that the Court should order the production of the minutes concerning the opinion expressed by the Advisory Committee, and all the documents and correspondence exchanged between the Committee or its members and the Commission.

68 With regard to the reasoning of the decision, SIV considers that the grounds upon which the conclusions of the decision are based contain seriously flawed reasoning. For example, the Commission stated that the Italian glass producers granted wholesalers identical discounts after it had selectively picked out such (rare) evidence as was capable of supporting such an argument, and without considering the general relevance and objectivity of the argument advanced. That tendency to make its reasoning fit in with certain conclusions is nothing other than the result of a passive acceptance of the arguments put forward and proposed by third parties.

69 SIV claims that the Commission practically ignored the arguments advanced and the documents produced by the three producers concerned in so far as it reproduced in the decision the basic content of the statement of objections.

70 In its reply, SIV also objected to the fact that the Commission was both judge and prosecutor at the same time. Although the Court of Justice has already had occasion to reject such an objection (judgments in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission*, known as the *Fedetab* judgment, [1980] ECR 3125 and in *Musique Diffusion Française*, cited above), the applicant requested that the Court should review that case-law having regard to Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Article 14, paragraph 1 of the United Nations' International Covenant on Civil and Political Rights. According to SIV, the grounds upon which the Court of

Justice based itself are no longer adequate. The reform of all national procedures, including the procedures of administrative courts, which was dictated by the obligation to adapt national systems to the principles laid down by international agreements, must necessarily also affect the Community system.

71 In any event, SIV considers that the dual function that characterizes the action of the Commission, which exercises both an investigative and a decision-making power, imposes on the Commission an even stricter duty to observe the rights of defence (judgment in *Musique Diffusion Française*, cited above). In particular, the Commission must not have the right to prevent the defence from having access to documents or information that the Commission has gathered.

B — *Arguments of the Commission*

72 The Commission points out first of all that it gave SIV a period of three months (from 6 November 1987, the date on which it sent the statement of objections to SIV, until 2 February 1988, the date on which SIV lodged its reply to the statement of objections) to make known its observations, which was a more than sufficient time to prepare complete observations in reply to the statement of objections. In addition, a large part of the documentation gathered came from SIV itself or was already well known to SIV. The Commission points out that, at SIV's request, it extended the time-limit for submission of the reply.

73 The Commission rejects the idea that it accorded excessive importance to Mr Cobelli's complaint. The investigations upon which the decision is based were carried out in part before the application was made and, in any event, independently of its submission.

74 As regards the communications between Cobelli and/or its lawyers and the Commission, which SIV sought to have produced, the Commission considers that

those documents are entirely extraneous to the contested decision. Each time that statements and/or evidence supplied by Cobelli were taken, even indirectly, into account by the Commission, the decision made specific reference to that fact. For the same reasons, the Commission rejects the objection that it 'took from Fiat' information other than that mentioned in the decision.

75 The Commission rejects the claim that the observations made by the producers concerned were not taken into consideration. It states that it weighed up those observations very carefully, comparing them with the evidence adduced to support them and with the facts upon which the contested decision is based.

76 According to the Commission, all the documents relating to the procedure which gave rise to the contested decision were annexed to the statement of objections and sent to SIV. No limitation was placed on SIV with regard to its right of access to the evidence upon which the decision is based.

77 With regard to SIV's application for an order requiring the production of documents relating to the Advisory Committee, the Commission considers that those documents are not in any way connected with the present case.

78 The Commission rejects the allegation that it did not provide sufficient evidence in support of its decision.

79 As regards the applicant's additional plea in law in its reply, concerning the alleged infringement of the European Convention for the Protection of Human Rights and the United Nations' International Covenant on Civil and Political Rights, the Commission states that, in the light of the case-law of the Court of Justice in its judgments in Case 374/87 (*Orkem* v *Commission* [1989] ECR 3283) and Case 85/87 (*Dow Chemical Iberica* v *Commission* [1989] ECR 3165), *Fedetab*, cited

above, and *Musique Diffusion Française*, cited above, its conduct throughout the procedure towards SIV has been well above the minimum guarantee of the rights of defence required by the Court of Justice.

80 In its application, SIV also puts forward a plea in law based on Articles 2 and 3(f) of the EEC Treaty. SIV considers that if all the principles stated in the decision are to be followed, that would have objectively disastrous results from the industrial and commercial point of view: in particular, all forms of competition would be entirely eliminated, owing to the magnitude of the investment necessary and the long-term planning it entailed; the creation of a production and commercial system on monopolistic lines would be encouraged, as would price increases at the different stages of distribution and sale and a crisis in supply.

81 The Commission rejects those claims as general, contradictory and confused. In its opinion, the decision is based on a series of irrefutable facts and notes explaining those facts, the probative value of which cannot be called into question by the assumptions made by SIV concerning the functioning of the market.

C — *Assessment by the Court*

82 Under the first paragraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, just as under the first paragraph of Article 42(2) of the Rules of Procedure of the Court of Justice, which were previously applicable *mutatis mutandis* to the procedure before the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which come to light in the course of the written procedure. The plea in law based on the infringement of Article 6 of the European Convention for the Protection of Human Rights and Article 14 of the United Nations' Covenant on Civil and Political Rights was introduced for the first time by the applicant only at the reply stage. It is not based on matters of law or of fact which came to light in the course of the written procedure. Consequently, that plea in law cannot be accepted. There is therefore no need, in the context of these cases, to review, in the light of allegedly changed circumstances, the case-law of the Court of Justice in its judgments in Joined Cases 209 to 215 and 218/78 *Fedetab* and Joined Cases 100 to 103/80 *Musique Diffusion Française*, cited above.

83 Furthermore, the Court finds that the applicant has not specified in any way whatsoever how the principle *audi alteram partem* and the rights of defence were infringed by the Commission. Consequently, the pleas in law based on the infringement of the principle *audi alteram partem* and the rights of defence cannot be accepted as grounds for the annulment of the decision in its entirety. In so far as those pleas have not yet been taken into consideration and concern certain specific aspects of the decision, they will be dealt with in the substantive examination of those aspects.

84 With regard to the plea in law based on Articles 2 and 3(f) of the Treaty, the Court considers that it is has no legal basis in law and that it cannot, therefore, be relied on as a ground for the annulment of the decision.

Substance

85 The applicant SIV puts forward the following pleas in law in support of the form of order it seeks:

(a) infringement and incorrect application of Article 85(1) with regard to the assessment of the possible existence of agreements or concerted practices between the Italian glass producers;

(b) infringement and incorrect application of Article 85(1) with regard to the conditions for its applicability;

(c) infringement and incorrect application of Article 86 of the Treaty;

(d) infringement and incorrect application of Article 15(2) of Regulation No 17 with regard to the fines imposed.

86 The applicant FP puts forward the following pleas in law in support of the form of order it seeks:

With regard to the application of Article 85(1):

(a) with regard to the non-automotive glass market:

(i) factually incorrect assessments and lack of evidence;

(ii) incorrect application of the concept of concerted practice;

(b) with regard to the automotive glass market:

(i) factually incorrect assessment and lack of evidence;

(ii) incorrect assessment of the economic and legal context;

(c) with regard to the transfers of glass between producers:

(i) factually inaccurate assessments and lack of evidence;

(ii) no object or restrictive effects on competition;

With regard to Article 86:

(a) incorrect application of the concept of dominant collective position;

(b) factually incorrect assessments;

(c) cumulative unlawful application of Articles 85 and 86;

With regard to the fines:

(a) infringement of Article 15(2) of Regulation No 17.

87 The applicant VP puts forward the following pleas in law in support of the form of order it seeks:

(a) absence of credible evidence capable of establishing VP's participation in an unlawful agreement;

(b) failure to seek evidence from independent sources;

(c) erroneous assessment of the product, the market and VP's behaviour on the market.

88 The pleas in law of all the three applicants can be grouped under three general pleas relating respectively to: (A) the assessment of the market, (B) the findings of fact and the evidence, and (C) the legal assessment. According to the applicants, the decision does not contain any economic analysis of the market and that absence of analysis vitiates the decision in its entirety. As regards the evidence, the applicants claim that the evidence taken into consideration consists, for the most part, in a very partial selection of quotations which ought to have been read in the context both of the documents from which they were taken and of the realities of

the market. Consequently, the legal assessment of the facts allegedly found to exist is vitiated with regard to the application of both Article 85 and Article 86.

89 With regard to the second plea in law, which concerns the findings of fact and the evidence, a point must be mentioned at this stage which came to light only when, as was stated above (paragraph 41), the Commission was called upon to place in the file, in the original form in its possession, the documentary evidence on which it relied when adopting its decision.

90 Under Article 14(1)(b) of Regulation No 17, in the course of the investigations which it carries out at the premises of undertakings, the Commission is authorized only to take copies of or extracts from the books and business records. In the present case, a large number of the documents to which the Commission refers in its statements of objections, and which it communicated to the undertakings in the form of photocopies, are hand-written notes, sometimes scarcely legible, in Italian. In some cases, it was clear from the form of the document communicated by the Commission to the undertakings that the document in question was only part of the original document. Other documents were internal memoranda of the undertakings or their subsidiaries. Once again, it was clear from the form of the document that, in some cases, the documents in question were merely part of the original. In other cases, the fact that the document was an extract was not evident from the document communicated.

91 It emerges from the inquiry carried out by the Court that when the Commission prepared the documentary evidence with a view to communication to the undertakings, certain relevant passages were deliberately deleted or omitted, even though they did not relate to business secrets. In particular, nine words were deleted without trace in a handwritten note from SIV of 30 January 1985 (374).

92 There are four references to that note of 30 January 1985 in the decision: the note is used, firstly, as evidence of the existence of 'agreements between the three producers on price lists and terms of sale' in the non-automotive market (point 62 of the legal part, which recapitulates points 27 and 32 of the factual part) and, secondly, as evidence of 'discussions on how to get price increases accepted by the Fiat group' (point 47 of the factual part). In the second paragraph of point 24, the decision expressly states that that document was communicated to the undertakings with the statement of objections, and it is cited in paragraph 23 (page 17) of the statement of objections. The relevant passage reads as follows in the original:

'— Problema Fiat

— Scaroni [FP] pensa di non potersi battere per fermare PPG

— aumento fori e staffette come cavallo di Troia in Fiat per aumento prezzi'

('Fiat problem — Scaroni [FP] considers that he cannot fight to stop PPG [VP]'; — increase in holes and brackets [mechanism for raising side windows] as Trojan horse in Fiat for increase in prices').

In the photocopy sent with the statement of objections, the words 'Scaroni pensa di non potersi battere per fermare PPG' ('Scaroni considers that he cannot fight to stop PPG') had been deleted. In the statement of objections itself the passage is quoted as follows: 'Problema Fiat — aumento fori e staffette come cavallo di Troia in FIAT per aumento prezzi', without any indication that words have been omitted.

93 The Court considers that it is self-evident and indisputable that the tenor of the note is changed completely by the omission of those nine words. With those nine words the note could be taken as clear evidence of a competitive struggle between SIV and FP on the one hand and VP on the other. At the hearing, the

Commission tried in vain to supply an objectively justifiable reason for the deletion of those words.

94 The Court must record that that is not the only example of such a proceeding, other examples of which will be commented upon below (see in particular paragraphs 214, 215, 224, 236 and 246 below). The Court also observes that SIV's note of 30 January 1985, cited above, and another note of SIV of 24 June 1985 (715) appear in the list of documents referring expressly or implicitly to VP supplied to the Court by the Commission, as making implicit reference to VP, whereas it emerges from the full version of those notes that they make express mention of VP. That fact would appear to indicate that the full versions of those documents were not available to all departments of the Commission.

95 Accordingly, the Court considers that it is incumbent on it, in assessing the applicants' second general plea, to check meticulously the nature and import of the evidence taken into consideration by the Commission in the decision. However, since the nature and the import of the evidence is intimately connected with the nature and the functioning of the market in question, and the parties have focused their arguments essentially on analysis of the nature of the market, it will be appropriate, first of all, to examine the assessment of the market made in the decision in the light of those arguments. An examination will then be made of the evidence taken into consideration and of the findings of fact in the decision which were based on that evidence. Finally, the legal assessment made in relation to Articles 85 and 86 of the Treaty will be examined.

A — *The assessment of the market*

1. Contested decision

96 This part of the decision (points 2-17) is divided into three headings: the product, supply and demand. However, it should be pointed out straight away that the Commission, at the hearing, stated that as the written evidence of the agreements between the three producers was unambiguous and explicit, it made any investi-

gation whatsoever into the structure of the market entirely superfluous. This part of the decision must be considered to be descriptive rather than analytical.

(a) The product

7 The description of the product given in points 2 to 5 of the decision is repeated in essence in paragraphs 1 to 3 above. The decision states that the Italian market 'accounts for some 20% of the European automotive market and roughly the same percentage of the European non-automotive market' (point 6). The development of the Italian market in flat glass is shown in the tables in Annex 1 to the decision.

(b) Supply

8 The decision finds that the three producers were able to meet 'an average of 79% of Italian demand for non-automotive glass and an average of 95% of Italian demand for automotive glass' (point 7 and Annex 2). There then follows (in points 8 to 10) a description of the three producers.

9 FP is a subsidiary of SG, which, through the intermediary of FP or other group companies, owns a number of companies, including Luigi Fontana SpA, which is the largest processing wholesaler on the Italian market. FP owns a float-glass plant at Pisa and a float- glass plant at San Salvo, which it shares with SIV and is operated by Flovetro, a subsidiary of SG. FP is the only producer of cast-glass in Italy (point 8).

0 SIV, which is controlled by the State holding company EFIM, owns two float-glass plants at San Salvo, one of which is operated by Flovetro. In addition, SIV owns one company in Italy and one in Spain which produce automotive glass, another company at San Salvo which produces reflective glasses and two glass-marketing companies in Frankfurt and Paris respectively. In 1986, SIV took control of Veneziana Vetro and Splintex SpA and transferred to Glaverbel control of the company Ilved (point 9).

101 VP, which is a subsidiary of PPG, owns two float-glass plants, at Cuneo and Salerno respectively, and controls the company Pennitalia Securglass, which produces automotive glass. In 1982 PPG bought Boussois, a company which 'has a long tradition in glass manufacture and a strong position on the French market for automotive and non-automotive glass' (point 10).

102 Point 11 contains two tables showing, respectively, the market shares (that is to say on the Italian market) of the three companies, on the basis of the figures in Annex 2, and their shares of the European market. The European flat-glass market is dominated by a tight oligopoly comprising SG, SIV, PPG, Pilkington, Glaverbel (of the Asahi group) and Guardian. These are groups whose activities are integrated upstream and downstream (point 12).

103 With regard to the production capacity of that market, the decision relies on the forecasts made by the European Flat-Glass Producers Association (hereinafter referred to as 'GEPVP') in June 1986 (Community of Ten, valid until 1996) and in June 1987 (Community of Twelve, valid until 1989). Community production was amply sufficient to meet demand in the period from 1980 to 1987, with exports to non-community countries having consistently exceeded imports from outside the Community. Moreover, Community demand for glass would, on the most optimistic assumptions, increase by only 1 to 3% a year. The GEPVP thus anticipated that excess production capacity, which was high in the early 1980s, would persist in the years ahead, albeit at a lower level.

104 According to the information supplied by FP, the average investment involved in a float-glass plant of 150 000 tonnes per year amounts to some ECU 70.5 to 86 million on an existing site and twice that amount on a new site. The possibility of other producers entering the market in the foreseeable future can therefore be ruled out (point 12).

With regard to the automotive market, processing requires different production lines for each technique, each production line being especially designed in the light of the shapes and technical specifications required by demand. Technical obsolescence is therefore fairly rapid and occurs after seven to eight years, according to technical developments in motor vehicle manufacturing. According to FP, the cost of a processing line for the manufacture of 650 000 motor vehicle fittings a year may be put at ECU 40 million. 'Few firms are therefore capable of bearing the costs and risks of processing glass for motor vehicles' (point 13).

(c) Demand

The customers of non-automotive flat-glass producers are wholesalers and producers. Some 40% of demand is accounted for by processors purchasing directly from producers, while the remaining 60% is accounted for by wholesalers. Wholesalers themselves process at least half of the glass they purchase, with the bulk of the remainder being sold directly to final customers and a smaller proportion to small processors (point 14, first paragraph). Processors are often in competition with the flat-glass producers who process glass themselves. Sometimes, processors are dependent on the transfer of technology from glass producers and thus manufacture processed products under licence granted by their suppliers (point 14, second paragraph).

The customers of automotive glass producers are the car manufacturers. The decision describes the two stages in the development of a product: the prototype stage involving only one or two producers, and the marketing stage at which the manufacturer calls on a larger number of producers (point 15).

The decision states (point 16) that the non-automotive market 'saw a fall in demand in the period 1979 to 1983, reflecting the recession in the European economy. As from 1984, demand picked up again, allowing producers, particularly as from the second half of 1985, to increase their prices considerably. As was

stated in [point] 12, demand for glass is expected, according to the industry's forecasts, to increase by between 1 and 3% a year over the next decade'.

109 The automotive market 'is closely bound up with the trend of car production, which, following the second oil shock, went through a period of recession in Italy and the rest of Europe up to 1984. Only in 1985 did production begin to pick up again somewhat, with the recovery gathering further momentum in 1986 and 1987. According to the forecasts, the growth in demand for automotive glass over the next decade is expected to be lower than that for non-automotive glass' (point 17).

2. Arguments of the applicants

110 Throughout the procedure, both before the Commission and before the Court, the applicants insisted that the absence of an economic analysis of the market vitiated the decision in its entirety. At the hearing, they made a joint presentation of their analysis of the market. It is appropriate to summarize the essence of that presentation and to add to it the few remaining elements of their individual arguments.

(a) The argument on principle

111 The applicants claim that, although the decision describes the two markets, non-automotive and automotive, it does not draw the necessary consequences from that description when it analyses the behaviour of the parties and the economic phenomena that it finds to exist. The Commission has an obligation to take into consideration all the circumstances, including the special characteristics of the market in question, which form the legislative background and economic context of the conduct to which exception is taken (judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* [1975] ECR 1663). Since the existence of the concerted practices is categorically denied, the analysis ought to have served not only to prove that the behaviour of the undertakings had the effect of restricting competition but also, and above all, to prove that the behaviour of the undertakings could be explained only by the existence of unlawful concertation, and not merely by market forces. The analysis of the market was therefore essential in two ways: firstly, in the absence of written evidence, to prove the

existence of the alleged concerted practices and, secondly, to demonstrate their restrictive effects on competition.

(b) The arguments regarding the product

While the parties accept that there are three types of flat glass, namely, drawn glass (or window panes), cast glass (in Italian 'greggi'), and plate glass (which was formerly produced by continuous casting, but is now almost exclusively produced by the float-glass process), the applicants draw attention to the fact that their respective shares of the Italian market are, 0.5%, 4.5% and 95% (Assovetro data, 227). Consequently, although the decision concerns flat glass in general, it concerns, almost exclusively, behaviour relating to float glass.

Cast glass is entirely different from the two other types of flat glass from the point of view both of its characteristics (translucent but not transparent) and its uses. Intended solely for certain construction and decorative applications, this product is in decline (188). The manufacture of this type of glass with a very low added value is no longer profitable owing to massive cheap imports from eastern European countries and Turkey (188, 235). Since 1983, FP has been the only producer which still has a production line for cast glass in Italy (229, 235). The Commission ignored the distinction between cast glass and float glass intended for the construction industry and used documents relating to cast glass to criticize the behaviour of FP and SIV in relation to float glass.

Basic float glass has become a commonplace homogenous product. The same technology is used by all the producers for the construction of the floats; the production techniques of float glass are more or less identical throughout Europe and even the world; and quality standards and criteria, organization of work and level of qualification, are all largely equivalent in all European factories. It follows that at the stage of the basic products, it is extremely difficult for customers to distinguish between the products of the different producers. In fact, basic flat glass has become a true raw material, a 'commodity' like gold or aluminium. For that

reason, the price of the glass is more or less the same in all the countries with major glass producers. Variations in price, if any, depend on secondary costs such as, for example, transport costs. That finding is an important factor for understanding the organization of the market and for a true appreciation of certain practices and certain behaviour of the undertakings.

115 Float glass is produced in a wide variety of colours and thicknesses. Apart from clear glass there are six colours on the European non-automotive market and, in the automotive market, four colours. The production of coloured glass is more difficult and more costly than the production of clear glass on account of the additional mineral and chemical ingredients. Moreover, there are approximately 15 different thicknesses, ranging from 2mm to more than 20mm.

116 The Commission itself, in the 1981 decision, recognized that flat glass is a homogenous product (point II A 3 a-1, on page 39), whereas, in the present decision, it refused or omitted to take that factor into account as an explanation for certain phenomena which it found to exist in the market.

117 The flat glass industry covers various activities and trades, of which the most important are the production of basic glass (already considered above), processing and the manufacture of special products.

118 The decision ignored the importance of processing. Almost 78% of total production is processed (insulating glass, laminated glass for construction and reflecting glass, safety glass for construction, glass for household appliances, glass for mirrors). Processing includes the manufacture of laminated glass, tempered glass, toughened glass, double-glazing, insulating glass, layered glass etc. In Italy, most processing is carried out by independent undertakings, some of which are exclusively processors while others have mixed wholesaling, dealing and processing operations. Those which are exclusively processors have their own dynamics; their

priorities are different from those of wholesalers because they are less sensitive to price changes and do not make speculative purchases, their profitability coming from the added value of processing and not simply from the purchase and resale of products.

The behaviour alleged in the decision (identical price lists and discounts, simultaneous publication dates, classification of wholesalers, meetings etc) concerns exclusively basic flat-glass products distributed through wholesalers. Such behaviour concerns only 30% of total flat glass consumption in Italy and not the 76 to 80% claimed in the decision, which distorts the assessment of the effects of the behaviour and its seriousness.

Special products, which are also ignored in the decision, are high-technology products which meet very high specific performances and/or standards (reflecting glasses, laminated glasses, low-emission glasses, glass for silvering). Those products are very different from producer to producer, and producers are fighting a veritable technological war constantly to develop new products, which is strategically important for their position in the market. Those highly competitive products represent more than one-third of the turnover of the applicant undertakings. They are, moreover, a competitive tool for other products, in so far as they permit each producer to reinforce its brand image, to penetrate new markets and thereby strengthen its position in the market for basic flat glass and processed glass. Special products are, moreover, the basis for the revitalization of the non-automotive market.

The automotive and non-automotive markets are organized and function in entirely different ways: the non-automotive market is supplied essentially through wholesalers and processors, to which producers sell their products either unprocessed, or processed on processing lines, while the automotive market is exclusively a market for glass processed in accordance with the specifications of the motor vehicle manufacturers and delivered directly by the producers to the vehicle manufacturers. The absence of intermediaries in the automotive market is explained by the importance and the complexity of processing for this market, its high cost, the need for close and continuous relations with motor vehicle manufacturers for the

development and perfection of models, the requirement for deliveries made 'just in time' (delivery to the assembly line without stocks being kept by the motor vehicle manufacturer).

122 Although the Commission acknowledged the distinction between those two markets with regard to Article 85, it refused to do so in connection with the application of Article 86. Without any explanation at all, the Commission stated that the market to be taken into consideration was the flat-glass market in general.

123 With regard to the characteristics of the industrial production of float glass, the applicants point out that float-glass furnaces are very heavy and inflexible production plant. In order to be profitable, they must have high capacities (of the order of 500 tonnes per day) and be used fully (24 hours per day) and rationally. The construction of a float-glass furnace constitutes a major investment decision (approximately ECU 100 million) so that industry cannot adapt either rapidly or flexibly to variations in demand. Once established, a float-glass furnace must operate continuously, which necessarily involves an increase in production and the risk of over-capacity.

124 Float-glass plant also lacks flexibility from the operating point of view in so far as one float-glass production line can produce only a single colour and a single thickness at one time. Each change of colour requires time (more or less 14 days) and involves a considerable loss of production (7 000 tonnes of saleable product for a furnace of 500 tonnes per day). It is imperative that production runs should be long, corresponding to a high level of demand, in order to be economically viable, whereas the variety of products required by the market is very wide. Moreover, because of its bulk, it is not economic to store flat glass either in large quantities or for long periods.

125 Finally, repairs and maintenance, which must be carried out at regular intervals, must be carried out cold, and involve production stoppages every five or six years. Float-glass production lines are out of action for several months on account of

such repairs and maintenance and on account of possible technological improvements and increases in capacity.

