1. In the context of a cartel, the fixing of common prices, even if not observed in practice, constitutes an infringement of Article 85(1) of the Treaty if they are intended to restrict competition.

2. The fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to exclude the possibility that trade between Member States might be affected. That is the position where, in the case of a market susceptible to imports, the undertakings participating in the cartel arrange a common defence against foreign competition in order to maintain their market shares.

3. It is not necessary for an undertaking to have been aware that it was infringing the rules of competition laid down in the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object the restriction of competition.

4. Although when taking a decision with regard to the application of the rules of competition the Commission is required by Article 190 to set out all the circumstances justifying the adoption of the decision and the legal considerations which led the Commission to adopt it, that article does not require the Commission to discuss all the matters of fact and of law which may have been dealt with during the administrative proceedings.

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delivered in Case 246/86 *

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I — Summary of the facts

1. *The contested agreements and practices*

Société coopérative des asphalteurs belges Belasco ('Belasco') is an association of Belgian producers of roofing felt established in 1955. Its principal activity is assistance in the establishment of IBN (Belgian Standards Institution) standards. The applicants are members of Belasco.

In 1978 the members of Belasco entered into an agreement among themselves, replacing an agreement of 1966 in similar terms, which provided in particular for the following:

the adoption of a price list and minimum prices for all roofing felt supplied in Belgium;

the allocation of quotas between members for deliveries to the Belgian market;

penalties for breaches of the agreement or decisions made under it;

the lodging of security for observance of obligations in a guarantee fund;

the defence and furtherance of the members' collective interests, notably by joint advertising;

the study and promotion of ways of standardizing and rationalizing the production and distribution of roofing felt;

a ban on making customers any kind of gifts or selling them products at a loss.

The agreement was to expire on 31 December 1983 and would be automatically renewed for a term of five years if not terminated. It was put into effect by resolutions of the general meeting of Belasco and supplemented by agreements entered into in May and October 1978 between Belasco members and non-members with a view to an agreed reduction of discounts granted to customers.

2. *The relevant products*

The members and non-members of Belasco are manufacturers of bituminous felt and similar waterproof coverings used in the building industry, principally for roofing work. The products, which are sheets a few millimetres thick sold in rolls, consist of a base of felt, woven or unwoven glass fibre matting, jute or man-made fibres, impregnated and/or coated with bitumen or tar. Roofing felt made with bitumen 'enhanced' by the addition of plastic substances, mainly to improve its mechanical properties, is also now on the market. All those products, including tar-coated felts, are the relevant products and are hereinafter referred to as 'roofing felt'.

Three categories may be distinguished among the relevant products:

(a) products certified with the 'Benor' mark as manufactured to the very strict design and performance specifications approved by the Belgian Standards Institution (IBN) and subject to periodical testing and inspections of manufacturing facilities by the Building Safety Standards Monitoring Office (SECO);

(b) products similar to 'Benor' products which, for secondary reasons mainly connected with rationalization, do not correspond to IBN specifications;

(c) roofing felt enhanced by the addition of plastic substances generally made with a polyester core. These are 'new products' which have been available on the market since the end of the 1970s.

In the decision the two categories are collectively referred to as 'Belasco' products.

The members of Belasco also sell other products, such as mastics and liquid bitumen, which are sold to the same customers and are used largely in conjunction with roofing felt (the 'ancillary' products).

3. *The Commission decision*

1. As a result of information notified to the Commission on 11 November 1983, and a request dated 8 March 1985 that such notification be regarded as a complaint under Article 3 of Regulation No 17, the Commission decided to initiate a proceeding for infringement of Article 85(1) of the EEC Treaty against the applicants and against two companies which were not members of Belasco, International Roofing Company SA ('IR') and Al-Asfalt ('AA').

On 1 July 1985 the Commission sent a statement of objections to those undertakings, in which it stated that in its opinion certain agreements and concerted practices on the part of those companies were contrary to Article 85 of the Treaty.

After giving the companies concerned an opportunity to express their views on the statement of objections, the Commission adopted the contested decision.

2. The Commission considered that the preconditions for the application of Article 15(2) of Regulation No 17 were satisfied.

The adoption of an agreement between competing producers, intended to restrict competition in the most important areas where it was likely to occur, constituted a serious infringement of the competition rules of the EEC Treaty. Among the matters provided for in that agreement, restrictions on prices and sharing of the market and collective measures against competitors constituted threats to competition of the most serious kind. The effects of such restrictions on trade between Member States had been established and Article 85(1) had thus been infringed.

The agreements and practices in question could not qualify for the exemption provided for in Article 85(3). Even agreements or practices that can be shown to have improved the production or distribution of products or to have promoted technical or economic progress can be exempted only if they give consumers a fair share of the resulting benefit, do not impose on the parties restrictions that are not indispensable to the attainment of the objectives, and do not afford the parties the possibility of eliminating competition for a substantial part of the products in question. None of those three conditions was met by a cartel whose objectives included both price-fixing and market-sharing by competing manufacturers collectively holding a predominant position on the market of a Member State and protection of that market against actual or potential competition from firms from other Member States.

As regards the agreements between members and non-members, the Commission also considered that the preconditions for the application of Article 85(3) were not satisfied. They were straightforward pricing agreements whose object was to restrict competition.

3. Consequently, the Commission called upon the addressees of its decision, namely Compagnie générale des asphaltes SA, Antwerps Teer- en Asfaltbedrijf NV, De Boer & Co. NV, Kempisch Asfaltbedrijf NV, Limburgse Asfaltfabrieken PVBA, Lummerzheim & Co. NV, Vlaams Asfaltbedrijf Huyghe & Co. PVBA, Société coopérative des asphalteurs belges, International Roofing SA and Al Asfalt NV to cease the infringements forthwith (in so far as they were still in existence) and to refrain from entering into any agreement or engaging in any concerted practice or measure likely to have a similar effect. It also imposed fines on all but the last two of those companies.

4. *The written procedure before the Court of Justice*

By application received at the Court Registry on 23 September 1986, S. C. Belasco, Compagnie générale des asphaltes SA, Antwerps Teer- en Asfaltbedrijf NV, De Boer & Co. NV, Kempisch Asfaltbedrijf NV, Limburgse Asfaltfabrieken PVBA, Lummerzheim & Co. NV and Vlaams Asfaltbedrijf Huyghe & Co. PVBA brought an action against the Commission decision.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The applicants claim that the Court should:

(1) primarily, declare void the Commission decision of 10 July 1986 (IV/31.371);

in the alternative, cancel or at least reduce the fines imposed on the applicants;

(2) order the Commission to pay the costs in their entirety.

The defendant claims that the Court should:

(1) dismiss the application as unfounded;

(2) order the applicants to pay the costs.

The intervener claims that the Court should:

(1) dismiss the application as unfounded;

(2) order the applicants to pay the intervener's costs.

III — Submissions and arguments of the parties

The applicants' submissions relate first to the errors allegedly committed by the Commission in assessing the facts relating to:

(1) the relevant market;

(2) the scope of the agreement and the measures for its implementation; the duration of the agreement;

(3) the adoption of the common price list for Belasco products; the adoption of common prices for the ancillary products; the pricing agreements relating to new products;

(4) the prohibition of gifts and sales at a loss;

(5) monitoring of observance, and compensation for non-observance, of quotas;

(6) discounts; the rules on discounts between members; the ceiling for discounts to non-members;

(7) the adoption and application of the principle of stability of clientele;

(8) concerted action against other undertakings;

(9) the application of a common programme for Belasco products; the common use of the Belasco mark and joint advertising to promote it; decisions on the coordination of the characteristics of new products.

The other arguments concern:

(10) infringement of essential procedural requirements, in that the statement of the reasons on which the decision is based is incorrect, contradictory and inadequate;

(11) infringement of Article 85 of the Treaty;

(12) infringement of Regulation No 17;

(13) breach of the principle of equality.

1. *Assessment of the relevant market*

(a) *The relevant products*

According to the applicants, the market defined by the Commission is merely a small fragment of the market for flexible waterproof roof coverings (other than tiles and slates). Over the last 10 to 15 years, there have appeared in addition to roofing felt, the traditional material, new products which perform the same function but have different characteristics.

The new materials are as follows:

high polymers, which are divided into two types: elastomers and plastomers;

polymeric bitumens;

sheets (steel, zinc, copper, aluminium, asbestos bitumen and so on);

liquids (for example, 'Triplex').

The fact that those products belong to the same market is apparent from the following documents:

a technical memorandum from CSIC (Centre scientifique et technique de la construction);

a list published by UBATC (Union belge pour l'agrément technique dans la construction) of 31 December 1984 containing technical approvals, directives and information;

UEATC (Union européenne pour l'agrément technique dans la construction) directives for the approval of roof-waterproofing systems;

CEN (European Committee for Standardization) documents.

Those documents show that the two types of products are interchangeable, although the new materials are as a rule more expensive and have different characteristics. They are of increasing importance on the market, as is evidenced by the growing number of manufacturers, suppliers and importers, both on the Belgian market and on markets abroad.

On the Belgian market there is very active and strong competition. The applicants can only survive by constantly improving their techniques and the quality of their products, by rationalizing their products and by applying prices which compete very favourably with other waterproofing and flat-roof covering products. If the Commission had not incorrectly defined the relevant market, it would have formed a different impression of the realities of the market, in particular the competition referred to above, and it would not have taken such a narrow view of the contested agreement.

The Commission points out in the first place that the applicants mentioned the new materials for the first time in their application, which explains why the Commission did not take them into account in its decision.

