JUDGMENT OF THE COURT (Sixth Chamber)
8 July 1999 *

In Case C-49/92 P,

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

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 17 December 1991 in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, seeking to have that judgment set aside,

the other party to the proceedings being:

Anic Partecipazioni SpA, formerly Anic SpA, then Enichem Anic SpA, whose registered office is at Palermo, Italy, represented by M. Siragusa and G. Guarino, of the Rome Bar, and G. Scassellati Sforzolini and F.M. Moretti, of the Bologna

* Language of the case: Italian.

Bar, with an address for service in Luxembourg at the Chambers of Messrs Arendt & Medernach, 8-10 Rue Mathias Hardt,

applicant at first instance,

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,

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 19 February 1992, the Commission of the European Communities 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-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623 ('the contested judgment'), by which the Court of First Instance partially annulled Article 1 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'), and set the amount of the fine imposed on the respondent in Article 3 of that Decision at ECU 450 000, that is to say ITL 662 215 500.

2 In its response, lodged on 28 May 1992, Anic Partecipazioni SpA, formerly Anic SpA, then Enichem Anic SpA ('Anic'), having contended that the appeal should be dismissed, requested the Court of Justice, pursuant to Article 116 of the Rules of Procedure of the Court of Justice, to set aside the contested judgment in whole or in part, to annul the Polypropylene Decision in whole or in part or to declare it non-existent, and subsequently to reduce the fine imposed on Anic by that Decision, which had already been reduced by the contested judgment, or to refer the case back to the Court of First Instance for that purpose.

Facts and procedure before the Court of First Instance

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

4 Several undertakings active in the European petrochemical industry brought an action before the Court of First Instance for the annulment of the Polypropylene Decision.

5 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.

6 Anic was one of the producers supplying the market in 1977. Its position on the polypropylene market was that of a medium-sized producer whose market share was between 2.7 and 4.2%. It left the market in spring 1983, having transferred its polypropylene business to Monte at the end of October 1982. In that connection Anic stated before the Court of First Instance that the facilities of another Italian producer, SIR, were first transferred to SIL, a company whose entire capital was held by Anic; then, in June 1982, the shares in SIL were transferred by proxy ('girate per procura') to Enoxy Chimica; lastly, on 31 December 1982, the shares were transferred to that company, so that the whole of the polypropylene sector in Italy is held by Monte.

7 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, of whom Anic was not one. According to paragraph 8 of the contested judgment, 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 SA and to that end sent a statement of objections, similar to the statement of objections addressed to the other undertakings, to those two undertakings.

8 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that Anic had infringed Article 85(1) of the Treaty by participating, with other undertakings, and in Anic's case from about November 1977 until a date in late 1982 or early 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).

9 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).

10 Anic was fined ECU 750 000, or ITL 1 103 692 500 (Article 3 of the Polypropylene Decision).

11 On 31 July 1986, Anic lodged an action for annulment of that decision before the Court of Justice. By order of 15 November 1989, it 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).

12 Before the Court of First Instance, Anic sought annulment, in its entirety or in part, of the Polypropylene Decision in so far as it concerned it, in the alternative

reduction of the fine imposed on it, and in any event an order that the Commission pay all its costs and expenses.

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

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

The contested judgment

Proof of the infringement — Findings of fact

The system of regular meetings

15 With regard to the system of regular meetings of polypropylene producers, the Court of First Instance first found, at paragraph 69 of the contested judgment, that for the period from 1977 to the end of 1978 or the beginning of 1979, the only evidence put forward by the Commission to prove Anic's participation in the meetings was Anic's reply to the request for information, in which it stated that it thought that the start of its participation was close to the beginning of the meetings in question. The Court of First Instance considered, at paragraph 70, that that reply could not be regarded as a clear admission of participation in the meetings from November 1977 onwards. At paragraphs 71 and 72 it pointed out that the Commission itself had expressed doubts on that point in the particular

objections addressed to Anic, in the general statement of objections and in the Polypropylene Decision. It concluded, at paragraph 73, that the Commission had not proved, to the requisite legal standard, Anic's participation in the infringement before the end of 1978 or the beginning of 1979.

16 For the period from the end of 1978 or the beginning of 1979 to the end of 1982 or the beginning of 1983, the Court of First Instance observed, at paragraph 87 of the contested judgment, that, on the basis of Anic's and ICI's replies to the request for information, the Commission had established to the requisite legal standard that Anic had participated regularly in the periodic meetings of polypropylene producers from the end of 1978 or the beginning of 1979 onwards. As regards the beginning of that participation, it follows from paragraphs 88 and 89, that ICI's reply to the request for information, confirmed on that point by Anic's written pleadings before the Court of First Instance, includes Anic among the regular participants in the 'bosses" and 'experts" meetings from that time onwards. As regards the end of that participation, the Court of First Instance noted, in paragraph 90, that the Commission had acknowledged in the Polypropylene Decision that there was still some doubt and, in its written pleadings before the Court of First Instance, that Anic's presence at the meetings had ceased to be regular from May 1982. At the hearing it had accepted that from September 1982 Anic had no longer participated in the meetings. According to paragraphs 91 and 94, it also appeared from the note of the meeting of 13 May 1982 that it was stated during that meeting that Anic was no longer coming. The meeting of 13 May 1982 was an exception, according to the note of the meeting of 9 June 1982, whilst an indication given by Anic in its reply to the request for information concerning its participation in the meeting of 6 October 1982 is incorrect.

17 The Court of First Instance stated, moreover, at paragraph 96, that the Commission was 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 98 of the contested judgment, the Commission was also entitled to conclude from ICI's reply as to the regularity of the 'bosses" and 'experts" meetings and from the identical nature and purpose of the meetings that they were part of a system of regular meetings. At paragraph 99, the Court of

First Instance added that the allegedly passive nature of Anic's participation in the meetings was belied in particular by the fact that it had provided information on its monthly sales tonnages.

18 The Court of First Instance concluded, in paragraph 100, that the Commission had established to the requisite legal standard that Anic had regularly participated in the system of regular meetings of polypropylene producers from the end of 1978 or the beginning of 1979 until mid-1982, that the purpose of those meetings was, in particular, to fix price and sales volume targets, that they were part of a system and that Anic's participation in those meetings was not purely passive. However, in the view of the Court of First Instance, the Commission had not established to the requisite legal standard that that participation had continued beyond mid-1982.

The price initiatives

19 At paragraph 109, 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 110, since it had been established to the requisite legal standard that Anic had participated regularly in those meetings, it could not assert that it had not supported the price initiatives which were decided on, planned and monitored at those meetings, without providing any evidence to corroborate that assertion.

20 In that connection, the Court of First observed, at paragraph 111, that Anic had stated, first, that its participation in the meetings was purely passive and, secondly, that it had taken no account of the results of the meetings in determining its conduct on the market as regards price. It considered, at paragraph 112, that neither of those arguments could corroborate Anic's assertion that it had not subscribed to the agreed price initiatives: in the light of the findings of the Court of First Instance concerning Anic's participation in the meetings, the first argument was not founded in fact. As regards the second argument, even if it were supported by the facts, it would at most show that Anic

had not put into effect the results of those meetings. Moreover, according to paragraph 113, although the Commission had not been able to obtain price instructions issued by Anic and thus had had no proof of its implementation of the price initiatives in question or of parallel conduct, that did not impugn in any way the finding that Anic had participated in those initiatives.

21 At paragraph 114, the Court of First Instance added that the Commission was fully entitled to deduce from ICI's reply to the request for information that those initiatives were part of a system of fixing target prices.

22 The Court of First Instance concluded, at paragraph 115, that the Commission had established to the requisite legal standard that Anic was one of the producers amongst whom there had emerged common intentions concerning the price initiatives mentioned in points 29 to 39 of the Polypropylene Decision and that those initiatives were part of a system. However, since it had not proved to the requisite legal standard that Anic had participated in the regular meetings in the second half of 1982, the Commission had not established to the requisite legal standard that Anic had participated in the price initiative mentioned in points 40 to 46 of that Decision.

The measures designed to facilitate the implementation of the price initiatives

23 At paragraph 121, the Court of First Instance considered that the Polypropylene Decision was to be interpreted as asserting that at various times each of the producers had adopted at those meetings 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 122, the Court of First Instance pointed out that the Commission had not been able to establish to the requisite legal standard that Anic had

participated in the meetings during which that set of measures was adopted or that Anic had subscribed thereto.

24 According to paragraph 123, it followed, first, that Anic's participation in the 'account management' system had not been proved to the requisite legal standard. Even though the Commission stated in its defence that it had never sought to hold Anic responsible in that respect, the Court of First Instance observed that such a limitation of the objections raised against Anic was not apparent from the Polypropylene Decision or from the statements of objections. Secondly, according to paragraph 124, Anic's participation in the output restrictions had not been proved to the requisite legal standard either.

25 At paragraph 127, the Court of First Instance concluded that the Commission had not established to the requisite legal standard that Anic was one of the polypropylene producers amongst whom there had emerged common intentions concerning the measures designed to facilitate the implementation of the price initiatives, in so far as the Decision had accused it of having taken part.

Target tonnages and quotas

26 The Court of First Instance first pointed out, at paragraph 147, that from the end of 1978 or the beginning of 1979 until mid-1982 Anic had participated regularly 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 was exchanged on that subject.

27 At paragraph 148, the Court of First Instance pointed out that, in addition to Anic's participation in the meetings, its name appeared in various tables found on the premises of polypropylene producers, whose content clearly indicated that they were intended to be used in setting sales volume targets. The Commission

was therefore entitled to take the view that the content of those tables, which must have been drawn up on the basis of information obtained from the producers, not on the basis of Fides statistics, had been provided, as far as Anic was concerned, by Anic in the meetings in which it participated.

28 At paragraph 149, the Court of First Instance found 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.

29 As regards the year 1979 in particular, the Court of First Instance stated, at paragraph 150, that the note of the meeting of 26 and 27 September 1979 and the table taken from the premises of ICI headed 'Producers' Sales to West Europe' indicated that the quota system originally planned for 1979 had had to be made tighter for the last three months of the year.

30 At paragraph 151, the Court of First Instance found that it was clear from the table dated 26 February 1980 found at the premises of Atochem and from the note of the January 1981 meetings, which were further supported by a table dated 8 October 1980, comparing nameplate capacity and the 1980 quota for the various producers, that sales volume targets were set for the whole of the year.

31 At paragraphs 152 to 157, the Court of First Instance noted that, as regards the year 1981, the complaint against the producers was that they had taken part in negotiations in order to reach a quota agreement, that they had communicated their 'aspirations', that they had 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 had taken the previous year's quota as a theoretical entitlement for the rest of the year, that they had reported their sales each month to the meetings, and, finally, had monitored whether the sales matched the theoretical quota allocated to them. According to the Court of First Instance, the existence of those negotiations and the communication of '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 there; according to the Court of First Instance, the participation of Anic in those various activities was apparent from its participation in the meetings at which those activities took place, and from the fact that its name appeared in the various documents mentioned above.

32 At paragraphs 158 to 160, the Court of First Instance stated 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 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 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.

33 The Court of First Instance also found, at paragraph 161, that, as regards the year 1981 and the first half 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.

