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

Contents

* Language of the case: English.

In Case T-13/89,

Imperial Chemical Industries plc, a company incorporated under English law, having its registered office at Imperial Chemical House, Millbank, London (United Kingdom), represented by David Vaughan QC, of the Inner Temple, Victor O. White and Richard J. Coles, Solicitors, and by D. Anderson, Barrister, with an address for service in Luxembourg at the Chambers of Maître L. H. Dupong, 14a Rue des Bains,

applicant,

v

Commission of the European Communities, represented by Anthony McClellan, Principal Legal Adviser, and Karen Banks, a member of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of R. Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

defendant,

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

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

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

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

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

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

gives the following

Judgment

Facts and background to the action

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

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

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

Imperial Chemical Industries PLC was one of the producers supplying the polypropylene market in 1977 and is one of the 'big four'. Its market share was between about 10.6 and 11.4%.

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

— ATO Chimie SA, now Atochem ('ATO'),

— BASF AG ('BASF'),

— DSM NV ('DSM'),

— Hercules Chemicals NV ('Hercules'),

— Hoechst AG ('Hoechst'),

— Chemische Werke Hüls ('Hüls'),

— Imperial Chemical Industries PLC ('ICI'),

— Montepolimeri SpA, now Montedipe ('Monte'),

— Shell International Chemical Company Limited ('Shell'),

— Solvay et Cie SA ('Solvay'),

— BP Chimie ('BP').

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

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

— Amoco,

— Chemie Linz AG ('Linz'),

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

— Petrofina SA ('Petrofina'),

— Enichem Anic SpA ('Anic').

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

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

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

commercial services of the undertakings. The lawyers of a number of undertakings refused to accept those conditions and returned the documentation before the oral hearing.

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

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

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

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

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

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

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

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2

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

Article 3

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

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

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

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

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

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

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

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

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

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

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

ii(xi) Petrofina SA, a fine of 600 000 ECU, or Bfrs 26 306 100;

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

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

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

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

Article 4

...

Article 5

...'

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

Procedure

7 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 6 August 1986, the applicant brought this action seeking annulment of the Decision. Thirteen of the fourteen other addressees of the Decision have also brought actions for its annulment (Cases T-1/89 to T-4/89, T-6/89 to T-12/89, T-14/89 and T-15/89).

8 By a separate document lodged on the same day, ICI requested the Court of Justice, pursuant to Article 91 of the Rules of Procedure of the Court of Justice, to order the Commission to produce the documents which it had refused to disclose to it. That application was dismissed by order of the Court of Justice of 11 December 1986 (Case 212/86 R *ICI* v *Commission*, not published in the Reports of Cases before the Court).

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

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

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

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

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

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

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

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

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

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

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

Forms of order sought by the parties

30 ICI claims that the Court should:

(i) annul the Commission's decision of 23 April 1986 (IV/31.149 — Polypropylene) in so far as it concerns ICI;

(ii) cancel or reduce the fine imposed on ICI;

(iii) if ICI were obliged to pay the fine at the present stage without being able to suspend payment, order the Commission to repay to ICI the fine paid or the appropriate proportion thereof, together with interest at the rate of 1% over the lending rate set by the bank in the United Kingdom referred to in Article 4 of the decision;

(iv) order the Commission to pay ICI's costs.

The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

Substance

31 The Tribunal considers that it is necessary to examine, *first*, the applicant's grounds of challenge relating to a breach of the rights of the defence allegedly committed by the Commission in so far as it (1) failed to disclose to the applicant documents on which it based the Decision, (2) did not communicate to the applicant the hearing officer's report and (3) made a premature judgment based on preconceived ideas; *secondly*, the grounds of challenge relating to proof of the infringement concerning (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty whereby it is contended that the Commission (A) did not correctly define the infringement, (B) did not correctly assess the anti-competitive object or effect or (C) did not correctly assess how trade between Member States was affected; *thirdly*, the grounds of challenge relating to the reasoning of the Decision; and, *fourthly*, the grounds of challenge relating to the determination of the fine, which is alleged to be (1) partially time-barred, (2) disproportionate to the duration of the alleged infringement and (3) disproportionate to the gravity of the alleged infringement.

The rights of the defence

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

32 The applicant contends that when the Commission notified it of the statement of objections it did not send it 14 documents or sets of documents on which it based the Decision and that the Commission thus made it impossible for it to explain their contents. The documents concerned consist of documents obtained at the premises of ATO relating to the exchange of information on deliveries by the French producers and the operation of quotas on the French market in 1979 (Decision, point 15(h)), a document allegedly found at the premises of Solvay dated 6 December 1977 (Decision, point 16, penultimate paragraph), two sets of minutes of Shell internal meetings held on 5 July and 12 September 1979 (Decision, points 29 and 31), a Solvay internal document comparing 'achieved prices' for October and November 1980 with 'list prices' for January 1981 (Decision, point 32), a reminder sent by Solvay to its sales offices on 17 July 1981 (Decision, point 35), a Shell document relating to the fixing of a price target on 1 November 1981 (Decision, point 36, first paragraph), a Hercules note showing that in December 1981 the target price was revised downwards (Decision, point 36, second paragraph), an internal Hoechst note dated 6 June 1983 fixing a minimum price from 1 July of that year and a Linz telex of 8 June 1983 (Decision, point 49), two Shell documents headed 'PP W. Europe — Pricing' and 'Market quality report' (Decision, point 49), an internal ATO note dated 28 September 1983 (Decision, point 51) and, finally, a planning document relating to the first quarter of 1983 found at the premises of Shell (Decision, point 63, third paragraph, and point 64).

33 The Commission states that the documents mentioned in points 15, 32 or 35 of the Decision were made available to the applicant during the access-to-file procedure. Linz's telex of 8 June 1983 was disclosed as Appendix Linz H1 to the letter of 29 March 1985. In a very limited number of cases, it considered that the documents contained sensitive business information of a particular producer and consequently did not allow access by other producers. It concludes that none of the documents cited by the applicant was in any event essential to the case since those documents either did not concern ICI or merely confirmed other documents. Indeed, the applicant has not attempted to explain how its rights of defence could have been affected by the non-disclosure of the documents in question.

34 The Court notes that, according to the case-law of the Court of Justice, the important point is not the documents as such but the conclusions which the Commission has drawn from them, and if those documents were not mentioned in the statement of objections, the undertaking concerned was entitled to take the view that they were of no importance for the purposes of the case. By not informing an undertaking that certain documents would be used in the Decision, the Commission prevented it from putting forward at the appropriate time its view of the probative value of such documents. It follows that those documents cannot be regarded as admissible evidence as far as it is concerned (judgment of the Court of Justice in Case 107/82 *AEG-Telefunken AG* v *Commission* [1983] ECR 3151, paragraph 27, and see most recently the judgment of 3 July 1991 in Case C-62/86 *AKZO Chemie* v *Commission* [1991] ECR I-3359, at paragraph 21).

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

36 It follows that, of the documents mentioned by the applicant, only Linz's telex dated 8 June 1983 may be used as evidence against the applicant, since it was mentioned in the letter of 29 March 1985, of which it also forms Appendix Linz H1. The other documents referred to by the applicant may not be considered to be evidence admissible against it in the present case.

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

2. *Non-disclosure of the hearing officer's report*

38 The applicant contends that the hearing officer's report was not made available to it despite the request to this effect which it made to the Commission. It points out that it requested the Court of Justice, under Article 91 of the Rules of Procedure, to order the Commission to produce this report, in which, according to the applicant, the hearing officer acknowledged the existence of intense competition on the market. It is aware that this application was dismissed by an order of the Court of Justice of 11 December 1986 (Case 212/86 R *ICI* v *Commission*, not published in the Reports of Cases before the Court, paragraphs 5 to 8) but nevertheless requests the Court of First Instance to order the production of that report or at least to take note of it owing to the weaknesses of the Commission's argument as to the substance.

39 The Commission relies on the aforementioned order which the Court of Justice made in Case 212/86 R (paragraph 7) as authority for refusing to disclose the hearing officer's report. It considers that there is no reason to reverse that order.

40 This Court holds that the rights of the defence do not require that undertakings involved in proceedings under Article 85(1) of the EEC Treaty should be able to comment on the hearing officer's report, which is a purely internal Commission document. On this question the Court of Justice has held that the hearing officer's report is in the nature of an opinion for the Commission, which is in no way bound to follow it, and that the report does not therefore constitute a decisive factor which must be taken into account by the Community court in performing its judicial review (order of 11 December 1986 in Case 212/86 R, cited above, paragraphs 5 to 8). Respect for the rights of the defence is ensured to the requisite legal standard if the various bodies involved in drawing up the final decision have been properly informed of the arguments put forward by the undertakings in response to the objections notified to them by the Commission and to the evidence presented by the Commission in support of those objections (judgment of the Court of Justice in Case 322/81 *Nederlandsche Banden-Industrie-Michelin NV* v *Commission* [1983] ECR 3461, paragraph 7 at p. 3498).

41 It is to be noted in this regard that the purpose of the hearing officer's report is neither to supplement or correct the undertakings' arguments nor to set forth fresh objections or adduce fresh evidence against the undertakings but to express the

opinion of a Commission official with a view to the adoption of a decision by the Commission. It follows, first, that respect for the rights of the defence does not give the undertakings the right to demand disclosure of the hearing officer's report so as to be able to comment upon it (see the judgment of the Court of Justice in Joined Cases 43 and 63/82 *Vereniging ter Bevordering van het Vlaamse Boekwezen, VBVB, and Vereniging ter Bevordering van de Belangen des Boekhandels, VBBB* v *Commission* [1984] ECR 19, paragraph 25 at p. 58) and, secondly, that there is no reason for this Court to order the Commission to produce that report.

42 Consequently, this ground of challenge must be dismissed.

3. *Premature judgment and preconceived views*

43 The applicant contends that the Commission failed in its duties imposed on it by the case-law of the Court of Justice and its own stated views (judgment of the Court of Justice in Case 86/82 *Hasselblad (GB) Limited* v *Commission* [1984] ECR 883, Opinion at pages 914 and 915, and paragraph 45 of the Commission's *Fifteenth Report on Competition Policy*) in not approaching the matter with an open mind and in prejudging the issue, although it moderated its position to a certain extent following the submission of ICI's observations and the hearing of ICI. This premature judgment led the Commission to conclude that the infringements were of the 'utmost gravity', to impose such a large fine and, despite the contrary view taken by the hearing officer, to refuse to recognize the existence of intense competition on the market during the period in question and the total lack of effect on the market, particularly on prices, of any arrangement made between the producers. Thus, the Commission showed that it was determined not to have its preconceived views affected by the detailed evidence, studies and experts' reports.

44 The Commission contends that it cannot be accused of having prejudged the issue since the position taken in the Decision is justified and was reached after taking account of the arguments of the parties. Thus, in the present case, the Commission was convinced by the large body of evidence which cannot be reconciled with the applicant's argument that there was 'intense competition'.

45 The Court holds that the question whether the Commission came to a premature judgment based on preconceived ideas is indissociable from the question whether the findings of fact made by the Commission in the Decision are supported by the evidence which it has produced. Since this is a question of substance related to proof of the infringement, it must be examined at a later stage together with the other questions relating to proof of the infringement.

Proof of the infringement

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

47 It is therefore necessary to verify first of all whether the Commission has established to the requisite legal standard its findings of fact relating to (A) the floor-price agreement and the meeting of the European Association for Textile Polyolefins (EATP) on 22 November 1977, (B) the system of regular meetings, (C) the price initiatives, (D) the measures designed to facilitate the implementation of the price initiatives and (E) the fixing of target tonnages and quotas, taking into account (a) the contested decision and (b) the arguments of the parties, before going on to (c) an assessment of them; it will then be necessary to review the application of Article 85(1) of the EEC Treaty to those facts.

1. *The findings of fact*

A. The floor-price agreement and the EATP meeting of 22 November 1977

(a) The contested decision

48 The Decision (point 16, first, second and third paragraphs; see also point 67, first paragraph) states that during 1977, after seven new polypropylene producers came on stream in western Europe, the established producers initiated discussions with a

view to avoiding a substantial drop in price levels and attendant losses. As part of those discussions the major producers, Monte, Hoechst, ICI and Shell, initiated a 'floor-price agreement' which was to be in operation by 1 August 1977. The original arrangement did not involve volume control but if it proved successful tonnage restrictions were envisaged for 1978. That agreement was to run for an initial period of four months and details of it were communicated to other producers, including Hercules, whose marketing director noted as the basis for floor prices for the major grades for each Member State a raffia grade market price of DM 1.25/kg.

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

50 According to the Decision (point 17, first and second paragraphs), it was at about this time that the system of regular meetings of the polypropylene producers began, and ICI claims that meetings were not held until December 1977 but has admitted that contact was occurring between producers before that date, probably by telephone and on an *ad hoc* basis. Shell says that its executives 'may have had discussions concerning price with Monte in or about November 1977 and Monte may have suggested the possibility of increasing prices and may have sought (Shell's) views on its reactions to any increase'. In the third paragraph of point 17 of the Decision it is stated that while there is no direct evidence of any group meetings being held to fix prices before December 1977, the producers were already informing meetings of a trade association of customers, the EATP, held in May and November of 1977, of the perceived need for common action to be taken

to improve price levels. In May 1977 Hercules had stressed that the 'traditional industry leaders' should take the initiative, while Hoechst had indicated its belief that prices needed to rise by 30 to 40%.

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

(b) Arguments of the parties

52 The applicant maintains that although producers did have contacts by telephone during 1977, they did not result in a real agreement since if that had been the case the parties would have attempted to implement it. In this case, however, those contacts had no effect on the market since the floor price was not reached. The document on which the Commission relies in this regard, namely a handwritten note made by Hercules's marketing director (main statement of objections, Appendix 2) is ambiguous.

53 It also points out that the EATP meetings could not in any way have formed the framework for the implementation of that agreement, since those meetings took place at the request of industrial customers who wished to be informed in particular about foreseeable price moves, and it is therefore absurd to regard them as a forum for enabling the producers to present a united front to their customers.

54 The Commission states that its finding that a floor-price agreement had been made among the 'big four' as early as 1977 is based on a handwritten note of Hercules's marketing director. The existence of that agreement is borne out by several documents and items of evidence: first, by Shell's and ICI's replies to the statement of objections, in which they admitted that the producers were in contact with another in order to decide how to stop the price slide and, in ICI's case, that minimum price levels 'may have been suggested'; secondly, by Monte's announcement in ECN of an increase in prices bringing them to a level close to the floor price (main statement of objections, Appendix 3); and, thirdly, by the support simultaneously given to that price increase by the three other 'majors' and six other producers at the EATP meeting on 22 November 1977 (main statement of objections, Appendix 6).

(c) Assessment by the Court

55 The question is, first, whether the applicant supported the floor-price agreement which the Commission alleges was made in mid-1977 and, secondly, whether the applicant participated in the fixing of a target price of DM 1.30/kg for 1 December 1977.