All those factors make it extremely difficult to adjust supply to demand, and impossible, both technologically and economically, for each producer to have the full range of products available at any given moment. Those technical constraints and economic imperatives, which mean that the most rational utilization of capacity has to be reconciled with the need to maintain a presence on the market, explain why producers have an objective interest in purchasing from, or selling to their competitors, according to circumstances.

Although it is true that 'few firms are ... capable of bearing the costs and risks of processing glass for motor vehicles' (point 13), the parties emphasize that that is because of the considerations set out in paragraph 121 above.

(c) The arguments relating to supply

The total (saleable) European production capacity in 1989 is estimated at approximately 5 100 000 tonnes, according to the applicants, whereas it was 4 444 000 tonnes in 1986 and 4 176 000 tonnes in 1982 (source GEPVP, 175). Italian float-glass production in 1985 was 700 000 tonnes and in 1986 673 000 tonnes, produced on five float-glass production lines, one of which belonged to FP, one to SIV, one to FP and SIV jointly, and two to VP (source, Assovetro Istat, 187). At the end of 1987, SIV brought into operation a new float-glass plant at Porto Marghera (Veneziana Vetro).

In the European flat-glass market, including the United Kingdom, Italy is the third — or fourth (depending on the year) — market in order of importance, with a share of total European flat-glass consumption of 14.1% in 1986, never having previously exceeded 16.3% (189).

130 The decision considers that the three Italian producers have 79% of the Italian non-automotive market. The applicants maintain that their share of the Italian non-automotive market during the period under consideration was, at its highest level, only 63.7% in 1986 when SIV took control of Vetrocoke. On average, their market share was of the order of 56.2% between 1982 and 1986. That is explained by the fact that, according to the Commission, imports from France could not be regarded as independent imports if the seller was a company linked to an Italian producer. No reasons were given for that position. Boussois, a sister company of VP, had an outside shareholder who held 30% of its capital and who forced the company to act in its own best interest, independently of VP, which was itself 20% owned by independent shareholders and was therefore not fully controlled by PPG either. Imports into Italy by Boussois were independent imports (judgment in Case 75/84 *Metro* v *Commission* [1986] ECR 3021). In any event, imports in 1986 amounted to approximately a third of the Italian market in non-automotive flat glass. Although that market structure changed a little after PPG took over Boussois in 1982, it remains the case that the flow of imports, even from sister companies, shows that imports are economically profitable. The flow of exports is also not negligible (30%).

131 Accordingly, the decision is wrong to state that Italy is the relevant geographical market because the undertakings are able to sell for export only quantities produced at a marginal cost. There is no evidence in the file to support that statement. In its 1981 decision, and in Commission Decision 84/388/EEC of 23 July 1984 relating to agreements and concerted practices in the flat glass-sector in the Benelux countries (Official Journal 1984 L 212, p. 13, hereinafter referred to as 'the 1984 decision'), the Commission emphasized the importance of intra-Community trade. Thus, in its 1981 decision, (point 6, page 35), it stated, firstly, that the market shares of Italian producers in the Italian flat-glass market as a whole were FP 20%, SIV 14%, VP 14%, Fabbrica Sciarra 3%, and Vetro Coke 3%, the remainder, namely 46%, was accounted for by imports; secondly, that SIV and VP, in 1976 and 1977, sold some 55% of their output on the markets of the other Member States.

2 While it is true, as the decision points out, that at the beginning of the 1980s the flat-glass market experienced a difficult crisis period with considerable over-capacity, ever-increasing production costs, crises in the construction and motor vehicle sectors, increased energy costs, leading to heavy losses for the producers, the producers nevertheless carried out the necessary restructuring measures (closure of unprofitable or obsolete plant, reductions in the workforce, recapitalization, new investment in more efficient plant, research and development into special products, etc). The flat-glass industry, unlike the Community's other heavy industries, (for example the steel industry), was able to survive this crisis without major interventions or specific sectorial measures on the part of the national or Community authorities. Consequently, during the period from 1982 to 1986, which is the period covered by the contested decision, the flat-glass industry was a dynamic industry which, far from seeking to weather the crisis by market sharing and other prohibited agreements, reacted in a positive way by adopting sound economic measures.

3 The Commission was not entitled to find that the market is stagnant, with permanent over-capacity and inaccessible to new producers. Quite the contrary, the market has experienced — and always experiences — frequent and profound changes: Glaverbel was taken over by Asahi, Boussois was taken over by PPG, Flachglas was taken over by Pilkington; Guardian set up in Luxembourg at the height of the crisis; nine new production lines have been brought into production since 1981, increasing capacity from 3.8 million tonnes in 1981 to more than 5.1 million tonnes in 1989, all developments which demonstrate the intensity of the competition between producers, who are constantly at war with one another using the weapons of new investment and new products.

4 In fact, despite the general situation in Europe, characterized by over-capacity, on the Italian market there was a lack of supply, which made it particularly attractive for foreign producers. This was confirmed by the import/export balance in Italy (253A).

135 Moreover, SIV and VP point out that in the period under consideration inflation in Italy was very high and fluctuated between 12 and 20% depending on the year, from which it follows that the price increases were more apparent than real and that the parallel increases were not necessarily unlawful (215).

136 Another important factor is that the concept of 'producer' covers, in fact, various professions: producer of basic flat glass, processor of construction glass, processor of automotive glass, producer of special products. While it is true that all those activities concern flat glass, they relate to different markets, each having its own logic. The transfers of basic flat glass did not therefore necessarily influence the market in processed automotive glass, which obeys other laws.

137 Each of the three producers follows its own strategies, placing different emphasis on the various professions:

— FP, as part of the distribution of tasks within the Saint-Gobain group, concentrates on the Italian market and on an important processing activity in the non-automotive sector;

— SIV finds its competitive advantage in concentrating rather on the processing of automotive glass and spreads its processing capacities and sales throughout Europe, exporting 50% of its capacity in 1986, with a smaller operation (at least in the period covered by the decision) as a producer of basic glass;

— VP places the emphasis on the production of basic glass with a low degree of integration of processing activities; in 1986 it exported 40% of its output.

38 The three undertakings are also structurally different: SIV is not part of a multinational group and is controlled by the Italian State holding company EFIM, a non-industrial public partner which does not have the same objectives, interests or operating methods as the private groups.

39 In addition, the market shares of each of the undertakings have undergone significant changes: from 1982 to 1986, for non-automotive glass, FP increased its market share by 22%, while those of SIV and VP fell by 8 and 12% respectively.

(d) The arguments relating to demand

40 With regard to the non-automotive market, the parties emphasize, firstly, that processors are in a completely different competitive situation by reason of the added value generated by processing and, secondly, that the behaviour of the wholesalers was ignored by the Commission.

41 As regards the wholesalers, demand is highly concentrated, with the 20 most important wholesalers absorbing more than 80% of the products distributed through this channel. This sector has experienced very serious difficulties owing to outmoded methods and principles of management, and a liquidity position which is inappropriate to their activities and gives rise to unusually high financial costs, and to competition from the producers who possess an integrated distribution operation. In order to attempt to tackle those difficulties, the wholesalers sought to group themselves into associations. From the mid-seventies, the most important undertakings specializing in the wholesale flat-glass market in Italy created associations designed to impose a common commercial policy on everyone, at both the purchasing and resale stages. The 1981 decision condemned those association agreements between wholesalers, which sought to limit competition among them. That very extensive wholesalers' organization, whose dual purpose is to obtain better conditions and to limit competition among wholesalers, is an essential characteristic of the market in flat glass for the construction industry in Italy.

142 A careful reading of Cobelli's complaint shows very clearly that it concerns the fact that all wholesalers do not benefit from the same conditions, and that the more advantageous conditions enjoyed by some of them have led to the bankruptcy and closure of numerous undertakings including Cobelli's. That is consistent with the conclusions of the Battelle report (276), which highlighted the difficulties of the flat-glass distribution section in Italy. That is an objection of an entirely different nature from the accusations of an agreement among the producers to raise prices. It should be pointed out, moreover, that Cobelli claims that it was from 1982 that the situation became intolerable, that is to say just after the 1981 Commission decision which condemned the association agreements among wholesalers and the undertaking that they had sought from producers to grant special rebates to the members of the associations, in accordance with customer lists. Cobelli is in fact complaining of a situation which had become intolerable because the producers would no longer submit to the wholesalers' demands that prices and conditions be fixed jointly for everyone.

143 With regard to the automotive market, the applicants claim that, although the decision sets out more or less correctly the principal characteristics of the automotive glass market, the Commission ignores the consequences that follow from that description. Motor vehicle manufacturers both compose the music and conduct the orchestra and automotive glass suppliers are dependent on them to a very large extent. The market is entirely defined by demand. The only limit on the power of the motor vehicle manufacturers, as far as suppliers of glass are concerned, consists in the technical possibilities for manufacturing and shaping the glass components of the car, where the glass-producer's technology will come into play. However, once a model has been completed, the fate of the suppliers is entirely in the hands of the motor vehicle manufacturer.

144 The applicants insist that, as, moreover, the decision recognizes, processing plant very quickly becomes technically obsolete and that it must be maintained at full load if it is to pay for itself. A producer therefore tries both to obtain orders which are as big as possible from the motor vehicle manufacturer, and normally has no interest in sharing with others the quota which is allocated to it, and to anticipate the future needs of motor vehicle manufacturers with regard to models, technical requirements and probable volumes, in order to be in a position to meet demand

when it arises. In fact, it takes a year from the start of the installation of new processing plant before that plant actually becomes operational. In view of its specific nature, once installed, an automotive glass production plant is very inflexible and must operate at full load in order to be profitable.

145 With regard to the process of developing models, it is very clear that, if permitted, the 'producer/developer' of the prototype would keep the market entirely to himself, thereby achieving substantial economies of scale. He has no interest in sharing the market with competing producers. However, that is not the policy followed by motor vehicle manufacturers and the file contains eloquent proof of Fiat's strong position in contract negotiations. (721 et seq.).

146 With regard to the sharing out of sources of supply and to the 'quotas' allocated by motor vehicle manufacturers, when motor vehicle manufacturers refuse to rely on a single supplier, it should be pointed out that the number of suppliers is nevertheless limited to two or three per model, a practical consideration which gives rise to the system of allocating 'quotas'. These quotas-shares are fixed as percentages and not as components or quantities. The volume that that quota represents depends on the commercial success of the model of car in question. That system is applied by all motor vehicle manufacturers in Europe, and, in the present case, by Fiat. Accordingly, the supplier runs a risk because, if sales of a model exceed forecasts, it may have difficulties in supplying the number of components that corresponds to his quota, and if he does not manage to supply what Fiat has ordered from him in accordance with the quota, he risks being penalized by a reduction in his quota during the next negotiations. On the other hand, if a supplier sees, as the orders are placed, that he is not receiving his quota, he can lodge a complaint with Fiat's central purchasing department. Thus negotiations on quotas and prices go hand in hand; the allocation of a bigger quota is obtained by making a concession on prices. Hence the supplier's interest in constantly monitoring whether his supply quota has in fact been observed.

147 Motor vehicle manufacturers do not merely impose on glass-producers the technical specifications and quantities required model by model, they also determine the rate of deliveries. The requirement for 'just in time' delivery means that deliveries must be made at the required point in the production process, and not, as the Commission appears to believe, that the manufacturer can rely only on local producers.

148 To the applicant's joint presentation on the market, VP adds that the Commission is mistaken about the special position it occupies on the non-automotive market and presented it in an inaccurate manner. VP does not carry out any processing itself or through related companies. Consequently VP is unable to compete with any of its customers, including the complainant Cobelli. The adoption of a policy consisting in forcing Cobelli, and other customers in the South of Italy, to leave the market, would be contrary to the interests of VP. Cobelli's complaint does not contain any credible evidence establishing unlawful behaviour on the part of VP. In the non-automotive glass market, VP has approximately 3 times more customers than its competitors, some 55% of which are processors. In terms of glass sold, the sales made by VP to processors has increased steadily from 42.2% of VP's total sales outside the automotive sector in 1985, to 53.3% of the total of such sales in 1988.

149 Moreover, if the Commission had not involved VP as a party to the proceedings, the market shares held jointly by SIV and FP during the period under consideration would have varied, for glass intended for the non-automotive market, between 21.2% and 36.1%. That smaller market share could explain the basis of the decision as regards the accusation of a 'collective dominant position'. According to VP, it is plausible that one of the underlying reasons for the procedure against it was to provide justification for the finding made by the Commission on the basis of Article 86.

150 SIV emphasizes that, in the automotive market, it has seen its market share fall from 50.3% to 37.5%. There would have been no point in participating in

'agreements' with other producers, since its market share had been seriously eroded, particularly in its relations with Fiat, of which it had been the main supplier (721 et seq.).

3. The Commission's arguments

151 The Commission insists that the European market in flat glass was characterized by excess production capacity throughout the period covered by the decision, namely from January 1982 to June 1987. That statement is not contradicted by the fact that it is possible, *a posteriori*, on the basis of statistics prepared after the alleged facts, to establish that the excess capacity was lower than predicted. In any event, according to the most recent figures, namely the GEPVP data for 1988 (172, 173 and 174), the entire period covered by the decision was characterized by excess production capacity, and that fact means that claims that the price increases implemented during that period both in the non-automotive and automotive markets were the result of market conditions, lose all credibility.

152 The Commission cannot accept the claim that the three producers hold only 30% of the Italian market in non-automotive glass. The share of the non-automotive glass market, as can be seen in Annex 2 to the decision, is approximately 73 to 79% of the market. The positions of the three Italian producers were frozen. Not only did the position held by the three producers jointly in the Italian market remain essentially the same (point 11 of the decision), but also the market shares held by each of the producers individually did not vary significantly, although SIV did record a loss of several percentage points in the automotive glass market.

153 The Commission repeats that the agreements between the producers emerge clearly from the documents mentioned in the decision and are consistently borne out by events. Even if the market was recovering strongly, with limited supply and very high demand, the behaviour of the undertakings constituted a prohibited agreement.

154 With regard to the imports into Italy made by companies controlled by the producers (for example Boussois), the Commission considers that it is illogical to deduct them from the market shares of the producers, because that would suppose a degree of independence which does not in fact exist between the members of one and the same group. It cannot be considered that those imports could have competed against the three Italian producers' own production. The Commission points out that, unlike in Case 75/84 (*Metro*, cited above), where certain undertakings controlled by one and the same group marketed under different trade names products which were technically different at different prices, this case concerns a product described by VP as a primary product, the added value of which is extremely low (unprocessed flat glass).

155 The Commission claims that its analysis concentrated on the degree of competition between, on the one hand, imports from Boussois and Saint Gobain (France) and, on the other hand, the production of FP, SIV and VP. Leaving aside those imports, there remains only a relatively modest figure which, even though it represents imports made by wholesalers in competition with FP, VP or SIV, certainly had no effect on the conclusions reached by the Commission in the decision.

156 With regard to the credibility and accuracy of Cobelli's complaint against the glass-producers, the Commission emphasizes that the decision is based on its own investigations and that, whenever it refers to the complaint, any conclusions drawn from it and all the relevant documents are expressly identified.

157 With regard to VP's arguments, VP cannot claim, according to the Commission, not to be concerned by the documents referring to the 'glass producers'. Account must be taken of the number of documents and of the current economic situation. The fact that VP was not a processor of non-automotive glass could, of course, mean that it accorded preferential treatment to processing wholesalers, but not that its interests were fundamentally different from those of FP or SIV. The Commission repeats that there is nothing to contradict the fact that VP increased its prices at the same time or just after SIV and FP.

4. Assessment by the Court

158 The Court notes at the outset that, to a certain extent, the Commission has accepted the applicants' analysis of the market. In fact, a large part of the Commission's description of the production of flat glass was taken unchanged from FP's reply to the statement of objections (without, however, always indicating the source). Some of the figures in point 11 and in annexes 1 and 2 to the decision were also extracted from information supplied by the applicants. However, the Commission used only a small part of that information without giving any indication in the decision or in its pleadings in these proceedings why only the passages selected were considered reliable. It is only very occasionally that the Commission refutes in detail the conclusions drawn by the applicants from the information they supplied. The Commission even stated at the hearing that the written evidence of the agreements between the three producers was so unambiguous and explicit that any investigation whatsoever into the structure of the market was entirely superfluous.

159 The Court cannot agree with the Commission's view that an analysis of the market would have been superfluous. The Court considers, on the contrary, that the appropriate definition of the market in question is a necessary precondition of any judgment concerning allegedly anti-competitive behaviour. Even if the Commission is not required to discuss in its decisions all the arguments raised by the undertakings, the Court considers that, having regard to the arguments of the applicants set out above, the Commission ought to have examined more fully the structures and the functioning of the market in order to show why the conclusions drawn by the applicants were groundless. The Court finds itself faced, on the one hand, with a series of detailed arguments advanced by the applicants based on data from which the Commission itself extracted certain evidence in support of its decision and, on the other hand, with a defence which consists, for the most part, in a simple reference to the text of the decision.

160 That being so, the Court considers that it is not for the Court to carry out its own analysis of the market but that it must confine itself to verifying, as far as possible, the correctness of the findings in the decision which were essential for the assessment of the case.

(a) The evolution of the Italian market

161 According to the decision, Annex 1 shows the changes which have taken place in the Italian flat-glass market. However, the three tables in Annex 1 are composed of figures drawn from different sources. The figures designated 'Assovetro' and 'Istat' are taken from tables supplied by SIV during the administrative procedure (183-185, 187-188), whereas the figures in the first lines of tables 1 and 2 appear to have been assembled from other data supplied by the three producers. This mix of figures drawn from different sources has had, at least, two consequences. Firstly, imports represent a reduced proportion of consumption in the Italian market. Secondly, the ratio of imports to consumption in one year compared with another and, consequently, the representation of how that ratio changed (up or down) during the period under consideration, are not the same as they would have been if the figures used had been obtained from the same source.

162 Next, having calculated the apparent consumption of transparent glass in Italy on the basis of those figures, the Commission deducted from the result 'imports from France' and 'imports from other countries by the three producers'. In a footnote, it is stated that:

'Imports from France have been deducted, since there are only two producers in France, namely Saint-Gobain, which is the parent company of Fabbrica Pisana, and Boussois, which is an affiliate of Vernante Pennitalia. Imports from these two French companies are mostly intended for the Italian producers. When quantities are sold direct on the Italian market by one of the French companies, they cannot be considered to be sales by competitors'.

The documents before the Court show that the figures for 'imports from France' were obtained from certain data supplied by SIV concerning total exports from other countries to Italy (183, 185). However, despite the fact that the footnote acknowledges that imports into Italy from France were not always intended for Italian producers, and despite the fact that VP had supplied it with figures for sales made in Italy by Boussois independently of its affiliate (213), the Commission appears to have assumed, when drawing up the tables in Annex 1, that all imports into Italy of all types of flat glass from France by affiliated companies were

intended exclusively for the three Italian producers. The Commission seeks to justify that method by referring to the low volume of imports from French sources other than the companies affiliated to the applicants. That attempted justification finds no support either in the decision or in the documents before the Court.

163 The Commission stated, in reply to a question put by the Court, that the figures under 'imports from other countries' relate exclusively to imports from other Member States of the Community. It expressly confirmed that those figures do not take account of imports from non-member countries. However, the documents before the Court show that imports into Italy from Turkey and from the countries of Eastern Europe were often very important for the functioning of the Italian market in flat glass in general. Called upon during the hearing to state the source of the figures under 'imports from other countries', the Commission referred to a document which does not appear in the common file and from which, moreover, those figures do not appear to be derived.

164 The Commission was unable to explain to the Court why it considered it necessary to combine statistics drawn from different sources. At first sight, such a methodology is suspect. In any event, for the reasons set out above, the Court considers that it is not possible to rely on the findings based on Annex 1 to the decision.

165 The Court records that it has also been unable to reconstruct from the documents to which it was referred by the Commission proof of the claim in point 6 of the decision that the Italian market represents approximately 20% of the European market.

(b) Supply capacity in relation to demand

166 The Commission emphasizes, both in the decision and in its pleadings, that the market was stagnant and characterized by excess production capacity throughout

the period covered by the decision. However, it is evident from a number of graphs which appear in the documents before the Court, and in particular graph 176, to which the Commission drew the attention of the Court during the hearing, that the gap between 'saleable capacity' and 'total sales' became progressively smaller after 1981. Graph 178, which was prepared by GEPVP, indicates that sales began to exceed production capacity during 1985. The GEPVP report of June 1987, to which express reference is made in the decision (point 12, third paragraph) mentions a 'tight supply situation' in 1986 and 1987.

167 The Court considers that it is not possible to dismiss the conclusions which flow from those documents by claiming, as the Commission appears to do, that the market situation must be assessed on the basis of forecasts and not on the basis of facts established *a posteriori*. Accordingly, the Court considers that the Commission has not proved to the requisite legal standard its hypothesis that the market was stagnant and characterized by persistent surplus capacity.

168 The Court considers that, once the hypothesis that the market was stagnant and characterized by persistent over-capacity cannot be accepted since it has not been sufficiently proved, it is all the more necessary to re-evaluate the information supplied by the applicants concerning the commissioning of new float-glass furnaces during the period under consideration. That information could be considered to be proof of a dynamic market, as the applicants claim.

(c) The share of the non-automotive market held by the three producers

169 According to point 7 of the decision, the three producers were able to meet an average of 79% of Italian demand for non-automotive glass. Point 11 contains a table of the 'market shares of the three companies, calculated on the basis of the figures set out in Annex 2'. However, the figures under the heading 'non-automotive' in the table in point 11 amount to 79% only for 1985. Nor was the Commission able to justify the figures in the other table in point 11 concerning the market shares of SG, SIV and PPG at European level.

170 Notwithstanding the express request of the Court to be told all the sources of the tables contained in annexes to the decision, the Commission has not identified any document containing the alleged 'GEPVP figures' in the first line of table 1 in Annex 2. Nor has the Court been able to determine from the documents before it or from the information supplied whether, and to what extent, the tables in Annex 2 were drawn up taking account of the fact that, according to the Commission, imports by affiliated companies must be regarded as forming part of Italian production.

171 Accordingly, the Court cannot accept as a basis for the assessment of the behaviour of the undertakings in the non-automotive market, the hypothesis that the three Italian producers actually held four-fifths of the Italian market. However, nor can the Court accept it as proved that the market shares of the three producers were much lower. The Court can only find that this essential point remains unresolved.

B — *The findings of fact and the evidence*

172 As stated above (paragraph 15), the decision examines the behaviour of the undertakings under three main headings: the non-automotive market, the automotive market and the exchanges of glass between the producers. The heading concerning the non-automotive market is divided into five sub-headings concerning, respectively, identical prices, identical discounts, identical classification of the main customers, the elements of concerted practices between producers, and relations between producers and wholesalers. The heading relating to the automotive market is divided into two sub-headings concerning, respectively, relations with Fiat and Piaggio.

173 It is appropriate, for most of the questions, to examine the evidence and the findings of fact in the order adopted in the decision. However, it should be pointed out that some of the documents concern two or more headings and/or sub-headings, and that consequently, it will be necessary to refer to the findings made under another heading or sub-heading.

1. The behaviour of the undertakings in the non-automotive sector

(a) Identical prices

174 According to the decision (points 18-19), the three Italian producers communicated identical price lists to their Italian customers on dates which were close to one another and in some cases on the same days. Annex 3 to the decision lists the dates on which the price lists were sent to the customers and the dates on which they took effect. The initiative in altering the price lists was not always taken by the same producer, but sometimes by one and sometimes by another of the three producers. The three producers sent at least half of the price lists examined on the same day or within a short period of time. In November 1981, VP had to withdraw the price increase announced the previous September because FP and SIV did not apply VP's price increase. Following that incident, 'there has never again been a case of a price rise not being immediately matched by all the other producers'.

175 The Court observes that no distinction is made here between the three types of glass to which the price lists applied. The finding is therefore entirely general, concerning exclusively two aspects: firstly, the uniformity of the content of the price lists sent by the three undertakings and, secondly, the closeness of the dates on which those price lists were sent by the undertakings and of the dates on which they took effect. The Court notes, however, that the list of dates in Annex 3 to the decision commences in June 1981 and ends in October 1986, whereas Article 1(a) of the decision limits the period of the infringement in the non-automotive sector to the period from 1 June 1983 to 10 April 1986. It follows that only the price lists sent during that latter period may be taken into consideration in order to establish an infringement. The price lists sent outside that period are not, however, without interest as regards the methodology of the decision. Since neither the grounds of the decision nor Annex 3 thereto give any details regarding the content of the price lists, the Court has found it necessary to examine them case-by-case.

