JUDGMENT OF THE COURT (First Chamber)
17 December 1991 *

Contents

* Language of the case: Dutch.

In Case T-8/89,

DSM N. V., a company incorporated under Dutch law, having its registered office at Heerlen (Netherlands), represented by I. G. F. Cath, of the Maastricht Bar, with an address for service in Luxembourg at the Chambers of L. H. Dupong, 14a Rue des Bains,

applicant,

v

Commission of the European Communities, represented by A. McClellan, Principal Legal Adviser, acting as Agent, assisted by T. R. Ottervanger, of the Rotterdam Bar, with an address for service in Luxembourg at the office of R. Hayder, a national civil servant seconded to its Legal Service, Wagner Centre, Kirchberg,

defendant,

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

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

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

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

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

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

gives the following

Judgment

Facts and background to the action

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

2 The west European market for polypropylene is supplied almost exclusively from European-based production facilities. Before 1977, that market was supplied by ten producers, namely Montedison (now Montepolimeri SpA), Hoechst AG, Imperial Chemical Industries PLC and Shell International Chemical Company Limited (called 'the big four'), which together account for 64% of the market, Enichem Anic SpA in Italy, Rhône-Poulenc S. A. in France, Alcudia in Spain, Chemische Werke Hüls and BASF AG in Germany and the nationalized Austrian producer Chemie Linz AG. Following the expiry of the controlling patents held by Montedison, seven new producers came on stream in western Europe in 1977: Amoco and Hercules Chemicals N. V. in Belgium, ATO Chimie S. A. and Solvay et Cie S. A. in France, SIR in Italy, DSM N. V. in the Netherlands and Taqsa in Spain. Saga Petrokjemi AS & Co, a Norwegian producer, came on stream in the middle of 1978, and Petrofina S. A. in 1980. The arrival of the new producers,

with nameplate capacity of some 480 000 t, brought a substantial increase in installed capacity in western Europe which for several years was not matched by the increase in demand in that market. This led to low rates of utilization of production capacity, which, however, rose progressively between 1977 and 1983, increasing from 60% to 90%. According to the Decision, supply and demand were roughly in balance from 1982. However, during most of the period covered by the investigation (1977-1983), the polypropylene market was reported to be characterized by either low profitability or substantial losses, owing in particular to the extent of the fixed costs and to the increase in the cost of the raw material, propylene. According to the Decision (point 8), in 1983 Montepolimeri SpA held 18% of the European polypropylene market, Imperial Chemical Industries PLC, Shell International Chemical Company Limited and Hoechst AG each held 11%, Hercules Chemicals N. V. slightly below 6%, ATO Chimie S. A., BASF AG, DSM N. V., Chemische Werke Hüls, Chemie Linz AG, Solvay et Cie S. A. and Saga Petrokjemi AS & Co from 3 to 5% and Petrofina S. A. about 2%. The Decision states that there was a substantial trade in polypropylene between Member States because each of the then EEC producers supplied the product in most, if not all, Member States.

3 DSM N. V. is one of the seven new producers which appeared on the market in 1977. Its position on the polypropylene market was that of a medium-sized producer whose market share was between 3.1 and 4.8%.

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

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

BASF AG ('BASF'),

DSM N. V. ('DSM'),

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

Hoechst AG ('Hoechst'),

Chemische Werke Hüls ('Hüls'),

Imperial Chemical Industries PLC ('ICI'),

Montepolimeri SpA, now Montedipe ('Monte'),

Shell International Chemical Company Limited ('Shell'),

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

BP Chimie ('BP').

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

5 Following the investigations, the Commission addressed requests for information under Article 11 of Regulation No 17 (hereinafter referred to as 'the request for

information'), not only to the undertakings mentioned above but also to the following undertakings:

Amoco,

Chemie Linz AG ('Linz'),

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

Petrofina S. A. ('Petrofina'),

Enichem Anic SpA ('Anic').

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

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

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

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

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

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

Monte, Petrofina and Solvay. In a letter of 4 December 1984, Hüls associated itself with the view taken in the joint letter.

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

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

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

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

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2

The undertakings named in Article 1 shall forthwith bring the said infringement to an end (if they have not already done so) and shall henceforth refrain in relation to their polypropylene operations from any agreement or concerted practice which may have the same or similar object or effect, including any exchange of information of the kind normally covered by business secrecy by which the participants

are directly or indirectly informed of the output, deliveries, stock levels, selling prices, costs or investment plans of other individual producers, or by which they might be able to monitor adherence to any express or tacit agreement or to any concerned practice covering prices or market sharing inside the EEC. Any scheme for the exchange of general information to which the producers subscribe (such as Fides) shall be so conducted as to exclude any information from which the behaviour of individual producers can be identified and in particular the undertakings shall refrain from exchanging between themselves any additional information of competitive significance not covered by such a system.

Article 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 4

...

Article 5

...'

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

Procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 31 July 1986, the applicant brought this action seeking annulment of the Decision. Thirteen of the fourteen other addressees of the Decision have also brought actions for its annulment (Cases T-1/89 to T-4/89, T-6/89, T-7/89 and T-9/89 to T-15/89).

18 The written procedure took place entirely before the Court of Justice.

19 By order of 15 November 1989, the Court of Justice referred this case and the thirteen other cases to the Court of First Instance, pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities (hereinafter referred to as 'the Council Decision of 24 October 1988').

20 Pursuant to Article 2(3) of the Council Decision of 24 October 1988, an Advocate General was designated by the President of the Court of First Instance.

21 By letter of 3 May 1990, the Registrar of the Court of First Instance invited the parties to an informal meeting in order to determine the arrangements for the oral procedure. That meeting took place on 28 June 1990.

22 By letter of 9 July 1990, the Registrar of the Court of First Instance requested the parties to submit their observations on the possible joinder of Cases T-1/89 to T-4/89 and T-6/89 to T-15/89 for the purposes of the oral procedure. No party had any objection on this point.

23 By order of 25 September 1990, the Court joined the abovementioned cases for the purposes of the oral procedure, on account of the connection between them, in accordance with Article 43 of the Rules of Procedure, then applicable *mutatis mutandis* to the procedure before the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988.

24 By order of 15 November 1990 the Court adjudicated on the requests for confidential treatment lodged by the applicants in Cases T-2/89, T-3/89, T-9/89, T-11/89, T-12/89 and T-13/89 and granted them in part.

25 By letters lodged at the Registry of the Court between 9 October and 29 November 1990, the parties replied to the questions put to them by the Court in a letter sent to them by the Registrar on 19 July 1990.

26 In the light of the answers provided to its questions, on hearing the report of the Judge-Rapporteur and after hearing the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

27 The parties presented oral argument and answered questions from the Court at the hearing which took place from 10 to 15 December 1990.

28 The Advocate General delivered his Opinion at the sitting on 10 July 1991.

Forms of order sought by the parties

29 The company DSM claims that the Court should:

(i) annul or declare void, in its entirety or partially, the Commission's Decision of 23 April 1986 (IV/31.149 — Polypropylene) which is the subject of this action;

(ii) annul or reduce the fine imposed on the applicant by that decision;

(iii) order all steps and measures that the Court [the Court of First Instance] considers appropriate;

(iv) order the Commission to pay the costs.

The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

Substance

30 The Court considers that it is necessary to examine, *first*, the applicant's grounds of challenge relating to a breach of the rights of the defence allegedly committed by the Commission in so far as (1) it failed to disclose to the applicant documents on which it based the Decision, and (2) in basing its decision on insufficient evidence it reversed the burden of proof; *secondly*, the grounds of challenge relating to proof of the infringement, which concern (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty whereby it is contended that the Commission (A) did not correctly define the infringement, (B) did not correctly assess the restrictive effect on competition and (C) did not correctly assess how far trade between Member States was affected; *thirdly*, the grounds of challenge relating to the reasoning of the Decision; and, *fourthly*, the grounds of challenge relating to the determination of the fine, which is alleged to be (1) disproportionate to the duration of the infringement and (2) disproportionate to the gravity of the alleged infringement.

The rights of the defence

1. *Non-disclosure of documents with the statement of objections*

31 The applicant contends that when the Commission notified it of the statement of objections it did not send it documents referred to in 14 points of the Decision and that the Commission thus gave it no opportunity to explain their contents. The documents concerned consist of a note made by a Hercules executive relating to the meeting of 13 May 1982 (Decision, point 15b; see also point 37), a document allegedly found at the premises of Solvay dated 6 December 1977 (Decision, point 16, penultimate paragraph), Shell's reply to the statement of objections (Decision, point 17), two sets of minutes of Shell internal meetings held on 5 July 1979 (Decision, point 29, second paragraph) and 12 September 1979 (Decision, point 31), an internal Solvay document (Decision, point 32), a reminder sent by Solvay to its sales offices on 17 July 1981 (Decision, point 35), articles published in the trade press at the end of 1981 (Decision, point 36), an internal ICI note relating to the 'firm climate' (Decision, point 46), Shell documents relating to the United Kingdom and France and a Shell document headed 'PP W. Europe-Pricing' and 'Market quality report' (Decision, point 49), various ATO documents, in particular an internal note of 28 September 1983 (Decision, point 51), tables found at the premises of ICI relating to revised targets for 1979 (Decision, point 54), the note of the meeting of 10 March 1982 made by an ICI executive (Decision, point 58), an undated ICI note made in preparation for a meeting with Shell planned for May 1983 and, finally, a working document relating to the first quarter of 1983 found at the premises of Shell (Decision, point 63).

32 In this regard, the applicant claims that the Commission acted in breach of 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), according to which the Commission is to inform undertakings in writing of the objections raised against them. Those objections must be accompanied by the documents on which the Commission bases its allegations. Although it is not necessary that the entire content of the file should be communicated to the undertakings concerned, they should nevertheless be informed of the facts upon which the Commission's complaints are based (judgment of the Court of Justice in Joined Cases 56 and 58/64 *Établissements Consten S.à r. l. and Grundig-Verkaufs-Gmbh* v *Commission* [1966] ECR 299). If those facts consist of specific documents, the Commission should communicate those documents to the undertakings or, if access to them is

available, indicate those which are thus in point. Moreover, the assessment of the importance of a document or of the meaning of an undertaking's reaction to a document should be left to that undertaking.

33 The Commission states in reply that all the documents which concerned the applicant and proved its participation in the cartel were communicated to it with the statement of objections in a perfectly identifiable way, with the exception of the note of a meeting of 10 March 1982 made by an ICI executive (Decision, point 58). This note, however, simply explained a scheme found at the premises of ICI and Hercules (main statement of objections, Appendix 71), which was disclosed and concerned the year 1982 during which the applicant has admitted in its application that it participated in the cartel.

34 It also states that the applicant was able, during the access-to-file procedure, to examine some of the documents which it states were not disclosed to it.

35 The Commission again points out that the documents to which reference is made in points 46 and 54 of the Decision were disclosed to the applicant as Appendices 35 and 55 to the main statement of objections.

36 Finally, it admits that some documents referred to in the Decision were not communicated to the applicant because they did not concern it at all and did not therefore serve as a basis for the part of the Decision which concerns it. They do not therefore have the slightest relevance in assessing the applicant's position in the cartel.

37 The Court notes that, according to the case-law of the Court of Justice, the important point is not the documents as such but the conclusions which the Commission has drawn from them, and if those documents were not mentioned in

the statement of objections, the undertaking concerned was entitled to take the view that they were of no importance for the purposes of the case. By not informing an undertaking that certain documents would be used in the Decision, the Commission prevented it from putting forward at the appropriate time its view of the probative value of such documents. It follows that those documents cannot be regarded as admissible evidence as far as it is concerned (judgment of the Court of Justice in Case 107/82 *AEG-Telefunken AG* v *Commission* [1983] ECR 3151, paragraph 27, and see most recently the judgment of 3 July 1991 in Case C-62/86 *AKZO Chemie* v *Commission*, not yet published in the Reports of Cases before the Court, at paragraph 21).