56 As regards the first question, the Court notes that in its reply to the statement of objections the applicant admitted that in mid-1977

'the producers were faced with the inevitable prospect of heavy losses. In the light of this, producers may well have made contact with each other to see what could be done to halt the slide in prices and suggested a price level below which prices should not be allowed to fall if the burden of losses was to be stemmed. This would almost certainly have been done by telephone discussions between producers since there were not then in existence the various meetings of producers of the kind that started at the end of 1977 . . . '.

The Court also notes that the applicant denies that those discussions resulted in an agreement confined to the 'big four':

'the ICI employees are certain that there was no agreement or arrangement between the four named producers in mid-1977 to the exclusion of the other producers. If there had been discussions on "floor prices" at that time as the note [of Hercules] appears to suggest then it is most unlikely that any such discussions would have been confined only to the four main producers but would have also included most of the polypropylene producers'.

57 It is in the light of those circumstances that the note written by Hercules' marketing director (main statement of objections, Appendix 2), in which the Commission sees the expression of a common purpose between the 'big four', must be examined. That note reads as follows:

'Major producers have made agreement (Mont., Hoechst, Shell, ICI) 1. No tonnage control; 2. System floor prices — DOM less for importers; 3. Floor prices from July 1. definitely Aug. 1st when present contracts expire; 4. Importers restrict to 20% for 1000 tonnes; 5. Floor prices for 4 month period only — alternative is for existing; 6. Com.[panies] to meet Oct. to review progress; 7. Subject [of the] scheme working — Tonnage restrictions would operate next year.' [There then follows a list of prices for three grades of polypropylene in four national currencies, including DM 1.25/kg for raffia.]

58 Given that the applicant does not specifically deny that an agreement on floor prices was made but only that the agreement was confined to the 'big four', that it adduces no evidence to shake the conclusions which the Commission draws from the note of Hercules's marketing director and that it admits that at that time the producers were discussing price levels below which prices should not fall, the Court finds that a common purpose emerged between a number of producers, including the applicant, concerning the fixing of floor prices, without there being any need to establish whether producers other than the 'big four' agreed to those prices.

59 The fact that the agreed floor prices could not be achieved does not tell against the applicant's agreement to those prices since the Court considers that, even if that fact is assumed to be established, it would at the most tend to show that the floor prices were not implemented. However, far from asserting that the floor prices were achieved, the Decision (point 16, last paragraph) states that the price of raffia had fallen to around DM 1.00/kg in November 1977.

60 The second question to be considered is whether, in the light of the contacts between certain producers during 1977 and the fixing of floor prices by some of them, the statements made by the applicant and other producers at the EATP meeting on 22 November 1977 constitute the expression of a common purpose between them concerning a target price of DM 1.30/kg for 1 December 1977.

61 The Court considers that this is indeed so. At the EATP meeting on 27 May 1977, the applicant stated, after Hercules had suggested that the traditional industry 'leaders' should bring some order out of the chaos on the market, that ICI 'would give every support to such a move providing through all this that they could see a reasonable return for themselves in the future' (main statement of objections, Appendix 5); in mid-1977, a floor price of DM 1.25/kg was fixed by at least the 'big four' and Hercules was informed about it; at the EATP meeting on 22 November 1977, the applicant stated that:

'We will seek every opportunity to increase our polymer prices and do earnestly request your support in this. The announcement by MONTEDISON last Friday in *European Chemical News* shows that there is an upward movement in prices already and we support MONTEDISON in this. I do not have specific details of what we propose but we will be informing our customers very shortly. Our aim longer term is for DM 1, 60 per kilo' (main statement of objections, Appendix 6).

At the meeting on 26 May 1978, the producers reviewed the results of the preceding meeting and the applicant stated:

'ICI is very disappointed that the price levels and stability discussed in Paris [on 22 November 1977] have not been achieved, because I think they would have been beneficial to the industry as a whole'(main statement of objections, Appendix 7).

62 The organized attendance of customers at the various EATP meetings does not weaken the foregoing findings, since the purpose of the statements made at them was to convince customers of the need to see prices rising and of the inevitability of the increases announced.

63 It follows that the Commission has established to the requisite legal standard, first, that the applicant was one of the producers which arrived at a common purpose concerning floor prices in mid-1977 and, secondly, that in furtherance of that purpose it made statements at the EATP meeting on 22 November 1977 which also constituted the expression of a common purpose between the applicant and other producers regarding the fixing of a target price of DM 1.30/kg for 1 December 1977.

B. The system of regular meetings

(a) The contested decision

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

65 According to the Decision (point 18, first paragraph), at least six meetings were held during 1978 between senior managers responsible for the overall direction of the polypropylene business of some of the producers ('bosses'). This system soon evolved to include a lower tier of meetings attended by managers possessing more detailed marketing knowledge ('experts') (ICI's reply to the request for information under Article 11 of Regulation No 17, main statement of objections, Appendix 8). The Decision asserts that the applicant was a regular participant at those meetings until September 1983 and that it took over the chairmanship of them from the middle of 1982, a responsibility which it accepted on condition that more determined efforts were made by the producers to increase prices before the end of the year (point 18, third paragraph, and point 19, second paragraph).

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

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

(b) Arguments of the parties

68 The applicant does not deny having participated in the meetings which the Commission alleges took place but considers that the Commission exaggerates their importance. It states that the meetings were few in number and irregular and that the evidentiary value of the notes of the meetings is questionable because the notes were supplemented after the meetings by personal remarks and comparisons.

69 As regards the purpose of the meetings, it emphasizes that the meetings rarely ended in real agreement and that, in any event, the commitment necessary to implement such an agreement was lacking. Furthermore, the agreements were not systematic and the initiatives regarding prices and sales volumes were haphazard. Finally, the applicant points out that the discussions were also concerned with matters other than exchanges of views on prices and volumes, such as the analysis of the market through the Fides data exchange system, which the Commission does not mention.

70 The applicant maintains that the Commission overestimates the role which it played in assuming the chairmanship of those meetings after mid-1982 since its apparently active role was only a purely administrative function involving no particular responsibility. It further contends that the Commission likewise exaggerates the importance of some meetings between the 'big four'.

71 The Commission states that ICI's participation in the meetings of the cartel is clear from its reply to the request for information (main statement of objections, Appendix 8), which sets out in Annex 1 all the 'bosses" and 'experts" meetings which ICI attended (in total 54 meetings were held between January 1980 and September 1983). To those meetings it adds the meeting of 26 and 27 September 1979 in which ICI admits, in the body of its reply, having participated and a meeting of 10 March 1982 for which the Commission has a note written by Hercules (main statement of objections, Appendix 23) and claims to have a note written by ICI.

72 It states that the notes of the meetings which were held from 13 May to 2 December 1982 (main statement of objections, Appendices 24 to 26 and 28 to 33) show that the meetings were a standing forum for communication and agreement among the producers, that they were organized well in advance, that the producers had to abide by the measures which had been agreed and that they were conducted as an ongoing system.

73 It asserts that the notes of the meetings of 20 August, 6 October, 2 November and 21 December 1982 and an internal ICI note (main statement of objections, Appendices 28, 31, 32, 34 and 35) prove the leading played by ICI during those meetings and in the cartel.

74 Referring to points 67 and 68 of the Decision, the Commission considers that, as a member of the 'club' of the 'big four', ICI bears particular responsibility in the infringements committed. Its role in that capacity is clear from numerous documents (main statement of objections, Appendices 8, 9, 19, 64, 87, 94 to 100) which mostly report the discussions between the 'big four'.

(c) Assessment by the Court

75 The Court notes that the applicant does not deny having participated in the meetings which the Commission, in the Decision, alleges were held. However, the applicant denies the significance and purpose of those meetings.

76 In this regard, the Court considers that the Commission was fully entitled to take the view, based on the information which was provided by the applicant in its reply to the request for information (main statement of objections, Appendix 8) and was borne out by numerous meeting notes (see the main statement of objections, Appendices 12, 17 and 23 to 34), that the purpose of the meetings was, in particular, to fix target prices and sales volumes. Indeed, that reply contains the following passages:

'Generally speaking however, the concept of recommending "Target Prices" was developed during the early meetings which took place in 1978'; '"Target prices" for the basic grade of each principal category of polypropylene as proposed by producers from time to time since 1 January 1979 are set forth in Schedule . . . ';

and

'A number of proposals for the volume of individual producers were discussed at meetings.'

77 As far as the evidentiary value of the meeting notes with regard to their purpose is concerned, it must be observed that the contents of those notes are confirmed by various documents, such as a number of tables relating to the sales volumes of the various producers — of which some were found on the applicant's premises — and price instructions broadly corresponding in their amount and date of entry into force to the target prices mentioned in those meeting notes. Similarly, the replies of the various producers to the requests for information addressed to them by the Commission bear out in the aggregate the contents of those notes.

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

79 As regards the addition to the notes of remarks and comparisons for the author's own use, it must be observed that those additions, if assumed to be proved, were necessarily made in continuation of the meetings and did not change the meaning of the notes. In particular, the comparisons made in some meeting notes, such as those reporting on meetings held from September to November 1982 (main statement of objections, Appendices 30 to 32), must, if they were added afterwards, have been based on figures provided by the other producers either during the meetings themselves or on the fringe of the meetings.

80 In addition, in explaining the organization of marketing 'experts" meetings as well as 'bosses" meetings from the end of 1978 or the beginning of 1979, ICI's reply to

the request for information reveals that the discussions about the fixing of target prices and sales volumes became increasingly concrete and precise, whereas in 1978 the 'bosses' had confined themselves to developing the actual concept of target prices.

81 Besides the passages set forth above, the following statement appears in ICI's reply to the request for information: 'Only "Bosses" and "Experts" meetings came to be held on a monthly basis'. The Commission was fully entitled to deduce from that reply, as well as from the identical nature and purpose of the meetings, that they were part of a system of regular meetings.

82 The particular role played by the applicant in the meetings as from August 1982 is apparent first of all from the note of the first meeting held under its chairmanship (main statement of objections, Appendix 28), which reads as follows:

'This was the first bosses' meeting under the new arrangements. It was stressed that acceptance of responsibility for leading the group was conditional on seeing real progress on prices before the end of the year. The ground rules were:

(a) Apart from the well known exceptions all companies should participate.

(b) The level of participation had to be right i. e. individuals had to be capable of committing their companies.

(c) Companies had to give the highest priority to making progress by making available the right amount of effort/time.

(d) Accept + agree a control system on market shares to be ready for use by the beginning of 1983.

In order to overcome the current lack of trust and confidence it was stressed that companies should only commit themselves when they knew they could deliver. If after agreeing to a particular course of action a company found the consequences too onerous they should at least wait to the next meeting/call for an extraordinary meeting before abandoning the planned action.'

83 As chairman of the meetings, the applicant took numerous initiatives, particularly concerning the fixing of sales volume targets. This was the case in particular in December 1982 when the applicant entered into bilateral discussions with various producers (main statement of objections, Appendices 74 to 84) with a view to fixing quotas for 1983 and on that basis produced a synthesis (main statement of

objections, Appendices 85 to 87) and proposed quota schemes (main statement of objections, Appendices 70 and 84).

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

85 After December 1982, those meetings of the 'big four' took place the day before the 'bosses" meetings, and their purpose was to determine the steps which they could take together in order to bring about a rise in prices, as is shown by the summary note prepared by an ICI employee in order to inform one of his colleagues about what had transpired at a pre-meeting on 19 May 1983 which the 'big four' had attended (main statement of objections, Appendix 101). That note mentions a proposal to be submitted to the 'bosses" meeting on 20 May. With regard to that note, ICI states in its reply to the request for information:

'A meeting of the "Big Four" which had taken place on 19 May 1983 immediately prior to a "Bosses" meeting held on 20 May. The "Big Four Pre-meeting" took place in Barcelona. [...] the outcome of the meeting was a proposal for a "Target Price" for raffia of DM 1.85/kg with effect from 1 July 1983.'

It is also to be observed that the note of the 'experts" meeting on 1 June 1983 (main statement of objections, Appendix 40) states:

'those present reaffirmed complete commitment to the 1.85 move to be achieved by 1 July. Shell was reported to have committed themselves to the move and would lead publicly in ECN'.

In the aforementioned summary note it is stated: 'Shell to lead — ECN article 2 weeks. ICI informed'.

86 It follows that the Commission has established to the requisite legal standard that the applicant participated in all the regular meetings of polypropylene producers which the Commission alleges were held between December 1977 and September 1983, that the purpose of those meetings was, in particular, to set price and sales volume targets, that the applicant chaired those meetings from August 1982 and that those meetings were part of a system.

C. The price initiatives

(a) The contested decision

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

88 With regard to the first of those price initiatives, the Commission (Decision, point 29) states that it has no detailed evidence of any meetings held or price initiatives undertaken in the first part of 1979. However, a note of a meeting held on 26 and 27 September 1979 shows that a price initiative had been planned based on a raffia grade price of DM 1.90/kg applicable from 1 July and DM 2.05/kg from 1 September. The Commission has price instructions from certain producers, including ICI, showing that those producers had given orders to their sales offices to apply this price level or its equivalent in national currencies from 1 September, in most cases before the planned price increase was announced in the trade press (Decision, point 30).

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

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

91 The Decision (point 33) then refers to ICI's participation in two meetings in January 1981, at which it was decided that a price increase, fixed in December 1980 for 1 February 1981, was required in two stages on the basis of DM 1.75/kg for raffia: the 1 February target was to remain at DM 1.75/kg and a target of DM 2.00/kg was to be introduced 'without exception' from 1 March. A table was drawn up in six national currencies of the target prices for six principal grades, to come into effect on 1 February and 1 March 1981.

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

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

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

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

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

96 The meeting of 13 May 1982 was followed by price instructions from ATO, BASF, Hoechst, Hercules, Hüls, ICI, Linz, Monte and Shell, corresponding, with a few insignificant exceptions, to the target prices set at the meeting (Decision, point 39, second paragraph). At the meeting on 9 June 1982, the producers were able to announce only modest increases.

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

98 It was at the meeting of 20 August that ICI took over the chairmanship of the meetings from Monte and this was the occasion on which it was sought to obtain from producers further expressions of 'commitment' to a significant increase of prices by the end of the year and agreement to a quota control system to be ready for use by the beginning of 1983. It was with this in view that a senior director from ICI's Petrochemicals and Plastics Division met each of the other producers in a series of visits. Those visits were the subject of a briefing note headed 'Object of visits' found at the premises of ICI, which sets out a number of questions to be put to the other producers as regards their commitment to the initiative to come into force on 1 September.

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

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

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

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

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

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

5 The Decision (point 49) states that after the meeting of 20 May 1983, ICI, DSM, BASF, Hoechst, Linz, Shell, Hercules, ATO, Petrofina and Solvay issued instructions to their sales offices to apply from 1 July a price table based on DM 1.85/kg for raffia. It goes on to state that only fragmented price instructions were obtained from ATO and Petrofina but these confirmed that these producers were implementing the new price levels, somewhat belatedly in the case of Petrofina and Solvay. The Decision concludes that, with the exception of Hüls, for which the

Commission found no price instructions for July 1983, all the producers which had attended the meetings or had promised support for the new price target of DM 1.85/kg are shown to have given instructions to implement the new price.