176 On 26 June 1981 (427), FP announced new price lists for clear and coloured glass to take effect on 25 July 1981. On 14 July 1981 (300), SIV announced new price lists for the same glasses to take effect on 14 September 1981. SIV's list for clear glass was identical to FP's list for glass of 3mm to 12mm in standard size and large sheets. SIV's list for coloured glass is not available to the Court. On 1 September 1981 (494), VP announced new price lists for clear and drawn glasses to take

effect on 1 October 1981. (At that time, VP did not produce coloured glass). VP's list for clear glass was identical to the lists published by FP and SIV some weeks earlier, except for 3mm glass. By letter of 9 November 1981 (497), VP withdrew the lists announced on 1 September 1981 and announced that the previous lists of 23 March 1981 were again in force. On 1 February 1982 (A183), VP again announced new lists to take effect on 1 March 1982. Those lists were identical to the lists announced by VP on 1 September 1981 and withdrawn on 9 November 1981. It follows that the decision is wrong to state in point 19 that 'VP . . . in November 1981, had to withdraw the price increase announced the previous September, since FP and SIV did not apply VP's price increase'.

177 On 7 May 1982 (430), FP published new price lists for clear and coloured glasses to take effect on 15 June 1982. On 20 May 1982 (302), SIV announced new price lists for clear and coloured glasses to take effect on 30 June 1982. SIV's list for clear glass was identical to FP's list. SIV's list for coloured glass is not available to the Court. On 24 June 1982 (498), VP announced a new list for clear glass to take effect on 1 September 1982. VP's list was identical to the lists of FP and SIV, except for 3mm glass.

178 On 17 February 1983 (A185), VP announced a new price list for clear glass to take effect on 5 April 1983. On 7 March 1983 (433), FP announced a new list for (only) clear glass, which was identical to VP's list for glasses of 3mm to 12mm in standard size and large sheets, to take effect on 11 April 1983. Also on 7 March 1983 (A047), SIV announced new price lists for clear and coloured glasses to take effect on 7 April 1983. The list for clear glass was also identical to VP's list. Since SIV's list for coloured glass is not available to the Court, it is unable to compare that list with the lists of the other producers for that type of glass.

179 On 21 July 1983 (500), VP announced a new price list for clear glass to take effect on 10 October 1983. On 2 September 1983 (A014), FP announced a new price list for coloured glass to take effect on 5 September 1983. On 19 September 1983 (304), SIV announced new price lists for clear and coloured glasses to take effect

on 2 November 1983. The list for clear glass was identical to VP's list as regards 3mm to 10mm glass in standard size and large sheets; the list for coloured glass was identical to FP's list. On 26 September 1983 (A001), FP announced a new list for clear glass which was identical to the lists of VP and SIV as regards 3mm to 10mm glass in standard size and large sheets, to take effect on 2 November 1983.

180 On 16 December 1983 (A187), VP announced a new price list for clear glass to take effect on 15 February 1984. That list comprised, as did all VP's subsequent lists, a price for 2mm glass. On 27 December 1983 (A003), FP announced new lists for clear glass and coloured glass to take effect on 13 February 1984. On 28 December 1983 (A409), SIV announced an identical list for clear glass to take effect on 20 February 1984. The lists announced by FP and SIV did not include a price for 2mm glass. That difference between the lists of SIV and FP, on the one hand, and VP, on the other hand, persisted. The lists of SIV and FP were identical. They were different from VP's lists as regards 4mm and 5mm glass in standard size and 19mm glass in large sheets.

181 On 20 April 1984 (A 189), VP announced a new price list for clear glass to take effect on 21 May 1984. On 7 May 1984 (A051), SIV announced a new list for clear glass, which was identical to VP's list, (except for 2mm glass), to take effect on 23 May 1984. FP did not announce a new list for that type of glass. Also on 7 May 1984 (A051), SIV announced a new list for coloured glass. That announcement is referred to in Annex 3 to the decision but the list does not appear in the documents before the Court. It appears, but the Court was not able to verify the fact, that FP did not announce a new list for coloured glass either.

182 On 3 July 1984 (435 and 308), FP and SIV announced new lists of identical prices for clear glass to take effect on 20 August 1984 (FP) and on 3 September 1984 (SIV). Those lists introduced significant reductions in prices, bringing prices back to the level of the lists of September and December 1983. Also on 3 July 1984 (435), FP announced a new price list for coloured glass to take effect on 20 August 1984. SIV did not make a new announcement. On 27 July 1984 (502), VP announced a new list for clear glass and, for the first time, a list for coloured glass,

to take effect on 3 September 1984. VP's list for clear glass was identical to the lists of FP and SIV for glass in large sheets, but it was appreciably different for standard size glass. VP's list for coloured glass was also identical to FP's list as regards 3mm to 12mm glass in large sheets, but appreciably different for standard size glass. In both cases, the prices for standard size glass appearing in VP's lists were higher than those in the lists of FP and SIV.

183 On 25 October 1984 (505), VP announced a new price list for clear glass, and a change, which is not mentioned in the decision, in the price of standard size coloured glass to take effect on 9 November 1984. The letter accompanying that announcement reads as follows:

'As you will see, this price list reflects the current price situation pertaining in the Italian market.

In effect, we have abolished — as the other producers did some months ago — the price difference between "standard" and "large sheets", leaving the prices for medium thicknesses unchanged.

However, we have slightly altered the prices of a number of other thicknesses in order to bring them more into line with their production costs in relation to [the prices of] the other thicknesses.

Naturally, since the new price list reflects only the current situation as regards prices in our market, it does not take full account of the continual increases in production costs (for example energy, labour, transport, packaging and raw materials). However, these points will be taken into account in our next price list, which will probably be published next January.

As for our price list for bronze and green float glass, this remains unchanged; however, we have abolished, in this price list too, the price difference between "standard" and "large sheets".

Finally, please note that we have considered it necessary to make certain slight changes in the number of sizes offered for certain thicknesses'.

A comparison between that list announced by VP in that letter and the lists published by FP and SIV in the previous July show that, firstly, VP followed FP and SIV in offering the same price for standard size glass and glass in large sheets and that, secondly, some of VP's prices were identical to those of FP and SIV, while others were not.

184 On 12 November 1984 (438), FP announced a new price list for clear and coloured glasses to take effect on 16 January 1985. On 15 November 1984 (310), SIV announced identical lists to take effect on 15 January 1985. On 22 November 1984 (508), VP announced its new lists for clear and coloured glasses to take effect on 14 January 1985. VP's lists re-introduced certain differences between the prices of 'standard' and 'large sheet' glass. Out of 16 prices for clear glass, leaving aside the prices for 2mm glass, only five are identical to the prices in the lists of FP and SIV. VP's prices for coloured glass in large sheets are identical to those of FP and SIV, but its prices for standard size glass are different owing to the fact that FP and SIV maintained the same prices for the two sizes.

185 On 7 March 1985 (511), VP announced a new price list for clear glass to take effect on 14 March 1985. The only effect of that list was to increase only the prices of standard size glass. On 11 March 1985 (313), SIV announced price increases for packaged clear glass. The prices in the latter list were the same as the prices in VP's list for standard size glass. FP did not announce any changes to its price lists at that time.

186 On 13 May 1985 (314 and 441), SIV and FP announced new price lists for clear glass to take effect on 15 (SIV) and 18 (FP) of June 1985. On 27 May 1985 (513), VP announced a new list for clear glass to take effect on 24 June 1985. All three lists were identical, except for the fact that SIV's prices were different as regards 5mm standard size glass.

187 On 8 July 1985 (515) — and not on 8 August 1985, as the decision claims — VP announced a new price list for coloured glass to take effect on 2 September 1985. Neither FP nor SIV announced a change in their price lists for coloured glass at that time.

188 On 26 July 1985 (386 and A053), SIV announced a new price list for clear glass to take effect on 29 July 1985. On an unknown date towards the end of July 1985, probably on 28 July 1985 (A007 and A008), FP announced a new price list for clear glass to take effect on 1 August 1985. That list was identical to SIV's list, except as regards one price, the price of standard 10mm glass. On 31 July 1985 (517 and 598), VP announced a new list for clear glass, which was identical to FP's list, to take effect on 5 August 1985 and not 3 August as the decision claims. The circumstances surrounding this price change will be examined under the heading B.1. iv. 'Elements of concerted practices between producers' (see paragraphs 221-222 below).

189 On 28 August 1985 (A055), SIV announced a new price list for coloured glass to take effect on 4 October 1985. The prices in that list were higher than those in VP's list announced in July 1985. On an unknown date in September 1985 (A013), FP announced a new list for coloured glass which was identical to the list announced by SIV. On 12 September 1985 (see the announcement of 6 February 1986, A191, paragraph 3), VP announced a new list for coloured glass which is not mentioned in Annex 3 to the decision. This new list contained an increase of 8% in comparison with the prices in the list published in July (memorandum of Mr Giordano, a VP employee, of 11 September 1985, 528). The September 1985 list is

not to be found in the documents before the Court, but from those documents that are available to it the Court is able to find that such an increase of 8% in comparison with the July 1985 list would have made VP's prices clearly higher than those in the lists of FP and SIV which had just been published.

190 On 21 October 1985 (384 and A057), SIV announced a new price list for clear glass to take effect on 28 October 1985. On an unknown date towards the end of October, FP announced an identical list (479) to take effect on 25 October 1985 (A010). In that regard, the decision (Note 2 in Annex 3) points out that FP claimed in its reply to the statement of objections that this new price list was announced by telegram, a copy of which (document 16), dated 19 and 21 October 1985, was placed in the administrative file. Such a telegram does not appear in the documents before the Court, which has established, moreover, that another document, which originated with FP (A010), indicates that a new price list with immediate effect had been announced on 25 October 1985. On 25 October 1985 (519), VP also announced a new price list to take effect on 4 November 1985, and that list was identical to the lists of SIV and FP.

191 On 6 February 1986 (253A), VP announced a considerable increase in its prices for coloured glass to take effect on 3 March 1986 (and not on 1 April 1986 as the decision claims). In February 1986, the exact date being unknown, FP announced a new price list (445) for coloured glass to take effect on 10 March 1986. On 10 March 1986 and not February 1986 (443), FP announced a new list for clear glass to take effect on 17 March 1986. In 8 cases out of 14, FP's prices for coloured glass were the same as the prices announced by VP. On 14 March 1986 (316), SIV announced a new list for clear glass to take effect on 24 March 1986. The documents before the Court include an SIV list for coloured glass to take effect on 17 March 1986; its publication date is, however, unknown. SIV's prices for coloured glass were the same as VP's prices. SIV's prices for clear glass were, in 13 out of 16 cases, different from the prices announced by FP. Finally, on 21 March 1986 (521), VP announced a new list for clear glass to take effect on 1 April 1986. In 4 out of 16 cases, VP's prices were different from FP's prices; in 10 cases out of 16, they were different from those of SIV. The circumstances surrounding that last increase by VP will be considered below under the heading B.1. iv 'Elements of concerted practices between producers' (see paragraph 214 below).

92 On 9 September 1986 (A059), SIV announced new lists for clear glass and coloured glass to take effect on 29 September 1986. According to Annex 3 of the decision, on 17 September 1986 FP announced a new list for clear glass to take effect on 1 October 1986. Neither that announcement nor FP's list appear in the documents before the Court. However, in a VP internal memorandum of 29 September 1986 (530), it is stated that 'some days after [the SIV announcement], on 17 September, Saint Gobain published its price list, which was very similar to SIV's, the differences consisting generally only of figures which had been rounded'. After stating that 'we do not agree with these increases', the author of VP's memorandum then analyses the tactics to be adopted with regard to price increases. One day after that memorandum was written, on 30 September 1986 (523), VP announced a new list for clear glass to take effect on 31 October 1986. That list did not contain, in any of the 18 cases, a price which was identical to those on SIV's list. In an FP internal memorandum of 7 October 1986 (446), it is stated:

'In September F. Pisana and SIV published a new Planilux [clear glass] and Parsol [coloured glass] list with increases ... which resulted in an average increase of approximately 6.5%. ... Several days ago PPG's [VP] list for Planilux [clear glass] alone came out; it differs from our list and contains an average increase of 4.8%'.

The author draws the conclusion that FP could not maintain its own price list. It follows from that memorandum that FP had announced a new list for coloured glass at the same time as its list for clear glass, an announcement which is not mentioned in Annex 3 to the decision. On 20 October 1986 (526), VP announced a new price list for coloured glass to take effect on 15 November 1986. The prices contained in that list were, in all cases, significantly lower than those in SIV's list of 9 September 1986.

193 It emerges from this examination that Annex 3 to the decision gives only a partial, and sometimes inaccurate, account of the timing and of the surrounding circumstances of the price changes made by the 3 producers. Consequently, the Commission has not proved to the requisite legal standard that, as the decision claims, the *three* Italian producers communicated *identical* price lists to their Italian customers *on dates which were close to one another and in some cases on the same*

days. On the contrary, it is only in May, July and October 1985 — and only for clear glass — that the announcements of all 3 producers actually coincide, both with regard to the dates and the prices, in the way stated in the decision. In the case of July 1985, it will emerge from the examination of the evidence under the heading B.1. iv 'Elements of concerted practices between producers' that VP took the decision to change its prices only some days after the announcement of new lists by SIV and FP.

194 The Court also finds, on the basis of its examination, that the rhythm of VP's announcements diverges significantly from the rhythm of those of FP and SIV. It is also evident that the rhythm of changes in the price of coloured glass was entirely different from that of changes in the price of clear glass.

195 The Court thus finds it is not correct to claim, as does the decision (point 19, second paragraph), that 'following VP's experience in 1981, there has never again been a case of a price rise not being immediately matched by all the other producers'.

196 However, the examination carried out by the Court shows that, until October 1985, the announcements made by FP and SIV in relation to clear glass were nearly always coincident, both with regard to dates and prices. The consequences of this finding will be considered below (paragraphs 326 to 333) in the light of the pleas in law of the applicants relating to procedure. The Court notes, moreover, that its examination does not support FP's contention that it always published its new 'seasonal' lists twice yearly.

(b) Identical discounts

197 According to the decision (points 20 to 21), the three producers granted identical discounts in accordance with the categories or levels in which customers were

classified. The decision then lists, for the years 1983 to 1986, the discounts granted to the customers in the categories or level A, B and C. The fact that the scales of the discounts granted to customers by the three producers coincide is not due to objective factors, such as, for example, the quantities bought from a producer or the terms of payment. 'As was admitted at the hearing, each customer normally buys the bulk of its needs from one supplier and spreads the remainder of its requirements amongst the other producers, in the knowledge that, whatever the quantities it purchases from the various supplies, it will always obtain the same terms.'

8 The Court observes, firstly, that the only findings of fact in question here concern the uniformity of the discounts granted by the three producers to the customers classified in the three categories A, B and C. It is only subsequently that the decision deals with the question of the identity of the customers classified in those three categories (points 22-23) and the question of the implementation of the discounts at the invoicing stage (point 34). The line of argument thus appears to be based on the hypothesis that all three producers classified their customers in accordance with a common system of categories or levels. However, the reason for that hypothesis is not explained in the decision.

9 Called upon to explain to the Court the documentary basis for its finding that the discounts were identical, the Commission referred to a series of documents (319 to 351, 452 to 463, 544 to 571, A016-A037, A121-A127 and A194-A285), which consist of tables found in the files of each of the three producers on which are noted the discounts which they had from time to time granted to their customers. An examination of those documents shows that only SIV adopted a system for classifying its customers into categories A, B, C and D, and only from 11 March 1985 (A335). Before that date, SIV classified its customers into two levels (livelli), according to region. The documents originating with SIV show that it granted a basic discount for each category or level and that it then granted supplementary discounts. The tables originating with FP and VP consist only in long lists of customers, relating to different periods, and containing, opposite the name of each customer, the percentage discounts which it had been granted. It appears that VP applied at least seven levels of discounts (see, for example, 544). Inasmuch as the Court has been able to follow the methodology adopted by the Commission, it appears to consist in comparing the discounts granted by the three producers to

certain companies, from which the Commission concluded, firstly, that all the producers had adopted the same system for classifying their customers and, secondly, that they had granted the same discounts to each category of customer.

200 The Court considers that the Commission could not infer from the series of documents cited above, without further supporting evidence, either the hypothesis that all three producers classified their customers according to a common system of categories or, still less, the finding that all three producers granted identical discounts in accordance with that system of classification. An examination of the tables of the three producers shows that they did not all grant their discounts in accordance with the same system and criteria. The Court considers that the fact that the discounts granted to some wholesalers by the three producers coincide is not sufficient, in itself, to prove systematic concerted action among the three producers in relation to the discounts granted to wholesalers in general.

201 As for the fact that at the hearing the producers are said to have admitted that customers could be sure of obtaining the same terms from each of the suppliers, the Court observes that the Commission refers to page 4 of the minutes of the hearing where FP's Mr Milletti stated:

'A wholesaler does not concentrate his purchases on a single supplier because no supplier, in spite of the exchanges of products among producers, has the entire range of products; a wholesaler needs credit and it is therefore dangerous to rely on a single supplier; a supplier does not have an interest in 100% of the purchases of a wholesaler because the risk would be very serious. Normally a wholesaler has a favourite supplier from which it purchases 60 to 70% of its requirements. That supplier grants it the most favourable conditions with which the other suppliers, in substance, fall into line because if they do not, they will achieve sales only with difficulty. If, then, these latter suppliers granted conditions which were better than those of the favoured supplier, the latter would immediately fall into line. That is why, in the medium term, you end up with a situation in which the conditions granted to wholesalers by the producers are practically uniform'.

The Court considers that this passage, far from constituting an admission by the producers of an anti-competitive practice is rather evidence of the ability of the customers to play off one producer against the other in order to ensure that they have the same purchasing conditions from each producer.

Accordingly, the Court finds that the Commission has not proved to the requisite legal standard the findings of fact made by it in this part of the decision, and, in particular, has not proved that the three producers granted identical discounts according to the categories or levels in which customers were classified.

(c) Identical classification of the main customers by category or level

According to the decision (point 22), the main customers, that is to say, those which account for more than half of demand, were classified in the same category or level, whenever they obtained their supplies from any of the producers. Reference is made in the decision to Annex 4, which refers only to 1985 and 1986 because (note 1 in point 22) 'not all the producers were able to provide full information'. The exceptions were due to the fact that 'some producers, such as VP, aim to give preferential treatment to processors or to the fact that each producer tries to give preferential treatment to certain customers in certain regions'. The decisions states that 'the classification of customers by category or level was not dependent on their purchases from a given producer, but on each customer's total purchases from all producers'. The classification was updated several times a year according to the table in Annex 5. In point 23, fifth paragraph, the decision states that 'the table in Annex 4 shows that the main wholesalers are classified in the same category by the three producers'.

The Court considers that it is necessary first to examine the sources of the table in Annex 4 to the decision since that table is, according to the decision, the essential proof of the findings made under this heading. This table entitled 'Analysis of the

main Italian wholesale operators and their classification' is divided into two main parts. The left hand part reproduces a document which was drawn up by SG and annexed by FP to its reply to the statement of objections (451). It is a list of 43 wholesalers and processing wholesalers with, against each name, the total purchases of float, drawn, cast and processed glass, in tonnes per year, made, according to SG's calculations, in 1986 by each of those wholesalers from Italian and foreign producers. The wholesalers are listed in descending order according to their purchases, a third column indicating the progressive percentage of the sum of their purchases in relation to the overall total. The right hand part of the table, which refers to the two years 1985 and 1986, was prepared by the Commission on the basis of its findings, examined above, concerning the classification of their customers into the categories A, B and C made by FP, SIV and VP. In each column relating to a producer, against the name of each wholesaler, is entered the letter 'A' or 'B' or the letters 'ncl' (not a customer). Thus, Annex 4 claims to prove that wholesaler X was classified in category A by the three producers for each of the years 1985 and 1986, while wholesaler Y was classified in category A by FP and VP and in category B by SIV.

205 The Court considers that the methodology so adopted by the Commission is highly questionable. It applies the technique of 'cutting and pasting', using, on the one hand, a table placed in the file by FP and, on the other hand, the Commission's reconstruction of the classification of the customers into categories or levels that, according to the Commission, had been made by FP, SIV and VP. With regard to the first source of information used, it should be pointed out that the table prepared by SG was placed in the file in order to show the structure, and in particular the concentration, of Italian demand for glass in general. It turns out to be an estimate of the purchases made in one year by the Italian wholesalers and processing wholesalers of float, drawn, cast and processed glass from Italian and foreign producers. It is not known what data the table is based upon and the Commission has not carried out any independent verification in that regard. Moreover, it does not contain any indication of the proportion of the purchases made from Italian producers. With regard to the second source of information used, namely the reconstruction allegedly carried out by the Commission of the classification of customers by category or level which the Italian producers are said to have carried out, the Court refers to the finding already made under the two preceding headings (B.1. i and ii) and the conclusions which it drew therefrom.

Accordingly, the Court considers that the Commission cannot rely on Annex 4 to the decision alone to support its finding that the three producers classified their main customers identically. In any event, even assuming that Annex 4 could be accepted as proof of a system of classification, it must be stated, as the decision itself acknowledges, that the classifications made by the producers would not be absolutely identical. According to the decision, the 'exceptions' can be explained. The Court considers that those exceptions make it necessary to examine the assumptions upon which the Commission's findings under this heading are based.

The Court considers that the use of the term 'the main customers' begs the question, namely, that it is possible to identify a list of the main customers which is common to the three producers. The tables of discounts, to which the Commission has drawn the Court's attention, make it possible to establish the customers to which each of the three producers granted the most favourable discounts (see, for example 340 and 344 for SIV, 452-465 for FP, and 544-547 for VP). Although it can be assumed that the most favourable discounts would be accorded by each producer to its most important customers, it is nevertheless clear from a comparison of the lists of discounts that 'the main customers' were not the same for each of the three producers. That finding does not imply by any means that there is any contradiction with SG's table, cited above, because it is evident from that table that only four wholesalers each purchased more than 5% of the overall volume of purchases during 1986, and that the great majority of the wholesalers mentioned each purchased between 2 and 3% of the overall volume.

It would, moreover, be normal for processing wholesalers to be more important to VP, which did not process glass, than to FP and SIV. The Court therefore cross-checked the discounts granted to Sangalli which carried out processing and which, being the second on the list in Annex 4, may be assumed to be an important customer for each of the producers. The Court found that the discounts granted to Sangalli by the three producers were far from identical. Called upon at the hearing to indicate the discounts which it claimed were granted by the three producers to Sangalli, the Commission produced figures which were themselves evidently far from identical.

209 It must be pointed out that the invoices referred to in point 34 of the decision, which will be examined below, prove that the discounts granted by the three producers to Cobelli were not identical either.

210 However, the Court emphasizes that, so far, both the decision and the examination of the decision by the Court have been concerned exclusively with the *uniformity* of the price lists, the discounts and the classification of the main customers.

(d) Elements of concerted practice between producers

211 According to the decision (point 24), the uniformity of prices and of discount scales and the uniform classification of the main customers by category or level were the result of concerted practices between the producers agreed on directly during talks, meetings or contacts, or through the intermediary of the spokesman of the spokesman of the main customers. The decision then lists the documentary evidence considered and the conclusions reached by the Commission on the basis of that evidence (points 25 to 33). It states that the prices and discounts agreed on were actually applied (point 34). There then follows a list of invoices from which it allegedly emerges that one and the same customer who purchased widely differing quantities was granted identical discounts by the three producers.

212 The Court considers that it is necessary to examine, firstly, the documentary evidence which, according to the list supplied to the Court by the Commission, refers expressly or implicitly to VP. The documents making express reference to VP are: the Socover notes of 12 July 1983 (point 25 of the decision) and of 12 March 1986 (point 32). Those making implied reference to VP are: the notes of FP and SIV of 30 January 1985 (point 27) and Socover's notes of 12 April 1985 (point 29), of 10 July 1985 (point 30) and of 23 July 1985 (point 31). However, the Court notes that, in the decision, it is stated that 'Socover notes are explicit, since they always mention the decisions adopted by the three producers'.