38 In this instance, only the documents mentioned in the main or specific statements of objections or in the letters of 8 October 1984 and of 29 March 1985, or those appended to them without being specifically mentioned therein, may be treated as admissible evidence as against the applicant in the present case. As far as the documents which are appended to the statements of objections but which are not mentioned therein are concerned, they may be used in the Decision as against the applicant only if the applicant could reasonably deduce from the statements of objections the conclusions which the Commission intended to draw from them.

39 It follows that, of the documents mentioned by the applicant, only the internal ICI note concerning the 'firmer climate' (Decision, point 46) and the tables found at the premises of ICI relating to the revised targets for 1979 (Decision, point 54) may be used as evidence against the applicant since they are mentioned in points 71 and 92 respectively of the main statement of objections addressed to the applicant of which they also form Appendices 35 and 55. The other documents referred to by the applicant may not be considered to be evidence admissible against it in the present case.

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

2. *The alleged insufficiency of the evidence adduced by the Commission*

41 The applicant contends that the documents produced by the applicant are not reliable and, in particular, that the ICI notes reflect subjective intentions or interpretations of their authors, inspired by their own personal political aims within their undertakings.

42 It states that the Commission must not attempt to give a matter wider significance than is objectively justified by the established facts. Furthermore, it should apply the presumption of innocence and the principle *in dubio pro reo.* However, the Commission drew general conclusions from incidents and circumstances which, placed in their true context, could give a different picture of the conduct or position of the applicant on the market. It claimed that these incidents and circumstances constituted proof of guilt, thus basing its finding on insufficient, uncertain or inconclusive evidence. According to the applicant, that approach has the effect of reversing the burden of proof, DSM having to demonstrate in general that its conduct on the market was quite different from that alleged by the Commission or to give a different interpretation of the facts, whereas it is for the Commission to make its version of the facts plausible in the face of the interpretation given by the undertakings.

43 The Commission replies that DSM does not adduce any reasons for doubting the reliability of the documents which it has produced.

44 The Commission states that it gave the various facts that emerged a significance which did not go beyond that which they actually had. It draws attention to the fact that proof of an infringement of Article 85 of the EEC Treaty must necessarily be adduced by reference to the conduct of a number of undertakings. Contrary to what DSM suggests, it is for DSM to show, having regard to all the evidence adduced by the Commission, that the facts of the matter may be interpreted differently.

45 Finally, in the Commission's view, the ground of challenge based on the principle *in dubio pro reo* is irrelevant in view of the large body of evidence in the case.

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

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

48 In those circumstances, it is for the applicant to provide a different explanation for what occurred at the meetings in which it participated, by adducing precise evidence, such as, for example, notes taken by members of its staff during the meetings at which they were present or testimony by those persons. It must be concluded that the applicant has not advanced, or offered to advance, any such evidence before the Court.

49 Furthermore, the question whether the Commission drew excessively general conclusions from the available evidence, thus acting in breach of the presumption of innocence and the principle *in dubio pro reo*, is indissociable from the question whether the findings of fact made by the Commission in the Decision are supported by the evidence which it has produced. Since that is a question of

substance related to proof of the infringement, it must be examined subsequently with the other questions relating to proof of the infringements.

Proof of the infringement

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

51 It is therefore necessary to verify first of all whether the Commission has established to the requisite legal standard its findings of fact relating to (A) the system of regular meetings, (B) the price initiatives, (C) the measures designed to facilitate the implementation of the price initiatives, and (D) the fixing of target tonnages and quotas, taking into account (a) the contested measure and (b) the arguments of the parties, before going on to (c) an assessment of them; it will then be necessary to review the application of Article 85(1) of the EEC Treaty to those facts.

1. *The findings of fact*

A. The system of regular meetings

(a) The contested decision

52 The Decision (point 78, fourth paragraph, and point 104, third paragraph) states that the system of regular meetings of polypropylene producers began at about the end of 1977, six meetings having taken place in 1978 (point 18, first paragraph), but it is not possible to identify the precise date on which each individual producer began to attend. It states that DSM, which is one of the producers in whose case it is not proved that it 'supported' the December 1977 initiative, claims not to know when the meetings began and that it admits attending them only from 1980.

53 However, the Decision (point 105, first and second paragraphs) states that the precise date on which each producer began to attend regular plenary meetings cannot be established with certainty. The date on which Anic, ATO, BASF, DSM and Hüls began to participate in the arrangements cannot have been later than 1979 since all these five producers are shown to have been involved in the market sharing or quota systems which were first in force in that year.

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

55 According to the Decision (point 21), the purpose of the regular meetings of polypropylene producers was, in particular, the setting of target prices and sales volumes and the monitoring of their observance by the producers.

(b) Arguments of the parties

56 The applicant points out that, according to the Decision, it participated in the cartel 'from some time between 1977 and 1989'. It contends that the Commission could not in any event introduce such a wide indeterminate margin as to the starting point of the infringement. It must establish that starting point precisely and, if it was not capable of doing this, give the applicant the benefit of the doubt.

57 It states that, although it admitted having participated regularly in meetings of polypropylene producers from 1 January 1981, it has always energetically denied having participated in them before that date with any definite regularity or in any structured form.

58 It contends that, if the Commission still maintains that the date on which DSM began to participate in the arrangements could not have been subsequent to 1979, it does so by relying on documents originating from ICI which are not conclusive or are interpreted incorrectly. Those documents consist only of tables mentioning production figures for the various producers.

59 In the reply, the applicant states that the conclusiveness of those documents as far as its participation in the meetings is concerned is undermined by their mention of Amoco, which, as the Commission has admitted, did not participate in the meetings. A note of 27 February 1978 (defence, Appendix III) is not conclusive either.

60 The Commission states that DSM admits having been present at the meetings with some regularity after 1 January 1981 and that, although it denies having participated in them with any regularity or in any structured form before 1981, it does not dispute that it attended them irregularly or occasionally.

61 The Commission contends that a large number of documents prove the applicant's participation in the meetings before 1981. The pieces of evidence relied upon in this regard are: point 23 of DSM's reply to the statement of objections in which it admitted in veiled terms that it was represented in the meetings before 1981; ICI's reply to the request for information (main statement of objections, Appendix 8), according to which DSM attended the meetings as a 'regular participant'; statements made at the general meeting of the European Association of Textile Polyolefins (EATP) of 26 May 1978, according to which DSM 'will support the movement to get prices at a reasonable level' (main statement of objections, Appendix 7); Appendix 55 et seq. to the main statement of objections, which contain precise information which could only have been provided by DSM, and, finally, a note originating from DSM, dated 27 February 1978, from which it is clear that as from that time DSM was observing the agreements and was worried that some of its competitors were observing them less scrupulously.

(c) Assessment by the Court

62 The Court holds first of all that the finding relating to the commencement of the applicant's participation in the infringement, which, according to Article 1 of the Decision, dated from some time between 1977 and 1979, must be understood as meaning, having regard to the reasons stated in the Decision, that the applicant's participation in the infringement commenced between the beginning and end of 1978. It must be pointed out, first, that neither the main and specific statements of objections addressed to the applicant nor the Decision raised against the applicant any objection relating to a period before 1978, the Decision even expressly excluding the applicant from the December 1977 price initiative (point 78) and, secondly, that the second paragraph of point 105 of the Decision states that the commencement of the applicant's participation in the infringement cannot have been later than the beginning of 1979.

63 On the basis of the evidence formed by, first, the internal DSM note dated 27 February 1978 (defence, Appendix III), which had been written in preparation for a meeting of 28 February 1978 and which mentions, in particular, amongst the errors made by DSM in its pricing policy, 'clinging to agreements even when heavy violations of our partners become obvious', the context of that quotation indicating that the 'partners' cannot be customers or suppliers who are named as such elsewhere in the document, and, secondly, by the applicant's statements at the EATP meeting of 26 May 1978 (main statement of objections, Appendix 7), according to which:

'It is our conviction that stability in supply and in pricing is most important . . . Therefore we will support the move to get prices at a reasonable level. This morning we have heard some comments indicating the November initiative has not been fully carried through, nevertheless we are of the opinion that it is absolutely necessary to pursue this goal further',

it must be held that, from a time which may be located in 1978, the applicant participated in meetings of 'Senior Managers' ('bosses') organized by polypropylene producers at which the idea of setting target prices was developed, as is shown by ICI's reply to the request for information (main statement of objections, Appendix 8) in which it is stated that: 'Generally speaking however, the concept of recommending "Target Prices" was developed during the early meetings which took place in 1978'.

64 As regards the subsequent period, the Court finds that it is clear from ICI's reply to the request for information that DSM participated regularly in the 'bosses" and 'experts" meetings from the end of 1978 or the beginning of 1979. That reply classifies the applicant, unlike two other producers, among the regular participants at those meetings and states, moreover, that:

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

65 It must also be observed that ICI's reply to the request for information is corroborated, first, by the applicant's reply to the statement of objections in which it maintains that it did not participate in the meetings with any regularity from January 1981 but does not deny having participated in them before that date and, secondly, by the fact that in various tables found at the premises of ICI and ATO (main statement of objections, Appendices 55 to 61) there appear, beside the applicant's name, its sales figures for various months and years. However, most of the applicants admitted in their replies to a written question put to them by this

Court that it would not have been possible to draw up the tables found at the premises of ICI, ATO and Hercules on the basis of the statistics available under the Fides data exchange system and in its reply to the request for information ICI stated, with regard to one of those tables, that 'the source of information for actual historic figures in this table would have been the producers themselves'. It must, however, be stated that the evidence formed by that statement does not in itself constitute proof of the applicant's participation in the meetings, no more than was the case with Amoco, but merely serves to corroborate other pieces of evidence on the basis of which such participation must be considered to be proved, such other evidence not existing in the case of Amoco.

66 Finally, it is clear from the tables appended to the applicant's reply to the request for information that it participated in nearly all the meetings of producers which are alleged to have been held during 1982 and 1983.

67 The Court holds that the Commission was entitled to consider, on the basis of the information which was supplied by ICI in its reply to the request for information and which was confirmed by a large number of meeting notes, that the purpose of the meetings was, in particular, to set target prices and sales volumes. In that reply, ICI stated that: '"Target prices" for the basic grade of each principal category of polypropylene as proposed by producers from time to time since 1 January 1979 are set forth in Schedule . . . '; and that 'A number of proposals for the volume of individual producers were discussed at meetings'.

68 In addition, in explaining the organization of marketing experts' meetings from the end of 1978 or the beginning of 1979, in addition to the organization of 'bosses" meetings, ICI's reply to the request for information reveals that the discussions about the fixing of price and sales volume targets became increasingly concrete

and precise when, in 1978, the 'bosses' were confining themselves to developing the actual concept of target prices.

69 Besides the previous passage, the following extract may be read in ICI's reply to the request for information: 'Only "Bosses" and "Experts" meetings came to be held on a monthly basis'. The Commission rightly deduced from that reply as well as from the similar nature and purpose of the meetings that they were part of a system of periodic meetings.

70 It follows from the foregoing considerations that the Commission has established to the requisite legal standard that the applicant participated in the regular meetings of polypropylene producers from some time between 1977 and 1979 until September 1983 and that the purpose of those meetings was, in particular, to fix price and sales volume targets and that they were part of a system.

B. The price initiatives

(a) The contested decision

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

72 With regard to the first of those price initiatives, the Commission (Decision, point 29) states that it has no detailed evidence of any meetings held or price initiatives undertaken in the first part of 1979. However, a note of a meeting held on 26 and 27 September 1979 shows that a price initiative had been planned based on a raffia grade price of DM 1.90/kg applicable from 1 July and DM 2.05/kg from

1 September. The Commission has price instructions issued by certain producers, which do not include the applicant, from which it is clear that those producers had instructed their sales offices to apply that price level or its equivalent in national currency from 1 September and, in most cases, before the trade press had announced the planned increase (Decision, point 30).