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

107 According to the Decision (point 50, last paragraph), the instructions obtained from the producers show that it was later decided to maintain the impetus of the September move with further steps based on raffia at DM 2.10/kg on 1 October, rising to DM 2.25/kg on 1 November. It is further stated (point 51, first paragraph) that BASF, Hoechst, Hüls, ICI, Linz, Monte and Solvay each sent instructions to their sales offices setting identical prices for October and November, with Hercules initially fixing slightly lower prices.

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

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

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

(b) Arguments of the parties

11 Whilst not disputing its participation in any particular price initiative, the applicant denies a number of contentions made by the Commission in the Decision concerning price instructions, the links between the price initiatives and the system of meetings and the movement in actual prices in relation to the target prices.

12 As regards the relationship between target prices and price instructions, the applicant considers that the Commission makes an artificial link between the 'targets' communicated to sales branches and the target prices which were sometimes determined during producer meetings. The Commission's contentions regarding the uniformity and simultaneity of the price instructions and the representative nature of the periods selected by the Commission to demonstrate that character were not supported by the facts and were disproved by a detailed analysis of the Commission's own tables, which shows that the Commission made selective use of the price instructions and sometimes referred to instructions issued prior to meetings.

13 In this connection, the applicant complains first of all that the Commission arbitrarily selected four months in the period from January 1982 to September 1983 in order to prove that the price instructions given by ICI matched those given by the other producers. If the 16 months of that period for which price instructions are

available are considered, they correspond for only four months if no account is taken of the discounts given and for only one month if discounts are taken into account.

114 It likewise denies that the price instructions of the various producers were given simultaneously. It points out that during 1982, for example, several weeks often separated the first price instruction given by a producer and the last instruction (between three and eight weeks). It points out that the same is true for the price instructions given for July and September 1983. Furthermore, in both 1982 and 1983 some price instructions were issued before the meetings at which the target prices which they were supposed to implement had been set according to the Commission. Thus, on 3 May 1982, two producers (BASF and DSM) gave instructions for the price of raffia to be increased to DM 2.00/kg on 1 June 1982, that is to say before the meeting held on 13 May 1982 at which that target price was allegedly set. Similarly, five producers gave instructions for the price to be increased to DM 1.85/kg on 1 July 1983, before the meeting of 1 June 1983 at which that target price was set.

115 The applicant also disputes that the price instructions given by the various producers were uniform. It points out, for example, that the Commission failed to take account, in its analysis of the price instructions given for June 1982, of differing price instructions given by DSM and Hercules and, for July 1983, of price instructions given by Hercules and Shell. Furthermore, the Commission also failed to take account of the fact that some price instructions corresponding to the price targets were altered at a later stage by fresh instructions which differed from both the price instructions issued by the other producers and the target prices.

116 The applicant also claims that the Commission arbitrarily selected, from amongst the price instructions used for the purposes of its comparison, sometimes the list price and at other times the minimum price and systematically chose the price which corresponded to the target price. This was the case, it claims, with the price instructions given by Monte and Hercules for July 1983 and with those given by BP for September 1983.

7 Finally, the applicant points out that the Commission has not taken account of the fact that some price instructions issued by DSM and Hercules left a wide margin of discretion to the sales offices and that ICI's price-fixing system was such that its price instructions were simply indicative and subject to discussion depending on the state of the market.

8 It also states that, even if the Commission had established a high degree of uniformity between price instructions, it would still face the burden of proving, which it has not done, that this uniformity had its origins in a target-price consensus and not in conscious and normal price parallelism in an oligopolistic market. In any event, the existence of a link between the target prices and the price instructions of producers cannot constitute evidence of implementation and of an effect on the market unless, of course, the existence of a link between the price instructions and the prices obtained is simultaneously established by equally convincing evidence.

9 As regards the link between the price instructions and the prices obtained, the applicant points out that the price instructions had no effect on the prices obtained on the market, in particular on account of the applicant's internal system of price formation and because they were communicated to customers only rarely. The differences between price instructions and the prices obtained were the result not of discounts but of an independent pricing policy. The Commission, which seems in fact to have admitted the lack of any relationship between the price instructions and the prices obtained (Decision, point 74), ought to have drawn the conclusion that the measures in question had no effect on prices or on competition.

10 As regards the relationship between target prices and prices achieved, the applicant contends that there was wide variance between the target prices and its own achieved prices, as is shown in particular by an audit carried out by an independent firm of auditors, Coopers & Lybrand (hereinafter referred to as 'the Coopers & Lybrand audit') and an econometric study carried out by Professor Budd. In his study Professor Budd explains in particular that the causal link was the exact converse of the one alleged by the Commission: the 'targets' merely confirmed changes in price already found, and had no effect on subsequent price

changes. The Commission naturally contests those explanations, but it does so, in the applicant's view, in a vague and shallow manner which reveals its lack of understanding of economics.

121 The applicant states that price levels are controlled by a large number of variables and, as regards the period in question, the price movements can be explained satisfactorily by, *inter alia*, the imbalance between supply and demand, changes in raw material prices and the general economic environment, as is shown by Professor Budd's study and the evidence of Mr Freeman, ICI's chief economist. This was accepted by the Commission (Decision, point 73) but is in contradiction with point 90 of its Decision where it states that the cartel had appreciable effects.

122 It also states that by selecting certain 'initiatives' extending over a period of 26 months (compared with the period of 77 months of the alleged cartel) the Commission is able to ignore those periods in which the disparities between 'target' prices and achieved prices are even more obvious.

123 Finally, the applicant objects to the taking into account of the period subsequent to the last meeting since it brought any infringements to an end as soon as the Commission's investigation began.

124 The Commission states that the producers were trying to fix actual selling prices and that they did fix target selling prices, even if their efforts were not always fully successful.

125 The meeting notes (main statement of objections, Appendices 17, 24, 27 to 30, 33 and 38) show, in the Commission's view, that the target prices reflected concrete

agreements reached by the producers and that they were intended and generally expected to be applied, in particular by pressurizing uncooperative producers.

126 It considers that there was a link between the target prices applied in the form of instructions addressed to sales departments and the target prices discussed at the meetings. The argument that it was a mere coincidence (the price instructions being the result of separate decisions taken by each producer) is not credible and not borne out by the evidence.

127 In the Commission's view, econometric studies are ineffective in the face of documentary evidence. They may only be used to establish that price parallelism is not attributable to collusion when there is no evidence of collusion, which is not the case here since a large number of notes of producers' meetings exists.

128 As regards the price initiative of January-May 1981, the Commission points out in particular that the note of the January 1981 meetings (main statement of objections, Appendix 17) proves that price agreements for February and March were made at those meetings since that note states in particular:

'It was generally agreed that a step change in prices was needed and that ... the industry should be aiming for a minimum of DM 2.00/kg'.

That document, it adds, is indicative of the very specific character of the decisions taken during the meetings and the determination to apply them, which is itself confirmed by the matching price instructions issued by the various producers

(particular objections, ICI, Appendix 9; main statement of objections, Appendix 19; letter of 29 March 1985, Appendix C).

129 Likewise, the Commission considers that ICI's participation in the price initiative of June-July 1982 is proved by the notes of the meetings of 13 May 1982 (main statement of objections, Appendix 24) and 9 June 1982 (main statement of objections, Appendix 25). According to those documents, a target price of DM 2.00/kg for 1 June 1982 was set and implemented by price instructions issued by a number of producers (letter of 29 March 1985, Appendix F).

130 According to the Commission, the notes of meetings held between 21 July 1982 and 21 December 1982 (main statement of objections, Appendices 26 to 34) prove ICI's participation in the price initiative of September-December 1982, which comprised the setting of a series of target prices and their implementation by matching price instructions from most of the producers (particular statement of objections, ICI, Appendix 12; letter of 29 March 1985, Appendix G).

131 It states that ICI's participation in the price initiative of July-November 1983 is clear, first, from the notes of meetings held on 3 May 1983 and 1 June 1983 (main statement of objections, Appendices 38 and 40), which indicate that target prices were set for May, June and July 1983, and, secondly, from the price instructions which were issued pursuant to the meetings by most of the producers and related to a period from July to November 1983 (letter of 29 March 1985, Appendices H and I; main statement of objections, Appendices 42 to 51).

132 The Commission states that even if it were proved that there was no connection between the price instructions and the prices obtained on the market, that would not alter the infringement, since Article 85 prohibits agreements which have the object of distorting competition, whatever their effect. However, the Commission asserts that the target prices served as a basis for negotiations with customers and that the prices achieved followed a pattern of close parallel movement with target

prices. It recognizes, as it did in the Decision (point 74), that the target prices were not always fully achieved, although the gap between the target prices and the actual prices is exaggerated by the applicant. It argues that proof of infringement of Article 85 by the producers does not depend upon proof that their unlawful behaviour achieved the anticipated result.

133 It contends that ICI's argument that if there was a link between the target prices and the prices achieved, the link consisted only in the fact that achieved prices influenced target prices and not vice versa is artificial and contrary to common sense. On the contrary, clear contemporaneous evidence shows that the producers used their target prices to 'push' market prices (main statement of objections, Appendices 22, 24, 31, 36 and 39, as well as Appendices 26, 28, 29 and 38). Such evidence cannot be disregarded on the basis of a *post hoc* econometric study.

134 In the Commission's view, it is incorrect to say that all of the polypropylene price movements recorded during the period in question can be explained away on the basis of factors operating on a normal market. That assertion, based solely on theoretical economic analyses, is contradicted by the documents and the facts.

135 Finally, the Commission considers that it was entitled to take into account the period subsequent to the ending of the meetings since the effects of the infringement continued to last beyond the meetings, as is shown by the matching price instructions of the various producers which related to a period continuing until November 1983 (letter of 29 March 1985, Appendix I).

(c) Assessment by the Court

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

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

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

138 In this regard, it must be noted that the applicant does not specifically deny participating in any particular price initiative but contends that it never undertook to observe the target prices; that, it claims, is borne out, first, by its internal pricing policy in so far as its price instructions did not correspond to the target prices set at the meetings and, secondly, by its external pricing policy in so far as the prices which it charged on the market were independent of both the target prices and its internal pricing instructions.

139 None of those arguments can be accepted as evidence capable of corroborating the applicant's assertion that it did not subscribe to the agreed price initiatives.

140 As far as the first argument is concerned, the applicant's criticisms made during the administrative procedure, to which it refers in its application, as regards the similarity and simultaneity of its price instructions in relation to those of other producers and to the target prices set at meetings in 1982 and 1983, were partly taken into account in the Decision. In Tables 7A to 7N the Decision reproduces both the similarities and the differences between the applicant's price instructions and those of other producers or the target prices set at the meetings. Consequently, the Commission correctly described the applicant's situation. In this regard, it must be added that the selection made by the Commission between the various price instructions of the applicant did not falsely portray the applicant's situation but is inherent in the synthesis undertaken in the Decision's tables.

141 As regards the choice of the periods to which the analysis of the price instructions of the various producers relates, that choice was dictated not by premature judgments but by the evidence possessed by the Commission, such as the co-existence of notes of meetings referring to target prices and price instructions issued by the various producers.

142 As regards the consequences which the applicant seeks to draw from the partial lack of simultaneity of its price instructions for 1982 and 1983, the Court considers that, in the present case, the length of time separating the price instructions of the various producers as between themselves and in relation to the meetings at which the target prices were set is likewise not apt to weaken the evidence advanced by the Commission. The length of that delay does not lead to the conclusion that the applicant issued its instructions on the basis of an independent assessment of the market, since it had learned at the meetings the prices which its competitors had in view. Moreover, almost all of the applicant's price instructions were issued within the five days which followed the meeting at which the Commission contends a target price was set (even though this is not the case with the price instruction issued for November 1983 on 27 September of that year (see the Decision, Table 7N)).

143 Furthermore, as regards the price initiative of June-July 1982, the Court finds that, contrary to the applicant's contentions, it is not true that two producers (BASF and DSM) issued instructions to their sales offices on 3 May 1982 to raise the price of raffia to DM 2.00/kg the following 1st of June, that is to say before the meeting on 13 May 1982 at which that target price was set. Although BASF did instruct its sales office in the United Kingdom, on 3 May 1982, to apply prices expressed in pounds sterling for raffia, homopolymer and copolymer as from mid-June 1982 (letter of 29 March 1985, Appendix BASF F1), prices which proved to have been adopted at the meeting of 13 May 1982 for implementation from mid-June 1982 (main statement of objections, Appendix 24), it was not until 19 May 1982 that it issued its price instructions, expressed in German marks, French francs and Italian lira, to its sales offices in Germany, France and Italy (letter of 29 March 1985, Appendix BASF F2). Those instructions are DM 2.00/kg for raffia and correspond in the main to the target prices set at the meeting on 13 May 1982, as is apparent from Table 7H of the Decision. As far as DSM is concerned, it is sufficient to point out that this producer stated in reply to a question from the Court that there were no price instructions issued by it on 3 May 1982, despite the assertion to that effect contained in the Commission's letter of 29 March 1985 but not repeated in the Decision and that neither the applicant nor the Commission has contradicted that reply of DSM. Thus, the Decision merely states that price instructions for June 1982 were not available for DSM (point 39, third paragraph, and Table 7H). Consequently, the applicant's argument does not in any way weaken the Commission's finding that the target prices set at the meeting on 13 May 1982 were implemented by the producers by means of the price instructions mentioned in the second paragraph of point 39 and in Table 7H of the Decision.

144 It must also be observed that, as the applicant had to admit at the hearing, it is not true that in May 1983 five producers issued price instructions prior to the meeting at which, according to the Commission, the target price which they were prepared to implement had been set. It is clear from points 47 and 49 of the Decision that the process of setting a target price for July 1983 went on during the meetings of 3 May, 20 May and 1 June 1983, which is borne out by the notes of the first and third of those meetings (main statement of objections, Appendices 38 and 40), and not only during the meeting of 1 June 1983, as the applicant stated in its pleadings submitted to the Court. Thus, the price instructions of Monte (17 May), ICI (23 May), DSM (25 May), BASF (27 May) and Hoechst (30 May) were all issued after one of the relevant meetings.

145 As regards the lack of uniformity of the price instructions issued by the producers, it is to be noted that, contrary to the applicant's assertions, the Commission took full account, in Table 7H of the Decision, of the divergent character of the price instructions given by Hercules for 1 June 1982 and did not set out or mention in the table or in the second paragraph of point 39 of the Decision any price instruction for DSM, as was noted in the third paragraph of point 39. As far as Shell's price instruction for copolymer is concerned, it is to be observed that the Commission has corrected in Table 7K of the Decision the error which it had made in its letter of 29 March 1985.

146 Likewise, the Commission rightly took no account of the fact that some undertakings, such as the applicant, Shell or Hoechst, sometimes altered the price instructions which they had given following a particular meeting, since such alterations merely indicate that, when a price initiative proved to have failed, the producers took account of this and modified their prices. This fact was taken into account in the Decision in so far as it often acknowledges the failure of price initiatives.