34 The Court of First Instance added, at paragraph 162, 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.

35 The Court of First Instance considered, at paragraphs 163 to 166, that the arguments put forward by Anic did not weaken the findings of fact made by the Commission. First of all, the notes of meetings contradicted the argument that the documents produced by the Commission came from third parties and were not the result of discussions between the producers. Secondly, even if had been established that Anic was using its production capacity to the maximum, all that that might establish was that Anic had not done what it had agreed to do. Thirdly, the fact that Anic and SIR were mentioned jointly in several documents did not affect the evidentiary value of those documents, which all dated from after November 1980, the time when ENI, to which Anic belonged, had been authorised to take over the management of SIR, so that those companies were no longer competitors.

36 However, the Court of First Instance found, at paragraphs 167 and 168, that the Commission had not established to the requisite legal standard that Anic had taken part in the measures restricting sales volumes in the second half of 1982, since Anic had ceased to participate in meetings as from mid-1982 and the restriction of monthly sales could not be dissociated from the *a posteriori* monitoring by the producers during their meetings of the correspondence between the figures actually achieved and those which should in theory have been achieved. The Court of First Instance considered that that finding was confirmed by the fact that the notes of the meetings of 6 October and 2 December 1982 in which the implementation of the restriction of monthly sales was monitored indicated that Anic did not participate in that monitoring.

37 Lastly, the Court of First Instance noted, at paragraphs 169 and 170, that Anic was accused of having taken part during the last quarter of 1982 in negotiations

with a view to fixing quotas for 1983 and thus of having continued to be involved in the arrangements covering at least the first quarter of 1983, although it had ceased to take part in the meetings in mid-1982 or at the end of that year. It is clear from paragraphs 171 to 174 that Anic could not claim, in that connection, that such participation was highly unlikely, since at that time it had left the polypropylene market, because the Commission was entitled to conclude from Anic's reply to the request for information that it had remained on the polypropylene market until April 1983. It followed, according to the Court of First Instance, that it was not unlikely that in late 1982 Anic had informed the other producers of its aspirations with a view to fixing quotas for the first quarter of 1983, so that it had therefore to be determined whether the Commission had proved that fact to the requisite legal standard.

38 On that point, the Court of First Instance pointed out, in paragraphs 175 to 177, that for its part the Commission was able to rely on a handwritten note made by an ICI employee and dated 28 October 1982, which set out Anic's sales volume 'aspirations' and its proposals regarding the quotas to be allocated to other producers, which, according to the Court of First Instance, had to be considered to be an act of participation in the negotiations with a view to fixing quotas for the first quarter of 1983.

39 The Court of First Instance concluded, at paragraph 178, that the Commission had established to the requisite legal standard, first, that Anic was one of the polypropylene producers amongst whom common purposes emerged in relation to sales volume targets for 1979 and 1980 and to the restriction of their monthly sales by reference to a previous period for 1981 and the first half of 1982 which were mentioned in the Polypropylene Decision and which formed part of a quota system, and, secondly, that at the end of October 1982 Anic had informed ICI of its sales volume aspirations for the first quarter of 1983. However, in the view of the Court of First Instance, the Commission had not established to the requisite legal standard that Anic was one of the polypropylene producers amongst whom there had emerged a common purpose concerning the restriction of their monthly sales by reference to a previous period for the second half of 1982.

The application of Article 85(1) of the Treaty

Legal characterisation

40 The Court of First Instance observed, at paragraphs 196 and 197 of the contested judgment, that the Commission had characterised each factual element as either, principally, an agreement or, in the alternative, a concerted practice for the purposes of Article 85(1) of the Treaty. At paragraph 198, referring to Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661 and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, it held that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it was sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way. The Commission was accordingly entitled to treat the common intentions existing between Anic and the other polypropylene producers, which related to price initiatives, sales volume targets for 1979 and 1980 and measures for restricting monthly sales by reference to a previous period for 1981 and the first half of 1982, as agreements.

41 For a definition of the concept of concerted practice, the Court of First Instance referred, at paragraph 199, to 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. In the case before it, it found, at paragraph 200, that Anic had participated in meetings concerning the fixing of price and sales volume targets, and including the exchange of information between competitors on the subject, and that it had thus taken part in concerted action the purpose of which was to influence the conduct of the producers on the market and to disclose to each other the course of conduct which each itself contemplated adopting on the market. The Court of First Instance added, at paragraph 201, that Anic had not only pursued 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, according to the Court of First Instance, 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 Anic about the course of conduct which it had

decided upon or which it contemplated adopting on the market. The Court of First Instance concluded, in paragraph 202, that the Commission was justified, in the alternative, having regard to their purpose, in categorising the regular meetings in which Anic had participated between the end of 1978 or the beginning of 1979 and mid-1982 and its communication to ICI at the end of October 1982 of its sales volume aspirations for the first quarter of 1983 as concerted practices within the meaning of Article 85(1) of the Treaty.

42 As regards the question whether there was a single infringement, described in Article 1 of the Polypropylene Decision as 'an agreement and concerted practice', having pointed out, in paragraph 203, that, in view of their identical purpose, the various concerted practices and agreements formed part of schemes of regular meetings, target-price fixing and quota fixing, the Court of First Instance stated, in paragraph 204, that 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. According to the Court of First Instance, it would thus have been artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements. The fact was that Anic had taken 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.

43 The Court of First Instance therefore held, at paragraph 205, that the Commission was entitled to characterise that single infringement as 'an agreement and a concerted practice', since the infringement involved at one and the same time factual elements to be characterised as 'agreements' and factual elements to be characterised as 'concerted practices'. According to the Court of First Instance, given such a complex infringement, the dual characterisation by the Commission in Article 1 of the Polypropylene Decision was to be understood not as requiring, simultaneously and cumulatively, proof that each of those factual elements presented 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 characterised as agreements and others as concerted practices for the purposes of Article 85(1) of the Treaty, which lays down no specific category for a complex infringement of that type. Furthermore, according to paragraph 206, in Anic's case, the Commission had proved to the requisite legal standard each of the aspects of

the infringement for the duration of its participation in the system of regular meetings and it did not therefore attribute to Anic liability for the conduct of other producers.

Restrictive effect on competition

44 With regard to Anic's line of argument seeking to demonstrate that its participation in the regular meetings of polypropylene producers had had no anti-competitive object or effect, the Court of First Instance pointed out, in paragraph 215, that the purpose of those meetings had been to restrict competition within the common market, in particular by fixing price and sales volume targets, and that consequently its participation in those meetings did have an anti-competitive object within the meaning of Article 85(1) of the Treaty. Moreover, it considered, at paragraph 216, that the relevant question was not whether Anic's individual participation was capable of restricting competition but whether the infringement in which it had participated with others could have had that effect. The Court of First Instance pointed out that the undertakings concerned accounted for nearly the whole of that market, which clearly indicated that the infringement which they had committed together could have restricted competition.

Effect on trade between Member States

45 The Court of First Instance pointed out, in paragraph 223, that in the light of Article 85(1) of the Treaty the Commission was not required to demonstrate that Anic's participation in an agreement and a concerted practice had had an appreciable effect on trade between Member States, but only that the agreements and concerted practices were capable of having an effect on trade between Member States. In that connection, referring to *Van Landewyck and Others* v *Commission*, the Court of First Instance held that the restrictions on competition found to exist were likely to divert trade patterns from the course which they would otherwise have followed. Furthermore, according to paragraph 224, Anic could not rely on its small market position since the infringement which it had

committed together with others was capable of affecting trade between Member States. The Court of First Instance concluded, in paragraph 225, that the Commission had established to the requisite legal standard that the infringement in which Anic had participated was apt to affect trade between Member States, and it was not necessary for the Commission to demonstrate that Anic's individual participation had affected trade between Member States.

46 At paragraph 227, the Court of First Instance concluded from all the foregoing considerations, first, that since the findings of fact made by the Commission in relation to Anic for the period prior to the end of 1978 or the beginning of 1979 and the period after the end of October 1982 had not been proved to the requisite legal standard, Article 1 of the Polypropylene Decision had to be annulled in so far as it found that Anic had participated in the infringement during those periods. Secondly, since the findings of fact made by the Commission in relation to Anic for the period after mid-1982 concerning its participation in the regular meetings of polypropylene producers, in the price initiatives and in the restriction of monthly sales by reference to a previous period had not been proved to the requisite legal standard, the Court of First Instance held that Article 1 of the Decision had to be annulled in so far as it found Anic to have participated in them. Thirdly, since the findings of fact made by the Commission in relation to Anic as regards the implementation of the price initiatives had not been proved to the requisite legal standard, the Court of First Instance held that Article 1 of the Decision had to be annulled in so far as it found that Anic had participated in those measures. For the rest, the Court of First Instance held that Anic's grounds of challenge relating to the findings of fact and to the application of Article 85(1) of the Treaty by the Commission in the contested decision had to be dismissed.

The question whether or not Anic was answerable for the infringement

47 Ruling on Anic's argument that it should not have been held answerable for the infringement, since the Commission should have attributed it in part to other Italian producers, Monte and SIR, with whom Anic had cooperated following restructuring, the Court of First Instance pointed out, first, in paragraphs 235 and 236, that Article 85(1) of the Treaty was aimed at economic units made up of a

combination of personal and physical elements and, when an infringement was found to have been committed, it was necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed.

48 Secondly, the Court of First Instance stated, at paragraph 237, that where the person responsible for the operation of the undertaking had ceased to exist in law, it was necessary, first, to find the combination of physical and human elements which had contributed to the commission of the infringement and then to identify the person who had become responsible for running that combination, so as to avoid the result that, because of the disappearance of the person who was responsible for its operation when the infringement was committed, the undertaking might fail to answer for it.

49 In the case of Anic, the Court of First Instance observed, at paragraphs 238 to 242, that the legal person responsible for the operation of the undertaking when the infringement was committed continued to exist until the adoption of the Commission's Decision and the Commission was therefore entitled to hold it answerable for the infringement. The Court of First Instance added that the case of Saga Petrokjemi, cited by Anic, was different because that legal person had ceased to exist following its merger with Statoil. As regards the alleged attribution to Anic of acts committed by SIR, the Court of First Instance pointed out that the infringement had been proved in relation to Anic on the basis of its own actions alone and that the Commission had stated that SIR should have been answerable for any infringement committed by it, but that for reasons of expediency the Commission did not consider it appropriate to initiate proceedings against that undertaking.

Amount of the fine

50 At paragraphs 259 to 261 the Court of First Instance stated that it followed from its assessments that the duration of the infringement was shorter than the Commission had held it to be, and for that reason the amount of the fine had to be reduced.

51 With regard to the gravity of the infringement, the Court of First Instance held, in paragraphs 264 and 265, that the Commission had correctly established the role played by Anic during the period of its participation and that it was entitled to take account of that role in determining the amount of the fine. Moreover, according to the Court of First Instance, the facts established showed, by their intrinsic gravity — in particular the fixing of price and sales volume targets — that Anic had not acted rashly or even through lack of care but intentionally.

52 In dealing with Anic's argument that the Commission did not correctly take account of its size on the market when determining the amount of the fine, the Court of First Instance considered, at paragraphs 269 to 275, 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), which amply justified the general level of the fines imposed, and then defined the criteria for achieving a fair balance between the fines imposed on each of those undertakings (point 109 of the Decision). As regards that last category of criteria, which it found to be relevant and sufficient, the Court of First Instance found that in determining the amount of the fine to be imposed on each of the undertakings the Commission had referred to their size on the Community polypropylene market. According to the Court of First Instance, the fact that the Commission did not mention the figures which it took into account in that respect in the Polypropylene Decision could not vitiate the Decision, since during the proceedings before the Court of First Instance the Commission had submitted the relevant figures, and Anic had not contested their accuracy. According to the Court of First Instance, it followed that in calculating the amount of the fine, the Commission had correctly assessed Anic's size on the Community polypropylene market.

