JUDGMENT OF THE COURT (Sixth Chamber)

8 July 1999 *

In Case C-51/92 P,

Hercules Chemicals NV, whose registered office is at Beringen, Belgium, represented by M. Siragusa, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Messrs Elvinger & Hoss, 15 Côte d'Eich,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 17 December 1991 in Case T-7/89 *Hercules* v *Commission* [1991] ECR II-1711, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by K. Banks, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

* Language of the case: English.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch, G.F. Mancini (Rapporteur), J.L. Murray and H. Ragnemalm, Judges,

Advocate General: G. Cosmas,

Registrars: H. von Holstein, Deputy Registrar, and D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 March 1997, at which Hercules Chemicals NV was represented by M. Siragusa and F.M. Moretti, of the Rome Bar, and the Commission by J. Currall, Legal Adviser, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 July 1997,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 21 February 1992, Hercules Chemicals NV ('Hercules') brought an appeal under Article 49 of

the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 17 December 1991 in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711 ('the contested judgment').

Facts and procedure before the Court of First Instance

2 The facts giving rise to this appeal, as set out in the contested judgment, are as follows.

3 Several undertakings active in the European petrochemical industry brought an action before the Court of First Instance for the annulment of Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1, 'the Polypropylene Decision').

4 According to the Commission's findings, which were confirmed on this point by the Court of First Instance, before 1977 the market for polypropylene was supplied by 10 producers, four of which (Montedison SpA ('Monte'), Hoechst AG, Imperial Chemical Industries plc ('ICI') and Shell International Chemical Company Ltd ('Shell'), 'the big four') together accounted for 64% of the market. Following the expiry of the controlling patents held by Monte, new producers appeared on the market in 1977, bringing about a substantial increase in real production capacity which was not, however, matched by a corresponding increase in demand. This led to rates of utilisation of production capacity of between 60% in 1977 and 90% in 1983. Each of the EEC producers operating at that time supplied the product in most, if not all, Member States.

5 Hercules was one of the new producers which appeared on the market in 1977. Its position on the West European market was that of a medium-sized producer

with a market share of between 5 and 6.8 %. Hercules was, however, the largest North American producer.

6 Following simultaneous investigations at the premises of several undertakings in the sector, the Commission addressed requests for information to a number of polypropylene producers under Article 11 of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). It appears from paragraph 6 of the contested judgment that the evidence obtained led the Commission to form the view that between 1977 and 1983 the producers concerned had, in contravention of Article 85 of the EC Treaty (now Article 81 EC), regularly set target prices by way of a series of price initiatives and developed a system of annual volume control to share out the available market between them according to agreed percentage or tonnage targets. This led the Commission to commence the procedure provided for by Article 3(1) of Regulation No 17 and to send a written statement of objections to several undertakings, including Hercules.

7 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that Hercules had infringed Article 85(1) of the Treaty by participating, with other undertakings, and in the case of Hercules from about November 1977 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:

— 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;

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

— 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;

— introduced simultaneous price increases implementing the said targets;

— 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 1 of the Polypropylene Decision).

8 The Commission then ordered the various undertakings concerned to bring that infringement to an end forthwith and to refrain thenceforth from any agreement or concerted practice which might have the same or similar object or effect. The Commission also ordered them to terminate any exchange of information of the kind normally covered by business secrecy and to ensure that any scheme for the exchange of general information (such as Fides) was so conducted as to exclude any information from which the behaviour of specific producers could be identified (Article 2 of the Polypropylene Decision).

9 Hercules was fined ECU 2 750 000, or BEF 120 569 620 (Article 3 of the Polypropylene Decision).

10 On 31 July 1986, Hercules lodged an action for annulment of that decision before the Court of Justice which, by order of 15 November 1989, referred the case to the Court of First Instance, pursuant to Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1).

11 Before the Court of First Instance, Hercules sought the annulment, in whole or in part, of Articles 1 and 3 of the Polypropylene Decision in so far as they pertained to Hercules, or, in the alternative, modification of Article 3 of that decision as it pertained to Hercules so as to annul or substantially reduce the fine imposed on it and, in any event, an order that the Commission pay the costs.

12 The Commission contended that the application should be dismissed and the applicant ordered to pay the costs.

13 By order of the Court of Justice of 30 September 1992 the application to intervene submitted by DSM NV was dismissed as inadmissible and accordingly the latter was ordered to bear its own costs.

The contested judgment

Rights of the defence — Refusal to grant access to the replies of other producers to the statement of objections

14 In paragraph 51 of the contested judgment, the Court of First Instance observed that regard for the rights of the defence requires that an applicant must have been

put in a position to express, as it sees fit, its views on all the objections raised against it by the Commission in the statement of objections addressed to it and on the evidence which is to be used to support those objections and is mentioned by the Commission in the statement of objections or annexed to it (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 7).

15 In paragraph 52 the Court of First Instance nevertheless indicated that regard for the rights of the defence does not require that an undertaking involved in a procedure pursuant to Article 85(1) of the Treaty must be able to comment on all the documents forming part of the Commission's file since there are no provisions requiring the Commission to divulge the contents of its files to the parties concerned (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25).

16 The Court of First Instance observed, however, in paragraph 53, that in establishing a procedure for providing access to the file in competition cases the Commission had imposed on itself rules exceeding the requirements laid down by the Court of Justice and set out in the *Twelfth Report on Competition Policy*, from which the Commission was not permitted to depart (Case 81/72 *Commission* v *Council* [1973] ECR 575, paragraph 9, and Case 148/73 *Louwage* v *Commission* [1974] ECR 81).

17 The Court of First Instance concluded, at paragraph 54, that the Commission had an obligation to make available to the undertakings involved in Article 85(1) of the Treaty proceedings all documents, whether in their favour or otherwise, which it had obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information were involved.