73 However, since it was difficult to get further price increases, the producers decided at the meeting held on 26 and 27 September 1979 to postpone the date for implementing the target by several months until 1 December 1979, the new plan being to 'hold' the existing levels over October with the possibility of an immediate step increase to DM 1.90 or 1.95/kg in November (Decision, point 31, first and second paragraphs).

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

75 The Decision (point 33) then refers to DSM's participation in two meetings in January 1981 at which it was decided that a two-stage increase was required, on

the basis of a price of DM 1.75/kg for raffia: the February target remained at DM 1.75/kg and a target of DM 2.00/kg was to be introduced 'without exception' from 1 March. A table of target prices in six major grades was drawn up in six national currencies. Its implementation was scheduled for 1 February and 1 March 1981. The documents obtained from DSM show, in particular, that it took steps to introduce the target prices set for February.

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

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

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

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

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

80 The meeting of 13 May 1982 was followed by price instructions from ATO, BASF, Hoechst, Hercules, Hüls, ICI, Linz, Monte and Shell, corresponding, with a few insignificant exceptions, to the target prices set at the meeting (Decision, point 39, second paragraph). The Decision admits (point 39, third paragraph) that price instructions for June are not available for DSM but states that a DSM sales report refers to price increases being planned for June which it was hoped would prove successful. At the meeting on 9 June 1982, the producers were able to announce only modest increases.

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

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

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

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

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

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

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

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

89 The Decision (point 50) also points out that further meetings, in which all the regular participants took part, took place on 16 June, 6 and 21 July, 10 and 23 August and 5, 15 and 29 September 1983. At the end of July and beginning of August 1983, BASF, DSM, Hercules, Hoechst, Hüls, ICI, Linz, Solvay, Monte and Saga all issued price instructions to their various national sales offices for application from 1 September based on raffia at DM 2.00/kg, whilst a Shell internal note of 11 August, relating to its prices in the United Kingdom, indicated that its United Kingdom subsidiary was 'promoting' basic prices to be in force on 1 September corresponding to the targets fixed by the other producers. By the end of the month, however, Shell was instructing the United Kingdom sales office to postpone the full increase until the other producers had established the desired basic level. The Decision states that, with minor exceptions, those instructions were identical by grade and currency.

90 According to the Decision (point 50, last paragraph), the instructions obtained from the producers show that it was later decided to maintain the impetus of the September move with further steps based on raffia at DM 2.10/kg on 1 October, rising to DM 2.25/kg on 1 November. It is further stated (point 51, first paragraph) that BASF, Hoechst, Hüls, ICI, Linz, Monte and Solvay each sent instructions to their sales offices setting identical prices for October and November, with Hercules initially fixing slightly lower prices. It states that DSM claims that no price instructions were issued for October or November but its list prices were identical for each grade and national currency with those of all the other producers.

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

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

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

(b) Arguments of the parties

94 The applicant contends that the essential objection raised by the Commission against the undertakings to which the Decision is addressed is the conclusion in 1977 of a floor-price agreement, which had to be revised periodically. It subsequently took concrete form in six periods identifiable through 'price initiatives'. The Commission uses the terms 'framework agreement' and 'sub-agreements' to describe this complex. The applicant therefore considers that, should the Court dismiss this fundamental objection, this must lead to the annulment in whole or in part of the Decision and the fines.

95 The applicant, which admits that it participated in the meetings with some regularity from January 1981, categorically denies that those meetings took place as part of a structured arrangement or, *a fortiori*, pursuant to a floor-price agreement.

96 It states that it never entered into any commitments and it never considered itself bound, either legally or morally, by the discussions which it had during the meetings. *A fortiori*, it never allowed itself to be guided by the outcome of those meetings when determining its commercial policy. On the contrary, that policy was characterized by the adoption of a position which was consistently aggressive, as is

demonstrated by the increase in its market share. In the face of that evidence, the Commission, which, after all, bears the burden of proof, confines itself to general observations which do not show at all that DSM aligned its intentions with those of the other undertakings. Furthermore, the applicant states that it does not understand the reasoning by which the Commission seeks to demonstrate the existence of a *de facto* commitment. The Commission has therefore failed to prove DSM's participation in a pricing agreement.

97 The applicant considers that its internal pricing policy does not justify the Commission's conclusion on this point and refers in this regard to the sale prices which it charged on the market.

98 It points out that, as far as it is concerned, four types of prices must be distinguished: target prices, which are the prices which the company hopes to achieve; 'list prices', which are the prices that are in principle indicated each month in the sales offices for each product; floor prices, notified to the sales offices at the same time as list prices, which determine the sales offices' margin for independent negotiation and, finally, actual sale prices.

99 The applicant produces graphs for different grades of polypropylene and different markets which, in its view, show, first, that the list prices never coincided with the target prices; secondly, that there were always substantial differences (of more than 20% on average) between the list prices and the floor prices; thirdly, that when prices were negotiated, it was the floor prices and not the target prices which served as a point of reference; and, finally, that the sales offices always had wide latitude to depart from the floor prices when fixing sale prices. Thus, the facts refute the Commission's basic contention that the meetings actually influenced DSM's commercial behaviour, since no link between the subject-matter of the meetings and the prices charged on the market nor any parallelism between the various prices charged by the undertakings on the market could be demonstrated. The applicant points out that the Commission itself admitted in point 73 of the Decision that: 'It may also be that price was determined to a large extent by conditions of supply and demand'.

100 The applicant then sets out to demonstrate that it did not participate in the various price initiatives.

101 As regards the initiative of July-December 1979, the applicant is not mentioned in the Decision, since it denies any participation in the infringements before 1 January 1981.

102 As regards the price initiative of January-May 1981, it states that its price instructions (application, Appendices 6 and 7) on which the Commission relies did not prove its intention to align itself with the target prices since in reality it was the market prices which served as a basis for the negotiation of prices with customers. Those instructions show that the prices referred to by the Commission were simply used as 'guidelines' for the corresponding products and that they were not minimum prices, which are also mentioned in its price instructions and were, moreover, appreciably lower. The Commission did not therefore correctly interpret DSM's price instructions.

103 As regards the initiative of August-December 1981, the applicant contends that the prices indicated in its price instructions diverged clearly from those which were set as target prices and from the instructions issued by other producers. The points made with regard to the previous period also apply to this period as well.

104 As regards the initiative of June-July 1982, it states that, contrary to what the Commission asserts in the Decision (point 39) and in its pleadings submitted to the Court, DSM's price instruction for June 1982 consisted of the note communicated by DSM to the Commission as Appendix 43 to its reply to the statement of objections. That price instruction, which had been issued before the meeting at which an alleged price target had been agreed and which was ignored by the Commission, also shows a divergence from the so-called target prices referred to by the Commission. In its reply, the applicant further states that the document of

13 July 1982 originating from DSM, which forms Appendix 9 to the specific statement of objections addressed to it and which the Commission identifies as being the price instruction issued by the applicant for June 1982, cannot be that instruction by reason of its date, since a planned increase for June clearly could not be drawn up in July.

105 As regards the initiative of September-November 1982, the applicant refers to the explanations provided in respect of the period from January to May 1981. It points out that, although it indicated to its sales offices that the floor prices had to be used cautiously, this was only in order to counteract its offices' tendency to go below the floor prices.

106 Finally, as regards the initiative of July-November 1983, the applicant draws a distinction between the beginning and end of that period. As regards the beginning of that period, it explains that the price instruction dated 25 May 1983 to which the Commission refers (application, Appendix 11) and which appears to be parallel to other instructions, must be considered in the context of a rising market in which the applicant could not remain in the background. As regards the end of that period, there was no written instruction concerning the floor prices, as is shown by a telex sent to the sales offices on 2 August 1983 (application, Appendix 12), which indicated that supplementary instructions for floor prices were to follow.

107 The applicant concludes by stating that the Commission is merely condemning an intention internal to the undertaking, whereas the rules of competition aim to protect the competitive structure and not to penalize internal intentions which have had no effect on that competitive structure through concrete commercial attitudes. The Commission is breaking new ground in asserting that a common intention to adopt parallel conduct is punishable *per se*.

108 The Commission states that various pieces of evidence, such as the applicant's prices instructions which matched those given by other producers both in their amount and date of entry into force (Appendix to the Commission's letter of 29 March 1985), undeniably support the conclusion that DSM took part in the implementation of a plan agreed with those other producers. The Commission is convinced that, *de facto*, DSM did consider itself bound to implement the agreements made in the cartel, as is evidenced by its price instructions. Given such concrete participation in the cartel, the applicant's view as to whether it was bound was irrelevant, as was its aggressive conduct on the market. The questions whether the 'decisions' taken within the cartel were subject to control or whether DSM brought its pricing conduct into line with that of the others only to a limited extent are also irrelevant.

109 Furthermore, according to the Commission and contrary to DSM's contention, there is evidence showing that the undertakings involved in the cartel, including DSM, set target prices for each Member State of the Community.

110 According to the Commission, DSM seeks to show that it is untrue that the discussions which took place at the meetings could actually have affected the operation of the market or the determination of the internal commercial policy of the undertaking. The Commission considers this defence argument to be irrelevant: the important factor is that, after having agreed target prices at meetings, all the producers, including DSM, instructed their sales departments to try to apply the agreed price levels and the target prices were used as a basis for the negotiation of prices with customers. In this regard, Table 9 to the Decision shows the link which undeniably existed between the prices achieved on the market and what was agreed between the producers.

111 The Commission also submits that collusion exists even if the target prices were not always achieved on the market. In its view, Table 7 to the Decision shows that parallelism undoubtedly existed between the price instructions issued by the various producers.

112 DSM's point that price discussions related only to market prices and that the floor prices were used as a sort of 'catch net' cannot be taken seriously because it implies that for years the setting of target prices was to no avail, that the sales departments did not need to observe them and that buyers did not need to bother about them.

113 As regards the applicant's participation in the various price initiatives, the Commission states that, as far as the price initiative of July-December 1979 was concerned, it is true that DSM's name does not appear in this regard in the Decision, but that its participation in the collusion during that period is established by other documents demonstrating its participation in the meetings, such as ICI's reply to the request for information (main statement of objections, Appendix 8), the tables relating to quotas (main statement of objections, Appendices 55 to 60), the applicant's internal note of 27 February 1978 (defence, Appendix III) or its statements at the EATP meeting of 26 May 1978 (main statement of objections, Appendix 7).

114 As regards the initiative of January-May 1981, it states that the documents provided by DSM itself show that the targets were used as a basis for negotiations of prices with customers and that they confirm that they were simultaneous and uniform in relation to those of other producers. The reference which DSM makes to the floor prices is irrelevant, as previously indicated.

115 As regards the initiative of August-December 1981, the Commission states that the list prices mentioned in DSM's price instructions are identical to the agreed target prices mentioned in the Decision. For the rest, the Commission refers to what it stated in respect of the previous period.

116 As regards the initiative of June-July 1982, the Commission states that the document which DSM puts forward as its price instruction for June 1982 is dated 18 March 1982 and does not mention any price for June (DSM's reply to the statement of objections, Appendix 43). It therefore considers that it was entitled to disregard that document and use instead, for the purposes of establishing the

applicant's participation in that price initiative, a sales report drawn up by the company on 13 July 1982 following the expert's meeting of 13 May 1982 (specific statement of objections, DSM, Appendix 9).

117 As regards the price initiative of September-November 1982, the Commission adduces arguments analogous to those put forward in respect of the price initiative of January-May 1981.

118 As regards the price initiative of July-November 1983, the Commission considers that, in view of the documentary evidence at its disposal, DSM's argument in relation to the optimum use of the possibilities offered by a rising market is unconvincing. In particular, it is established that DSM's prices for September 1983 were identical to those of all the other producers for all grades and in all currencies (letter of 29 March 1985, Appendix I).

119 In conclusion, the Commission states that the common intention to adopt parallel conduct was unmistakably put into effect through price initiatives which it has identified and which, as Table 9 to the Decision shows, had an effect on the market.