53 Anic had submitted that the Commission should have taken into account the effects of the infringement, in particular Anic's actual conduct on the market as regards both prices and volume, conduct which could be explained independently of any participation in agreements or concerted practices, or, in the alternative, that any participation by it in agreements or concerted practices had had no effect on competition or on trade between Member States. The Court of First Instance noted, at paragraph 279, that the Commission had distinguished two types of effect: first the price instructions from the producers to their sales offices; secondly, the movements in prices charged to various customers. According to paragraph 280, the first type of effect had been proved to the requisite legal

standard by the Commission from the many price instructions given by the various producers. With regard to the second type of effect, the Court of First Instance observed, at paragraph 281, that it was clear from the Polypropylene Decision that the Commission had taken into account, in mitigation of the penalties, the fact that price initiatives generally had not achieved their objective in full and that there were no measures of constraint to ensure compliance with quotas or other measures. The Court of First Instance concluded, at paragraphs 282 and 283, that the Commission had rightly taken full account of the first type of effect and that it had taken account of the limited character of the second type of effect, to an extent that Anic had not shown was insufficient, and it pointed out that it had already rejected Anic's argument concerning its small size on the market.

54 The Court of First Instance found, at paragraph 290, that the Commission had taken account of the fact that the undertakings had incurred substantial losses on their polypropylene operations over a considerable period, and that it had thereby taken account of the unfavourable economic conditions prevailing in the sector with a view to determining the general level of the fines. Moreover, according to paragraph 291, the fact that in the past the Commission had considered that the crisis affecting the economic sector in question had to be taken into account could not oblige it to take similar account of such a situation in the instant case.

55 Lastly, the Court of First Instance pointed out, in paragraph 295, that the absence of any previous infringement could not constitute a mitigating factor, and, in paragraph 299, that the Commission had proceeded on the basis of a correct characterisation of the infringement in calculating the amount of the fine to be imposed on Anic.

56 The Court of First Instance concluded, at paragraph 301, that the fine imposed on Anic was appropriate having regard to the gravity of the breach of the competition rules found, but that it had to be reduced by reason of the shorter duration of that infringement. First of all, according to paragraph 302, the duration of the infringement had been reduced by 14 months out of 62, in respect of the period from about November 1977 to the end of 1978 or the beginning of 1979. However, the Commission had already taken into account, in determining

the amount of the fines, the fact that the mechanism by which the infringement was to operate had not been completely established until about the beginning of 1979. Secondly, according to paragraph 303, the duration of the infringement had been reduced by two months in respect of the period from the end of October 1982 until the end of 1982 or the beginning of 1983 during which the infringement was particularly grave. Thirdly, according to paragraph 304, after mid-1982, with the exception of the communication by Anic to ICI at the end of October 1982 of its sales volume aspirations for the first quarter of 1983, the Commission had not proved that Anic had participated in any of the elements of the infringement. Fourthly, according to paragraph 305, the Commission had not established to the requisite legal standard that Anic had participated in the measures designed to facilitate the implementation of the price initiatives. The Court of First Instance therefore held that the amount of the fine had to be reduced by 40%.

57 In those circumstances the Court of First Instance:

1. Annulled Article 1 of the Polypropylene Decision in so far as it held that Anic had taken part:

   — in the infringement before the end of 1978 or the beginning of 1979 and after the end of October 1982;

   — in the system of regular meetings of polypropylene producers, the price initiatives and the restriction of monthly sales by reference to a previous period after mid-1982; and

   — in measures designed to facilitate the implementation of the price initiatives;

2. Set the amount of the fine imposed on the applicant in Article 3 of that Decision at ECU 450 000, that is to say ITL 662 215 500;

3. For the rest, dismissed the application;

4. Ordered each party to bear its own costs.

The appeal

58 In its appeal, the Commission requests the Court of Justice:

— to annul the contested judgment in so far as the parts referred to in point 1, second and third indents, of the operative part are concerned;

— to set the amount of the fine at ECU 562 500;

— to dismiss the forms of order sought by Anic claiming that the Polypropylene Decision should be annulled;

— to dismiss in their entirety the pleas in law submitted by Anic in its appeal against the contested judgment;

— to order Anic to pay the costs.

59 Anic requests the Court of Justice:

— to dismiss in its entirety the Commission's appeal against the contested judgment;

— to annul the contested judgment on account of the fact that its grounds are insufficient and contradictory, and for misapplication of law with regard to determination of the date on which Anic's participation in infringement ceased; to set that date at June 1982 rather than October 1982 and, having annulled the relevant part of Article 1 of the Polypropylene Decision, consequently to reduce the fine imposed on Anic or refer the case back to the Court of First Instance for that purpose;

— to annul the contested judgment on account of the fact that its grounds are insufficient and contradictory and for misapplication of the law with regard to the principles governing liability, the establishment of the infringement, legal characterisation and gravity of the infringement, and to reappraise the factors and criteria for determination of the fine imposed on Anic and, having annulled the relevant part of Article 3 of the Polypropylene Decision, to reduce that fine in an appropriate manner or, in the alternative, to refer the case back to the Court of First Instance for that purpose;

— to order the Commission to pay the costs, both of the application at first instance and of this appeal.

60 Anic also asked the Court to adopt appropriate measures in order to determine whether the Polypropylene Decision was adopted in compliance with the procedures laid down and, if that was not the case, to declare it non-existent or annul it in so far as it concerns Anic.

61 In support of its appeal the Commission relies on two pleas in law based on infringement of Community law and alleging, first, misinterpretation of the Polypropylene Decision and, second, contradictions between the grounds and the operative part of the contested judgment. The Commission claims that those defects also led to the amount of the fine being wrongly determined.

62 In support of its cross-appeal, Anic claims infringement of Community law through insufficient and contradictory reasoning and misapplication of the law on the question of: (i) defects vitiating the procedure by which the Polypropylene Decision was adopted; (ii) the principle of personal responsibility; (iii) the finding of an infringement; (iv) the legal characterisation of the infringement; (v) attribution of responsibility; (vi) assessment of the gravity of the infringement; and (vii) determination of the amount of the fine.

63 At the Commission's request and despite Anic's objection, 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 ('the *PVC* judgment of the Court of Justice'), 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').

Anic's cross-appeal

Procedure by which the Polypropylene Decision was adopted

64 By the first plea of its cross-appeal, which it is appropriate to examine first, Anic maintains that, in view of the *PVC* judgments of the Court of First Instance and of the Court of Justice, it must be considered that, in adopting the Polypropylene Decision, the Commission infringed the applicable rules of procedure, in particular those concerning both competence to adopt acts in all the authentic languages and compliance with the formalities relating to their authentication. Anic considers that there is sufficient evidence in this respect and claims that, in any case, the Court of Justice has the power to verify whether the Italian language text was properly adopted and authenticated. To that end the Court of Justice could procure the recorded statements and minutes of the hearing held between 18 and 22 November 1991 before the Court of First Instance in the *PVC* case. If the Court of Justice found that the Polypropylene Decision was not adopted in a proper manner, it should hold it non-existent or, in the alternative, annul it in so far as it concerns Anic.

65 In reply to the Commission's objection that this plea is inadmissible, Anic maintains that Article 116 of the Rules of Procedure of the Court of Justice permit it to contend that the appeal should be dismissed, that the contested judgment be set aside, and that the Polypropylene Decision be declared invalid, in accordance with the forms of order sought at first instance. In so pleading it is not changing the subject-matter of the proceedings at first instance at all. It points out that in any case Article 42(2) of the Rules of Procedure of the Court of Justice — which Article 118 declares is to apply to the procedure on appeal from a decision of the Court of First Instance — allows for an exception to the general principle that no new plea in law may be introduced in the course of proceedings where such a plea is based on matters of law or of fact which come to light in the course of the procedure. That applies to the matters that came to light in the course of the PVC procedure before the Court of First Instance. Furthermore, the existence of procedural defects such as would invalidate the Polypropylene Decision to such a dire degree as to render it non-existent is a matter of public policy that the Court of Justice could raise of its own motion.

66 The Commission considers that this plea and the claims to which it leads are clearly inadmissible within the meaning of Article 119 of the Rules of Procedure of the Court of Justice. Anic's criticisms relate to the Polypropylene Decision, not to the contested judgment, and that plea was not put forward before the Court of First Instance. Since it cannot identify any ground of the judgment to which the criticism could attach, Anic is in fact seeking a declaration that the Polypropylene Decision is non-existent or, in the alternative, its annulment. Articles 113 and 116 of the Rules of Procedure of the Court of Justice provide that an appeal must seek to set aside, in whole or in part, the decision of the Court of First Instance, in accordance with the definition of appeal in Article 49 of the EC Statute of the Court of Justice. Moreover, under those same Articles 113 and 116, an appeal may not change the subject-matter of the procedure before the Court of First Instance.

67 The Court observes that, according to 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.

68 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 *John Deere* v *Commission* [1998] ECR I-3111, paragraph 62).

69 In the present case it is common ground that Anic 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.

70 Secondly, the appeal relates only to the contested judgment and it is only if that judgment were set aside that the Court of Justice could, in accordance with the first paragraph of Article 54 of the EC Statute of the Court of Justice, deliver judgment itself in the case. As long as the contested judgment is not set aside, the Court is not therefore required to examine possible defects in the Polypropylene Decision.

71 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 Polypropylene Decision, the Commission complied with the relevant Rules of Procedure is also inadmissible. Only if the contested judgment is set aside will the Court of Justice need to examine whether it should, of its own motion, as Anic claims, examine the question whether the Polypropylene Decision was non-existent.

Breach of the principle of personal responsibility

72 By its second plea, Anic claims that the Court of First Instance committed an error of law in holding that Anic was responsible for all aspects of the conduct attributable to the undertakings involved, even if was impossible to attribute to it individual infringements. The contested judgment was also vitiated by defective reasoning, inasmuch as the question of attributing collective responsibility was not addressed by the Court of First Instance at any point in its judgment. The paragraphs cited by the Commission in this respect relate only to the closely-related, but not identical, question of a single infringement.

73 Participation with other undertakings in an infringement of Article 85 of the Treaty cannot involve the attribution to those undertakings of conduct which took place over a fairly long period of time, the forms, intensity and length of which were variable for all the participants, especially when the undertakings concerned showed that they played a limited role in terms of the length and gravity of the infringement actually committed. Such reasoning flies in the face of the principle of the personal nature of criminal responsibility — which is

applicable by analogy —, since the Court of First Instance unjustifiably ascribed to Anic responsibility for actions in which its non-participation had been proved.

74 Anic considers that a single infringement must not be confused with collective responsibility. The first is an artificial classification bringing together in the abstract various lines of conduct which in substance were dissociated. Characterisation as a single infringement may enable the Commission to escape its burden of proving actual participation of each undertaking in each action and stretch out the limitation period, but it cannot be turned into a criterion for attributing responsibility, thus making Anic responsible for all aspects of the conduct of all the undertakings charged during the period under consideration.