18 With regard to the Commission's refusal to grant Hercules access to the replies of the other producers to the statements of objections, the Court of First Instance considered, in paragraph 56, that it was not necessary to examine whether that refusal constituted a breach of the rights of the defence. According to the Court of

First Instance, such an examination would be necessary only if, in the absence of that refusal, the administrative proceedings could have led to a different result (Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26, and T-7/90 *Kobor* v *Commission* [1990] ECR II-721, paragraph 30). The Court of First Instance held that that was not the case, since following joinder of the cases for the purposes of the oral procedure before the Court of First Instance, the applicant had had access to the replies of the other undertakings to the statements of objections and it had not drawn from those replies any exonerating evidence on which it could have relied during the oral procedure. The Court of First Instance concluded that those replies contained no exonerating evidence and therefore the fact that the applicant was unable to have access to them during the administrative procedure could not have affected the result reached by the Commission in the Polypropylene Decision. The Court of First Instance therefore dismissed that ground of challenge in paragraph 57.

Proof of the infringement — Findings of fact

The contacts between producers and the European Association for Textile Polyolefins meeting of 22 November 1977

19 With regard to the contacts between producers and the meeting of the European Association for Textile Polyolefins ('the EATP') of 22 November 1977, the Court of First Instance found, at paragraph 71, that Hercules had admitted, both in its reply to the request for information and in its application, that it occasionally received information from other producers by telephone concerning discussions or meetings which had taken place between them, even though it denied having taken the initiative in making such contacts. Furthermore, the Court of First Instance noted that Hercules had not limited in time the existence of those contacts.

20 The Court of First Instance next considered, at paragraphs 72 and 73, that the statements made by Hercules at the EATP meeting of 22 November 1977 constituted the expression of a common purpose with other producers regarding

a target price of DM 1.30/kg for 1 December 1977, the existence of which was borne out by the statements made by Hercules at the EATP meeting on 26 May 1978.

21 In conclusion the Court of First Instance found, at paragraph 75, that the Commission had established to the requisite legal standard, first, that the applicant was informed of the outcome of the discussions about prices and that it was in contact with other producers, in particular during 1977 and 1978, on an ad hoc basis and, secondly, that the statements made by the applicant, as they appeared in the minutes of the EATP meeting of 22 November 1977, constituted the expression of a common purpose between the applicant and other producers regarding the fixing of a target price of DM 1.30/kg.

The system of regular meetings

22 With regard to the system of regular meetings of polypropylene producers, the Court of First Instance noted first of all, in paragraph 93 of the contested judgment, that the particular objections addressed to Hercules indicated that, in the person of an employee, it had attended a number of 'Bosses" and 'Experts" meetings from 1979, and in paragraph 94 it pointed out that Hercules' participation was not as irregular as it contended since it was possible that before May 1982 Hercules had taken part in 15 meetings out of 29.

23 The Court of First Instance then considered, at paragraphs 95 and 96, that the relative irregularity with which Hercules participated in those meetings was not the only factor which had to be taken into account for the purpose of examining its participation in the system of regular meetings of polypropylene producers; account had also to be taken of the contacts which it could have had with other producers and at which it would have been able to supplement the large amount of information which had been obtained during the meetings regarding the commercial policies which its competitors were going to adopt. The Court of First Instance concluded that that irregularity did not belie its participation in the

system of regular meetings before May 1982. The Court of First Instance also found, in paragraph 97, that Hercules was a regular participant in the meetings from May 1982 until the end of August 1983.

24 The Court of First Instance further stated, at paragraph 98, that the Commission was fully entitled to take the view, based on ICI's reply to the request for information, which was borne out by numerous notes of meetings, that the purpose of the meetings was, in particular, to fix target prices and sales volumes. According to paragraph 100 of the contested judgment, the Commission was also fully entitled to deduce from ICI's reply with regard to the regularity of the 'Bosses" and 'Experts" meetings, as well as from the identical nature and purpose of the meetings, that they were part of a system of regular meetings.

25 At paragraph 101 the Court of First Instance added that the allegedly passive participation of Hercules' employee in the meetings was belied by various pieces of evidence. According to paragraph 102, it was not credible that his superiors were unaware of his participation; on the contrary, they themselves had contacts with other participants in the meetings. According to paragraph 103, the nature of the participation of that employee in the meetings was no different from that of the other participants. As regards the level of the duties performed by the employee in question within Hercules, the Court of First Instance held, in paragraph 104, that he either had the authority to make the Hercules' pricing policy directly reflect the results of the meetings which he attended, which demonstrated that he had the necessary authority to bind the company, or, if that was not the case, that he had been instructed to do so.

26 The Court of First Instance concluded, in paragraph 105, that the Commission had established to the requisite legal standard, first, that the applicant had participated in the system of regular meetings of polypropylene producers from the beginning of 1979 until at least the month of August 1983, which it was entitled to infer from Hercules' participation in the meetings and the contacts which Hercules had had in relation to those meetings; secondly, that the purpose of those meetings was, in particular, to fix price and sales volume targets; and, thirdly, that the applicant's participation in those meetings had the significance attributed to it in the Polypropylene Decision.

The price initiatives

27 At paragraph 144 the Court of First Instance found that the records of the regular meetings of polypropylene producers showed that the producers which participated in those meetings had agreed to the price initiatives mentioned in the Polypropylene Decision. According to paragraph 145, since it had been established to the requisite legal standard that Hercules had participated in those meetings, it could not 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.