Socover's handwritten note of 12 July 1983 (258), written following a meeting between Socover and FP, contains the words 'Scale sconti e supercredito: gli altri non hanno tenuto fede agli impegni' ('Discount scales and super credit: the others have not fulfilled their commitments') followed by mention of SIV and VP. Of course, that passage may be read as being evidence of a commitment of the three producers vis-à-vis the wholesalers concerning discounts and credits. However, it must also be pointed out that the date on which the Commission considers the alleged infringement to have begun is 1 June 1983. According to the context of that note, the commitment of the 'others' to which it refers cannot be a commitment undertaken and broken during the short period which elapsed between 1 June and 12 July 1983. It follows that, although that note could have been considered to be evidence of a commitment by the three producers vis-à-vis the wholesalers before 1 June 1983, it cannot be accepted as proof that such a joint commitment continued throughout the period of the alleged infringement.

Socover's handwritten note of 12 March 1986 (263), written following a meeting between Socover and VP, contains the words 'Anche loro adotteranno gli aumenti previsti da SG e SIV col 1/4/86 e saranno rigidi (?)' ('They too will adopt the increases planned by SG [FP] and SIV from 1/4/86 and will be rigid (?)'). According to the decision (point 32), those words mean that VP had been informed, as early as 12 March 1986, at least by SIV, that the other two producers planned a price increase with effect from 1 April 1986 and that VP had informed Socover on 12 March 1986 that it had already decided to apply the same increase. It must, however, be pointed out that the passage of the note quoted above is followed immediately by the words: 'Se così fosse lunedì 17/3 dovremmo segnalare quanti carichi noi possiamo ritiare che ce li manderanno loro' ('If it were so Monday 17/3 we must give notice of how many loads we can take so that they will send them to us'), which means, at first sight, that a final decision had not been taken on 12 March 1986. That interpretation is borne out by the wording of a VP internal memorandum (529) of 20 March 1986, written by Mr Giordano, one of the participants in the meeting with Socover on 12 March 1986. Mr Giordano mentions, firstly, the fact that SIV and FP had already announced price increases on 14 and 17 March 1986 respectively. He then sets out the circumstances favouring an increase in prices, namely, the fact that demand was holding up; the fact that certain furnaces were going to be shut down for repairs (in particular the float glass plant in Turkey 'which is causing great disruption in the Italian market'); and the fact that VP was going to start a production run for coloured glass, which meant a shortage of clear glass. Mr Giordano concludes from that that the increase announced by SIV and FP should, in general, be followed. That memorandum, written *in tempore non suspecto*, thus refutes the

interpretation that, eight days earlier, VP had announced to Socover its intention of adopting the increases planned by FP and SIV.

215 With regard to the allegedly *implicit* references to VP, the Court has already referred to the deletion, in SIV's handwritten note of 30 January 1985 (374), of the words 'Mr Scaroni considers that he cannot fight to stop PPG [VP]'. In fact, that note contained an *express* reference to VP, but in a way which was incompatible with the assumption that there was a close agreement among the three producers. In that regard, the Court points out, in passing, that SIV's note of 30 October 1984 (369) (which is mentioned in point 26 of the decision but which does not appear in the list of documents referring to VP) contains the words: 'AUTO — secondo Scaroni non alimentare PPG' ('Auto — according to Scaroni not to supply PPG [VP]'). That reference is again express and incompatible with the argument that there was a close agreement among the three producers.

216 However, even if there was fierce competition in the automotive market, it is not impossible for there to have been concertation in the non-automotive market, and that possibility must be examined by the Court. According to the decision (point 27), SIV's note of 30 January 1985, cited above, and FP's note (474) concerning the same meeting between FP and SIV, are particularly significant because they show that:

'SIV and FP mutually noted that they were complying with the agreements in substance and in particular that they were complying with the prices for clear glass. However, as regards coloured and laminated glass, SIV accused FP of breaching the provisions of the cartel by resorting to various devices, such as supplementary discounts granted to certain wholesalers. SIV proposed that each producer should have its preferential customers to which to grant supplementary discounts. For its part, SIV undertook, with regard to discounts and customers classified in category "super A", to apply the same terms and conditions as the other producers'.

The decision insists (point 32, third paragraph) that SIV's note 'mentions ... *the three producers*, as a reference parameter for the discounts' and that FP's note '[refers] ... to *the existence of a cartel between the producers*'.

It is to be noted, firstly, that the meeting between FP and SIV, to which those notes refer, appears to have encompassed a wide range of subjects of common interest to the two undertakings, some of which are dealt with in more detail in one note than in the other. In general, FP's note is more detailed than SIV's note. It is necessary, secondly, to look at the timing of the meeting in relation to the announcements of prices made by the three producers. As the Court has already found (see above, paragraph 183), on 25 October 1984 VP had announced a new list in which it fell partly into line with the lists announced by FP and SIV in the previous July. 18 days and 21 days later, on 12 and 15 November 1984, respectively, FP and SIV announced a completely new identical list. One week after that latter announcement by SIV, VP announced a new list which was not identical to the lists of FP and SIV.

It is true that SIV's note of 30 January 1985 (374) uses the words 'noi faremo le stesse condizioni degli altri' ('we will apply the same conditions as the others') and that FP's note states that 'Ing. Papi [SIV] dichiara que loro tengono i prezzi mentre noi scartelliamo almeno per i colorati e laminati tenendo fermo il ch[iaro]. Ing. D'Errico [SIV]: l'accordo di fondo tiene ma ci sono piccoli mezzucci che in practica pregiudicano l'accordo'. (Mr Papi [SIV] declares that they hold their prices while we breach the cartel at least with regard to coloured and laminated holding still cl(ear). Mr D'Errico [SIV]: the basic agreement is holding, but there are a number of petty subterfuges which in practice are harming the agreement.'). However, it should be noted that it was not until the end of 1984 that VP started to offer coloured glass, and that VP did not offer laminated glass.

Accordingly, the Court finds that, although the two notes in question can be considered to be evidence of a concerted practice, or at least of a detailed discussion between FP and SIV about the prices and discounts to be applied vis-à-vis certain customers, it is not evident from those notes, on their own, that the expressions 'gli altri' ('the others'), 'scartelliamo' ('we breach the cartel') and 'l'accordo di fondo' ('the basic agreement') necessarily mean that VP participated in an earlier agreement, as the decision claims. With regard to relations exclusively between FP and SIV, as they emerge from those notes, the Court considers that it is significant that, in the version of FP's note sent with the statement of objections,

the Commission deleted the first words: 'Reclami: chiediamo l'armistizio' ('Advertising: we seek a truce'). The concept of 'truce' presupposes an element of combat.

220 Socover's note of 12 April 1985 (260), written following a meeting with FP, does not contain any reference to other producers. Socover's handwritten note of 10 July 1985 (261), also written following a meeting with FP, contains the words 'il dr Roberti [of FP] sta lavorando a livello europeo per un aumento dal 1/x abbastanza consistente (7/8%)' ('Doctor Roberti [FP] is working *at the European level* for an increase from 1 October which is quite substantial (7/8%)'). According to the decision (point 30), that means that 'an FP manager informed Socover that FP was in the process of consulting *with the other producers* on a price increase of 7-8%'. The words 'at the European level' must, however, be read in their proper context, which concerns the operations of the Saint Gobain group in Europe. It follows that it is more likely that Dr Roberti, an FP employee, was working at the European level within the Saint Gobain group. In any event, the meaning of those words is ambiguous.

221 After having found (point 30), following the interpretation given to Socover's note of 10 July 1985, that a *7.5%* price increase was indeed announced to customers by the three producers in *October* 1985, the decision mentions (point 31) another handwritten note from Socover (262) concerning a meeting with Mr Caberlin, an SIV employee, on 23 July 1985, that is to say 13 days after the meeting with FP. The latter note reads as follows: 'Si sta varando un aumento sul float del 10% già nel prossimo mese di Agosto. Ribadisce l'idea di un certo numero di clienti preferenziali a cui concede un premio finale anno del 3% sul float' ('[SIV] is launching an increase in float glass of 10% as early as next month, August. [Mr Caberlin, SIV] backs the idea of a number of preferential customers to be granted a end-of-year bonus of 3% on float'). According to the decision, those words mean that 'SIV's commercial director informed Socover that *the producers* were in the process of deciding on a 10% price increase for float glass as from August'. Following the interpretation given to that note, the decision states (point 31) that an 8% price increase was indeed notified to customers by the three producers towards the end of *July*.

2 When called upon to specify the documentary basis for the findings that there had been increases of 8% in July and 7.5% in October 1985, the Commission (595 and 597) replied to the Court that it need only add 8% to the price list of May 1985 to arrive at the price list of July 1985, and add 7.5% to the price list of July 1985 to arrive at the price list of October 1985. However, according to Annex 3 to the decision, the price list of July 1985 was announced by SIV on 26 July (to take effect on 29 July), by FP on 28 July (to take effect on 1 August) and by VP on 31 July (to take effect on 3 August). If the three producers were, on 23 July 1985, still in the process of preparing a 10% increase for August, and if the increase which followed some days later was 8%, it is impossible for FP to have been, 13 days earlier, colluding with the same producers with a view to a subsequent increase of the precise amount of 7 to 8% for October. The Court finds that neither the note of 10 July nor the note of 23 July 1985 contain an express reference to the 'other producers'. Accordingly, the Court considers that the Commission was not entitled to interpret them in that way. In addition, the Court considers it particularly significant, and scarcely compatible with the thesis that there were continuous and close concerted practices between the producers, that three days before the announcement, on 26 July 1985, of an increase which the Commission puts at 8%, SIV informed Socover that it was in the process of preparing an increase of 10% for August.

3 In the light of the foregoing, the Court considers that the documentary evidence relied on by the Commission is not sufficient to prove, expressly or implicitly, VP's participation in an agreement between the three producers, as alleged in point 24 of the decision. With regard to SIV and FP, it is necessary to examine, apart from the notes of SIV and FP of 30 January 1985 (point 27), already analysed above, the following documents: SIV's note of 30 October 1984 (point 26), FP's note of 28 March 1985 (point 28), Socover's note of 12 April 1985 (point 29), FP's letter to SIV of 6 March 1985 and FP's notes on the meetings between SIV and FP of 23 April, 30 April and 16 December 1985 and of 3 February 1986 in order to determine whether they can prove concertation between those two producers.

It is to be noted at the outset, both that FP was the only producer of cast glass (vetro greggio ou greggi, 'raw glass') in Italy, and that FP and SIV jointly operated a float glass plant at San Salvo (in the FP's case, it was operated by its

subsidiary Flovetro). Some of the documents mentioned above concern the sale by of cast glass by FP to SIV and, therefore, a vertical relationship of seller and purchaser between those two producers. The documents are, in particular, passages from the letter of 6 March 1985 from FP to SIV (485 or 869), and FP's note on the meetings with SIV of 23 and 30 April 1985 (486 or 871), referred to in point 33, third and fourth paragraphs, of the decision. The Court considers that the existence of a vertical relationship of seller and purchaser between two producers, when it concerns a product manufactured by only one of those producers does not in itself prove an unlawful horizontal agreement. In any event, the Commission must ask itself whether a vertical relationship such as that between FP and SIV was likely to affect trade between the Member States. The Court finds, moreover, that the decision quotes only the words of one paragraph of FP's letter to SIV of 6 March 1985, and that on the copy of that letter sent with the statement of objections, the third paragraph was deleted. That paragraph reads as follows:

'Assistiamo in questo periodo ad una politica commerciale SIV assolutamente dirompente ed addirittura abbiamo *verificato* casi in cui il vostro prezzo di vendita è inferiore a quello da voi a noi corrisposto. Per di più, ci è impossibile (e mi chiedo se l'impossibilità è pratica o strumentale) organizzare un incontro per definire:

1. quantitativi e prezzi dei vostri acquisiti 1985

2. condizioni e modalità di vendita da voi praticate sul mercato per i prodotti acquistati presso di noi.'

('However, we are now seeing an absolutely disruptive commercial policy on the part of SIV, and we have even observed cases in which your selling price is lower than the price you pay us. Moreover, it is impossible (and I wonder whether this impossibility is genuine or just convenient) to organize a meeting in order to define:

1. The quantities and prices of your purchases for 1985;

2. The terms and conditions of sale which you apply in the market for products purchased from us').

225 Certain other documents concern relations between FP and SIV as joint operators of their joint float glass plant, Flovetro, at San Salvo. They are quotations, in the fifth paragraph of point 33 of the decision, from FP's notes relating to the meetings of 16 December 1985 (487 or 873) and 3 February 1986 (488 or 874). Unless the mere fact that the two competitors jointly manage a production facility can be regarded as proof of an unlawful horizontal agreement — which the Commission does not claim in the present case — the Court considers that the fact that the co-managers acted together to avoid a situation in which the quantities taken by each of them from this joint production facility might lead to unfair competition, cannot, in itself, be regarded as proof of an unlawful horizontal agreement.

226 With regard to SIV's handwritten note of 30 October 1984 (369), the decision highlights two of the points it makes: that cast glass was not to be sold below FP's price; and that a common policy was adopted for triple glass. The first point concerns, once again, the conditions of sale imposed by FP as seller on SIV as purchaser of a product that it did not produce. With regard to the second point, the passage quoted in the decision reads as follows: 'Laminati — (sopratutto bistrati) — Scaroni — desiderio in [? prospettiva/proposito?] di una politica di riporto in fabbrica invece che fare [? transformare/trasformazioni?] — per il triplo strato fare una politica comune' ('[laminates — (particularly in two layers) — Scaroni [FP] — wish with a view to a policy of application in the factory instead of processing — for triple layer to have a common policy'). It emerges from the full note that the parties (SIV and FP) discussed, on a number of occasions, the management of their joint production facility. The Court considers that it is possible that the passage relied on in the decision may also refer to an aspect of that joint operation.

227 FP's note of 28 March 1985 (475) concerns a contract for the sale by FP to SIV of 1 000 tonnes of cast glass. Once again, therefore, there is a vertical relationship between FP and SIV. The decision notes (point 28) that 'the two firms agreed that

SIV would not sell the cast glass to 16 listed customers reserved for FP. These 16 reserved customers are not the Fontana affiliates, as FP claims in its reply to the statement of objections, because they are 8 Fontana affiliates . . . and not 16, and because it is illogical to reserve customers that are by definition already reserved since they are totally controlled'. In its Application to the Court, FP claims that 'while it is true that it [Fontana] now has 8 subsidiaries, . . . [that is the result] of an entire period of restructuring which regrouped 16 different businesses into eight companies'. In its Defence, the Commission points out, without however disputing that at that time there were 16 Fontana companies, that 'as for the 16 customers reserved for FP . . . they could not be FP subsidiaries, in particular because they are not customers of SIV'. In that regard, it is sufficient to observe that, in its note of 10 July 1985 (261), cited above, Socover noted the declared intention of FP's Dr Roberti 'to promote exports with 4/5 customers who have an organization here', and that under these words, between the lines are entered the names Socover, *Fontana*, Savas and D'Adda. Other indications in the documents before the Court, for example the telex sent by the wholesalers on 11 October 1984 (270), mentioned in point 37 of the decision, and Socover's note of 12 April 1985 (260), mentioned in point 29, contradict the argument that Fontana could not have been the customer of a producer other than FP.

228 With regard to Socover's note of 12 April 1985 (260) (point 29 of the decision), which has just been mentioned, the decision claims that it is evident from that document that 'Socover and FP also discussed the apportionment of orders *among the producers* on the historical basis of the last two years'. However, after examining the full text of the note, which was not sent with the statement of objections, the Court points out, first of all, that the note contains no mention of producers other than FP; secondly, that it refers to a price list of 16 January 1985 and that only FP had published a list taking effect on that date; and, thirdly, that it refers, without any distinction, to cast glass, which was produced exclusively by FP. Accordingly, the note could not be regarded by the Commission as proof of a discussion concerning producers other than FP.

229 Under this heading, it is necessary to examine, finally, the invoices mentioned in point 34 of the decision. According to the decision, examination of those invoices 'shows that one and the same customer who purchased widely different quantities

from the three producers was charged identical prices and granted identical discounts'. It emerges from the pleadings of the parties and from the inquiry carried out by the Court that the customer in question was Cobelli, and that no verification was carried out by examining the prices charged and discounts granted to other customers. Of the invoices examined, for 1983, five were from SIV and FP and four from VP; for 1984, five were from SIV, three from FP and six from VP; and for 1985, three were from SIV and VP and two from FP. Neither the criteria for selection nor the total number of available invoices have been specified.

230 It should be pointed out that the form of the invoices differs considerably from one producer to another and that it is not immediately evident from an examination of the invoices that the prices and discounts are identical. When asked to explain how it was possible to arrive at the finding made in this regard, the Commission chose three invoices relating to 3mm standard size clear glass dated January 1985 on the basis of which it found (489) that 'the invoices of SIV/FP and VP contain the same unit prices, even if they are presented differently'. It is true that the net unit prices are effectively the same — namely, for FP Lit 3 607/m², for VP Lit 3 608/m² and for SIV Lit 3 607.40/m². However, a more detailed examination of those documents shows, firstly, that the invoices of FP and SIV start from a basic price of Lit 5 500/m² while VP's basic price does not emerge from the invoice; secondly, that VP's invoice appears to refer to glass in large sheets, while the invoices of FP and SIV appear to refer to standard size glass (see above, paragraph 184); thirdly, that in order to arrive at the same net unit price, VP granted discounts which were different from those of SP and SIV and that SIV's method of calculation was different from that of FP. It follows that, although the three invoices selected by the Commission show that the three producers arrived at the same unit price, they do not prove that the three producers charged identical prices and granted identical discounts as alleged by the Commission. In this context, it must be pointed out that the three producers have never disputed, and have in fact stressed, that the net unit prices invoiced to one and the same customer have often been the same on account of the structure of the market.

231 The Court has been able to carry out only a very limited verification of the findings that can be made on the basis of the invoices mentioned in the decision. However, mention should be made of two factors which emerge from that verification. Firstly, it appeared that in some cases, in order to offer a better price, the

producers did not apply the price list theoretically in force at the time of delivery. Secondly, the system of applying discounts involved the successive deduction from the basic price of a series of different percentages. Apart from any difference between the amounts of the discounts, it emerged that the order in which they were applied, and consequently the mathematical process, varied from one producer to another. In particular, SIV applied its basic and supplementary discounts differently from the other two producers.

232 In the light of that examination of the evidence considered in the decision, the Court finds that the Commission has not proved to the requisite legal standard the allegation made in point 24 of the decision, namely, that during the period from 1 June 1983 to 10 April 1986, the period defined in Article 1(a) of the operative part of the decision, the existence of agreements between the three producers resulted in uniformity of prices and of discount scales and uniform classification of the main customers by category or level. The Court considers that some of the documents cited, in particular the notes of FP and SIV concerning their meeting in Rome on 30 January 1985 could, at best, be regarded by the Commission as evidence of concerted practices between FP and SIV. However, those documents are not sufficient to prove an agreement, even between FP and SIV, designed to produce, overall and permanently, identical prices, discounts and customer classification. In so far as it may be relevant to take into consideration the net unit prices charged to one and the same customer, the applicants do not dispute that those net prices could have been the same.

(e) Relations between producers and wholesalers

233 According to the decision (point 35), the three producers took care to ensure that their prices and discounts were also applied downstream. The Commission concedes that, notwithstanding its allegations in the statement of objections based on the statements of Cobelli (see paragraph 10 above), it does not have any direct evidence of meetings between producers and wholesalers, except in the case of a meeting held on 17 April 1986 between, in particular, FP and SIV, the purpose of which was to introduce the new administrator of Fontana Sud, a meeting attended by a representative of SIV although his presence had not been planned. 'However', claims the decision, 'certain documents show, firstly, that some meetings between wholesalers were arranged on the initiative of the producers and that, given their identical prices and discounts, the producers managed to guide the commercial choices of the wholesalers and, secondly, they confirm that the customers expected

producers' prices to be identical'. The decision then (point 36 to 42) examines and comments upon a series of documents. With regard to one of those documents (the telex of 11 October 1984, analysed below, paragraph 236), the decision stresses that 'wholesalers cannot spontaneously embark on such conduct when it should be in their interest to obtain the best prices, to obtain their supplies from suppliers who grant them the best terms of sale and to achieve a good profit margin' (point 37, fourth paragraph). It is appropriate to recall, in this regard, the reference in the legal part (see above, paragraph 21) to the economic dependence of the wholesalers.

234 Before analysing the documentary evidence relied on by the Commission, the Court points out that the Commission's 1981 decision (see paragraph 4 above) concerned, *inter alia*, associations of wholesalers whose objectives included, firstly 'a common business policy; to obtain this each association had to promote a common approach to sales by issuing, applying and complying with selling prices for flat glass and processed products' and, secondly, 'co-operation with the producers with the aim of promoting "a production policy to increase the consumption of glass and the value of processed products by means of an appropriate sales policy"' (point I. C. I.3. a. of the 1981 decision). The decision also concerned unlawful agreements between the three producers (FP, SIV and VP) and the wholesalers' associations. The Commission found that 'tension and differences developed between the interested parties throughout the entire currency of the agreements' (point I. C. III, second paragraph). No fine was imposed on the ground, *inter alia*, that 'their restrictive clauses were implemented partially and to a limited extent' (point II. C, second paragraph). The present decision, on the other hand, accuses the producers of having succeeded, a number of years later, in exercising their economic power to reinstate, against the will and the interests of the wholesalers, a system such as the one condemned in the 1981 decision, and that despite its previous lack of success.

235 According to the present decision (point 36), Socover's note of 12 July 1983 (258), which has already been analysed in paragraph 213 above, 'shows that Socover is the channel for passing messages from the wholesalers to the producers and from the producers to the wholesalers. Socover does not discuss with FP the terms

granted, which would have been particular interest to it, but discusses the undertakings of the producers vis-à-vis all the wholesalers'. The Court has already found that that note could have been regarded by the Commission as evidence of an undertaking of the three producers vis-à-vis the wholesalers, but outside the period of the alleged infringement. Here it is rather a question of assessing its value as evidence of Socover's position as an intermediary between the producers and the other wholesalers or, at least, a group of major wholesalers. With regard to this question, the note can doubtless be read as showing that Socover acted as a spokesman for a group of wholesalers to whom, at least according to Socover itself, all three producers had entered into undertakings. On the other hand, it is not evident from that note that Socover was, from the point of view of the three producers, their intermediary vis-à-vis all the wholesalers.

236 In point 37, the decision examines a telex (270) sent on 11 October 1984 following a meeting on 10 October 1984 in Rome attended by 28 wholesalers. According to the decision, that telex was sent 'to the producers'. The decision states that that telex 'demonstrates clearly the signatories' intention of co-operating with the producers'. In fact, the signatories to the telex 'confirmano la volontà di collaborare al miglioramento dei prezzi di mercato et considerano indispensabile che vengano rispettati i prezzi, gli sconti e le condizioni di vendita confermati' ('confirm their willingness to co-operate in improving prices on the market and regard it as essential that the approved prices, discounts and conditions of sale should be complied with'). However, on the copy of the telex which was sent with the statement of objections, the call sign of the addressee was deleted. Called upon at the hearing to produce the original of the telex, the Commission produced five copies of the telex addressed, respectively, to SIV, Saint-Gobain, Pilkington, Vetrocoke and Glaverbel. No copy addressed to VP was found in the Commission's file and because of the way in which the documents were numbered such a copy could not have existed in Socover's files, from where the other copies were obtained. It is therefore clear that that telex was not, as the decision claims, addressed to the three producers, FP, SIV and VP, whereas it was sent to three companies whose production facilities were outside Italy. It should also be pointed out that the second paragraph of the telex (omitted in the decision) reads as follows: 'Nello stesso tempo auspicano che vengano costituiti tre livelli, differenziando in due gruppi le aziende non comprese allo stato attuale nel primo livello' ('At the same time, they would like three levels to be constituted splitting into two groups the undertakings which are not included at this stage in the first level'), a sentence which suggests that, if there was a uniform system of categories or levels, three other producer companies participated in it.

237 It is, however, true, as the decision points out, that it emerges from the mission report of Mr Ricciardi, VP's sales director (619-620), that he met Socover's Mr Borgonovo in Milan on 11 October 1984. It is therefore possible that Mr Borgonovo communicated to him orally the content of the telex sent to the other producers.