75 In the present case, that would mean that there would be no individual analysis of the evidence against it and, under the principle of a single infringement, from which collective responsibility flows, it would entail infringement of the parties' rights of defence. Furthermore, it is clear from paragraph 109 of the Polypropylene Decision that as a result of this reasoning no consideration is given to the extent of the activities of each undertaking when the fine is set.

76 The Commission observes that Anic is here challenging the concept of a single infringement which the Court of First Instance applied at paragraphs 203 to 204 of the contested judgment. The various concerted actions undertaken during a specific period by the polypropylene producers formed part of an overall plan aimed at maintaining the price of that product, and therefore it was an overall plan constituting a single infringement which manifested itself in different actions. This renders each undertaking responsible for the entire infringement, regardless of its participation in any particular action, but it does not preclude consideration of the activeness of the undertaking concerned for the purposes of determining the fine.

77 The Commission states that characterisation as a single infringement involves no legal concept but consists of a characterisation of the facts, which presupposes the finding of a link between various lines of concerted conduct having a single objective in a specific economic situation. It cannot be excluded in the abstract that certain facts may be characterised as a single infringement. The Commission and the Court of First Instance could therefore have committed at most an error in characterising the facts, but certainly not an error of law. This kind of characterisation does not run counter to the principle of the personal nature of criminal responsibility, assuming that this could be applicable by analogy in this case.

78 On this question the Court must observe, first of all, that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, responsibility for committing those infringements is personal in nature.

79 Secondly, the agreements and concerted practices referred to in Article 85(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged.

80 However, the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect.

81 Thirdly, it must be remembered that Article 85 of the Treaty prohibits agreements between undertakings and decisions by associations of undertakings, including conduct which constitutes the implementation of those agreements or decisions, and concerted practices when they may affect intra-Community trade and have

an anti-competitive object or effect. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 85 of the Treaty.

82 In the present case the Court of First Instance held, at paragraph 204 of the judgment, that, because of their identical object, the agreements and concerted practices found to exist, formed part of systems of regular meetings, target-price fixing and quota-fixing, and that 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. It considered that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices.

83 In such circumstances, the Court of First Instance was entitled to consider that an undertaking that had taken part in such an infringement through conduct of its own which formed an agreement or concerted practice having an anti-competitive object for the purposes of Article 85(1) of the Treaty and which was intended to help bring about the infringement as a whole was also responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement. That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk.

84 Contrary to Anic's submission, such a conclusion is not contrary to the principle that responsibility for such infringements is personal in nature. It fits in with widespread conception in the legal orders of the Member State concerning the attribution of responsibility for infringements committed by several perpetrators

according to their participation in the infringement as a whole, which is not regarded in those legal systems as contrary to the personal nature of responsibility.

85 Nor does such an interpretation neglect individual analysis of the evidence adduced against an undertaking, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.

86 Where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58). In doing this, the Commission must establish in particular all the facts enabling the conclusion to be drawn that an undertaking participated in such an infringement and that it was responsible for the various aspects of it.

87 When, as in the present case, the infringement involves anti-competitive agreements and concerted practices, the Commission must, in particular, show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.

88 The Court of First Instance found, at paragraph 204, cited above, that all the efforts of the participating undertakings were in pursuit of a common anti-competitive aim. It is clear from all the findings of fact made by the Court of First Instance, at paragraphs 63 to 178 of the contested judgment, with regard to the various aspects of the infringement, that it reached the finding that Anic had participated in each of those aspects only on the basis of Anic's own conduct, the

contribution it thus intended to make towards those aspects and of its knowledge of the conduct planned or put into effect by other undertakings gained through its participation in the regular meetings of polypropylene producers. In those circumstances, the Court of First Instance was entitled to consider that Anic's participation, through its own conduct, in the infringement rendered it co-responsible for the entire infringement committed during its participation.

89 Secondly, the undertakings concerned are able to exercise their rights of defence both in regard to the charge that they actually participated in the infringement and in regard to the actual conduct of which other undertakings are accused but which relates to the same infringement. In the case of agreements or concerted practices having anti-competitive object, they will also be able to exercise those rights in respect of the existence of a common objective, their intention to contribute to the infringement as a whole by their own conduct and their knowledge of the conduct of other participants or its foreseeability and the acceptance of the related risk.

90 The fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement is assessed and if and when it comes to determining the fine.

91 Lastly, in so far as Anic specifically claims that the Court of First Instance did not properly take into account the degree of its involvement in the infringement when the amount of the fine was determined, these complaints overlap with those made or part of its sixth plea and will therefore be examined together with that plea.

92 It follows from the foregoing that the second plea in law must also be dismissed.

Mistaken finding of the infringement

93 By its third plea, Anic claims that at paragraphs 110 to 113 of the contested judgment the Court of First Instance erred in law in holding that, once Anic's participation in the regular meetings of polypropylene producers had been proved, it could not assert that it had not subscribed to the price initiatives which had been decided on, planned and monitored at those meetings, without providing any evidence to corroborate that assertion. That approach involves a manifest reversal of the burden of proof and gives presence at meetings the value of absolute proof, thus freeing the Commission from its burden of finding any other corroborating evidence of the undertaking's conduct.

94 At paragraphs 112 and 113 of the contested judgment, the Court of First Instance itself pointed out the absence of documents proving Anic's adherence to the price initiatives and of any correspondence between Anic's conduct on the market and what was supposed to have been agreed upon between the producers at the meetings. In those circumstances, it cannot be automatically deduced from Anic's presence at meetings that it participated in the price initiatives which were discussed at them. The presence of a representative of the undertaking at the meetings could constitute proof that the undertaking was aware of the anti-competitive scheme, but the undertaking's collusion is only established if other evidence of its conduct corroborates a convergence of intentions.

95 The Commission maintains that the Court of First Instance did not reverse the burden of proof at all. Once an undertaking's participation in meetings has been proved, it may be concluded that it participated in the anti-competitive scheme. It is then incumbent on any undertaking which claims that it dissociated itself from decisions reached on agreed action to provide express proof thereof. Any failure to put the concerted decisions into effect is another matter and does not suffice to refute such participation.

96 The Court finds that the Court of First Instance was entitled to hold, without unduly reversing the burden of proof, that since the Commission had been able to establish that Anic had participated in the meetings at which price initiatives had

been decided on, planned and monitored, it was for Anic to adduce evidence that it had not subscribed to those initiatives.

97 Furthermore, Anic's arguments that its conduct on the market had been independent of the price initiatives referred to in the Polypropylene Decision are irrelevant, since agreements within the meaning of Article 85 of the Treaty were involved here.

98 The Court of First Instance considered, at paragraph 198 of the contested judgment, that the Commission was entitled to treat the common intentions existing between Anic and the other polypropylene producers, which related in particular to price initiatives, as agreements within the meaning of Article 85(1) of the Treaty.

99 It is settled case-law that, for the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1964] ECR 299, at p. 342; see also, to the same effect, Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 14 and 15).

100 It does not, therefore, appear that the Court of First Instance broke the rules of evidence in holding that the Commission had established to the requisite legal standard that Anic was one of the polypropylene producers amongst whom there emerged common intentions concerning the price initiatives mentioned in the Polypropylene Decision.

101 Consequently, the third plea in law cannot be upheld either.

Incorrect legal characterisation of the infringement

102 By its fourth plea in law, Anic criticises the Court of First Instance for having wrongly rejected its complaint that the infringement had not been legally characterised as either an agreement or a concerted practice within the meaning of Article 85 of the Treaty.

103 First, the Court of First Instance has not clearly indicated the actual criteria for characterising the type of infringement. Moreover, its classification does not correspond to the distinction made by the Commission in its decision, which uses the concept of concerted practice as a catch-all device for preventing suspected infringements from going unpunished, in the absence of proof of common intention between the producers. According to Anic, the distinction between an agreement and a concerted practice has consequences for the level of proof required of the Commission and therefore for the rights of defence of the parties. The Commission's line of argument would lead to the conclusion that the reference to agreements in Article 85 of the Treaty is superfluous. If a concerted practice could consist in the mental element alone, with no need for any physical element, the two concepts would become redundant and would differ only as to the degree of manifestation of intention, joint intention in the case of an agreement and the manifestation of unilateral intention in the case of a concerted practice. Anic claims that, if the characters of the two concepts are to be kept distinct, a concerted practice must be recognised as having an additional physical element, to compensate for the more evanescent nature of the mental element (see the Opinions of Advocate General Gand in *ACF Chemiefarma* v *Commission*, cited above, and of Advocate General Mayras in Case 48/69 *ICI* v *Commission* [1972] ECR 619, and *Suiker Unie and Others* v *Commission*, cited above).

104 Anic points out, secondly, that at paragraph 201 of its judgment the Court of First Instance adopted in full the argument put forward by Judge Vesterdorf, designated Advocate General before the Court of First Instance, as to the

automatically anti-competitive effect of the meetings between polypropylene producers. Such an interpretation implies the need to provide contrary evidence against a presumption of anti-competitive intent based on the sole fact of having taken part in several meetings, deprives the undertakings concerned of any possibility of defending their point of view and is contrary to the Community concept of concerted practice, which, apart from the preliminary aspect of undertakings' concerting together, requires a common practice attributable to the participants.

105 Thirdly, Anic states that the characterisation of the alleged cartel as a single infringement, treated as an agreement and concerted practice, may have dangerous legal consequences. In particular it led in this case to the grouping together, as a 'single' infringement, of the various lines of conduct followed by 15 undertakings over a period of approximately five years and prevented infringements which could actually be ascribed to an individual undertaking from being distinguished from those alleged.

106 Fourthly, Anic complains that the Court of First Instance accepted the Commission's dual characterisation of the infringement as an agreement and concerted practice. Anic considers that such a characterisation alters the burden of proof for the Commission and, consequently, the thrust of the defence mounted by the undertaking concerned. Thus, in this case, the Commission was freed of its obligation to determine the type and value of the evidence adduced and to rule specifically what that evidence went to demonstrate. Anic, on the other hand, was obliged to speculate about the reasons for which it stood accused and how it had to mount its defence. The fact that Article 85 of the Treaty does not provide for a specific characterisation for infringements of this type provides no authority for creating new infringements, with, moreover, retroactive effect.

107 The Commission states that this plea is based on a supposed difference in the burden of proof according to whether the infringement is a concerted practice or an agreement. That supposed difference is wrongly based on a literal construction of the term 'concerted practice', according to which 'practice' refers to conduct on the market and, consequently, to an objectively observable element. Such a construction is contrary to the *ratio legis* which bolsters the prohibition by widening it to cover concerting arrangements that are less elaborate than a real

agreement, so as to prevent the rule being too easily circumvented. Anic's argument would paradoxically weaken the prohibition, by requiring more exacting proof for a concerted practice than for an agreement. Article 85 of the Treaty would thus be disarmed in relation to concerted practices since, contrary to what counts for agreements, only the anti-competitive effect would count, not the object.

108 The list in Article 85(1) of the Treaty is intended to apply to all collusion between undertakings, whatever the form it takes. There is continuity between the cases listed. The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion. Anic's argument would break down the unity and generality of the prohibited phenomenon and would remove from the ambit of the prohibition, without any reason, certain types of collusion which are no less dangerous than others. The Court of First Instance rightly rejected that argument at paragraph 199 of the judgment when it referred to the mental element without requiring an observable physical element.