It then states that the definition of the relevant products serves to describe the products in question and does not have the same significance in law as in the context of a decision based on Article 86. A national cartel is likely to partition the market to an appreciable extent where the parties hold a sufficiently important position on the national market to enable them to change

the conditions of competition on that market as a result of the cartel. That concept differs, nevertheless, from the concept relevant to a proceeding under Article 86, in which it must be demonstrated that a given undertaking is in a position to act independently of its competitors and consequently requires all substitutable products to be taken into consideration.

The Commission concedes that the existence of products other than those covered by an agreement may bring competitive pressure to bear on the conduct of the parties. However, synthetic coverings are available on the Belgian market only to a limited extent. Such products may be used for roof waterproofing but that does not mean that synthetic products and roofing felt are capable of being employed by users absolutely interchangeably.

Roofing felt differs from synthetic products as regards their prices and the manner in which they are laid. The price of synthetic products is significantly higher, so that they do not represent a real alternative in economic terms for many day-to-day waterproofing jobs and tend to be used only for specific applications. Highly skilled and specialized personnel are required to lay them. If a user wishes to change to synthetic products, his staff will, in particular, need to be extensively retrained.

According to a market survey carried out in 1981 by a German firm, synthetic coverings do not genuinely compete as a substitute for roofing felt, but rather constitute a separate category of supplementary products intended for specific applications.

The use of those products is said to have given rise to serious problems in the 1970s because the users had not had the necessary training. They were used in inappropriate locations without proper account being taken of their specific technical properties. By contrast with roofing felt, which was then usually applied in two or three layers, only one layer of a synthetic product could be used in view of its high price. The slightest mistake in laying caused leaks and the contractor incurred liability as a result.

For those reasons there was a decline in the use of synthetic products in and after 1976. It was only in 1984 that they began to be used again, but only for specific applications.

The Commission also maintains that the fact that certain organizations adopt — more or less — the same specifications for the approval of roof waterproofing products does not mean that users regard them as substitutable products from the economic and practical points of view. To be relied on as proof, the UAETC and UBATC documents would have to relate both to tiles, slates, boards and steel tiles and roofing felt, in the first case, and to all materials, components and accessories used for providing a roof with a watertight barrier, in the second case. That does not mean that all those products form a single market.

The lack of any reference to synthetic products in the pre-litigation phase and in the minutes of the general meetings of Belasco members, which deal with many points relating to market trends and competition, shows that the applicants never considered that those products should be assimilated to the relevant products, or that those products brought any real competitive pressure to bear on their own products or at least not to such an extent as to be worth mentioning.

The intervener, which agrees with the market definition adopted by the Commission and with the arguments set out immediately above, also maintains that the Commission acted in conformity with the previous decisions of the Court.

The Court held in Case 27/76 *United Brands* v *Commission* [1978] ECR 207, that in order to be regarded as forming a market which is sufficiently differentiated from others it must be possible for the product in question to be singled out by such special features distinguishing it from other products that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible. It also stated in Case 31/90 *L'Oréal* v *De Nieuwe AMCK* [1980] ECR 3775, and in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, that 'the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products' (paragraph 37). However, coverings which contain no bitumen are not, or are hardly, interchangeable with roofing felt; consequently, products which contain no bitumen cannot be included in the relevant market, namely the market in roofing felt which is used in the building industry because it is waterproof, principally for roofing work.

(b) *The share of the relevant market*

As regards the market share to be attributed to synthetic products in the event of their having to be included in the relevant market, the Commission expresses its disagreement with the applicants' statement that it may be reasonably estimated that the applicants' market share, taking account of all substitutable products within that market, should be reduced by 10 to 15% for 1981 to 1983. The consequence of so doing would be to reduce the applicants' market share in Belgium to a range of 47 to 50% (1981) and 42 to 45% (1983). Those are the only data given by the applicants regarding the extent of the competition from synthetic products whose inclusion they regard as being of fundamental importance, data for which they provide no documentary or factual evidence.

In response, the Commission makes the following observations:

(i) The 'synthetic' products available on the Belgian market were, and are, for the most part imported. However, it would be difficult to use foreign-trade figures to obtain a precise idea of what importance such products might have had on the Belgian market during the

period 1981 to 1983; synthetic products appear under a number of items; moreover, such statistics would not enable a distinction to be drawn between products used, or usable, for roofing work and products used for other purposes;

(ii) A study, of which a copy is annexed to the rejoinder, estimated the market share of synthetic products in Western Europe as 4 to 5% at the end of 1981. Since only a single layer is used, those products would thus represent, in terms of surface covered, a market share of 10%. That market share was, moreover, considered to be growing slightly;

(iii) In the event that, in Belgium, synthetic products had, by the end of 1981, achieved the market percentages mentioned above in the West European market, that is to say 10% (to take a maximalist approach, in so far as those products were developed and launched primarily in the large European countries, particularly Germany) and in the event that those products formed a single market with roofing felt, their inclusion would increase the overall relevant market from 100 to 110 and the market share of the members for 1981 would be reduced from 58.7% to 53.4%. In view of the upward trend for synthetic products as from 1981, the effect of widening the definition of the market would be greater in 1983. According to the study annexed to the rejoinder, the rate of growth in the market share of synthetic coverings increased slightly. Assuming that sales of synthetic products had increased by 30% between 1981 and 1983, which must be regarded as the maximum possible increase, the members' market share would be reduced from 59.6 to 52.7% in 1983;

(iv) The abovementioned figures put forward by the applicants are very improbable. If the widening of the definition of the relevant products were to bring about a reduction of 10 to 15% in the members' market shares, as the applicants assert, that would mean that the market share of those products would have been between 20 and 30%. At the very least it seems strange that products which were so important in the market should not have been mentioned by the members and that such importance was not identified by the German firm that undertook the study of a market in which it had a direct interest. Finally, the applicants cite extracts from a technical memorandum from the CTSC (Annex 1 to the reply, Annex C to the application) devoted to 'flexible roof-waterproofing materials'. According to the Commission, all the quotations happen to relate generally both to the 'new products', which are covered by the cartel, and to the 'synthetic products', which are not. However, the new products have achieved much greater importance than synthetic products.

In conclusion, the Commission considers that, even if it ought to have taken account of the 'synthetic products' in its definition of the relevant market — which it disputes — the applicants' market shares would have remained unchanged from 1978 to 1980 and — if the hypotheses most favourable to the

applicants' case are adopted — would have been cut by 5.3% for 1981 to 1983 and by 6.9% for 1983 to 1984, that is to say by minor, or relatively minor, percentages. In any event, they definitely remained above 50% at all times.

(c) *The geographical market*

The intervener considers that the relevant market cannot be the whole European market. The applicants appear to maintain that it is, but such a view is unacceptable. The relevant market must be the one in which the parties actually wield an influence, that is to say where Belasco's abusive practices constitute a barrier to effective competition (see *inter alia* the *United Brands* judgment, *ante*). The fact is that only Belgian territory meets those criteria.

2. *The scope of the agreement and of the measures for its implementation; the duration of the agreement*

(a) *The scope of the agreement and of the measures for its implementation*

According to the applicants, the Belasco agreement and all communications by its members to other producers of roofing felt related only to old-type roofing felt known as 'Belasco'. They were never concerned with the new products. The Commission itself acknowledged that fact by implication since it did not address its decision to the Derbit Company on the ground that that company produces only new products not included in the Belasco price list (paragraph 30 of the decision). The Commission had also recognized that the price list adopted by the members included all the roofing felt marketed by the members, with the exception of new products.

The Commission did not prove the existence of a price list for the 'enhanced' or 'new' products. Nor did it prove the existence of an agreement on discounts applied to those products.

The applicants state that they never applied the agreement with respect to those products. In fact:

(a) All the new products were created and developed individually by each member. Certain members had worked with oil refineries in order to develop new products, such as Huyghe, De Boer and LAF, assisted by their supplier, Shell. Other members had used their own or foreign technology, particularly from the USA. The products manufactured by each member were different in their essential composition and in the proportions of the component substances:

ATAB	Bitumen + filler + polyester or glass fibre
	Oxidized bitumen + filler + polyester
Asphaltco	Bitumen + APP + Polyester

De Boer	Cariphalt asphalt base (from Shell) + polyester or polypropylene Oxidized bitumen + filler + polyester
Huyghe	Cariphalt asphalt base (from Shell) + polyester
Lummerzheim	Bitumen + APP + polyester Bitumen + SBS + polyester
KAB	Bitumen + filler + SBS or glass fibre, two qualities with different SBS content (13 to 20%)
LAF	Cariphalt asphalt base (from Shell) + polyester; trial production limited to own works.

The products reached the market at different times. The UBATC technical approvals record the differences in the product descriptions.

ATAB	Polygum	15.1.1980
Asphaltco	Ascoflex	8.9.1978
De Boer	No technical approval	
Huyghe	Polyflex	6.11.1981
Lummerz-heim	Elastolum	11.5.1984 (applied for on 9.7.1982)
	Lumcopol	11.5.84 (applied for on 10.5.1983)
KAB	No technical approval	
LAF	No technical approval	

The members put their new products on the market with considerable time lags. Only three of the members, ATAB, Asphaltco and Huyghe, occupied a significant position on the market during the relevant period. Accordingly, apart from the fact that those new products were only in the launch phase during the first years of the agreement, it is reasonable to ask whether the action of those three members was of such a nature as to impede competition between the manufacturers of new products.

(b) The members had different commercial policies. That is apparent from the advertising material issued by the members for the new products. Moreover, none of those documents refers to Belasco.

(c) Finally, the sale prices of new products are generally adjusted in line with the authorizations for increases granted by the Ministry. Only a comparison of the net prices shown on the invoices produced in these proceedings can establish that there was no common pricing policy. The applicable price was the market price which each of the members individually considered appropriate.