238 In point 38, the decision mentions a letter from Socover dated 19 October 1984 (268) and a letter from VP to Socover dated 20 November 1984 (625). The version of the first letter found in VP's files was a photocopy which does not mention the addressee. The letter mentions, firstly, a price list allegedly drawn up by Socover 'at the request of the producer' and, secondly, a 'meeting to which we have invited all operators in the industry on Wednesday 7 November . . . in Milan'. The decision points out that the monthly report of Mr Giordano, one of VP's commercial directors (626), shows that he 'was on mission in Milan on 7 and 8 November 1984, i. e. on the day of the meeting called by Socover'. The Court finds that examination of those documents shows that they prove the opposite of what the decision claims. Firstly, Mr Giordano's monthly report notes that he left Genoa at 10.50 a. m. on 7 November, that is to say twenty minutes after the meeting started. Secondly, VP's letter of 20 November 1984 was addressed by Mr Ricciardi to Socover and reads as follows:

'Ci è pervenuta solo in questi giorni fotocopia della lettera da Voi inviata il 19.10.84 ad alcune aziende del Vs. settore.

Scopo della presente è solo quello di riconfermarVi, facendo seguito all'incontro avuto con l'Egr. Dr Borgonovo [Socover] a Milano, il 7 c. m., che nessun invito Vi è stato da noi mai formulato per riunioni che riguardano la commercializzazione e trasformazione del vetro.'

('It is only recently that a photocopy reached us of the letter you sent on 19.10.84 to a number of undertakings in your industry.

I am writing this letter only in order to confirm to you again, following the meeting with Dr Borgonovo [Socover] in Milan, on 7th of this month, that no invitation was ever issued by us to you to meetings concerning the marketing and processing of glass'.)

The Court considers that it is not credible that that letter, written *in tempore non suspecto*, does not reflect the true situation, namely, that Mr Giordano (VP) did not attend the meeting held on 7 November 1984 and that VP did not wish to participate in such meetings, still less initiate them. The Court considers, in addition, that the above letter, in so far as it was written by Mr Ricciardi himself, tends to refute any conclusions unfavourable to VP which could have been inferred from his presence in Milan on 11 October 1984.

239 In points 39 and 40, the decision examines two Socover notes of 12 April and 23 July 1985 (260 and 262), which have already been analysed above (paragraphs 228 and 221 respectively). For the reasons already stated, the Court considers that those documents concern only the relations between Socover and, respectively, FP and SIV.

240 In point 41, the decision examines three documents dated 16 September, 23 September and 31 October 1985 (271, 275 and 273 respectively), described as reports made by subsidiaries of FP, Fontana Est and Fontana Ovest, to their parent company. The inquiry carried out by the Court shows that those documents are in fact bi-monthly reports for a deputy director of FP written by one of its employees entrusted, *inter alia*, with maintaining contact with subsidiaries. The third document, dated 31 October 1985, concerns Fontana Est and not Fontana Ovest, as the decision claims; and the last eight words of that document (273-274) quoted in the French and English versions of the decision do not appear in the authentic Italian version. Although it requested the full versions of those documents to be produced, the Court has only partial copies available to it. Finally, another report concerning Fontana Est, dated 2 October 1985, which is not mentioned in the decision, was sent with the statement of objections and appears in the documents before the Court (273B).

241 According to the list supplied to the Court by the Commission, those 'Fontana reports' are to be regarded as containing express references to VP. According to

the decision (point 41, fourth paragraph), 'far from being vague and unspecific or from revealing the wholesalers' general position, as the parties claim, [they] deal with precise facts such as the willingness of the wholesalers to accept the producers' price increases, the publication by the producers of identical price lists, and the producers' desire that the prices be complied with so as to stabilize the market. This means that the producers directly or indirectly exert an influence over the market downstream, since destabilization of that market could have a harmful effect on their business policy'. The Court considers it necessary to examine all those reports, in so far as they are available to it, in order to place in their original context the quotations which appear in the decision. The Court points out that the four documents relate to a period between the end of July and the end of October 1985, which, albeit very limited, nevertheless offers an insight into the functioning of the market downstream during a period in which, as was pointed out above (paragraphs 188 to 190), a number of new price lists were announced by the three producers.

242 Each report is divided into sections, one of which is always entitled 'prezzi di rivendita float' ('float resale prices') or simply 'rivendita' ('resale'). The reports on Fontana Est of 16 September and 31 October 1985 contain another section entitled 'prezzi di vendita float' ('float sale prices') or simply 'vendita' ('sale'). A comparison of the content of those sections shows that the word 'vendita' refers to the sale prices charged by the producers to the wholesalers, whereas 'rivendita' refers to the resale prices charged by the wholesalers to their customers.

243 The first report, which is dated 16 September 1985, notes, under the heading 'Prezzi di rivendita float', a meeting of wholesalers on 31 July 1985 'after the increase published by the producers'. (It should be noted that the new VP price list was announced only on 31 July 1985 in the circumstances examined above (paragraphs 188 and 221 to 222). The report states that 'the wholesalers, at their meeting, drew up this list of resale prices'. There then follows a price list and a recapitulation of the discounts to be granted, with a number of reservations on the part of the two wholesalers Checchin and Sangalli. Then, after a deleted section, the report continues, under the heading 'Prezzi di vendita float':

'Per quanto riguarda le Fabbriche, l'aumento sembra essere applicato ovunque e, del resto, i magazzini non certo pieni ed il lavoro che in questo momento non manca hanno favorito la "digestione" del nuovo prezzo. La Glaverbel (che prima

delle ferie insisteva un pò dappertutto con sconti inferiori ai nostri) sembra, di primi sondaggi dopo le ferie, che abbia mantenuto questa posizione. Resta communque da verificare ulteriormente l'entità del prezzo (poichè è presumibile che il cliente non venga subita a dire a noi se la concorrenza gli ha tolto uno sconto.'

('With regard to the producers, the increase appears to be applied everywhere and, for the rest, the stores [which] are certainly not full and the work which is not lacking at the present time have made 'digestion' of the new prices easier. Glaverbel (which before the holidays still had discounts which were lower than ours just about everywhere) appears, from the first sounding made after the holidays, to have maintained that position. However, the full price must be verified subsequently (because it is to be assumed that the customer is not suddenly going to tell us if the competition has withdrawn a discount from him).')

244 The report of 23 September 1985 (275) concerns a meeting, which also took place on the 16 September 1985, with Fontana Ovest. Under the heading 'Prezzi rivendita float', it notes the prices charged by four wholesalers for 4mm glass. There then follows the passage quoted in part in the decision, which refers to quotations for 4mm glass.

245 The report of 2 October 1985 (273B) was written following a meeting with Fontana Est and notes a meeting of wholesalers on 18 September 1985 'to fix resale prices'. The reservations expressed by Sangalli and Checchin are noted.

246 Finally, the report of 31 October 1985 (273), written following a meeting with Fontana *Est*, records a meeting of 11 wholesalers on 29 October 1985. The Court points out in this regard that the three Italian producers announced identical new price lists between 21 and 25 October 1985 (see paragraph 190 above). Under the heading 'rivendita' ('resale') the report states that the wholesalers agreed, again

subject to reservations on the part of Checchin and Sangalli, on new price lists for clear float glass. Then, under the heading 'vendita' ('sale') there appears the passage quoted in part in the decision in point 41, third paragraph. The passage, unabridged, reads as follows:

'Per quanto riguarda le fabbriche, si sta portando avanti l'aumento, [chi per consegne un pò prima chi un pò dopo,] in ogni caso sembra che la comunicazione sia stata fatta da tutte ** [, comprese Glaverbel,] anche se i termini sono probabilmente più elastici di tutte.' [1]

'As far as the producers are concerned, the increase is in the process of being introduced, [some for deliveries a bit earlier, some a bit later], in any case, everyone has communicated the new prices ** [, including Glaverbel,] even if the terms are somewhat elastic.') [1]

247 While it is evident from this last document that the references to the 'producers' relate to all Italian producers, including SIV and VP, it is also clear that Glaverbel was one of the producers concerned and that it was considered to be pursuing a policy of active competition. The importance of Glaverbel on the Italian market was underlined in an internal VP note (A193) of 6 February 1986. That being so, the Court considers there is nothing in the report analysed above to indicate that 'the producers . . . exert an influence over the market downstream' as the decision claims. On the contrary, that document shows that certain wholesalers were free to take joint action to fix the resale prices charged and the discounts granted to their customers and that the discussions between the representatives of FP and its subsidiaries reflected their uncertainties over the behaviour of the other producers as regards the application of the price lists. The Court observes, finally, that Sangalli and Checchin, which appear in Annex 4 of the decision as the second and ninth

1 — Words omitted in all the versions. (The translations in the French and English versions are partly incorrect.

** End of quotation in the authentic version.

wholesalers in order of importance, respectively, seem to have pursued their own policies on prices and discounts.

248 Finally, in point 42, the decision examines a handwritten note of VP of 10 April 1986 (638) which, according to the decision, shows that during a meeting held on the same date, 'VP and Socover discussed the setting up of a club, consisting of 12 wholesalers, for the distribution of glass products. The two firms stated their intention of discussing the matter with FP and SIV the following week'. The document in question consists of one page on which the author has jotted notes concerning the matters discussed with Mr Borgonovo of Socover, and mentions the following: (on the left) the names of eight wholesalers, followed by four other names; (on the right on different lines) 'CLUB: obiettivo distribuzione' ('CLUB: objective distribution); 'prossima settimana' ('next week'); 'parlare SIV/S. Gobain' ('speak SIV/St. Gobain'). VP disputes the Commission's interpretation of that document, while accepting that Mr Borgonovo actually mentioned a proposal to set up a club. According to VP, Mr Borgonovo intended to speak to SIV and FP about it the following week. According to the Commission, that interpretation is neither logical nor grammatical.

249 The Court finds, firstly, that the document does not express, explicitly and unambiguously, the intentions stated in point 42 of the decision. Secondly, the Court observes that the words that the Commission considers relevant concern a proposal for a club whose objective is the distribution of glass products, and not the application downstream of prices and discounts, which the decision, in point 35, states to be the subject-matter of the evidence analysed under the heading B.1. V. 'Relations between producers and wholesalers'. Accordingly, the Court considers that that document cannot be relied on by the Commission as relevant evidence and that consequently there is no need to assess its import.

250 In the light of all the foregoing, the Court finds, first, that the Commission has not proved to the requisite legal standard that the three producers took care to ensure that their prices and discounts were applied downstream, that some meetings between wholesalers were arranged on the initiative of the producers, or that producers managed to guide the commercial choices of the wholesalers. The Court

finds, secondly, that some of the documents examined, while not necessarily constituting proof of an illicit cartel between the producers, can be accepted as proof that the wholesalers relied on the producers' prices being identical. Finally, the Court considers that the Fontana reports prove that FP used its wholesaler subsidiaries as sources of information regarding the policy of the wholesalers. The consequences of those findings will be examined below (paragraphs 322 to 323) in the context of the pleas in law relating to the procedure made by the applicant.

2. The behaviour of the undertakings on the automotive market

251 Under this heading, the decision states that 'the company documents discussed below indicate that SIV and FP agreed on prices and the allocation of prices at least as from 1982. VP also participated in these restrictive practices from 1983 at least, albeit less strictly than the other two producers'. The decision then deals, under two headings, with the agreements and concerted practices concerning the Fiat (points 44 to 51) and Piaggio (point 52) groups.

(a) The agreements and concerted practices concerning the Fiat group

252 Under this heading, the decision launches directly into an examination of the documents (points 44 to 47) whose meaning will be examined below. At the end of point 45, the decision mentions a uniform price reduction of 8% granted from 1 January 1984 to Fiat by each of the three producers. At the end of point 47, the decision mentions other changes in prices, which were uniform in percentage terms, charged by the three producers during 1985 and 1986, and a uniform 2% increase for the second half of 1985 with Alfa Romeo. The decision then states (point 48) that 'the three producers carried out reciprocal sales or purchases of products (which will be discussed in greater detail under heading 6) with the objective of maintaining their respective penetration quotas or of achieving quotas agreed with their competitors'. There then follows an examination of the figures and documents relating to those exchanges. In point 49, the decision mentions certain tabulations in FP's possession showing, model-by-model and in overall terms, the quantities which each producer supplied in 1985 and 1986 and will supply in 1987 to the Fiat group and to the percentage quotas represented by such supplies.

253 The decision then recalls certain arguments advanced by the undertakings (point 50) and states the reasons why the Commission could not accept them (point 51). In order to identify more closely the differences between the positions of the undertakings and the Commission, highlighted in this part of the decision, it is necessary to quote them in full. The arguments of the undertakings are summarized as follows:

'The automotive-glass market in Italy, they argue, is dominated by Fiat. Like any other motor vehicle manufacturer, Fiat allocates overall supply percentages to each supplier on the basis of considerations relating to prices, its technical capacity and the service offered. Each overall percentage is reviewed bilaterally when negotiations are carried out on the updating of prices. The overall allocation percentages thus defined are converted into allocation percentages for each model of car. The confirmations sent out by Fiat to its automotive-glass suppliers explicitly mention the quota allocated by it to the supplier concerned in respect of the model in question.

During the negotiations, Fiat is in the habit of revealing the most favourable quotation, with the aim of getting the competing suppliers to fall into line. This leads inevitably to an alignment of prices. Contrary to the Commission's supposition, Fiat frequently informs each of its suppliers of the supply quotas allocated to competitors. All in all, the system results in total transparency of the market. Consequently, it is argued, concerted practices between the producers are not necessary.

With regard to the exchange of products, it is argued, the Commission has not provided any proof that such exchanges are deliberately arranged in order to share the market between the producers. In addition, the products exchanged are primary glass and only in exceptional cases do the exchanges involve processed products.

254 In response to those arguments, the Commission states:

'(i) It is true that Fiat enjoys a position of almost total monopoly in Italy as a purchaser of glass for motor vehicles; however, its contractual power is greatly limited by the restrictive nature of alternative offers on the market.

The supply of motor vehicle glass in Europe is controlled by an oligopoly comprising, as well as Saint-Gobain, PPG, SIV, the present suppliers for Fiat, Pilkington and a number of small producers.

'(ii) On the allocation of quotas, it is true that Fiat, like any other motor vehicle manufacturer, specifies in its confirmations of orders the quota allocated to the supplier concerned. However, the quota allocated is merely an indication and not a final allocation, it commits neither the motor vehicle manufacturer nor the supplier, and changes may be made during the period of the contract either on the initiative of the motor vehicle manufacturer or on that of the supplier. ...' There then follows a discussion of certain documents, and in particular, a letter from Fiat to VP dated 3 July 1985 (657). In the course of that discussion, it is stated that 'if it were really the case that the motor vehicle manufacturer allocated fixed and final quotas for the period of the contract, the suppliers would not have to worry about any danger of non-compliance with the quotas allocated and would not have to feel the need to collaborate on this subject or to exchange products in order to maintain their quotas'.

'(iii) The Commission does not dispute that a buyer may, during business negotiations, claim to have had a better offer, whether real or imaginary, in an attempt to get the other suppliers to fall into line. However, this does not mean that all suppliers will apply the same terms and that all suppliers are on an equal footing vis-à-vis a given buyer, since each suppliers position depends on what it has to offer in terms of production and business strength (wider range, special products, better service). Nor does it mean that a dominant buyer can oblige all its suppliers to align themselves on the most favourable offer or that it can easily turn to foreign suppliers in order to force local suppliers to reduce their prices, since, as was admitted at the hearing, motor vehicle manufacturers increasingly demand to be supplied "just on time"; this sort of service can more easily be provided by local glass manufacturers, which have on-the-spot structure, than by a foreign glass manufacturer, who has to set up such a structure and, amongst the glass manufacturers having the necessary structure, this requirement confers an advantage, in terms of quantities to be supplied and prices, on those which have a more firmly established and, at the same time more flexible structure.

At all events, whatever the types of relationships that develop between a dominant buyer and its supplier, it is established that SIV, FP and VP collaborated in order to decide on the attitude to be adopted towards the Fiat group. ...

The price increases for the second half of 1985 and the first and second halves of 1986 were discussed and agreed on between the three producers. ... VP's accession to the agreement on the price rises for the three half years concerned was essentially put into practical effect. ...'

'(iv) The facts which demonstrate that the exchanges of products are aimed at market sharing are essentially as follows:

The exchanges are considerable every year and, as shown by the documents referred to in paragraph 48, they are not simply intended to make good shortages. ...

The notes and documents referred to in paragraph 48 explicitly mention the fact that FP is performing subcontracting work for SIV in respect of processed products.

The exchanges relate in particular to thicknesses and colours which are not manufactured by another producer and are intended to allow the three producers to have the whole range of products available. However, the competitive advantage for a producer of having the whole range available is annulled if the three producers act in such a way as to ensure that there is no difference between them in this respect. ...'.

255 Before going on to examine the documents used as proof of an infringement, the Court considers it necessary to define more closely the nature and the context of the alleged infringement. As was pointed out above, the finding in point 43 of the decision is confined to the allegation that SIV and FP agreed on prices and the allocation of quotas at least as from 1982, and that VP participated in those agreements from 1983 at least. In the legal part (see above, paragraph 24), the

decision states that FP and SIV, from 1982 to 1986, and FP, SIV and VP, from 1983 to 1986, agreed or at any rate colluded on the prices to be charged to the Fiat group and, from 1982 to 1987, on the sharing of the market, thus removing any uncertainty as to their mutual conduct. The Court considers that prior concertation as to the prices to be charged and to the sharing of the market must be distinguished from setting up of a system of reciprocal transfers of products with the objective of maintaining the quotas or of achieving the quotas already held. Examination of the documents mentioned in point 48 of the decision, relating to the exchanges of glass, will therefore be deferred until consideration is given, below, to the heading B.3 'Exchanges of glass between the producers'. At this point only the evidence of prior concertation on prices and quotas will be examined.

56 With regard to the context in which this question must be assessed, the Court observes, first, in paragraph 15 of the decision, it was explained that the product sold by the producers to the car manufacturers is glass processed by the producers or by their subsidiaries in the light of the designs and technical specifications required by the motor vehicle manufacturers. Thus, what is involved here is not the sale by the producers to Fiat of float glass in its 'raw' state (sales which are at issue in the context of the exchanges of products) but the sale of an entire range of different processed products. Secondly, in point 15, second paragraph, a distinction is made between the stage at which a prototype vehicle is developed and the stage at which a new model is marketed. The products in question here were not supplied at the prototype development stage, but were sold with a view to incorporation into vehicles which had already been launched onto the market. Finally, according to the last sentence of point 15 of the decision, 'it is at the stage where the new model is marketed that glass suppliers and motor vehicle manufacturers negotiate prices and quantities, normally on an annual basis'. Thus, the market in question is indeed one in which prices and quantities are normally negotiated between seller and purchaser at regular intervals.

57 It is to be noted that the dates accepted in Article 1(b) and (c) of the decision as defining the periods of infringement of the Treaty in relation to Fiat are, as regards prices, from 26 October 1982 to 1 December 1986 for FP and SIV and from 11 May 1983 to 1 December 1986 for FP, SV and VP jointly, and as regards

quotas, from 1 January 1982 to 30 June 1987 for the three producers without distinction.

258 In point 44, the decision mentions three documents which, albeit dated 1982, all appear on the list of documents referring implicitly to VP supplied to the Court by the Commission. They are a handwritten note addressed by FP's Mr Scaroni to Dr Landeschi, Vice-President of SIV, dated 26 October 1982 (733), forwarding to him an internal memorandum of FP dated 26 October 1982 (734), and an internal memorandum of SIV, also addressed to Mr Landeschi and dated 11 November 1982 (680).

259 FP's internal memorandum of 26 October 1982 consists in a 'riepilogo' (recapitulation) of the increases obtained by FP from Fiat since 1977 'including the last two-year contract 83/84'. SIV's internal memorandum of 11 November 1982 opens as follows:

'The 1983 contract relating to Fiat Auto is now practically completed. We need not remind you of the precedents (certainly not positive as regards us) formalized in writing between Fiat and our most qualified competition, with 46% being allocated to FP'.

The author goes on to examine four points in turn: '(1) allocations in percentage terms; (2) Price rises obtained; (3) Parallels between the 1983 and 1982 contracts; (4) absolute figures)'. Under the heading 'allocations in percentage terms' mention is made of a quota of ... % exclusively for 'il primo equipaggiamento' (original equipment). Under the heading 'Parallels between the 1983 and 1982 contracts', a distinction is drawn, for 1982, between the 'theoretical market quota' and 'the quota actually received' and the author concludes that 'our quota for original equipment is lower at ... %, the percentage which we had been allocated at the relevant time'. It is in relation to the quota allocated for original equipment for 1983 that the author uses the words 'un ferreo controllo delle quote effettivamente praticate' ('a strict monitoring of actual quotas') quoted in the decision. The Court considers that the context in which those words belong shows that the author means by that to emphasize the need for SIV to ensure that it does in fact receive

from Fiat, in 1983, an actual quota for original equipment that corresponds to the theoretical quota allocated to it. It should be noted that the French and English versions of the decision use the words: 'the average percentage increases obtained by SIV are *the same* as those obtained by FP', while the Italian version of the decision uses the word 'simili' (similar). The Court finds that the figures are, in fact, similar but not the same. It is true, however, that the memorandum notes, towards the end, that 'stiamo portando avanti, a seguito degli accordi da Voi presi, il discorso di integrazione con la concurrenza per i lotti di piccole serie' ('we are following up, after the agreements taken by you, the question of integration with the competition for small-scale batches').

60 The Court considers that the Commission was not entitled to conclude on the basis of those three documents that VP participated in an agreement with FP and SIV since the references to 'the competition' must, from their context in which they were made, be references to FP alone. The Court considers that those documents are significant evidence of a high-level exchange of information between FP and SV on the outcome of their negotiations with Fiat and of an agreement on integration for small-scale batches. However, the Court considers that the Commission was not entitled to conclude on the basis of those documents alone that FP and SIV colluded beforehand during the final quarter of 1982 on the prices to be charged to the Fiat group (that quarter being the first of the period of the infringement as defined in Article 1(b) of the operative part of the decision). With regard to quotas, SIV's internal memorandum of 11 November 1982 (the only document mentioning quotas) refers expressly to the 'allocation' of quotas. The Court considers that the document taken as a whole shows that the allocation of quotas in question was carried out by Fiat among the producers, and that the document cannot therefore constitute proof of prior concertation between FP and SIV during 1982 in relation to the sharing out of quotas for supplies to the Fiat group.

61 In point 45, the decision quotes two extracts from another SIV internal memorandum dated 11 May 1983 (686-688), written by the same author. The extracts mention, respectively, 'la concorrenza' (the competition) and — an expression which had already been used in the previous memorandum — 'la concorrenza più qualificata' (the most qualified competition). The Court notes that that document

appears in the list of the documents which the Commission considers to contain an implicit reference to VP. However, it is evident, even from the copy sent with the statement of objections, that that document refers expressly to PPG (that is to say VP) and that it contains relevant evidence, firstly, on the subject of the relations between the producers and Fiat and, secondly, on the subject of the relations between SIV, FP and VP. The memorandum is entitled 'Richiesta Fiat auto revisione prezzi 1983' (Request Fiat auto review prices 1983). The author gives an account of how Fiat's purchasing department called representatives of SIV to a meeting on 26 April 1983 'to present to us its comparison of the prices per square metre per product line' and how Fiat stated that 'our average levels are not competitive in the national and international market'. He then continues:

'Stesso atteggiamento veniva operato da Fiat il 4.5 (per risposta entre il 24.5) nei confronti di F. P., chiedendo riduzioni su alcuni PB ACC. già dal 1.1.83 e per numerose anomalie dal 1.7.83, aggiungendo che altri concorrenti nazionali ed esteri avevano presentato proposte favorevoli. (Splintex e PPG: l'AD di quest'ultimo si è già impegnato a mantenere le quotazioni 1982, già inferiori alle nostre, sino ad almeno tutto il 1984)...

Fiat insiste per una revisione entro il 19.5 su alcuni accoppiati normali...

Qualora aderissimo a tale richiesta, ne deriverebbero queste conseguenze:

(1) Notevole decurtazione dell'aumento a suo tempo acquisito per il 1983.

(2) Nessuna assicurazione, in ogni caso, sul mantenimento delle quote di mercato legate a tali prezzi.

(3) Negative ed immediate ripercussioni su tutte le offerte recentissime e/o a venire...

(4) Proseguimento di queste analisi al ribasso su altri particolari . . .

(5) Inevitabile coinvolgimento della FP nella concessione di tali ribassi ed accelerazione del processo riduttivo senza alcuna contropartita in termini di quote di penetrazione, e con l'inasprimento dei rapporti commerciali con la concorrenza.

(6) Propagazione degli atteggiamenti ribassitici alle altre Case Auto nazionali ed estere le cui Direzioni Acquisti sappiamo essere in collegamento (es. Alfa Romeo — Fiat).