28 In that connection the Court of First Instance held, at paragraph 146, that Hercules did not specifically deny participating in any particular price initiative but contended that it never undertook to observe the target prices. However, the Court of First Instance considered, in paragraph 147, that that argument could not be accepted: first, according to paragraph 148, the status of the Hercules' employee who participated at the meetings enabled him to subscribe to the said price initiatives. Secondly, according to paragraphs 149 to 159, Hercules could not derive any favourable argument from its pricing policy, either internal or external, in order to establish that it did not subscribe to the price initiatives decided on, organised and monitored at the meetings in which it participated.

29 At paragraph 160, the Court of First Instance added that the Commission was fully entitled to deduce from ICI's reply to the request for information that the initiatives were part of a system of fixing target prices.

30 The Court of First Instance concluded, in paragraph 161, that the Commission had established to the requisite legal standard that Hercules was one of the polypropylene producers amongst whom there emerged common intentions concerning the price initiatives mentioned in the Polypropylene Decision and that those initiatives were part of a system.

The measures designed to facilitate the implementation of the price initiatives

31 At paragraph 176 the Court of First Instance considered that the Polypropylene Decision was to be interpreted as asserting that at various times each of the producers adopted together with the other producers a set of measures 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. At paragraph 177, the Court of First Instance held that, in participating in the meetings during which that set of measures was adopted, Hercules had subscribed to it, since it had not adduced any evidence to prove the contrary.

32 With regard to the question of 'account leadership', the Court of First Instance found, at paragraph 178, on the basis of the notes of the three meetings attended by Hercules, that during those meetings the producers present at them had agreed to that system. According to paragraph 180 of the contested judgment, the fact that Hercules had not been designated 'account leader' for its biggest customers was irrelevant.

33 Moreover, it is clear, first, from paragraph 181 that the allegation that Hercules restricted its output and diverted production to overseas markets was corroborated by the notes of the meeting of 13 May 1982 and, secondly, from paragraph 182 that Hercules did not dispute that it took part in local meetings that were intended to ensure the implementation, at local level, of a particular price initiative. The Court of First Instance added, at paragraph 183, that it was plain from the Polypropylene Decision that the Commission had not based it on a finding that Hercules had exchanged information relating to its sales.

34 At paragraph 184 the Court of First Instance concluded that the Commission had established to the requisite legal standard that Hercules 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 Polypropylene Decision.

Target tonnages and quotas

35 The Court of First Instance stated first, at paragraph 206, that it had already been found that from the beginning of 1979 Hercules had participated in the system of regular meetings of polypropylene producers at which discussions relating to the sales volumes of the various producers were held and information exchanged on that subject. Since the Polypropylene Decision indicated that Hercules had not disclosed figures relating to its sales volumes but that, owing to its participation in the meetings, Hercules possessed detailed information on the monthly sales of the other producers, the Court of First Instance considered, in paragraphs 207 and 208, that examination of Hercules' involvement in the system for fixing volume targets should begin with an analysis of the operation of the whole of that system.

36 In that connection the Court of First Instance pointed out, at paragraph 209, that the terms used in the various documents relating to the years 1979 and 1980 produced by the Commission justified the conclusion that the producers had arrived at a common purpose.

37 As regards the year 1979 in particular, the Court of First Instance, in paragraphs 210 and 211, relied on the note of the meeting of 26 and 27 September 1979, on the table headed 'Producers' Sales to West Europe' taken from the premises of ICI, and on the statements made by the Hercules employee at his interview with Commission officials.

38 In paragraph 212, the Court of First Instance found, in respect of the year 1980, that it was clear from the table dated 26 February 1980 found at the premises of Atochem SA and from a table dated 8 October 1980 comparing nameplate

capacity and the quota for the various producers that sales volume targets were set for the whole of the year.

39 In paragraphs 213 to 217, the Court of First Instance pointed out that, for 1981, the complaint against the producers was that they took part in negotiations in order to reach a quota agreement, that they communicated their 'aspirations', that they 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. According to the Court of First Instance, the existence of those negotiations and the communication of their 'aspirations' were attested by various pieces of evidence such as tables and an ICI internal note; the adoption of temporary measures during February and March 1981 was apparent from the note of the meetings of January 1981; 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 was established by the combination of a table dated 21 December 1981, an undated table entitled 'Scarti per società' found at the premises of ICI and an undated table, also found on ICI's premises.

40 In paragraphs 218 to 221 the Court of First Instance pointed out that, for 1982, the complaint against the producers was that they took part in negotiations in order to reach an agreement on quotas, that 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. According to the Court of First Instance, the existence of those negotiations and the communication of their 'aspirations' were evidenced, first, by a document entitled 'Scheme for discussions "quota system 1982"', by an ICI note entitled 'Polypropylene 1982, Guidelines', by a table dated 17 February 1982 and by a table written in Italian which was a complex proposal; the measures adopted for the first half of the year were established by the note of the meeting on 13 May 1982; the implementation of those measures was evidenced by the notes of the meetings of 9 June, 20 and 21 July and 20 August 1982; the measures adopted for the second

half were proved by the note of the meeting of 6 October 1982 and the continuation of the measures was confirmed by the note of the meeting of 2 December 1982.

41 The Court of First Instance also found, in paragraph 222, that, with regard to 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.

42 In respect of 1983, the Court of First Instance found, in paragraphs 223 to 226, that it was clear from the documents produced by the Commission that at the end of 1982 and the beginning of 1983 the polypropylene producers had discussed a quota system for 1983. According to the Court of First Instance, the Commission was entitled to conclude from the combination of the note of the meeting on 1 June 1983, which Hercules did not attend, and the note of an internal meeting of the Shell group on 17 March 1983, which were confirmed by two other documents mentioning the figure of 11% as Shell's market share, that those negotiations had led to the introduction of such a system.

