OPINION OF ADVOCATE GENERAL COSMAS

delivered on 15 July 1997 *

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In this case the Court of Justice is called upon to deliver judgment on the appeal of Montecatini SpA (originally known as Montedison, with subsequent changes of name to Montepolimeri SpA and to Montedipe SpA, hereinafter 'Monte') brought pursuant to Article 49 of the EEC Statute of the Court of Justice against the judgment of the Court of First Instance of 10 March 1992.[1] The judgment under appeal dismissed the action brought by the appellant company pursuant to Article 173 of the EEC Treaty (hereinafter 'the Treaty') against the Commission's decision of 23 April 1986 (hereinafter the 'Polypropylene' decision).[2] That decision concerned

1 — Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155.

2 — IV/31.149 — Polypropylene, OJ 1986 L 230, p. 1.

* Original language: Greek.

the application of Article 85 of the Treaty in the polypropylene production sector.

I — Facts and course of the procedure before the Court of First Instance

1. As regards the facts of the dispute and the course of the procedure before the Court of First Instance, the judgment under appeal relates as follows: Before 1977 the west European polypropylene market was supplied almost exclusively by ten producers, the largest of which was the appellant, with a market share fluctuating somewhere between 14.2 and 15%. At the time Monte held the relevant controlling patents which expired in most of the European countries between 1976 and 1978. After expiry of those patents seven new producers appeared with substantial production capacity. This was not accompanied by a corresponding increase in demand, with the consequence that demand did not match supply, at least until 1982. More generally, for the greater part of 1977-1983, the polypropylene market was characterised by low profits or even significant losses.

2. On 13 and 14 October 1983 Commission officials, acting under the powers conferred by Article 14(3) of Council Regulation No 17 of 6 February 1962 [3] (hereinafter 'Regulation No 17'), carried out simultaneous investigations in a number of undertakings operating in the polypropylene production sector. Following those investigations, the Commission addressed requests for information, under Article 11 of Regulation No 17, to the above companies, and also to other related undertakings. From the evidence obtained during the course of those investigations the Commission concluded that, between 1977 and 1983, certain polypropylene producers, including Monte, had been acting in contravention of Article 85 of the Treaty. On 30 April 1984 the Commission decided to open the proceedings provided for by Article 3(1) of Regulation No 17 and sent a written statement of objections to the undertakings in contravention.

3. At the end of that procedure, the Commission adopted the abovementioned decision of 23 April 1986, which has the following operative part:

'Article 1

(The companies)... Montepolimeri SpA (now Montedipe)... have infringed Arti-

3 — OJ, English Special Edition 1959-1962, p. 87.

cle 85(1) of the EEC Treaty, by participating:... in the case of Hoechst, ICI, Montepolimeri and Shell, from about mid-1977 until at least November 1983... in an agreement and concerted practice originating in mid-1977 by which the producers supplying polypropylene in the territory of the EEC:

(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 increases 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 3

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

...

(x) Montedipe, a fine of 11 000 000 ECU, or 16 187 490 000 Italian Lira (...)'

4. Fourteen of the fifteen companies which were the addressees of the decision, including the appellant, brought an action for its annulment. At the hearing which took place from 10 to 15 December 1990, the parties presented oral argument and answered questions from the Court.

5. By a letter received at the Registry of the Court of First Instance on 6 March 1992, when the written and oral procedure had, as stated above, been completed, but nevertheless before judgment had been delivered, Monte asked the Court of First Instance to reopen the oral procedure. In support of that request it relied on certain factual evidence of which, it maintained, it had only become aware after the conclusion of the oral procedure and, in particular, after the hearing and delivery of the judgment of the Court of First Instance in the related cases *BASF and Others* v *Commission* (hereinafter 'the *PVC* cases'. [4] From that evidence it could be concluded, according to Monte, that the contested decision was vitiated by serious procedural defects in the examination of which a further review of the evidence was required. By its above-mentioned decision of 10 March 1992, the Court of First Instance, after hearing the views of the Advocate General once again, on the question arising, rejected the request for the oral procedure to be reopened, and rejected the application in its entirety.

6. By an application lodged at the Registry of the Court of First Instance on 11 June 1992, Monte applied for revision of that judgment, which application was in its turn rejected by an order of the Court of First Instance of 4 November 1992. [5]

7. Subsequently, Monte appealed to the Court seeking the setting aside, in whole or, in the alternative, in part, of the judgment of 10 March 1992 and referral of the case back to the Court of First Instance. At the same time it sought an order that the respondent should pay the costs.