A nostro avviso si presentano pertanto le seguenti alternative che riteniamo di politica aziendale più che commerciale:

(A) Aderire alle richieste Fiat con tutte le conseguenze sopra enunciate.

(B) Tenere un atteggiamento fermo e coerente con la nostra politica commerciale e costistica, rifiutando in linea di massima (salvo appunto macroscopiche anomalie) le richieste del cliente.

Per operare in questa ottica è necessario però accertarsi dell'*assoluto e sicuro* analogo atteggiamento da parte della concorrenza più qualificata.'

('Fiat adopted the same attitude on 4.5 (for response by 24.5) vis-à-vis FP, seeking reductions on several [products] already from 1.1.83, and for numerous irregularities from 1.7.83, adding that other national and foreign competitors had made favourable proposals. (Splintex and PPG: the AD of the latter has already undertaken to maintain the 1982 quotations, which are already lower than ours, until at least the end of 1984) . . .

Fiat insists on a review by 19.5 on certain regular laminates . . .

If we comply with that request, the consequences would be the following:

(1) Significant reduction in the increase originally obtained for 1983.

(2) No assurance, in any case, regarding the maintenance of the market shares linked to those prices.

(3) Negative and immediate repercussions for all very recent and/or pending offers . . .

(4) Extension of this analysis to reductions on other components.

(5) FP will inevitably be involved in the granting of those reductions and acceleration in the reduction process without any quid pro quo in terms of penetration quotas, and with a souring of relations with the competition.

(6) Spread of attitudes in favour of reduction to the other motor vehicle manufacturers here and abroad, whose purchasing departments are, as we know, in contact (example Alfa Romeo — Fiat).

In our opinion, the following alternatives therefore present themselves, which we consider to come under the heading of company policy rather than commercial policy:

(A) Grant Fiat's requests with all the abovementioned consequences.

(B) Maintain a firm and coherent stance with our commercial policy and costs, refusing in general (except, of course, for glaring irregularities) the customer's requests.

In order to act in this direction, we must ensure parallel, *reliable and strict* conduct on the part of our more qualified competitors.')

The Court considers that that document cannot be relied on by the Commission as constituting proof of any concertation whatsoever between VP, on the one hand, and SIV and FP, on the other hand. On the contrary, in the opinion of the Court, the words used in that document are sufficiently explicit to prove the absence of such concertation. The reference to more qualified competitors is obviously a reference to FP. While the document is certainly proof of an element of concertation between SIV and FP alone, it is also proof of the considerable economic power that Fiat was able to wield vis-à-vis all the producers and of its ability to induce one producer to act competitively in relation to the others. The Court considers that by failing to take into consideration this aspect of the market, the decision has presented a distorted picture of that market.

As regards the finding at the end of point 45 that 'the price reduction granted by the three producers FP, SIV and VP was uniform, at 8% and was effective from 1 January 1984', the Commission has not produced to the Court any document from that period which can support that finding. The sources used appear to have been, firstly, a statement made by VP during the administrative procedure, on 16 January 1987 (756), detailing the changes in the prices charged to Fiat, Alfa Romeo, Iveco and Opel and noting an average reduction of 8% for the period from 1 January to 31 December 1984 in comparison with 1983; secondly, a sentence in FP's reply to the statement of objections (736) claiming that 'on 1 January 1984, Fabbrica Pisana reduced its prices by 8% in relation to the price list of 30 December 1982, consequently withdrawing the increases made in 1983, which led to an actual reduction of 12.2%'; and, thirdly, a sentence in SIV's reply to the statement of objections (690) claiming that 'the deduction ... that the reduction in prices made by the three producers SIV, FP and VP was uniform, at 8%, from 1.1.1984 is absolutely wrong, because the total reduction of SIV and

Vetroeuropa [a subsidiary of SIV] was 11%, as can be seen from the official price catalogues submitted at the time to the Commission, whereas we have good reason to believe that FP applied a reduction of 12.2% and VP 8%'. As those statements are completely incompatible, the Court considers that they do not permit the Commission, which, moreover, did not carry out any checks at Fiat, to allege that the three producers applied a uniform reduction of 8% from 1 January 1984.

264 As for SIV's handwritten note of 12 October 1983 (691), quoted at point 46 of the decision, it is sufficient to point out that the decision makes no mention of the words found at the top of that note, written in another hand-writing: ('Zanoni [SIV] vedi se riesce sapere qualcosa delle offerte S. G.' ('Zanoni [SIV], see if you can manage to learn something about Saint-Gobain's offers'). The words at the head of the note are not compatible with the hypothesis that there was prior concertation regarding prices.

265 The decision makes no mention of any document relating to 1984. However, two relevant documents relating to that year appear in the documents before the Court. The first is an internal SIV memorandum of 21 May 1984 (703-705) concerning the holes in 3mm side-windows. After comparing the prices of FP, VP and SIV (the source for which is not revealed), and after finding that SIV's prices were much higher than those of FP, the author notes that SG [FP] had told Fiat that it was ready to cover all its requirements from September 1984. The author then continues:

'Fiat ci dichiara che il non adeguamento ai prezzi SG ci comporterebbe l'esclusione dalle forniture e chiede nostra immediata risposta, con tempistiche ed impegno a fornire la nostre quote.

. . . . . .

Se risponderemo concretamente alle necessità Fiat, spiezzeremo in modo totale SG . . . ., conserveremo l'opzione della quota 50% per il 1985 e la possibilità di un riadeguamento prezzi.

In caso negativo vedremo drasticamente decurtata la nostra quota presso Fiat, a vantaggio SG e VP, e con ridotto potere contrattuale sui prezzi.'

('Fiat tells us that failure to adapt to SG's prices would exclude us from supplies and seeks an immediate reply from us with time-limits and obligation to supply our quotas.

.....

If we actually meet Fiat's requirements, we will totally wrongfoot SG..., we retain the option of the 50% quota for 1985 and the possibility of a re-adjustment of prices.

If not, our quota with Fiat will be reduced drastically, to the advantage of SG and VP, with reduced contractual power over prices.')

The second document relates to 1984 and is another internal memorandum of SIV, by the same author, dated 28 December 1984 (697-700). That memorandum reads as follows:

'Venerdì 21.12. us., abbiamo avuto una riunione con la Direzione Acquisti Fiat onde fare il punto di tale vicenda particolarmente travagliata: ricordiamo che questo "travaglio" viene sopratutto dal fatto che la Fiat ha in practica promesso, per il 1985 ai suoi interlocutori, il 120% di quota, creando le premesse per le gravissime tensioni a tutti i livelli, oggi in atto.

1 *Premesse* ...

Quota di penetrazione [1° equipaggiamento]: al 30.11. la quota reale si aggira, invalore, intorno a: 15.7%, contro una quota ufficiale del 13%...

Ricordiamo che nel corso del 1984 le nostre quotazioni sono state mediamente di almeno il 3% superiori ai nostri concorrenti: ci riferiamo in particolare alla S. G. che, oltre a delle quotazioni [illegible] mediamente del 2% rispetto alle nostre, ha riservato un ristorno dell'1% a fine anno ...

2 *Prospettive per il 1985*

La posizione *SIV* è stata particolarmente chiara ...

— far valere l'opzione del 50% delle forniture di 1° equipaggiamento per il 1985;

— incremento netto delle quotazioni qualora ci discostassimo in maniera sensibile da tale quota. ...

La posizione della *FP* nella realtà è stata, lungo tutto il corso della trattativa, quella di avvicinarsi per quanto possibile alla quota 1984, portando le sue quotazioni a livelli approssimativamente vicini a quelli della Siv: tale fatto è stato il vero freno di qualsiasi azione di incremento sostanziale delle quotazioni. ...

PPG che aveva un impegno da parte della Fiat di attribuzione del 10%, ha praticamente chiuso la settimana scorsa ad un 8% teorico ma, nella realtà, ad un 6-7% reale, per varie ragioni di carattere tecnico-logistico. ...

GLVB e GLASSEXPORT verranno cristallizzate alle quote del 1984.

...'

('On Friday 21 December last, we had a meeting with Fiat's purchasing department to discuss that particularly troubled matter: remember that that 'trouble' arises particularly from the fact that Fiat in fact promised, for 1985, quotas of 120%, thereby creating the conditions for the most serious tensions at all levels now arising.

1 *Introduction* . . . .

Penetration quota [original equipment]: on 30.11, the actual quota is, in value, approximately 15.7%, against an official quota of 13%. . .

We recall that during 1984 our quotations were on average at least 3% higher than those of our competitors: we refer in particular to SG which, in addition to quotations [illegible] on average 2% than ours, reserved an end of year discount of 1%.

2 *Outlook for 1985*

SIV's position was particularly clear . . .

— take up option of 50% of supplies of original equipment for 1985;

— net increase in quotations if we diverge significantly from that quota. . . .

FP's position was, in fact, throughout the negotiations, to get as close as possible to the 1984 quota, bringing its quotations onto a level which was close to that of SIV: that fact was a veritable brake on any substantial increase in quotations. . . .

PPG which had an undertaking from Fiat for an allocation of 10%, practically closed the week on an 8% theoretical but, in reality, on an actual 6 to 7%, for various reasons of a technical and logistical nature.

GLVB [Glaverbel] and GLASSEXPORT will be frozen at the 1984 quotas . . .'

The author then mentions two versions, 'both originating with SG', of the meetings between FP and Fiat. In the final paragraph, the author mentions an 'actual quota promised by [Mr Bussolati of Fiat]'.

266 The Court considers that those documents, which are the only documents relating to 1984, are sufficiently explicit to prove that, at least in 1984, contrary to the argument advanced in the decision, there was no concertation between the three producers as regards their relations with the Fiat group.

267 In point 47, the decision refers to a series of documents relating to 1985, in order to prove that 'discussions [had begun] on how to get price increases accepted by the Fiat group'. The first document is SIV's note of 30 January 1985 (374/708), in which the following words were deleted 'Scaroni pensa di non potersi battere per fermare PPG' ('Scaroni considers that he cannot fight to stop PPG [VP]') — see paragraphs 91 to 93 above. It is true that, as the decision points out, SIV's note refers to 'holes and brackets' [mechanism for raising side-windows] as Trojan horse in Fiat for increase in prices'and that the corresponding note of FP mentions (without further particulars) 'Fiat problems'. The Court considers, however, that although that note may constitute proof of concertation between SIV and FP as regards their policy vis-à-vis Fiat, they are not sufficient to prove concertation involving VP.

268 The second document is FP's note of 7 May 1985 (738), referred to in the third paragraph of point 47, which does indeed contain the words quoted in the decision. The Court finds, however, that it is not true that the note makes express reference to an 'agreement' between SIV and FP, still less of an agreement including VP. If that note is read in the light of the wording and the content of the memoranda relating to 1984, it seems more likely that what it records is an exchange of information regarding the outcome of the negotiations with Fiat.

The third document is FP's note of 23 May 1985 (740), referred to in the fourth paragraph of point 47, which does indeed use the words 'Accordo Pennitalia' ('Pennitalia agreement'). Nevertheless, the Court considers that the Commission has not proved that those words refer to an agreement concerning Fiat. It is to be noted that that note is part of a sort of diary kept by the author recording on a daily basis the important things he did during the day, and that the relevant words are set down on the page in the following way:

Accordo FIAT + Alfa Romeo

+ 7% imm

+ 5 1 genn [January] 86

Accordo Pennitalia

Ricostruz. Flovetro.

At the very least, the exact significance of the words 'Accordo Pennitalia' is uncertain. However, their meaning may be checked by reference to SIV's memorandum of 24 June 1985 (see below, paragraph 270) examination of which will show that it cannot be relied on as proof, for May 1985, of an agreement on prices or quotas in this market sector between VP, SIV and FP. However, it should be pointed out at this stage that the note of 23 May 1985 can legitimately be used as proof of an exchange of information between FP and SIV, as can the note of 20 June 1985 (739) referred to in the following paragraph of point 47 of the decision.

The fourth document is SIV's internal memorandum of 24 June 1985 (715), referred to in the sixth and seventh paragraphs of point 47 of the decision, which appears, yet again, in the list of the documents which the Commission considers to contain an implicit reference to VP, whereas the full document refers expressly to VP. The memorandum summarizes the outcome of SIV's negotiations with Fiat for the second half of 1985. The copy sent with the statement of objections contains the following paragraphs:

'Nella realità, sappiamo che la Fiat è già intervenuta in favore della PPG per lo spostamento immediato di quote sia sulla Uno (a danno della S. G. per l'equivalente del 4.2% ca di quota), sia sulla Ritmo (a danno del nostro Gruppo per l'equivalente di un 1.5% ca di quota).

E' evidente che le prossime settimane, e sopratutto i prossimi mesi, ci diranno quanto e come la PPG in particolare riuscirà a rispondere alle richieste di Fiat.

Continuiamo a parlare di PPG in quanto GLVB ci pare relativamente fuori gioco, e la differenze di quotazioni fra Siv e PPG dal 1.7. sarà superiore al 10% medio e, in taluni casi, sino al 13/14%.

E' evidente che ci stiamo preparando già sin d'ora agli incrementi di prezzi del 1° gennaio "86 che, al di là di un aumento generalizzato da definire, dovranno colpire in particolare i cristalli più difficoltosi e quelli di impossibile fornitura PPG.'

('In fact, we know that Fiat has already intervened in favour of PPG in order to alter quotas immediately both for the Uno (at the expense of SG for the equivalent of approximately 4.2% of quota), and on the Ritmo (at the expense of our group for the equivalent of approximately 1.5% of quota).

It is clear that during the next weeks, and above all the next months, they will tell us to what extent and how PPG in particular is going to manage to meet Fiat's needs.

We continue to speak of PPG in so far as GLVB [Glaverbel] seems to us to be relatively sidelined, and the difference in quotations between SIV and PPG from 1/7 will exceed 10% on average and, in some cases, up to 13/14%.

It is clear that we are in the process of preparing ourselves as of now for price increases from 1 January 1986 which, beyond a general increase still to be defined, will have to affect in particular the most difficult glasses and those that PPG cannot supply.')

The Court considers that the wording of that memorandum is sufficiently explicit to prove that there was no concertation whatsoever, either with regard to the prices to be charged to Fiat or with regard to the sharing-out of quotas, between VP, on the one hand, and SIV and FP, on the other hand, in 1985.

The Court finds that the Commission has produced no document supporting the findings made in the last two paragraphs of point 47 concerning an alleged uniformity of price increases, and that, therefore, it cannot exercise its power of review on that point. That being so, and having regard to the foregoing findings, the Court finds that the Commission has not proved to the requisite legal standard that its allegations are well-founded.

With regard to the tabulations to which reference is made in point 49 of the decision, it is true that those tabulations mention quantities and quotas, as is pointed out in the decision. However, the Court considers that the examination of the documents containing an express reference to VP showed that SIV could have been aware of the nature of the supplies made by VP to Fiat from information supplied by Fiat. The Court cannot therefore accept as self-evident the Commission's claim that the information in the tabulations concerning VP could have come only from VP. The Court cannot *a fortiori* accept that those tabulations, without further particulars which would enable the source of information they reproduce to be identified, are to be regarded as evidence of an agreement on prices and quotas throughout the long period to which they refer.

Finally, the Court must note Fiat's letter to VP, dated 3 July 1985 (657), quoted in point 51 under (ii). The passage quoted in the decision is only a half sentence, removed from its context, which is clear only from a reading of the full letter together with the preceding letter from VP to Fiat of 28 June 1985 (795), to which it is a reply. Fiat's letter reads as follows: the words in italics being the words quoted in the decision:

'Per quanto concerne i programmi di consegna di breve termine, come già anticipatoVi, non ci è possibile definire percentuali di assegnazione impegnative in

quanto la Vostra presenza limitata, che non copre la totalità dei nostri modelli, ci pone intuibili vincoli nell'impostazione dei programmi con i Vostri concorrenti. Ciò nonostante, siamo d'accordo con Voi nel ritenere una perecentuale del 15% un obiettivo realmente perseguibile anche per il 1986.'

'Questo, confidando nella Vostra capacità di estendere in tempi brevi la Vostra gamma di prodotti e di conservare o migliorare gli attuali livelli di competitività.'

'Prendiamo atto infine della Vostra possibilità di contare non solo sugli Stabilimenti italiani, ma sull'intera potenzialità installata dalla Casa Madre (PPG) in Europa.'

'With regard to the short-term supply programmes, as you have been informed, it is not possible to define allocation percentages which are binding on us since your limited presence, which does not cover all our models, imposes upon us foreseeable constraints as regards the putting in place of programmes with your competitors. In spite of that, we agree with you in considering 15% as a realistic target for 1986 too.'

'We have confidence in your ability to increase your range of products very quickly and to maintain or improve present levels of competitiveness.'

'Finally, we note that you are in a position to rely not only on your factories in Italy but also on the full capacity of the installations of your parent company (PPG) in Europe.')

It emerges from a reading of the full text of Fiat's letter, and especially together with VP's letter of 28 June 1985, that it concerns the allocation of an additional quota that Fiat was not in a position, at that time, to grant to VP.

74 With regard to the quotas with Alfa Romeo, it is relevant to note the wording of a telex from the Vice-President of Alfa Romeo to Mr Scaroni of SIV, dated 6 January 1984 (670): '... we inform you that we are allocating to you for 1984 a supply quota equivalent to 23/25% of our total requirements'. That telex, like many of the documents already referred to, supports the applicants' claim that the quotas were allocated by the motor vehicle manufacturers.

75 Accordingly, the Court finds that the Commission has not proved to the requisite legal standard prior concertation among the three producers on the prices to be charged to or on the sharing-out of quotas for supplies to the Fiat group. With regard to relations between SIV and FP, the Court points out that there were exchanges of information which could be caught by Article 85(1) of the Treaty. The consequences of that finding will be examined below (points 334-335) in the light of the pleas in law relating to the procedure made by the applicants.

(b) The agreements and concerted practices concerning the Piaggio group

76 Under this heading, the decision states that 'SIV and FP reached agreement, at least from 1983, on the sharing of supplies and of prices charged to Piaggio' (point 52). The operative part of the decision (Article 1(d)) defines the period of the infringement found to have been committed to be from 1 January 1983 to 1 May 1986. The evidence considered consists in an internal note of FP (751) of 12 December 1984; an internal note of SV (728) dated 28 December 1984; and a list, from an unspecified source, of the dates on which the two producers changed their prices during the years 1983 to 1986. In order to understand the positions of the parties, it is necessary, firstly, to examine the documents, whose dates are all very close, considered as evidence.

77 It emerges from a comparison of the texts, firstly, of the quotations which appear in the decision (point 52, second and third paragraphs) and, secondly, of the original memoranda, that the quotations are faithful to the original, (apart from a mistranslation of the words 'la situazione quote cambiava poco' ('the situation hardly changed') in the French and English versions). However, a reading of the full text of FP's memorandum of 12 December 1984 gives a slightly different

impression from the one obtained from the decision. According to that memorandum, at the end of 1982, FP's quota with Piaggio was four times larger than SIV's quota. Out of four Piaggio models, FP's price was slightly lower than SV's price for two models and slightly higher for a third; only FP was a supplier for the fourth model. Following certain contacts, two undertakings formed the common intention to make their respective quotas for the three models equal. Differentiated price increases were agreed and implemented from 1 March and from 1 September 1983. SIV's prices were lower than those of FP, with the result that at the end of 1983, FP's quota was significantly reduced in relation to SIV's. Subsequently, and still with a view to maintaining an equal share of quotas, it was agreed that, in 1984, FP would introduce an increase of 4% from 1 March and of 3.5% from 1 September, while SIV would introduce a differentiated increase from 1 July (the amount of SIV's increase being greater than that of FP's for March, but less than FP's for September). However, according to the author of the memorandum, that agreement was not observed by SIV, which, without informing FP, agreed with Piaggio to defer its price increase until September or October, which led FP to defer its own increase planned for 1 March to 1 June. In fact, it did not implement the planned increase either in September or in October. Consequently, FP's quota was appreciably smaller for a number of components. The competent SIV employee was invited to discuss the matter with the competent FP employee, but he claimed that, in his opinion, there was a third supplier, a claim for which FP's representative found no confirmation. SIV's memorandum of 28 December 1984 disputes the account of the facts given in FP's memorandum and refers to the wording of a telex sent by SIV given to Piaggio mentioning the agreements made between SIV and Piaggio concerning the application of the new price list from November 1984.

278 FP claims that, although these memoranda may be taken as evidence of the existence of agreements between the two producers for 1983 and 1984, nevertheless those same documents show that only the 1983 agreement was applied. According to FP, the object of those agreements was to rationalize supplies to Piaggio which were, from a global point of view, of negligible importance, and, moreover, were not at all profitable for the suppliers. SIV disputes the relevance of those documents as evidence of an agreement which was allegedly applied in 1985 and 1986. The Commission, for its part, insists that those memoranda — which it

claims constitute significant evidence of agreements between the two producers — are relevant.

279 The Court considers that the Commission could legitimately consider that the two memoranda clearly show the existence of two agreements between FP and SIV on the prices to be charged to Piaggio; firstly, an agreement for 1983 which was put into effect and implemented; secondly, an agreement for 1984 which was put into effect in accordance with the agreed terms by FP but not by SIV, which modified its position in the light of its relations with Piaggio. The objective of the agreements appears to have been to achieve, by applying a policy of differentiated price increases designed to favour SIV's position, an equal share of the quotas for supply to Piaggio for three models out of four. The Court considers, however, that those two memoranda provide no proof of the existence of such agreements for 1985 and 1986.

280 With regard to the list of the dates on which the two producers changed their prices, a list which is summarized in the last paragraph of point 52 of the decision, the Court observes that the dates in that list for 1984 are only partly compatible with the information which emerges from the memoranda of FP and SIV mentioned. In particular, the memoranda clearly show that FP and SIV did not once change their prices on the same date in 1984. The Court also observes that there was a gap of 2 months and 1 month, respectively, between the dates of the price changes in 1985 and 1986.

281 Accordingly, the Court finds, firstly, that the Commission has proved to the requisite legal standard that FP and SIV agreed on the prices to be charged and the supply quotas to be applied to the Piaggio group only for the years 1983 and 1984; secondly, that the Commission has proved to the requisite legal standard that the agreement was applied for 1983 in the way described in the final paragraph of point 52 of the decision; thirdly, that the Commission has not proved to the requisite legal standard that the agreement was applied for 1984, as also stated in the final paragraph of point 52 of the decision; fourthly, that the Commission has adduced no direct proof of the existence of an agreement or on the prices to be charged or the supply quotas to be applied to Piaggio for the years 1985 and 1986; and, finally, that the dates of the price changes in the years 1985

and 1986 are not sufficiently close to constitute indirect proof of the existence of an agreement for those two years. The consequences of those findings will be examined below (points 336 to 337) in the light of the pleas in law relating to the procedure made by the applicants.

282 The Court observes that there is nothing in the decision to enable the effect of the agreements for 1983 and 1984 on competition to be assessed, and that the Commission did not carry out any checks in that regard at Piaggio.

3. The exchanges of glass

283 The decision examines the exchanges of glass in three places in the factual part of the decision: in point 33, under the heading 'Elements of concerted practices between producers' in the non-automotive market; in point 48, under the heading 'The agreements and concerted practices concerning the Fiat group' in the automotive market; and in points 53 to 58, under the main heading 'Exchanges of glass between the producers'.

284 In point 33, it is stated that 'the exchanges of products between the three Italian manufacturers also provide an opportunity for knowing the prices charged by competitors or for agreeing on the conduct to be pursued' and that 'the prices of the products exchanged were always set and subsequently adjusted on the basis of the price adjustments of the transferring producers'. The documents referred to in point 33 concern only FP and SIV.

285 In point 48 it is stated that 'the three producers carried out reciprocal sales or purchases of products ... with the objective of maintaining their respective penetration quotas or of achieving the quotas agreed with their competitors'. Certain documents and figures concerning those transfers are then quoted. At point 51, under (iv), the decision lists 'the facts which demonstrate that the exchanges of products are aimed at market sharing'. Those facts are: the considerable quantity

of exchanges not simply intended to make good shortages; the fact that FP is performing sub-contracted work for SIV in respect of processed products; and the fact that 'the exchanges relate in particular to thicknesses and colours that are not manufactured by another given producer and are intended to allow the three producers to have the whole range of products available'.