109 The Court observes first of all that, at paragraphs 198 and 202 of the contested judgment, the Court of First Instance held that the Commission was entitled to categorise as agreements certain types of conduct on the part of the undertakings concerned, and, in the alternative, as concerted practices certain other forms of conduct on the part of the same undertakings. At paragraph 204, the Court of First Instance held that Anic had taken part in an integrated set of schemes constituting a single infringement which progressively manifested itself in both unlawful agreements and unlawful concerted practices.

110 With regard to the conduct categorised as concerted practices, namely the regular meetings of polypropylene producers and Anic's communication to ICI at the end of October 1982 of its aspirations in terms of sales volumes for the first quarter of 1983, the Court of First Instance based its finding, in paragraph 201, on the assertion that following the concerted action decided upon at the meetings of the polypropylene producers Anic was bound to take account, directly or indirectly, of the information obtained during the course of those meetings in determining the policy which it intended to follow on the market. Similarly, according to the Court of First Instance, its competitors were bound to take into account, directly

or indirectly, the information disclosed to them by Anic about the course of conduct which it had itself decided upon or which it contemplated adopting on the market.

111 At paragraph 205, the Court of First Instance held that the Commission was entitled to characterise that single infringement as 'an agreement and a concerted practice', since the infringement involved at one and the same time factual elements to be characterised as 'agreements' and factual elements to be characterised as 'concerted practices' within the meaning of Article 85(1) of the Treaty. According to the Court of First Instance, given such a complex infringement, the dual characterisation by the Commission in Article 1 of the Polypropylene Decision had to be understood not as requiring, simultaneously and cumulatively, proof that each of those factual elements presented 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 characterised as agreements and others as concerted practices for the purposes of Article 85(1) of the Treaty, which lays down no specific category for a complex infringement of this type.

112 Secondly, it must be observed that, if Article 85 of the Treaty distinguishes between 'concerted practices', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibitions of that article catch different forms of coordination and collusion between undertakings (see, to that effect, in particular, *ICI* v *Commission*, cited above, paragraph 64).

113 It does not, however, follow that patterns of conduct having the same anti-competitive object, each of which, taken in isolation, would fall within the meaning of 'agreement', 'concerted practice' or 'a decision by an association of undertakings', cannot constitute different manifestations of a single infringement of Article 85(1) of the Treaty.

114 The Court of First Instance was therefore entitled to consider that patterns of conduct by several undertakings were a manifestation of a single and complex infringement, corresponding partly to an agreement and partly to a concerted practice.

115 Thirdly, it must be borne in mind that a concerted practice, within the meaning of Article 85(1) of the Treaty, refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (see *Suiker Unie and Others* v *Commission*, cited above, paragraph 26, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 63).

116 The Court of Justice has further explained that criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt on the market (see *Suiker Unie and Others* v *Commission*, cited above, paragraph 173; Case 172/80 *Züchner* [1981] ECR 2021, paragraph 13; *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 63; and *John Deere* v *Commission*, cited above, paragraph 86).

117 According to that case-law, although that 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, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 174; *Züchner*, paragraph 14; and *John Deere* v *Commission*, paragraph 87, all cited above).

118 It follows that, as is clear from the very terms of Article 85(1) of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.

119 The Court of First Instance therefore committed an error of law in relation to the interpretation of the concept of concerted practice in holding that the undertakings' collusive practices had necessarily had an effect on the conduct of the undertakings which participated in them.

120 It does not, however, follow that the cross-appeal should be upheld. As the Court of Justice has repeatedly held (see, *inter alia*, Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28), if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other legal grounds, the appeal must be dismissed.

121 For one thing, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance.

122 For another, a concerted practice, as defined above, falls under Article 85(1) of the Treaty even in the absence of anti-competitive effects on the market.

123 First, it follows from the actual text of Article 85(1) that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.

124 Next, although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition.

125 Lastly, that interpretation is not incompatible with the restrictive nature of the prohibition laid down in Article 85(1) of the Treaty (see Case 24/67 *Parke Davis* v *Centrafarm* [1968] ECR 55, p. 71) since, far from extending its scope, it corresponds to the literal meaning of the terms used in that provision.

126 The Court of First Instance therefore rightly held, despite faulty legal reasoning, that, since the Commission had established to the requisite legal standard that Anic had participated in collusion for the purpose of restricting competition, it did not have to adduce evidence that the collusion had manifested itself in conduct on the market. The question whether Anic has refuted the presumption set out in paragraph 121 of this judgment must therefore be examined.

127 First, with regard to the regular meetings of polypropylene producers, Anic had claimed that its conduct on the market in relation to prices had been determined independently of the result of the meetings and that, although a certain parallelism of reactions had been observable between it and other producers, that was due to the movement in the price of the raw material and to the normal conduct of a producer in a market dominated by the 'big four'. In that connection, the Court of First Instance rightly held, at paragraph 112 of the contested judgment, that such an argument would at most show that Anic had not put into effect the results of the meetings with regard to the fixing of price targets.

128 Secondly, with regard to the communication, at the end of 1982, by Anic to ICI of its sales volume aspirations and its proposals regarding the quotas to be allocated to other producers, which the Court of First Instance held to be an act of participation in the negotiations with a view to fixing quotas for the first quarter of 1983, it follows from paragraph 172 of the contested judgment that the Commission was entitled to conclude from the annexes to Anic's reply to the request for information that Anic had remained on the polypropylene market until April 1983. It follows that Anic remained active on the market after those negotiations. Moreover, Anic did not claim that its subsequent conduct on the market had been determined independently of its participation in those negotiations.

129 It follows that the error of law committed by the Court of First Instance had no effect on the operative part of the contested judgment, which appears well founded on other legal grounds.

130 Fourthly, it is clear from the settled case-law of the Court of Justice (see, in particular, *ACF Chemiefarma* v *Commission*, cited above, paragraph 112), which was quoted by the Court of First Instance at paragraph 198 of the contested judgment, that an agreement within the meaning of Article 85(1) of the Treaty arises from an expression, by the participating undertakings, of their joint intention to conduct themselves on the market in a specific way.

131 A comparison between that definition of agreement and the definition of a concerted practice dealt with in paragraphs 118 to 125 of this judgment shows that, from the subjective point of view, they are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves.

132 It follows that, whilst the concepts of an agreement and of a concerted practice have partially different elements, they are not mutually incompatible. Contrary to Anic's allegations, the Court of First Instance did not therefore have to require the Commission to categorise either as an agreement or as a concerted practice each

form of conduct found but was right to hold that the Commission had been entitled to characterise some of those forms of conduct as principally 'agreements' and others as 'concerted practices'.

133 Fifthly, it must be pointed out that this interpretation is not incompatible with the restrictive nature of the prohibition laid down in Article 85(1) of the Treaty (see *Parke Davis* v *Centrafarm*, cited above, p. 71). Far from creating a new form of infringement, the arrival at that interpretation merely entails acceptance of the fact that, in the case of an infringement involving different forms of conduct, these may meet different definitions whilst being caught by the same provision and being all equally prohibited.

134 Sixthly, it must be observed that, contrary to Anic's allegations, such an interpretation does not have an unacceptable effect on the question of proof and does not infringe the rights of defence of the undertakings concerned.

135 On the one hand, the Commission must still establish that each form of conduct found falls under the prohibition laid down in Article 85(1) of the Treaty as an agreement, a concerted practice or a decision by an association of undertakings.

136 On the other hand, the undertakings charged with having participated in the infringement have the opportunity of disputing, for each form of conduct, the characterisation or the characterisations applied by the Commission by contending that the Commission has not adduced proof of the constituent elements of the various forms of infringement alleged.

137 Seventhly and lastly, inasmuch as Anic claims that the effect of this interpretation is to attribute to it liability for the conduct of other undertakings, its argument overlaps with that put forward in the second plea and must be dismissed on the same grounds.

138 In conclusion, the fourth plea in law is partially founded, inasmuch as it complains that the Court of First Instance committed an error of law in interpreting the concept of concerted practice. That error does not, however, mean that the contested judgment should be set aside. For the rest, the plea must be dismissed as unfounded.

Incorrect attribution of responsibility

139 By its fifth plea, Anic claims that the Court of First Instance committed an error of law, which was reflected in faulty reasoning, in upholding the application of a dual criterion for identifying an undertaking to which an infringement of Community law may be attributed. That error consisted in alternatively applying the legal continuity test and the continuous economic function test, depending on which appeared the most useful, so that where the legal person responsible for managing an undertaking at the time when an infringement was committed ceases to exist, that undertaking does not go unpunished.

140 Anic maintains that such an approach is not appropriate because it surrounds its application in uncertainty, does not guarantee certainty in legal relations, may result in discriminatory treatment and leaves the door open for companies to work out strategies to secure impunity.

141 In the present case the 'binomial' Anic/SIR has suffered discrimination in comparison with Saga Petrokjemi/Statoil. In the case of infringements committed by Saga Petrokjemi, the Commission gave more weight to the economic continuity test: since the legal person responsible had disappeared from the scene, responsibility fell on Statoil, into which it had been incorporated. On the other hand, Anic was held responsible for the actions and infringements for which SIR, a company it had acquired in 1980 was charged, as well as for its alleged participation in the polypropylene cartel, although it had transferred its activities in this sector to Monte. The Court of First Instance, which should have

selected the most appropriate test and stuck to it, upheld the discriminatory application of those tests by the Commission and, in paragraph 240, ignored the doubts expressed by Anic.

142 The Commission points out, first of all, that the Court of First Instance did not apply the dual test at all, for the simple reason that it had only to give judgment on Anic's application, since Statoil did not bring an action. It is not just a question of identifying the undertaking which committed the infringement but, for the purposes of enforcing the decision, in particular with regard to the fine, of determining the legal person responsible for the conduct of that undertaking. Lastly, Anic makes assertions which must be held unfounded, by reason of the findings of fact made by the Court of First Instance, in particular concerning the alleged attribution to Anic of SIR's actions.

143 The Commission also considers that this plea could be held inadmissible on the ground that it is too general. In any event, Statoil was chosen as the addressee of the Polypropylene Decision because Saga Perokjemi had been taken over by Statoil. Anic, on the other hand, presented itself on the market as a whole, with a single commercial strategy, and sold its polypropylene production business to Monte before the said decision, while continuing to exist as a legal person.

144 The Court of Justice observes, first of all that, inasmuch as this plea relates to the alleged attribution to Anic of acts committed by SIR, the Court of First Instance indicated, at paragraph 241 of the contested judgment, that it followed from its assessments regarding the findings of fact made by the Commission that the infringement had been proved in relation to Anic on the basis of its own actions alone. It is not for the Court of Justice, when hearing an appeal, to call in question the findings made by the Court of First Instance.

145 In complaining that the Court of First Instance attributed responsibility for the infringement to it although it had transferred its polypropylene business to Monte, Anic is disregarding the principle of personal responsibility and neglecting the decisive factor, identifiable from the case-law of the Court of

Justice (see to this effect *Suiker Unie and Others* v *Commission*, cited above, paragraphs 80 and 84), that the 'economic continuity' test can only apply where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed. It also follows that the application of these tests is not contrary in any way to the principle of legal certainty.

146 Lastly, at paragraph 240, the Court of First Instance rightly considered that it was not necessary to reply to the questions concerning factual situations unrelated to the case. Nor is it necessary for the Court of Justice to consider strategies which might have been adopted for the specific purpose of avoiding penalties for infringement of the competition rules.

147 The fifth plea in law cannot therefore be accepted either.

Incorrect assessment of the gravity of the infringement

148 By its sixth plea, Anic criticises the Court of First Instance for not taking sufficient account of the marginal role which, it says, it played in the alleged cartel and for declaring itself satisfied with the Commission's findings. Because of the association between Anic and SIR, Anic's actual size was distorted by largely incorrect figures which, contrary to what is stated in the judgment at paragraph 274, were disputed by Anic at the hearing before the Court of First Instance. With regard to the effects of the infringement, the Court of First Instance failed to take into account the individual conduct of the undertakings, in disregard of the personal character of criminal responsibility. Contrary to the Commission's contention, those criticisms are not meant to go back over questions of fact because the Court of First Instance must rule on the question of the gravity of the infringement pursuant to Article 15(2) of Regulation No 17.

149 With regard to Anic's complaint that the Court of First Instance gave too little weight to its limited role in the cartel, the Commission observes that this complaint is inadmissible because it entails going back over findings of fact. As to the personal nature of criminal responsibility, the Commission reiterates that it has already taken into consideration the greater or lesser gravity of the undertakings' responsibility by imposing more severe fines on the four undertakings bearing most responsibility for the anti-competitive scheme.

150 In regard to these issues, the Court observes, first, that it has held that where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (see, to that effect, *Suiker Unie and Others* v *Commission*, cited above, paragraph 623). However, the Court of First Instance found, at paragraph 264 of the contested judgment, that the Commission had correctly established the role played by Anic in the infringement during the period of its participation and that it took proper account of that role in determining the amount of the fine to be imposed on it. The Court of First Instance cannot therefore be said to have committed an error of law in that respect.

151 Next, in so far as Anic by this plea challenges the fact, found by the Court of First Instance at paragraph 274, that during the proceedings before it the Commission had submitted the relevant figures concerning Anic's size on the Community polypropylene market and that Anic had not contested their accuracy, this challenge concerns questions of fact which cannot be examined in an appeal.

152 Lastly, when considering how the effects of the infringement had been taken into account, the Court of First Instance did not have to examine the individual conduct of the undertakings when, as it rightly pointed out at paragraph 280, the effects to be taken into account in setting the general level of fines are not those resulting from the actual conduct which an undertaking claims to have adopted, but those resulting from the whole of the infringement in which it had participated.

153 It follows that the sixth plea in law must also be dismissed.

Incorrect assessment of the amount of the fine

154 By its seventh plea, Anic claims that, in reexamining the amount of the fine, the Court of First Instance committed an error of law in not duly taking into account the factors listed in Article 15(2) of Regulation No 17 in relation to both the duration and the gravity of the infringement committed by it. With regard to duration, Anic ceased any conduct capable of constituting an infringement of Article 85 of the Treaty in June 1982, not in October of that year. The Court of First Instance should therefore have reduced the fine to a greater extent, given the lesser duration of the collusive conduct.

155 As far as the gravity of the conduct is concerned, Anic maintains that neither the Commission nor the Court of First Instance properly evaluated the role which it played in the collusive agreements, the amount of polypropylene deliveries in the Community or turnover.

156 On the first point, the Commission made a distinction between the big four and the other producers, but did not otherwise differentiate between those other producers on the basis of degree of participation in the alleged cartel.

157 As regards share of the market, it follows from a table produced by the Commission following a question from the Court of First Instance that the Polypropylene Decision is based on data from 1983 (2.8%) which are completely irrelevant, since Anic had ceased to take part in the infringement in 1982 (a year in which its share of the market was 2.43% and not 2.7% as Table 1, annexed to the Decision, indicates).

158 Lastly, as regards its turnover, Anic claimed before the Court of First Instance, which took no account thereof, that in 1982 this was ITL 32 966 000 000, while the Commission had taken a figure of ECU 25 000 000, that is to say between

ITL 36 790 000 000 and ITL 38 636 000 000. The Commission explained that the figure of ECU 25 000 000 resulted from application of the 1982 exchange rate, but Anic replied that the Commission should not have used the 1982 exchange rate to determine the amount of a fine imposed in 1986. The 1986 exchange rate was in fact used to convert the amount of the fine from ECU 750 000 to ITL 1 103 692 500. That inconsistency results in a serious error in the table produced to the Court of First Instance by the Commission: the fine imposed on Anic was not equal to 2.5% of its 1982 turnover, but to 3.35%. It is thus clear that the fine was set at a level higher than that intended in relation to turnover or that the turnover taken into account was much higher than the true turnover for 1982. In both cases, the contradictory and erroneous indications given by the Commission altered the assessment made by the Court of First Instance.

159 The Commission considers that the arguments based on the lesser duration of the infringement, which it disputes, and on the wrong weighting given by the Court of First Instance to various factors when assessing the gravity of the infringement seek to challenge questions of fact.

160 As regards the question of determination of Anic's share of the market, the Commission points out that the table produced to the Court of First Instance was prepared after the adoption of the Polypropylene Decision and that it did not carry out any mathematical operations in setting the amount of the fines. The table was intended to produce comparable data for all the undertakings, which explains why it indicated Anic's share in 1983, as for all the other undertakings.

161 Lastly, with regard to turnover, the amount of ITL 32 966 000 000 put forward by Anic corresponds in substance to that of ECU 25 million used by the Commission, on the basis of the average 1982 exchange rate.

162 As far as the duration of the infringement is concerned, the Court finds that it follows from the assessments of the Court of First Instance regarding proof of the infringement, summarised in paragraphs 259 and 260, that it came to an end at

the end of October 1982 and that, from mid-1982, Anic had ceased to take part in the regular meetings of polypropylene producers and in the common purposes which emerged from them. It further appears from paragraph 261 that the Court of First Instance accordingly reduced the amount of the fine imposed on Anic. Since Anic's criticisms of the assessments regarding proof of the infringement have been rejected, they need not be taken into consideration as far as calculation of the fine is concerned.

163 Secondly, the complaints concerning the account taken of the role played by Anic in the infringement and of Anic's size on the Community polypropylene market overlap with those submitted in the sixth plea in law and must be dismissed for the same reasons.

164 Thirdly, in so far as Anic's criticism relates to the account taken of its 1982 turnover, according to consistent case-law (see, *inter alia*, Joined Cases 100/80, 101/80, 102/80, 103/80 *Musique Diffusion Française* v *Commission* [1983] ECR 1825, paragraph 120, and Case 183/83 *Krupp* v *Commission* [1985] ECR 3609, paragraph 37), in the determination of the fine account may be taken both of the overall turnover of the undertaking, which gives some indication, however approximate and imperfect it may be, of the size and economic strength of that undertaking, and of the part of that turnover represented by the goods concerned in the infringement, which therefore serves to provide an indication of the extent of that infringement.

165 When the size and economic strength of an undertaking at the time of the infringement are assessed, the exchange rates at that time must therefore be used, not those at the time when the decision imposing the fine is adopted. In the contrary case, the respective size of the undertakings which took part in the infringement would be distorted by account being taken of extrinsic and uncertain factors, such as the changes in the value of national currencies during the subsequent period. On the other hand, it is clear that the amounts of the fines fixed in ECU and in national currency must be converted on the basis of the exchange rates applicable when the decision was adopted, otherwise the respective levels of the fines for undertakings established in States using different currencies would be altered.

166 It follows that the seventh plea in law must also be dismissed.

167 Since none of the pleas in law put forward by Anic has been accepted, its cross-appeal must be dismissed in its entirety.

The Commission's appeal

Admissibility

168 Only in its rejoinder does Anic challenge the admissibility of the Commission's appeal for the first time, on the ground of lack of interest. The Commission said that it appealed in order to obtain clarification of the principles involved, without having any specific interest in the alteration of the level of the fine decided upon by the Court of First Instance. However, only an interest in having the operative part of a judgment of the Court of First Instance altered can justify an appeal. Since the Commission states that it is prepared to accept the operative part as far as the amount of Anic's fine is concerned, there is no longer any issue to try.

169 Anic also claims that the reasoning of the Court of First Instance in the judgment under appeal is wholly analogous to that in its judgment of 10 March 1992 in a parallel case, Case T-11/89 *Shell* v *Commission* [1992] ECR II-757. However, the Commission did not lodge an appeal against that judgment, which might be explained either by the smaller percentage by which the fine was reduced in *Shell* v *Commission* or by the fact that that judgment was delivered after the *PVC* judgment of the Court of First Instance, in other words at a time when the

attention of the Commission's Legal Service was focused on reacting to that latter judgment. In any case, Anic has fallen victim to discrimination.

170 The Commission replies that, even supposing, as Anic contends, that it discriminated against it by appealing in this case when it abstained from doing so in Shell's case, that cannot lead to the appeal being dismissed.

171 The Court finds that it is sufficient to observe here, first, that, pursuant to the third paragraph of Article 49 of the EC Statute of the Court of Justice, with the exception of cases relating to disputes between the Community and its servants, an appeal may be brought by Member States and Community institutions even if they did not intervene in the proceedings before the Court of First Instance. Whether or not they were parties to the case at first instance, the Community institutions do not, therefore, have to show interest in order to bring an appeal against a judgment of the Court of First Instance.

172 Second, it is open to any party to assess the expediency of bringing an appeal against a judgment of the Court of First Instance, and it is not for the Court of Justice to review the choices made in this regard by the Commission.

173 It follows that Anic's objections alleging a lack of interest on the Commission's part or discrimination against it are unfounded, so that the Commission's appeal must be examined as to its substance.

Substance

General

174 The Commission states that it is not appealing against the parts of the contested judgment in which the Court of First Instance annulled the Polypropylene Decision in so far as it held that Anic had taken part in the infringement before the end of 1978 or the beginning of 1979 and after the end of October 1982 (point 1, first indent, of the operative part) and by which it reduced the fine accordingly. Its appeal concerns the parts of the contested judgment by which the Court of First Instance annulled the Polypropylene Decision in so far as it held that Anic had taken part in accompanying measures to facilitate the implementation of the agreed prices either after mid-1982 (point 1, second indent, of the operative part) or throughout the period (point 1, third indent, of the operative part) and by which it reduced the fine accordingly (point 2 of the operative part).

175 For the Commission, that question has an importance going beyond this case, because it involves establishment of the principle that, where a group of undertakings agree to maintain the price level of a product, each undertaking is responsible for all the activities aimed at maintaining prices, even those in which it did not actually collaborate. The effects on the level of the fine are of secondary importance, but confirm the Commission's interest, even from the procedural point of view.

Mistaken interpretation of the Polypropylene Decision

176 By its first plea in law, the Commission claims that the Court of First Instance misinterpreted its decision by ascribing to it a finding that it does not contain. By Article 1 of that decision it never intended to state that Anic had participated in all or in part of the activities referred to therein, but that it was responsible, like the other undertakings for the entire infringement, and therefore even for

activities in which it did not directly participate. The Court of First Instance accordingly annulled part of the Polypropylene Decision which did not exist.

177 According to the Commission, the 15 undertakings concerned committed an infringement of Article 85 of the Treaty by participating in an anti-competitive design to maintain the price of polypropylene, the main aim being to fix minimum sale prices, with accompanying measures for facilitating the implementation of that aim. Not all the undertakings participated in all the accompanying measures, but the Polypropylene Decision attributed to each undertaking responsibility for the agreement as a whole. According to the Decision, there was not a series of infringements but a single infringement, although the fact that each undertaken played a greater or lesser role in it was taken into account when the amount of the fine was determined. In Article 1 of the Polypropylene Decision, the undertakings were thus held responsible, at the times specified for each of them, for an infringement which manifested itself in five forms of conduct, but with no indication as to which undertakings had adopted which course of conduct, or the times at which it had done so.

178 The operative part of the contested judgment, however, seems to assume that responsibility was attributed for the infringement as a whole separate from attribution of responsibility for the various forms of conduct constituting the infringement: the dates on which these ceased may not coincide and the fine takes account both of that difference and of non-participation in one given form of conduct. That shows the effects of the difference between the concept of a single infringement and the way in which it was applied by the Court of First Instance.

179 Anic considers that the Commission's approach, which is to take no account of whether or how each undertaking participated in all the individual forms of conduct adopted for putting the anti-competitive scheme into effect, which could take the form of either an agreement or a concerted practice, can be defended only by asserting that there is no fundamental difference between the concepts of an agreement and of a concerted practice. Such an assertion, however, is at odds with the principles which the Court of First Instance expounded in paragraphs 198 and 200 of the contested judgment on the basis of the case-law of the Court

of Justice: an agreement always presupposes a joint intention, whereas a concerted practice consists of conscious parallel conduct. Between those two concepts there are not only quantitative but also qualitative differences, since an agreement may arise from a joint intention without actual action whilst a concerted practice consists of conduct revealing parallel, coordinated behaviour consciously adopted by the actors. Actual conduct can therefore constitute the outward manifestation of a single infringement only if this is produced by an agreement. However, in such a case, the existence of an agreement, and in particular of the common intentions on which it is based, must be proved, which the Commission failed to do in the Polypropylene Decision.

180 Anic considers that the misinterpretation alleged by the Commission is not a great problem at all and that it has no practical consequences. The Commission did not accuse it of having committed a series of separate infringements, but of having taken part in a single infringement. That single infringement is, however, composed of various forms of conduct. The Commission charges the various undertakings concerned with participating to various degrees in the activities listed in Article 1 of the Polypropylene Decision, and those activities constitute the infringement itself. The single infringement which is not included in the reference to those forms of conduct is, according to Anic, 'an empty box'.

181 The Commission used the concept of a single infringement to accuse the undertakings of participating in all the forms of conduct included in the infringement, getting round the need to prove each undertaking's conduct. The approach taken by the Commission in the Polypropylene Decision is implicit in that taken by the Court of First Instance, which adopted the concept of a single infringement and did not distinguish the various elements of the infringement except for the purpose of limiting their duration in time and better assessing the degree of responsibility of each undertaking. An agreement and a concerted practice manifest themselves in certain conduct on the part of the undertakings. No complaint can therefore be made against the Court of First Instance for having annulled the parts of the Polypropylene Decision in which Anic was found guilty of conduct which could not be attributed to it because they had not been proved to the requisite legal standard.

Contradictions between the grounds of the judgment and the operative part

182 By its second plea in law, the Commission claims that the contested judgment is vitiated by a contradiction. On the one hand, the Court of First Instance accepted, in paragraphs 203 and 204, the characterisation of the facts on which the Polypropylene Decision was based, and therefore the allegation of a single infringement. On the other hand, it partially annulled the Decision on the ground that it had not been proved that Anic had participated in some of the activities during the period concerned, whereas those activities formed part of the infringement which the Court of First Instance regarded as a single infringement. That contradiction can be detected in the operative part of the contested judgment itself. Whereas in point 1, first indent, reference is made to the infringement as a whole, which is delimited in time, Anic's responsibility is excluded, in the second and third indents, in relation to activities during the period thus delimited, whereas those activities formed part of the infringement. In short, the Commission's objection is that the Court of First Instance did not hold Anic responsible for the infringement as a whole, in accordance with the single infringement theory, but drew distinctions between the various activities as if they were separate infringements.

183 According to the Commission, Anic shares its point of view on the concept of a single infringement and on the fact that the Court of First Instance did not apply that concept correctly. The parties diverge only as to the consequences they draw from that criticism, the Commission considering that the Court of First Instance should not have wholly or partly discharged Anic from responsibility for the forms of conduct constituting the infringement, whereas Anic considers that its participation in the infringement came to an end in mid-1982, at the same time as its participation in the meetings, and not in October 1982. Anic's argument relates to questions of fact and is therefore inadmissible but, even if the Court of Justice were to follow Anic on that point, Anic would remain responsible for the entire infringement until mid-1982, so that in any case the contested judgment should be set aside in so far as point 1, second and third indents, of the operative part are concerned.

184 Anic considers that there is no contradiction between the grounds of the contested judgment and its operative part in the sense indicated by the Commission. The Court of First Instance should, on the contrary, have gone the whole way in drawing the necessary conclusions from the findings of fact and

the principles of law set out in the grounds so as to hold that Anic did not participate in the anti-competitive scheme. As Anic explains in its cross-appeal, four of the five forms of conduct held indispensable to the implementation of the scheme have not been proved in its case. In those circumstances, mere participation in the meetings could not constitute adherence to an agreement or to a concerted practice.

185 More generally, referring without distinction to all the elements of the alleged system of concerted action, it still has to be demonstrated that Anic put it into effect. It has not been shown in respect of any of the activities impugned that Anic implemented commitments, for example by simultaneous price rises or by keeping within the quantities which it had been allocated. Even the date of October 1983 as the end of the period is debatable, since on that date the transfer to Monte had already been put into effect, participation in the meetings had ended in May 1982 or mid-1982 and the communication to ICI of sales volume aspirations was not enough to constitute participation in a concerted practice. Since all relevance is thus denied to the communication of those aspirations, all that remains is Anic's participation in the meetings, not followed by any effects, which is insufficient for the purpose of attributing to Anic responsibility for the entire infringement.

186 The contested judgment is wholly founded on the idea that participation in the producers' meetings is a necessary and sufficient element for proving Anic's participation in the anti-competitive scheme. Consequently, every time that Anic's participation in meetings was not proved, with one exception, the Court of First Instance logically excluded its participation in the scheme for the periods and initiatives concerned. In the view of the Court of First Instance it is also logical that, even for the period during which it was held that Anic had participated in the entire scheme, its responsibility was excluded for the practices planned during the meetings in which it had not taken part. The Commission's criticism is therefore unjustified, although Anic does not wish to be considered as supporting the reasoning of the Court of First Instance.

187 For the period subsequent to the end of 1978 or the beginning of 1979, the examination by the Court of First Instance is divided between the various elements of the infringement, but its reasoning remains based on the indissociable nature of the participation in the meetings and in the scheme. In particular, with regard to collusion on prices and quotas, Anic claims that it follows from its lack of participation in meetings after mid-1982 that it was not involved in the

initiatives subsequent to that period. Similarly, with regard to measures intended to facilitate the implementation of the price initiatives, its lack of participation in the meetings during which those measures were adopted implies its non-involvement in the initiatives agreed there.

188 Anic does not subscribe to the single infringement characterisation. Even supposing that there was a purpose behind all the various lines of conduct adopted by several undertakings over several years, the various infringements are not a single deed, they retain their character and should be contested individually. The Commission's argument helps to explain how Anic could have been considered responsible for price or quota initiatives without it being proved that it had actually acted on them: its intellectual collaboration was considered to be enough. However, even that device does not enable responsibility to be attributed to an undertaking for activities in which it did not participate, even in any intellectual sense.

189 Even supposing, as the Court of First Instance does, that the meetings constituted the determinant element in the producers' scheme of collaboration, the contradiction between the grounds of the contested judgment and its operative part as pointed out by Anic is still manifest. Since it has not been established that Anic participated in the meetings after 9 June 1982, as paragraphs 91 and 100 of the contested judgment make clear, no initiative subsequent to that date may be attributed to it. It follows that its involvement in the alleged cartel ceased in all its effects in June 1982 and not in October 1982.

190 The Court of Justice will examine together the two pleas put forward by the Commission in its appeal. In order to decide whether its objections are well founded, it must be ascertained, first, whether the Polypropylene Decision does in fact have the tenor and effect attributed to it by the Commission with regard to the attachment to each undertaking, and to Anic in particular, of responsibility for the infringement as a whole. If that is the case, it will be necessary to assess, secondly, whether the grounds of the contested judgment and its operative part do in fact contain a contradiction as to the interpretation of the Polypropylene Decision, as the Commission claims. If appropriate, the Court will also have to

verify, thirdly, whether, on the Commission's interpretation, the Polypropylene Decision infringes Article 85(1) of the Treaty, the personal nature of responsibility for infringements of that provision, the applicable rules of evidence and the rights of the defence, as contended by Anic.

191 Article 1 of the Polypropylene Decision charges the undertakings concerned with having participated, during various periods, in an agreement and concerted practice involving the unlawful conduct referred to in letters (a) to (e) of that provision. Such a formulation lends support to the argument that the Commission thereby wished to attribute to each of the undertakings involved responsibility for all the unlawful conduct thus described.

192 That interpretation is corroborated by the statement of reasons in the Polypropylene Decision. Referring to elements of the infringement that it characterised, in point 81, as a single continuing 'agreement', the Commission indicated, *inter alia*, at point 83, that 'The conclusion that there is one continuing agreement is no altered by the fact that some producers inevitably were not present at every meeting.' It also stated that 'All the undertakings to which this Decision is addressed took part in the conception of the overall plans and in detailed discussions and their degree of responsibility is not affected by reason of their absence on occasion from a particular session (or in the case of Shell, from all plenary sessions)'.

193 The conception on which the Polypropylene Decision is founded is expressed particularly clearly in the same point 83, when the Commission indicates that 'The essence of the present case is the combination over a long period of the producers towards a common end', and that 'each participant must take responsibility not only for its own direct role but also for the operation of the agreement as a whole. The degree of involvement of each producer is not therefore fixed according to the period for which its pricing instructions happened to be available but for the whole of the period during which it adhered to the common enterprise'.

194 In the particular cases of Anic and Rhône-Poulenc SA, which had left the polypropylene sector before the date on which the Commission carried out its investigations, the latter pointed out, at point 83, that 'Their attendance at meetings and their participation in the volume target and quota schemes can however be established from the documentary evidence. The agreement must be viewed as a whole and their involvement is established even if no price instructions from them were found.'

195 It must be inferred from the foregoing that the Polypropylene Decision should be interpreted as attributing to Anic responsibility for the infringement as a whole, including the elements in which it did not participate directly.

196 Secondly, it must be held that the Court of First Instance accepted that same interpretation of the Polypropylene Decision at several points in the contested judgment and, essentially in point 1, first indent, of the operative part, where it annulled the Polypropylene Decision in so far as it held that Anic had taken part in the infringement before the end of 1978 or the beginning of 1979 and after the end of October 1982. That formulation indicates, by implication, that according to the Court of First Instance, Anic was responsible for a single infringement throughout the period of its participation.

197 That same point of view is set out explicitly in paragraphs 203 and 204 of the contested judgment, in which the Court of First Instance pointed out that, in view of their identical purpose, the various concerted practices observed and the various agreements concluded formed part of systems of regular meetings, target-price fixing and quota-fixing, and stated that 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. The Court of First Instance therefore indicated that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements, and considered that Anic had taken part in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.

198 It follows from those paragraphs of the contested judgment that Anic, in the same way as the other undertakings involved, had to be considered a co-perpetrator of a single infringement which manifested itself in a pattern of unlawful conduct forming an integrated set of schemes, not several forms of conduct to be considered in isolation.

199 However, the Court of First Instance departed from that interpretation at other points of the contested judgment, in particular in point 1, second and third indents, of the operative part where it annulled Article 1 of the Polypropylene Decision in so far as it held that Anic had taken part in the system of regular meetings of polypropylene producers, the price initiatives and the restriction of monthly sales by reference to a previous period after mid-1982 and that it had taken part in measures designed to facilitate the implementation of the price initiatives for the entire duration of its participation in the infringement.

200 It follows from the formulation chosen that the Polypropylene Decision was annulled in so far as it attributed to Anic responsibility for certain conduct on the ground that the Commission had not demonstrated Anic's participation in that conduct.

201 That analysis is confirmed by certain paragraphs in the contested judgment. Having held, at paragraph 95, that Anic's regular participation in the meetings of polypropylene producers had been established only until mid-1982, the Court of First Instance concluded, at paragraphs 100 and 115, that the Commission had not proved to the requisite legal standard that Anic had participated in the regular meetings and price initiatives after mid-1982. Similarly, at paragraphs 122 to 127, the Court of First Instance considered that Anic's participation in the system of 'account management' and other measures designed to facilitate the implementation of the price initiatives had not been established to the requisite legal standard, on the ground that the Commission had not shown that Anic had participated in the meetings during which that set of measures had been adopted.

202 It must therefore be held that the contested judgment does in fact contain a contradiction. On the one hand, the Court of First Instance held that Anic had taken part with other undertakings until the end of October 1982 in a single infringement, involving systems of regular meetings, target-price and quota fixing, all with the same economic objective in common, namely to distort the normal movement of prices on the polypropylene market. On the other hand, it excluded Anic's responsibility, either in part of the period during which it had participated in the infringement, or in that entire period, for lines of conduct which nevertheless constituted specific manifestations of that single infringement, on the ground that it had not been proved that Anic had taken part in those lines of conduct or that it had participated in the meetings during which it had been decided to follow those lines of conduct, without examining whether its responsibility for those specific lines of conduct could ensue from its participation in the infringement as a whole.

203 Thirdly, it must be borne in mind that it follows from paragraphs 81 to 90 of this judgment that an undertaking which has participated in a single infringement, such as in this case, by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 85(1) of the Treaty and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement. That is the case where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk. Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.

204 From the interpretation of the Polypropylene Decision arrived at by the Court of Justice, it follows that the Decision does not infringe Article 85(1) of the Treaty,

the personal nature of responsibility for infringements of that provision, the applicable rules of evidence or the rights of the defence.

205 Fourthly, contrary to what was held by the Court of First Instance in point 1, second and third indents, of the operative part of the contested judgment and in the grounds of the judgment referred to in paragraph 201 above, it must be held that the Commission established to the requisite legal standard Anic's participation in the system of regular meetings of polypropylene producers, in the price initiatives and in the restriction of monthly sales by reference to a previous period after mid-1982, and in measures designed to facilitate the implementation of the price initiatives for the entire period of its participation in the infringement.

206 On the one hand, in the case of Anic's participation in those elements of the infringement after mid-1982, the finding of fact by the Court of First Instance at paragraph 176 of the contested judgment to the effect that Anic took part in October 1982 in negotiations with a view to fixing quotas and that it thus intended to contribute to the infringement as a whole, is such as to entail its responsibility for the conduct planned or followed by the other undertakings and forming part of those elements of the infringement. Anic was perfectly aware of all those elements by virtue of its participation in the regular meetings of polypropylene producers during a period of several years and must have assumed that they would continue after mid-1982.

207 With regard, secondly, to the measures designed to facilitate the implementation of the price initiatives, it need merely be held that the various forms of conduct referred to in point 27 of the Polypropylene Decision and examined by the Court of First Instance in paragraphs 116 to 127 of the contested judgment were all secondary to the price initiatives, in that they sought to create conditions favourable to the achievement of the price objectives fixed by the polypropylene producers. It must be held that, since Anic participated for several years in those price initiatives, it could reasonably have foreseen that the participating undertakings would try to take those initiatives forward by various means and was prepared to accept that eventuality. Therefore, even if it has not been proved that Anic actually participated in the adoption or furtherance of those measures,

it is nevertheless responsible for the actual conduct followed, in that context by the other undertakings as part of a single infringement in which it participated and to which it contributed.

208 It follows that the Commission's pleas are founded and that point 1, second and third indents, of the operative part of the contested judgment must be set aside.

209 According to the first paragraph of Article 54 of the EC Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may then itself give judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

210 Since the state of the proceedings so permits, the Court of Justice will itself give final judgment in the matter.

Merits of the application for annulment

Alleged non-existence of the Polypropylene Decision

211 Here it must be ascertained, first, whether, as Anic contends, the Court of Justice should examine of its own motion the question whether the Polypropylene Decision is non-existent.

212 Any such obligation for the Court to raise of its own motion public policy issues concerning the regularity of the procedure by which the Polypropylene Decision

was adopted could arise only in the light of the factual evidence adduced before the Court.

213 No evidence casting doubt on the existence of the Polypropylene Decision has been adduced before the Court in these proceedings, so that there is no ground for it to examine this question of its own motion.

Pleas in law seeking annulment of the Polypropylene Decision

214 Secondly, it follows from the foregoing that the Commission rightly considered that Anic had participated in an agreement and concerted practice consisting of systems of regular meetings of polypropylene producers, price initiatives and measures designed to facilitate the implementation of the price initiatives, target tonnages and quotas between the end of 1978 or the beginning of 1979 and the end of October 1982.

215 Anic's action against the Polypropylene Decision must therefore be dismissed, except in so far as results from point 1, first indent, of the operative part of the contested judgment, which has not been challenged in this appeal.

Amount of the fine

216 The Commission states that it would appear from other judgments delivered in cases concerning the Polypropylene Decision (Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087 and Case T-4/89 *BASF* v *Commission* [1991] ECR II-1523) that, in reducing the fine by 40% from ECU 750 000 to ECU 450 000,

the Court of First Instance applied the principle of proportionality, taking into account the lesser duration of the infringement, adjusted to take into consideration the gravity factor. In Anic's case, the duration of the infringement was determined to be 62 months in the Polypropylene Decision, as against 46 months in the contested judgment, which ought to have led to a reduction in the fine of 25%. There remains, therefore, a reduction of 15% associated with point 1, second and third indents, of the operative part of the contested judgment, which should be set aside in so far as the determinations in those indents should also be set aside. This only leaves the matter of determining the amount of the fine on the basis of Anic's participation in the infringement, since the Commission has already taken into consideration the lesser or greater degree of gravity of the responsibility of the undertakings, by imposing more severe fines on the four undertakings which bore most responsibility for the anti-competitive scheme.

217 Anic states that, having reevaluated its participation in the infringement from the point of view of duration and gravity, the Court of First Instance considered that the fine was not proportionate to its actual responsibility and therefore reduced the level of the fine. In the great majority of the legal systems of the Member States, the role played by each participant in an infringement is taken into consideration, at least for the purposes of determining the severity of the penalty to be imposed. The criterion of the duration of the infringement is no more significant than that of its gravity and the latter criterion should be assessed in relation to the conduct of each undertaking and not only in relation to the infringement as such.

218 The Court observes here that, by reason of the partial setting aside of the contested judgment and pursuant to Article 17 of Regulation No 17, it has unlimited jurisdiction within the meaning of Article 172 of the EC Treaty (now Article 229 EC).

219 The Court upholds the assessments of the Court of First Instance concerning the general level of fines imposed on the undertakings to whom the Polypropylene Decision was addressed and the criteria applied in weighting the fines imposed on each undertaking, as set out in the contested judgment.

220 The reduction of Anic's fine made by the Court of First Instance is justified inasmuch as it relates to the lesser duration of the infringement, which the Court of First Instance considered had been proved between the end of 1978 or the beginning of 1979 and after the end of October 1982, and not from about November 1977 until a date in late 1982 or early 1983, as was found in the Polypropylene Decision.

221 However, the decision of the Court of First Instance to reduce the amount of Anic's fine was made on the basis of incorrect premisses, in so far as it relates to Anic's participation in the system of regular meetings of polypropylene producers, price initiatives and the restriction of monthly sales by reference to a previous period between mid-1982 to the end of October 1982, and to its participation in measures designed to facilitate the implementation of the price initiatives for the entire duration of its participation in the infringement, which the Court of First Instance wrongly considered had not been proved.

222 Nevertheless, in view of the fact that Anic's participation in those elements of the infringement was marginal, the Court, exercising its unlimited jurisdiction, considers it appropriate to confirm the reduction in the amount of the fine decided upon by the Court of First Instance.

223 Under Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), every reference in a legal instrument to the ecu, as referred to in Article 109g of the EC Treaty (now Article 118 EC) and as defined in Council Regulation (EC) No 3320/94 of 22 December 1994 on the consolidation of the existing Community legislation on the definition of the ecu following the entry into force of the Treaty on European Union (OJ 1994 L 350, p. 27), is to be replaced by a reference to the euro at a rate of one euro to one ecu. References in a legal instrument to the ecu without such a definition shall be presumed to be references to the ecu as referred to in Article 109g of the EC Treaty and as defined in Regulation No 3320/94, such presumption being rebuttable taking into account the intentions of the parties.

224 In the present case, the Commission, in the Polypropylene Decision, like the Court of First Instance in the contested judgment, expressed the amount of the fine imposed on Anic in ecu and in Italian lire, using the rate of exchange of ITL 1 471.59 per Ecu, applicable on the day on which that decision was adopted (see OJ 1986 C 95, p. 1). It follows that the Commission intended to indicate definitively the countervalue in national currency of the amount expressed in ecu. In those circumstances, the presumption set out in Article 2 of Regulation No 1103/97 must be set aside and the fine fixed in Italian lire, reducing by 40% the amount indicated in Article 3 of the Polypropylene Decision and confirming the amount indicated by the Court of First Instance at point 2 of the operative part of the contested judgment.

Costs

225 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.

226 Since Anic's action against the Polypropylene Decision was partially successful, it must be held that each party must bear its own costs relating to the proceedings before the Court of First Instance. Point 4 of the operative part of the contested decision must therefore be upheld.

227 Since Anic's pleas have failed in the appeal, it must be ordered to pay the costs relating to these proceedings.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Annuls point 1, second and third indents, of the operative part of the judgment of the Court of First Instance of 17 December 1991 in Case T-6/89 *Enichem Anic* v *Commission*;

2. Dismisses Anic's action against Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene), except to the extent that results from point 1, first indent, of the operative part of that judgment;

3. Sets the amount of the fine imposed on Anic Partecipazioni SpA, formerly Anic SpA, then Enichem Anic SpA, in Article 3 of Decision 86/398/EEC at the sum of ITL 662 215 500;

4. Dismisses the cross-appeal by Anic Partecipazioni SpA, formerly Anic SpA, then Enichem Anic SpA;

5. **Orders each party to bear its own costs relating to the proceedings before the Court of First Instance;**

6. **Orders Anic Partecipazioni SpA, formerly Anic SpA, then Enichem Anic SpA, to pay the costs relating to these proceedings.**

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