43 The Court of First Instance added, in paragraph 227, that 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.

44 As far as the question of the participation of Hercules in that system is concerned, the Court of First Instance stated, in paragraph 228, that Hercules denied any participation on the basis of indications in certain passages of the Polypropylene Decision and other documents. In paragraph 229 the Court of First Instance

found that whilst the Commission had not disputed those facts it did not consider them sufficient to weaken the evidence that Hercules did participate in the quota system.

45 In respect of the period prior to March 1982, the Court of First Instance found, in paragraph 230, first that in participating in the system of regular meetings of polypropylene producers from 1979 Hercules had taken part in the negotiations which led to the fixing of sales volume targets and, secondly, that without any objection on its part it was allocated a quota calculated on the basis of figures available through the Fides scheme. With regard to the period subsequent to March 1982, the Court of First Instance found, at paragraph 231, that Hercules had taken an active part in the discussions concerning quotas, even though its name did not appear in the document headed 'Scheme for discussions "quota system 1982"'. Indeed the Court of First Instance pointed out that Monte's plan for a general market-sharing scheme for 1982 had been found on Hercules' premises; the latter had amended the plan at a meeting in March 1982, in order to eliminate errors relating to its nameplate production capacity; at the meetings on 13 May and 21 September 1982 it had provided information relating to its future production; at the meeting on 2 December 1982 it had given the impression that it might agree to a joint quota for itself, BP Chemicals Ltd ('BP') and Amoco Chemicals Ltd ('Amoco'); lastly, on the day after that meeting it had contacted ICI in order to relay the reactions of BP and Amoco to the proposed quota and to confirm its agreement.

46 The Court of First Instance concluded, in paragraph 232, that the Commission had established to the requisite legal standard that Hercules had participated in a quota system in so far as, even though it might not have expressly subscribed to the quota which had been allocated to it by the other producers for the years 1979 and 1980 or to a restriction of its monthly sales in relation to a previous period for the years 1981 and 1982, it had obtained information on the sales volume restrictions which its competitors considered necessary, on their past sales and on the sales volume targets which they were allocating to one another and, by its presence at the meetings and its lack of objection to the quota which had been allocated to it, it had given its competitors the impression that it would take account of all that information and of that quota in determining the policy which it intended to follow on the market and had thus supported the common purposes which emerged between the participants at the meetings. The Court of First Instance further considered that the Commission had established to the requisite

legal standard that the applicant had taken an active part in the negotiations concerning quotas from March 1982 and was one of the polypropylene producers amongst whom there emerged a common purpose concerning the fixing of sales volume targets for the first part of 1983.

The fine

47 The Court of First Instance first pointed out, in paragraph 314 of the contested judgment, that the Commission had properly assessed the duration of the period during which Hercules had infringed Article 85(1) of the Treaty. Subsequently, with regard to the gravity of the infringement, the Court of First Instance held, in paragraph 323, that the Commission had correctly established the role played by Hercules in the infringement and that it had indicated in point 109 of the Polypropylene Decision that it had taken account of that role when determining the amount of the fine. The Court of First Instance also found that the facts established showed, by their intrinsic gravity, that Hercules did not act rashly or even through lack of care but intentionally.

48 In paragraph 332 the Court of First Instance then found that the Commission had first defined the criteria for setting the general level of the fines imposed on the undertakings to which the Polypropylene Decision was 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).

49 In paragraph 360 the Court of First Instance concluded that the fine imposed on Hercules was appropriate having regard to the duration and gravity of the breach of the Community competition rules which it had been found to have committed.

50 In those circumstances the Court of First Instance dismissed the application and ordered Hercules to pay the costs.

The appeal

51 In its appeal Hercules requests the Court of Justice to:

— adopt the necessary measures in order to establish whether, in adopting the Polypropylene Decision, the Commission complied with the relevant rules of procedure;

— declare the Polypropylene Decision null and void, should it be established that the Commission failed to comply with its Rules of Procedure;

— in the alternative, quash the contested judgment and declare Articles 1 and 3 of the Polypropylene Decision partially or entirely null and void insofar as they pertain to Hercules;

— in the alternative, quash the contested judgment and modify Article 3 of the Decision as it pertains to Hercules in order to annul or reduce the fine imposed on Hercules by that decision;

— order the Commission to pay the costs.

52 The Commission contends that the Court should:

— dismiss the appeal as partially inadmissible, and for the rest, unfounded;

— order Hercules to pay the costs.

53 In support of its appeal, Hercules relies on six grounds alleging breach of procedure and infringement of Community law relating, first, to procedural defects in the adoption of the Polypropylene Decision by the Commission; secondly, to the omission by the latter to communicate the replies of the other producers to the statements of objections; thirdly, to the omission by the Court of First Instance to deliver all the polypropylene judgments at the same time; fourthly, to the contradiction between the findings of fact made by the Court of First Instance and its conclusion as to the participation by Hercules in a concerted practice involving the establishment of a sales target or quota system in 1981 and 1982; fifthly, the non-application by the Court of First Instance of a rule of law developed by the Court of Justice in its judgment in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283; and, sixthly, to the refusal to reduce the fine.

54 At the Commission's request and in the absence of any objection on the part of Hercules, by decision of the President of the Court of Justice of 28 July 1992 proceedings were stayed until 15 September 1994 to enable the appropriate conclusions to be drawn from the judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, which was delivered on the appeal against the judgment of the Court of First Instance in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315 ('the *PVC* judgment of the Court of First Instance').