4 — Joined Cases T-79/89, T-84/89, T-85/89, 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.

5 — Case T-14/89 REV *Montecatini SpA (formerly Montedipe SpA)* v *Commission* [1992] ECR II-2409.

The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

DSM NV intervened in the appeal in support of Monte.

II — Admissibility of the intervention

8. As regards the admissibility of the intervention by DSM the same considerations apply in principle as those set forth in the relevant paragraphs of my Opinion in *Hüls*.[6] It follows from that analysis that the intervention by DSM in the present case is admissible in part only, inasmuch as the intervener supports the appellant in requesting the Court to set aside the judgment of the lower court and declare the Polypropylene decision non-existent. The other claims made by the intervener and the arguments which it relies on in order to support other pleas by the appellant do not call in any event for an examination as to whether they are well founded since they are inadmissible.

6 — Paragraphs 10 to 15 of my Opinion delivered on the same date in Case C-199/92 P.

III — Grounds of appeal

A — *Pleas concerning formal defects in the Polypropylene decision*

(1) Arguments of the parties

9. In its first ground of appeal Monte challenges paragraph 391 and submits that the Commission's Polypropylene decision is vitiated by substantial formal defects which render it non-existent or, at least, null and void. In particular, the appellant considers that the Court of First Instance infringed the rules governing the burden of proof which require the Court on every occasion to examine of its own motion whether the act contested before it is non-existent. In that connection it points out that, prior to delivery of the judgment appealed against, the Press had announced the judgment of the Court of First Instance in the related *PVC* cases in which it had been found, on the one hand, that the procedure consistently followed by the Commission in adopting its decisions was contrary to Community rules and, on the other, that decisions adopted under that procedure were non-existent. Furthermore, the representatives of the Commission in the *PVC* cases expressly acknowledged before the Court of First Instance that the irregularities found were not confined to those cases but were characteristic of the whole of the Commission's activity over a certain period. The appellant considers that those matters constituted substantial evidence which ought to have prompted the Court of First Instance to examine further whe-

ther the Commission's Polypropylene decision was non-existent. The Court of First Instance, it is contended on behalf of Monte, ought to have examined of its own motion the likelihood that the act contested before it displayed the same formal defects as those identified for the first time during the course of the procedure in the *PVC* cases. The obligation on the court determining the action to review of its own motion whether acts whose lawfulness it is called on to examine are non-existent is, according to the appellant, a principle common to all the national legal systems and one which is applicable within the Community legal order. Consistently with logic, Monte maintains, the onus was not on it to prove the existence of the formal defects in respect of which it made submissions in its pleading of 6 March 1992. The appellant states, moreover, that it was not in a position to submit complete evidence of the irregularities committed by the Commission. Only the Court of First Instance could request the Commission — and ought to have done so — to produce the original of the contested decision in order for it to be determined whether the infringements alleged had in fact been committed. A corresponding obligation of *ex officio* review is, in the appellant's view, incumbent on the Court of Justice at the appeal stage.

10. In its reply, Monte supplements its first ground of appeal by pleading, in addition to non-existence, nullity of the Commission decision at issue. In that connection it maintains that the Polypropylene decision is invalid in so far as it concerns it because, first, it had not been drawn up in Italian at the time of its adoption [7] and, secondly, it underwent changes as to content between adoption and notification. In the appellant's submission, the existence of the abovementioned defects is an established fact.

11. For its part, the Commission considers that the first ground of appeal is ill-founded, particularly following delivery of the Court's judgment in the *PVC* cases. [8] It may be inferred from that judgment, according to the respondent, that the defects in respect of which Monte made submissions in its pleading of 6 March 1992 did not render the act non-existent, as it had erroneously maintained, but merely invalid. Accordingly, the Court of First Instance correctly held in the judgment appealed against that the submission going to non-existence was to be rejected. As regards Monte's submissions going to invalidity of the contested decision, the Commission contends that, even if they were made in admissible form in the reply, they must be rejected as ill-founded. At no stage of the administrative and judicial procedure in the polypropylene case were there found to have been the same infringements of essential procedural requirements as in the *PVC* cases. The appellant's submissions in that regard are, in the Commission's view, unproven.

7 — In breach of Article 3 of Regulation No 1/58 (OJ, English Special Edition 1952-1958 (Series I), p. 59).