147 As regards the fact that the Commission at times used list prices and at other times minimum prices in its analysis of price instructions, it is to be noted that this is the result of the Commission's taking into account varying degrees of flexibility of the price-fixing systems of the producers who did not all have the same ideas about the function of list prices and minimum prices, so that the Commission had to refer, in the case of each producer, to the price which the producer used as its basis in price negotiations with its customers, whatever that price was called.

148 The fact that the applicant implemented only partially the price initiatives agreed upon cannot disprove that it subscribed to them at the meetings, especially when the notes of those meetings do not reveal any difference of view between the applicant and the other participants at the meetings about those initiatives.

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

150 As regards the second argument, which relates to ICI's external pricing policy — that is to say the prices which it charged on the market — the Decision does not contain any assertion to the effect that the applicant charged prices which always corresponded to the target prices agreed at the meetings, which shows that the contested decision likewise does not rely on the applicant's implementation of the outcome of meetings in order to establish that it participated in the fixing of those target prices. Any difference between the prices actually obtained on the market by the applicant and the target prices fixed at the meetings, even if actually proven, would not gainsay the applicant's participation in the fixing of target prices at the meetings but would at the most tend to show that the applicant did not put the decisions reached in those meetings into effect.

151 Consequently, in the present case, the applicant cannot derive any favourable argument from its pricing policy, either internal or external, in order to establish that it did not subscribe to the price initiatives decided on, organized and monitored at the meetings in which it participated.

152 Furthermore, the Commission was fully entitled to deduce from ICI's reply to the request for information (main statement of objections, Appendix 8), in which it is stated that:

> ""Target prices" for the basic grade of each principal category of polypropylene as proposed by producers from time to time since 1 January 1979 are set forth in Schedule . . . '

that those initiatives were part of a system of fixing target prices.

153 Finally, although the last meeting of producers proved by the Commission to have taken place was that held on 29 September 1983, the fact remains that between 20 September and 25 October 1983 various producers (BASF, Hercules, Hoechst, Hüls, ICI, Linz, Monte, Solvay and Saga) sent out matching price instructions (letter of 29 March 1985, Appendix I) scheduled to enter into force on 1 November 1983, and the Commission could therefore reasonably take the view that the meetings of producers had continued to produce their effects until November 1983.

154 Moreover, in order to support the foregoing findings of fact, the Commission did not need to use documents which it had not mentioned in its statements of objections or which it had not disclosed to the applicant.

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

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

(a) The contested decision

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

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

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

(b) Arguments of the parties

159 The applicant emphasizes that the increase in exports to overseas markets was not the effect of collusion on the diversion of supplies to those markets, for which the Commission does not, according to the applicant, adduce any conclusive evidence, but of the desire of producers to increase the utilization of their production capacity. In any case, such a solution would have been totally unrealistic owing in particular to the time needed for its implementation. The applicant also points out that it could not defend itself against this allegation, which was not contained in the statement of objections.

160 The applicant contends that, although the producers did talk about stocks at the meeting on 21 July 1982 (main statement of objections, Appendix 26), its conduct was independent inasmuch as its stocks remained high and it did not reduce its production in order to reduce them. It also states that the exchanges of information on the prices charged (main statement of objections, Appendices 27 to 33) were totally anonymous since the information was exchanged through the Fides system.

161 The applicant maintains that in the beginning the system of 'account leadership' was very incomplete and that it was not implemented. As evidence it points out that the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) indicates that the idea of managing accounts was proposed. That document also proves, in its view, that the system of 'account leadership' was not adopted in September 1982.

162 The applicant admits, however, that the only attempt to implement the proposed system was made at the meeting held in March 1983 (main statement of objections, Appendix 37) but it claims that it is clear from the note of that meeting that its implementation did not go beyond the stage of the sharing of information.

ICI's conclusion is that attempts were certainly made but that they could not have any influence on the prices obtained, as is shown by the Coopers & Lybrand audit.

163 It also admits to having participated in numerous local meetings but considers that they did not have the significance which the Commission attributes to them.

164 The Commission, on the other hand, considers that the note of the meeting held on 26 and 27 September 1979 (main statement of objections, Appendix 12) proves that the producers attempted to divert supplies of polypropylene to overseas markets in order to support prices. In its view, this is also shown by the notes of the meetings held on 13 May and 21 September (main statement of objections, Appendices 24 and 30), as was indicated in point 79 of the statement of objections.

165 It states that it is clear from the notes of the meetings held in May and August 1982 (main statement of objections, Appendices 24 and 26 to 28) that ICI participated in the producers' efforts to cause distortions in the channels of trade between States, in particular in order to counteract the effect of the price-freezing system in France (main statement of objections, Appendices 27 and 28), and that it also took part in the exchanges of information on unilateral reductions of production and on stocks (main statement of objections, Appendices 24, 26 and 27).

166 The Commission states that the note of the meeting held on 2 September 1982 (main statement of objections, Appendix 29) shows that it was at that meeting, in which ICI participated, that the concept of the 'account leadership' system was born. The Commission states that the note shows that the system was very complete from the very beginning since it specified 'account leaders', 'contenders' and 'interested suppliers' for a large number of customers.

167 It further states that the note of the meeting held on 2 December 1982 (main statement of objections, Appendix 33) does not in any way disprove that the 'account leadership' system was adopted after September, as ICI contends, since that note states that the idea of account management was proposed for more

general adoption. That document, which comprises a very detailed table of customers and 'account leaders', proves that the system was implemented since it is unlikely that the producers would have drawn up such a table if there had been no agreement to implement it.

168 The Commission considers that the note of the meeting of March 1983 (main statement of objections, Appendix 37) proves, like the previous ones (main statement of objections, Appendices 29 and 33), that ICI participated in the 'account leadership' system.

169 According to the Commission, ICI participated in numerous local meetings, such as that held in October 1982 for which a meeting note exists (main statement of objections, Appendix 10).

(c) Assessment by the Court

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

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

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

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

172 As regards the question of 'account leadership', the Court finds that it is clear from the notes of the meetings of 2 September 1982 (main statement of objections, Appendix 29), 2 December 1982 (main statement of objections, Appendix 33) and of spring 1983 (main statement of objections, Appendix 37), which were all attended by the applicant, that during those meetings the producers present at them agreed to that system. As far as the note of the meeting held on 2 December 1982 is concerned, it confirms that the system had already been adopted at the meeting in September since it states: 'The idea of account management was proposed for more general adoption & a list of customers/account leaders drawn up'.

173 The implementation of this system is evidenced by the note of the meeting of 3 May 1983 (main statement of objections, Appendix 38), in which it is stated:

'A long discussion took place on Jacob Holm who is asking for quotations for the 3rd quarter. It was agreed not to do this and to restrict offers to the end of June, April/May levels were at Dkr 6.30 (DM 1.72). Hercules were definitely in and should not have been so. To protect BASF, it was agreed that CWH[üls] + ICI would quote Dkr 6.75 from now to end June (DM 1.85) . . . '.

Such implementation is confirmed by the applicant's own reply to the request for information (main statement of objections, Appendix 8), in which it is stated in relation to that meeting note:

'In the Spring of 1983 there was a partial attempt by some producers to operate the "Account Leadership" scheme . . . Since Hercules had not declared to the "Account Leader" its interest in supplying Jacob Holm, the statement was made at this meeting in relation to Jacob Holm that "Hercules were definitely in and

should not have been so". It should be made clear that this statement refers only to the Jacob Holm account and not to the Danish market. It was because of such action by Hercules and others that the "Account Leadership" scheme collapsed after at most two months of partial and ineffective operation. The method by which Hüls and ICI should have protected BASF was by quoting a price of DK 6.75 for the supply of raffia grade polypropylene to Jacob Holm until the end of June'.

174 The Court further finds that at the meeting of 20 and 21 July 1982 (main statement of objections, Appendix 26) the applicant participated in an exchange of information on the state of stocks after which the following conclusion was reached:

'Stocks at the end of May had risen to 270 Kt + MP (Montepolimeri) estimated that they could reach 300 Kt by the end of August. This was at variance with professed statements about stock control policies where every company except Saga said stocks had to be kept down to 5-6 weeks cover + production reduced if the level looked like being exceeded. Saga said that they would be running their plant flat out + that stocks would rise to 9-9 1/2 weeks over the holiday period'.

75 Finally, the Court notes that the applicant does not dispute that it took part in local meetings and that the purpose of those meetings is evidenced in particular by the note of the meeting of 12 August 1982 (main statement of objections, Appendix 27), which shows that those meetings were intended to ensure the implementation, at local level, of a particular price initiative and by the note of the local meeting held in the United Kingdom on 18 October 1982 (main statement of objections, Appendix 10).

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

E. Target tonnages and quotas

(a) The contested decision

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

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

179 Volume targets (in tonnes) were set for 1979 based in part at least on sales in the preceding three years. Tables found at the premises of ICI show the 'revised target' for each producer for 1979 compared with actual tonnage sales achieved during that period in Western Europe (Decision, point 54).

180 By the end of February 1980, volume targets — again expressed in tonnage terms — had been agreed for 1980 by the producers, based on an expected market of 1 390 000 tonnes. According to the Decision (point 55), a number of tables showing the 'agreed targets' for each producer for 1980 were found at the premises of ATO and ICI. The original estimated total market available proved over-optimistic and the quota of each producer had to be revised downwards to fit total consumption during the year of only 1 200 000 tonnes. Except for ICI and DSM, the sales achieved by the various producers were largely in line with their targets.

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

182 The Decision (point 58) states that for a 1982 scheme complicated quota proposals were advanced which attempted to reconcile divergent factors such as previous achievements, market aspirations and available capacity. The total market to be

divided was estimated at 1 450 000 tonnes. Some producers submitted detailed plans for market sharing while others were content to communicate only their own tonnage aspirations. At the meeting on 10 March 1982 Monte and ICI tried to reach an agreement. The Decision (point 58, last paragraph) states, however, that, as in 1981, no definitive agreement was reached and for the first half of the year the monthly sales for each producer were communicated during the meetings and monitored against its achieved percentage share in the previous year. According to the Decision (point 59), in the August 1982 meeting, negotiations for an agreement on quotas for 1983 were held and ICI held bilateral discussions with each of the producers on the new system. However, pending the introduction of such a quota scheme, producers were required in the second part of 1982 to aim to restrict their monthly sales to the same percentage of the overall market which each of them had achieved in the first six months of 1982. Thus, in 1982, the market shares had reached a relative equilibrium (described by ATO as a 'quasi-consensus' and, among the majors, ICI and Shell remained at about 11% with Hoechst slightly below at 10.5%). Monte, always the largest producer, had advanced slightly to take a 15% market share compared with 14.2% the previous year.

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

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

(b) Arguments of the parties

185 The applicant claims that the Commission, aware that no agreement on prices could be implemented without sales volume restrictions, has attempted unsuccessfully to prove the existence of a quota system, taking provisional proposals and exchanges of view which came to nothing for agreements.

186 It states that the Commission's arguments regarding implementation of the supposed agreements by ICI are weaker still. No quota system could have been implemented unless all the producers participated and mechanisms were agreed to correct or regulate variances from any proposed quota. However, those essential prerequisites were absent in this case, in particular because of the diverging interests of the producers. As proof of this it relies in particular on the study by Professor Budd which, in its view, showed that the changes in market shares were not influenced by any targets regarding sales volumes.

187 The applicant considers that the evidence produced by the Commission does not prove that it participated in a quota system in 1979. The table found on its

premises, headed 'Producers' Sales to West Europe' (main statement of objections, Appendix 55), setting out, against the sales volumes of the various producers for the years 1976 to 1979, 'revised targets 1979', cannot be accepted as evidence of the existence of a volume control system since there is nothing to suggest that the 'targets' in question constituted anything other than individual aspirations. It further states that the documents found at the premises of ATO do not concern it and that the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12) proves by its wording that no quota system had yet been adopted in 1979 since the adoption of such a system was only envisaged. It also points out that it is clear from Table 8 (1979) of the Decision that the various producers did not adhere to the targets and that ICI's market share in 1979 was 5.5% lower than its targets.

88 It states that in 1980 there was in fact no true meeting of minds and, therefore, no implementation of the targets. In its view, there is a wide divergence between the actual figures and the revised figures, as the figures in Table 8 (1980) of the Decision show.

89 According to the applicant, the Commission was forced to admit that no definitive quota agreement was reached for 1981. Put in its context, the passage from the note of the January 1981 meetings (main statement of objections, Appendix 17) cited in the Decision (point 56, second paragraph) does not constitute the expression of an agreement but a general exhortation. It states that it is apparent from the notes of the May and June meetings (main statement of objections, Appendix 64) that no producer considered any such agreement to be in force. Once again, it adds, it is clear from Table 8 (1981) of the Decision that the sales figures differed considerably from the alleged targets. Finally, it considers that the monitoring by the producers of their sales figures against a notional division of the available market based on the 1980 quotas cannot in any event amount to volume control and can only have been of academic or historical interest. In its view, this is borne out by the fact that the note of the meeting of 20 August 1982 (main statement of objections, Appendix 28) refers to a 'notional quota' and not to an actual quota.

190 It states that, as regards 1982, the Commission once more admits the absence of agreement on sales volume targets or quotas. As regards the note of the meeting of 20 August 1982 (main statement of objections, Appendix 28), the applicant contends that the Commission distorts its meaning in deducing from it that the producers were required, in the second part of 1982, to aim to restrict their monthly sales to the same percentage of the overall market which each had achieved in the first six months of 1982 since the note states that the undertakings should aim to restrain their September volume to the market share achieved for the period from January to June. In its view, proof that volume controls were never agreed or implemented in 1982 and that the figures achieved by the various undertakings did not match the targets is provided by Table 8 (1982) to the Decision. Finally, it contends that the Commission is wrong to maintain, on the basis of the annual ATO report (main statement of objections, Appendix 72), that, compared with previous years, the market shares of the medium-sized producers were stable since the market shares of some undertakings, such as Linz and Petrofina, changed considerably.

191 As far as 1983 is concerned, the applicant contends that the Commission has mistaken a proposal for an effective agreement. It explains that the proposal which it made (main statement of objections, Appendix 86) was 'acceptable' to only nine of the sixteen producers and that conditions were attached even to some of these 'acceptances', as is indicated by the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33). It concludes that it is clear that effective agreement was never reached and that the proposal could never have succeeded and could not therefore be implemented. Moreover, the guidelines referred to in point 61 of the Decision were never discussed, those guidelines being a purely internal document, as is shown by some of the comments made in the note itself. Finally, ICI argues that the existence of an agreement is disproved by the discrepancy between the growth in actual production and the targets set. By way of conclusion, it points out that, contrary to the Commission's arguments, the market shares of the 'big four' increased between 1980 and 1982, as is demonstrated, in ICI's view, by a comparison of two tables produced by the Commission (main statement of objections, Appendices 61 and 87).