Procedural defects in the adoption of the Polypropylene Decision by the Commission

55 By its first plea Hercules claims that during the oral procedure before the Court of First Instance in the *PVC* cases it became apparent that the Commission had failed to fulfil its obligation to comply with the provisions of its own Rules of Procedure. According to Hercules, such a procedural defect renders a decision null and void. Accordingly, Hercules requests the Court to take the necessary

steps in order to establish whether the Commission, in adopting the Polypropylene Decision, complied with its Rules of Procedure. If it were established that the Commission had failed to fulfil its obligation in that regard, Hercules requests the Court to set aside the contested judgment and to declare the Polypropylene Decision void.

56 The Commission considers that plea to be inadmissible. Pursuant to the combined provisions of Articles 118 and 42(2) of the Rules of Procedure of the Court of Justice, no new plea in law may be introduced before the Court of Justice on appeal which could have been raised before the Court of First Instance. In particular, the question of the formal validity of the Polypropylene Decision could have been broached at first instance without waiting for the statements made in the *PVC* hearings.

57 Under the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal to the Court of Justice lies on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance.

58 According to settled case-law, to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would mean allowing that party to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is thus confined to examining the assessment by the Court of First Instance of the pleas argued before it (see, in particular, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59, and Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 62).

59 In this case it is common ground that Hercules did not put forward any plea in law before the Court of First Instance relating to the lawfulness of the procedure by which the Polypropylene Decision was adopted.

60 It follows that the first plea in law must be dismissed as inadmissible. For the same reasons, the request that the Court of Justice adopt the necessary measures in order to establish whether, in adopting the decision, the Commission complied with the relevant Rules of Procedure is also inadmissible.

The refusal to grant access to the replies of the other producers to the statements of objections

61 By its second plea, Hercules claims that the Court of First Instance infringed Hercules' rights of defence and thus infringed Community law in considering that it was not necessary to examine whether the Commission's refusal to allow Hercules to apprise itself of the replies of the other producers to the statement of objections constituted an infringement of the rights of the defence.

62 Access to the documents in question should have been given at the stage of the administrative proceedings, in particular in the light of the Commission's allegation that all the undertakings in question had jointly participated in conduct contrary to Article 85(1) of the Treaty. The infringement of the rights of the defence thus committed could no longer be remedied after the conclusion of the administrative proceedings, and even less once proceedings before the Community judicature had been commenced.

63 Hercules also observes that the refusal to grant an undertaking authorisation to apprise itself of the replies given to the statement of objections by the undertakings with which it was alleged to have taken part in a single infringement automatically prevents that undertaking from taking account of those replies for the purposes of its defence. Yet a party's right to defend itself during the course of administrative proceedings is held to be a principle of Community law (*Michelin* v *Commission*, cited above, and Joined Cases C-48/90 and C-66/90 *Netherlands* v *Commission* [1992] ECR 1-565).

64 In those circumstances, the case-law cited by the Court of First Instance in support of its conclusion is not applicable. In its judgment in *Distillers Company* v *Commission*, cited above, the Court of Justice found that the procedural defect relied upon could not have altered the Commission's decision given that the only respect in which that defect was of relevance was in regard to the Commission's refusal to grant an exemption under Article 85(3) of the Treaty. Since the undertaking concerned had not made a formal notification with a request for an individual exemption, the Commission could not have granted it any such exemption, even in the absence of any procedural defect. In *Kobor* v *Commission*, cited above, the procedural defect had, according to Hercules, no relationship to the claimant's ability to pursue her claim against the Commission and thus could not affect the manner in which she pursued her claim.

65 The solution adopted by the Court of First Instance would allow the Commission to infringe the rights of the defence without any adverse consequences if the party whose rights had been infringed were unable to demonstrate that the result would have been different had its rights been observed. That would be tantamount to conferring rights of defence only on the innocent.

66 Hercules emphasises that, in cases involving an alleged infringement of Article 85(1) of the Treaty committed jointly by various parties, the statements issued and information furnished by each party to the Commission in response to its requests for information and to its statement of objections may play a decisive role. The rights of the defence protected by the Community legal order require that such documents be made available to the other parties involved during the course of the administrative proceedings. In *Netherlands* v *Commission*, cited above, the Court held that the rights of the defence require that a Member State against which proceedings are brought under Article 90(3) of the Treaty (now Article 86(3) EC) must be permitted to comment on the observations of interested third parties. By analogy, where Article 85(1) of the Treaty is applied to several parties in respect of the same infringement, each of them must be allowed to apprise itself of the observations of the other parties. The need to guarantee access to the Commission's file becomes even more relevant in cases in which parties are confronted with credible evidence and each party therefore bears the burden of proving that there is an innocent explanation of the facts.

67 In conclusion, Hercules requests the Court of Justice to rule that in refusing access to the responses of other producers to its statement of objections, the Commission has infringed Hercules' right of defence and that such an infringement cannot be cured at a later stage of the proceedings, regardless of whether or not the documentation withheld actually contains exonerating evidence that it could have invoked. In that connection Hercules requests the Court of Justice to set aside the judgment and declare the Polypropylene Decision null and void.

68 The Commission states that in both *Distillers Company* v *Commission* and *Kobor* v *Commission*, cited above, the Community judicature applied the principle that the Court of First Instance applied in this case, that where an alleged procedural defect could not in any event have affected the content of a decision, it cannot be relied upon in order to annul that decision. That rule makes good sense since it would be a manifestly disproportionate and wrong result if a decision correct as to its content were to be struck down owing to a flaw in the procedure leading to its adoption which, however, had no effect on the content of the decision.