86 In point 53, the decision points out that, 'large quantities of glass are exchanged under contracts between the three producers. The purpose of the exchanges is to enable each producer to have available the full range of products, even those which it does not manufacture, and to maintain its market quotas. They also provide a means of sharing markets and customers and of knowing the prices charged by competitors'.

87 In the third paragraph of point 56, it is stated that, 'the exchanges of memos, the minutes and the handwritten notes show that the prices of the products sold are established and subsequently readjusted on the basis of the sellers' price changes, that the prices are established by reference to the destination of the products sold on the national market and on specific foreign markets and that, even in the case of sale for the national market, the destination of the products is broken down by individual regions and uses'.

88 In point 58, under (i), it is explained that 'the Commission does not intend to call in question exchanges of products to help out firms facing temporary shortages (renewal of production plant, shutdown for maintenance of furnaces, filling occasional orders), but, as stated in the present case, only the systematic exchanges of products agreed over long periods and which are the result of industrial and commercial policy decisions made by the manufacturers in the context of other agreements restricting competition. The Commission cannot agree with the producer's view that such exchanges are economically necessary. As the producers affirm, the purpose of the exchanges is to allow each of them to have a full range of products available at any time, thus cancelling out the economic advantage

deriving from each producer's specialization. Whether the specialization relates to a given thickness or a given colour, the exchanges cancel out the advantage of specialization and artificially place all the producers on an equal footing, thus preventing customers from benefiting economically from the productive and commercial edge enjoyed by individual producers. As the uniformity of the price lists and discounts of the three producers show, the exchanges result in practice in a flat and uniform market'.

289 The Court considers that it is necessary, first of all, to identify more precisely from the above statements the substance of the Commission's objection. The Court observes that the Commission alleges, firstly, that the purpose of the exchanges of glass was to allow the producers to know the prices charged by competitors and that 'as the uniformity of the price lists and discounts of the three producers shows, the exchanges result in practice in a flat and uniform market', and, secondly, that 'only the systematic exchanges of products agreed over long periods and which are the result of industrial and commercial policy decisions made by the manufacturers *in the context of other agreements restricting competition*' are at issue.

290 The Court considers that the statements quoted above are inconsistent since, as regards most of the aspects analysed above, the decision sought to demonstrate that the agreements restricting competition, in the context of which the alleged 'commercial policy decisions' were made, consisted in, *inter alia*, *prior* concertation among producers on the prices to be charged, that concertation itself resulting in uniform prices and conditions of sale. The grounds of the decision do not show why the producers would have needed to establish a system of exchanges of glass so that each of them could know the prices charged by competitors, if the prices had already been agreed and the market was 'flat and uniform' because of the uniformity of prices and discounts. Nor is it clear why it was important that the prices of the products exchanged should be established and subsequently re-adjusted *on the basis of the sellers' price changes*, if all three producers had already colluded in order to adopt the same price list at the same time. Nor, finally, is it obvious from the grounds of the decision how the fact that the three producers' prices and discounts were uniform could constitute proof of the fact that the system of exchanges of glass resulted in a flat and uniform market if that uniformity of prices and discounts was the result of a prior concertation.

291 The Court observes that Article 1(e) of the decision accuses the producers of having infringed the prohibition laid down in Article 85(1) of the Treaty by participating 'in product exchange agreements in the flat-glass sector *designed to achieve market sharing*'.

292 Accordingly, the Court considers that it is necessary to leave to one side the numerous statements in the decision concerning the reasons why the producers established an institutionalized system of exchanges of glass, and to confine itself to an examination of the strictly factual aspects of the evidence on the basis of which the Commission found, firstly, that there existed a system of exchanges of glass in the sense of reciprocal sales or purchases, and, secondly, that that system had been established in order to achieve market sharing. The Court will consider, firstly, the figures in points 48, 51 under (iv), 54 to 56 and 58 (under iii). The legal aspects of this plea will be examined below in paragraphs 338 to 339.

293 The figures in point 48, which relates only to automotive glass, show the following trends:

294 *Between FP and SIV*: the figures for unprocessed automotive glass show that, from 1982 to 1984, FP sold to SIV very large quantities without any reciprocal sales by SIV to FP. In 1985, FP sold SIV quantitatively five times more than SIV sold to FP. In 1986, FP sold to SIV, and SIV sold to FP, very small quantities in comparison with the preceding years. The figures for processed automotive glass show, except in 1982 when only SIV sold to FP, a significant upward trend in sales by FP to SIV and a less marked downward trend in sales by SIV to FP.

295 *Between FP and VP*: the data supplied by FP and VP do not agree, but they show, in any event, that VP sold nothing to FP. FP's sales to VP concerned only unprocessed automotive glass in quantities which remained relatively stable from 1982 to 1984, with a fall in 1985 and a significant rise in 1986.

296 *Between VP and SIV*: only VP sold processed automotive glass to SIV, and then only in 1984 and 1985. In 1983, SIV sold to VP a small quantity of unprocessed automotive glass. In 1984 their reciprocal sales of unprocessed automotive glass were of approximately the same quantities. In 1985 and 1986 VP sold large quantities to SIV, while SIV sold only a small quantity to VP in 1985.

297 The Court finds that those figures show that, in the automotive sector, SIV sold only very small quantities of glass, processed or otherwise, to the other producers but that it was a significant purchaser of unprocessed glass, VP having replaced FP in that regard as its main supplier from 1985. FP purchased very small quantities of glass, processed or otherwise, and only from SIV. VP purchased only relatively limited quantities of unprocessed glass. It follows that the Commission cannot infer from those figures any regular pattern of exchanges among the three producers.

298 The figures in point 51, under (iv), represent only the sum of the figures which appear in point 48, and they do not provide any additional information.

299 With regard to the figures in points 54 to 56, it is not certain that they were compiled using the same statistical basis since the figures for 'SIV-VP exchanges' and for 'VP-FP exchanges' also cover automotive and non-automotive glass, while the figures for 'FP-SIV exchanges' are presented separately for cast glass (produced only by FP) and 'automotive and non-automotive float glass'. Nevertheless, a comparison of all those figures confirms rather than contradicts the two trends which already emerged from the examination of the figures for automotive glass, namely, that in general, SIV was a purchaser rather than a seller, that from 1984 VP gradually replaced FP as SIV's main supplier and that FP and VP purchased relatively small quantities, except for FP's purchases in 1983 and 1984. It follows that the Commission cannot infer from those figures a regular pattern of reciprocal exchanges among the three producers.

300 With regard to the documents relied upon in the decision, the notes and letters referred to in point 33 of the decision have already been analysed above (paragraphs 224 and 225). It should be noted that all those documents date from 1985 or 1986. That is also true for the documents quoted in point 48. The documents quoted in points 53 to 58 include three documents dated October 1984, and one document dated December 1984; the rest are all from 1985 and 1986.

301 Accordingly, the Court finds that the Commission has not proved to the requisite legal standard the existence of an institutionalized system of exchanges of glass, in the sense of reciprocal sales or purchases, before 1984, whereas in Article 1(e) of the decision, the producers are accused of having infringed Article 85(1) of the Treaty by participating in product exchange agreements from 1 January 1982.

302 The documents dating from 1984 (855-863), referred to in point 56 of the decision, concern FP and SIV and must be read in conjunction with the first document from 1985 (864-868). In fact, only the subject-matter mentioned at the head of the first two documents (telexes of 18 and 20 October 1984) refers to an exchange of products; 'Oggetto scambio prodotti residuo 1984 e 1985' ('Re: exchange products remainder 1984 and 1985'). The other documents relate almost exclusively to the negotiation of a contract between FP and SIV for the sale by FP to SIV of a large quantity of glass in 1985, the first document from 1985 being the contract concluded as a result of those discussions. A reading of those documents shows that that contract was negotiated between competitors under the usual market conditions. The Court observes that the quotation from SIV's note of 30 October 1984 which appears in the decision omits the revealing sentence, already quoted above in paragraph 215: 'Auto — secondo Scaroni [FP] non alimentare PPG' ('According Scaroni not supply VP'). The words 'non deve essere venduto a prezzo minore di FP' ('must not be sold at a price lower than FP's'), taken from the same document and quoted in the decision, relates only to cast glass, which only FP produced, and is followed in the original by the words — not quoted in the decision — 'non è bloccabile l'importazione da paesi est' ('imports from eastern countries cannot be blocked'). The words, 'politica di riporto' ('policy of sharing') and 'politica commune' ('common policy'), also taken from the same document

and quoted in the decision, appear to relate to the joint operation of the 'Flovetro' float glass plant, while the distinction made in the documents of 18 and 20 October and 18 December 1984 between glass intended for export and glass intended for the Italian market is explained, from a careful reading of the documents, by the differences in specifications and packaging that exports entail.

303 Accordingly, the Court considers that the Commission has not proved to the requisite legal standard for 1984 either the existence of an institutionalized system of exchanges in the sense of reciprocal sales or purchases or, still less, the intention of achieving market sharing by that means. The Court observes, moreover, that none of the documents quoted mentions VP except in terms which reveal a situation in which there is active competition.

304 With regard to relations between FP and SIV, the Court finds that it was from 1985 that SIV started to transfer most of its purchases from FP to VP. The importance of that transfer is reinforced by reading the full version of FP's letter to SIV (485 or 869) of 6 March 1985, and of which extracts appear in point 56 of the decision. The passages of that letter quoted in the decision relate only to cast glass, a product sold exclusively by FP. However, the author of the letter continues by complaining of the fact that he found it impossible to organize a meeting with SIV in order to fix the quantities and prices of SIV's purchases for 1985 (see the word-for-word quotation above, paragraph 224). The Court also recalls the complaints made in the notes of SIV and FP concerning their meeting of 30 January 1985 (see above, paragraph 218). FP's prices for 1985 were discussed subsequently at a meeting on 28 March 1985 (FP's note, 475 or 870) at which SIV seems to have indicated that it was not satisfied with the prices charged by FP: 'prezzi inferiori — float exp rifiutano +8% per 85 si interrompono le forniture' ('lower prices — float [exp] refuse +8% for 1985 if they interrupt supplies'). Those words are followed immediately by the words 'Greggi: 1) OK per fornire' ('cast glass: 1) OK to supply'), which underlines the contrast between the lack of agreement on float glass and the agreement on cast glass, which SIV could not purchase in Italy except from FP. That being the context, it becomes perfectly clear that FP's note of 30 April 1985 (871), quoted in point 56, does in fact refer, as FP claimed, to an agreement reached between FP and SIV on the prices to be charged by FP to SIV's customers for delivery of cast glass. The enigmatic words quoted in decision, 'il 4 riunione per compensazione' ('the 4[th] meeting for compensation'), must be interpreted as referring to the meeting of 4 June 1985

mentioned in FP's note of the same date (872). It follows that the note of 4 June 1985, the content of which is illegible or incomprehensible, must be interpreted, as FP explained, as relating to the sale of cast glass.

305 On the other hand, FP's note of 25 June 1985 (848), quoted in point 48, contains, as the decision points out, an express reference to an exchange of products: 'SIV scambio prodotti in particolare quelli che acquistiamo in Francia' ('SIV exchanges products, in particular those we purchase in France'). Those words, which relate exclusively to products for the automotive market, are followed by the following words, which are not quoted in the decision: 'Nota: nelle riunioni si è parlato solo di prodotti ma non di vendita' ('in the meeting only products were discussed but not sale'). The Court considers that those words underline the distinction which must be made from the economic point of view between, on the one hand, the exchange of products between producers, which may concern products purchased abroad by one of the parties, and on the other hand, the sale of products by one producer to another. That distinction is not drawn anywhere in the decision.

306 The other documents quoted in the decision which refer to relations between FP and SIV are the following: two internal memoranda of FP (849 and 850), dated 31 October and 8 November 1985 respectively; four notes handwritten by one of FP's employees (487 or 873, 852, 854 and 488 or 874), dated 16 and 17 December 1985, and of the 23 January and 3 February 1986; and an internal memorandum of FP (851), dated 4 March 1986.

307 The two internal memoranda of October and November 1985 concern a request by SIV to be supplied with 500 000 side windows intended for Fiat cars.

308 The four handwritten notes concern a series of meetings and contacts which appear to have related, firstly, to the management of the joint float glass plant called 'Flovetro' and, secondly, to a proposal for FP to supply to SIV a certain quantity of products intended for Fiat in exchange for a transfer by SIV to FP of a

proportion of its share of production from Flovetro. The note of 23 January 1986 concerns, however, only an internal meeting of FP employees. The notes set out the consequences of the proposals discussed for the quotas of FP and SIV with Fiat. The note of 17 December 1985 mentions the increase in the quotas of the 'others' with Fiat and SIV's lack of production capacity. Those references are certainly evidence of a concern on the part of the two producers to maintain their quotas with Fiat. However, the note of 3 February 1986 notes their disagreement over the basic proposal which they had discussed. There is no document available to the Court showing that those discussions subsequently resulted in a definitive agreement.

309 The last internal memorandum of FP, dated 4 March 1986, records the production in January and February 1986 of a quantity of '84 000 vol.' for SIV on a production line called 'Minilat Savigliano'. None of the documents before the Court enable it to assess the significance of this brief reference.

310 The first documents concerning relations between VP and FP date from December 1985; the reference in point 55 to a telex of 19 February 1985 is an error in the Italian and French versions of the decision. A first series of seven documents (827-840) concerns the negotiation of a contract between FP and VP for an 'compensated exchange of products' ('scambio merce compensato'). The other two documents concerning relations between FP and VP (843 to 845) appear to relate to the implementation of the agreement resulting from those negotiations.

311 The documents concerning relations between VP and SIV divide into three groups. Firstly, there are four documents (801, 841, 802 and 803), dated between February and April 1986, concerning the sale by VP to SIV of a certain quantity of green automotive glass, the first of which, dated 14 February 1986, notes that SIV purchased from VP because the latter's prices are lower than those of Saint-Gobain's. Secondly, there is a single document (805) concerning the sale by VP to SIV of a certain quantity of automotive float glass which quotes, for SIV's benefit, VP's prices for other types of clear glass. Finally, there is a series of documents (807-825) concerning the sale by VP to SIV of large quantities of automotive and non-automotive glass in 1986 and 1987. There is nothing in those documents from which the existence of a system of exchanges of glass between SIV and VP can be inferred since SIV was always the purchaser.

312 On the other hand, a reading of all the documents relating both to relations between FP and SIV and to relations between VP and SIV confirms the finding that the Court was able to make on the basis of the examination of the figures relating to the quantities exchanged (see above paragraphs 293 to 299), namely, that SIV was in principle the purchaser and that SIV increasingly transferred most of its orders from FP to VP. The Court considers that those documents also show that that transfer of orders was due to the fact that VP's prices were lower than those of FP, and that there was active competition between VP and FP for SIV's orders. Accordingly, the Court considers that the Commission could not infer the existence of unlawful concertation either between FP and SIV solely on the basis of the words appearing at the head of the telexes of 18 and 20 October 1984, or between FP and VP solely on the basis of the contract negotiated between December 1985 and January 1986 with a view to an exchange of products.

313 Accordingly, the Court finds that the Commission has not proved to the requisite legal standard the existence of an institutionalized system of exchanges of glass, in the sense of reciprocal sales or purchases, either between the three producers or between two of them during the years 1985 and 1986, and that it has also not proved a joint intention to achieve market sharing by that means.

C — *Concerning the legal assessment*

1. Application of Article 85 of the Treaty

314 The main points of the legal assessment made by the Commission from the point of view of Article 85(1) have already been set out above (paragraphs 20 to 28). The Court considers that it is clear from both the factual and the legal parts of the decision that the decision is based on the hypothesis that there is a close cartel among the three members of a national oligopoly protected against effective competition by economic and geographical barriers. At the hearing, after discussing with the parties' representatives the nature and the import of the evidence adduced, the Court expressly asked the defendant's representative to state what the Commission's position would be if the Court were, on the one hand, to find that the existence of such a close cartel had not been proved to the requisite legal standard but, on the other hand, to consider that some documents were proof of a certain element of concertation among the producers, or at least

between two of them. The Court noted the reply given by the Commission's agent: 'Hier stehe ich und kann nicht anders' ('Here I stand. I cannot do otherwise').

315 Having regard to the findings already made, the Court considers that the hypothesis set out above of a close cartel among the three applicants, as advanced in the decision, has not been proved to the requisite legal standard. However, the Court has found that some of the documents upon which the decision is based can prove a more episodic concertation among two or three producers. That being so, the question arises whether the Court must carry out a new legal assessment of those documents and of any findings which could follow from them.

316 First of all, the Court considers it appropriate to recall the terms of Article 1 of the decision. Whereas paragraph (b) distinguishes between the situations of FP and SIV, on the one hand, and of VP, on the other hand, and paragraph (d) concerns only FP and SIV to the exclusion of VP, the remaining paragraphs (a), (c) and (e) accuse the three undertakings, without distinction, of having participated in the agreements and concerted practices referred to therein.

317 Under the administrative procedure which precedes the finding of an infringement of Articles 85 and/or 86, as established by Regulations Nos 17 and 99/63 and supplemented by the practice adopted by the Commission, the undertakings concerned must be given the opportunity of making known their views concerning the objections raised against them and the documents upon which those objections are based. They have the right, firstly, to give a written reply to a written statement of objections, the essential points of which may be altered only by a further new written statement of objections, all such statements being required to be accompanied by copies of the documents considered to be proof of the objections raised. The parties have the right, secondly, to be heard at an oral hearing under the chairmanship of a hearing officer who, where appropriate, may send his observations directly to the member of the Commission responsible for competition matters. The Advisory Committee on Restrictive Practices and Dominant Positions, the members of which have the right to attend the hearing, must then be consulted. It is only when that procedure has been completed that the member of the Commission responsible for competition matters may propose to the college of Commissioners a decision finding an infringement of the provisions

of the Treaty and, where appropriate, the imposition of fines or periodic penalty payments or both.

318 Finally, under Article 172 of the Treaty, its unlimited jurisdiction is limited to the penalties provided for in regulations made by the Council. It is for that reason, *inter alia*, that the Community court is not required to take cognizance of the entire administrative file, but only of that part of the file which is relevant to a review of the lawfulness of the contested decision.

319 Accordingly, the Court considers that, although a Community court may, as part of the judicial review of the acts of the Community administration, partially annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision. The assumption of such jurisdiction could disturb the inter-institutional balance established by the Treaty and would risk prejudicing the rights of defence.

320 In the light of those factors, the Court considers that it is not for itself, in the circumstances of the present case, to carry out a comprehensive re-assessment of the evidence before it, nor to draw conclusions from that evidence in the light of the rules on competition. That conclusion is all the more inescapable since the examination carried out by the Court revealed that certain documents in the file had been distorted and that, consequently, neither the parties, nor the hearing officer, nor the advisory committee, nor the members of the Commission were able to assess their nature and significance in full knowledge of the facts. Accordingly, it must be established whether the conditions for a partial annulment of the decision have been fulfilled. It is thus necessary to determine whether the scope of the operative part of the decision, read in the light of the grounds of the decision, can be limited *ratione materiae*, *ratione personae* or *ratione temporis* in such a way that its effects are restricted but its substance remains unaltered; whether the proof of the infringement so limited is accompanied by an adequate assessment of the market in the reasoning of the decision; and whether the undertaking or undertakings concerned were given an opportunity of replying effectively to the objection so defined.

(a) The non-automotive market

321 In the present case, the Court considers that Article 1(a) of the decision can be limited *ratione materiae* in so far as it draws a distinction between the participation of the undertakings, on the one hand, in agreements and concerted practices on prices and terms of sale and, on the other hand, in agreements and concerted practices designed to influence the purchasing and selling policies of the main wholesalers. It can also be limited *ratione personae* by the exclusion of one of the undertakings accused, and *ratione temporis* by a limitation in time of the period of the infringement found to exist.

322 The Court refers to the findings of fact made under heading B.1. v, 'Relations between producers and wholesalers' (see in, particular, paragraph 250 above). It has been found, firstly, that the wholesalers had relied on the fact that the producers charged identical prices and, secondly, that FP had used its wholesaler subsidiaries in order to obtain information on the policy of the wholesalers. However, the Court found that the Commission had not proved to the requisite legal standard the other objections that it had raised in point 35 of the decision. The Court considers that the Commission has also not proved to the requisite legal standard the allegation made in the legal part, in point 64 of the decision, that the wholesalers, because of their economic dependence, were unable to assert themselves against the power and manipulations of the producers. Finally, the Court accepts the applicants' argument, set out under heading A. 'The assessment of the market' (see above, paragraphs 141 to 142), which appear also to be borne out by the documents examined in this connection, that the situation of the wholesalers, including Cobelli, was due to a large extent to the fact that they had not adapted to the new economic circumstances.

323 Accordingly, the Court considers that Article 1(a) of the decision, in so far as it finds that the three undertakings in question participated in agreements and concerted practices designed to influence the purchasing and selling policies of the main wholesalers, must be annulled *ratione materiae.*

24 As regards the prices and terms of sales, the Court points out that it has found, under the heading B.1. i. ('Identical price lists'), that the Commission was far from proving to the requisite legal standard all the objections that it had raised: that the price lists announced by the three producers actually coincided, with regard to dates and prices, only in May, July and October 1985 and only for clear glass; that in July 1985, VP had decided to change its prices some days after the announcements made by SIV and FP; that there were revealing differences between the rhythm of VP's announcements and the rhythm of those of FP and SIV; that the rhythm of changes in the price of coloured glass was entirely different from that of changes in the price of clear glass; but that until October 1985 the announcements of FP and those of SIV regarding clear glass almost always coincided both with regard to dates and to prices (see above, paragraphs 193 to 196). The Court recalls, secondly, that it found, under the heading B.1. ii ('identical discounts') and B.1. iii ('Identical classification of the main customers by category or level'), that the Commission had not proved to the requisite legal standard its objections concerning identical discounts and identical classification of customers (see above, paragraphs 202 and 210). Finally, under heading B.1. iv ('Elements of concerted practices between producers'), the Court found, that the Commission had not proved to the requisite legal standard that there was a general agreement between the three producers resulting in uniform prices and discount scales and the uniform classification of the main customers. However, the Court found that some of the documents could be regarded as evidence of concertation between FP and SIV, in particular their notes concerning their meeting in Rome on 30 January 1985, although they were not sufficient to prove an agreement between FP and SIV designed to produce, overall and permanently, identical prices, discounts and customer classification (see above, paragraph 232).

25 Accordingly, the Court concludes that the Commission has not sufficiently proved VP's participation in the alleged infringements. It follows that Article 1(a) of the decision must be annulled *ratione personae* in so far as it applies to Vernante Pennitalia SpA.

26 In so far as Article 1(a) concerns the participation of FP and SIV in agreements and concerted practices on prices and terms of sale, the Court must take into account the fact that the content of their price lists and the dates on which they

were announced coincided. While it is true that such coincidence could, in a situation in which there is an oligopoly, be the result of the structure and of the normal functioning of the market, as the applicants claim, the Court must also take into account the evidence showing concertation between FP and SIV on prices and terms of sale. In doing so, the Court fully realizes, however, that those documents cannot be assessed on the basis of their apparent content alone, having regard, firstly, to the distortion of some of the documents sent with the statement of objections and, secondly, to the established principle that any written document must be read and interpreted in its proper context. In that regard, the Court observes that the abovementioned notes of FP and SIV concerning their meeting in Rome on 30 January 1985 were written in the context of SIV's transfer from FP to VP of a significant proportion of its purchases (see above, paragraph 304). Nevertheless, read in that context, those notes constitute proof of regular concertation between those producers, since FP's complaint against SIV was precisely that the latter did not fulfil the obligations arising from such concertation. Although from 1985 relations between those producers appear to have become less cooperative, there are, nevertheless, documents which prove the existence of some concertation after the end of 1985. Accordingly, the Court considers that the Commission had sufficient evidence to proceed with the objection against FP and SIV that they concerted on prices and terms of sale during a period between 1983 and 1986 yet to be defined.