The Commission considers that the definition in the text of the agreement of the products covered by it included the new products: mention is made of felt and other cores of all kinds, both tarred and bitu-

menized, and of materials of the same kind which may be manufactured in the future to satisfy the same needs. Consequently, the provision of the agreement concerning in particular joint determination of the price list and minimum prices applicable to the sales of roofing felts related also to the new products (point 73(i) of the decision). Also, the fact that those products are mentioned in Article 3 of the agreement in relation to the fixing of quotas confirms that the agreement was indeed applicable to them pursuant to clause 1(b) thereof which defines its scope.

Moreover, the Commission considers that it has proved that, with respect to those products, the general meeting had resolved:

On four occasions between August and September 1981 to increase the sale prices of enhanced bitumen products by a specified percentage. Then, in December 1983, it had fixed the price of six new products for two classes of customer, and also the maximum permitted discounts (point 57 of the decision); and

In September 1981 and December 1982, to adopt coordinating measures (point 66 of the decision).

Finally, it is established that the new products had been included, since their introduction, in the calculation of quotas. There was no price list, in the physical sense of the term, for the new products such as existed for the Belasco products; on the other hand, the Commission had noted resolutions of the general meeting adopted on a case-by-case basis with respect to the prices of and discounts on new products (*infra*, 3(c)).

The Commission does not contend that all the measures implementing the agreement were applied also in respect of the new products. The Belasco mark and joint advertising did not relate to them and the prices of those products were not notified to other producers who were not members of Belasco.

The agreement was applied in a limited and progressive manner to those products, the volume of which did not become significant for several years (5% in 1981, 11% in 1982 and 20% in 1983 — points 4(c) and 74(xi) of the decision).

(b) *The duration of the agreement*

According to the applicants, the Belasco agreement ended on 31 December 1983, the date on which the accountant who was Belasco's only employee retired.

The Commission contends that the agreement was renewed automatically beyond 31 December 1983, at least until 9 April 1984. The Commission set out the facts proving that the agreement was applied between those dates in paragraphs 51 to 54 of the statement of objections, from which document it is also apparent that the general meeting passed resolutions for the application of the agreement in 1984 until the Commission intervened.

The applicants' argument that the accountant retired on 31 December 1983 is unfounded because he continued to act as secretary to three general meetings in 1984, before the Commission investigations of 9 April 1984, and to represent members in their relations with the authorities responsible for price control (correspondence in January and February 1984).

3. *The adoption of a common price list for Belasco products; the adoption of common prices for the ancillary products; the pricing agreements for new products*

(a) *The adoption of a common price list for Belasco products*

The applicants maintain that, whilst it is true that the members adopted a common price list for Belasco products, the prices charged on the market differed from company to company since each of the members granted substantial discounts, of up to 35%. Efforts made to standardize those discounts had failed.

As regards the joint application for price increases, the applicants maintain that such applications were strongly recommended by the Prices Department of the Ministry of Economic Affairs and were also accounted for by the limited number of raw materials and of manufacturing and distribution operations (which are similar for all of them), the small number of distributors of raw materials, cost prices which were close to each other for each product and the similar prices charged by suppliers of raw materials.

The result was that an individual application had little chance of success and in any event the Ministry would take much longer to grant it than in the case of a joint application. Moreover, authorizations for price increases took an extremely long time to come through by comparison with increases in the prices of the basic products (in this case, bitumen which enjoys automatic and immediate price increases since it is covered by the programme contract for petroleum). As a result, when the increase was finally granted, the companies applied it immediately. The time lapses between the grant of authorization and the implementation of the new price reflected the time needed to print Belasco price lists.

The applicants deny that there was any concerted action between the parties to the agreement as to the apportionment of the price rise amongst the various products or as to the most appropriate time for introduction of the increases decided upon.

As regards notification to non-members of common intentions concerning the applicants' price list, the applicants maintain that the only consequence of such disclosure was that the non-members were given a competitive advantage, in so far as they could then adjust the prices of their various products in relation to the scales proposed by Belasco. That item of information was of capital importance for competition and disclosure thereof was attributable to the obligation imposed by the prices department to make joint applications for price rises.

The Commission emphasizes that its objection is not that the applicants

submitted joint applications for price rises but that they prepared a common price list or determined prices collectively.

As is shown by the pattern of the eight price-list increases which occurred in the relevant period, the authorized increases were not automatically incorporated in the lists. On the contrary, the documents appended as Annex II to the defence highlight the differing time it took for authorized increases to be applied — between six days and several months — and demonstrates that the price rises were not applied uniformly and fully to all the products.

In fact, the eight new price lists were the subject of joint resolutions of members, after discussions in general meetings, which determined:

The general percentage of the rise to be applied;

The apportionment of that rise amongst the various products, which in several cases gave rise to jointly agreed changes in the prices of the various products;

The best time for the implementation of the changes to the rises decided upon.

As regards disclosure of the price lists to non-members, the Commission states that the competitive advantages referred to by the applicants are precisely what the Commission complained about in relation to that measure (point 74(iv) of the decision and Annex 7 to the statement of objections).

Such disclosure was not the consequence of the obligation imposed by the Prices Department to make joint applications for price rises. In the first place, no such obligation exists; in the second place, the non-members had made their applications for price rises individually; and in the third place, the disclosure related not only to intended applications to the authorities for price rises but also to plans and price lists for implementation of any increases granted.

(b) *The adoption of common prices for the ancillary products*

The applicants maintain that, whilst it is true that the general meeting of members adopted 10 resolutions regarding the sales prices of the ancillary products, there is no proof that there was anything like a common price list for such products. Moreover, the Commission concedes that 'those prices do not appear to have been observed in practice' (point 74(v) of the decision).

The Commission contends that it took full account of the fact that the prices for ancillary products were not observed in practice.

(c) *Pricing agreements relating to new products*

According to the applicants, the Commission concedes that the common prices were not applied (point 74(xi) of the decision).

The Commission contends that the agreement related also to the joint determination of common price lists for new products. Between August and September 1981, the general meeting resolved on four occasions to increase the sale prices of enhanced bitumen products by a specified percentage. Then, in December 1983, it fixed the prices of six new products for two classes of customer and also the maximum permitted discounts (point 57 of the decision).

4. *The prohibition of making gifts or selling at a loss*

According to the applicants, the prohibition of making gifts and selling at a loss merely reflected the incorporation in the agreement of a provision designed to ensure fair competition. Moreover, the provision in the agreement was partially redundant because the Belgian Law of 14 July 1971 on commercial practices (*Moniteur belge*, 30.7.1971) expressly prohibits any trader from offering for sale or selling a product to a consumer at a loss (Article 22).

The offering of gifts is strictly limited by the same Law, being allowed in only very restricted circumstances (Article 37) and the exceptions have been restrictively interpreted by the Belgian courts.

According to the Commission, the provisions of the Belgian Law mentioned by the applicants have nothing to do with fair competition between traders but are designed to protect consumers and relate only to sales to the final consumer; consequently they do not apply to sales by the applicants, whose customers are retailers or roofing contractors.

The provisions of the agreement are intended to ensure that the minimum prices laid down in it are not undermined by gifts or sales at a loss to purchasers of roofing felt.

5. *The monitoring of quotas and the system of compensating their non-observance*

The applicants consider that whilst it is true that Article 3 of the agreement allocated quotas which were subject to monitoring by the accountant and were enforced by a system of penalties and compensation, that system had never operated. The accountant responsible for monitoring quotas, who had no powers of investigation, accepted the figures which he received from the various companies but they did not reflect the real position. Also, the Commission recognized in its decision that the quotas had not been applied and that ATAB, for example, had exceeded its quota by a considerable amount, since although its allocated quota was 24% in practice it had 30%, and KAB's sales were three times its quota (point 26).

The figures given in Annex 4 to the statement of objections under the heading 'Accounts outstanding' related not to penalties in respect of any quota infringements but reflected adjustments in the proportional contribution of each member to the operating expenses of Belasco as a cooperative association.

The argument that the sums involved represented adjustments to the proportional contributions to Belasco's operating expenses appears to be without foundation. It is apparent from Annex VII to the rejoinder that, if that had been the case, KAB would have contributed nothing to the operating expenses but would have received a sum of BFR 119 858 (contribution to expenses BFR 344 016, less 'adjustment' of BFR 463 874) whereas Asphaltco would have borne almost one third of the operating costs for 1983.

According to the Commission, those provisions of the agreement were applied and the quota system was observed by five of Belasco's seven members.

The fact that two companies managed to evade the monitoring system does not mean that, as a whole, the system was inadequate or that the quota system did not operate. Even in the case of those two companies, the agreement had been effective in so far as they expected compliance with it by their partners, at the same time taking the view that it had a restrictive effect on themselves which prompted them to infringe it and to conceal their infringement.

The accountant did not merely examine the monthly returns submitted by the members but also made visits to their premises to verify the figures. He prepared year-end statements and noted quota infringements and sales falling short of the agreed quotas. Under that system, there were consequential compensation payments between members, those who exceeded their quotas having agreed to pay sometimes substantial sums by way of penalty, which were then paid as compensation to those who had not achieved their quotas.

6. *The discounts*

(a) *The rules on discounts between members*

The table annexed to the rejoinder shows clearly, for example, the direct relationship between quota infringements and quota shortfalls, on the one hand, and the total sum of BFR 1 189 288 paid by ATAB, Asphaltco and Huyghe to De Boer, KAB, LAF and Lummerzheim in 1983, on the other.

The applicants maintain that they never entered into any agreement on the level of the discounts to be applied by each of them against the common price list, as the Commission itself conceded, and that in any case no common discounts were ever applied (point 33 of the decision).