69 The Court of First Instance did not rule on the point whether Hercules had the right to have access to the documents in question. The Commission nevertheless makes it clear that it does not concede that Hercules had a right of access to the replies of the other producers to the statement of objections. The Commission denies that a right may be derived from a desire to glean ideas as to how to defend oneself from the arguments put forward by the other producers involved. In that respect, it makes clear that there is no analogy between the case of Hercules and the case of *Netherlands* v *Commission*, cited above. In that case, the refusal to grant access to the observations of the undertakings prevented the Kingdom of the Netherlands from being informed of the full case which it had to answer and of material considered to be important in relation to the final decision. However, no such special circumstances arise in the present case.

70 Referring to its *Twelfth Report on Competition Policy*, the Commission stresses that access to the file must concern only documents obtained by the Commission during the course of the investigation pursuant to Articles 11 and 14 of Regulation No 17. In that report, the Commission in no way undertook to grant access to any replies received subsequent to the statement of objections, but was

clearly referring to the documents obtained prior to the stage of the statement of objections. Noting that confidential treatment is often requested, the Commission maintains that an undertaking has a right of access to the reply of another undertaking to a statement of objections only where that reply is to be relied upon against it. It concludes that, consequently, it did not infringe the rights of Hercules.

71 As to the request that the Polypropylene Decision be declared null and void, the Commission notes that, under Article 113 of the Rules of Procedure of the Court of Justice, an appeal may only seek the same form of order as that sought at first instance. According to the Commission, Hercules made no such request at first instance, so that the present request must be understood as an application for a simple declaration of nullity.

72 It is sufficient to point out here, as regards the admissibility of the claim for a declaration that the Polypropylene Decision is null and void, that, pursuant to Article 174 of the EC Treaty (now Article 231 EC), if an action for annulment is well founded, the Court of Justice is to declare the act concerned to be void. Under Article 113 of the Rules of Procedure of the Court of Justice, an appeal may seek the same form of order, in whole or in part, as that sought at first instance. It follows that the forms of order sought by Hercules are an inherent part of any action for annulment and may be validly formulated in an appeal against a judgment of the Court of First Instance dismissing an action for annulment.

73 As regards the merits of that ground of appeal, it must be noted first of all that, at paragraph 56 of the contested judgment, the Court of First Instance did not rule on the lawfulness of the Commission's refusal to grant Hercules access to the replies of the other producers to the statements of objections. On the basis of the principles set out in *Distillers Company* v *Commission* and *Kobor* v *Commission*, it considered that such an examination would be necessary only if, in the absence of that refusal, the administrative proceedings could have led to a different result and it considered that that was not the case.

74 Accordingly, it must be ascertained whether, in reaching the conclusion that a possible breach of the requirement to grant access to the replies of the other producers to the statements of objections would not have led to annulment of the Polypropylene Decision, the Court of First Instance committed an error of law. If that were the case, it would also be necessary to rule on the lawfulness of the Commission's refusal to grant Hercules access to those documents.

75 In that regard, it must be observed that access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their views effectively on the conclusions reached by the Commission in its statement of objections (*Michelin* v *Commission*, cited above, paragraph 7; Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraphs 9 and 11; Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 21; and Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 89).

76 Thus the general principles of Community law governing the right of access to the Commission's file are designed to ensure effective exercise of the rights of the defence, including the right to be heard provided for in Article 19(1) of Regulation No 17 and Articles 3 and 7 to 9 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47).

77 In the case of a decision concerning infringement of the competition rules applicable to undertakings and imposing fines or penalty payments, breach of those general principles of Community law in the procedure prior to the adoption of the decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed.

78 In such a case, the infringement committed is not remedied by the mere fact that access was made possible at a later stage, in particular during the judicial proceedings relating to an action in which annulment of the contested decision is sought.

79 Although belated disclosure of documents in the file allows the undertaking that has brought an action against a Commission decision to derive from them pleas and arguments in support of the forms of order it is seeking, it does not put the undertaking back into the situation it would have been in if it had been able to rely on those documents in presenting its written and oral observations to the Commission. It is not therefore an adequate remedy for the infringement of the rights of the defence that occurred before the decision was adopted.

80 In this case, however, it is clear from paragraph 56 of the contested judgment that, following joinder of the cases concerning the annulment of the Polypropylene Decision for the purposes of the oral procedure, Hercules had access to the replies of the other producers to the statement of objections and did not draw from those replies any exonerating evidence on which it could have relied during the oral procedure. It thereby failed to establish that those replies contained evidence of use for its defence and, consequently, that the fact that it was not able to apprise itself of their contents before the Polypropylene Decision was adopted had infringed its rights of defence; on the contrary, it admitted, implicitly but unequivocally, that that was not the case.

81 That conclusion is not open to the objection that that is tantamount to conferring rights of defence only on the innocent, as Hercules claims. The undertaking concerned does not have to show that, if it had had access to the replies provided by the other producers to the statement of objections, the Commission decision would have been different in content, but only that it would have been able to use those documents for its defence.

82 It follows from the foregoing that the Court of First Instance did not commit an error of law in holding that a possible breach of the requirement to ensure access

to the replies of the other producers to the statements of objections would not have led to annulment of the Polypropylene Decision.

83 Accordingly, it is not necessary to examine the question whether the Commission's refusal to grant Hercules access to the replies of the other producers to the statement of objections was lawful and the second plea must be dismissed.

Failure on the part of the Court of First Instance to deliver all the polypropylene judgments at the same time

84 By its third plea Hercules criticises the Court of First Instance for not delivering all the judgments in the actions for annulment of the Polypropylene Decision at the same time, although it had joined the cases for the purposes of the oral procedure. That manner of proceeding infringed its rights of defence since the question of its liability was appraised by the Court of First Instance on the basis of findings of fact which would be the subject of review in future judgments. That infringement is particularly grave since the judgments subsequently delivered concerned the actions brought by the 'big four', who were alleged to have initiated and led the infringement.