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

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

94 As regards 1980, the Commission contends that an agreement on quotas was made. It bases this contention essentially on a table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60) and headed 'Polypropylene — Sales target 1980 (kt)', which compares for all the producers of western Europe a '1980 target', 'opening suggestions', 'proposed adjustments' and 'agreed targets 1980'. That document shows the process whereby quotas were drawn up. This analysis is confirmed, in the Commission's view, by the note of the two January 1981 meetings (main statement of objections, Appendix 17) at which sales volume targets were compared with the quantities actually sold by the producers. It emphasizes that the aim of the quota system was to stabilize market shares. That is why, in its view, the agreements related to market shares, which were then converted into tonnages for use as reference figures, since if they were not converted it would not have been possible to determine from which point in time a participant in the cartel had to restrain his sales in order to comply with the agreements. For that purpose, it was essential to forecast the total volume of sales. Since the initial forecasts for 1980 proved to be too optimistic, the total volume of sales originally anticipated had to be adjusted several times, leading to adjustments in the tonnages allocated to each of the undertakings.

95 The Commission recognizes that no definitive quota agreement could be reached for 1981. It states, however, that the producers reached agreement at the beginning of 1981 on a temporary scheme limiting monthly sales to 1/12 of 85% of the targets which had been agreed for 1980, as is evidenced by the note of the January 1981 meetings (main statement of objections, Appendix 17). Secondly, the

producers monitored each other's actual sales on a monthly basis, as is shown in particular by a table dated 21 December 1981 found at the premises of ICI, setting out the monthly sales of the various producers in 1981 (main statement of objections, Appendix 67). Thirdly, ICI, Shell and Monte met twice, on 27 May and 15 June 1981, in order to discuss proposals for quota agreements (main statement of objections, Appendix 64).

196 As regards 1982, the Commission states that no definitive agreement could be reached, despite the efforts made in this direction which, in its view, are proved by the various quota schemes discovered. However, a provisional solution was found in the form of a specific orientation of sales according to the figures for the previous year. The Commission states that the existence of discussions on the setting of quotas emerges from a large number of documents. Among those documents, reference must be made above all to the meeting notes drawn up by ICI, from which it is clear that information was exchanged on the quantities sold (main statement of objections, Appendices 24 to 26 and 31 to 33). Reference should also be made to various schemes found at the premises of ICI (main statement of objections, Appendices 69 and 71) and a fairly comprehensive proposal for 1982 originating from ICI (main statement of objections, Appendix 70). The Commission states that two documents (main statement of objections, Appendix 32; specific objections, ICI, Appendix 30) show that when the producers wished to obtain an increase in their market shares they had to give reasons.

197 As regards 1983, the Commission considers that a quota agreement could have been made. It bases that assertion on notes of telephone conversations between ICI and other producers (main statement of objections, Appendices 74 to 84) which show that ICI invited each producer to communicate its own ambitions as well as its view of the percentage which the others should be allowed, on documents relating to the processing of the information thus collected (main statement of objections, Appendix 85) and on schemes drawn up by ICI (main statement of objections, Appendices 86 and 87). A number of meeting notes describe the course of the negotiations on a proposal limited to the first quarter of 1983 (main statement of objections, Appendices 32 to 34). An internal Shell document (main statement of objections, Appendix 90) shows that such a system was agreed for the first two quarters of 1983. This is corroborated by the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40), which, while not referring to quotas, describes exchanges of information on the tonnages sold by each producer in the previous month of May.

(c) Assessment by the Court

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

9 Concurrently with ICI's participation in the meetings, its name appears in various tables found on its premises (main statement of objections, Appendices 55 to 61) whose contents clearly show that the tables were drawn up for the purpose of determining sales volume targets. Most of the applicants have admitted in their replies to a written question from the Court that it would not have been possible to draw up those tables on the basis of the statistics available under the Fides system. In fact, in its reply to the request for information (main statement of objections, Appendix 8) ICI stated with reference to one of those tables that 'the source of information for actual historic figures in this table would have been the producers themselves'. The Commission was therefore entitled to take the view that the data contained in those tables had, as far as ICI is concerned, been provided by ICI in the course of the meetings in which it participated.

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

1 As regards the year 1979 in particular, having regard both to the whole of the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12) and to the undated table taken from the premises of ICI (main statement of objections, Appendix 55) headed 'Producers' Sales to West Europe', which sets out for all the polypropylene producers of western Europe the sales figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual', 'revised target' and '79', it is apparent that the need to tighten the quota system agreed for 1979 for the last three months of that year was recognized at that meeting. The term 'tight', read in conjunction with the restriction to 80% of one-twelfth of planned annual sales, indicates that the

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

202 As regards the year 1980, the Court finds that it is clear from the table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60), which contains a column headed 'agreed targets 1980' and from the note of the January 1981 meetings (main statement of objections, Appendix 17) at which producers, not including the applicant, compared the quantities actually sold ('Actual kt') with the targets set ('Target kt'), that sales volume targets were set for the whole of the year. Those documents are further supported by a table dated 8 October 1980 (main statement of objections, Appendix 57) comparing two columns, one setting out the '1980 Nameplate Capacity' and the other the '1980 Quota' for the various producers.

203 As regards the differences between the figures set out as 'quotas' in the tables, it is to be noted, first, that they are small and, secondly, that they are due to the adjustment of the tonnages corresponding to the market shares allocated to the various producers. Such adjustments, made necessary by the change in the overall market, must be considered to be a normal operation in a quota system when the participants in the system make a mistake in their estimate of total demand, as was the case for 1980 in this instance.

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

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

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

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

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

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

The applicant cannot claim that such a precise indication constitutes a general exhortation.

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

producer for the period January-November 1981 sales figures and market shares with those for 1979 and 1980 and making a forward projection to the end of the year.

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

The applicant's participation in those various activities is apparent, first, from its participation in the meetings at which those activities took place, in particular the January 1981 meetings, and, secondly, from the fact that its name appears in the various documents mentioned above. Furthermore, in those documents are set out figures with regard to which ICI in fact stated in its reply to a written question from the Court — to which other applicants refer in their own reply — that it would not have been possible to ascertain them on the basis of the statistical data available under the Fides system.

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

The existence of negotiations between the producers with a view to introducing a quota system and the communication of their aspirations during those negotiations are evidenced, firstly, by a document entitled 'Scheme for discussions "quota

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

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

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

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

comparison with actual monthly sales is due to the fact that no quota could be agreed for the whole of 1981, yet it does not deprive that comparison of its significance as a method of monitoring the restriction of monthly sales by reference to the previous year.

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

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

5 As regards 1983, the Court finds that it is clear from the documents produced by the Commission (main statement of objections, Appendices 33, 85 and 87) that at the end of 1982 and the beginning of 1983 the polypropylene producers discussed a quota system for 1983, that the applicant participated in the meetings at which

those discussions took place and that on those occasions it supplied data relating to its sales.

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

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

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

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

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

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

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

220 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.

221 For the rest, the Court finds that the applicant's arguments tend not to prove directly that it did not participate in the fixing of sales volume targets but to demonstrate that those targets were not adhered to by the producers, a fact which,

in the applicant's view, invalidates any conclusion that such targets were set. It is to be observed in this regard that the Decision acknowledges that the sales volume targets were not adhered to, which shows that the Decision likewise does not rely on implementation by the applicant of the decisions reached in the discussions on sales volume targets in order to prove that the applicant participated in the fixing of those targets.

222 In any event, in participating in the meetings at which various producers were criticized after not adhering to what had been agreed, the applicant took part in making those criticisms and by this means exerted pressure on those producers.

223 It is also to be observed that, in order to support the foregoing findings of fact, the Commission had no need to use documents which it had not mentioned in its statements of objections or which it had not disclosed to the applicant.

224 Having regard to the foregoing considerations, it must be concluded that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom common purposes emerged in relation to sales volume targets for 1979, 1980 and the first half of 1983 and to the restriction of their monthly sales by reference to a previous period for the years 1981 and 1982 which are mentioned in the Decision and which formed part of a quota system.

F. Conclusion

225 It follows that the Commission has proved, to the requisite legal standard, that all the findings of fact which it made in the contested decision against the applicant are correct and that, consequently, contrary to the applicant's contention, it observed the rules governing the burden of proof. It also follows that the Commission did not come to a premature or preconceived judgment on the basis of the evidence which it adduces in support of its findings of fact.

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

A. Legal characterization

(a) The contested decision

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

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

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

229 As regards more specifically the December 1977 initiative, the Decision states (in the third paragraph of point 82) that even in front of customers at the EATP meetings producers like Hercules, Hoechst, ICI, LINZ, Rhône-Poulenc, SAGA and Solvay were stressing the perceived need for concerted action to increase prices. There was further contact on pricing between the producers outside the EATP meetings. In the light of these admitted contacts the Commission considers that behind the device of one or more producers complaining of inadequate levels of profitability and suggesting joint action while the others expressed 'support' for such moves lay on existing agreement on pricing. It adds that even in the absence

of further contacts such a device might still indicate a sufficient consensus for an agreement within the meaning of Article 85(1).

230 The conclusion that there was one continuing agreement was not altered by the fact that some producers inevitably were not present at every meeting. Any 'initiative' took several months to plan and to implement and it would make little difference to the involvement of a producer if it was absent on occasion (Decision, point 83, first paragraph).

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

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

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

234 According to the Decision (point 87, first paragraph), the object of the Treaty in creating a separate concept of concerted practice was to forestall the possibility of undertakings evading the application of Article 85(1) by colluding in an anti-competitive manner falling short of a definite agreement by, for example, informing each other in advance of the attitude each intends to adopt, so that each could regulate its commercial conduct in the knowledge that its competitors would

behave in the same way (see the judgment of the Court of Justice in Case 48/69 *Imperial Chemical Industries Ltd* v *Commission*, cited above).

235 In its judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (*Suiker Unie* v *Commission*, cited above) the Court of Justice held that the criteria of coordination and cooperation laid down by its case-law, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the competition provisions of the Treaty according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors but it does strictly preclude any direct or indirect contact between them the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (Decision, point 87, second paragraph). Such conduct may fall under Article 85(1) as a 'concerted practice' even where the parties have not reached agreement in advance on a common plan defining their action in the market but adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour (Decision, point 87, third paragraph, first sentence).

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

237 According to the Decision (point 87, fifth paragraph), the importance of the concept of a concerted practice does not thus result so much from the distinction between it and an 'agreement' as from the distinction between forms of collusion falling under Article 85(1) and mere parallel behaviour with no element of concer-

tation. Nothing therefore turns in the present case upon the precise form taken by the collusive arrangements.

238 In the Decision (paragraph 88, first and sentence paragraphs) it is stated that most of the producers, having argued during the administrative procedure that their conduct in relation to alleged price initiatives did not result from any 'agreement' within the meaning of Article 85 (see the Decision, point 82), went on to assert that it could not form the basis of a finding of concerted practice either. The latter concept, they argued, required some 'overt act' in the market, which was claimed to be wholly absent from the present case: no price-lists or 'target prices' were ever communicated to customers. This argument is rejected in the Decision: were it necessary in the present case to rely on proof of a concerted practice, the requirement for some steps to be taken by the participants to realise their common object was fully met. The various price initiatives were a matter of record. It was also undeniable that the individual producers took parallel action to implement them. The steps taken by the producers both individually and collectively were apparent from the documentary evidence: meeting reports, internal memoranda, instructions and circulars to sales offices and letters to customers. It was wholly irrelevant whether or not they 'published' price lists. The price instructions themselves provided not only the best available evidence of the action taken by each producer to implement the common object but also by their content and timing reinforced the evidence of collusion.

(b) Arguments of the parties

239 The applicant contests the Commission's view that, although it is possible to distinguish conceptually between an agreement and a concerted practice, the question of the matter to be proved is not significantly affected. According to the applicant, which refers to the Opinion of Mr Advocate General Gand in the *Quinine* cases (judgment of the Court of Justice in Case 41/69 *ACF Chemiefarma NV* v *Commission* [1970] ECR 661), the distinction between those two concepts is not of 'negligible importance', in particular as far as the matter to be proved is concerned.

240 It submits that in order to establish the existence of an agreement it is necessary to prove the existence not only of consensus but also of a sufficient commitment to

the objectives of the agreement and a sufficient degree of mutual obligation. ICI does admit the existence of unilateral commitments which were reflected in the reiteration by the undertakings of their personal commitment during the meetings. But it contends that the Commission may not deduce any meeting of minds from those commitments whose unilateral character prove, on the contrary, the lack of any prior general commitment and the absence of consensus.

241 According to the applicant, a concerted practice requires conduct in the marketplace on the part of the participants, as is clear of the word 'practice'. However, the Commission has not established the existence of such conduct, which cannot be constituted by the sending to sales offices of internal price instructions, as the Commission claims, since these are rarely communicated to customers and since ICI published practically no price lists, which were usually for internal use.

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

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

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

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

246 The Commission goes on to argue that if the two requirements — concerted action and conduct on the market — were required for the existence of a concerted practice, as ICI suggests, a whole gamut of practices having as their purpose, but not necessarily as their effect, the distortion of competition on the common market would not be caught by Article 85. Part of the purpose of Article 85 would thus be frustrated. Furthermore, that view is not in accordance with the case -law of the Court of Justice concerning the concept of concerted practice (judgment in Case 48/69 *ICI* v *Commission*, cited above, paragraph 66; judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission*, cited above, paragraph 26; and judgment in Case 172/80 *Züchner* v *Bayerische Vereinsbank AG* [1981] ECR 2021, paragraph 14). Although those judgments each mention practices on the market, they are not mentioned as an element constituting the infringement, as the applicant maintains, but as a factual element from which the concerted action may be deduced. According to that case-law, no actual conduct on the market is required. All that is required is contact between economic operators, characteristic of their abandonment of their necessary autonomy.

247 In the Commission's view, it is not therefore necessary, in order for there to be an infringement of Article 85, for the undertakings to have put into practice that which they have discussed together. The offence under Article 85(1) exists in full once the intention to substitute cooperation for the risks of competition has materialized in cooperation, without there necessarily being, after the event, conduct on the market which may be found.

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

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

250 As regards the existence of an agreement, the Commission states that the producers repeatedly showed their commitment and that it is not necessary to take into account the fact that the degree of support of certain participants may have fluctuated during the period. That commitment was shown in the price instructions given by the producers, in particular by ICI, which confirmed the reality of the agreements.

(c) Assessment by the Court

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

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

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

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

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

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

257 Accordingly, not only did the applicant pursue the aim of eliminating in advance uncertainty about the future conduct of its competitors but also, in determining the policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, its competitors were bound to take into account, directly or indirectly, the information disclosed to them by the applicant about the course of conduct which the applicant itself had decided upon or which it contemplated adopting on the market.

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

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

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

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

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

B. Object or effect restrictive of competition

(a) The contested decision

263 The Decision (point 89, first paragraph) points out that Article 85(1) of the EEC Treaty expressly mentions as restrictive of competition agreements which directly or indirectly fix selling prices or share markets between producers, which are the essential characteristics of the agreements under consideration in the present case.