No 'price rules', which would have at the very least involved severe decisions and a strict framework for the implementation of those decisions, so as to avoid and penalize any non-compliance, had ever existed. In fact, disorder prevailed and it was everyone for himself as far as discounts were concerned — discounting followed the traditional pattern in all cases, being dictated by the importance of the customer and the volume of the order.

The applicants emphasize that the term of the agreement included the years 1979 and 1980 when the second petroleum crisis occurred. During that period the applications for price rises took a considerable time to go through (more than three months for each application) and such temporary 'freezing' of prices naturally prompted all the manufacturers and suppliers to reduce their discounts, regardless of the effects of any agreement.

The applicants also rely in support of their argument on the report by the auditor, Mr Buytaert, which shows that the rebates granted varied greatly from one company to another. The Commission's criticisms of that report are unjustified, for the following reasons:

(1) *Failure to specify the total number of customers*

The members provided the Commission, by way of example, with a variable number of invoices to show the differences in the prices invoiced. The number of invoices was different for each member and was necessarily limited, since no member was materially able to produce to the Commission its full invoicing records for a period of six years. Since they were specimen invoices, the total number of customers was irrelevant.

(2) *The fact that several invoices were addressed to the same customers*

By reducing the number of infringements of the agreement to the number of customers who benefited thereby, the Commission is trying to present the situation in a manner favourable to its view.

The customers receiving large discounts are few in number but are capable of disposing of substantial quantities of products. That applies to Asphaltco, the Wickes DIY chain, which has 10 branches in Belgium and sells direct to the public at prices which many contractors would be unable to obtain from the manufacturers.

The number of customers which received large discounts is necessarily small, but those customers are all in a position to disturb the Belgian market by reason of their size.

(3) *Analysis of the invoices*

The invoices submitted to the auditor, Mr Buytaert, may be analysed by reference to the following table:

		Number of invoices presented	Number of different customers	Number exceeding 25/23%	Range of discounts in %
ATAB	1978	20	11	9	18 to 34
	1979	27	10	13	20 to 35
	1980	25	16	13	5.5 to 40
	1981	20	12	19	21 to 35
	1982	22	15	21	20 to 37
	1983	23	12	23	28 to 38
Asphaltco	1978	12	12	1	0 to 30
	1979	12	12	1	15 to 30
	1980	13	13	2	0 to 30
	1981	12	12	3	8 to 30
	1982	13	13	6	9 to 36
	1983	13	13	8	6.5 to 36
De Boer	1978	—	—	—	—
	1979	30	?	0	5 to 25
	1980	29	?	2	5 to 25
	1981	26	?	17	10 to 30
	1982	23	?	17	20 to 50
	1983	23	?	21	10 to 32
KAB	1978	—	—	—	—
	1979	5	?	0	23 to 25
	1980	5	?	0	20 to 25
	1981	5	?	4	23 to 30
	1982	5	?	3	22 to 28
	1983	5	?	5	29 to 40
Lim. Asf. Fabr.	1978	16	15	0	0 to 15
	1979	15	14	0	0 to 20
	1980	15	13	0	0 to 23
	1981	14	13	1	0 to 25
	1982	15	15	2	0 to 25
	1983	15	15	1	0 to 28
Huyghe	1978	—	—	—	—
	1979	7	7	0	10 to 18
	1980	8	8	0	5 to 20
	1981	8	7	1	10 to 35
	1982	8	8	0	2 to 20
	1983	8	8	1	10 to 25

From the foregoing table it is apparent that:

(i) The number of infringements of the 'agreement' is much greater than would appear to be the case from the Commission's presentation of the data (reduction of the number of infringements to the number of customers);

(ii) The number of infringements, and even the number of customers benefiting thereby, increases progressively over the years. It is precisely in 1980, when the members suggested, at their general meetings, reducing the ceiling for discounts from 25 to 23%, that the number of infringements started to increase considerably and monitoring of observance was less strict, as conceded by the Commission (paragraph 48 of the defence). This clearly shows that the members were not observing the agreement and therefore obtained no advantage or *quid pro quo* from it;

(iii) The percentage discounts shown on the invoices produced show that the members applied discounting policies which differed from customer to customer. Logic dictates that the members should accord large discounts only to customers whose size and purchasing power justify them, and therefore that the number of cases should be limited;

(iv) It was the largest manufacturers (such as ATAB, Asphaltco and KAB) which granted the largest discounts and those are the manufacturers which concentrate their efforts on trade in materials and large-scale distribution;

(v) The differences between net sale prices to different customers are exceptionally large for standardized, and thus widely-used, products and very close in terms of cost prices. It is economically illogical to maintain that manufacturers of widely-used products could remain in the market with big price differences as between each other. The most expensive are automatically eliminated by the customers, not by competition;

(vi) The number of exceptions accepted by the Commission is less than the true figure, which shows that the Commission should have examined the Buytaert report more carefully.

(4) *The number of infringements*

The Buytaert report shows the following infringements:

ATAB

1978:	customers	De Somer	26 and 28%
		Albintra	31, 34 and 33%
		Tytgat	31%
		Germeau	29%
		Massar	29%
		Lubico	26%

that is to say, six customers and nine infringements.

1979:	customers	Abintra	30 and 35%
		Tytgat	26 and 32%
		Massar	28 and 31%

that is to say, three customers and 13 infringements.

1 January to 31 June 1980:

customers	Massar	30%
	Tytgat	35%
	Albintra	35%
	Kerkhofs	31%

that is to say, four customers and four infringements.

1 September to 31 December 1980:

customers	Stassart	33% and 34%
	Albintra	35%
	Alosta	27%
	Distribouw	30%
	We Po Gro	27%
	Tytgat	40% and 32%

that is to say, eight customers and 13 infringements.

1981:

customers	Albintra	33, 35 and 27%
	Tytgat	25 and 34%
	Alosta	27 and 26%
	Collette	30%
	Eurosan	32%
	D'Haeseleer	25%
	Bricoplus	28%
	Labeeuw	35%
	Braembussche	25%
	Asphaltex	25%
	Naessens	30%

that is to say, 11 customers and 19 infringements.

1982:

customers	Massar	30, 36%
	Albintra	35, 37%
	Nissen	30%
	Naessens	37%
	Van Maldeghem	25%
	Audenaert	25%
	Stassart	34, 30%
	Van den Abeele	28%
	J. Kin	30%
	Hansez	35%
	Bolckmans	35%
	Cradec	35%
	Valcke	28%
	Tytgat	26%
	Collette	35%

that is to say 15 customers and 21 infringements.

1983:

customers	Bolckmans	35%
	Naessens	35, 36%
	Van Marcke	20%
	Van Lierde	30, 35%
	Lubico	35%
	Albintra	38, 31, 28%
	Hansez	35%
	Stassart	34%
	Superbois	33, 35%
	Decamps	35%
	David	30%
	Asphaltex	30%

that is to say 12 customers and 23 infringements.

Asphaltco

1978: customer Wickes 30% — 10 branches and discount policy

1979: customer Wickes 30% — 10 branches and discount policy

1980:

customers	Wickes	30%
	Asphaltbat	30%
	28 705	30%
	28 706	25%

that is to say 17 invoices on which the ceiling was exceeded.

1982: 17 invoices on which the ceiling was exceeded.
1983: 21 invoices on which the ceiling was exceeded.

KAB

1978: no discounted invoices
1979: no infringements
1980: no infringements
1981: 5 invoices and 4 infringements
1982: 5 invoices and 3 infringements
1983: 5 invoices and 5 infringements

LAF

1978: no infringements
1979: no infringements
1980: no infringements
1981: 1 infringement
1982: 2 infringements
1983: 1 infringement
Note: the Commission mentions no infringements by LAF

Huyghe

1978: no invoices submitted
1979: no infringements
1980: no infringements
1981: no infringements
1982: no infringements
1983: 1 infringement
Note: the Commission mentions no infringement

It is apparent from the foregoing that:

(i) the members adopted different policies regarding price discounts; ATAB is notable for large discounts, Asphaltco, KAB and De Boer for medium-sized discounts, Huyghe and LAF for resolutely low discounts;

(ii) a wide range of discounts, differing according to the members, was granted on sales of products.

The Commission states in the first place that its decision relates to 'rules' on discounts between members, applied in particular from 1978 to 1980 but also less intensively from 1981 to 1983. The 1978 agreement was not observed and the agreement concluded later on 30 October 1978 was applied until it collapsed in July or August 1980, as a result of UPM's being declared insolvent on 4 July 1980.

According to the Commission, the fact that the highest discounts increased after 1980 does not mean that the rules on discounts ceased to exist on that date. The reference by the applicants to infringements of the rate of 23% for 1981 to 1983 is meaningless in so far as the decision does not claim that the members observed a ceiling during that period.

The Commission considers that the complaints of one member or another about non-compliance with whatever was agreed concerning discounts confirm the existence of an arrangement between the parties on discounts.

With regard more particularly to the agreement concluded with non-members on discounts and applied from October 1978 to the end of July 1980, the Commission

considers that any examination of the information provided by the applicants must take account of such number of customers as may have received larger discounts than those envisaged in the agreements. For a first assessment of the extent to which the agreement was observed, the number of invoices addressed to each customer is not a significant factor, but those invoices cannot be used at a later stage to assess the volume of business involved, in so far as only a sample of the invoices was provided and not the total number. The invoices are meaningful only in so far as they establish the date on which the discount was granted.

According to the Commission, the following conclusions are to be drawn from the information provided by the applicants and the Buytaert report:

4.1. With respect to ATAB

None of the infringements recorded for 1978 relates to the period following 30 October 1978, the beginning of the relevant period.

The infringement by Kerkhofs in 1980 occurred at the end of July 1980, that is to say well after UPM's insolvency on 4 July 1980.

The infringements noted in the Albintra invoices are of no significance; Albintra is a wholly owned subsidiary of ATAB and the prices invoiced to it are transfer prices.

It follows that the only ATAB customers which benefited from discounts over the 25% envisaged in the agreement of October 1978 are Tytgat and Massar. The above table, which indicates 13 infringements in 1979, shows that those two Albintra customers together received a total of 13 invoices granting discounts in excess of the ceiling.

In 1979, following a documented complaint made by another member concerning the discounts applied by ATAB, an inquiry was ordered by the general meeting; the meeting concluded that the discounts granted 'were in fact in conformity with the agreements'.

4.2. With respect to Asphaltco

None of the infringements relating to Asphaltco's customers related to the period from October 1978 to July 1980.

Thus, only one customer (Wickes) received discounts exceeding 15% during the period under consideration. Wickes is in fact a private customer, in so far as Asphaltco made products under contract specifically for it at a price which was uniformly 30% lower than the list price. It is normal for work under contract to be carried out on more favourable terms than those applied to sales of a manufacturer's own products.

4.3. With respect to De Boer, KAB, LAF and Huyghe

It is apparent from the information produced by the applicants that no customer received discounts in excess of 25% during the period from October 1978 to July 1980.

It follows that three customers (two of ATAB's and one of Asphaltco's) received discounts in excess of the ceiling fixed by the October 1978 agreement during its period of application.

Discounts in excess of 25% were more numerous both before and after that agreement and Lummerzheim has produced no evidence to shown that it did not observe the October 1978 agreement.

The Commission concludes that the agreement of October 1978 to July or August 1980 on the ceiling of 25% for discounts was observed, except in the case of the three customers referred to above.

If, as they maintain, the applicants obtain 80% of their turnover from 20% of their customers and that it is the large customers which benefit from substantial discounts, that fact can only serve to emphasize the impact of measures imposing a ceiling on discounts.

(b) *The ceiling for discounts granted to non-members*

The applicants claim that the Commission itself conceded that the agreement of May 1978 ended in failure (points 54 and 55); as regards the October 1978 agreement, the Commission confines itself to referring to indices (point 58) but is obliged to conclude that any agreement on limitation of discounts failed (point 56).

The Commission contends that the content and the implementation of the abovementioned agreements is described at length in points 53 to 56 of the decision. The applicants have put forward no argument to dispute those facts.

7. The adoption and implementation of the principle of stability of clientele

With respect to this complaint, the applicants maintain that the Commission recognized that this objective laid down in the agreement had been attained to only a limited extent in practice. The list produced by the applicants of the customers won and lost during the relevant period clearly shows changes in clientele.

The Commission contends that, contrary to the applicants' assertion, it also cited specific cases of allocation of customers (point 52 of the decision), which are described in detail in points 35, 36, 40, 41, 42 and 46 of the decision and show that that provision of the agreement was implemented in clearly defined circumstances. That is true, in particular, of the following cases: in January 1979 ATAB asked the other members not to make their best offers (point 40 of the decision); in November 1979 LAF made the same request (point 41); and in May 1980, ATAB again made the same request (point 42).

The Commission reproduced in its decision (point 74(vi)) the applicants' response to the statement of objections, according to which the principle of stability of clientele was observed only to a limited extent in practice.

8. *Concerted action against other undertakings*

The applicants claim that the action mentioned by the Commission whereby three members were able to take customers from IKO is indicative of the extremely fierce competition which prevailed in the market. They state that any defence measures undertaken against IKO, discussed in general meetings, went no further than the stage of declarations and that the proposals were not put into effect.

As regards the applicants' action concerning UPM, they consider that the manner in which the Commission presented that event is wholly at odds with the true position.

In the first place, UPM's insolvency resulted from incautious management.

The public authorities had taken an interest in that insolvency and when a Netherlands group commenced negotiations with the Ministry for the Flemish Region with a view to taking over the company it was that ministry which attempted to find Belgian purchasers for the insolvent company. To that end, it contacted several of the applicants, on two occasions, urging them to take action to ensure that the insolvent undertaking did not fall into the hands of rival Netherlands companies regarded with suspicion by the Flemish people.

Notes taken by Mr Louwers, the managing director of Lummerzheim, during the meeting of 23 July 1980 held in the office of Mr Akkermans, the Minister of the Economy for the Flemish Region, appended by the applicants to their reply, show that:

The Minister wanted UPM, which was a Flemish undertaking, to be saved and Mr Madou (UPM) wanted Belasco to undertake that task;

Three ways of rescuing UPM were envisaged: two with the intervention of the SCNI, and one with the intervention of the GIM (Geweestelijke Investeringmaatschappij);

Mr Geboes, a member of the Minister's personal staff, drew attention to the fact that people in the Netherlands, and also the Germans, were interested but expressed the wish, having regard to the prospects of the regional economy, that the undertaking should remain in Belgian, that is to say Flemish, hands;

The response given by Belasco and those of its members that were present was that UPM was not worth the asking price and that the Dutch and the Germans, after making their calculations, would arrive at the same conclusion — and they did;

Mr Geboes had already considered UPM's position in December (1979) and his conclusion had been in the negative.

In the applicants' view, it may be concluded from that document and from the background to the affair that:

In no case did the members of Belasco boycott UPM to such an extent as to bring about its insolvency. The insolvency appears to be a direct result of errors, bad management and deterioration of capital goods.

It was the Flemish Minister, and not the applicants, who wanted a takeover by Flemish undertakings. It is wrong to attribute that attitude to the applicants and to allege that they wanted to obviate a takeover of UPM by foreign interests (see point 39 of the decision and paragraph 59 of the defence). There was certainly no reliance upon the 'already unstable equilibrium of the market'. The only reference thereto was by the representative of the Minister for the Flemish Region.

The applicants did not come forward as purchasers since the price was excessive. They cannot be criticized for taking that view since they were under no obligation to take UPM over.

The Commission admits that the concerted action undertaken by the members in order to take customers away from IKO shows that there was price competition on the part of that undertaking but states that it is also indicative, in particular, of the members' wish to stifle such competition by collective dissuasive action.

As regards UPM, the Commission states that it never claimed that the applicants were responsible for its insolvency or for the fact that it could not be saved. On the contrary, the decision criticized the members for taking action to prevent a takeover by one or more foreign undertakings.

The members had approached the insolvency of UPM in accordance with the spirit and the letter of a number of provisions in the agreement intended to ensure that the members' plant could not be used to grant any benefit whatsoever to competitors on the Belgian market and to promote and defend the collective interests of the members, particularly in the event of an increase in competition from undertakings abroad.

Moreover, it is apparent from the minutes of the general meetings that, as soon as there was any hint of UPM's becoming insolvent or being taken over by third parties, the members responded by adopting a joint position. After considering whether or not it was appropriate to purchase UPM, they concluded that UPM might 'disappear on its own' and therefore that to do so would be to 'send good money after bad'. That confirms that their purpose was indeed to ensure that UPM did not become a competitor in the hands of a non-member.

It was then decided to contact the Netherlands company which had been in touch with UPM with a view to a takeover. Thereafter the members kept a close watch on all moves relating to a takeover of UPM by foreign potential purchasers. For example, it emerged in 1982 that offers were made to purchase UPM, even though at an earlier stage all hope of saving the company was seen to have been abandoned. The general meeting then noted: 'It would be advisable to keep this matter under close review'. Furthermore, the members jointly arranged for an auditor's report on the insolvent company. It is clear from the foregoing that the members took joint action regarding the takeover of UPM.

It was against that background that the meeting of July 1980 was held at the offices of the Flemish regional economic authorities, a report thereof having been prepared by Mr Jan Geboes, a member of the Minister's staff.

According to the applicants, that document is inaccurate in so far as it indicates that Belasco's representatives intervened in favour of a national solution, going against a takeover by foreign interests, for fear of upsetting the 'already unstable equilibrium of the market'. During the pre-litigation procedure, the Commission considered that there was adequate proof of that intervention in view of the clear wording of the report on that point, its origin and the context in which the intervention occurred. The fresh documents produced (the abovementioned notes taken by Mr Louwers) do not detract from the report of the meeting even if they make no reference to the issue of destabilization of the market.

The intervener shares those views and adds that not only a Netherlands group but also other undertakings or international groups were interested in a takeover of UPM. They were: BP Ltd., UK, P. W. Smith Co., Chicago, Illinois, and — jointly — Mathys NV (Belgium), OFIC (France) and Lancashire Tar Distillers (UK).

According to the Commission, the provisions of the agreement on collective action did not remain at the purely theoretical stage, as asserted by the applicants. The Commission showed that:

The members did in fact undertake concerted and effective action against a Belgian producer (IKO) (point 60) whereby customers were successfully taken from it;

The members decided, shortly before the Commission investigation, to take similar concerted action against an importer, Canam Sales, and against a Belgian producer, Al-Asfalt (point 62); it went further than the mere proposal to which the applicants claimed it was limited;

In November 1983 the members considered a proposal to undertake action in the Netherlands to combat deliveries by a Netherlands producer to a Belgian importer (point 61); similar action undertaken in Germany at a time prior to the period under review was cited as an example by the originator of that proposal; according to the Commission, it was therefore relevant, in order to illustrate the scope of the proposal and to show that it was not incapable of

implementation or hypothetical, to summarize in the decision the action taken in Germany (point 61);

The members acted in concert with respect to the takeover of UPM (point 63 *et seq.*).

The Commission does not consider that it has demonstrated the 'implementation of each of those proposals or decisions to take action' since it recognized that it was unable to determine how some of them had been acted upon. On the other hand, it considered that those examples of proposals concerning action taken, decided upon or suggested, whether or not accomplished, show that the provisions of the agreement relating thereto were certainly not theoretical. There was thus no contradiction in its reasoning.

9. *The application of a common programme for Belasco products; joint use of the Belasco mark and advertising measures to promote it; the decisions on coordination of the characteristics of new products*

(a) *The application of a common programme for Belasco products; joint use of the Belasco mark*

According to the applicants, neither the Benor standard nor the Belasco name is a trade mark, but they provide a guarantee of conformity with Belgian standards. Moreover, each member has always continued individually to advertise the Benor products, each under its own trade mark. By way of example, the applicants mention the following trade marks which have been used by the various manufacturers for traditional or 'old' products: Roofex, Isolum, Poliphalt, Rocar, Limburgia, Glasfiber, Flasmex, Asco, Siliphalt, and so on.

Each manufacturer developed its own technology and sold 'new' products under its own trade mark, at different prices, thus increasing competition among the members.

There was never any agreement for a common product programme other than Benor products, which are now outmoded from the technical point of view. The name 'Benor' may also be used by any manufacturer or importer of bitumen products, even those not belonging to the groups of undertakings involved in the present proceedings. The Commission conceded that the measures in question had no restrictive effect (point 80 of the decision).

According to the Commission, the aim pursued in using the Belasco mark, taking rationalization measures and establishing a common programme was to limit the range of products and, consequently, to limit the extent to which members competed by differentiating their products. That effect must be assessed in relation to the restrictive framework of the agreement and its implementation.

Whether or not 'Belasco' was registered as a trade mark is irrelevant in that context.

In the Commission's opinion, the common programme did not include new products, but it is wrong to say that the programme was limited to Benor products. It covered Belasco products, the range of which was barely wider (3% of members' production).

The Commission never conceded that the restrictive effect of those measures had not been proved. In point 80 of the decision it stated that it was not certain that those measures themselves actually had major restrictive effects, which does not mean that they had no effect. Moreover, according to the Commission, the specific restrictive effect of those measures derived from their function as reinforcement for other restrictive measures in the agreement concerning quotas, prices, discounts and concerted action to eliminate factors by which products might be differentiated and therefore to eliminate competition.

(b) *Joint advertising to promote the Belasco mark*

The applicants claim that the fact of participating in the promotion of members' interests by joint advertising is not intrinsically contrary to competition law. Joint advertising of Benor and Belasco logos is not likely to reinforce the allegedly anti-competitive nature of the agreement in so far as the latter is intended precisely, through the Belasco association, to improve the quality of products, rationalize manufacturing and standardize the range of products offered to architects.

The Commission contends that although such measures are not normally covered by Article 85(1), the position is different where they derive from an agreement intended to ensure uniformity of prices and products, where individual advertising should still promote competition by differentiating the products in the eyes of the users.

(c) *Decisions on the coordination of the characteristics of new products*

The applicants claim that the pursuit of standardization is necessarily the first stage in the desirable process of ensuring uniformity at both Belgian and European level.

The Commission contends that the objective of the standardization measures is not that claimed by the applicants but is to limit the variety of new products to be manufactured so that common prices can be fixed for them.

10. *Infringement of essential procedural requirements in that the statement of the*

reasons on which the decision was based was incorrect, contradictory and inadequate

(1) *Incorrect and contradictory statement of reasons*

1.1. The applicants maintain that there is a contradiction between points 73(vi) and 66 and points 11 and 73(vi) of the decision. On the one hand, the Commission considers that the measures for the rationalization and standardization of products were 'at least partly intended to restrict members' freedom to differentiate their products' (point 73(vi)) and criticizes the applicants for having undertaken to adopt a common definition for the principal specifications of new products. Thus, in 1981 the members decided to manufacture felt with a plastic core material 4 mm thick and in December 1982 they jointly decided the concentrations of plastic substances to be incorporated in enhanced bitumen (point 66).

On the other hand, the Commission recognized that Belasco's principal activity was the establishment of standards (point 11) and that the complaint regarding the adoption of rationalization measures did not relate to members' participation in the establishment of standards (point 73(vi)).

That statement of reasons is incorrect and contradictory since standardization and rationalization are by definition intended to remove differences between products and a precondition for the establishment of IBN standards is the marketing of standardized products for 10 years.

The Commission replies that there is no contradiction between the points mentioned and refers to the arguments set out in part 9(c) of this Report.

1.2. The applicants also claim that there is a contradiction between, on the one hand, point 76 and, on the other, points 101 and 104 of the decision. The Commission states that 'the effects of a cartel must be taken into consideration when it comes to assessing the gravity of the infringements' (point 76) but, in applying Article 15(2) of Regulation No 17, it purports to take account of the gravity of the infringements without at any time considering the effects of the cartel on the relevant market, which are negligible from the point of view of competition.

The Commission contends that the effects on competition ascertained by it are not negligible.

1.3. According to the applicants, the Commission's statement of reasons is also incorrect and contradictory where it states that the deliveries of the members of the cartel accounted for 57 to 60% of consumption of the relevant products (point 88); that figure becomes 70% (at least) when the Commission seeks to establish that trade between Member States was affected (point 91).

The Commission states in reply that the percentage given in point 88 is for deliveries by members alone whilst the figure in point 91 is for deliveries by both members and non-members.

1.4. According to the applicants, there is a contradiction between points 88 and 62. The Commission states that 'It has been shown . . . that such [collective] action was by no means hypothetical' (point 88). However, when it considered the implementation of that action the Commission concedes that it found no evidence that either of the measures proposed by one of the member companies, in November 1983 and in February 1984, was taken (point 61). The only operation which it mentions is irrelevant since it took place in the Federal Republic of Germany in 1973 and 1974, outside the period covered by the decision.

The Commission contends that the collective action envisaged in the agreement did not remain at the purely theoretical stage (see the arguments discussed at the end of part 8 hereof).

1.5. The applicants claim, finally, that there is a contradiction between the Commission's complaint that they had entered into an agreement relating not only to Belasco products but also to new products and the fact that it excluded Derbit from the addressees of the decision (point 30) on the ground that it manufactured only new products, admitting by implication (or perhaps indeed expressly) that the cartel did not relate to the latter.

The Commission contends that the fact that the decision is not addressed to Derbit, an undertaking which manufactures only new products, is irrelevant. Derbit is not a party to the agreement in question and did not participate, as a non-member, in the agreements with members; those agreements also excluded new products from their scope. It was for those reasons that the decision was not addressed to Derbit and certainly not because the cartel did not relate to new products.

(2) *Inadequacy of the statement of reasons*

2.1. According to the applicants, the Commission did not reply to the arguments which it put forward regarding the effects of the agreement on the market. It did not examine the reports drawn up by an auditor, according to which none of the commitments entered into by the parties to the agreement had been observed by them.

The Commission states that the Court has consistently held that it is not required to discuss all the issues of fact and law raised by all interested parties in the course of the pre-litigation procedure (for example in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125). Contrary to the applicants' assertion, the Commission carefully examined the reports referred to and all the figures in them. It gave the result of that examination in point 50 of the decision. It was not the result desired by the applicants.

2.2. The statement of reasons for the decision is also alleged to be inadequate with respect to the matter of quotas. According to the Commission, 'the quotas practically eliminated any incentive or

advantage for the members to try to increase their market share through greater competition, since any increase at the expense of other members was effectively prohibited and penalized' (point 78 of the decision). The Commission uses that form of words because it concedes implicitly that the real position was entirely different. In the same paragraph of its decision it states that 'ATAB and KAB in particular were able to avoid the quotas, sharing out the market by exploiting alleged deficiencies in the policing arrangements'.

The same acknowledgement of non-observance appears in the part of the decision dealing with the facts (point 26).

The Commission considers that the statement of reasons is adequate (see the arguments set out in part 5 hereof).

2.3. According to the applicants, the Commission admitted that all attempts to unify discounts had failed, in particular:

point 35: '... campaign involving large discounts being conducted by IR'.

point 36: '... bidding up of discounts'.

point 37: '... UPM complained that the planned reductions had not been implemented ... the attempt to reduce discounts had been a failure'.

point 38: 'At the request of UPM and IR, together with AA, the general meeting decided "to work for a 2% cut across the board in the discounts granted ... ".'

point 39: '... at least four meetings took place between members and the three other manufacturers on a further cut in discounts whereby the maximum rate would be reduced to 23%'.

point 40: '... complaints were made about discounts allegedly given by ATAB ... UPM complained to the members about the alleged failure to honour the agreements on discounts ... '

point 41: 'In November 1979 KAB complained about the terms Asphaltco had offered ... LAF asked its fellow members not to offer discounts ... '

point 42: 'In May 1980 IR complained about disregard of the agreed maximum discounts" ... '

point 44: 'The minutes ... contain reports of competition on discounts and complaints about this by AA and IR ... '

point 45: '1980 had been "a year of missed opportunities ... no reduction in discounts was achieved. On the contrary, after the bankruptcy (of

UPM in July 1980) everyone joined in the rush to sign up the firm's customers, by offering higher and higher discounts" . . . '

point 46: 'In June 1981 ATAB again denied allegations that it had given too high discounts . . . '

point 48: '. . . a member complained of illicit discounts being given by KAB . . . '

point 50: 'In the course of the proceedings all the members except Lummerzheim produced invoices and credit notes for 1979 and 1980 (and three members for 1978 also) purporting to show that their own conduct at least belied the existence of any joint measures in October 1978 and March 1979 to limit discounts to 25 and 23% respectively. In fact, the rates of discount the documents show most members to have been giving during the period October 1978 to August 1980 do conform, with some exceptions in the case of certain members, to a pattern of limitation on discounts. ATAB, which during this period was greatly exceeding its sales quotas, kept to the maximum of 25% . . . and 23% . . . which often took the total discounts above the maxima'.

The applicants claim that the statement of reasons is inadequate in relation to the above matters because the independent auditor's report annexed to the first reply given by the applicants to the statement of objections showed that the discounts granted differed greatly from one undertaking to another.

The Commission considers that the statement of reasons was adequate, relying upon the arguments set out above (part 6). As regards the quotations given by the applicants to support their view that the Commission acknowledged that the rules on discounts had failed, the Commission makes the following observations.

The first two quotations (from points 35 and 36 of the decision) relate in fact to the reactions of the general meeting of members to discount campaigns or competitive discounting by non-members during the period prior to the conclusion of the agreement with the non-members in May 1978. The third quotation (point 39) concerns the period preparatory to the conclusion of the second agreement in October 1978, when the general meeting envisaged proposing at a subsequent stage a reduction of 2% on all discounts. The fifth quotation (point 39) refers to the negotiation phase leading up to the agreements. The sixth, seventh and eighth quotations (points 40, 41 and 42) relate to complaints made by members or non-members concerning non-observance by their partners of the agreed limits on discounts. They

confirm the existence of a cartel. The ninth quotation (point 44) confirms the purpose of the application — expressly noted by the Commission — of the agreement of November 1978 with the non-members and the members' decision to continue, among themselves, to limit discounts to 23%. Points 45, 46 and 48 of the decision confirm the existence of an agreement after 1980 between the members concerning the limitation of discounts and records the assessment of certain members and of the President of Belasco of the extent to which it was observed.

Far from demonstrating the failure of any attempt to standardize discounts, the quotations selected by the applicants show, when read in context, that there were rules on discounts between members, on the one hand, and agreements between members and non-members, on the other, concerning the limitation of discounts applied by members between 1978 and 1980 and even beyond that date in the first case, although in a less rigorous manner.

Point 50 of the decision gives a precise answer to the argument raised by the applicants in the course of the procedure when they produced the report by the auditor, Mr Buytaert, according to which the discounts actually granted differed greatly from one undertaking to another and regularly exceeded the agreed ceilings. That report, which the Commission studied attentively, is made up of a series of invoices and credit notes from six members, without any indication of the total number of customers, and, in many cases, several invoices addressed to the same customers were produced. As stated in point 50 of the decision, an analysis of those documents produced by the members in the course of the procedure showed that the members kept the discounts granted to customers within a ceiling of 25% during the period from October 1978 to August 1980, with the exception of the discounts granted by ATAB to two customers and by Asphaltco to one particular customer and the transfer prices to subsidiaries and between members; it also showed that after August 1980 the exceptions to the ceiling — then 23% — were more numerous (two customers of KAB, two of De Boer, one of Asphaltco and six of ATAB); points 35 to 45 of the decision also recorded the complaints made on that subject by members against ATAB; the Commission took account of this less strict application of the rules (see points 74(iii) and the end of point 79 of the decision).

It follows that the Commission gave ample reasons for its finding that the measures and agreements referred to in the decision, whose purpose was to restrict competition, were applied, even if, as is inherent in the nature of such agreements, certain parties contrived to evade them, and their effect was to restrict competition, as is confirmed in particular by the complaints referred to.

2.4. The applicants state that the Commission criticizes them for fixing the sale prices of new products even though at the same time it recognizes that 'it has not been established that the prices and price increases decided for new products were actually adhered to' (point 74(xi)) and that they were excluded from the Belasco common price list (points 28 and 84).

The Commission contends that it never maintained that a 'price list' in the physical sense ever existed for the new products as it existed for the Belasco products. On the contrary, it noted the decisions actually taken on a case-by-case basis regarding prices of and discounts on new products (see point 3(c)).

2.5. The applicants state that it is true that the general meeting of members took decisions regarding the sales prices of ancillary products on two occasions (point 58) but that, on the contrary, there is no evidence that there was ever a common price list for those products. Moreover, the Commission admitted that the 'prices do not appear to have been observed in practice' (point 74).

The Commission alleges that the members had fixed the prices for ancillary products on 10 occasions since 1979, and the applicants do not dispute that allegation. The Commission, they say, recognized that those prices were not observed in practice, which can only mean that the decision is vitiated by an inadequate statement of reasons.

2.6. According to the applicants, the Commission criticizes them for a series of other measures even though it was not shown that in themselves they had major restrictive effects: the issues are the application of a common programme for Belasco products, the principle of stability of clientele, the joint use of the common Belasco trade mark and the joint advertising carried out for that mark (point 80). The Commission therefore recognized that the restrictive effect of all those measures had not been proved. As regards more particularly the stability of clientele, the only cases — limited cases — which the Commission can identify are those where members and non-members complained of lost customers (points 46, 52 and 74). In that regard, the Commission reiterates the arguments set out above (part 9).

2.7. The applicants maintain that the statement of the reasons on which the decision is based is inadequate as regards the agreements between members and non-members on the ceiling for discounts. The parties' arguments relating thereto are set out in part 7(b) above.

11. *Infringement of Article 85 of the Treaty*

(a) *Lack of any evidence of fulfilment of the legal and factual preconditions for the conclusion that Article 85 had been infringed*

According to the applicants, the terms used by the Commission show that it did not compile adequate evidence. Thus, it used phrases like 'less close attention seems to have been paid to controlling discounts' (point 33), '.. the principle [of stability of clientele] does not appear to have been widely observed in practice' (point 74(vi)), 'Sometimes members reached a common viewpoint . . . ', 'there can be little doubt that . . . ' (point 55), 'The evidence presented in points 39 to 44 strongly suggests that . . . ', '. . . There is no mention . . . whether anything came of the . . . suggestion . . .' (point 61), 'There is no doubt that . . . ' (point 74 and 103), 'however, these prices do not appear to have been observed in practice . . . ' (point 74(v)), 'It has not been established that the prices

and price increases decided . . . were actually adhered to' (point 74(xi)), 'The effects of the . . . restrictions . . . can only have been reinforced by other measures, although it is not certain that these in themselves actually had major restrictive effects' (point 80), '. . . did not in fact observe the agreements (as some evidence suggests). . . ' (point 86), 'It has been shown . . . that such action was by no means hypothetical' (point 88), 'the members, particularly the smaller ones, may well not have fully appreciated that the cartel was prohibited by Article 85(1)' (point 109).

It is clearly apparent from the above phrases that the Commission based its decision on fragmentary and incomplete factual evidence and on several occasions was obliged to admit the doubts and uncertainties which it felt, taking refuge behind vague and hypothetical expressions. But, as the Court has held (Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679), the Commission must produce sufficiently precise and coherent proof to justify its views and may not rely merely on generalities and suppositions.

The Commission replies that a mere collection of expressions noted by the applicants in the decision and taken out of their context cannot support the conclusions which they draw. The Commission relied on very clear facts in establishing the infringement. In its analysis of the facts, it drew a distinction between the measures actually put into effect and those not reflected by the facts, and it showed that the effects on competition which it had noted were not negligible.

(b) *Lack of any evidence of an appreciable effect on trade between Member States*

The applicants maintain that, contrary to the Commission's assertion, collective action against foreign producers was not shown. Although the possibility of taking such action was mentioned, it was not implemented and the Commission conceded that it found no evidence that the suggestion was followed up (points 61 and 62 of the decision).

The agreements related only to products manufactured by the applicants and not to any imported products. They did not even cover 10% of imports.

In that connection, the applicants identify in paragraph 2 of the summary of the judgment in Case 73/74 (*Papiers Peints* v *Commission* [1975] ECR 1491) the following principles:

'A restrictive agreement the purpose of which is to market products in a single Member State can affect trade between Member States. Since it extends over the whole of the territory of a Member State, it is by its very nature liable to have the effect of reinforcing the compartmentalization of markets at national level, thereby preventing the economic interpenetration which the Treaty is designed to bring about and

protects domestic production. In this connection it is necessary to identify the means available to parties to a restrictive agreement to ensure that customers remain loyal, the relative importance of the agreement on the market concerned and the economic context in which it exists'.

It is therefore necessary to appraise, case by case, the real economic influence of a purely internal agreement in order to decide whether or not it affects trade between Member States.

For a 'purely' national cartel to affect trade between Member States, the market share held by the members of such a cartel must be extremely large. However, the applicants manufacture only 57 to 60% of the apparent consumption on the market chosen by the Commission, the market in 'Belasco roofing felt' and 'new coverings', and, as far as the market which should be taken into consideration is concerned, the market in waterproof coverings for flat roofs, the applicants' market share is minimal (see 1(b) above).

Moreover, the market remained open. The number of manufacturers and importers of waterproof coverings has grown continuously since 1966, whereas in other countries it was falling. According to the Commission, the volume of imports also increased (15 to 22% from 1980 to 1983, and those figures could be amended to 20 to 30% if all the interchangeable products were taken into account).

There is no justification for the Commission's also taking into account, when assessing the applicants' market share, supplies made by members to divisions of their own companies. In those cases, the products supplied are never invoiced as such to customers but represent only a percentage (less than 30%) of the total price for the work invoiced.

Finally, the applicants claim that the prices to consumers, notwithstanding the system of collective applications for price rises recommended by the Belgian Prices Department, have remained very competitive and variable as a result of the percentage discounts granted by the various companies involved in these proceedings, which vary according to the customer and the size of the order.

It follows that the agreement could not have had any real economic effect on trade between Member States, and *a fortiori* could not have done so to an appreciable extent.

According to the Commission, Article 85(1) of the Treaty does not require proof that an agreement has in fact appreciably affected trade between Member States and in that regard it cites Case 19/77 *Miller* v *Commission* [1978] ECR 131.

In the present case, the agreement contained specific provisions whereby the members were to take, in concert, defensive and protective measures if, for some reason alien to the membership, the objectives of the agreement were jeopardized, in particular

by stronger competition from foreign producers. On the basis of those provisions, the members decided or proposed measures for that purpose, which were realistic and capable of implementation. Even if those measures, which related to competition, were not carried out (action against the importer Calam) or did not come to fruition (takeover of UPM), they show with sufficient probability that the agreement could influence the pattern of trade between Member States.

Moreover, the agreement contained other provisions which were also liable to affect trade between the Member States, in so far as they provided for partitioning of the market in order to protect it from competition from other Member States. The measures concerned were restrictions on the transfer of manufacturing plant to actual or potential competitors — the basis of the collective action at the time of the negotiations for the takeover of UPM — and the use of such plant on behalf of such competitors.

Even if there were no measures specifically intended to impede participation by foreign manufacturers or re-sellers in the market, the agreement was liable to affect trade between Member States.

The Commission observes that the Court has held that agreements covering all the territory of a Member State are liable to have sufficiently far-reaching effects to bring about a significant change in the conditions of competition in that territory which the foreign undertakings would have encountered in the absence of such agreements and thus to partition the market. In the Commission's opinion, the foreign suppliers of the relevant products on the Belgian market would not, as a result of the agreement, encounter fragmented supply by 10 or more national producers competing amongst themselves but would come up against a cartel of producers acting in concert on the market, on the basis of a number of elaborate provisions which regulated the roofing felt market in Belgium. It follows that the agreement changed the basic conditions on which manufacturers and re-sellers from other Member States had to base their decisions with a view to penetrating the market and competing on that market with the existing re-sellers.

The Commission points out that the applicants held an important place in the relevant market (see 1 above). It considers that, where the parties to a cartel hold 57 to 60% of the market, their competitors together hold 20% of the market, and a larger number of importers together hold only 15 to 22% of the market, then those parties are in a position, by virtue of the agreement between them — like the agreement at issue here — to change the conditions of competition on that national market so as to have an appreciable effect on the pattern of trade.

Even if the members held a market share which was 5 to 7% smaller, that assessment of the members' economic influence on the market cannot be altered when in any event it is of the size noted and especially when such a reduction of their market share would arise from the inclusion of products which they themselves seem never to have

regarded as presenting any danger to their influence on the market (by contrast with IKO, for example, which manufactures roofing felt).

Finally, the Commission observes that, to assess the members' influence, it is correct to take account of their supplies to their own subsidiaries or establishments since, if there are any products over which they exercise a direct influence, it is those products.

12. *Infringement of Article 15 of Regulation No 17*

According to the applicants, the Commission did not respond to certain arguments put forward by them regarding the intentional nature of the infringements committed and the duration thereof. Nor did the Commission assess the gravity of the infringement by reference to their effects on the market.

(a) *The intentional nature of the infringements*

The applicants maintain that Belasco and its members never thought or even imagined that their agreements could in any way affect trade between the Member States and were therefore liable to be caught by Article 85(1). It should not be forgotten that the applicants are small and medium-sized undertakings without their own legal departments. Their partial renewal of the 1966 agreement was therefore made in good faith.

The Commission recognized that 'the members, particularly the smaller ones, may well not have fully appreciated that the cartel was prohibited by Article 85(1)' (point 109 of the decision). That statement conflicts with the finding that 'the members of a cartel . . . could not have been unaware that they were engaging in restrictions of competition . . . the members . . . intended to restrict competition' (point 103 of the decision). It is not possible to criticize the applicants for acting deliberately whilst at the same time admitting that they were not even aware that they were infringing Article 85 (1) of the EEC Treaty.

The judgment of the Court cited by the Commission (Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131) must be interpreted as meaning that in order to establish that an infringement was committed intentionally the mere fact that a person was aware that he was infringing Article 85(1) of the EEC Treaty is not sufficient.

The Commission did not allege negligence on the part of the applicants because, although it alleged negligence on the part of the undertakings which were not members of Belasco, it did not fine them. Since there was no intentionality the Commission infringed Article 15 of Regulation No 17.

The Commission contends that in order to establish the intentional nature of an infringement 'it is of little relevance ... whether the applicant knew that it was infringing the prohibition contained in Article 85(1)' (paragraph 18 of *Miller*). The parties to the cartel could not have been unaware that the clauses of such a cartel agreement had as their object the restriction of competition (paragraph 18 of the same judgment). There is no contradiction between the finding that the applicants deliberately restricted competition and are therefore liable to fines and the admission that some of them may not have been fully aware that the cartel was prohibited under Article 85(1), a consideration which influenced the amount of the fines.

(b) *The duration of the infringements*

According to the applicants, the cartel lasted from 1 January 1978 to 31 December 1983. It had never been renewed, not even tacitly, since the members of Belasco had come to realize that the agreement had not been applied. Although there were contacts between the members after that date, the effects thereof could only have been more sporadic and of even less importance than when the agreement was in force.

The Commission relies on the arguments set out above (part 2(b)).

(c) *The effects of the infringements on the market*

According to the applicants, the Commission itself conceded in its decision that 'the effects of a cartel must be taken into consideration when it comes to assessing the gravity of the infringements' (point 76). However, in fixing the amount of the fines (point 104), the Commission states that it took account of the gravity of the infringements and points out that 'restrictions on prices, market-sharing and concerted attacks on competitors are among the most serious of all such infringements' (point 105).

However, the Commission gave no indication of the manner in which it took account of the effects on the market in determining the amount of the fines. To do so is even more important in this case since the applicants insisted in both of their submissions in response to the statement of objections that there was no effect on the market.

Whether they related to the 'common' price list, the system of discounts and rebates, 'stability of clientele', use of the Benor 'mark', or the fixing of prices for 'new' products, all those provisions of the Belasco agreement remained more or less inoperative in practice. The applicants also deny that they ever used the Belasco agreement in order to obstruct, in any way, a takeover of UPM. The only implementing measures adopted — in a disparate and unequal way — had in any case only a negligible effect on freedom of competition.

In those circumstances, it would be fair to cancel the fines imposed or at least reduce them substantially.

The Commission claims that, in point 106 of its decision, in which it appraised the factors affecting the determination of the fine, it indicated that the effects of the restrictions on competition resulting from the cartel and, in some cases, the more limited duration of some of them, were referred to earlier in the decision. It mentions points 76 to 82 — the effects of the cartel — which, with specific reference to assessment of the gravity of the infringements, identify each of the restrictions which affected competition and assess their impact. It thus relied on that assessment to take account of the effects of the cartel on the market in determining the amount of the fine. Moreover, in point 107 it indicated that it had taken account of the, in some respects, less rigorous treatment applied by the members to new products.

Moreover, UPM had been a party to the 1966 agreement — which contained provisions largely the same as those of the 1978 agreement — and had been one of its most ardent defenders.

In such a limited market, with such a standardized range of products, it is impossible for any undertaking, whether or not a party to any agreement, to ignore the realities of the market. Accordingly, the parties to the agreement acted individually whenever their interests were involved and the non-members based their attitude on that of the members when it was advantageous for them to do so. In that context, the survival of the agreement was far from assured. That is particularly true in the present case, where the members did not observe the restrictive clauses of the agreement whereas the non-members, for their part, took steps, particularly in the form of reductions and rebates, which were tantamount to parallel action encroaching upon freedom of competition.

13. *Infringement of the principle of equality*

According to the applicants, the decision infringed the principles of equality and proportionality as enshrined in the case-law of the Court of Justice by treating them differently from the non-members.

The Commission's statement that the non-members 'were never parties to the agreement and never took part in its implementation' must be qualified. Interoof and Al Asphalt made a clear request at the Belasco meeting that the discounts should be reduced or standardized (points 37, 38, 40 and 42 of the decision).

The osmosis which naturally existed in practice between the various undertakings, both members and non-members, manufacturing and importing the same products onto the same market, ought to have resulted in all the undertakings present on that market being accorded identical treatment. However, the Commission imposed an excessive penalty, reflected in the amount of the fines, on the undertakings which are parties to these proceedings whereas it imposed no penalty on the non-member undertakings.

According to the Commission, the non-members never adhered to the agreement and never participated in its implementation. The infringements on their part related only to the May 1978 and October 1978 agreements concluded by the non-members with the members which, as far as the latter were concerned, constituted infringements additional to those deriving from their cartel, with which the decision was principally concerned.

The Commission concedes that the agreements between members and non-members did not cover the new products. On the other hand, it had proved that, in the framework of their cartel, the members had taken decisions on joint fixing of prices and maximum discounts for new products; it had been unable to establish that those decisions had been observed in practice and had taken that fact into account in determining the fines.

As regards the discounts, whilst those granted by the members were, with rare exceptions, within the agreed ceiling, the Commission had been unable to establish that that was the case as far as the non-members were concerned.

The Commission considers that the intentions of the members and non-members coincided regarding discounts. However, it had considered it appropriate to take account of the fact that the non-members operating on the market were confronted by a cartel comprising their main competitors and could not disregard it.

IV — Addendum to the Report for the Hearing

At the sitting on 21 April 1988, the parties presented oral argument. The Advocate General delivered his Opinion at the sitting on 5 May 1988. Thereafter, the Court (Fifth Chamber) ascertained that, as a result of its workload and the partial replacement of Judges and Advocates General on 6 October 1988, it was unable to give judgment before that date. Consequently, on 23 September 1988, pursuant to Article 61 of the Rules of Procedure and after hearing the views of the Advocate General, the Court ordered that the oral procedure be re-opened.

J. C. Moitinho de Almeida
Judge-Rapporteur