(c) Assessment by the Court

120 The Court notes first of all that, since none of the objections raised against the applicant related to the period before 1978, it is not contended in the Decision that it participated in the floor-price agreement concluded in mid-1977 or that it took part in the price initiative of December 1977 (footnote to the fourth paragraph of point 78 of the Decision).

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

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

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

123 In order to demonstrate that at the regular meetings of polypropylene producers it did not subscribe to the agreed price initiatives, the applicant has contended that it took no account at all of the decisions taken at the meetings when determining its pricing conduct on the market, as is shown, in its view, by its aggressive pricing policy on the market. It also points out that the Commission has misinterpreted its price instructions by failing to take account of the existence of four types of prices involved in the process by which DSM's prices are fixed.

124 That argument cannot be accepted as evidence corroborating the applicant's assertion that it did not subscribe to the agreed price initiatives. The Court considers that even if that argument were founded in fact, it would not gainsay the applicant's participation in the fixing of target prices at the meetings but would at most tend to show that the applicant did not put into effect the results reached at those meetings. Indeed, the Decision in no way asserts that the applicant charged prices which always corresponded to the price targets agreed upon at the meetings, which shows that the contested decision does not rely on the applicant's implemen-

tation of the outcome of meetings in order to establish that it participated in the fixing of those target prices.

125 In this same context, it must be observed that the Commission does not challenge an audit carried out by an independent firm of auditors, Coopers & Lybrand (hereinafter referred to as 'the Coopers & Lybrand audit') showing that there were considerable differences between the prices actually charged and the target prices. However, it must be pointed out that the analyses which the producers themselves carried out at the meetings on 21 September, 6 October, 2 November and 2 December 1982 in order to review the effect of their price initiatives on the prices charged on the market seem to indicate that they regarded their results as being generally positive (main statement of objections, Appendices 30 to 33).

126 In any event, the Court finds that the applicant's implementation of the results reached at the meetings was more real than it claims. The existence of four types of prices in the applicant's case pre-supposes that they were all involved in the process by which the prices asked of customers were set. In this regard, it must be pointed out, first of all, that a reading of the price instructions sent by the applicant to its sales offices shows that the 'target price' always corresponds to the 'list price' and that both are slightly higher than the 'Rock bottoms' which 'have to be used with care by each product manager or area sales manager at certain specific accounts (for instance certain key customers)' and, secondly, that the price targets set at the meetings were incorporated in DSM's price instructions as target prices and list prices even if the sales offices could in exceptional circumstances depart from them by applying the 'rock-bottom prices'. In this regard, it must be observed that when explaining why it had indicated to its sales offices that the 'rock-bottom prices' had to be used 'with care', the applicant is not convincing because if reference is made to the actual wording of those price instructions they do not indicate that the sales offices could go below those prices if they were careful, but rather that those prices were to be used only 'with care'.

127 Thus, despite the existence of the applicant's various types of prices, the applicant endeavoured as far as possible, using its own methods of price setting, to pass on to its sales offices and thus to its customers the target prices set at the meetings.

128 The Court must examine next the specific evidence presented by the applicant to demonstrate that it did not participate in the various price initiatives.

129 As regards the applicant's participation in the price initiative of July-December 1979, it must be pointed out, first, that the Decision (point 29) asserts that the meetings of producers were held during the first half of 1979 although it was not possible to identify the places and dates of the meetings and, secondly, that the Court has found that the Commission has established to the requisite legal standard that the applicant participated in those meetings. Furthermore, it is clear from matching price instructions issued by ATO, BASF, Hoechst, ICI, Linz and Shell that the initiative for obtaining DM 2.05/kg by 1 September 1979 had been decided on and announced at the end of July. The existence of that initiative and its postponement until 1 December 1979 are established by the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12), in which it is stated: '2.05 remains the target. Clearly 2.05 not achievable in Oct., not in Nov. Plan now is 2.05 on 1/12'.

130 It follows that the Commission has established to the requisite legal standard that the price increase of September 1979 was the result of the setting of target prices by the applicant and other producers for the period from July to December 1979.

131 Furthermore, the Court finds that in participating in the meetings of 1980 and those of January 1981, at which the price initiative of early 1981 was decided on, planned and monitored and in issuing price instructions matching the target prices set at those meetings, the applicant took part in that price initiative and that it may

not rely on the fact that in its price instructions the target prices set at the meetings were used as list prices and not as minimum prices.

132 The Court likewise finds that in participating in the meetings at which the initiative of August-December 1981 was decided on, planned and monitored and in issuing price instructions corresponding to those given for the same period by other producers, the applicant participated in that price initiative.

133 As regards the initiative of June-July 1982, the Court finds that it is to be inferred from the note of the meeting of 13 May 1982 (main statement of objections, Appendix 24) that that initiative was decided on at that meeting at which the applicant participated. As regards the question whether the applicant provided the Commission with its price instruction for June 1982, as it claims, it must be concluded that it is clear from an examination of the document produced by the applicant (Appendix 43 to DSM's reply to the statement of objections), headed 'Price list Stamylan P./April/May/June' and dated 18 March 1982, that, despite its heading, that document does not lay down price targets for June 1982 since, beside the column relating to the month of June, it is written: 'In case of need to be discussed with marketing Stamylan P.' Consequently, that document does not constitute the applicant's price instruction for June 1982, which was not therefore issued before the meeting of 13 May 1982 at which the target price for June had been agreed.

134 As regards the initiatives of September-November 1982 and July-November 1983, the Court finds that the applicant's participation in those initiatives may be inferred from its participation in the meetings at which those price initiatives were decided on, planned and monitored, and from the fact that the price instructions issued by the applicant matched the target prices set at those meetings and those issued by other producers.

135 As regards the latter price initiative, it must be observed that the applicant does not deny that its price instructions match those of other producers and that it cannot explain that circumstance by the fact that the market was rising, since, whilst that background may explain why it issued price instructions increasing in value, it cannot explain why the increases planned by the various producers were of the same amount. Furthermore, as regards the month of September, it must be concluded that the price list which the applicant had drawn up on 2 August 1983 (application, Appendix 12) and which was to enter into force on 1 September 1983, provides for prices identical to those of the other producers for all grades in all currencies. Although price instructions issued by the applicant are not available for the months of October and November 1983, it is safe to deduce that it participated at the end of the price initiative in question from the fact that it participated in the meetings at which that initiative was decided on and planned.

136 Furthermore, the Commission was fully entitled to deduce from ICI's reply to the request for information (main statement of objections, Appendix 8), in which it is stated that '"Target prices" for the basic grade of each principal category of polypropylene as proposed by producers from time to time since 1 January 1979 are set forth in Schedule . . . ', that those initiatives were part of a system of fixing target prices.

137 It must also be observed that in order to support the findings of fact set forth above the Commission did not need to use documents which it had not mentioned in its statements of objections or which it had not disclosed to the applicant.

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

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

(a) The contested decision

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

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

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

(b) Arguments of the parties

142 The applicant contends that from the documents on which the Commission bases its assertion that it participated in the system of 'account leadership' it may be concluded at most that this mechanism came up for discussion. However, they cannot prove that it was adopted and implemented, still less that DSM participated in it.

143 The Commission considers that the existence of a system of 'account management' or of 'account leadership' and DSM's participation in that system are established. This is clear from the discussions which took place at a meeting on 2 September 1982 (main statement of objections, Appendix 29) in which DSM took part. At the end of those discussions this system was 'generally agreed'. The implementation of this system was also examined at a meeting of 3 May 1983 (main statement of objections, Appendix 38).

(c) Assessment by the Court

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

145 It must be concluded that in participating in the meetings during which that set of measures was adopted (in particular those of 13 May, 2 and 21 September 1982 (main statement of objections, Appendices 24, 29, 30)), the applicant subscribed to it, since it has not adduced any evidence to prove the contrary. In this regard, the adoption of the system of 'account leadership' is clear from the following passage appearing in the record of the meeting of 2 September 1982:

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

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

146 As regards the system of 'account leadership', the Court finds that the applicant participated in three meetings (those of 2 September 1982, 2 December 1982 and 3 May 1983) at which this system was the subject of discussions between producers (main statement of objections, Appendices 29, 33 and 38). During the meetings of 2 December 1982 (main statement of objections, Appendix 33) and 3 May 1983 (main statement of objections, Appendix 38) the polypropylene producers examined the implementation of this system whose adoption was agreed on 2 September 1982 (main statement of objections, Appendix 29) and on that occasion they exchanged information relating to their customers.

147 The Court also finds that in its reply to the request for information the applicant listed the numerous local meetings in which it took part in 1982 and 1983 and that the purpose of those meetings is evidenced by notes of meetings of 12 August and 2 November 1982 (main statement of objections, Appendices 27 and 32) which show that those meetings were intended to apply a specific price initiative at the local level.

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

D. Target tonnages and quotas

(a) The contested decision

149 According to the Decision (point 31, third paragraph), it was 'recognized that a tight quota system [was] essential' at the meeting held on 26 and 27 September 1979, the note of which refers to a scheme proposed or agreed in Zurich to limit monthly sales to 80% of the average achieved during the first eight months of the year.

150 The Decision (point 52) further points out that before August 1982 various schemes for sharing the market were applied. While percentage shares of the estimated available business had been allocated to each producer, there was not at this stage any systematic limitation in advance of overall production. Thus, estimates of the total market had to be revised on a rolling basis and the sales (in tonnes) of each producer had to be adjusted to fit the percentage entitlement.

151 Volume targets (in tonnes) were set for 1979 based in part at least on sales in the preceding three years. Tables found at the premises of ICI show the 'revised

target' for each producer for 1979 compared with actual tonnage sales achieved during that period in Western Europe (Decision, point 54).

152 By the end of February 1980, volume targets — again expressed in tonnage terms — had been agreed for 1980 by the producers, based on an expected market of 1 390 000 t. According to the Decision (point 55), a number of tables showing the 'agreed targets' for each producer for 1980 were found at the premises of ATO and ICI. The original estimated total market available proved over-optimistic and the quota of each producer had to be revised downwards to fit total consumption during the year of only 1 200 000 t. Except for ICI and DSM, the sales achieved were largely in line with their targets. DSM, which 'disputed any undertaking to cut back from their original target', had appreciably exceeded its allocation (sales of 46 100 t compared with a target of 38 400 t).

153 According to the Decision (point 56), the sharing of the market for 1981 was the subject of prolonged and complex negotiations. At the meetings in January 1981, it was agreed that as a temporary measure to help to achieve the February/March price initiative each producer would restrict monthly sales to one-twelfth of 85% of the 1980 'target'. In preparation for a more permanent scheme, each producer communicated to the meeting the tonnage it hoped to sell during 1981. However, added together, those 'aspirations' largely exceeded total forecast demand. In spite of various compromise schemes put forward by Shell and ICI, no definitive quota agreement was reached for 1981. As a stopgap measure the producers took the previous year's quota of each producer as a theoretical entitlement and reported their actual sales each month to the meeting. In this way actual sales were monitored against a notional split of the available market based on the 1980 quota (Decision, point 57).

154 The Decision (point 58) states that for a 1982 scheme complicated quota proposals were advanced which attempted to reconcile divergent factors such as previous

achievements, market aspirations and available capacity. The total market to be divided was estimated at 1 450 000 t. Some producers submitted detailed plans for market sharing while others were content to communicate only their own tonnage aspirations. At the meeting on 10 March 1982 Monte and ICI tried to reach an agreement. The Decision (point 58, last paragraph) states, however, that, as in 1981, no definitive agreement was reached and for the first half of the year the monthly sales for each producer were communicated during the meetings and monitored against its achieved percentage share in the previous year. According to the Decision (point 59), in the August 1982 meeting, negotiations for an agreement on quotas for 1983 were held and ICI held bilateral discussions with each of the producers on the new system. However, pending the introduction of such a quota scheme, producers were required in the second part of 1982 to aim to restrict their monthly sales to the same percentage of the overall market which each of them had achieved in the first six months of 1982. Thus, in 1982, the market shares of medium-sized producers like ATO had reached a relative equilibrium (described by ATO as a 'quasi-consensus') and in the case of most of the producers remained stable compared with previous years, with DSM as the only exception, continuing its regular progression of 0.5% a year.

155 According to the Decision (point 60), for 1983, ICI invited each producer to indicate its own quota ambitions and suggestions for what percentage each of the others should be allowed. Monte, Anic, ATO, DSM, Linz, Saga and Solvay, as well as the German producers via BASF, submitted their own detailed proposals. The various proposals were then processed by computer to obtain an average which was compared with the individual percentage 'aspirations' of each producer. Those steps enabled ICI to propose guidelines for a new framework agreement for 1983. Those proposals were discussed at the meetings of November and December 1982. A proposal initially restricted to the first quarter of the year was discussed at the meeting on 2 December 1982. The note of that meeting drawn up by ICI shows that ATO, DSM, Hoechst, Hüls, ICI, Monte and Solvay, as well as Hercules, found their allocated quota 'acceptable' (Decision, point 63). Those facts are borne out by the ICI note of a telephone conversation with Hercules of 3 December 1982.

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

(b) Arguments of the parties

157 The applicant states that it is not clear from the Decision whether and to what extent the Commission considers that a quota system was indeed established. However, it appears to DSM that the Commission is inclined to believe that this is not the case and that its objection is limited to the fact that at the meetings the producers submitted reports on the quantities sold by each of them during the previous month, as is indicated in points 52 and 53 of the Decision.

158 The applicant denies in any event that a quota system was established between the undertakings. Even if such a system was established, it remains to be demonstrated that DSM was involved in it and that it considered itself bound legally or morally by the system. According to DSM, the Commission itself recognizes and emphasizes, in points 55 and 59 of the Decision, that this was not the case.

159 It further points out that the variations in the market shares of the various producers and the increase in its own market share disprove the existence of such an agreement as well as its own participation in such an agreement.

160 As far as 1979 is concerned, the applicant states that the Decision nowhere indicates that DSM was involved in a quota system or could have been involved in such a system. Besides, it cannot be accused of any infringement in respect of the period prior to 1 January 1981 since it did not participate in the meetings with any regularity before that date. The table produced by the Commission, showing data relating to production and sales figures and 'targets' (main statement of objections, Appendix 55), cannot implicate the applicant since that document is of unknown origin and purpose and is open to an interpretation different from that given to it by the Commission. Furthermore, the fact that Amoco and other producers, which were not involved in the proceedings, were mentioned there further diminishes the evidentiary force of that document.

161 As far as 1980 is concerned, the applicant contends that the documents provided by the Commission (main statement of objections, Appendices 56 to 61) provide no evidence of DSM's involvement for the reasons which have just been explained. A note of two meetings held in January 1981 (main statement of objections, Appendix 17) even prove the opposite, since it not only shows DSM's hostile attitude towards a quota system but also indicates that the discussions concerning quotas never went further than the proposal stage.

162 As far as 1981 is concerned, the applicant states that it is clear from the Decision itself (point 57, second paragraph) that no definitive quota agreement was reached. It adds that, contrary to what the Commission asserts on the basis of documents unknown to DSM, the producers did not adopt 'stop-gap measures' either, in order to be able to monitor actual sales.

163 As regards 1982, it admits that discussions on quotas took place but contends that no agreement on such a system could be reached. Furthermore, DSM maintained the regular progression of its market share, as was found in the Decision (point 59, third paragraph).

164 As regards 1983, the applicant contends that the Commission bases its finding of the existence of a quota system on suppositions and not on evidence. If information was exchanged on the tonnages sold by each producer, the purpose of such an exchange was not to check whether a quota system was being observed but to increase the transparency of the market.

165 The Commission, on the other hand, states that, contrary to what DSM asserts, point 54 et seq. of the Decision provides a general survey of the quota system which was applied over a number of years and in which DSM was closely involved.

166 As regards 1979, it states that ICI's participation in a quota agreement is apparent from an undated table headed 'Producers' Sales to West Europe', found at the premises of ICI (main statement of objections, Appendix 55), setting out for all the polypropylene producers of western Europe the sale figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual' and 'revised target'. The precise data contained in that document are of the kind not known by competitors in a 'normal' competitive situation and therefore presuppose participation by DSM and the other producers in the preparation of that document.

167 As regards 1980, the Commission again states that DSM's participation in the cartel is clear from the documents in its possession. Those documents consist, first, of a table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60) and headed 'Polypropylene — Sales target 1980 (kt)', which compares for all the producers of western Europe a '1980 target', 'opening suggestions', 'propose adjustments' and 'agreed targets 1980'. That document shows the process whereby quotas were drawn up. They consist, secondly, of a table found at the premises of both ATO and ICI (main statement of objections, Appendices 59 and 61) comparing for all the producers their sales in tonnes and market shares in columns headed: '1979 actual', '1980 target', '[1980] actual' and '1981 aspirations'. The Commission points out that in its reply to the request for information (main statement of objections, Appendix 8) ICI stated with regard to that document that 'the source of information for actual historic figures in this

table would have been the producers themselves'. The comments recorded in the note of two January 1981 meetings (main statement of objections, Appendix 17), according to which 'DSM disputed any undertaking to cut back from their original target' matters little since, even if the term 'target' meant 'internal ambition', the act of making internal ambitions public would be incompatible with Article 85 of the EEC Treaty.

168 The Commission acknowledges that no quota agreement could be concluded for 1981. However, it considers that provisional measures were taken. The Commission points out that it appears from the note of the abovementioned meetings in January 1981 that the producers compared their actual performances with the targets set, and from a table found at the premises of ICI but originating from an Italian producer (main statement of objections, Appendix 65) that the producers compared their 1981 sales with those in the previous year. It concludes that provisional measures were taken for 1981 in the absence of a general agreement allocating sales volumes for that year. This is further confirmed by other documents (main statement of objections, Appendices 66 to 68).

169 The Commission states that, in respect of 1982, various documents from Monte and ICI (main statement of objections, Appendices 69 to 71) show that proposals were made by those producers but were unsuccessful.

170 It states that it appears from the tables attached to the notes of the meetings of 9 June 1982 and 20 August 1982 (main statement of objections, Appendices 25 and 28) that during the first half of 1982 the producers compared their monthly sales with those achieved in 1981. It adds that for the second half of the year it appears from the second of those notes that the producers were asked to restrict their monthly sales to the level of those of the first half. It appears from the tables attached to the notes of the meetings of 6 October, 2 November and 2 December 1982 (main statement of objections, Appendices 31 to 33) that the producers compared their sales in the second half of the year with those in the first.

171 The Commission goes on to state that it has the ambitions and proposals for themselves and other producers which various producers expressed at ICI's request and provided to it with a view to the conclusion of an agreement on quotas for 1983 (main statement of objections, Appendices 74 to 76 and 78 to 84). According to the Commission, those proposals were then processed by computer to obtain an average which was compared with the aspirations of each producer. The resulting document was commented on in an ICI internal note headed 'Polypropylene Framework' (main statement of objections, Appendix 87). To those documents the Commission adds an ICI internal note headed 'Polypropylene framework 1983' (main statement of objections, Appendix 86), in which ICI outlines a future agreement on quotas. It asserts that the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) shows that the experts examined a quota proposal restricted to the first quarter of 1983.

172 Finally, the Commission states that it appears from an internal document found at the premises of Shell (main statement of objections, Appendix 90) that a quota agreement was concluded for the second quarter of 1983. According to that document, Shell instructed its national sales companies to reduce their sales in order to observe the quota allocated to it. The Commission adds that the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) shows that information on sales volumes in May was exchanged at that meeting.

173 The Commission also challenges the applicant's assertions that the exchanges of information between producers and the resulting increase in market transparency had a beneficial effect. In its view, the exchange of information was the consequence of the concertation carried on in order to achieve the fixing of quotas and the purpose of the exchange of information was not to increase market transparency but to monitor observance of a quota agreement. The Commission points out that DSM does not deny being closely associated in that concertation or having made quota proposals to ICI, such as that set out in Appendix 79 to the main statement of objections, nor having considered the quota proposals of November and December 1982 acceptable for it.

(c) Assessment by the Court

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

175 Alongside DSM's participation in the meetings, it should be pointed out that its name appears in various tables (main statement of objections, Appendices 55 et seq.) whose content clearly indicates that they were intended to be used in setting sales volume targets. Most of the applicants have admitted in their replies to a written question from the Court that it would not have been possible to draw up the tables found at the premises of ICI, ATO and Hercules on the basis of the statistics available under the Fides data exchange system. In its reply to the request for information (main statement of objections, Appendix 8), ICI stated with reference to one of those tables that 'the source of information for actual historic figures in this table would have been the producers themselves'. The Commission was therefore entitled to take the view that the content of those tables had been provided by DSM in the meetings in which it participated.

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

177 As regards the year 1979 in particular, having regard both to the whole of the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12) and to the undated table taken from the premises of ICI (main statement of objections, Appendix 55) headed 'Producers' Sales to West Europe', which sets out for all the polypropylene producers of western Europe the sales figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual', 'revised target' and '79', it is apparent that the need to tighten the quota system agreed for 1979 for the last three months of that year was

recognized at that meeting. The term 'tight', read in conjunction with the restriction to 80% of one-twelfth of planned annual sales, indicates that the scheme originally planned for 1979 had to be made tighter for those last three months. That interpretation of the note is borne out by the abovementioned table because it contains, under the heading '79' in the last column to the right of the column headed 'revised target', figures which must correspond to the quotas initially fixed. These had to be circumscribed because they had been drawn up on the basis of an over-optimistic market evaluation, as was also the case in 1980. The reference in the third paragraph of point 31 of the Decision to a scheme 'proposed or agreed in Zurich to limit monthly sales to 80% of the average achieved during the first eight months of the year' does not tell against these findings. That reference, read in conjunction with point 54 of the Decision, is to be taken as meaning that sales volume targets had already been set initially for the monthly sales of the first eight months of 1979.

178 As regards the year 1980, the Court finds that it is clear from the table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60), which contains a column headed 'agreed targets 1980', and from the note of the January 1981 meetings (main statement of objections, Appendix 17) at which producers, including the applicant, compared the quantities actually sold ('Actual kt') with the targets set ('Target kt'), that sales volume targets were set for the whole of the year. Those documents are further supported by a table dated 8 October 1980 (main statement of objections, Appendix 57) comparing two columns, one setting out the '1980 Nameplate Capacity' and the other the '1980 Quota' for the various producers. It must be pointed out in this regard that the fact that at the two January 1981 meetings DSM 'disputed any undertaking to cut back from their original target' does not disprove the setting of a target for 1980 or the applicant's participation in the setting of that target since there existed a 'original target' to which the applicant adhered completely.

179 Furthermore, it must be observed that, contrary to the applicant's assertions, the origin of the documents used by the Commission to prove its participation in the setting of sales volume targets for the years 1979 and 1980 is known since they

were found at the premises of ICI or ATO (main statement of objections, Appendices 12 and 55 to 61). It is also unnecessary for the author of each document to have been identified or for the method by which each document was drawn up to have been described in order for the Commission to be able to use documents against a specific undertaking, at least where they form part of a huge body of documents which are all connected with meetings which have been proved to have as their purpose in particular the setting of price and sales volume targets.

180 Those findings are not refuted by the fact that the Commission did not make the same findings against Amoco whose name also appears in the aforementioned tables. Amoco's case is different from that of the applicant in so far as Amoco did not participate in the meetings of producers whose purpose was, in particular, to set sales volume targets. The Commission was therefore entitled to consider that the figures set out in the various tables concerning Amoco were only broad estimates of its position made by the other producers in the absence of individualized data disclosed by that undertaking. Moreover, ICI's reply to the request for information confirms that conclusion since it is stated in that reply that: 'However figures for Amoco/Hercules . . . would have been estimated from industry figures generally available from Fides'.

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

182 The existence of negotiations between the producers in order to achieve the establishment of a quota system and the communication of their 'aspirations' during

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

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

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

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

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

184 The fact that the producers each took their previous year's quota as a theoretical entitlement for the rest of the year and monitored whether sales matched that quota by exchanging their sales figures each month is established by the combination of three documents: first, a table dated 21 December 1981 (main statement of objections, Appendix 67) setting out for each producer its sales broken down by month, the last three columns, relating to the months of November and December and the annual total, having been added by hand; secondly, an undated table written in Italian entitled 'Scarti per società' ('Differences company by company') and found at the premises of ICI (main statement of objections, Appendix 65), comparing for each producer for the period January-December 1981 the 'actual' sales figures with the 'theoretic' figures; and finally, an undated table found at the premises of ICI (main statement of objections, Appendix 68) comparing for each producer for the period January-November 1981 sales figures and market shares with those for 1979 and 1980 and making a forward projection to the end of the year.

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

186 The applicant's participation in those various activities may be inferred, first, from its participation in the meetings — in particular those of January 1981 — at which those actions took place and, secondly, from the fact that its name appears in the various abovementioned documents. Moreover, those documents contain figures in

respect of which ICI stated in its reply to a written question from the Court — to which other applicants refer in their own replies — that it would not have been possible to establish them on the basis of the statistics available under the Fides system.

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

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

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

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

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

190 The measures adopted for the second half are proved by the note of the meeting of 6 October 1982 (main statement of objections, Appendix 31), which states: 'In October this would also mean restraining sales to the Jan/June achieved market share of a market estimated at 100 kt' and then 'Performance against target in September was reviewed'. Attached to that note is a table entitled 'September provisional sales versus target (based on Jan-June market share applied to demand est[imated] at 120 Kt)'. The continuation of those measures is confirmed by the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33), to which is attached a table comparing, for November 1982, the 'Actual' sales with the 'Theoretical' figures calculated from the 'J-June % of 125 Kt'.

191 The Court finds that, as regards the year 1981 and the two halves of 1982, the Commission was entitled to conclude from the mutual monitoring, conducted at the regular meetings, of the implementation of a system for restricting monthly sales by reference to a previous period that that system had been adopted by the participants at the meetings.

192 As regards 1983, the Court finds that it is clear from the documents produced by the Commission (main statement of objections, Appendices 33 and 74 to 87) that at the end of 1982 and the beginning of 1983 the polypropylene producers discussed a quota system for 1983, that the applicant participated in the meetings in which those discussions took place, that at the meetings it provided data on its sales, that in Table 2 appended to the note of the meeting of 2 December 1982 the word 'acceptable' appears beside the quota by which the applicant's name appears and, finally, that it is clear from an ICI note headed 'DSM — proposal, 1983' (main statement of objections, Appendix 79) that the applicant made a proposal expressed in tonnages, for sharing the market between the various producers which is set out in the summary table drawn up by ICI (main statement of objections, Appendix 85, p. 2) converted in terms of market shares.

193 It follows that the applicant participated in the negotiations for achieving a quota system for 1983.

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

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

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

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

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

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

197 The applicant's argument based on the increase in its market share, the fluctuations in the market shares of other producers and the exceeding of the alleged quotas is not such as to disprove its participation in the setting of sales volume targets found in the Decision. The complaint made against the producers in the Decision is not that they observed the quotas which had been allocated to them but only that they agreed quotas. Furthermore, the Decision itself (point 59, last paragraph) emphasized DSM's progression in terms of market share and therefore took account of it.

198 Owing to the identical aim of the various measures for restricting sales volumes — namely to reduce the pressure exerted on prices by excess supply — the Commission was entitled to conclude that those measures were part of a quota system.

199 It must also be observed that, in order to support the findings of fact set out above, the Commission has no need to use documents which it had not mentioned in its statements of objections or which it had not disclosed to the applicant.

200 In view of the foregoing considerations, it must be concluded that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom there emerged common purposes relating to sales volume targets for the years 1979, 1980 and the first half of 1983 and to the restriction of their monthly sales by reference to a previous period for the years

1981 and 1982 which are mentioned in the Decision and which were part of a quota system.

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

A. Legal characterization

(a) The contested decision

201 According to the Decision (point 81, first paragraph), the whole complex of schemes and arrangements decided on in the context of a system of regular and institutionalized meetings constituted a single continuing 'agreement' within the meaning of Article 85(1).

202 In the present case, the producers, by subscribing to a common plan to regulate prices and supply on the polypropylene market, participated in an overall framework agreement which was manifested in a series of more detailed sub-agreements worked out from time to time (Decision, point 81, third paragraph).

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

204 The conclusion that there was one continuing agreement was not altered by the fact that some producers inevitably were not present at every meeting. Any

'initiative' took several months to plan and to implement and it would make little difference to the involvement of a producer if it was absent on occasion (Decision, point 83, first paragraph).

205 According to the Decision (point 86, first paragraph), the operation of the cartel, being based on a common and detailed plan, constituted an 'agreement' within the meaning of Article 85(1) of the EEC Treaty.

206 The Decision states (in point 86, second paragraph) that the concepts of 'agreements' and 'concerted practices' are distinct, but cases may arise where collusion presents some of the elements of both forms of prohibited cooperation.

207 A concerted practice relates to a form of cooperation between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation for the risks of competition (Decision, point 86, third paragraph).

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

209 In its judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (*Suiker Unie* v *Commission* [1975] ECR 1663) the Court of Justice held that the criteria of coordination and cooperation laid down by its case law, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the competition provisions of the Treaty according to

which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors but it does strictly preclude any direct or indirect contact between them the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (Decision, point 87, second paragraph). Such conduct may fall under Article 85(1) as a 'concerted practice' even where the parties have not reached agreement in advance on a common plan defining their action in the market but adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour (Decision, point 87, third paragraph, first sentence).

210 The Decision also points out (point 87, third paragraph, third sentence) that, in a complex cartel, some producers at one time or another might not express their definite assent to a particular course of action agreed by the others but nevertheless indicate their general support for the scheme in question and conduct themselves accordingly. In certain respects, therefore, the continuing cooperation and collusion of the producers in the implementation of the overall agreement may display the characteristics of a concerted practice (Decision, point 87, fourth paragraph, second sentence).

211 According to the Decision (point 87, fifth paragraph), the importance of the concept of a concerted practice does not thus result so much from the distinction between it and an 'agreement' as from the distinction between forms of collusion falling under Article 85(1) and mere parallel behaviour with no element of concertation. Nothing therefore turns in the present case upon the precise form taken by the collusive arrangements.

212 In the Decision (paragraph 88, first and sentence paragraphs) it is stated that most of the producers, having argued during the administrative procedure that their conduct in relation to alleged price initiatives did not result from any 'agreement'

within the meaning of Article 85 (see the Decision, point 82), went on to assert that it could not form the basis of a finding of concerted practice either. The latter concept, they argued, required some 'overt act' in the market, which was claimed to be wholly absent from the present case: no price lists or 'target prices' were ever communicated to customers. This argument is rejected in the Decision: were it necessary in the present case to rely on proof of a concerted practice, the requirement for some steps to be taken by the participants to realize their common object was fully met. The various price initiatives were a matter of record. It was also undeniable that the individual producers took parallel action to implement them. The steps taken by the producers both individually and collectively were apparent from the documentary evidence: meeting reports, internal memoranda, instructions and circulars to sales offices and letters to customers. It was wholly irrelevant whether or not they 'published' price lists. The price instructions themselves provided not only the best available evidence of the action taken by each producer to implement the common object but also by their content and timing reinforced the evidence of collusion.

(b) Arguments of the parties

213 The applicant considers that the Commission was not entitled to introduce for the first time in the defence the concept of 'collusion', which does not appear in the EEC Treaty and is borrowed from American law. Furthermore, conceptually and as a matter of evidence, the concept of 'conspiracy' remains subject to the same twofold division as that applied in Community law. For this reason, the Commission may not merge the concepts of 'agreement' and 'concerted practice' in order to avoid defining the characterization to be applied.

214 It points out that the difference between an 'agreement' and a 'concerted practice' is not only a difference of characterization but also that it has practical implications from the point of view of evidence. In the case of an agreement, there is in principle no need to consider the actual consequences of the agreement. On the other hand, in the case of a concerted practice, it is necessary to prove both specific conduct and a link between that conduct and a plan drawn up in advance so that the joint intention appears *in concreto*. In this instance, the fact that the conduct and arrangements alleged by the Commission had no concrete effect on the market is particularly important. In the applicant's view, the Commission has

not stated whether it had in view an agreement or a concerted practice, thus preventing the undertakings from knowing what is specifically alleged against them and therefore from defending themselves.

215 According to the applicant, an agreement presupposes a binding commitment based on a *consensus ad idem* between undertakings to regulate their conduct on the market. In order to prove the existence of an agreement, the following must be proved: the intention of the parties, the existence of an agreement in this regard, the acceptance of some commitment in this regard and the outward manifestation of the agreement in conduct on the market. A concerted practice entails not only coordination but also conduct which manifests itself on the market.

216 In the present case, the question of the characterization and definition of the infringement is important because the Commission has not proved that the applicant participated in either an agreement or a concerted practice if it is assumed that a concerted practice requires actual coordinated conduct on the market. The applicant therefore considers the definition of 'concerted practice' to be particularly important, especially since this is the first time that this specific question has arisen before the Community Court in these terms. In the cases which have come before the Court hitherto, the conduct on the market was not disputed as such and the question was simply whether concerted action could be inferred from it.

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

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

219 It states that, according to the case law of the Court of Justice (judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission*, cited above, paragraphs 173 and 174), it is a matter of precluding any direct or indirect contact between operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt, or contemplate adopting, on the market. A concerted practice therefore exists wherever there is contact between competitors prior to their behaviour on the market.

220 In the Commission's view, there is a concerted practice as soon as there is concerted action having as its purpose the restriction of the autonomy of the undertakings in relation to one another, even if no actual conduct has been found on the market. In its view, the argument revolves around the meaning of the word 'practice'. It opposes the argument put forward by ICI that the word has the narrow meaning of 'conduct on the market'. In its view, the word can cover the mere act of participating in contacts, provided that they have as their purpose the restriction of the undertakings' autonomy.

221 The Commission goes on to argue that if the two requirements — concerted action and conduct on the market — were required for the existence of a concerted practice, as ICI suggests, a whole gamut of practices having as their purpose, but not necessarily as their effect, the distortion of competition on the common market would not be caught by Article 85. Part of the purpose of Article 85 would thus be

frustrated. Furthermore, that view is not in accordance with the case law of the Court of Justice concerning the concept of concerted practice (judgment in Case 48/69 *ICI* v *Commission*, cited above, paragraph 66; judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission*, cited above, paragraph 26; and judgment in Case 172/80 *Züchner* v *Bayerische Vereinsbank AG* [1981] ECR 2021, paragraph 14). Although those judgments each mention practices on the market, they are not mentioned as an element constituting the infringement, as the applicant maintains, but as a factual element from which the concerted action may be deduced. According to that case-law, no actual conduct on the market is required. All that is required is contact between economic operators, characteristic of their abandonment of their necessary autonomy. The American case-law relating to the Sherman Act also follows that line.

222 In the Commission's view, it is not therefore necessary, in order for there to be an infringement of Article 85, for the undertakings to have put into practice that which they have discussed together. The offence under Article 85(1) exists in full once the intention to substitute cooperation for the risks of competition has materialized in cooperation, without there necessarily being, after the event, conduct on the market which may be found. Thus, contrary to the applicant's assertion, it is quite conceivable for a concerted practice to have an anti-competitive purpose without having an anti-competitive effect.