264 According to the Decision (point 89, second, third and fourth paragraphs), the basic purpose behind the institution of the system of regular meetings and the continuing collusion of the producers was to achieve price increases by means of a complex of agreements and arrangements. By planning common action on price initiatives with target prices for each grade and national currency effective from an agreed date, the producers aimed to eliminate the risks which would be involved in any unilateral attempt to increase prices. Thus, the various quota systems and other mechanisms designed to accommodate the divergent interests of the established producers and the newcomers all had as their ultimate objective the creation of artificial conditions of stability favourable to price rises.

265 In pursuit of those objectives, the producers were aiming at the organization of the polypropylene market on a basis which substituted for the free operation of competitive forces an institutionalized and systematic collusion between producers which amounted to a cartel (Decision, point 89, fifth paragraph).

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

267 According to the Decision (point 90, third and fourth paragraphs), the agreement in meetings of target prices for each grade and national currency was implemented by the producers all using price instructions to their national sales offices or agents which then had to inform customers of the new price levels. Customers were thus faced with a uniform basic price in each currency for each major grade. Individual customers might benefit from special conditions or discounts, some producers might delay the planned increase or make concessions and some producers might fix their actual prices for some grades or in some countries slightly below the targets while still determining such prices in the context of a general move by all the other producers. However, the setting of a particular price level which was then presented to the market as 'the list price' or 'the official price' meant that the opportunities for customers to negotiate with producers were already circumscribed and they were deprived of many of the benefits which would otherwise be available from the free play of competitive forces.

268 In the last paragraph of point 90 the Decision states that the documentary evidence, including the market reports of the producers themselves, shows the existence in the marketplace of concerted price initiatives involving all producers and the close link between these initiatives and the system of regular meetings.

269 Whilst it is conceded (in the first paragraph of point 91 of the Decision) that the achieved price level generally lagged behind the 'targets' and that price initiatives tended to run out of momentum, sometimes eventually resulting in a sharp drop in prices, it is pointed out that the graphs relied upon by the producers themselves show a regular pattern over the years of close parallel movement of target and actual levels. During the period covered by known price initiatives, the price achieved each month moved up toward the agreed target. When there was a sudden price 'collapse' (for example, when propylene prices fell) this was arrested by fixing a new and much lower target and the upward trend was re-established, the success of such a tactic being particularly marked in July to November 1983.

270 According to the Decision (point 91, second paragraph), the deliveries of most producers in the years when a system was in operation did not generally show a sharp variance from the quota or target which had been allocated.

271 The Decision concludes (in point 92, first paragraph) that the fact that in practice the cartelization of the market was incomplete and did not entirely exclude the operation of competitive forces does not preclude application of Article 85. Given the large number of producers, their divergent commercial interests and the absence of any enforceable measures of constraint in the event of non-compliance by a producer with agreed arrangements, no cartel could control totally the activities of its participants. The Decision (point 92, last paragraph) also rejects the undertakings' argument that in the absence of their arrangements market developments would have been the same. It points out that what might have occurred had there been no agreement is a matter of speculation but that it is significant that the producers themselves acknowledged the effectiveness of their meetings in rejecting the suggestion in May 1982 that they cease to meet, since it was considered better, if supply and demand were in equilibrium, to take active steps to move prices up rather than leave it to the market.

272 In point 73 it is stated that the Commission has in any event never maintained that the system of regular meetings controlled fully the operations and sales of the producers or was the only factor affecting the price levels of polypropylene. Indeed the evidence relied upon by the Commission shows that the producers recognized that the market was affected by matters such as changes in demand or raw material price increases beyond their control. In deciding upon the amount, timing, modalities and chances of success of a planned price initiative those market factors had to be taken into account by the producers. One of the main purposes of the meetings, however, was to try to coordinate the response of the producers to such factors. It may also be that price was determined to a large extent by conditions of supply and demand but the documentary evidence shows that by means of their volume control or quota systems the producers were attempting to manipulate those conditions.

(b) Arguments of the parties

273 The applicant notes that, in the Commission's view, the object of the cartel was to substitute for the free operation of competitive forces an institutionalized and systematic collusion between producers amounting to a cartel. In the applicant's view, however, what matters in ascertaining whether an agreement or a concerted practice has an anti-competitive object is not the subjective intention of the participants but the actual object of the arrangements. That object must be assessed objectively, that is to say in the light of the actual economic context (judgment of the Court of Justice in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm GmbH* [1966] ECR 235, in Case 5/69 *Franz Völk* v *Établissements J. Verwaecke* [1969] ECR 295, and in Case 99/79 *Lancôme S. A and Cospar France Nederland B. V.* v *Etos B. V. and Albert Heyn Supermart B. V.* [1980] ECR 2511, paragraph 24). The Commission must, moreover, prove, on the basis of objective facts, that there was a sufficient probability that the object could be achieved. The assessment of an arrangement cannot be divorced from its actual effects upon competition, even if it is only the object of the arrangement which is being considered. That is particularly true in the present case in so far as there is no written agreement.

274 The applicant considers that, in view of the intense competition prevailing in the polypropylene sector and the fact that prices, sales volumes and market developments were determined by competitive forces, it was highly unlikely that any anti-competitive action could have had the slightest effect on the market. The Commission is therefore condemning the undertakings for their intentions.

275 The applicant claims that the Commission ought to have made an analysis of the economic effect of the cartel in order to justify its finding in the Decision (points 90 to 92) that there was an appreciable effect upon the market. The only method recognized by the Court for assessing impact on competition is economic analysis, which enables a link to be established between the object or intention, on the one hand, and the actual effect on the market, on the other (judgment of the Court of Justice in Case 99/79 *Lancôme*, cited above).

276 According to the applicant, the Decision is marked by an almost complete absence of economic arguments, the Commission merely relying on bold assertions, showing its preference for 'gut feeling' over the very concept of economic analysis. Thus, the Commission makes no attempt to address ICI's detailed analysis

regarding the alleged link between the meetings and the prominent facts of the marketplace, nor the economic evidence of Mr Freeman and Professor Budd, which was confirmed by Professor Albach of the University of Bonn. These studies and experts' reports show that the characteristics of the polypropylene industry were such that any attempt to operate a cartel would have been unlikely to succeed, that during the whole period in question the conduct of ICI and the other producers was consistent with sound competition and incompatible with collusion, that actual prices were determined by market forces and not by 'target' prices and that movements in market shares were not related to any quotas and that, consequently, this period was characterized by the intensity of the competition which was not impaired in any way by the alleged collusion.

77 According to the applicant, the Decision and defence submitted to the Court by the Commission are confused and ambiguous as to the effects of the producers' behaviour on competitive conditions: those effects are described at times as appreciable (Decision, point 90), at times as insignificant (points 73 and 108), and at other times as non-existent (point 91). In particular, on the question whether the presentation of target prices to customers in the form of price instructions reduced the possibilities of negotiation and resulted in higher prices than would otherwise have prevailed, on the question whether the introduction of a quota system led to a fall in production and an increase in prices, and on the question whether the arrangements regarding prices and sales volumes distorted competition by disrupting the structure of trade between Member States, the Commission's case is obscure and, in any event, based on mere hypotheses.

78 It again emphasizes that the methods used by the Commission to make up for the lack of an economic analysis are unsatisfactory. For example, the Commission is unjustified in regarding the fact that the producers engaged in price and volume discussions or their belief that prices would rise due to the collusion as proof of there being an effect on the market. Moreover, the Commission's use of economic or statistical language cannot hide the fact that its assertions are not supported by any thorough analysis.

279 Finally, the applicant claims that the Commission must establish that the quotas or targets influenced actual production to a measurable degree and that production was not determined by market forces; that, even if this was so, the determination of quotas or targets enabled producers with a reasonable degree of certainty to predict the actions of their competitors and that quotas or targets led to a lack of competitive terms offered to consumers or inefficiency at the expense of consumers (Decision of 23 December 1971, *Nederlandse Cement-Handelsmaatschapppij*, Official Journal 1972 L 22, p. 16).

280 As regards the role of new producers, ICI contends that, contrary to what the Commission states, there was no significant correlation between trends in market share and membership of one of the two categories 'new producers' and 'larger firms'.

281 The Commission replies that ICI's argument concerning the object of the cartel is based on a wrong analysis of the case-law. It does not follow at all from that case-law that it is necessary to demonstrate the effects of an anti-competitive arrangement when, as in this case, the anti-competitive object is clear from the terms and nature of the arrangement itself. The most that may be deduced from that case-law is the requirement of a potential effect.

282 The Commission states that the complaints made by the applicant in relation to the effects of the cartel are based first of all on its wrong idea as to the kind of economic impact which the Commission should, in its view, have to show before it can make a finding of infringement of Article 85. The Commission states that it made it perfectly clear in the Decision (points 90 to 92) what kind of economic impact the cartel had.

283 It further states that in the present case it adduced strong evidence of both the potential and actual effects of the arrangements which amply meet the requirements of the case-law.

84 The Commission explains that contemporaneous evidence of the facts alleged, such as the meeting notes, showing that the producers themselves believed that prices could be, and were being, pushed up was, in its view, preferable to *ex post facto* economic theorizing to the opposite effect. In order to assess the effectiveness of the cartel, it was entitled to rely on the records of meetings, from which it is apparent that the producers not only expressed their desire that prices should rise or their confidence that they could be increased as a result of collusion but also affirmed that their efforts had been effective in raising prices, as is shown, for example, by the following passages:

'General determination got prices up to DM 2.05 the closest ever to published target prices' (main statement of objections, Appendix 22)

'On the basis of this review everyone felt that there was a very good opportunity to get a price rise through before the holidays' (main statement of objections, Appendix 24)

'The need for security was emphasized as was our determination to have a concerted push rather than a protracted crawl towards higher prices' (main statement of objections, Appendix 31)

'The fall in polypropylene prices appears to have halted ... The producers, however, plan to increase prices and have set targets ... They are reasonably confident of achieving these targets' (main statement of objections, Appendix 36)

'It would be silly not to try for a price increase under these conditions and we are aiming for a raffia level of around 2 DM in September. It is obviously impossible to make such a jump in one step and we have therefore decided to make an interim move which will be implemented now ...' (main statement of objections, Appendix 39).

285 In the Commission's view, the judgment which the Court of Justice gave in the *Lancôme* case (Case 99/79, cited above), relied upon by the applicant, does not establish a requirement for economic studies but simply the requirement 'to examine the competition within the actual context in which it would occur in the absence of the agreement in dispute'.

286 The Commission maintains that the Decision is perfectly clear and consistent with regard to the effects of the cartel and that ICI's complaints are based on a misrepresentation of the passages in the Decision (points 73 and 74, 90 to 92 and 108) relating to the effect of the price and quota agreements. The effects were not total but appreciable.

287 The Commission points out that the question whether the fixing of quotas was fully or partially achieved is secondary. It contests ICI's argument concerning the conditions under which it may be concluded that an agreement on quotas is caught

by Article 85(1). In its view, that argument is based on an incorrect interpretation of the judgment of the Court of Justice in the *Cementhandelaren* case (Case 8/72 *Vereniging van Cementhandelaren* v *Commission* [1972] ECR 977).

88 With regard to new producers, the Commission points out that all it was saying was that some fluctuation was to be expected, given the volatile state of the market and that, moreover, it did not claim that all the producers adhered exactly to their allocated targets.

(c) Assessment by the Court

89 ICI's line of argument seeks to demonstrate that its participation in the regular meetings of polypropylene producers was not caught by Article 85(1) of the EEC Treaty since its competitive conduct on the market showed that that participation had no anti-competitive object or effect. The applicant claims, in particular, that the requirement for an anti-competitive object must be interpreted as requiring a potential effect on competition and contends that in the present case the economic studies which it has produced demonstrated that it was impossible for the cartel to have any effect on the market.

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

91 The Court repeats that it is clear from its assessments relating to the findings of fact made by the Commission that the purpose of the regular meetings which the applicant attended together with competitors was, in particular, to fix price targets and sales volumes.

292 In this regard, it is to be noted that various producers have stated, in the pleadings which they have submitted to the Court, that the prices charged for polypropylene on the European market were lower than the world prices for polypropylene. In those circumstances, it cannot be ruled out that agreements concluded between an overwhelming majority of the polypropylene producers, if they had been strictly observed, might have had an effect on the market.

293 Even if the agreements were not always successful, they were apt to have an effect on competition and therefore had an anti-competitive object within the meaning which the applicant attributes to that term. In this regard, it is to be noted that this analysis is borne out by the view which the producers themselves held about the effect of their agreements, that view being evidenced in particular by the passages in the meeting notes cited by the Commission and by the analyses which the producers made during their meetings (see the notes for 21 September, 6 October, 2 November and 2 December 1982, main statement of objections, Appendices 30 to 33), which show that the price targets set at the meetings by and large came to be reflected on the market. The applicant's participation in those meetings was not therefore without an anti-competitive object within the meaning of Article 85(1) of the EEC Treaty.

294 As regards the extent of the actual effects of the infringement found and proved by the Commission, this will be examined in the review of the fine imposed on the applicant.

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

C. Effect on trade between Member States

(a) The contested decision

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

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

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

(b) Arguments of the parties

99 The applicant objects that, although it demonstrated during the administrative proceedings that there has always been an exceptionally high and increasing degree of inter-State trade on the polypropylene market, the Commission claims that inter-State trade and the structure of competition were appreciably affected by the arrangements, whilst recognizing that the quotas were not allocated per State or per region and that no penalty was provided for in the event of their non-observance.

300 In the applicant's view, which it bases on economic studies, the discussions which took place at the meetings did not have the slightest effect on trade between Member States, either to increase it or to reduce it, nor did they have any effect upon the competitive structure. The Commission has failed to prove the contrary (points 93 and 94 of the Decision are, in its view, mere conjecture).

301 The applicant states that the Commission wholly fails to acknowledge the inevitable economic consequences of such a high degree of inter-State trade and that such a degree of trade shows the transparency of the market, the lack of any restrictions on sales or of any price agreement and the existence of fierce price competition.

302 In reply to those points the Commission states that an agreement on prices must inevitably have the effect of diverting trade from the channels which would otherwise have developed and that the fixing of prices at an artificial level impairs the structure of competition through the Community. This is not cast in doubt by the acknowledged fact that the volume of trade in polypropylene between the Member States was large.

303 It adds that, contrary to ICI's contentions, a division of the market is not necessarily achieved through export bans. Any agreement between producers having as its object a restriction of deliveries by each producer to a certain level constitutes a division of the market.

(c) Assessment by the Court

304 Contrary to the applicant's assertions, the Commission was not required to demonstrate that its participation in an agreement and a concerted practice had had an appreciable effect on trade between Member States. All that is required by Article 85(1) of the EEC Treaty is that anti-competitive agreements and concerted practices should be capable of having an effect on trade between Member States. In this regard, it must be concluded that the restrictions on competition found to exist were likely to distort trade patterns from the course which they would

otherwise have followed (see the judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission*, cited above, paragraph 172).

It follows that the Commission has established to the requisite legal standard, in points 93 and 94 of its Decision, that the infringement in which the applicant participated was apt to affect trade between Member States, and it is not necessary for it to demonstrate that the applicant's individual participation affected trade between Member States.