85 In answer to that plea it is sufficient to observe, first, that no provision requires the Community judicature to deliver on the same date its judgments on applications for annulment of the same measure. On the contrary, Article 43 of the Rules of Procedure of the Court and Article 50 of the Rules of Procedure of the Court of First Instance make it clear that joinder of cases concerning the same subject-matter is merely a discretionary power and that, having once been joined, cases may subsequently be disjoined.

86 Second, Hercules has in any event failed to indicate in what respect delivery on different dates of the judgments relating to the Polypropylene Decision was

prejudicial to its rights of defence or how the findings of fact in the contested judgment would have been called into question in subsequent judgments.

87 Accordingly, the third plea must also be dismissed.

Contradiction between the findings of fact made by the Court of First Instance and the conclusion concerning Hercules's participation in a concerted practice

88 By its fourth plea Hercules contends that the Court of First Instance erred in law in concluding that Hercules had participated in a concerted practice involving the fixing of sales volume targets or quotas for the years 1981 and 1982. Referring to paragraphs 222 and 207 of the contested judgment, Hercules states that the findings of fact made by the Court of First Instance contradict that conclusion, since Hercules cannot be deemed to have participated in any system based on mutual monitoring without at the same time disclosing its own information for that purpose.

89 The erroneous nature of that conclusion reached by the Court of First Instance is also clear from the evidence of all parties to the effect that Hercules was perfectly aware that the other producers could not calculate Hercules' production or sales figures using the Fides scheme data. Hercules adds that its unwillingness to disclose the information required in order to participate in a target sales or quota system demonstrates that it did not have the objective of influencing its competitors' conduct on the market and that, if it ever were involved in the quota system, Hercules had withdrawn from it for the years 1981 and 1982.

90 The Commission points out that the question whether a particular undertaking took part in a particular aspect of the infringement is a question of fact which

cannot give rise to an appeal. As far as Hercules is concerned, the Court of First Instance held at paragraphs 230 and 231 of the contested judgment that that undertaking had participated in the process of setting targets and quotas. Since the Court of First Instance considered that a certain quota had been allocated to Hercules with its consent, it was possible for Hercules to be included in the mutual monitoring process mentioned at paragraph 222 of the contested judgment.

91 Besides, the Court of First Instance was entitled to consider that Hercules was allocated a quota on the basis of the Fides scheme since the actual production figures available for most of the producers enabled the quota of other producers such as Hercules to be calculated without those producers having to communicate their sales figures.

92 In that connection it must be borne in mind that, pursuant to Article 168A of the EC Treaty (now Article 225 EC) and the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The appraisal by the Court of First Instance of the evidence put before it does not constitute (save where the clear sense of that evidence has been distorted) a point of law which is subject, as such, to review by the Court of Justice (Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraphs 10 and 42).

93 In disputing the fact that it could have been allocated a quota calculated on the basis of the Fides scheme, Hercules is asking the Court of Justice to review findings of fact made by the Court of First Instance and the latter's assessment of the evidence put before it, which are matters which cannot form the subject-matter of an appeal.

94 Moreover, the fact, referred to in paragraph 207 of the contested judgment, that Hercules had not disclosed figures relating to its sales volumes does not contradict the finding, in paragraph 222, of the implementation of a system of restricting monthly sales evidenced by the mutual monitoring conducted at the regular meetings.

95 The Court of First Instance was entitled to conclude that, under a system of quotas involving almost all polypropylene producers and in the light of the data provided by the other producers as well as the Fides scheme statistics, Hercules' quota could have been determined without the undertaking concerned disclosing data concerning its own production. Similarly, the Court of First Instance was entitled to consider that the failure on the part of Hercules to disclose such data, as well as not preventing the latter from participating in the mutual monitoring, did not deprive the other producers in turn of the opportunity of monitoring its activities.

96 The fourth plea cannot therefore be accepted.

Failure on the part of the Court of First Instance to apply the principle set out by the Court of Justice in *Orkem* v *Commission*

97 By its fifth plea, Hercules maintains that the Court of First Instance failed to apply the rule of law developed in *Orkem* v *Commission,* cited above. The Polypropylene Decision as regards Hercules is based on findings of fact which are themselves based on evidence obtained by the Commission in breach of the rights of the defence. The Commission sent a series of questions to Hercules to which Hercules could respond only in a fashion which would indirectly acknowledge that an infringement had been committed.

98 None the less, the Court of First Instance based its findings on evidence wrongfully obtained in particular with regard to contacts between producers, the EATP meeting of 22 November 1977 (paragraph 71 of the contested judgment) and the system of regular meetings (paragraphs 94, 95 and 97 of the contested judgment). In addition, the Court of First Instance and the Commission based their findings with regard to Hercules' participation on evidence which was also wrongfully obtained from other producers pursuant to similarly illegal requests for information.

99 Therefore, Hercules requests the Court of Justice to order the Commission to produce copies of the letters addressed to all the undertakings involved in the 'Polypropylene' investigation requesting information as well as the replies, in order to enable the Court to appraise the validity of the conclusions that both the Commission and the Court of First Instance derived from such wrongfully obtained evidence. Hercules also requests the Court to quash the contested judgment in so far as its conclusions are based on evidence wrongfully obtained and to order the Court of First Instance to review its findings of fact in the light of the principle established in *Orkem* v *Commission.*

100 The Commission observes that this issue was not raised before the Court of First Instance and that it is therefore a fresh plea inadmissible on appeal. The EC Statute of the Court of Justice and its Rules of Procedure in fact preclude new pleas from being raised on appeal unless the judgment of the Court of First Instance or the procedure before it give rise to the new plea and that is not so in this case. The logic of the division of tasks as between the Court of First Instance and the Court of Justice would be thwarted if an applicant were to be allowed to hold certain arguments in reserve until the stage of the appeal.