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

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

(c) Assessment by the Court

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

226 It is likewise apparent from the second and third paragraphs of point 86, the third paragraph of point 87 and point 88 of the Decision, read together, that the Commission in the alternative characterized the elements of the infringement as 'concerted practices' where those elements either did not enable the conclusion to be drawn that the parties had reached agreement in advance on a common plan defining their action on the market but had adopted or adhered to collusive devices which facilitated the coordination of their commercial behaviour, or did not, owing to the complexity of the cartel, make it possible to establish that some producers had expressed their definite assent to a particular course of action agreed by the others, although they had indicated their general support for the scheme in question and conducted themselves accordingly. The Decision thus concludes that in certain respects the continuing cooperation and collusion of the producers in the implementation of an overall agreement may display the characteristics of a concerted practice.

227 Since it is clear from the case-law of the Court of Justice that in order for there to be an agreement within the meaning of Article 85(1) of the EEC Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (see the judgment in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, and the judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 86), this Court holds that the Commission was entitled to treat the common intentions existing between the applicant and the other polypropylene producers, which the Commission has proved to the requisite legal standard and which related to floor prices in 1977, price initiatives, measures designed to facilitate the implementation of the price initiatives, sales volume targets for the years 1979 and 1980 and the first half of 1983 and measures for restricting monthly sales by reference to a previous period for 1981 and 1982, as agreements within the meaning of Article 85(1) of the EEC Treaty.

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

229 For a definition of the concept of concerted practice, reference must be made to the case-law of the Court of Justice, which shows that the criteria of coordination and cooperation previously laid down by that Court must be understood in the light of the concept inherent in the competition provisions of the EEC Treaty according to which each economic operator must determine independently the policy which he intends to adopt on the common market. Although this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission*, cited above, paragraphs 173 and 174).

230 In the present case, the applicant participated in meetings concerning the fixing of price and sales volume targets during which information was exchanged between competitors about the prices they wished to see charged on the market, the prices they intended to charge, their profitability thresholds, the sales volume restrictions they judged to be necessary, their sales figures or the identity of their customers. Through its participation in those meetings, it took part, together with its competitors, in concerted action the purpose of which was to influence their conduct on the market and to disclose to each other the course of conduct which each of the producers itself contemplated adopting on the market.

231 Accordingly, not only did the applicant pursue the aim of eliminating in advance uncertainty about the future conduct of its competitors but also, in determining the

policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, its competitors were bound to take into account, directly or indirectly, the information disclosed to them by the applicant about the course of conduct which the applicant itself had decided upon or which it contemplated adopting on the market.

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

233 As regards the question whether the Commission was entitled to find that there was a single infringement, described in Article 1 of the Decision as 'an agreement and concerted practice', the Court points out that, in view of their identical purpose, the various concerted practices followed and agreements concluded formed part of schemes of regular meetings, target-price fixing and quota fixing.

234 Those schemes were part of a series of efforts made by the undertakings in question, in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. It would thus be artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of a number of separate infringements. The fact is that the applicant took part — over a period of years — in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.

235 The Commission was also entitled to characterize that single infringement as 'an agreement and a concerted practice', since the infringement involved at one and

the same time factual elements to be characterized as 'agreements' and factual elements to be characterized as 'concerted practices'. Given such a complex infringement, the dual characterization by the Commission in Article 1 of the Decision must be understood not as requiring, simultaneously and cumulatively, proof that each of those factual elements presents the constituent elements both of an agreement and of a concerted practice, but rather as referring to a complex whole comprising a number of factual elements some of which were characterized as agreements and others as concerted practices for the purposes of Article 85(1) of the EEC Treaty, which lays down no specific category for a complex infringement of this type.

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

B. Restrictive effect on competition

(a) The contested decision

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

(b) Arguments of the parties

238 The applicant contends that in order for there to be an infringement of the EEC Treaty it is necessary for the conduct of the undertakings to affect the operation of competition and thus for there to be an effect on the market. Consequently, the Commission is obliged to analyse the market and the structure of competition, which it has not done in the present case. In order to escape that obligation the Commission contends that even mere intentions or attempts to adopt the conduct complained of are caught by the rules of the EEC Treaty, thereby introducing a form of 'Gesinnungsstrafrecht' (law penalizing a mental attitude), which is foreign to Community law and does not correspond at all to the infringements described in Article 1 of the Decision.

239 The Commission replies that the anti-competitive purpose of the agreements and concerted practices constituting the infringement is in any event established and that it is not therefore necessary to prove that they had an anti-competitive effect. For the rest, it refers to the text of the Decision.

(c) Assessment by the Court

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

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

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

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

C. Effect on trade between Member States

(a) The contested decision

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

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

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

(b) Arguments of the parties

247 The applicant states that in order for there to be an infringement of the EEC Treaty the conduct of the undertakings must have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. The

Commission has not proved by an economic analysis of the market and of the structure of competition that this condition was fulfilled.

248 The Commission replies that it was entitled to conclude that trade between Member States and the structure of competition were affected since the cartel inevitably diverted trade from the channels which would otherwise have developed (judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission*, cited above, paragraph 172).

(c) Assessment by the Court

249 Contrary to the applicant's assertions, the Commission was not required to demonstrate, by an economic analysis of the market and the structure of competition, that the actual conduct of the polypropylene producers had an appreciable effect on trade between Member States. All that is required by Article 85(1) of the EEC Treaty is that anti-competitive agreements and concerted practices should be capable of having an effect on trade between Member States. In this regard, it must be concluded that the restrictions on competition found to exist were likely to distort trade patterns from the course which they would otherwise have followed (see the judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission*, cited above, paragraph 172).

250 It follows that the Commission has established to the requisite legal standard, in points 93 and 94 of its Decision, that the infringement in which the applicant participated was apt to affect trade between Member States.

251 The ground of challenge must therefore be dismissed.

3. *Conclusion*

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

The statement of reasons

253 The applicant contends that it had furnished the Commission with many documents and arguments of such a nature as to cast a different light on the facts established by the Commission and to provide a different explanation of the facts as opposed to the one adopted by the Decision (see the judgment of the Court of Justice in Joined Cases 29 and 30/83 *Compagnie Royale Asturienne des Mines S. A. and Rheinzink GmbH* v *Commission* [1984] ECR 1679, paragraph 16). The Commission could not dispense with a reply to all those matters without rendering the reasoning of the Decision deficient or reversing the burden of proof. On the latter point, the applicant again points out that there is no direct evidence of its participation in the matters alleged by the Commission.

254 According to the applicant, the Decision consists mainly of general considerations and assertions. It contains no precise analysis or refutation of the arguments of the undertakings or any fully coherent argument. This applies in particular to the individual arguments of the applicant, such as those relating to the price initiatives, the measures intended to implement the price initiatives and the parallelism of the price instructions. Such a general presentation was intended to conceal the lack of validity and intrinsic contradiction of the findings of fact, presumptions and arguments of the Commission.

255 The Commission replies that neither Article 190 of the EEC Treaty nor any other principle of procedural law requires it to refer in a collective decision to supplementary facts and arguments concerning a particular applicant on the ground that it has substituted its own views of its conduct on the market for those contained in the statement of objections. The Commission should indicate clearly in the Decision the facts and legal arguments on which the finding of the infringement is based. It should also set out the reasoning which it has followed in

order to reach the operative part of its decision. In the present case, the Commission considers that it has satisfied those obligations. On the other hand, it considers that it is not required to examine in the Decision all the arguments and documents put forward by the applicant (judgment of the Court of Justice in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831).

256 Furthermore, the Commission denies that it reversed the burden of proof and considers that on the contrary it based the Decision on a large body of overwhelming evidence.

257 This Court observes that the Court of Justice has consistently held (see in particular its judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck*, cited above, paragraph 66, and its judgment in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831, paragraph 88) that, although under Article 190 of the EEC Treaty the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and of law raised by every party during the administrative proceedings. It follows that the Commission is not obliged to answer those points of fact and law which it considers irrelevant.

258 It is clear from the assessments of this Court relating to the proof of the infringement as against the applicant that none of the documents and arguments which it has put forward cast any different light on the findings of fact made by the Commission. This applies in particular to the documents and arguments relating to the price initiatives, the measures designed to facilitate the implementation of the price initiatives and the parallel nature of the price instructions.

259 It follows, first, that the reasoning of the Decision is sufficient to support the finding that the applicant committed the infringement and, secondly, that since the

Commission has established to the requisite legal standard the facts on the basis of which it found that that infringement had been committed, it did not reverse the burden of proof to the applicant's detriment. Furthermore, the Court has found no intrinsic contradiction in those findings of fact.

260 Consequently, the ground of challenge must be dismissed.

The fine

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

1. *Duration of the infringement*

262 The applicant repeats that the point at which its participation in the alleged infringement began could not have been before 1 January 1981 and that consequently the Commission was wrong to find that it began on a date between 1977 and 1979. Furthermore, it points out that each of the practices objected to in Article 1 of the Decision must be regarded as a separate infringement and that, consequently, the Commission ought to have established the duration of each specific infringement which it found the applicant to have committed.

263 The Commission considers that it rightly determined that the point at which DSM's participation in the infringement began was on a date between 1977 and 1979. However, it states that it took account of the fact that the infringement did not exist in its most serious forms until the end of 1978 or the beginning of 1979.

264 The Commission adds that the practices of which the undertakings stand accused are not to be considered separate infringements since the whole complex of schemes and arrangements established in the context of the regular institutionalized meetings is to be defined as a single continuous infringement of the rules of competition.

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

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

2. *The gravity of the infringement*

A. The alleged single infringement and the applicant's limited role

267 The applicant disputes the definition of the infringement used by the Commission according to which the infringement was characterized by a whole complex of schemes and arrangements drawn up in the context of a system of regular and institutionalized meetings. The Commission's global approach, not individualizing each of the infringements found against the undertakings, is incompatible with the scheme of the EEC Treaty, the case-law of the Court (judgment in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission* [1983] ECR 3369 and judgment in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* v *Commission*, cited above), the practice followed by the Commission in previous decisions or with the operative part of the contested decision.

268 The applicant explains that, as far as the scheme of the EEC Treaty is concerned, the reason for the enumeration in points (a) to (e) of Article 85(1) of a number of examples of infringements of that article is to show that one infringement is not the same as another.

269 As far as the Commission's practice is concerned, it states that this shows that in an individual case a fine may be imposed for certain infringements and not for others.

270 As regards the operative of the Decision, the applicant states that in points (a) to (e) it lists a number of separate offences which do not overlap. Thus the Commission itself considers that separate infringements are not involved. As regards the determination of the amount of the fines, the applicant contends that if the Commission's view that a single fine must be imposed in respect of a whole complex of facts and circumstances were to be accepted, discussion of this matter would be pointless from the outset. The complex of facts still remains even if it is shown that it is only partially proved or not punishable, which excludes any reduction of the fine.

271 The applicant also emphasizes its limited role, in so far as it took part in the meetings with regularity only at a quite late stage. Its attitude at the meetings was in general rather passive. Its conduct on the market was always characterized by total independence. It does not appear, however, that those exonerating factors were taken into account in the Decision.

272 The Commission replies that it indicated carefully in Article 1 of the Decision the elements making up the infringement which the applicant was found to have committed. However, in justifying the amount of the fine it was not obliged to examine separately the gravity of each of those linked elements, even if, according to the case-law of the Court and previous decisions of the Commission, the nature of the infringement is one of the factors which must be taken into account in the determination of fines.

273 In its view, the applicant is presenting the case as if it concerned a series of individual and independent actions which were unconnected or connected with one another only by chance. The documentary evidence shows that the actions of each

of the undertakings were facets of a greater whole linked to each other by a network of regular meetings. The essential question is whether DSM was a part of the cartel and not the question whether DSM was absent from a meeting from time to time or sometimes departed from what was agreed at a meeting.

274 The Commission also emphasizes the particular gravity of the infringement which the applicant was found to have committed.