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

D. Nature of the agreements on target prices and sales volume targets

The applicant contends that only arrangements adopted in order to fix actual prices, margins, discounts or terms of payment (Decision of 20 July 1978, *GB-Inno-BM/Fedetab*, Official Journal L 244, p. 29; Decision of 3 July 1973, *Gas Water Heaters*, Official Journal 1973 L 217, p. 34), those having an actual effect on prices and altering the normal conditions of the market or those enabling the participants to predict competitors' pricing policy with a reasonable degree of certainty are unlawful under Article 85(1) of the EEC Treaty (judgment of the Court of Justice in Case 8/72 *Vereniging van Cementhandelaren*, cited above).

In its view, however, the determination of target prices is not an infringement of Article 85 *per se*, even if the fixing of selling prices or the partitioning of the market do constitute infringements. In order to determine in a particular case whether the setting of target prices does in fact amount to such an infringement, it

is necessary for the Commission to establish, with credible evidence, on the facts of the particular case, that target prices influenced selling prices to a measurable degree and that prices were not determined by market forces and that, even if that were so, the setting of target prices enabled sellers with a reasonable degree of certainty to predict the selling policy of their competitors. The applicant contends that the Commission has failed to establish either of those matters, which, moreover, are contradicted by the factual and economic evidence.

309 The Commission replies that, contrary to the applicant's contentions, an agreement having as its object the determination of target prices is caught by the prohibition laid down in Article 85(1) even if it has no actual proven effects on the market. The applicant's argument is based on a wrong interpretation of the judgment in the *Cementhandelaren* case (cited above, paragraphs 19 and 21), which also prohibits the fixing of target prices. Finally, the Commission disputes the applicant's argument that it is necessary to establish that the target prices influenced actual prices to a measurable degree and that the fixing of those target prices must enable producers to predict the selling policy of their competitors.

310 The Court considers that for the purposes of the application of Article 85(1) of the EEC Treaty the fixing of target prices constitutes direct or indirect fixing of selling prices as mentioned, by way of example, in point (a) of that provision, which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have an anti-competitive object or effect.

311 The purpose of Article 85(1), and in particular of point (a) thereof, is to prohibit undertakings from distorting the normal formation of prices on the markets. It is clear, however, from the note of the meeting held on 13 May 1982 (main statement of objections, Appendix 24) that the object of the agreements made by the producers at the meetings was to fix a price level higher than that which they could expect to see if they determined their prices independently. Thus, it was at that meeting that the applicant noted, after Solvay had proposed to end the meetings following the restoration of balance between supply and demand, that:

'The general response was that it was always better to talk than not and that if supply + demand were so closely in balance we should be taking active steps to move prices up rather than let them find their own level'.

The Court therefore considers that the distinction made by the applicant between the fixing of target prices and the fixing of prices is a purely semantic distinction which has no relevance.

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

3. *Conclusion*

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

The statement of reasons

4 The applicant contends that the Decision is wrongly or insufficiently reasoned. In its view, it follows from the case-law of the Court of Justice (Case 24/62 *Federal Republic of Germany* v *Commission* [1963] ECR 63; Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and Others* v *Commission* [1975] ECR 1491; Case 323/82 *Intermills SA* v *Commission* [1984] ECR 3809; Joined Cases 296 and 318/82 *Kingdom of the Netherlands and Leeuwarder Papierwaren-fabriek B. V.* v *Commission* [1985] ECR 809; Case 203/85 *Nicolet Instrument GmbH* v *Hauptzollamt Frankfurt am Main-Flughafen* [1986] ECR 2049; Case 258/84 *Nippon Seiko KK* v *Commission* [1987] ECR 1923, paragraph 28) that the

reasons of a decision should set out the principal rules of law and of fact upon which it is based and that it should set out clearly and unequivocally the reasoning of the Community authority. In the present case, the Decision does not set out in a clear and relevant manner the evidence on which it is based in so far as it deals with matters of law and of fact, in particular with the economic aspects and the fines. Furthermore, the Decision does not indicate that the Commission took account of much of the evidence adduced by the applicant relating to its conduct on the market and the lack of effects of the cartel.

315 In the reply, the applicant further states that throughout the administrative proceedings the Commission failed to identify, or to identify with sufficient particularity, the nature of the allegations and findings made against the producers in relation to the effect, as to both prices and quotas, of any arrangements there might have been. In particular, the Commission changed its view during the administrative proceedings and contradicted itself on the question of the actual achievement of target prices and target quotas.

316 The Commission replies that ICI confuses sufficient reasoning with correct reasoning. It states that the Decision is particularly long and detailed and that it deals with all the principal arguments advanced during the administrative proceedings.

317 The Commission contends that the submission that the Decision lacks sufficient detail constitutes a new submission which must be rejected on this ground under Article 42(2) of the Rules of Procedure. In any event, the submission is not well founded.

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

proceedings. It follows that the Commission is not obliged to answer those points of fact and law which it considers irrelevant.

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

0 Moreover, the Court perceives no intrinsic contradiction in those findings of fact and considers that the Commission did not change its position in this regard.

1 Consequently, this ground of complaint must be dismissed.

The fine

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

1. *The limitation period*

3 The applicant maintains that, even if there was a floor-price agreement in 1977, it is covered by the five-year limitation period laid down by Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (Official Journal 1974

No L 319, p. 1) since, owing to the different nature of the floor-price agreement and the meetings which, as the Commission acknowledges, were held after December 1977, the Commission cannot presume that the infringement was of a continuing or repeated character within the meaning of Article 1(2) of that regulation.

324 The Commission maintains that the floor-price agreement is not covered by the limitation rule since there is a clear link between the floor-price agreement and the agreements covering the subsequent periods and that, consequently, the infringement must be described as continuous.

325 The Court notes that under Article 1(2) of Regulation No 2988/74 the five-year limitation period applying to the Commission's power to impose fines begins to run, in the case of continuing or repeated infringements, on the day on which the infringement ceases.

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

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

2. *Duration of the infringement*

328 The applicant considers that the Commission is wrong to take the commencement of the infringement back to a date earlier than December 1977 since it does not have sufficient evidence of the conclusion of a floor-price agreement and consideration of that agreement is in any event precluded by prescription.

9 It points out that the Decision recognizes that the infringement in its most serious aspects did not exist before the end of 1978 (point 107, third paragraph).

0 The applicant also observes that the infringement was not continuous, since the price initiatives extended over only 26 months, the system of quotas was not the subject of an agreement in 1981 and 1982 and the simultaneous application of those two systems, essential for the functioning of the cartel, extended at the most only over a period of less than 10 months. Owing to the sporadic nature of the cartel, the Commission was not therefore entitled to take into consideration the whole period between 1977 and 1983.

1 As regards the question when the infringement came to an end, the applicant contends that the Commission has not adduced any evidence in support of its assertions relating to ICI's participation 'at least until November 1983' or to the effects of the agreement until that date. Consequently, the Commission ought to have found that the infringements had ceased by the time its investigation began, as was the case in the *Peroxygen Products* case and the *Zinc Producers Group* case (Decision of 23 November 1984, *Peroxygen Products*, Official Journal 1985 L 35, p. 1, and Decision of 6 August 1984, *Zinc Producers Group*, Official Journal L 220, p. 27).

2 The applicant concludes that it must benefit from a reduction in the duration of its participation in the infringement and therefore from a substantial and proportionate reduction in the fine (judgments of the Court of Justice in Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation* v *Commission* [1974] ECR 223, Opinion at p. 262, and in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461).

The Commission replies that it correctly assessed the duration of the infringement. In this regard, it states that the period prior to 1979 must be taken into account, even though the intensity of the infringement was not so great at that time, which is a factor which it states it took into account.

334 The Commission considers that the argument as to the sporadic nature of the infringement is refuted by the fact that the efforts made by the producers to apply the agreed price increases were continuous in nature.

335 As regards the question when the infringement came to an end, the Commission maintains that the effects of the agreement continued until at least November 1983, which is the last month in respect of which it is proved that target prices were agreed and implemented and submits that it therefore rightly took into consideration the period from September to November 1983 when determining the amount of the fine.

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

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

3. *The gravity of the infringement*

A. The applicant's limited role

338 The applicant claims that the Commission asserts, without adducing the slightest proof, that the 'big four' had particular responsibility in the infringement. That assertion conflicts with that made in the Decision (point 109, sixth paragraph) to the effect that no substantial distinction can be made between the producers on the basis of their individual degree of commitment to the agreed arrangements.

339 It contends that in reality it was not more committed that the other producers, that its apparently active role was purely administrative, that its greater participation

was due to its size on the market (which cannot be taken into account twice at this level) and that the 'big four' neither influenced nor directed the meetings.

340 The Commission, referring to points 67 and 68 of the Decision, takes the view that, as a member of the 'club' of the 'big four', ICI bears particular responsibility in the infringements committed. Its role in this respect is clear from a number of documents (main statement of objections, Appendices 8, 9, 19, 64, 87, 94 to 100), which mostly report discussions between the 'big four'.

341 The Court notes that after August 1982 the applicant assumed the chairmanship of the regular meetings of polypropylene producers. The chairing of the meetings was not a purely administrative task, as is shown by the role played by the applicant in the discussions conducted with a view to concluding quota agreements for the years 1982 and 1983, that role being evidenced by the meeting notes for the second half of 1982 (main statement of objections, Appendices 28 to 34) and the notes of meetings or of bilateral contacts between the applicant and other producers (main statement of objections, Appendices 75 to 77, 79 to 81, 83, 88, 89, 93, 95 and 98), or as is also shown by the summary notes and the market-sharing schemes drawn up by the applicant (main statement of objections, Appendices 33, 70 and 84 to 87) and the efforts which it made to ensure that the price agreements were adhered to, those efforts being evidenced in particular by an ICI note headed 'Pricing actions from December meeting' (main statement of objections, Appendix 34), which shows that the applicant made contact with certain producers in order to persuade them to adhere to the price agreements.

342 As regards the part played by the applicant in the infringement, it must also be noted that it participated in the preparatory meetings of the 'big four'. In this regard, a note relating to the meeting attended by representatives of ICI, Shell and Monte on 15 June 1981 (main statement of objections, Appendix 64) shows that those producers envisaged the following solutions in order to resolve the difficulties encountered on the market:

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

Similarly, a note written by an ICI employee headed 'Sharing the pain' and dated at the beginning of the second half of 1982 (main statement of objections, Appendix 98) states that the introduction of a compensation scheme for reductions in sales volumes 'might provide useful elements for the understanding between the

"Big Four"'. In its reply to the request for information (main statement of objections, Appendix 8), the applicant stated with regard to that document that:

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

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

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

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

345 Consequently, this ground of challenge must be dismissed.

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

346 The applicant complains that the Commission did not indicate the extent to which it had taken into account each of the factors involved in the determination of the amount of the fine. It asks the Commission to indicate how it weighted those different factors and to explain the formula which it used, as it did in the *Wood pulp* case (Decision of 19 December 1984, *Wood pulp*, Official Journal 1985 L 85, p. 1) and as the Court of Justice compelled it to do in the *IAZ International* case (judgment in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ International Belgium NV and Others* v *Commission ('ANSEAU')* [1983] ECR 3369.

347 It goes on to argue that the Commission has not explained the method of calculating the fines and does not have a consistent position regarding the nature and scope of the factors to be taken into account in the determination of the fines.

348 The Commission replies that it indicated in points 107 to 109 of the Decision the various factors which it took into account when setting the amount of the fines and that consequently the fine imposed on the applicant is sufficiently reasoned.

349 The Commission states that when imposing the penalties in this case it acted in accordance with its established policy and the fining principles enunciated by the Court of Justice. It points out that since 1979 it has applied a consistent policy of enforcing competition laws by imposing heavier fines, in particular for the categories of infringements well established in Community law and for particularly serious infringements, like those in this case, so as to reinforce the deterrent effect of penalties. That policy has been approved by the Court of Justice (judgment in Joined Cases 100 to 103/80 *Musique Diffusion Français SA and Others* v *Commission ('Pioneer')* [1983] ECR 1825, paragraphs 106 and 109), which has also accepted on many occasions that the determination of penalties involves the assessment of a complex array of factors (judgment in the *Pioneer* case, cited

above, paragraph 120, and judgment in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ International Belgium NV* v *Commission*, cited above, paragraph 52).

350 The Commission states that it is in a particularly good position to make such an assessment, which it claims cannot be overturned except in the case of material error of fact or law.

351 As regards the 'method' of calculating the fines, the Commission maintains that it is not possible to apply a simple mathematical formula valid in all cases and that a complex series of factors must be applied to the circumstances of the case.

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

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

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

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

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

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

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

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

359 The applicant maintains that, according to the Commission's published views and practice (*Thirteenth and Fourteenth Reports on Competition Policy*; Decisions of 23 November 1972, *Pittsburgh Corning*, Official Journal L 272, p. 35, and of 8 December 1977, *Hugin-Liptons*, Official Journal 1978 L 22, p. 23) and according to the case-law of the Court of Justice (judgments in Case 41/69 *ACF Chemiefarma*, cited above; Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie*, cited above; Case 35/83 *BAT Cigaretten-Fabriken GmbH* v *Commission* [1985] ECR 363), the effects of an infringement constitute an essential or very important element for determining its gravity. The Commission

should take into account the extent to which the infringement is contrary to the objective of the rules of competition. In this regard, the Commission did not take account of the expansion in trade, the unilateral and autonomous conduct of the undertakings in question and the advantages for consumers which benefited from particularly low prices.

360 It repeats its claim that the Court should order the Commission to disclose to ICI and to the Court the hearing officer's report, which, in its view, contains exonerating evidence as far as the effects are concerned, as well as the documents relating to the statements which were made to the press by the Commission's representatives when the Decision was adopted, according to which the cartel allegedly had the effect of raising prices by 15 to 40%. In this regard, ICI considers that the evidence which it has produced during the proceedings and the Commission's failure to advance any argument with regard to the effects of the infringement justify its claim, despite the order made by the Court of Justice on 11 December 1986 (order in Case 212/86 R *ICI* v *Commission*, cited above).

361 The Commission observes that the applicant's protestations about the cartel's lack of effect are to no avail. It maintains that it did take account, in determining the amount of the fines, of the fact that the price initiatives generally did not achieve their objective in full (Decision, point 108). This was already more than the Commission was obliged to do, since not only arrangements which have anti-competitive effects but also those which have anti-competitive objects are caught by Article 85. However, the Commission did not have to take into account the expansion in trade, the producers' unilateral efforts to decrease their production and increase efficiency or the relatively low level of prices, factors which are immaterial for assessing the harmful effects of the cartel with regard to the objectives of the competition rules.

362 As regards the question of the production of its case file, the Commission sees no reason for the Court to reverse the abovementioned order of 11 December 1986 and points out that ICI has not managed to establish the relevance of its claim.