101 As the Commission has rightly pointed out, this plea was not raised before the Court of First Instance. Accordingly, for the reasons set out in paragraphs 57 and 58 of this judgment, it must be held inadmissible.

102 The fifth plea must therefore be dismissed.

The refusal to reduce the fine

103 By its sixth plea Hercules contends that the Court of First Instance erred in law by failing to annul or reduce the fine and, in particular, by failing to draw the appropriate distinctions among producers as regards the gravity of the

infringement. In the case of infringements to which several undertakings are parties, the relative importance of the infringements committed by each must be taken into account when the amount of the fine is set.

104 Hercules alleges that the Court of First Instance did not take into account its refusal to provide any significant information in connection with the discussions relating to the establishment of a system of sales volume targets. The Court of First Instance should have appraised the blameworthiness of each party's conduct on its own facts and not merely on the basis of the fact that an undertaking did not hold itself aloof from the unlawful activities of other producers.

105 According to Hercules, its conduct was less deserving of fines than other undertakings which attended meetings with greater frequency and over a longer period, actively participated in local meetings, furnished information about their own sales figures to their competitors and indicated their agreement with targets and sales quotas. Although Hercules' involvement in these activities was clearly distinguished by the Court of First Instance from that of the other undertakings concerned, that Court failed to reduce the fine imposed on it.

106 Hercules submits that, having concluded that Hercules had ceased to participate in any illegal sales volume targets or quota schemes in 1983, the Court of First Instance ought to have reduced the fine. The fine should also be annulled or reduced by reason of the fact that the Commission failed to respect the rights of the defence and erroneously applied Article 85(1) of the Treaty to Hercules' alleged participation in a system of sales volume targets and quotas from 1981 onwards, in particular by reason of the fact that, in the view of the Court of First Instance, such participation contributed substantially to the gravity of the infringement.

107 According to the Commission, the Court of First Instance found that the Commission had correctly assessed the role played by Hercules in the infringement and had taken due account of this role when setting the fine. Paragraph 256 of the judgment of the Court of First Instance, as rectified by its

order of 9 March 1992 (T-7/89 *Hercules Chemicals* v *Commission*, not published in the ECR), makes it clear that, like the Commission, the Court of First Instance considered that Hercules' participation in the setting of sales volume targets or quotas continued until 1983. There was therefore no reason for the Court of First Instance to reduce the fine.

108 Lastly, the Commission contends that the pleas alleging infringements of the rights of defence and asserting non-participation by Hercules in the system of sales volume targets and quotas from 1981 onwards are unfounded and could not therefore give rise to any reduction of the fine. In any event, there is no connection between an alleged breach of the rights of the defence and the level of the fine.

109 First, it must be remembered that, according to settled case-law, it is not for the Court of Justice, when deciding questions of law in the context of an appeal, to substitute, on grounds of fairness, its own appraisal for that of the Court of First Instance adjudicating, in the exercise of its unlimited jurisdiction, on the amount of a fine imposed on an undertaking by reason of its infringement of Community law (see in particular Case C-320/92 P *Finsider* v *Commission* [1994] ECR I-5697, paragraph 46).

110 Secondly, under the case-law it is indeed the case that, where an infringement has been committed by several undertakings, the relative gravity of the participation of each undertaking must be examined (see, to that effect, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 623). However, in paragraph 323 of the contested judgment, the Court of First Instance found that the Commission had correctly established the role played by Hercules in the infringement and that the Commission had indicated in the Polypropylene Decision that it had taken account of that role when determining the amount of the fine. The Court of First Instance cannot therefore be held to have committed an error of law in that respect.

111 Thirdly, it is clear from paragraph 232 of the contested judgment that Hercules was one of the polypropylene producers amongst whom there emerged a

common purpose concerning the fixing of sales volumes targets for the first part of 1983. That finding is confirmed by paragraph 256 of the contested judgment, as rectified by the order in *Hercules Chemicals* v *Commission*, cited above. At paragraph 257, the Court of First Instance considered that the Commission was fully entitled to take the view that the infringement continued until at least November 1983. Moreover, in paragraph 314, the Court of First Instance, in giving its view on the determination of the amount of the fine, expressly stated that the Commission had properly assessed the duration of the period during which Hercules had infringed Article 85(1) of the Treaty. In those circumstances, the Court of First Instance did not have to reduce the amount of the fine to take account of an allegedly shorter duration of the infringement.

112 Fourthly, there is no need to examine whether a possible infringement of the rights of the defence would have justified reducing the fine since the Court of Justice finds that Hercules has been unable to establish such an infringement.

113 Fifthly and lastly, Hercules' allegation that the Court of First Instance misapplied Article 85(1) of the Treaty as regards its participation in a system of sales volume targets and quotas from 1981 onwards is too general and imprecise to be assessed by the Court. A mere abstract statement of a plea in the application does not satisfy the requirements of the first paragraph of Article 19 of the EC Statute of the Court of Justice and Article 38(1)(c) of its Rules of Procedure (see, *inter alia*, to that effect Case C-330/88 *Grifoni* v *EAEC* [1991] ECR I-1045, paragraph 18).

114 Accordingly, the sixth plea must also be dismissed.

115 Since none of the grounds of appeal put forward by Hercules has been upheld, the appeal must be dismissed in its entirety.

Costs

116 According to Article 69(2) of the Rules of Procedure, applicable to the appeal procedure by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since Hercules' pleas have failed, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. Dismisses the appeal;

2. **Orders Hercules Chemicals NV to pay the costs.**

Kapteyn Hirsch Mancini

Murray Ragnemalm

Delivered in open court in Luxembourg on 8 July 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber