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

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In Case T-15/89,

Chemie Linz AG, a company incorporated under Austrian law, having its registered office at Linz, Austria, represented by O. Lieberknecht, Rechtsanwalt, Düsseldorf, with an address for service in Luxembourg at the Chambers of A. Bonn, 20 Côte d'Eich,

applicant,

v

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

defendant,

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

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

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

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

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

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

gives the following

Judgment

Facts and background to the action

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

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

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

3 Chemie Linz AG was one of the producers supplying the market before 1977. Its position on the west European polypropylene market was that of a medium-sized producer, and its market share was between about 3.2 and 3.9%.

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

ATO Chimie SA, now Atochem ('ATO'),

BASF AG ('BASF'),

DSM NV ('DSM'),

Hercules Chemicals NV ('Hercules'),

Hoechst AG ('Hoechst'),

Chemische Werke Hüls ('Hüls'),

Imperial Chemical Industries PLC ('ICI'),

Montepolimeri SpA, now Montedipe ('Monte'),

Shell International Chemical Company Limited ('Shell'),

Solvay et Cie SA ('Solvay'),

BP Chimie ('BP').

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

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

Amoco,

Chemie Linz AG ('Linz'),

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

Petrofina SA ('Petrofina'),

Enichem Anic SpA ('Anic').

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

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

On 24 October 1984, the hearing officer appointed by the Commission met the legal advisers of the addressees of the statements of objections in order to agree certain procedural arrangements for the hearing provided for as a part of the

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

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

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

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

28 November 1984 by the lawyers of BASF, DSM, Hercules, Hoechst, ICI, Linz, Monte, Petrofina and Solvay. In a letter of 4 December 1984, Hüls associated itself with the view taken in the joint letter.

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

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

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

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

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

'*Article 1*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2

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

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

Article 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 4

. . .

Article 5

. . .'

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

Procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 11 August 1986, the applicant brought this action seeking annulment of the Decision. Thirteen of the fourteen other addressees of the Decision have also brought actions for its annulment (Cases T-1/89 to T-4/89 and T-6/89 to T-14/89).

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

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

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

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

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

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

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

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

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

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

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

Forms of order sought by the parties

29 Chemie Linz claims that the Court should:

(i) annul the defendant's decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene), notified on 28 May 1986, in so far as it concerns the applicant;

(ii) in the alternative, annul Article 3 of the abovementioned decision in so far as the fine imposed by that article exceeds the amount of a reasonable fine, to be fixed by the Court of Justice;

(iii) order the defendant to pay the costs.

The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

Substance

30 The Tribunal considers that it is necessary to examine, *first*, the applicant's grounds of challenge relating to a breach of the rights of the defence allegedly committed by the Commission in so far as it (1) failed to disclose to the applicant documents on which it based the Decision, (2) based itself on unreliable evidence, (3) did not give the applicant access to the whole of the file, (4) raised certain objections upheld against the applicant for the first time in the Decision, (5) the final record of the hearings was not transmitted to the Members of the Commission or to the Advisory Committee and (6) the report of the hearing officer was not provided to the Members of the Commission, the Advisory

Committee or the applicant; *secondly*, the grounds of challenge relating to proof of the infringement concerning (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty whereby it is contended that the Commission (A) did not correctly define the infringement and (B) did not correctly assess its anti-competitive effect; *thirdly*, the grounds of challenge relating to the reasoning of the Decision; and, *fourthly*, the grounds of challenge relating to the determination of the fine, which is alleged to be (1) partially time-barred, (2) disproportionate to the duration of the alleged infringement and (3) disproportionate to the gravity of the alleged infringement.

The rights of the defence

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

31 The applicant contends that when the Commission notified it of the statement of objections it did not send it certain documents on which it based the Decision and that the Commission thus made it impossible for it to explain their contents. The documents concerned are the note of the meeting of 13 May 1982 drawn up by an employee of Hercules (Decision, point 15(b)), the note of the meeting of 10 March 1982 drawn up by an employee of ICI (Decision, points 15(b) and 58), a document allegedly found at the premises of Solvay dated 6 September 1977 (Decision, point 16, penultimate paragraph), Shell's reply to the statement of objections (Decision, point 17), the replies of Amoco, ATO, BASF, DSM, Hoechst, Hüls and Monte to the request for information (Decision, point 18), price instructions (Decision, points 25 and 88), two sets of minutes of Shell internal meetings held on 5 July and 12 September 1979 (Decision, points 29 and 31), a Solvay internal document (Decision, point 32), a reminder sent by Solvay to its sales offices on 17 July 1981 (Decision, point 35), extracts from the trade press from the end of 1981 (Decision, point 36), an ICI internal note referring to the 'firm climate' (Decision, point 46), a Shell document headed 'PP W. Europe — Pricing' and 'Market quality report' (Decision, point 49), Shell documents concerning the United Kingdom and France (Decision, point 49), an internal ATO note dated 28 September 1983 (Decision, point 51), an undated ICI note intended as a briefing for a meeting with Shell in or about May 1983 (Decision, point 63, second paragraph), a planning document relating to the first quarter of 1983 found at the premises of Shell (Decision, point 63, third paragraph) and, finally, documents concerning the matters discussed at meetings found at the premises of ATO, DSM and Shell (Decision, point 70).

32 In that regard it adds, first of all, that the access-to-file procedure is no substitute for the production of those documents, unless the Commission indicates during that procedure — which it did not — on which documents it intends to base its decision; secondly, that although the trade press is an information source which is open to all, the Commission must nevertheless state precisely the references of the matters on which it intends to rely, which it did not; thirdly, the Commission cannot properly assert that certain documents did not concern the applicant or merely confirmed documents which were already known, since this was, according to the Commission itself, a collective infringement.

33 The Commission replies that the applicant's assertions are in part incorrect as a matter of fact and, for the rest, insignificant as a matter of law. Some of the documents were made available to the applicant either by being attached to the main statement of objections, by appearing in the trade press, of which Linz cannot pretend to be unaware (even if the Commission did not give precise references), or by being produced during the access-to-file procedure, which is precisely intended to enable undertakings to examine the evidence held by the Commission and prepare their defence.

34 It states that other documents did not need to be provided either because they did not concern the applicant or because they merely confirmed other documents.

35 The Commission acknowledges, however, that an undated ICI note intended as a briefing for a meeting with Shell, referred to in point 63 of the Decision, and the note of the meeting of 10 March 1982 drawn up by an ICI employee, referred to in point 58 of the Decision, were not disclosed, as the result of an error. However, the latter note merely confirms a note of the same meeting found at the premises of Hercules which was disclosed (main statement of objections, Appendix 23), and it is used only in order to identify a table which was also disclosed (main statement of objections, Appendix 71).

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

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

38 It follows that, of the documents mentioned by the applicant, only the following documents may be used as evidence against the applicant: the price instructions issued by various producers (Decision, points 25 and 88), which are mentioned in points 58 and 75 of the main statement of objections, of which they also form Appendices 19, 42, 46, 50 and 52, and are attached to the letter to the applicant of 29 March 1985; the ICI internal note on the 'firm climate' (Decision, point 46), which is mentioned in point 71 of the main statement of objections, of which it also forms Appendix 35; the documents found at the premises of ATO (Decision, point 70), mentioned in points 94 and 102 of the main statement of objections, of which they also form Appendices 60 and 72. The other documents referred to by the applicant may not be considered to be evidence admissible against it in the present case.

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

2. *Probative value of the documents used as evidence against the applicant*

40 The applicant argues that the Commission relied on rumours, on simple presumptions and suppositions, or on imaginary empirical theories. It states that the notes of meetings are not minutes which were approved and signed, but simple summaries which may contain an element of interpretation, deformation, exaggeration or wishful thinking on the part of their author. Their probative value is undermined by the divergent conduct of the undertakings on the market.

41 The Commission states that it holds an array of evidence spread over a period of six and a half years proving the infringement of which the polypropylene producers were accused. It emphasizes that its findings are based on documentary evidence and not on rumours or on the statements of witnesses. In particular, there is no reason to doubt the accuracy and reliability of the notes of meetings.

42 The Court notes that the content of the reports of meetings originating from ICI is confirmed by various documents, such as a number of tables relating to the sales volumes of the various producers and price instructions matching in their amount and their date of entry into force the price targets mentioned in those meeting reports. Similarly, the replies of various producers to the requests for information addressed to them by the Commission corroborate as a whole the content of those reports.

43 Consequently, the Commission could take the view that the meeting reports found at the premises of ICI reflected the matters discussed at the meetings fairly objectively. These meetings were chaired by different members of ICI's staff, which made it even more necessary for them to prepare written reports on them so as to give members of ICI's staff not attending particular meetings accurate information about the matters discussed at them.

44 In those circumstances, the burden is on the applicant to provide a different explanation of what occurred at the meetings it attended by advancing exact information, such as the notes taken by its employees during the meetings in which they took part or their testimony. The applicant has not put forward, or even offered to put forward, any such evidence before the Court.

45 The question whether the Commission relied on rumours, on simple presumptions and suppositions or on imaginary empirical theories is indissociable from the question whether the findings of fact made by the Commission in the Decision are supported by the evidence which it has produced. Since this is a question of substance related to proof of the infringement, it must be examined at a later stage together with the other questions relating to proof of the infringement.

3. *Insufficient access to the file*

46 The applicant considers that it did not have access to the whole file but only to the documents on which the Commission relied in the statement of objections, that is to say solely documents containing incriminating evidence. In Linz's view the fairness of the procedure and the right of the parties to be heard is not guaranteed if undertakings cannot have access to all documents, whether incriminating or exculpatory. That defect, it says, cannot be repaired before the Community courts.

47 The applicant states that it is aware that no right of access to the whole of the file for parties to administrative proceedings can be inferred from the case-law of the Court of Justice (judgment in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25). However, it submits that such a right is recognized in several Member States and could be treated as a general principle of law common to the laws of the Member States (by reference to the second paragraph of Article 215 of the EEC Treaty). It asks this Court to reconsider the case-law.

48 The applicant adds that even under the existing case-law the Commission did not meet the appropriate standards, since it failed to put exculpatory documents at the applicant's disposal.

49 The Commission replies that it is not obliged to disclose the whole of the file to the parties concerned (judgment of the Court of Justice in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission*, cited above, paragraph 25). In this case, moreover, although it was not obliged to do so the Commission granted access to all the documents in its possession (with the exception of documents containing business secrets) both in the statement of objections and its letter of 29 March 1985 and in the access-to-file procedure. It is thus futile for the applicant to ask the Community courts to alter their approach.

50 Furthermore, it is not true, as the applicant alleges, that the Commission made available only inculpatory documents and withheld all exculpatory documents. Indeed, the applicant has not identified any document to support that serious accusation.

51 The Court observes that regard for the rights of the defence requires that an applicant must have been put in a position to express, as it sees fit, its views on all the objections raised against it by the Commission in the statement of objections addressed to it and on the evidence which is to be used to support those objections and is mentioned by the Commission in the statement of objections or annexed to

it (judgment of the Court of Justice in Case 322/81 *Nederlandsche Banden-Industrie Michelin NV* v *Commission* [1983] ECR 3461, paragraph 7 at p. 3498).

52 However, regard for the rights of the defence does not require that an undertaking involved in a procedure pursuant to Article 85(1) of the EEC Treaty must be able to comment on all the documents forming part of the Commission's file since there are no provisions requiring the Commission to divulge the contents of its files to the parties concerned (judgment of the Court of Justice in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission*, cited above, paragraph 25 at p. 59).

53 It must be observed, however, that in establishing a procedure for providing access to the file in competition cases, the Commission imposed on itself rules exceeding the requirements laid down by the Court of Justice. According to those rules, which are explained in the Twelfth Report on Competition Policy (pages 40 and 41), the Commission

'... permits the undertakings involved in a procedure to inspect the file on the case. ... Undertakings are informed of the contents of the Commission's file by means of an annex to the statement of objections or to the letter rejecting a complaint, listing all the documents in the file and indicating documents or parts thereof to which they may have access. They are invited to come and consult these documents on the Commission's premises. If an undertaking wishes to examine only a few of them the Commission may forward copies. However, the Commission regards the documents listed below as confidential and accordingly inaccessible to the undertaking concerned:

(i) documents or parts thereof containing other undertakings' business secrets;

(ii) internal Commission documents, such as notes, drafts or other working papers;

(iii) any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality.'

The Commission may not depart from rules which it has thus imposed on itself (judgments of the Court of Justice in Case 81/82 *Commission* v *Council* [1973] ECR 575, paragraph 9 at p. 584, and in Case 148/73 *Louwage* v *Commission* [1974] ECR 81).

it follows that the Commission has an obligation to make available to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved.

55 The Court observes that the Commission categorically denies that its officials failed to make available to the applicant all the documents which might contain material exculpating it.

56 In response to the Commission's denials the applicant has not put forward any evidence to show that the Commission made only selected documents available to the applicant in order to prevent it from refuting the evidence advanced by the Commission to prove its participation in the infringement. It refers to statements made by the Commission's rapporteur to its lawyer but has not proved or offered to prove that such statements were made and had the meaning which it attributes to them.

57 Consequently, this ground of challenge must be dismissed.

4. *New objections*

58 The applicant contends that in accusing the undertakings of having participated in a 'framework agreement' and a 'single continuing agreement' the Decision makes both an assertion of fact and a legal categorization of the infringement. However, at no time during the administrative procedure did the Commission allege that the undertakings had concluded a 'framework agreement', that Linz had taken part in the conclusion of such an agreement or even that it subsequently became aware of it. Moreover, according to the applicant the legal categorization of the infringement was the subject of unclear and contradictory explanations by the Commission during the administrative procedure.

59 The applicant submits that the Decision does not simply 'supplement' or 'redraft' the objections previously raised by the Commission (judgments of the Court of Justice in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 91 to 93, and in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 68), but entirely replaces the objections raised against the applicant or replaces them from the point of view of the legal grounds. Accordingly, the Decision is based on objections on which Linz was not able to state its views.

60 The Commission denies that the objection concerning the conclusion of a framework agreement is a new and surprising development in the Decision, since in the main statement of objections addressed to the applicant (points 128 and 132) the Commission had already spoken of 'continuing and institutionalized cooperation', which is in itself a sufficiently clear description of a framework agreement. Moreover, in its letter of 29 March 1985 the Commission indicated that it did not exclude the possibility of a 'core' agreement among the four major producers (p. 3) and that in relation to the other participants in the meetings the agreements stemmed from 'a sufficiently detailed plan to amount to an "agreement" or "agreements" under Article 85' (p. 4).

61 The Court observes that the passages in the Decision which are criticized by the applicant correspond in their content to the objections made by the Commission in relation to the applicant and the other undertakings to which the Decision is addressed in the statements of objections which were sent to them.

62 Contrary to the assertions of the applicant, the Decision does not simply state baldly in point 81 that the undertakings in question 'participated in an overall framework agreement which was manifested in a series of more detailed sub-agreements worked out from time to time' and that this was thus 'a single continuing "agreement" within the meaning of Article 85(1)', since the first of those phrases is preceded by the words 'In the present case the producers, by subscribing to a common plan to regulate prices and supply in the polypropylene market . . . ' and the second is introduced by the words 'The Commission considers that the whole complex of schemes and arrangements decided in the context of a system of regular and institutionalised meetings constituted . . . '. It follows that in

the Decision the terms 'framework agreement' and 'single continuing "agreement"' are merely means of expressing the fact that the Commission found the undertakings to which the Decision was addressed guilty of a single infringement whose various elements made up an integrated complex of systems of regular meetings of polypropylene producers, of the fixing of price targets and quotas, which had a single economic purpose, namely to distort the normal movement of prices on the polypropylene market.

63 That is precisely the purport of the whole of the main statement of objections sent to the applicant and to the other undertakings to which the Decision was addressed, in particular points 1, 5, 128, 132 and 151(a). For example, point 1 is worded as follows:

'The present statement of objections concerns the application of Article 85(1) of the EEC Treaty to a complex of arrangements and/or concerted practices by which from about 1977 to October 1983 the producers supplying the bulk thermoplastic polypropylene in the Common Market co-ordinated their sales and pricing policy on a continuing and regular basis by setting and implementing "target" and/or minimum prices, controlling the tonnages supplied to the market by means of agreed "targets" and/or quotas and meeting regularly in order to monitor the progress of the said restrictive arrangements.'

The last sentence of point 132 states:

'Effectively the producers were aiming to control the market and a continuing and institutionalised co-operation at a high level was substituted for the normal play of competitive forces.'

64 It should be added that tenor of the objections made in relation to the applicant and the other undertakings to which the Decision was addressed is confirmed by the letter which was sent to them on 29 March 1985, which states at page 4 that 'Such arrangements constituted a sufficiently detailed plan to amount to an "agreement" or "agreements" under Article 85, at least as far as the producers involved in the meetings were concerned.'

65 Consequently, the Court considers that in its Decision the Commission merely re-drafted and clarified from the point of view of the law the arguments on which it bases the objections which it has maintained and therefore has not prevented the applicant from stating its position on the objections before the Decision was adopted.

66 It follows that the applicant is wrong to accuse the Commission of having infringed the rights of the defence by raising new objections against it in the Decision.

5. *Failure to transmit the minutes of the hearings*

67 The applicant argues that its right to be heard was infringed inasmuch as it is not disputed that neither the members of the Advisory Committee nor the members of the Commission had the minutes of the hearings when they made their decisions. They were thus able to base their view of the case only on drafts which often gave a very incomplete account of the statements made by the undertakings.

68 As regards the members of the Advisory Committee, the Commission's argument that the Member States were represented at the hearings is unfounded. First of all, two Member States were not represented at one session of the hearings; furthermore, the persons who represent the Member States at hearings and their representatives on the Advisory Committee are not necessarily the same; finally, even where the representatives are the same, they must be able to check whether their recollection of the undertakings' arguments is correct.

69 As regards the members of the Commission, it was difficult for them to grasp the relevant arguments put forward by the parties since they were obliged to read the initial draft minutes and the amendments requested by the undertakings together.

70 The Commission replies that Article 9(4) of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47) does not state within what period the minutes must be approved by the undertakings or to which bodies the Commission must provide the provisional or final minutes of hearings.

71 It adds that the changes to the draft minutes requested by the applicant were insignificant and that the Decision would not have been different even if the final version of the minutes of the hearings had been provided to the members of the Advisory Committee and of the Commission; accordingly, if there was a procedural irregularity, it was not one which calls for consideration by the Court (judgment of the Court of Justice in Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26).

72 As regards the Advisory Committee, the Commission observes that it is true that its members had only the provisional minutes, but that the Member States were represented at the hearings, with the exception of Greece and Luxembourg, which did not take part in the second session. For the authorities of the Member States, the minutes thus serve merely as a memory aid. It matters little in that regard that the official present at the hearings was not necessarily the State's representative on the Advisory Committee.

73 As for the members of the Commission, they had available to them not only the provisional minutes of the hearings but also the remarks made by the parties in regard to them.

74 The Court observes that it is apparent from the case-law of the Court of Justice that the provisional nature of the minutes of the hearing submitted to the Advisory Committee and to the Commission can only amount to a defect in the administrative procedure capable of vitiating the resulting decision on the grounds of illegality if the document in question is drawn up in such a way as to mislead the persons to whom it is addressed in a material respect (judgment in Case 44/69 *Buchler & Co* v *Commission* [1970] ECR 733, paragraph 17).

75 As regards the minutes forwarded to the Commission, it must be pointed out that along with the provisional minutes the Commission received the remarks and observations made in relation to those minutes by the undertakings, and it must therefore be concluded that the members of the Commission were aware of all the relevant information before they adopted the Decision.

76 As regards the provisional minutes forwarded to the Advisory Committee, it may be observed that the applicant has not stated in what respect those minutes were not a faithful and correct record of the hearings, and it has therefore not shown that the document in question was drawn up in such a way as to mislead the members of the Advisory Committee on an essential issue.

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

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

78 The applicant contends that since it was unable to obtain the hearing officer's report, despite the request to this effect which it made to the Commission, it cannot ascertain whether he included matters relating to the applicant in his report other than those contained in the minutes of the hearings. Nor, therefore, can it ascertain whether the Commission was aware of them and whether it made use of any exculpatory statements which may have been submitted to it by the hearing officer. The Court should order the Commission to produce the report.

79 In the Commission's view, it is apparent from the hearing officer's terms of reference that he plays an important role in the internal decision-making process of the Commission, a process in which undertakings cannot seek to be involved. There is no provision requiring the opinion of the hearing officer to be divulged. His independence and ability to state his views candidly would be imperilled if the report was required to be divulged. Furthermore, the Court of Justice dismissed an

application by ICI (order of 11 December 1986 in Case 212/86 R *ICI* v *Commission*, not published in the Reports of Cases, paragraphs 5 to 8) for production of the report.

80 This Court notes first of all that the relevant provisions of the hearing officer's terms of reference, which are appended to the *Thirteenth Report on Competition Policy*, are as follows:

'*Article 2*

The Hearing Officer shall ensure that the hearing is properly conducted and thus contribute to the objectivity of the hearing itself and of any decision taken subsequently. He shall seek to ensure in particular that in the preparation of draft Commission decisions in competition cases due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned.

In performing his duties he shall see to it that the rights of the defence are respected, while taking account of the need for effective application of the competition rules in accordance with the regulations in force and the principles laid down by the Court of Justice.

Article 5

The Hearing Officer shall report to the Director-General for Competition on the hearing and the conclusions he draws from it. He may make observations on the further progress of the proceedings. Such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections.

Article 6

In performing the duties defined in Article 2 above, the Hearing Officer may, if he deems it appropriate, refer his observations direct to the Member of the Commission with special responsibility for competition, at the time when the

preliminary draft decision is submitted to the latter for reference to the Advisory Committee on Restrictive Practices and Dominant Positions.

Article 7

Where appropriate, the Member of the Commission with special responsibility for competition may decide, at the Hearing Officer's request, to attach the Hearing Officer's final report to the draft decision submitted to the Commission, in order to ensure that when it reaches a decision on an individual case it is fully apprised of all relevant information.'

81 It is clear from the very wording of the hearing officer's terms of reference that it is not mandatory for his report to be passed on to either the Advisory Committee or the Commission. There is no provision which provides for the report to be forwarded to the Advisory Committee. Although it is true that the hearing officer must report to the Director-General for Competition (Article 5) and that he may, if he deems it appropriate, refer his observations direct to the Member of the Commission with special responsibility for competition (Article 6), who himself may, at the hearing officer's request, attach the hearing officer's final report to the draft decision submitted to the Commission (Article 7), there is no provision requiring the hearing officer, the Director-General for Competition or the Member of the Commission with special responsibility for competition to forward the hearing officer's report to the Commission.

82 Consequently, the applicant cannot rely on the fact that the hearing officer's report was not provided to the members of the Advisory Committee or of the Commission.

83 Furthermore, the Court holds that the rights of the defence do not require that undertakings involved in proceedings under Article 85(1) of the EEC Treaty should be able to comment on the hearing officer's report, which is a purely internal Commission document. On this question the Court of Justice has held that

the hearing officer's report is in the nature of an opinion for the Commission, which is in no way bound to follow it, and that the report does not therefore constitute a decisive factor which must be taken into account by the Community court in performing its judicial review (order of 11 December 1986 in Case 212/86 R, cited above, paragraphs 5 to 8). Respect for the rights of the defence is ensured to the requisite legal standard if the various bodies involved in drawing up the final decision have been properly informed of the arguments put forward by the undertakings in response to the objections notified to them by the Commission and to the evidence presented by the Commission in support of those objections (judgment of the Court of Justice in Case 322/81 *Nederlandsche Banden-Industrie-Michelin NV* v *Commission*, cited above, paragraph 7).

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

85 It follows that respect for the rights of the defence does not give the undertakings the right to demand disclosure of the hearing officer's report so as to be able to comment upon it (see the judgment of the Court of Justice in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission*, cited above, paragraph 25).

86 Consequently, this ground of challenge must be dismissed.

Proof of the infringement

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

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

1. *The findings of fact*

A. The EATP meeting of 22 November 1977

(a) The contested decision

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

40 According to the Decision (point 16, first and second paragraphs), that declaration of support was made in the context of discussions initiated between the producers with a view to avoiding a substantial drop in price levels and attendant losses, discussions in which the major producers, Monte, Hoechst, ICI and Shell, initiated a 'floor-price agreement' which was to be in operation by 1 August 1977 and the details of which were communicated to the other producers, including Hercules.

91 The Decision (point 16, fifth and sixth paragraphs) further states that ICI and Shell admit that there were contacts with other producers as to how the price slide could be checked. However, the Commission acknowledges that, with the exception of the 'big four' (Hoechst, ICI, Monte and Shell) and Hercules and Solvay, it was not able to establish the identity of the producers involved in discussions at that time or to obtain details of the operation of the floor-price agreement.

92 The Decision (point 17, first paragraph) states once more that it was about the time of Monte's announcement of its intention to increase prices that the system of regular meeting of polypropylene producers began. It points out, however, that on ICI's own admission contact was occurring between producers before that date, probably by telephone and on an ad hoc basis.

(b) Arguments of the parties

93 The applicant submits that the Commission cannot rely on the note of the EATP meeting on 22 November 1977 (main statement of objections, Appendix 6) in order to prove the existence of a price agreement at the end of 1977. All that that document proves is that neither the price of DM 1.30/kg nor the word 'objective' cited by the Commission in quotation marks appears in that note. None of the statements made by the participants in that meeting provide the slightest evidence of any previous contact between the producers. The cooperation in question is quite unambiguously cooperation between producers and customers.

94 It points out that the statement made by its representative shows very clearly that it had learned only the previous day of Monte's decision to raise prices, that he did not yet know the exact amount and that the applicant was forced, in view of its disastrous income situation, to follow the price increase decided on by the market leader.

95 The applicant goes on to state that concerted action on a price increase cannot be inferred from the note of the EATP meeting since the increase had already been announced publicly by Monte. Moreover, the fact that the producers expressed similar views on market trends cannot be taken as evidence of collusion, since those trends were the same for all the producers.

96 The Commission states that its finding that Linz began to take part in the cartel in November 1977 is based on the fact that it supported the initiative of a price increase from December 1977 announced publicly by Monte. That initiative and the support which it enjoyed constituted concerted action, not parallel conduct due to chance or to market forces. The note of the EATP meeting of 22 November 1977 shows that the price for raffia of DM 1.30/kg announced by Monte had already been accepted as a common target price, since it reports the following statement by Linz:

'Just yesterday we learnt that one of the important European polymer PP suppliers had already announced in the European Chemical News an increase in his PP polymer prices as from 1st December. At the present time, I do not know exactly how much his price increase will be, but I am hoping this price increase can and will be accepted by his customers. CHEMIE LINZ will have to follow these new prices to be in a better position to give all their customers in all applications all the supplies they require, including help in developing new and additional applications for PP polymers.'

97 The Commission adds that if it is borne in mind that the first contacts between producers had already been made when the announcement was made publicly it is not credible that Linz adhered to the initiative without having had prior contacts.

98 As indirect support for its view that there must have been contacts between producers before the EATP meeting of 22 November 1977 the Commission refers to a note (main statement of objections, Appendix 2) of a telephone conversation between a Hercules employee and an employee of one of the 'big four', since what is true of Hercules applies by analogy to all the others, including Linz.

99 At the hearing, the Commission stated that the purpose of the parallel statements by various producers at the EATP meeting on 22 November 1977 was to present their customers with a united front and convince them of the inevitability of a price increase in the area of that announced by Monte.

(c) Assessment by the Court

100 The Court finds that the statements made by the applicant at the EATP meeting on 22 November 1977 (main statement of objections, Appendix 6) constitute both the expression of general support for the policy of increased prices initiated by Monte and a precise indication intended for its competitors of the conduct which it had decided to pursue on the market. Those findings are confirmed by the note of the following meeting of EATP on 26 May 1978 (main statement of objections, Appendix 7), which the applicant did not attend; it reports the producers' assessments of the results obtained on the market following the meeting of 22 November 1977. The fact that the Commission acknowledged at the hearing that apart from the EATP meeting of 22 November 1977 it had no direct proof of the existence of contacts between Linz and the other producers does not undermine those findings.

It follows that the Commission has established to the requisite legal standard that the applicant, in the presence of its competitors, expressed general support for the policy of increased prices initiated by Monte (Decision, point 17, fourth paragraph, first sentence, and point 78, third paragraph, second sentence) and that it gave them a precise indication of the conduct which it had decided to pursue on the market.

B. The system of regular meetings

(a) The contested decision

According to the Decision (point 18, first paragraph), at least six meetings were held during 1978 between senior managers responsible for the overall direction of the polypropylene business of some of the producers ('bosses'). This system soon evolved to include a lower tier of meetings attended by managers possessing more detailed marketing knowledge ('experts') (ICI's reply to the request for information under Article 11 of Regulation No 17, main statement of objections, Appendix 8). The Decision asserts that the applicant was a regular participant at those meetings until at least the end of September 1983 (point 105, fourth paragraph).

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

(b) Arguments of the parties

The applicant submits that the Commission has not demonstrated its participation in a framework agreement establishing an institutionalized system of regular meetings covering the whole of the period, since it has not proved that the polypropylene producers agreed in 1977, by mutual and concordant statements of intention, to meet regularly in order to examine and determine their sales policy. The Commission itself acknowledges that the meetings of polypropylene producers only gradually became structured (Decision, point 18).

105 According to the applicant, it was only from 1982 onwards that meetings were held more or less regularly. It cannot be inferred from that that a system of meetings had been established by common accord five years previously. The meetings were in fact informal.

106 It states that in any event its participation in the meetings is proved only from the beginning of 1981 and that it could not therefore have taken part in the alleged framework agreement, whose existence, it points out once more, was alleged for the first time in the Decision.

107 The applicant can no longer identify the date on which it took part for the first time in the producers' meetings. It asserts that it did not take part from the beginning and points out that the earliest evidence of its presence at a meeting is at the beginning of 1981 (main statement of objections, Appendix 17). It concludes that it cannot be held responsible in any way for the events prior to that date.

108 It states that the purpose of the meetings was to discuss in detail the market situation, in order solely to gather information. The discussions concerned the prices and sales volumes of each participant and their future objectives.

109 The applicant explains that in view of the market situation all the suppliers had an interest in the market being very transparent. That need for information was particularly acute on the part of the applicant, which was arriving from a non-member country on a largely unknown market. It was obliged to gather as much information as possible on that market and, in particular, to participate in discussions between producers on the situation on that market. Consequently, it states that if it took part in the meetings it was only in order not to leave its competitors unobserved and to obtain important information on the market.

It states that no legal or moral commitment as to their conduct on the market was expected of participants or made by them. As evidence of this it cites the fact that although the objectives alleged to have been pursued were not achieved, the Commission has not been able to point to a single case of remonstrations directed at a participant whose conduct had not matched its statements.

The applicant asserts that it determined its conduct on the market itself, independently, and states that it was quite natural for it to use information gathered at meetings in drawing up price instructions issued to its sales departments. It used that information in the same way as any other information obtained by studying the market or by reading the trade press.

The Commission points out that the applicant took part in the price initiatives from November 1977 onwards and that ICI stated in its reply to the request for information (main statement of objections, Appendix 8) that the producers met for the first time in December 1977 to coordinate their sales strategies and that it was agreed to hold further meetings, first on an ad hoc basis and later in a more structured form.

According to the Commission, the framework agreement was implemented by the establishment of a system of institutionalized meetings held to discuss the sales strategies of the various producers. That agreement was reinforced by specific agreements concerning concrete measures on prices and, in some cases, agreements on quotas or by a system of 'account leadership'.

It disputes the assertion that Linz took part in the meetings only from 1981 onwards, and puts forward two pieces of evidence in that regard. First, in ICI's reply to the request for information it included Linz among the regular participants in the meetings without any qualification as regards time (unlike Anic and Rhône-Poulenc, for example, which, according to ICI, took part only during

a specific period, or Hercules, which took part only irregularly in the meetings) and states that the meetings began in December 1977. Secondly, an undated table headed 'Producers' Sales to West Europe', found at the premises of ICI (main statement of objections, Appendix 55), sets out for all the polypropylene producers of western Europe the sale figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual' and 'revised target'. Since that table contains information which must be kept strictly secret as confidential business information it could not have been drawn up without Linz's participation.

115 According to the Commission, the fact that regular participants in the meetings may occasionally have been absent does not mean that they cannot be considered to have been parties to all the agreements, having regard to the permanent nature of the collusion on prices and to the fact that the price initiatives generally stretched over several months.

116 As regards the purpose of the meetings, it disputes the assertion that the meetings served only for the exchange of information and that neither Linz nor the other producers intended to govern their conduct on the market according to the decisions adopted. In reality, the producers implemented the decisions made at meetings through their regular price instructions, which is sufficient proof of their intention to be bound, expressed also in the various notes of meetings.

117 The Commission states that in the case of Linz a note found at the premises of its subsidiary in Munich (main statement of objections, Appendix 21) shows quite unambiguously what it hoped to gain from its regular contacts with its competitors. In that regard the Commission asks why the undertakings would have continued to meet regularly for several years and calculate polypropylene prices to the last decimal in all European currencies if the sole purpose was to gather information, without anything to depend on and without making any commitments.

Finally, it states that the applicant's assertion to the effect that there was no criticism of participants in the meetings which failed to live up to the agreed objectives is contradicted by several pieces of evidence, such as ICI's reply to the request for information, various notes of meetings which refer to criticism, such as those of the meetings of 21 September and 2 December 1982 (main statement of objections, Appendices 30 and 33), or an ICI note from 1981 (main statement of objections, Appendix 64) which refers to the need to put pressure on certain producers.

(c) Assessment by the Court

The Court observes that ICI's reply to the request for information (main statement of objections, Appendix 8) includes the applicant, unlike two other producers, among the regular participants in the 'bosses" and experts'"meetings. That reply must be interpreted as meaning that the applicant participated in meetings from the beginning of the system of 'bosses" and 'experts" meetings, which was instituted in late 1978 or early 1979.

ICI's reply to the request for information is corroborated on this point by the mention, next to the applicant's name, in various tables found at the premises of ICI and ATO (main statement of objections, Appendices 55 to 61), of its sales figures for various months and years. Most of the applicants admitted in their replies to a written question put by the Court that the tables found at the premises of ICI, ATO and Hercules could not have been drawn up on the basis of statistics from the FIDES data exchange system. Indeed, in its reply to the request for information ICI stated in relation to one of the tables that 'the source of information for actual historic figures in this table would have been the producers themselves'. Moreover, during the proceedings before the Court the applicant, in the face of that strong evidence, never specifically denied having been present at the meetings, which it does not deny took place.

121 On the question whether the applicant participated in the meetings in 1978 the Court observes that it is apparent from point 18 of the Decision read together with the specific objections addressed to Linz that the applicant is accused of having participated in them.

122 The applicant states in its application that 'although the Commission asserts that there were six meetings in 1978, it gives no indication of the place, the date, the participants or the subject-matter of the discussions, and provides no evidence of those meetings. The applicant knows nothing of such meetings.'

123 The Court notes that, rather than denying having taken part in the meetings in 1978 the applicant thus argues that the Commission has no evidence concerning them and that it itself has no information in that regard.

124 The fact that producers' meetings were held in 1978 is shown by ICI's reply to the request for information, which states that 'During the first year (1978) about six ad hoc meetings took place at about two monthly intervals between the Senior Managers responsible for the polypropylene business of some producers'. That reply also indicates that those meetings began in about December 1977 ('Because of the problems facing the polypropylene industry . . . , a group of producers met in about December 1977 to discuss what, if any, measures could be pursued in order to reduce the burden of the inevitable heavy losses about to be incurred by them'), that is to say immediately after the EATP meeting of 22 November 1977 in which Linz participated.

In the face of that evidence the applicant did not deny its participation in those meetings, but stated in its reply that:

'Assuming those assertions [those contained in ICI's reply to the request for information] to be correct, they do not justify the conclusion that there was a general framework agreement from the outset.'

The Court further observes that the meetings held in 1978 had the same purpose as the EATP meetings, namely to discuss measures to be taken in order to stifle the losses incurred by the polypropylene producers. ICI's reply to the request for information states:

'It was felt to be essential for producers to consider appropriate means of alleviating this impending crisis which could, unless controlled in some way, lead eventually to the collapse of the polypropylene industry. It was proposed that future meetings of those producers who wished to attend should be called on an "ad hoc" basis in order to exchange and develop ideas to tackle those problems .... Generally speaking, however, the concept of recommending "Target Prices" was developed during the early meetings which took place in 1978 ...'.

At the EATP meeting on 22 November 1977 the producers indicated that prices were too low and that they could not tolerate them indefinitely. Linz made the following statement:

'We are sure that you all know the current low PP price level and we do hope also that you know that such a price level is far below the level needed to break even. There has been no reasonable return for PP polymer products for too long a period and we at CHEMIE LINZ do not and cannot believe that Polymer manufacturers can and will accept such an extremely low price level any longer.'

The producers also stressed the need to increase prices and supported Monte's announcement of a price increase.

128 Consequently, the Court considers that the meetings held in 1978 and subsequent years were a continuation for the producers of their statements at the EATP meeting on 22 November 1977.

129 It must also be pointed out that ICI's reply to the request for information shows that those meetings were the point of departure, in terms both of their organization and their purpose, for the system of 'bosses' and 'experts' meetings in which the applicant participated from the end of 1978 or the beginning of 1799 onwards. That reply states that:

'By late 1978/early 1979 it was determined that the "ad hoc" meetings of Senior Managers ["Bosses"][of 1978] should be supplemented by meetings of lower level managers with more marketing knowledge ["Experts"].'

and it should be recalled that the idea of recommending target prices, implemented through the system of 'bosses" and 'experts" meetings, was developed during the 1978 meetings.

Consequently, the Court finds that since the applicant participated in both the EATP meeting of 22 November 1977 and the system of 'bosses" and 'experts" meetings the Commission was entitled to take the view that the applicant had participated in the meetings in 1978 which constituted for the producers a continuation of their statements made at the meeting of 22 November 1977 and enabled them to institute the system of 'bosses" and 'experts" meetings.

The Court considers that the Commission was fully entitled to take the view, based on the information which was provided by ICI in its reply to the request for information and was borne out by numerous meeting notes, that the purpose of the meetings was, in particular, to fix target prices and sales volumes. That reply contains the following passages:

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

and

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

132 In addition, in explaining the organization of marketing 'experts" meetings as well as 'bosses" meetings from the end of 1978 or the beginning of 1979, ICI's reply to the request for information reveals that the discussions about the fixing of target prices and sales volumes became increasingly concrete and precise, whereas in 1978 the 'bosses' had confined themselves to developing the actual concept of target prices.

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

134 In the face of that evidence the applicant asserts that its conduct was not anti-competitive in spirit. It should be observed in that regard that since it has been established that the applicant took part in those meetings and that their purpose

was, in particular, to fix of price and sales volume targets, the applicant at least gave its competitors the impression that it was participating in the meetings in the same spirit as they.

5 In those circumstances it is for the applicant to adduce evidence to show that its participation in the meetings was without anti-competitive intention by showing that it indicated to its competitors that it was participating in the meetings in a spirit which was different from theirs.

6 The applicant's arguments, which are based on its conduct on the market and seek to show that it took part in the meetings solely in order to obtain information, do not constitute evidence of such a kind as to prove that it had no anti-competitive intention, since that evidence does not show that the applicant indicated to its competitors that its conduct on the market would not be governed by what occurred at the meetings. Even if its competitors had known that, the mere fact that it exchanged information which an independent business would keep strictly secret as confidential business information is sufficient to demonstrate that it had an anti-competitive intention.

7 It should be added that, contrary to the applicant's assertions, the notes of the meetings show that criticism was expressed of producers whose conduct was considered by the participants not to be consistent with the outcome of the meetings. For example, the note of the meeting of 21 September 1982 (main statement of objections, Appendix 30) states that:

'Anic were seen as a problem in September ... Pressure was needed + Z was asked to get M to speak to C. Sales to Italy were a potential problem + pressure was needed on Shell Italy to restrain themselves to the agreed levels for October.'

and that of the meeting of 2 December 1982 (main statement of objections, Appendix 33) states: 'Hercules said that they would not attend in future in view of criticism from the Dutch + Germans'.

138 It follows that the Commission has established to the requisite legal standard that the applicant participated regularly in the regular meetings of polypropylene producers between the end of 1977 and September 1983, that the purpose of those meetings was, in particular, to set price and sales volume targets, that they were part of a system and that the applicant's participation in those meetings was not free of an anti-competitive intention.

C. The price initiatives

(a) The contested decision

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

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

1 September. The Commission has price instructions from certain producers, including ICI, showing that those producers had given orders to their sales offices to apply this price level or its equivalent in national currencies from 1 September, in most cases before the planned price increase was announced in the trade press (Decision, point 30).

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

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

43 The Decision (point 33) then refers to Linz's participation in one of the two meetings in January 1981, at which it was decided that a price increase, fixed in

December 1980 for 1 February 1981, was required in two stages on the basis of DM 1.75/kg for raffia: the 1 February target was to remain at DM 1.75/kg and a target of DM 2.00/kg was to be introduced 'without exception' from 1 March. A table was drawn up in six national currencies of the target prices for six principal grades, to come into effect on 1 February and 1 March 1981. The documents found at Linz's premises show *inter alia* that it took steps to introduce the target prices set for February and March.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

160 According to the Decision (point 105, fourth paragraph), whatever the date of the last meeting, the infringement lasted until November 1983, since the agreement continued to produce its effects at least until that time, November being the last

month for which it is known that target prices were agreed and price instructions issued.

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

(b) Arguments of the parties

162 The applicant submits that although the Commission accuses the undertakings of having entered into agreements it does not provide sufficient detail of their subject matter. The use in the Decision of the expression 'price initiatives' is thus an attempt to evade the need to define the subject matter of the alleged agreements. In fact the Commission took as its premise the notion that the undertakings agreed on a price level which they considered desirable and capable of achievement and then sought to attain that level in different ways by concerted practices, because the Commission was aware that the prices obtained on the market in no way corresponded to the prices allegedly agreed upon at the meetings.

163 It goes on to argue that not only has the content of the alleged agreements not been established, it has not even been proved that the participants in the meetings concluded such agreements. The notes of meetings drawn up by ICI employees to which the Commission refers may be interpreted in an manner different from that in which they are interpreted by the Commission. According to the applicant, those notes in fact reflect the subjective impressions of their author, as is shown by the fact that they are disputed by all the undertakings, and the ideas which they mention were never implemented in the form which is indicated. The Commission is wrong to attribute particular importance to the expression 'agreed' which appears in certain of the notes, such as those of the meetings of 12 August 1982 (main statement of objections, Appendix 27) and 2 September 1982 (main statement of objections, Appendix 29). That term expresses a common view of the factual situation, not an agreement to do something. Similarly, the term 'commitment' used in the notes of the meetings of 2 September 1982 and 1 June 1983 (main statement of objections, Appendices 29 and 40) does not have the

meaning attributed to it by the Commission since it is not stated in relation to whom a commitment is made. In any event, the applicant never made a commitment to its competitors to adopt any particular conduct in relation to prices.

164 The applicant further argues that the complaints made by the Commission regarding the conduct of the undertakings to which the Decision was addressed were not sufficiently specific and that they changed in the course of the procedure. At first the Commission accused the undertakings of having charged agreed target prices; later it accused them of having sent internal price instructions to their sales offices; and finally it accused them of having held regular meetings.

165 It states that the lack of any agreement on prices is confirmed by the large divergences between the prices obtained by the producers on the market and the prices allegedly agreed upon. The applicant considers that the lack of correspondence between the conduct of the producers and the alleged agreements is evidence of their non-existence rather than of their existence. Moreover, in the face of such conduct from their competitors the producers would quickly have dropped such agreements.

166 The applicant argues that price instructions were purely internal, since they were not communicated to customers, and that they cannot therefore be regarded as conduct on the market if it is not proved that their recipients implemented them. Linz's sales offices did not pass on to customers the price instructions sent to them by its management. The management set the maximum prices which could be hoped for on the market, on the basis of its own independent assessment of market conditions, which was naturally made in the context of discussions with other producers. Those objectives might not be achieved by the sales offices, as is shown by the comment 'clowns' written in the margin of an instruction of 19 October 1983 (specific objections, Linz, Appendix 19), and frequently had to be revised downwards because of vigorous competition (specific objections, Linz, Appendices 10 and 14).

167 Contrary to the Commission's allegations, Linz' price lists were not made known to clients. The Commission cannot support its allegations in that regard by reference to a telex message sent by Linz to one of its sales offices on 31 August 1983 (letter of 29 March 1985, Annex Linz I2), since far from referring to the notification to clients of the prices which it contains that telex simply states that

'bedauerlicherweise sind wir mit der vorangegangen liste bereits bei unseren kunden vorgegangen, muessen jedoch auf basis der konkurrenzsituation entsprechende korrekturen anbringen und ersuchen in entsprechend vorsichtiger weise bei den schon kontaktierten kunden, insbesondere skandinavien copo-preise, durchzufuehren'.

('unfortunately we have already approached our customers with the previous list; in view of the competitive situation, however, we must make appropriate corrections and seek, with the necessary prudence, to introduce it in relation to customers who have already been contacted, in particular Scandinavia copo-prices').

It can only be inferred from that that the applicant based itself on the previous price list in approaching customers, not that it communicated that list to them. Moreover, no binding instruction to apply a price list can be inferred from the remark 'please implement the target function as usual'. On the contrary, these were only target prices representing the management's conception of the maximum prices which could be obtained on the market. It is self-evident that the sales offices were instructed to come as close to these prices as possible in the conclusion of contracts.

168 In any event, even if it is assumed that certain participants informed customers of target prices, that conduct can be considered reprehensible only if the customers had to expect those prices to be implemented immediately and effectively. That was not the case, however, because of market conditions, which prevented producers from charging customers the prices indicated in price instructions. Those

instructions thus remained purely theoretic and served at most as the basis for calculating the discounts to be granted.

169 Although the Commission asserts that for several years the target prices followed a trend parallel to that of the prices actually charged on the market, such a general assertion relating to such a long period has no probative value because such a trend is quite normal where producers are at all familiar with the fundamentals of their market. It is the short term that is important. The Commission itself acknowledges that the price initiatives sometimes resulted in a sharp drop in prices.

170 Finally, the applicant states that, even supposing that the agreements and concerted practices alleged by the Commission in fact existed, they concerned only basic grades and 'commodities', and certainly not the special products which account for 63% to 80% of Linz's sales in the Community. The Commission has not been able to produce the slightest evidence that the discussions on prices concerned special grades; although the price tables attached to the notes of the meetings of 13 May and 2 September 1982 (main statement of objections, Appendices 24 and 29) do include various prices, that is because a single price is expressed in several different currencies. Unlike certain producers, perhaps, Linz never standardized the price increases for special grades. It adds that the Commission's argument based on the fact that the alleged price agreements on basic grades had an effect on special grades cannot be upheld, since it contains a logical fallacy analogous to that which would make OPEC responsible for increases in the prices of gas or of coal resulting from increases in the price of oil.

171 The Commission states that it has substantial evidence of the existence of price agreements which were reflected in the price initiatives described in the Decision.

172 It holds various notes of meetings in which the applicant participated, showing that their purpose was *inter alia* the setting of price targets, primarily in order to achieve some stability of prices at a level higher than that which would have been reached on a competitive market, even if that level was ultimately lower than the price level originally decided on in the meetings.

173 The Commission submits that the applicant's assertion that it was clear to all the participants in the meetings that the information exchanged at them did not entail any commitment on their part is refuted by the fact that price instructions corresponding in every particular to the decisions reached in the meetings were sent to the sales offices after each meeting. Furthermore, the observance of the price targets was regularly the focus of discussion at meetings, as is shown by the comparisons of the target prices and the prices actually charged by participants contained in the notes of the meetings held between August and November 1982 (main statement of objections, Appendices 28 to 32).

174 The transmission to national sales offices of price instructions corresponding to the target prices proves that the producers took their agreements seriously and implemented them. The Commission acknowledges, however, that the price agreements certainly did not achieve their objectives in all cases and that the target prices consequently had to be revised downwards in various circumstances, since customers were aware of the existence of over-capacity and were not ready to accept the price increases agreed upon by the producers. The accusation that the Commission makes against the applicant is that it reached agreement with other polypropylene producers, in the context of the price initiatives, on the definition of price targets to be pursued by their sales offices.

175 Although some price initiatives were not entirely successful, others resulted in a clear increase in prices on the market.

176 The Commission points out that the price instructions were issued with a view to their implementation on the market and at the very least they were the basis for negotiations with customers. As evidence it refers to the very text of some of the price instructions (letter of 29 March 1985, Appendices Linz G1 and I2), according to which the sales offices were to use those prices as the starting point in their discussions with customers and to enter into contracts on terms as close as possible to those prices.

177 The Commission further argues that, contrary to the applicant's assertions, the price initiatives concerned both basic and special grades. The notes of the meetings of 13 May and 2 September 1982 (main statement of objections, Appendices 24 and 29) state prices for ten different grades. Moreover, the price instructions issued by various producers, such as the applicant (letter of 29 March 1985, Appendix Linz C), show that price increases for basic grades were regularly accompanied by simultaneous price increases for special grades. Finally, it cannot be doubted that the agreements on prices for basic grades also had repercussions on prices for special grades.

(c) Assessment by the Court

178 The Court observes as a preliminary point that the applicant considers that the Commission has not stated sufficiently precisely what it means by 'price initiatives' and that it denies that the notes of meetings drawn up by ICI employees are proper evidence of its commitment to those initiatives.

179 It must be pointed out first of all that in point 21(a) the Decision states that one purpose of the meetings was 'the setting of the price levels which the producers would seek to achieve during some future period ("target prices"), by means of a concerted price "initiative", sometimes lasting over a period of several months and consisting of several "step" increases'; it thus stated sufficiently precisely what it meant by price initiatives. It may be added that points 28 to 51 of the Decision contain a detailed illustration of the concept.

180 It must further be observed that the notes of meetings drawn up by ICI employees gave a sufficiently objective report of the content of the meetings as regards both the commitments made by the participating undertakings and the subject matter of those commitments.

181 Moreover, although the expressions 'agreed' and 'commitment' are not in themselves sufficient to prove that the producers committed themselves to participate in a price initiative, such a commitment can be inferred from those terms when they are viewed in the context of all the notes of meetings in which they appear.

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

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

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

184 In this regard the applicant has raised two arguments to show in general that it did not, at the regular meetings of polypropylene producers, subscribe to the price initiatives agreed upon. It argues first that it participated in the meetings without any anti-competitive intention and, secondly, that it took no account of the outcome of the meetings in determining its conduct on the market as regards prices, as is shown by the considerable differences between the prices allegedly agreed upon in the meetings and the prices which it charged on the market.

185 Neither of those arguments can be accepted as evidence to corroborate the applicant's assertion that it did not subscribe to the agreed price initiatives. The Court must point out that the Commission has proved to the requisite legal standard that the applicant's participation in the meetings was not free of an anti-competitive intention, so that the applicant's first argument is not supported by the facts.

186 Even if the second argument were supported by the facts it would not gainsay the applicant's participation in the fixing of price targets at the meetings but would at most tend to show that the applicant did not put into effect the results of those meetings. Indeed, the Decision in no way asserts that the applicant charged prices which always corresponded to the price targets agreed upon at the meetings, which shows that the contested decision does not rely on the applicant's implementation of the outcome of meetings in order to establish that it participated in the fixing of those price targets.

187 Furthermore, the question whether the applicant made known its internal price instructions to customers is irrelevant. The applicant cannot argue that its price instructions were purely internal since, although they were indeed purely internal inasmuch as they were sent by headquarters to the sales offices, they were nevertheless sent with a view to their being carried out and therefore in order to produce directly or indirectly external effects, which negates their internal character, even if, as the applicant asserts, they served simply as a basis for calculating the discounts to be granted.

188 The Court considers that the question whether the price initiatives also concerned special products should be dealt with in the course of the assessment of the applicant's participation in the fixing of target tonnages and quotas (part E, below), which concerns *inter alia* the range of products covered by the quota agreements held in the Decision to have been made. It further considers that what is true of the quotas is equally true, at least indirectly, of the price initiatives, which the quota agreements were intended to support.

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

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

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

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

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

192 It follows that the Commission has established to the requisite legal standard that the applicant was one of the polypropylene producers amongst whom there emerged common intentions concerning the price initiatives mentioned in the Decision, that those initiatives were part of a system and that the effects of those price initiatives continued until November 1983.

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

(a) The contested decision

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

194 As regards the system of 'account management', whose later more refined form, 'account leadership', dates from December 1982, the applicant, like all the producers, was nominated coordinator or 'leader' for at least one major customer, in respect of whom it was charged with secretly coordinating its dealings with suppliers. Under that system, customers were identified in Belgium, Italy, Germany and the United Kingdom and a 'coordinator' was nominated for each of them. In December 1982, a more general adoption of the system was proposed, with an account leader named for each major customer who would guide, discuss and organize price moves. Other producers which had regular dealings with the customer were known as 'contenders' and would cooperate with the account leader in quoting prices to the customer in question. In order to 'protect' the account leader and the contenders, any other producers approached by the

customers were to quote prices higher than the desired target. Despite ICI's assertions, according to which the scheme collapsed after only a few months of partial and ineffective operation, the Commission states in the Decision that a full note of the meeting held on 3 May 1983 shows that at that time detailed discussions took place on individual customers, on the prices offered or to be offered to them by each producer, and on the volumes supplied or on order.

(b) Arguments of the parties

95 The applicant argues that it could not have been designated 'account leader' for Billermann, as the Commission asserts on the basis of table 3 attached to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33), because it made only a few rare deliveries to that company and was therefore not in a position to exert any influence on the prices it was charged. Furthermore, the document produced by the Commission does not indicate whether it was a simple proposal or was actually agreed upon.

96 Similarly, the applicant contends that although it may occasionally have made known the prices which it charged some of its clients, the Commission cannot regard that as evidence of participation in the 'account leadership' system since such information is normally available on the market. It was in that context that it mentioned its deliveries at a high price to Adolff. The Commission is wrong to regard that as proof of its participation in the alleged 'account leadership' system, since that undertaking was charged high prices because it was a single small delivery.

97 The applicant repeats that the fact that during the meetings held in spring 1983 (main statement of objections, Appendices 37 and 38) the deliveries made to certain customers and the discounts granted were discussed is no proof of any agreement on the system of 'account leadership', since it was an exchange of information which was available on the market.

198 The Commission considers that it is clear from the note of the meeting of 2 September 1982 (main statement of objections, Appendix 29) that the 'account leadership' system was adopted by general agreement at that meeting. The representative of BASF warned the other participants in the meeting against quoting the same price to all customers. The producers which were present, including the applicant, accepted that point of view, and it was proposed and agreed that producers other than the main supplier of a customer would quote a few pfennigs more than it.

199 It considers that it follows from ICI's reply to the request for information (main statement of objections, Appendix 8) and the note of the meeting of 3 May 1983 (main statement of objections, Appendix 38) that the system was implemented. The Commission points out that the applicant is mentioned in two notes of meetings as a supplier of Adolff, Billermann and Teufelberger (main statement of objections, Appendices 37 and 38).

200 The Commission states that the applicant, which took part in those meetings, thus participated in the system, even if it was not designated an 'account manager', inasmuch as it played the role of 'contender' alongside an 'account leader'.

(c) Assessment by the Court

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

2 It must be concluded that in participating in the meetings during which that set of measures was adopted (in particular those of 13 May, 2 and 21 September 1982 (main statement of objections, Appendices 24, 29, 30)), the applicant subscribed to it, since it has not adduced any evidence to prove the contrary.

3 As regards the question of 'account leadership', the Court finds that the applicant took part in the four meetings (those of 2 September 1982, 2 December 1982, March 1983 and 3 May 1983) at which the system was discussed by the producers and that it appears from the notes of those meetings that the applicant provided certain information on its customers (main statement of objections, Appendices 29, 33, 37 and 38). In this regard, the adoption of the system of 'account leadership' is clear from the following passage appearing in the record of the meeting of 2 September 1982:

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

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

204 The implementation, at least in part, of this system is evidenced by the note of the meeting of 3 May 1983, in which it is stated:

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

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

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

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

5 The applicant's participation in that system is to be inferred, first, from its presence at the meetings in which the system was developed and its implementation reviewed and, secondly, from the fact that its name appears opposite those of certain of its customers in the tables attached to the notes of the meetings of 2 September (main statement of objections, Appendix 29) and 2 December 1982 (main statement of objections, Appendix 33). In the first table the applicant is mentioned among the 'present suppliers + account leader' of its German customer Billermann, and in the second table it is mentioned as the 'account leader' of the same customer and of its Austrian customer Teufelberger and other customers in Switzerland and Sweden.

The Court notes that the applicant has put forward nothing to show that it was not designated 'account leader' for those customers other than Billermann. It must be concluded that even assuming that it was not designated 'account leader' for Billermann, the fact remains that the applicant was designated 'account leader' for other customers outside the Community. The location of those customers is irrelevant to the finding that it participated in the system of 'account leadership' on the Community market, since that system constituted an undivided whole in which

the benefit expected by the applicant as the 'account leader' of a particular customer, perhaps one established outside the Community, was balanced by the commitment not to compete in relation to other customers established in the Community for which other producers had been designated 'account leader'.

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

E. Target tonnages and quotas

(a) The contested decision

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

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

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

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

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

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

The Decision (point 58) states that for a 1982 scheme complicated quota proposals were advanced which attempted to reconcile divergent factors such as previous achievements, market aspirations and available capacity. The total market to be divided was estimated at 1 450 000 tonnes. Some producers submitted detailed plans for market sharing while others were content to communicate only their own tonnage aspirations. At the meeting on 10 March 1982 Monte and ICI tried to reach an agreement. The Decision (point 58, last paragraph) states, however, that,

as in 1981, no definitive agreement was reached and for the first half of the year the monthly sales for each producer were communicated during the meetings and monitored against its achieved percentage share in the previous year. According to the Decision (point 59), in the August 1982 meeting, negotiations for an agreement on quotas for 1983 were held and ICI held bilateral discussions with each of the producers on the new system. However, pending the introduction of such a quota scheme, producers were required in the second part of 1982 to aim to restrict their monthly sales to the same percentage of the overall market which each of them had achieved in the first six months of 1982. Thus, in 1982, the market shares had reached a relative equilibrium and remained stable in relation to previous years as regards most of the producers.

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

215 The Decision (point 63, third paragraph) states that a document found at the premises of Shell confirms that an agreement was made, since it endeavoured not to exceed its quota. That document also confirms that a volume control scheme was continued into the second quarter of 1983 since, in order to keep its market share in the second quarter close to 11%, national sales companies in the Shell group were ordered to reduce their sales. The existence of that agreement is

confirmed by the note of the meeting on 1 June 1983, which, although not mentioning quotas, relates to exchanges of details of the tonnages sold by each producer in the previous month, which would indicate that some quota system was in operation (Decision, point 64).

The Decision (point 65) states that although no system of penalties for exceeding quotas was ever instituted, the system under which each producer reported in the meetings the tonnage which it had sold in the previous months, with the risk of facing criticism from the other producers if it was considered unruly, provided an inducement to observe its allocated target.

(b) Arguments of the parties

The applicant claims that the Commission has not been able to prove the establishment of a quota system, and still less Linz's participation in such a system. It argues that the Commission's findings regarding the setting of sales volume targets are singularly lacking in precision and that the only well established point lies in the acknowledgement by the Commission that the undertakings did not arrive at a final agreement for the years 1981 and 1982.

It states that the evidence put forward by the Commission consists essentially of proposals and of tables drawn up *a posteriori*, how and by whom is unknown. It is entirely improper for the Commission to seek to rely on the use in one of those tables (main statement of objections, Appendix 60) of the expression 'agreed targets' since it omits to point out that the note 'to be rechecked' appears in the table in respect of four of the undertakings mentioned. The applicant concludes from that that no agreement was reached.

219 The applicant also observes that the lack of precision of the Decision makes it impossible to determine whether the undertakings are accused of having implemented the sales volume targets. It considers, however, that Article 1(1)(e) of the Decision simply accuses the undertakings of having allocated themselves quotas or agreed to limit their monthly sales, without referring to any implementation.

220 It states in that regard that the sales volume targets were not generally applied and that no criticism was made of undertakings which did not comply with the quotas they were allegedly allocated. The applicant concludes from the fact that the quotas were not implemented that the targets mentioned in certain documents were not the result of agreements but merely working hypotheses or simple wishes, since the Commission has been unable to prove that the undertakings committed themselves to comply with those targets. The Commission itself admits that compliance with the targets was voluntary, so that the legal or moral intention to be bound which is necessary for the conclusion of an agreement was undeniably lacking.

221 As regards the implementation of the alleged quotas the applicant adds that Table 8 to the Decision itself shows that the quantities actually delivered were significantly different from the quotas. In the applicant's case there are divergences of up to 20% from the quotas it was allegedly granted.

222 It goes on to review the years in respect of which the Decision alleges that a system of sales volume targets was established.

223 In respect of 1979 the applicant observes that the Commission indicates that sales volume targets were fixed in tonnes, but without stating by whom or proving that anyone agreed to comply with them.

For 1980 it considers that there is no evidence that there was an agreement and that the undertakings committed themselves to observing the targets fixed. Furthermore, the Commission's finding that the sales of only one supplier remained above its target for 1980 is no proof of compliance with the quotas allegedly agreed upon by the undertakings. The applicant points out once again that the Commission has not proved that it took part in the meetings before 1981, and that must be taken into account in assessing the evidence put forward by the Commission for 1979 and 1980.

In respect of 1981 and 1982 the applicant points out that the only proven fact is the absence of any final agreement, as is expressly acknowledged in the Decision. It adds that it has not been proved that figures exchanged during the meetings in 1981 and 1982 were correct and that the Commission has not indicated whether the figures corresponded to the sales targets. Furthermore, the particular importance given in 1982 by the new chairman of the producers' meetings to the establishment of a quota system to which all the producers would have to subscribe can be explained only by the fact that until then no one had complied with the quotas previously discussed or agreed.

As a subsidiary point it states that if there was a degree of correspondence between the sales volume targets and actual sales, that is due to the fact that when undertakings draw up their strategy at the end of the year for the following year they make projections which cannot radically differ from reality, because polypropylene is a product whose particular characteristics require considerable attention to customers, so that there is little likelihood of brusque variations in market share.

As regards 1983, the applicant observes that the Decision contains a detailed description of the efforts of certain undertakings to establish a system of quotas. However, the Decision does not clearly indicate whether those efforts were successful. The applicant considers that the evidence put forward by the Commission does not support the conclusion that those efforts culminated in an agreement.

228 It states first of all that the conversations between Shell and ICI in May 1983 to which the Commission refers are completely unknown to it, and the Commission is wrong to allege that Linz itself made a detailed proposal for quotas. The ICI note to which the Commission refers (main statement of objections, Appendix 80) does not support that allegation, since it simply indicates that the applicant mentioned the figure of 5% as its target for 1983 in reply to a request for information made by telephone. That figure was naturally not accepted.

229 According to the applicant, the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) on which the Commission relies in order to show that the quotas were in fact observed is not conclusive since it contains no comparison of actual sales and alleged quotas. It merely sets out the actual sales of the various producers.

230 What is ultimately decisive, it says, is the fact that the Commission itself acknowledges that compliance with the targets was voluntary, so that the intention to be bound which is a necessary element of any agreement is undeniably lacking.

231 Finally, the applicant states that assuming that quotas were fixed by the producers, they concerned only basic grades and 'commodities', and certainly not special products, which account for between 63% and 80% of its sales in the Community.

232 The Commission, on the other hand, states that, contrary to the applicant's assertions, point 54 et seq. of the Decision provides a general survey, in very clear terms, of the quota system as it was applied over a number of years.

As regards 1979, it states that an undated table headed 'Producers' Sales to West Europe', found at the premises of ICI (main statement of objections, Appendix 55), setting out for all the polypropylene producers of western Europe the sale figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual' and 'revised target 79', whose interpretation is not open to doubt, shows clearly that Linz took part in a quota agreement for that year. The precise data contained in that document are of the kind not known by competitors in a 'normal' competitive situation and therefore presuppose participation by Linz in the preparation of that document.

As regards 1980, the Commission again states that Linz's participation in the cartel is clearly shown by the documents in its possession. It refers in particular to a table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60) and headed 'Polypropylene — Sales target 1980 (kt)', which compares for all the producers of western Europe a '1980 target', 'opening suggestions', 'proposed adjustments' and 'agreed targets'. That document shows the process whereby quotas were drawn up. It is corroborated by a table found at the premises of ATO and ICI (main statement of objections, Appendices 59 and 61) which compares the sales of all the producers in terms of tonnages and market shares under the following headings: '1979 actual', '1980 target', '[1980] actual' and '1981 aspirations'. The Commission points out that in its reply to the request for information (main statement of objections, Appendix 8) ICI stated in relation to that document that 'the source of information for actual historic figures in this table would have been the producers themselves'.

In respect of 1981 the Commission states that although no agreement could be reached on quotas for the whole year, the 1980 quota was regarded as a theoretical entitlement and sales were monitored on a monthly basis. It is apparent from the note of the abovementioned meetings in January 1981 (main statement of objections, Appendix 17) that the producers compared their actual performance with the targets which had been defined, and a table found at the premises of ICI but originally from an Italian producer shows that the producers compared their

1981 sales with those of the previous year (main statement of objections, Appendix 65). It concludes that in the absence of a general volume-sharing agreement for 1981 provisional measures were taken for that year. That is confirmed by other documents (main statement of objections, Appendices 66 to 68).

236 It goes on to state that it is apparent from the tables attached to the notes of the meetings of 9 June 1982 and 20 August 1982 (main statement of objections, Appendices 25 and 28) that during the first six months of 1982 the producers compared their monthly sales with those made in 1981. As regards the second six months it appears from the second of those documents that the producers were asked to limit their monthly sales to the level of those of the first six months. It follows from the tables attached to the notes of the meetings of 6 October, 2 November and 2 December 1982 (main statement of objections, Appendices 31 to 33) that the producers compared their sales in the second half-year with those of the first.

237 As regards 1983, the Commission goes on to state that it has in its possession the ambitions and proposals which various producers, including the applicant (main statement of objections, Appendix 80), expressed at ICI's request for themselves and for the other producers and sent to ICI with a view to the conclusion of a quota agreement for 1983 (main statement of objections, Appendices 74 to 84). It points out that the applicant has adduced no specific evidence to show that the ICI note did not reproduce the content of its proposition. According to the Commission, those proposals were then processed by computer in order to obtain an average which was then compared with the aspirations of each producer (main statement of objections, Appendix 85). To those documents the Commission adds an ICI internal note headed 'Polypropylene framework 1983' (main statement of objections, Appendix 86) in which ICI outlines a future agreement on quotas.

238 Finally, the Commission states that it appears from an internal Shell document (main statement of objections, Appendix 90) that a quota agreement was concluded for the second quarter of 1983. According to that document Shell instructed its national sales offices to reduce their sales in order to comply with the quota which had been allocated to it. The Commission adds that the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) shows that

information was exchanged on sales volumes for May and that the applicant complied with the quotas allocated to it.

In those circumstances the fact that there were no penalties for breach of quotas is irrelevant.

Finally, the Commission submits that, contrary to the applicant's assertions, the quotas concerned all grades of polypropylene.

(c) Assessment by the Court

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

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

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

244 As regards the year 1979 in particular, having regard both to the whole of the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12) and to the undated table taken from the premises of ICI (main statement of objections, Appendix 55) headed 'Producers' Sales to West Europe', which sets out for all the polypropylene producers of western Europe the sales figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual', 'revised target' and '79', it is apparent that the need to tighten the quota system agreed for 1979 for the last three months of that year was recognized at that meeting. The term 'tight', read in conjunction with the restriction to 80% of one-twelfth of planned annual sales, indicates that the scheme originally planned for 1979 had to be made tighter for those last three months. That interpretation of the note is borne out by the abovementioned table because it contains, under the heading '79' in the last column to the right of the column headed 'revised target', figures which must correspond to the quotas initially fixed. These had to be circumscribed because they had been drawn up on the basis of an over-optimistic market evaluation, as was also the case in 1980. The reference in the third paragraph of point 31 of the Decision, to a scheme 'proposed or agreed in Zurich to limit monthly sales to 80% of the average achieved during the first eight months of the year' does not tell against these findings. That reference, read in conjunction with point 54 of the Decision, is to be taken as meaning that sales volume targets had already been set initially for the monthly sales of the first eight months of 1979.

245 As regards the year 1980, the Court finds that it is clear above all from the table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60), which contains a column headed 'agreed targets 1980', that sales volume targets were set for the whole of the year. The probative value of that table is not impugned by the note 'to be rechecked' which appears next to the names of four undertakings, since two other items of evidence confirm that the

further check culminated in the agreement of all the parties. The documents in question are the note of the January 1981 meetings (main statement of objections, Appendix 17), at which producers, including the applicant, compared the quantities actually sold ('Actual kt') with the targets set ('Target kt'), and a table dated 8 October 1980 (main statement of objections, Appendix 57) comparing two columns, one setting out the '1980 Nameplate Capacity' and the other the '1980 Quota' for the various producers.

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

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

'Taking the various alternatives discussed at yesterday's meeting we would prefer to limit the volume to be shared to no more than the market is expected to reach in 1981, say 1.35 million tonnes. Although there has been no further discussion with Shell, the four majors could set the lead by accepting a reduction in their

1980 target market share of about 0.35% provided the more ambitious smaller producers such as Solvay, Saga, DSM, Chemie Linz, Anic/SIR also tempered their demands. Provided the majors are in agreement the anomalies could be best handled by individual discussions at Senior level, if possible before the meeting in Zurich.'

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

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

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

249 The fact that the producers each took their previous year's quota as a theoretical entitlement for the rest of the year and monitored whether sales matched that quota by exchanging their sales figures each month is established by the combi-

nation of three documents: first, a table dated 21 December 1981 (main statement of objections, Appendix 67) setting out for each producer its sales broken down by month, the last three columns, relating to the months of November and December and the annual total, having been added by hand; secondly, an undated table written in Italian entitled 'Scarti per società' ('Differences company by company') and found at the premises of ICI (main statement of objections, Appendix 65), comparing for each producer for the period January-December 1981 the 'actual' sales figures with the 'theoretic' figures; and finally, an undated table found at the premises of ICI (main statement of objections, Appendix 68) comparing for each producer for the period January-November 1981 sales figures and market shares with those for 1979 and 1980 and making a forward projection to the end of the year.

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

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

52 As regards 1982, the complaint against the producers is that they took part in negotiations in order to reach an agreement on quotas for that year; that in that connection they communicated their tonnage aspirations; that, failing a definitive agreement, they communicated at meetings their monthly sales figures during the first half of the year, comparing them with the percentage achieved during the

previous year and, during the second half of the year, attempting to restrict their monthly sales to the same percentage of the overall market achieved in the first six months of that year.

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

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

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

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

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

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

258 As regards 1983, the Court finds that it is clear from the documents produced by the Commission (main statement of objections, Appendices 33, 85 and 87) that at the end of 1982 and the beginning of 1983 the polypropylene producers discussed

a quota system for 1983, that the applicant participated in the meetings at which those discussions took place and that on those occasions it supplied data relating to its sales, and that it appears from an ICI note headed '1983 — C. Linz proposal' (main statement of objections, Appendix 80) that the applicant made a proposal for the sharing of the market among the various producers, expressed in tonnages, which is included in the consolidated table drawn up by ICI (main statement of objections, Appendix 85, p. 2), converted into market share.

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

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

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

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

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

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

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

263 The Court further finds that the quotas concerned all grades of polypropylene (basic grades and special products). The applicant stated in its reply to the statement of objections that its 1980 and 1983 sales in western Europe were 50 600 tonnes and 55 100 tonnes respectively, all grades taken together, and that special products accounted for between 63% and 80% of its sales. The quota allocated to the applicant for western Europe in 1980 was 55 000 tonnes (main statement of objections, Appendix 60), later amended to 48 000 tonnes (main statement of objections, Appendix 17), and in 1983 it was 54 000 tonnes (extrapolation on the basis of the quota for the first quarter, main statement of objections, Appendix 33, table 2).

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

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

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

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

F. Conclusion

268 It follows that the Commission has proved, to the requisite legal standard, that all the findings of fact which it made in the contested decision against the applicant are correct and that, consequently, contrary to the applicant's contention, it did not rely on rumours, simple presumptions and suppositions or imaginary empirical theories.

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

A. Legal characterization

(a) The contested decision

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

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

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

272 In the Decision (point 82, second paragraph) the Commission considers that even before 1979 the various initiatives reported as having been 'led' by one or other producer and 'followed' by the others also resulted from an agreement between them.

273 As regards more specifically the December 1977 initiative, the Decision states (in the third paragraph of point 82) that even in front of customers at the EATP meetings producers like Hercules, Hoechst, ICI, LINZ, Rhône-Poulenc, SAGA and Solvay were stressing the perceived need for concerted action to increase prices. There was further contact on pricing between the producers outside the EATP meetings. In the light of these admitted contacts the Commission considers that behind the device of one or more producers complaining of inadequate levels of profitability and suggesting joint action while the others expressed 'support' for such moves lay on existing agreement on pricing. It adds that even in the absence of further contacts such a device might still indicate a sufficient consensus for an agreement within the meaning of Article 85(1).

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

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

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

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

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

279 In its judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (*Suiker Unie* v *Commission* [1975] ECR 1663) the Court of Justice held that the criteria of coordination and cooperation laid down by its case-law, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the competition provisions of the Treaty according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors but it does strictly preclude any direct or indirect contact between them the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (Decision, point 87, second paragraph). Such conduct may fall under Article 85(1) as a 'concerted practice' even where the parties have not reached agreement in advance on a common plan defining their action in the market but adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour (Decision, point 87, third paragraph, first sentence).

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

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

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

(b) Arguments of the parties

283 The applicant submits that the Commission's argument to the effect that it is of little relevance whether in this case there was an agreement or simply concerted practices cannot be upheld. The question whether the collusion of which Linz is accused constituted, from the legal point of view, an agreement or a concerted practice within the meaning of Article 85 of the EEC Treaty, or whether it includes elements of both, cannot be left unanswered.

84 It considers that that argument is based on an incorrect definition of the concept of a concerted practice according to which the 'practice' element of a concerted practice is present whenever there is direct or indirect contact between undertakings; on this view their conduct on the market serves only as proof of contact when there is no other evidence.

85 The applicant submits that the Commission's argument is inconsistent with the wording of Article 85, which does not place 'agreement' and 'concertation' on the same level, as the Commission ultimately does, but instead 'agreement' and 'concerted practice'. Nor is the Commission's argument consistent with the case-law of the Court of Justice cited by it (judgments in Case 48/69 *ICI*, cited above, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie*, cited above, paragraphs 172 to 180, and Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021) or the Opinions of the Advocates General in Joined Cases 209 to 215 and 218/78 *Van Landewyck*, cited above, and Joined Cases 100 to 103/80 *Pioneer* v *Commission* [1983] ECR 1825. A thorough analysis of the *Suiker Unie* judgment (paragraphs 173 to 180) shows that in order for a concerted practice to be held to exist the Court of Justice requires that two conditions be met: the existence of concertation and the existence of conduct corresponding to that concertation. Paragraphs 173 and 174 of that judgment, which were cited by the Commission in support of its position, do not concern the definition of the concept of a concerted practice but relate only to one of its two elements, that of concertation. That element must be joined by the second element of a concerted practice, namely coordinated conduct on the market, which the Court of Justice examined in paragraph 180 of the judgment.

86 The applicant states that the elimination of the competitive risk is directly related to actual conduct. Although any additional information on the market reduces competitive risk to some extent, the limit beyond which the diminution of that risk falls under Article 85(1) of the EEC Treaty is reached only where it is possible to calculate the reaction of participants to market conduct.

287 In this case, it argues that neither of the two conditions necessary for the existence of a concerted practice is met: the discussions concerning various questions relating to the market did not make it possible to eliminate uncertainty as to the conduct of competitors and no conduct on the market can be observed which would correspond to any concerted practices.

288 The applicant concludes that the Commission's argument is based on an interpretation of Article 85 which, assuming it to be lawful, is novel and cannot be applied retroactively to past circumstances without infringing the principle 'nulla poena sine lege'.

289 It submits that in its Decision the Commission did not prove the existence of an agreement sufficiently clearly as regards its date, its subject matter and the participants. Since the Commission has not specifically accused the undertakings concerned of any specific agreement, the Court need not determine whether the facts would support such an accusation if it were made, since the undertakings cannot be expected to defend themselves against objections which the Commission has not made.

290 Accordingly, it is for the Commission to prove that the elements constituting an agreement or a concerted practice were present in relation to the applicant, and by seeking to show the existence of 'collusion' presenting features of one or the other concept the Commission has failed to do that.

291 According to the Commission, on the other hand, the question whether collusion or a cartel is to be described for legal purposes as an agreement or concerted practice within the meaning of Article 85 or whether the collusion has elements of both is of negligible importance. In its view, the terms 'agreement' and 'concerted practice' subsume the various types of arrangements by which competitors, instead

of determining their future competitive conduct in complete independence, mutually accept a limitation of their freedom of action on the market as a result of direct or indirect contacts between them.

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

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

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

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

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

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

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

(c) Assessment by the Court

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

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

01 Since it is clear from the case-law of the Court of Justice that in order for there to be an agreement within the meaning of Article 85(1) of the EEC Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (see the judgment in Case 41/69 *ACF Chemiefarma* v *Commission*, cited above, paragraph 112, and

the judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission*, cited above, paragraph 86), this Court holds that the Commission was entitled to treat the common intentions existing between the applicant and the other polypropylene producers, which the Commission has proved to the requisite legal standard and which related to floor prices in 1977, price initiatives, measures designed to facilitate the implementation of the price initiatives, sales volume targets for the years 1979 and 1980 and the first half of 1983 and measures for restricting monthly sales by reference to a previous period for 1981 and 1982, as agreements within the meaning of Article 85(1) of the EEC Treaty.

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

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

304 In the present case, the applicant participated in meetings concerning the fixing of price and sales volume targets during which information was exchanged between

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

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

06 The Commission was therefore justified, in the alternative, having regard to their purpose, in categorizing the EATP meeting of 22 November 1977 in which the applicant participated and the regular meetings of polypropylene producers in which the applicant participated between 1978 and September 1983 as concerted practices within the meaning of Article 85(1) of the EEC Treaty.

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

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

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

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

B. Restrictive effect on competition

(a) The contested decision

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

(b) Arguments of the parties

12 The applicant argues that its sales policy as regards both prices and sales volumes was entirely independent of the outcome of the meetings in which it took part. It refers in that regard to an audit carried out by an independent firm of accountants, Coopers & Lybrand, and to an econometric study of the German market carried out by Professor Albach of Bonn University, which show that the meetings had no influence on the market and caused customers no harm.

13 The Commission replies that the anti-competitive object of the agreements and concerted practices which make up the infringement has in any event been established and that it is therefore unnecessary to show that they had a restrictive effect on competition. For the rest, it refers to the text of the Decision.

(c) Assessment by the Court

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

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

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

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

3. *Conclusion*

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

The statement of reasons

319 The applicant observes that under Article 190 of the EEC Treaty the Commission is required to state the reasons for its decisions. The purpose of that obligation is both the protection of the person concerned and the proper administration of justice (judgment of the Court of Justice in Case 18/57 *Nold* v *High Authority* [1959] ECR 41). In order to enable the Community court to exercise its supervisory jurisdiction to the full the statement of reasons must therefore contain a detailed and precise statement of the factual and legal considerations which led to its adoption. The Commission must state clearly why it considers that well-founded and relevant objections should not be upheld.

In this case it considers that the Commission has infringed its obligation to state reasons by disregarding the whole of the statement of the facts submitted by the applicant and the other undertakings, which proved, by means of thorough and unassailable experts' reports, that the alleged agreements or concerted practices had no perceptible effect on the market. For example, the Commission did not trouble to refute Professor Albach's study of the German market, on which the applicant operates, a study which contains important information; nor did it refute the Coopers & Lybrand audit.

The applicant considers that since the Commission relied in its Decision on opposite conclusions it cannot have considered that the results of the study were irrelevant. It should therefore have analysed them in its assessment of the evidence and stated on the basis of what findings of fact it considered them to be refuted.

It further objects that the Commission did not reply to the arguments based on Linz's specific situation. The reference to Linz made by the Commission in point 95 of the Decision is entirely insufficient.

The Commission replies first of all that it is not obliged to discuss every argument put forward by the parties or to reply to every expert's report submitted by them with an equally detailed counter-argument if the aspects covered by those reports are not relevant to the resolution of the dispute (judgment of the Court of Justice in Case 24/62 *Germany* v *Commission* [1963] ECR 63, at p. 69).

It considers that it has, however, indicated the reasons which led it to take the view that the Coopers & Lybrand audit concerning the cartel's effects on the market was irrelevant to the determination of an infringement of Article 85(1) of the EEC Treaty.

325 The Commission considers that in the Decision (points 72 and 73) it discussed Professor Albach's study in sufficient depth, and points out that that study concerns only the German market and was not commissioned by the applicant.

326 Finally, it considers that it took full account in the Decision of the applicant's particular situation, which consists solely in the fact that its head office is located outside the Community (Decision, point 95).

327 The statement of the reasons for the Decision is therefore sufficient.

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

329 It is clear from the assessments of this Court relating to the findings of fact and the application of Article 85(1) of the EEC Treaty made by the Commission in the contested measure that the Commission took full account of the applicant's arguments regarding the effects of the cartel on the market and that it stated conclusively in the Decision (points 72 to 74 and 89 to 92) the reasons which led it to consider that the conclusions drawn by the applicant from the Coopers & Lybrand audit and Professor Albach's study were unfounded.

Moreover, the Commission is correct to consider that the only special feature of the applicant's situation that required a specific reply in the Decision was the fact that the applicant's head office was located outside the Community. The Court considers that point 95 of the Decision provides a sufficient and convincing reply to the applicant's arguments relating to its special situation. Furthermore, the applicant has not indicated in what respect that reply is insufficient.

Consequently, this ground of complaint must be dismissed.

The fine

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

1. *The limitation period*

The applicant maintains that, if the Commission's investigation began on 13 October 1977, any infringements of Article 85(1) of the EEC Treaty committed before 13 October 1978 are time-barred. It is solely in order to evade the rules on limitation periods that the Commission wrongly alleges that there was a single continuous agreement characterized by a framework agreement concluded in 1977.

334 The Commission argues that this was a continuous infringement in respect of which time begins to run only when the infringement is terminated.

335 The Court notes that under Article 1(2) of Regulation No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (Official Journal 1974 L 319, p. 1), the five-year limitation period applying to the Commission's power to impose fines begins to run, in the case of continuing or repeated infringements, on the day on which the infringement ceases.

336 In the present case, it follows from the Court's assessments relating to proof of the infringement that the applicant participated without interruption in a single and continuous infringement from November 1977 until November 1983.

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

2. *Duration of the infringement*

338 The applicant argues first of all that the Commission has not proved that Linz participated in the infringement in any way before 1981 and for the subsequent period only the periods covered by specific price initiatives can be taken into account. Accordingly, the duration of the infringement must be significantly reduced.

339 The Commission maintains that the relatively long duration of the infringement that the applicant has been found to have committed justifies heavy penalties.

It considers that the infringement continued even when it was not affecting the market and that the determination of its duration should not be confined to the duration of the various price initiatives.

The Court would point out that it has already found that the Commission properly assessed the duration of the period during which the applicant infringed Article 85(1) of the EEC Treaty.

It follows that this ground of challenge must be dismissed.

3. *The gravity of the infringement*

A. The applicant's role

The applicant denies that it took part in the infringements described in the Decision. Should the Court hold that it infringed Article 85(1) of the EEC Treaty, it states that, contrary to the Commission's assertions, it was not aware of the infringement. It was not aware at any time that participation in the meetings in order to obtain information and increase the transparency of the market fell within Article 85 of the EEC Treaty, since it was by virtue of a new interpretation of the concept of concerted practice that the Commission found that it had committed an infringement. It points out that such conduct is not unlawful in Austria, where its head office is, and that consequently, because of its limited ability to obtain information on Community competition law it did not know that its conduct was unlawful and that it was liable to large fines.

At the hearing the applicant emphasized the fact that it is a small State-owned undertaking which had an enormous need for information and that its staff, who have a civil service background, were entirely unaware that simple participation in meetings of polypropylene producers could be contrary to competition law.

345 Furthermore, it considers that the Commission is wrong to regard the fact that the meetings were held in the greatest secrecy as an aggravating factor. It states that it took no measures to keep the meetings secret and that its customers were aware of the meetings. The applicant asks, moreover, whether the fact that an infringement is kept secret should be regarded as an aggravating factor.

346 The Commission states that the applicant was not unaware of the fact that the meetings were not intended solely for the exchange of information and that it knew that decisions were taken at them.

347 It considers that the applicant cannot rely on its alleged ignorance of Community competition law on the ground that its head office is outside the Community. The Commission points out, moreover, that horizontal price agreements are a classic infringement of competition law wherever such law exists.

348 The Commission points out that, as the Court of Justice has held (judgments in Case 19/77 *Miller International Schallplat GmbH* v *Commission* [1978] ECR 131, paragraph 18, and Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 45), the fact that the applicant was unaware of infringing Article 85 of the EEC Treaty is irrelevant if it knew that the object of its conduct was the restriction of competition.

349 Furthermore, it considers that the secrecy of the meetings is an indication of the intentional nature of the participants' conduct. It states that if the participants had not been aware of the unlawful nature of their conduct they would have had no need to take precautions such as the note 'personal — no copy to file' on certain documents concerning the meetings. It also states that by refusing to reply to the

request for information made to it by the Commission the applicant did nothing to lift the veil covering the meetings. Finally, it considers that the secrecy of the cartel is one of its aspects for which the applicant must bear responsibility along with the others.

50 The Court finds that the facts established show, by their intrinsic gravity — in particular the fixing of price and sales volume targets — that the applicant did not act rashly or even through lack of care but intentionally. In this regard, particular emphasis must be placed on the clear nature of the infringement of Article 85(1) of the Treaty and in particular of points (a), (b) and (c) of that provision, whose terms were known to the polypropylene producers. In any event, even if the applicant was unaware of infringing Article 85(1) of the EEC Treaty it cannot escape liability. As the Court of Justice has held, it is not necessary for an undertaking to have been aware that it was infringing the competition rules laid down in the Treaty 85 for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition (judgments in Case 246/86 *Belasco* v *Commission* [1989] ECR 2117, paragraph 41, and Case 279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261). In view of the purpose of the meetings in issue that was clearly the case here.

51 Moreover, the applicant's argument regarding the transmission of information must be rejected categorically both for the reasons expressed by the Commission and because if it were upheld it would amount to depriving the provisions of the Treaty on competition of any practical effect.

52 Consequently, this ground of challenge must be dismissed.

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

353 The applicant acknowledges that the Commission has a discretion in fixing fines but considers that it must exercise that discretion with caution and fairness so as to avoid infringing the principle of legal certainty and imposing arbitrary fines. It states that the fines imposed by the Decision are many times greater in amount than those previously imposed by the Commission but that the Commission has not justified that sudden increase.

354 It argues that the Commission should have indicated the weight given to each of the factors which it took into account in determining the amount of the fine, as regards each of the undertakings. By failing to individualize the factors taken into account in fixing the fines the Commission makes it impossible to reconstruct the manner in which it fixed the fine for each undertaking, which leads to arbitrariness.

355 The applicant submits that by acting as it did and by justifying that course of action by the need for the fines to have a dissuasive effect the Commission seems to be adopting a policy of 'dissuasion by arbitrariness'. While it is true that the administration and the courts must have some discretion in fixing fines, their action must be foreseeable as a matter of principle and each infringement must be met with an appropriate fine if the very idea of the rule of law is not to be abandoned. The applicant argues that the dissuasive effect of fines may be achieved by a clear indication of the amount incurred.

356 The Commission states that in imposing the penalties in this case it acted in accordance with its established policy and the fining principles enunciated by the Court of Justice. It points out that since 1979 it has applied a consistent policy of enforcing competition laws by imposing heavier fines, in particular for the categories of infringements well established in Community law and for particularly serious infringements, like those in this case, so as to reinforce the deterrent effect of penalties. That policy has been approved by the Court of Justice (judgment in

Joined Cases 100 to 103/80 *Pioneer*, cited above, paragraphs 106 and 109), which has also accepted on many occasions that the determination of penalties involves the assessment of a complex array of factors (judgment in the *Pioneer* case, cited above, paragraph 120, and judgment in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission*, cited above, paragraph 52).

7 The Commission states that it is in a particularly good position to make such an assessment, which it claims cannot be overturned except in the case of material error of fact or law. Furthermore, the Court of Justice has confirmed that the Commission may assess the fines which it considers appropriate differently in different cases, even if those cases involve comparable situations (judgments in Joined Cases 32/78 and 36 to 82/78 *BMW Belgium* v *Commission* [1979] ECR 2435, paragraph 53, and Case 322/81 *Michelin*, cited above, paragraph 111 et seq.).

8 In this case, the Commission goes on to state that it determined the amount of the fines with due regard to observations of a general nature, which are described in point 108 of the Decision, and observations of a specific nature, which are described in point 109 of the Decision. The former played a role in the determination of an aggregate ceiling for the fine, while the latter enabled it to divide that fine in a fair and proportional manner among the various producers concerned. The general considerations cannot, by their very nature, be individualized. Nevertheless, the Commission points out that it took into account the factors referred to in that regard by Linz. As for the considerations of a specific nature, the Commission considers that it has already replied to the arguments put forward by Linz. That manner of proceeding has been approved by the Court of Justice (judgment in Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769, paragraph 55).

9 The Commission maintains that it has given a detailed statement of the reasons for the fines which it imposed on the various undertakings, indicating the mitigating or aggravating circumstances which it took into account. It adds that it is not obliged to make a mathematical classification of the inculpatory and exculpatory

factors; to do so would deprive the fines of their dissuasive character. The Commission's discretion cannot be reviewed on a mathematical basis, since otherwise undertakings would include the amount of the possible fine in advance in their calculation of the profitability of their cartel proposals. The Commission denies that it fixed the amount of the fines in an arbitrary manner or failed to act in accordance with the obligations inherent in the rule of law.

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

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

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

363 As regards the first two criteria mentioned in point 109 of the Decision — the role played by each of the undertakings in the collusive arrangements and the period of time during which they participated in the infringement — , it must be noted that, since the statement of reasons relating to the determination of the amount of the

fine must be interpreted with reference to all the reasons stated in the Decision, the Commission sufficiently individualized the way in which it took account of those criteria in the applicant's case.

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

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

C. The determination of the relevant market

66 The applicant observes that the conduct complained of in the Decision concerned only basic grades of polypropylene and 'commodities'. However, the applicant's production consists primarily of special grades. The applicant's market share taken into account in fixing the fine was therefore greatly overstated.

67 It goes on to state that the Commission took its market share in western Europe and not in the Community as the basis for fixing the amount of the fine, which also led to overstatement of its market share since Linz is established outside the Community and the bulk of its deliveries are thus not made to Community market.

368 The Commission points out that the cartel concerned both basic and special grades and that in that respect it therefore correctly calculated the applicant's market share.

369 It adds that, as it indicated in point 109 of the Decision, in fixing the amount of the fine it took into account the applicant's deliveries to the Community and not to western Europe, as is confirmed by the difference between Tables 1 and 2 to the Decision and the fact that Linz was assessed a lower fine than ATO although Linz has a larger market share in western Europe.

370 The Court observes that since the infringement concerned all grades of polypropylene the Commission was right to take the applicant's market share for all grades taken together as the basis for determining the amount of the fine to be imposed on it.

371 Furthermore, Table 1 to the Decision, which sets out the market shares in western Europe of the various producers, was not the basis for calculation of the fines imposed on the undertakings to which the Decision was addressed. Neither point 108 nor point 109 of the Decision refer to 'market shares in western Europe (by producer)'. In point 109 of the Decision the Commission referred to the size of the undertakings on the Community market in polypropylene by taking into account, among the criteria intended to result in a fair weighting of the fine imposed on each of the undertakings, their respective deliveries of polypropylene to the Community.

372 Moreover, it is apparent from a comparison of the fine imposed on the applicant with those imposed on the other producers that the Commission took the applicant's market share in the Community and not in western Europe as the basis for determining the amount of the fine to be imposed on the applicant.

373 It follows that this ground of challenge put forward by the applicant must be rejected.

D. Failure to take proper account of the adverse market conditions

374 The applicant submits that the Commission failed to take into account the considerable losses suffered by the polypropylene sector and lost sight of the fact that the disastrous results obtained by the producers were caused by cut-throat competition which meant that polypropylene prices in western Europe were probably the lowest in the world.

375 It denies that the polypropylene market was expanding rapidly, as the Commission asserts in point 108 of the Decision. In fact, contrary to expectations, the polypropylene market did not undergo the hoped for expansion, because of a lag in demand. Consequently, the Commission was wrong to regard that favourable market trend as an aggravating factor and to speak of a sector 'characterized by either low profitability or substantial losses'. The industry had in fact never enjoyed profitability, even low profitability. Linz itself incurred substantial losses throughout the period covered by the alleged infringement.

376 The Commission, for its part, points out that it accepted, in mitigation of the amount of the fines, that the undertakings concerned had incurred substantial losses in their polypropylene operations over a very long period, although it considers that it was not under any obligation to do so.

377 With regard to the losses and the disastrous price trends the Commission states that the notes of the meetings themselves show that the situation improved significantly from 1982 onwards. That led Solvay to propose that the meetings, now pointless, should be discontinued (main statement of objections, Appendix 24). It is

therefore wrong to argue that there was an imbalance between supply and demand on the polypropylene market throughout the period of the meetings. If Linz suffered losses throughout that period, it was not solely because of the poor market conditions.

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

379 Moreover, the fact that in the past the Commission has considered that in view of the circumstances it was appropriate to take into account the crisis affecting the sector of the economy in question cannot oblige it to take such a situation into account in the same manner in this case, since it has been proved to the requisite legal standard that the undertakings to which the Decision is addressed committed a particularly serious infringement of Article 85(1) of the EEC Treaty.

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

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

381 The applicant argues that the conduct of which it is accused in the Decision had no effect or in any event no significant effect on the market situation and caused

its customers no harm. It points out that it has produced several studies, such as the Coopers & Lybrand audit and the studies of Professor Albach, which show irrefutably that neither the price initiatives, the measures intended to facilitate the implementation of the price initiatives nor the alleged quotas had the slightest effect on the market. It considers that those factors should be taken into account in assessing the seriousness of the infringement and the amount of the fines. Instead, for the purpose of determining the fine the Commission considered that in the main the alleged cartel achieved its objective (Decision, point 108).

82 The Commission takes the view that Linz's protestations about the cartel's lack of effect are to no avail. First of all, the cartel had a real effect on prices. Secondly, it maintains that it did take account, in determining the amount of the fines, of the fact that the price initiatives generally did not achieve their objective in full (Decision, point 108). This was already more than the Commission was obliged to do, since not only arrangements which have anti-competitive effects but also those which have anti-competitive objects are caught by Article 85.

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

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

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

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

387 Consequently, this ground of challenge must be dismissed.

F. Agreement or concerted practice

388 The applicant argues that from the point of view of competition policy concerted practices are much less dangerous and hence less serious than agreements which are legally or morally binding on the parties, which give rise to much greater distortions of competition than concerted practices. Having regard to the fact that the Commission has not been able to prove the existence of agreements, the applicant's conduct should be treated as a concerted practice and is therefore not as serious as has been alleged.

389 The Commission disputes the applicant's assertion to the effect that there is a difference in the intrinsic seriousness of agreements and concerted practices. The degree of illegality of a cartel and hence its seriousness depend on its substance, not on its legal form. It is perfectly conceivable that a concerted practice may have infinitely more harmful effects on competition than an agreement.

390 The Court points out that on the basis of its assessments of the proof of the infringement it has held that the Commission was entitled to describe the infringement as 'an agreement and concerted practice', inasmuch as the findings of fact showed that the various agreements concluded and the various concerted practices observed formed part of a single scheme to which the applicant subscribed by virtue of its participation in those agreements and concerted practices. It follows that the Commission relied on that correct description of the infringement in calculating the amount of the fine to be imposed on the applicant.

391 Consequently, this ground of challenge must be dismissed.

392 It follows from all the foregoing considerations that the fine imposed on the applicant is appropriate having regard to the gravity and duration of the breach of the Community competition rules which the applicant has been found to have committed.

Reopening of the oral procedure

393 By a separate document of 28 February 1992 the applicant asked the Court to reopen the oral procedure and order measures of inquiry. It states that in its judgment of 27 February 1992 in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315, hereinafter referred to as the *PVC* cases, the Court of First Instance held that the defendant's decisions in the *PVC* cases were non-existent. The applicant was not a party to those cases. However, it has learned that at the hearing in those cases the Commission's agents stated that the Commission always followed the same procedure as in the *PVC* cases. It is therefore highly likely that the contested Decision is also non-existent. The applicant states that it raises this plea expressly, although it should in any event be considered by the Court of its own motion. Only examination of the original, which the Commission should be ordered to produce, will make it possible to conclude whether the Commission made subsequent changes to the Decision in this case too. The applicant reserves the right to make further pleas in that regard.

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

395 It must be stated first of all that the judgment in the *PVC* cases does not in itself justify the reopening of the oral procedure in this case. Furthermore, in the present case the applicant did not once argue, even by allusion, in the oral procedure that the Decision was non-existent because of the defects held in that judgment to have existed. The question to be examined, therefore, is whether the applicant has

adequately explained why it did not plead the existence of those alleged defects earlier, since they must in any event have existed before the action was brought. Even though the Community court, in an action for annulment under the second paragraph of Article 173 of the EEC Treaty, must of its own motion consider the issue of the existence of the contested measure, that does not mean that in every action brought under the second paragraph of Article 173 of the Treaty the possibility that the contested measure is non-existent must automatically be investigated. It is only in so far as the parties put forward sufficient evidence to suggest that the contested measure is non-existent that the Community court must review that issue of its own motion. In the present case, the arguments put forward by the applicant do not provide a sufficient basis to suggest that the Decision is non-existent. The applicant argues that it follows from the statements made by the Commission's agents at the hearing in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 that an original duly signed by the Commission is also lacking in this case. That allegation, if true, would not in itself entail the non-existence of the Decision. The applicant has not put forward anything to explain why the Commission would have made subsequent alterations to the Decision in 1986, that is to say in a normal situation entirely unlike the special circumstances of the *PVC* cases, where the Commission's term of office was about to run out in January 1989. It is not sufficient in that regard simply to reserve the right to make further pleas. In those circumstances there is nothing to suggest that the principle of the inalterability of the adopted measure was infringed after the adoption of the contested Decision and that the Decision has therefore lost, to the applicant's benefit, the presumption of legality arising from its appearance. The mere fact that there is no duly certified original does not in itself entail the non-existence of the contested measure. There is therefore no reason to reopen the oral procedure in order to carry out further measures of inquiry. Since the applicant's arguments could not justify an application for revision, its suggestion that the oral procedure be reopened should not be upheld.

Costs

396 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in

the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs to be awarded against it, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 10 March 1992.

H. Jung
Registrar

J. L. Cruz Vilaça
President