275 The Court finds that, as far as the determination of the fines is concerned, the unitary nature of the infringement which the Commission has established to the requisite legal standard does not have the effect of negating the criterion of the role played by the applicant in the infringement. If it had been found that the applicant had not participated in a particular aspect of the single infringement, the gravity of the infringement would have been diminished and the fine would have had to have been reduced on that account.

276 However, the Court must conclude that it is clear from its assessments relating to proof of the infringement that the Commission correctly established the role played by the applicant in the infringement throughout the period of its participation in that infringement. The Commission was thus entitled to take account of that role in determining the amount of the fine to be imposed on the applicant.

277 Consequently, this ground of challenge must be dismissed.

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

278 The applicant argues that the fine imposed upon it, considered on its own and in relation to the fines imposed on the other undertakings, was fixed in a way which

is not susceptible of review. Despite its repeated requests that the Commission should provide it with the key to the determination of the fines, the Commission did not state reasons for the choices which it made. Consequently, it is not possible to determine the weight ascribed to the various factors in the determination of the amount of the fine or to tell whether and to what extent the Commission took account of special circumstances.

279 The applicant argues in particular that in determining the amount of the fine which it imposed upon it the Commission did not take account of arguments which it had put forward with regard to its individual involvement.

280 The Commission replies that ample and sufficient reasons are stated in the Decision for the fines. When imposing the penalties in this case it acted in accordance with its established policy and the fining principles enunciated by the Court of Justice. It points out that since 1979 it has applied a consistent policy of enforcing competition laws by imposing heavier fines, in particular for the categories of infringements well established in Community law and for particularly serious infringements, like those in this case, so as to reinforce the deterrent effect of penalties. That policy has been approved by the Court of Justice (judgment in Joined Cases 100 to 103/80 *Musique Diffusion Français S. A. and Others* v *Commission* ('Pioneer') [1983] ECR 1825, paragraphs 106 and 109), which has also accepted on many occasions that the determination of penalties involves the assessment of a complex array of factors (judgment in the 'Pioneer' case, cited above, paragraph 120, and judgment in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ International Belgium N. V.* v *Commission*, cited above, paragraph 52).

281 The Commission states that it is in a particularly good position to make such an assessment, which it claims cannot be overturned except in the case of material error of fact or law. Moreover, the Court of Justice has confirmed that the Commission may come to a different judgment, according to the cases, of the sanctions which it holds to be necessary, even if the cases in question involve

comparable situations (judgment of the Court of Justice in Joined Cases 32, 36 to 82/78 *BMW Belgium S. A. and Others* v *Commission* [1979] ECR 2435, paragraph 53 and judgment in Case 322/81 *Nederlandsche Banden-Industrie-Michelin N. V.* v *Commission* [1983] ECR 3461, paragraph 111 et seq.).

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

283 The Court considers that the criteria set out in point 108 of the Decision amply justify the general level of the fines imposed on the undertakings to which the Decision is addressed. In this regard, particular emphasis must be placed on the clear nature of the infringement of Article 85(1) of the Treaty and in particular of points (a), (b) and (c) of that provision, whose terms were known to the polypropylene producers, which acted intentionally and in the greatest secrecy.

284 The Court also considers that the four criteria mentioned in point 109 of the Decision are relevant and sufficient for the purpose of achieving a fair balance between the fines imposed on each undertaking.

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

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

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

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

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

289 The applicant contends that the alleged practices had no effect on the market. As indeed is recognized by the Commission (Decision, point 73), during the period in question market prices were determined 'to a large extent by conditions of supply and demand'. The studies carried out by a number of undertakings show that the course of market development would have been the same in the absence of the alleged agreements. According to the case-law of the Court of Justice (judgment in Joined Cases 56 and 58/64 *Consten and Grundig*, cited above, and judgment in Case 172/80 *Bayerische Vereinsbank*, cited above), this point should have been taken into consideration in the assessment of the restrictions on competition. The Commission's argument that it is not required, when determining the amount of the fine, to take account of the effect of the collusive arrangements, is not supported by either the case-law of the Court of Justice (judgment in Case 41/69 *ACF Chemiefarma*, cited above; judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie*, cited above; and judgment in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie*, cited above) or by the Commission's practice relating to the application of Article 85(1) of the EEC Treaty.

290 The Commission replies that, in view of the direct and overwhelming evidence of the producers' conduct, there was no reason to undertake a closer analysis of the market.

291 It further states that in determining the amount of the fines it took account of the fact that the price initiatives generally did not achieve their objective in full (Decision, point 108) although it was not bound to do so, since not only arrangements which have the effect of impeding competition but also those which have such an object must be penalized under Article 85.

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

293 The first type of effect has been proved to the requisite legal standard by the Commission from the many price instructions given by the various producers which are consistent with one another as well as with the target prices fixed at the meetings, which were manifestly meant to serve as the basis for the negotiation of prices with customers.

294 As regards effects of the second type, the Commission had no reason to doubt the accuracy of the analyses carried out by the producers themselves during their meetings (see in particular the notes of the meetings of 21 September, 6 October,

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

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

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

D. The claim that insufficient account was taken of the situation of economic crisis

297 The applicant states that the Commission has not taken account of the situation of manifest crisis affecting the polypropylene industry or of the substantial losses which that crisis caused. It argues, and the Commission accepts this, that the crisis was not a structural crisis, as is shown by the fact that in 1983 the balance between supply and demand on the polypropylene market was gradually restored at a price which allowed capacity to be exploited at a reasonable average rate. The solution to the crisis was not therefore to be sought in a structural reduction in the existing production capacity. However, that was the only solution proposed by the Commission during discussions which it had with the polypropylene industry to resolve the crisis. By not carrying out a more searching analysis of the market and not therefore indicating which options could be considered in later discussions, the

Commission did not leave sufficient possibilities for the undertakings to resolve the problems created by the market situation.

298 Moreover, in certain circumstances, the undertakings were allowed, or even obliged, to adopt temporary measures restricting competition in order to assist the process of adapting the industry concerned to the changing market circumstances. In the present case, the failure of the Community authorities to make a 'diagnosis' and propose a 'remedy' for an industrial sector affected by a crisis left the 'patients' hardly any choice but to consider some form of 'self-help' or 'palliatives'.

299 The applicant states that some forms of contacts and exchanges of information for resolving a crisis situation must not be regarded as prohibited *per se* when they are intended to cope with problems which arise, in particular, where there is a manifest crisis in the sector concerned. The permanent erosion of an economic sector as a result of ruinous competition is in no-one's interests. On this point, the applicant refers to Articles 57 and 58 of the ECSC Treaty and to the Communication on agreements, decisions and concerted practices concerning cooperation between undertakings, published by the Commission on 29 July 1968 (Journal Officiel C 75 of 29 July 1968) which, in its view, is applicable in the present case since the exchange of information did not lead to a restriction of the undertakings' freedom of action or to any coordination, either overt or in the form of concerted practices, of their conduct on the market.

300 The applicant considers that the Commission should have taken account of the crisis situation, at least as a mitigating factor.

301 The Commission replies that it accepted, in mitigation of the fines, that the undertakings concerned incurred substantial losses in the operation of their polypropylene businesses during a very long period, although it considers that it had no obligation to take account of this factor.

302 The undertakings may not, in order to avoid being found guilty of an infringement, rely on the fact that temporary restrictions on competition were approved by the Commission in other sectors or plead that they were forced to resort to 'self-help' because the Commission refused to accept a 'crisis cartel'. The undertakings concerned could have notified 'crisis measures', but because they did not do so they are now to be censured for secret, continuous collusion.

303 The Commission further observes that the rules in force regarding the exchange of information must not be applied to cases other than those which they were meant to cover. This applies in particular to the Commission's Communication of 1968 on which the applicant relies. That communication concerns only small and medium-sized undertakings and, moreover, does not apply to instances of collusion which, as in the present case, largely exceeds the limits of the exchange of information that is authorized.

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

305 Moreover, the fact that in previous cases the Commission had considered that, in view of the factual circumstances, account had to be taken of the crisis affecting the economic sector in question cannot oblige the Commission to take similar account of such a situation in the present case since it has been proved to the requisite legal standard that the undertakings to which the Decision is addressed committed a particularly serious infringement of Article 85(1) of the EEC Treaty.

306 The reference made by the applicant to the previous decisions of the Commission is also irrelevant since they concerned the exemption of a so-called 'crisis' cartel under Article 85(3) of the EEC Treaty. In the present case, however, no application for an exemption under Article 85(3) of the Treaty had been made.

307 The Court also considers that, in the absence of intervention from the Commission, the undertakings cannot rely on provisions of Community law which require for their application intervention by the Commission and which, moreover, concern a specific economic sector, as is the case for Articles 57 and 58 of the ECSC Treaty.

308 As regards the Commission's Communication relating to agreements, decisions and concerted practices concerning cooperation between undertakings, it must be noted that this communication states in point II that 'agreements whose sole aim is to pool information which the individual undertakings need in order to determine their future conduct on the market in an autonomous and independent manner, or to consult individually a joint advisory body, do not have the object or effect of restricting competition. However, if the undertakings' freedom of action is limited or their conduct on the market is coordinated either expressly or through concerted practices, this may amount to a restraint of competition'.[1] However, it is clear from the Court's assessments relating to proof of the infringement that the elements of the infringement include agreements on prices and quotas prohibited by Article 85(1) of the EEC Treaty so that that Communication cannot apply to them.

1 — Unofficial translation.

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

E. Breach of the principles of fairness, proportionality and equal treatment

310 The applicant claims that the Decision constitutes a breach of the principles of fairness, proportionality and equal treatment in its regard since comparable or similar undertakings were fined considerably different amounts. After analysing the criteria which the Commission took into account in point 109 of the Decision in order to determine the fines and their relative weight, the applicant concludes that the fines of two undertakings (Linz and Saga) were much lighter than those imposed on other undertakings which, upon the application of those criteria, were in the same situation. That difference is not explained in the Decision.

311 The Commission states in reply that Linz and Saga are both established outside the Community, that most of their deliveries took place outside the Community and that although the cartel extended to the whole of western Europe it took into account when determining the fine the deliveries of polypropylene of the various producers in the Community, that is to say of the effects of the cartel on the territory of the common market (Decision, Table 2).

312 The Court finds that the ground of challenge raised by the applicant criticizes the relationship between the amount of the fine imposed upon it and the amount of the fines imposed on Linz and Saga.

313 In this regard, it is sufficient to state that the applicant has not been able to refute the Commission's reply to its argument that the difference between the amounts referred to results from the application of the criteria mentioned in the first paragraph of point 109 of the Decision and, in particular, from the third of those criteria, which relates to the respective deliveries of polypropylene in the Community of each of the undertakings to which the Decision is addressed. The

applicant has not contested the accuracy of the figures concerning those deliveries supplied by the Commission during the proceedings before the Court. In response to those figures, the applicant has not furnished any concrete information proving that the principles of equity, proportionality and equal treatment were contravened by the imposition of lower fines on Linz and Saga.

314 Consequently, this ground of challenge must be dismissed.

F. The absence of any previous infringement

315 The applicant states that, unlike other undertakings involved in this case, it has never been involved in proceedings brought by the Commission for the enforcement of competition law. The Commission should have taken account of this factor as a mitigating factor.

316 The Commission replies that the arguments put forward by DSM regarding the absence of any previous infringements do not give rise to any right to a reduction of the fine.

317 The Court holds that the fact that the Commission has in the past already found an undertaking guilty of infringing the competition rules and penalized it for that infringement may be treated as an aggravating factor as against that undertaking but that the absence of any previous infringement is a normal circumstance which the Commission does not have to take into account as a mitigating factor, especially since the present case involves a particularly clear infringement of Article 85(1) of the EEC Treaty.

318 This ground of challenge must therefore be rejected.

319 It follows from all the foregoing that the fine imposed on the applicant is proportionate to the duration and gravity of the breach of the Community competition rules found to have been committed by the applicant.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 17 December 1991.

H. Jung
Registrar

J. L. Cruz Vilaça
President