327 The Court notes that the operative part of the decision defines the period of the infringement as being from 1 June 1983 to 10 April 1986. The Court found no justification for the choice of the date of 1 June 1983, except for Socover's note of 12 July 1983 (258) which the Court has examined and dismissed as irrelevant (see above, paragraph 213). The Court considers that the period of the concertation complained of must therefore be limited to 1 September 1983, the date when FP and SIV began to react to VP's announcement of 21 July 1983 of a new price list. The date of 10 April 1986, which is considered to be the date when the concertation complained of came to an end, appears to have been fixed by reference to VP's note (638) concerning its meeting with Socover of the same date. Since that note was also dismissed as irrelevant (see above, paragraph 248), the Court considers that the end of the concertation complained of must be put back to an earlier date. The Court notes, in that regard, that the announcement of price changes in March 1986 introduced appreciable differences between the prices charged by FP and SIV (see above, paragraph 191) and that FP's note (487 and 873) of 16 December 1985 was also dismissed as irrelevant since it appears to

concern the joint management by FP and SIV of their Flovetro float glass production line (see above, paragraph 225). In the absence of further evidence, the Court considers that the period of the concertation complained of must be limited to 21 October 1985, which the decision considers to be the date of the last announcements of FP and SIV prior to March 1986 which can be described as identical and simultaneous.

28 Accordingly, the Court considers that Article 1(a) of the decision, in so far as it concerns the period from the 1 June to 1 September 1983 and the period from 21 October 1985 to 10 April 1986, must be annulled *ratione temporis.*

29 It remains therefore to be considered whether the concertation complained of in Article 1(a) of the decision, inasmuch as it has not been annulled, is caught by Article 85(1) of the Treaty.

30 With regard to the question of the legal definition of the concertation complained of, the Court notes that the terms 'intesa' and 'entente' which appear in the authentic Italian version and the French version, respectively, of Article 1(a) of the decision, do not appear in Article 85 of the Treaty. They cannot therefore add anything to the legal definition of the behaviour at issue. However, the Court considers that, taken overall, the concertation which actually took place between FP and SIV, as established above, must be described as a concerted practice within the meaning of Article 85(1) of the Treaty without its being necessary to decide whether the terms 'intesa' and 'entente' are to be regarded as synonyms of the terms 'accordo' and 'accord' and whether, in that case, the concertation between FP and SIV could, in the present case, be described as an agreement within the meaning of Article 85(1) of the Treaty. The Court also considers that it is unnecessary to consider the question, which was also raised by the applicants, of the definition of the conditions to be fulfilled in order for a practice to be described as a concerted practice which has as its object or effect the prevention, the restriction or distortion of competition within the common market. The Court points out that the Treaty expressly provides that that condition is fulfilled when the concerted practices in question '(a) directly or indirectly fix purchase or selling prices or any other trading conditions . . . '.

331 With regard to the condition that the concerted practice complained must be one 'which may affect trade between Member States', the Court considers that concertation on prices and terms of sale between the main Italian producers of flat glass is necessarily capable of affecting trade between Member States of the Community.

332 The Court considers, finally, that FP and SIV were given an opportunity to make known their views concerning the infringement thus found to exist and that, in so far as the evidence relates to the period in respect of which the Court has held an infringement to have been established, the applicants' pleas as to the procedure cannot be upheld.

333 It follows from the above that the grounds for the annulment of Article 1(a) of the decision proposed by the applicants can be accepted only to the extent specified above in paragraphs 323, 325 and 328.

(b) The automotive market

(i) The Fiat group

334 The Court recalls that it found (see above, paragraph 275) that the Commission has not proved to the requisite legal standard prior concertation among the three producers in question on the prices to be charged or on the sharing-out of quotas for supplies to the Fiat group. However, the Court found that there were certain exchanges of information between FP and SIV which could be caught by Article 85(1) of the Treaty. The Court, however, notes that Article 1(b) of the decision refers only to 'agreements and concerted practices on the prices to be charged to the Fiat group', and that Article 1(c) refers only to 'agreements and concerted practices relating to the apportionment of quotas for supplies to the Fiat group'.

335 That being so, since the Commission has not adduced, either in its statement of objections or in the reasoning of its decision, sufficient factual evidence to support

the objections it made, Article 1(b) and (c) of the decision must be annulled *ratione materiae*. The Court need not therefore determine whether the exchanges of information between FP and SIV are caught by Article 85(1) of the Treaty.

(ii) The Piaggio group

336 The Court recalls that it found, in paragraphs 281 and 282 above, that the Commission has proved to the requisite legal standard the existence of agreements between FP and SIV on the sharing-out of supplies and on the prices to be charged to the Piaggio group only for the years 1983 and 1984, and that only the agreements for 1983 were implemented. Those agreements, the purpose of which was price-fixing and market-sharing, are caught by Article 85(1)(a) and (c), without its being necessary to examine whether they actually affected competition. The Court cannot accept the argument advanced by the applicants FP and SIV that those agreements should be regarded as *de minimis*.

337 Accordingly, Article 1(d) of the decision, in so far as it concerns a period subsequent to the 31 December 1984, must be annulled *ratione temporis* only.

(c) The exchanges of glass

338 The Court recalls that it considered it necessary to determine from the reasoning of the decision the essential points of the objection raised under this heading (see above, paragraphs 289 to 292), and that it is in the light of that examination that it found above, in paragraphs 301, 303 and 313, that the Commission had not proved to the requisite legal standard the existence of an institutionalized system of exchanges of glass either among the three producers or between two of them during the years 1982 to 1986, and that it had also not proved a joint intention on the part of those producers to share out the market by means of such a system. The Court considers that if it changed the description of the behaviour complained of, it would be varying the contested decision, which would exceed the limits of its jurisdiction. Accordingly, Article 1(e) of the decision must be annulled.

339 It must also be emphasized that the facts of the case, as established above by the Court, are far from comparable with those of *Suiker Unie* (judgment of the Court in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie* v *Commission* [1975] ECR 1663) and *CRAM and Rheinzink* (judgment of the Court in Joined Cases 29 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679) in which the Commission proved that the exchanges or transfers complained of were part of an unlawful concertation with the aim, *inter alia*, of compartmentalizing markets.

2. Application of Article 86 of the Treaty

(a) Arguments of the parties

340 The Court considers that it must first of all examine the pleas in law and arguments of the intervener, according to which Article 86 is not applicable, legally and in principle, in the circumstances of the present case.

341 According to the United Kingdom, the Commission was not entitled to find an infringement of Article 86 by considering that SIV, FP and VP held a collective dominant position on the Italian market for flat glass and by finding an abuse of that collective dominant position. Consequently, Article 2 of the decision should be annulled in so far as it finds an infringement of Article 86, together with Article 3 in so far as it refers to Article 2.

342 In the opinion of the United Kingdom, it is only in very special circumstances that two or more undertakings may jointly hold a dominant position within the meaning of Article 86, namely, when the undertakings concerned fall to be treated as a single economic unit in which the individual undertakings do not enjoy a genuine autonomy in determining their conduct on the market and are not to be treated as economically independent of one another. The United Kingdom refers in that regard to the judgments of the Court of Justice in *Suiker Unie*, cited above,

together with the Opinion of Advocate General Mayras; Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 39; Case 172/80 *Züchner* [1981] ECR 2021, paragraph 10, together with the Opinion of Advocate General Slynn, at page 2039; Case 293/83 *CICEE* v *Commission* [1985] ECR 1105, together with the Opinion of Advocate General Lenz at page 1110; Case 75/84 *Metro* v *Commission* [1986] ECR 3021, paragraph 84; and Case 247/86 *Alsatel* [1988] ECR 5987, paragraphs 20 to 22.

3 The United Kingdom points out that, according to the case-law of the Court of Justice, Article 85 does not apply to an agreement between a parent and its subsidiary which, although having separate legal personality, enjoys no economic independence (Judgments in Cases 22/71 *Béguelin* [1971] ECR 949; Case 15/74 *Centrafarm* [1974] ECR 1147 and 1183; Case 170/83 *Hydrotherm* [1984] ECR 2999; and Case 30/87 *Bodson* [1988] ECR 2479, paragraphs 19 and 20). When undertakings form part of one and the same economic unit, their conduct must be considered under Article 86 (judgment in *Bodson*, cited above, paragraph 21). The Court considers that that view is supported by the judgment of the Court of Justice in Case 66/86 (*Ahmed Saeed* [1989] ECR 803, paragraphs 34 to 37).

4 According to the United Kingdom, the only matters relied on by the Commission to show that the three undertakings form a 'single entity' are the very same matters as the Commission relies on as constituting infringements of Article 85. The Commission has not demonstrated either the existence of institutional links between the undertakings analogous to those that exist between parent and subsidiary nor the loss of their individual autonomy nor the absence of competition among them.

5 As regards the abuse of dominant position, the United Kingdom considers the Commission to be in error in holding that the very agreements on which the finding of a collective dominant position is based also constitute an abuse of that collective dominant position (points 80 and 81 of the decision). It is only the abuse of a dominant position, that is to say abusive conduct by the dominant undertaking, that is prohibited. The abuse is separate from the dominant position itself

(judgments of the Court of Justice in Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 249, and Case 6/72 *Continental Can* v *Commission* [1973] ECR 215).

346 The applicants express their agreement with the arguments put forward by the United Kingdom. FP adds that neither the market shares held by the undertakings in question nor the alleged stability of those shares are in themselves sufficient to prove the existence of a dominant position. The fact that the three producers concerned are affiliated to multi-national groups is irrelevant. The interests and operating methods of SIV, which is controlled by the Italian State, are different from those of FP. The undertakings concerned categorically deny that they presented themselves on the market 'as a single entity and not as individuals' (point 79, paragraph 6). Neither the wholesalers, nor the other customers for glass intended for the construction industry, nor motor vehicle manufacturers perceive them, in any way whatsoever, as a single entity. Although there is considerable interdependence on the flat glass market with regard to prices and terms of sale, it is dictated by the oligopolistic structure of that market. The economic power that Fiat is able to exercise, in particular vis-à-vis its suppliers of glazing for motor vehicles, is such that the alleged 'restrictive nature of alternative offers' in no way undermines the position of that undertaking.

347 With regard to abuse, the Commission has not proved either that the undertakings in question have, by their behaviour, restricted the freedom of choice of the customers or limited the outlets of the other producers of flat glass, or that they have deprived customers of the possibility of making suppliers compete on prices. As regards the alleged limitation of the market outlets of the Community's other flat glass producers, made all of a sudden in points 80 and 81 of the decision, the applicants point out that there is no evidence that the Community's other producers (Glaverbel, Pilkington and Guardian) have been impeded in any way whatsoever in the development of their sales or other activities in Italy. Fiat also obtains supplies from Splintex, which was controlled by Glaverbel at the material time, and from Glasexport.

348 SIV adds that the Commission has confused cause with effect. According to SIV, the abuse of a dominant position, as analysed by the Commission, is constituted by behaviour already deemed to constitute agreements or concerted practices within the meaning of Article 85(1), whereas the existence of a collective dominant

position had not yet been proved. For that reason, the accusation of an abuse of a collective dominant position on the basis of behaviour and facts preceding the definition of 'collective dominant position', is groundless.

VP adds that the Commission failed to define seriously the market for the product in question. The fact that it amalgamated the two automotive and non-automotive markets for the purposes of the application of Article 86 is in itself sufficient to invalidate its reasoning. As regards the geographic market, what is important is the possibility of importing, in other words the existence or absence of barriers to imports. Since there are no such barriers, there was no reason to limit the non-automotive geographic market to Italy. With regard to the automotive market, the absence of intra-Community trade barriers is proved by the volume of VP's exports (214).

The Commission, for its part, refers to point 79 of the decision with regard to the circumstances in which the concept of collective dominant position may be applied to independent undertakings. It in no way intended to apply the concept of collective dominant position to the undertakings in question solely on the ground that they form part of a tight oligopoly controlling more than 80% of the Italian market in flat glass. It applied the concept of collective dominant position to the undertakings in question because, not only did they hold collectively a very large share of the market, they presented themselves on the market as a single entity and not as individuals. That emerges not from the structure of the oligopoly but from the agreements and concerted practices which led the three producers to create structural links amongst themselves, such as, in particular, the systematic exchanges of products. The Commission defends itself for having adopted the position that Article 86 may be applied to undertakings in an oligopolistic position regardless of whether or not there are agreements or concerted practices among them.

The Commission adds that, even if there were certain differences in behaviour, such as in the case of VP which especially favoured processing wholesalers, those differences did not prevent the producers from observing one and the same global market strategy: they, in fact, conducted themselves as undertakings belonging to a single group.

352 The claim that the Commission separated the automotive and non-automotive glass markets for the purposes of the application of Article 85 and combined them again for the purposes of Article 86 is incorrect and, in any event, irrelevant. The Commission distinguished between the two markets solely for the sake of the clarity of its account of the facts and the behaviour at issue. Nowhere in the decision did it consider that that distinction could create two separate markets as regards the supply of flat glass as a basic product. The distinction between automotive and non-automotive glass was made solely for statistical and practical reasons, for the purpose of classifying the customers correctly. If that argument is taken to an extreme, the absurd result would be that glass intended for each model of car would constitute a market in itself.

353 The Commission states that, in order to define the relevant geographical market, it is necessary to take into consideration the actual movements of the product rather than the theoretically possible movements. Four-fifths of Italian flat glass consumption is supplied by producers based in Italy. Consequently, there is no doubt that Italy, which is a substantial part of the common market, must be considered to be the relevant geographical market in which to assess the potential for competition and to determine whether the undertakings in question hold a collective dominant position (judgment of the Court of Justice in *United Brands*, cited above).

354 According to the Commission, in the present case the producers' behaviour is certainly caught by the prohibition laid down in Article 85 in view of the agreements found to exist, which resulted in concerted price changes and in market sharing. That is the objective factual situation in which the three producers found themselves by reason of those agreements which gave them a collective dominant position. Accordingly, that situation of dominance is the result of the unlawful agreements. However, in order to establish the existence of a collective dominant position, the Commission took into consideration, not the restrictive aim of the unlawful agreements, but their effect, which was to unite the three producers into a single entity on the market.

5 According to the Commission, the Community's other producers in the market in question were practically excluded because of the crystallization of the market by the three producers in the collective dominant position. It is irrelevant, in the Commission's view, whether the companies were controlled by the private sector (FP and VP) or the public sector (SIV) since the undertakings were managed according to the same economic criteria. The groups in question had more than 50% of all the Community's production and supply of flat glass and, given the nature of the market, in which the proximity of the place of delivery for the product plays a significant role, they managed to protect themselves from competition from other Community producers which might have had an interest in selling their flat glass in Italy.

6 The three producers abused their dominant position by agreeing on fixed prices and sharing market quotas among themselves. They thus denied customers the possibility of bringing into play competition on prices between suppliers and also deprived them of choice as to their sources of supply, it being impossible for other producers to enter the Italian market in so far as the three producers in question controlled a market which they had divided among themselves.

(b) Assessment by the Court

7 The Court notes that the very words of the first paragraph of Article 86 provide that 'one or more undertakings' may abuse a dominant position. It has consistently been held, as indeed all the parties acknowledge, that the concept of agreement or concerted practice between undertakings does not cover agreements or concerted practices among undertakings belonging to the same group if the undertakings form an economic unit (see, for example, the judgment in Case 15/74 *Centrafarm*, cited above, paragraph 41). It follows that when Article 85 refers to agreements or concerted practices between 'undertakings', it is referring to relations between two or more economic entities which are capable of competing with one another.

358 The Court considers that there is no legal or economic reason to suppose that the term 'undertaking' in Article 86 has a different meaning from the one given to it in the context of Article 85. There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers (judgment of the Court in *Hoffmann-La Roche*, cited above, paragraphs 38 and 48).

359 The Court finds support for that interpretation in the wording of Article 8 of Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (Official Journal L 378, p. 4). Article 8(2) provides that the conduct of a liner conference benefitting from an exemption from a prohibition laid down by Article 85(1) of the Treaty may have effects which are incompatible with Article 86 of the Treaty. A request by a conference to be exempted from the prohibition laid down by Article 85(1) necessarily presupposes an agreement between two or more independent economic undertakings.

360 However, it should be pointed out that for the purposes of establishing an infringement of Article 86 of the Treaty, it is not sufficient, as the Commission's agent claimed at the hearing, to 'recycle' the facts constituting an infringement of Article 85, deducing from them the finding that the parties to an agreement or to an unlawful practice jointly hold a substantial share of the market, that by virtue of that fact alone they hold a collective dominant position, and that their unlawful behaviour constitutes an abuse of that collective dominant position. Amongst other considerations, a finding of a dominant position, which is in any case not in itself a matter of reproach, presupposes that the market in question has been defined (judgment of the Court of Justice in Case 6/72 *Continental Can*, cited above, paragraph 32; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 57). The Court must therefore examine, firstly, the analysis of the market made in the decision and, secondly, the circumstances relied on in support of the finding of a collective dominant position.

With regard to the definition of the market, the Court recalls that the section of the factual part of the decision entitled 'The market' (points 2 to 17) is almost entirely descriptive and that, moreover, it contains a number of errors, omissions and uncertainties which have already been examined by the Court. The Court also recalls that the findings made by the Commission concerning relations between the three producers, and concerning relations between, on the one hand, the three producers, and on the other hand, the wholesalers on the non-automotive market and the manufacturers on the automotive market, are in many respects insufficiently supported. Finally, the Court points out that in the section of the legal part devoted to 'The relevant market' (points 76 to 77), the decision adds nothing from the factual point of view to what was stated previously.

It must therefore be determined whether the analysis of the market made in points 76 and points 77 of the decision is sufficiently well-founded and, moreover, whether that analysis is sufficient in itself to prove, as the Commission claims, that the appropriate market for the purposes of the application of Article 86 is, as regards the product, the flat-glass market in general and, from the geographical point of view, Italy.

With regard to the product, the applicants drew attention in the administrative procedure, in their pleadings and in their oral argument, to numerous aspects of the flat-glass market in general which were not mentioned in the decision (see above under the heading 'A. The assessment of the market'). Those included, for example, the structural differences between the automotive market and the non-automotive market (Fiat's position as the sole purchaser as against the presence of wholesalers and independent processors), the differences between the types of flat glass (cast glass, produced only by FP, as against float glass) and the differences between the types of products sold on the market by the producers (specialized and/or processed products as against basic products). While it is true that the Commission is not required to discuss in its decisions each argument advanced by the undertakings concerned, nevertheless, within the context of the application of Article 86 to the present case, the Court finds that an analysis of those factors was absolutely essential for an assessment of the question of dominance, that is to say for an assessment of the extent to which the degree of competition was weakened by the allegedly unitary presence of the three producers on the market (judgment of the Court in *Hoffmann-La Roche*, cited above, paragraph 91). The decision does not contain the least indication of the reasons why the Commission considered it appropriate to divide its assessment of the

undertakings' behaviour in relation, respectively, to the automotive market and the non-automotive market, while claiming that for the purposes of applying Article 86, the flat-glass market must be considered to be a single market. The Commission's claim in its pleadings that the distinction between the automotive and non-automotive markets was made only for the sake of the clarity of its presentation, is contradicted by the wording of the operative part of the decision.

364 The Court considers that that also applies as regards the alleged analysis of the geographical market. The decision states (point 77) that 'the geographical location of production facilities is a vital factor ... since, the greater the distance between the production centre and the points of supply, the more the logistic system becomes critical and the more the competitiveness of the product decreases'. However, it emerges from the documents before the Court that Italian producers were obliged to take account of the competitive effect of products originating in the Benelux countries, the countries of Eastern Europe and even Turkey. It would therefore have been useful to examine the importance of the distances between, on the one hand, each of the main points of delivery in Italy and, on the other hand, each of the centres of production in Italy and abroad.

365 However, the Court need not give a definitive ruling on the question whether the inadequate analysis that the Commission considered it appropriate to devote to the definition of the market is supported by satisfactory evidence, since the Commission stated, both at the informal meeting called by the Judge-Rapporteur (see above, paragraph 50) and at the hearing, that the sentence which appears in the sixth paragraph of point 79 of the decision, 'the undertakings present themselves on the market as a single entity and not as individuals', constituted an essential element of its position with regard to the application of Article 86 of the Treaty, and that it was for the Commission to substantiate it. It is evident from all the foregoing that the Commission has far from substantiated that statement.

366 It follows that, even supposing that the circumstances of the present case lend themselves to application of the concept of 'collective dominant position' (in the sense of a position of dominance held by a number of independent undertakings),

the Commission has not adduced the necessary proof. The Commission has not even attempted to gather the information necessary to weigh up the economic power of the three producers against that of Fiat, which could cancel each other out.

7 With regard to Article 2(d) of the decision, in which the Commission accuses FP and SIV, only, of infringing Article 86 in their relations with the Piaggio group, the reasoning of the decision makes no reference to this objection.

8 It follows that Article 2 of the decision must be annulled in its entirety.

9 With regard to Article 3 of the decision, the Court recalls that in point 84, under (c), second paragraph, of the decision, the Commission states that it cannot be sure that the infringements have been terminated. Since the only infringements which the Court has found to have been duly proved by the Commission came to an end on 21 October 1985 at the latest, Article 3 has become devoid of purpose and must be annulled.

The fines

10 It follows from the above that Article 4 of the decision, in so far as it imposes a fine on Vernante Pennitalia SpA, must be annulled.

11 With regard to the fines imposed on FP and SIV, it is evident from all the foregoing that they cannot be left unchanged. Those fines were imposed on the assumption that there was a close cartel between the three members of a national oligopoly, protected against effective competition by economic and geographical barriers, which is far from having been the case. Accordingly, the Court must

consider, in the exercise of its unlimited jurisdiction, whether it is necessary to cancel or at least reduce the fines imposed on FP and SIV.

372 The Court takes into consideration the fact that the infringement of Article 85(1) of the Treaty which it has upheld against FP and SIV was an infringement of the express terms of that provision of the Treaty and that the undertakings concerned had already been addressees of the 1981 decision, which however did not impose penalties on them. Accordingly, even though the infringements which the Court has found to exist are much less serious than all the infringements alleged in the decision, the Court considers that the fines cannot be cancelled entirely.

373 The Court observes that in point 85 of the decision, the Commission explains that the amount of the fines was fixed taking account of the role each undertaking played in the agreements and concerted practices, the period of time during which they participated in the infringement, their respective supplies of glass and the total turnover of each undertaking. Only the last two factors (respective supplies and turnover) would be relevant in fixing fines imposed only on FP and SIV. That being so, the Court considers that the fines imposed on the two undertakings must remain proportionally the same but that their amounts must be reduced.

374 Accordingly, the Court, in the exercise of its unlimited jurisdiction, reduces the amount of the fines imposed on FP and SIV by six-sevenths.

Costs

375 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 asked for in the successful party's pleadings. Since the Commission has failed in its submissions vis-à-vis VP, and since VP has asked for its costs to be paid, the Commission must be ordered to pay VP's costs.

76 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs. The Commission has failed vis-à-vis FP and SIV on numerous heads. However, only FP has asked for costs, SIV having failed to do so. Accordingly, the Court considers that the Commission must be ordered to bear its own costs vis-à-vis FP and SIV, and to pay one half of the costs of FP. FP must bear one half, and SIV all, of their own costs.

77 Under Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs. Accordingly, the United Kingdom shall bear its own costs.

on those grounds:

THE COURT OF FIRST INSTANCE
(First Chamber)

hereby:

1. Annuls Article 1(b), (c) and (e), Article 2 and Article 3 of the decision;

2. Annuls Article 1(a) of the decision

— in so far as it concerns Vernante Pennitalia SpA;

— in so far as it concerns the participation of Fabbrica Pisana SpA and Società Italiana Vetro SpA in agreements and concerted practices designed to influence the purchasing and selling policies of the main wholesalers;

— in so far as it concerns the participation of Fabbrica Pisana SpA and Società Italiana Vetro SpA in agreements and concerted practices on prices and terms of sale before 1 September 1983 and after 21 October 1985;

3. Annuls Article 1(d) of the decision in so far as it concerns the participation of Fabbrica Pisana SpA and Società Italiana Vetro SpA in agreements and concerted practices relating to the prices to be charged and supply quotas to be applied to the Piaggio group after 31 December 1984;

4. Cancels the fine imposed on Vernante Pennitalia SpA;

5. Fixes the amount of the fine imposed on Fabbrica Pisana SpA at ECU 1 000 000;

6. Fixes the amount of the fine imposed on Società Italiana Vetro at ECU 671 428;

7. Dismisses the remainder of the applications of Fabbrica Pisana SpA and Società Italiana Vetro SpA;

8. Orders the Commission to pay the costs of Vernante Pennitalia SpA and one half of the costs of Fabbrica Pisana SpA. Orders Fabbrica Pisana SpA to bear the remaining half of its costs;

9. Orders Società Italiana Vetro SpA, the Commission and the United Kingdom to bear their own costs.

Edward García-Valdecasas

Lenaerts Kirschner Schintgen

Delivered in open court in Luxembourg, 10 March 1992

H. Jung
Registrar

D. A. O. Edward
President