363 The Court notes that the Commission distinguished two types of effect produced by the infringement. The first type of effect consisted in the fact that following the agreement in meetings of target prices the producers all instructed their sales

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

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

365 As regards effects of the second type, the Commission had no reason to doubt the accuracy of the analyses carried out by the producers themselves during their meetings (see in particular the notes of the meetings of 21 September, 6 October, 2 November and 2 December 1982, main statement of objections, Appendices 30 to 33). These show that the target prices set at the meetings were largely achieved on the market and that, even if the Coopers & Lybrand audit and the economic studies commissioned by certain producers were to prove that the analyses made by the producers themselves at their meetings were wrong, that fact is not conducive to a reduction of the fine since the Commission indicated in the last indent of point 108 of the Decision that it took into account, in mitigation of the penalties, the fact that price initiatives generally had not achieved their objective in full and that in the last resort there were no measures of constraint to ensure compliance with quotas or other measures.

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

limited character of the second type of effect was not sufficiently taken into account in mitigation of the amount of the fines.

367 As regards the applicant's claim for production of the documents which served as a basis for the press conference at which the Commission stated that the infringement had had the effect of increasing the level of prices by 15 to 40%, the Court considers that the applicant has not placed before it any fresh evidence capable of proving that the Decision was motivated by considerations different from those set out therein with regard to the effects of the infringement. Consequently, there are no grounds in the present case for this Court to reopen the order which the Court of Justice made on 11 December 1986 by which it dismissed the claim for the production of the Commission's internal documents relating to the press conference in question.

368 Consequently, this ground of challenge must be dismissed.

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

369 The applicant maintains that the Commission ought to have taken into account the economic context in which the infringement was committed: the profits or losses made, as it has done in previous decisions (Decision of 17 December 1975, *United Brands*, Official Journal 1976 L 95, p. 1, and Decision of 12 December 1978, *Kawasaki*, Official Journal 1979 L 16, p. 9) and as the Court of Justice did in its judgment in Joined Cases 100 to 103/80 *Pioneer*, cited above; the extent of the damage done to consumers or customers (Commission Decision of 21 December 1976, *Theal-Watts*, Official Journal 1977 L 39, p. 19, Decision of 12 December 1978, *Kawasaki*, cited above and Decision of 28 November 1979, *Floral*, Official Journal 1980 L 39, p. 51; judgment of the Court of Justice in the *Suiker Unie* case, cited above), and the effects of the infringements (Commission Decision of 12 December 1978, *Kawasaki*, cited above, and Decision of 19 December 1984, *Wood pulp*, cited above; judgment of the Court of Justice in Case 35/83 *BAT*, cited above).

370 The Commission replies that it correctly took into account the economic context, mitigating the fines owing to the economic difficulties of the sector.

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

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

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

E. The turnover to be taken into account

374 The applicant points out that the fine was wrongly fixed on the basis of the total turnover of the undertaking, when the Commission had itself drawn attention to the dangers of such a practice in the *Wood pulp* cases (Decision of 19 December 1984, *Wood pulp*, cited above), and that the Court of Justice had also censured the practice in the *Pioneer* case (judgment in Joined Cases 100 to 103/81, cited above). The amount of the fine represents an excessively high percentage of ICI's external polypropylene sales to the Community in the period 1979 to 1983.

375 The Commission states that although it took account of the size and the market share of the undertakings concerned in assessing the gravity of the infringement, it did not attach any particular importance to this factor. Moreover, the amount of the fine did not exceed 10% of ICI's turnover on the polypropylene market in the business year preceding the Decision nor, *a fortiori*, 10% of the total turnover of the undertaking.

376 This Court finds that it is clear from the case-law of the Court of Justice (judgment in Joined Cases 100 to 103/80 *Pioneer*, cited above, paragraph 119) that the reference in Article 15(1) of Regulation No 17 making 10% of the turnover in the preceding business year the upper limit for a fine exceeding ECU 1 000 000 must be understood as referring to 10% of total turnover.

377 In the present case, the Commission did not therefore exceed the limit laid down in Article 15(1) of Regulation No 17.

378 Moreover, the Commission did not base its decision exclusively or even preponderantly on the applicant's turnover in calculating the fine which it imposed upon it.

379 Consequently, this ground of challenge must be dismissed.

F. The principle of equal treatment

380 The applicant claims in substance that the Commission infringed the principle of equal treatment in two ways: first, by imposing on the applicant a fine disproportionate to fines imposed in previous cases and, secondly, by imposing upon it a fine which was excessive in relation to those imposed on the other undertakings to which the Decision was addressed.

381 It states that although the Commission is indeed entitled to have regard to deterrent effect in fixing the level of fines, the need for deterrence should not vary substantially between cases involving infringements of similar type and gravity (judgment of the Court of Justice in the *Pioneer* case, cited above, and judgment in the *Stichting Sigaretten Industrie* case, cited above), in order to avoid discrimination between undertakings in comparable situations. In the present case, an unjustified distinction was made between the 'big four' and the other incriminated parties. Secondly, the fine was discriminatory and excessive in relation to those imposed in other recent decisions relating to infringements of Article 85 which were at least as serious, since actual prices were fixed, markets shared, customers injured and competition eliminated (Decision of 17 October 1983, *Cast Iron & Steels*, Official Journal 1983 L 317, p. 1; Decision of 6 August 1984, *Zinc Producer Group*, cited above; Decision of 7 December 1988, *Flat Glass*, Official Journal 1989 L 33, p. 44; Decision of 23 November 1984, *Peroxygen Products*, cited above; and Decision of 19 December 1984, *Wood pulp*, cited above).

382 Relying in particular on the point of view expressed both by the Commission itself in its *Thirteenth Report on Competition Policy* and by the Opinion of Advocate General Sir Gordon Slynn in the *Pioneer* case (judgment in Joined Cases 100 to 103/80, cited above, Opinion at p. 1930), the applicant argues that, whilst each case must be evaluated in its own particular circumstances, the Commission must nevertheless base its decisions on previous decisions and judgments when fixing the scale of fines, in order to avoid any infringement of the principle of protection of the legitimate expectations and create a coherent body of competition law.

383 The Commission replies that, contrary to what the applicant contends, the Court of Justice has clearly accepted in its judgment in the *Pioneer* case (Joined Cases 100 to 103/80, cited above) that the time may come when the Commission, in order to ensure the application of the Community's competition policy, may legitimately decide to raise the level of fines for certain types of infringement. Given the fact that it is difficult to imagine an infringement of the competition rules more flagrant than the present case, the Commission considers that it was entitled to impose fines which were a true deterrent.

384 In the rejoinder, the Commission contests the applicant's interpretation of the Opinion delivered by Advocate General Sir Gordon Slynn in the *Pioneer* case (cited above). The Advocate General accepted that the Commission was entitled to subject undertakings to heavier fines than may have been applied in the past even for similar infringements, as did the Court of Justice in its judgment in that case.

385 This Court holds that it is clear from the case-law of the Court of Justice that the Commission's power to impose fines on undertakings which intentionally or negligently commit an infringement of Article 85(1) of the EEC Treaty is one of the means conferred on the Commission in order to enable it to carry out the supervisory task conferred on it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the EEC Treaty and to guide the conduct of undertakings in the light of those principles. It was for that reason that the Court of Justice held that in assessing the gravity of an infringement for the purpose of fixing the amount of the fine the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community. The Court went on to state that it was open to the Commission to have regard to the fact that, although infringements of a specific type were established as being unlawful at the outset of Community competition policy, they were still relatively frequent on account of the profit that some of the undertakings concerned are able to derive from them and, consequently, it was open to the Commission to raise the level of fines so as to reinforce their deterrent effect. The Court concluded that the fact that in the past the Commission had imposed fines of a certain level for certain types of infringement did not mean that it was estopped from raising that level within the limits indicated in Regulation No 17 if that was necessary to ensure the implementation of Community competition policy (judgment in Joined Cases 100 to 103/80 *Pioneer*, cited above, paragraphs 105 to 109).

386 In view of those considerations, the Court finds that the Commission rightly described the fixing of target prices and of sales volumes as well as the adoption of measures designed to facilitate the implementation of target prices as a particularly

grave and clear infringement, intended to distort the normal formation of prices on the polypropylene market.

387 The Court also considers that the comparison of the fine imposed on the applicant with those imposed on the other addressees of the Decision reveals no discrimination, having regard to the duration and particular gravity of the infringement found against it.

388 This ground of challenge must therefore be dismissed.

G. The extent of the applicant's cooperation

389 The applicant maintains that the Commission has not taken account of ICI's cooperation in the investigation, whereas the Commission has held in previous cases (Decision of 19 December 1984, *Wood pulp*, cited above) that such cooperation should entail a significant reduction in the fine, possibly as much as 50%. It further states that as soon as it became aware of the investigation it took measures to prevent such infringements from occurring again.

390 The Commission states that although ICI claims that it cooperated with the Commission during the investigation and brought the infringement to an end once it was aware of the opening of the investigation, that attitude was taken into consideration but is naturally not sufficient in order to erase the infringement.

391 The Court notes first of all that in reply to a question asked at the hearing the Commission confirmed that ICI was one of the 'very few' producers which cooperated in the Commission's investigation referred to in the last paragraph of point 109 of the Decision.

392 An analysis of point 109 of the Decision shows that, for its cooperation in the Commission's investigation, the applicant benefited from a fine reduction of ECU 1 000 000 at the most. The second and third paragraphs of point 109 distinguish between, on the one hand, Monte and ICI, which consecutively held the chairmanship of the regular meetings of polypropylene producers and, on the other hand, Hoechst and Shell, which, whilst belonging to the 'big four', played a lesser role in the 'unofficial directorate' formed by the 'big four'. That is why the two latter undertakings were fined ECU 9 000 000 whilst the fine imposed on Monte was ECU 11 000 000 and the fine imposed on the applicant ECU 10 000 000. The difference of ECU 1 000 000 between the fine imposed on the applicant and the fine imposed on Monte is not necessarily accounted for solely by the taking into account of ICI's cooperation in the investigation but may also be partially due to the account taken of the 'respective deliveries of polypropylene to the Community' of the two undertakings, those of Monte being appreciably higher than the applicant's.

393 Since the fine imposed on the applicant was reduced by less than 10% on account of its cooperation in the investigation, the Court considers that, having regard to the very detailed reply given by the applicant to the request for information, which concerned not only its own activities but also those of all the undertakings concerned, and without which it would have been much more difficult for the Commission to establish and bring to an end the infringement which is the subject of the Decision, greater account than that taken by the Commission should be taken of the applicant's cooperation in order to determine the amount of the fine to be imposed upon it. Even though the applicant's cooperation was not forthcoming until after the Commission had found compromising documents on its premises, it would have been more difficult for the Commission to understand the significance of those documents and of those which it had taken from other producers' premises and to draw the necessary inferences from those documents so as to establish the existence of the infringement and bring it to an end if it had not had the benefit of the applicant's reply to the request for information.

394 Consequently, the Court, exercising its unlimited jurisdiction, considers that the fine imposed on the applicant should be reduced by a further ECU 1 000 000.

395 Moreover, whilst it is indeed important that the applicant took steps to prevent fresh infringements of Community competition law from being committed by

members of its staff in the future, that circumstance does not alter the fact that an infringement has been found to have been committed in the present case. It must be added in this regard that, here again, the fact that in a previous case the Commission considered that, having regard to the factual circumstances, account should be taken of the steps taken by the undertaking in question in order to prevent fresh infringements of Community competition law from occurring in the future cannot oblige it to take account in the same way of similar measures in the present case since the Commission emphasized in the Decision (point 108) that the infringement of Article 85(1) of the EEC Treaty was particularly serious and had been committed intentionally and in conditions of great secrecy. It follows that the fine is not to be reduced on this account.

396 In its application ICI asks the Court 'if ICI were to pay the fine at this stage and not to suspend payment according to terms set out in the letter from the Commission to ICI enclosing the Decision', to order the Commission 'to repay to ICI the fine paid or the appropriate proportion thereof, together with interest at the rate of 1% over the lending rate set by the bank in the United Kingdom referred to in Article 4 of the Decision'.

397 The very wording of the applicant's claim shows that it is conditional in so far as it depends on the applicant's having to pay the fine without being able to suspend payment of it. The claim was conditional at the application stage because the period laid down in Article 4 of the Decision for the payment of the fine was three months from notification of the Decision to the applicant. Since the period for bringing this action, in accordance with the third paragraph of Article 173 of the EEC Treaty, was two months from that notification and, consequently, when this action was brought the applicant had not yet decided to pay the fine or to furnish a bank guarantee and undertake to pay interest, as proposed by the Commission in its letter of 22 May 1986 notifying the applicant of the Decision.

398 The Court observes that at no stage in the proceedings subsequent to the expiry of the time limit laid down in Article 4 of the Decision, when the applicant had to decide either to pay the fine or to furnish a bank guarantee, has the applicant stated that the claim under consideration was no longer conditional; in particular, it confined itself to stating in the reply that it repeated the conclusions of its application. By failing to negate the conditional nature of this claim, the applicant

has not expressed its claim in a definite manner. The claim must therefore be considered inadmissible under Article 19 of the Statute of the Court of Justice of the European Economic Community and Article 38(1) of the Rules of Procedure of the Court of Justice and Article 44(1) of the Rules of Procedure of the Court of First Instance (judgment of the Court of Justice in Case 188/73 *Grassi* v *Council* [1974] ECR 1099, at paragraph 7).

The reopening of the oral procedure

399 By a letter lodged at the Court Registry on 4 March 1992 the applicant asked the Court to reopen the oral procedure and order measures of inquiry as a result of the statements made by the Commission at the hearing in 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.

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

401 It must be stated that the judgment delivered in the abovementioned cases (judgement of 27 February 1992 in 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) does not in itself justify the reopening of the oral procedure in this case. The Court observes that a measure which has been notified and published must be presumed to be valid. It is thus for a person who seeks to allege the lack of formal validity or the inexistence of a measure to provide the Court with grounds enabling it to look behind the apparent validity of the measure which has been formally notified and published. In this case the applicants have not put forward any evidence to suggest that the measure notified and published had not been approved or adopted by the members of the Commission acting as a college. In particular, in contrast to the PVC cases (judgement in 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, cited above, paragraphs 32 et seq.), the applicants have not put forward any evidence that the principle of the inalterability of the adopted measure was infringed by a change to the text of the Decision after the meeting of the college of Commissioners at which it was adopted.

Costs

402 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the application has failed in all essential respects and the Commission has applied for costs to be awarded against the applicant, the latter must be ordered to pay the costs, including those of the proceedings brought before the Court of Justice under Article 91 of the Rules of Procedure of the Court of Justice.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Sets the amount of the fine imposed on the applicant in Article 3 of the Commission's decision of 23 April 1986 (IV/31.149-Polypropylene, Official Journal L 230, p. 1) at ECU 9 000 000 or UK£ 5 803 173;

2. Dismisses the remainder of the application;

3. Orders the applicant to pay the costs, including the costs of the proceedings brought before the Court of Justice under Article 91 of the Rules of Procedure of the Court of Justice.

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 10 March 1992.

H. Jung J. L. Cruz Vilaça

Registrar President