8 — Judgment in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555.

(2) My reply to the above pleas

12. At the outset it must be pointed out that the appellant's submissions in its first ground of appeal contain a contradiction. Whilst Monte maintains that it does not have at its disposal the evidence necessary to prove the existence of the relevant formal defects in the contested decision on which it bases its submissions as to non-existence, when it relies on those same formal defects in order to categorise the contested decision as invalid rather than non-existent, it considers there to be sufficient evidence in that regard.

13. In any event, the paragraph of the judgment appealed against in which the supposed formal defects in the Polypropylene decision, even if they exist, do not render it non-existent is correct. On that point I refer to what I said in the *Hüls* case [9] in regard to the matters adjudged in the Court's *PVC* judgment which I believe should also be followed in the present case. Consequently, the submissions as to non-existence made on appeal by Monte are ill-founded and must be rejected. None the less, in my view, the court trying the case on its merits was under an obligation to examine whether the alleged formal defects in the Polypropylene decision — regardless of the legal categorisation given to them by the parties — constituted a possible infringement of an essential procedural requirement. [10] Nor, viewed in that light, however, is the contested act to be set aside. On the one hand, the matters relied on by Monte in its pleading of 6 March 1992 are not based on complete evidence as to whether the defects in question are present, [11] and they were submitted late, after closure of the oral procedure. [12] On the other hand, the Community rules on *ex officio* judicial review did not require the Court of First Instance — once it had acquiesced in examining the pleading, though it was out of time — further to investigate the issue as to whether the contested decision was in fact vitiated by substantial procedural defects. Where evidence of an issue to be reviewed *ex officio* is incomplete, the Community judicature is not obliged to carry out on its own initiative further investigations into that issue, by ordering further measures of inquiry; a fuller *ex*

9 — Paragraphs 20 to 24.

10 — Where a party legitimately puts forward a series of factual matters in support of his view that the act before the Court of First Instance is non-existent, that Court is not bound by the legal categorisation attributed to those matters by the party. If those matters found an infringement of an essential procedural requirement, which is to be reviewed *ex officio* and entails the annulment of the contested decision, the Court of First Instance was under an obligation to examine those matters and is not relieved of the obligation to determine whether there is an infringement and to draw the necessary conclusions. Moreover, in each case the applicant's basic claim is for the setting aside of the contested decision on the ground that it is contrary to rules of Community law, irrespective of the guise under which the setting aside takes place. What is important, then, is that the court should examine, by seeking the true interpretation of the pleadings before it for judgment, whether the contested decision is in actual fact vitiated by the defects imputed to it by the applicant, irrespective of whether the latter uses them to plead non-existence or nullity of the decision.

11 — It was for that reason, moreover, that that pleading sought the reopening of the procedure.

12 — See analysis at paragraphs 57 to 76 of my Opinion in *Hüls* which shows that those matters were, for the purposes of the provision in question, 'known' to the applicants since by diligent examination they could have deduced them from the case-file.

officio investigation is at the Court's discretion and is not mandatory. [13]

In light of the foregoing the first ground of appeal raised by Monte must be rejected as ill-founded.

B — *Pleas concerning application of the rules on competition*

(1) *Failure to appraise certain matters precluding application of Article 85(1) of the Treaty*

14. In the second ground of appeal Monte pleads misinterpretation and misapplication of Article 85(1) of the Treaty. According to the appellant, both the Commission and the Court of First Instance misappraised certain factors which either would have precluded the existence of an agreement or concerted practice as an explanation of Monte's conduct or, in any event, precluded that conduct from being unlawful. On thematic grounds I shall examine the eleven heads of claim put forward by the appellant on that point, which are sometimes couched in imprecise terms, in broad categories, using as criterion the legal interrelation of the arguments contained therein.

(a) Point (c) of the second ground of appeal

15. The first plea from a logical point of view is that in which Monte impugns paragraphs 82 and 91 of the judgment appealed against in which the Court of First Instance arbitrarily inferred a presumption of illegality from the appellant's mere participation in meetings of polypropylene producers.

According to the Commission, apart from being inadmissible, [14] that plea is ill-founded, because the Court of First Instance did not base its finding of an infringement of the rules on competition solely on the appellant's participation in meetings of the polypropylene producers but on the subject-matter thereof, namely determination of target prices and projected sales volumes.

16. In fact, in the words of paragraph 91 of the judgment appealed against, the Court of First Instance based its judgment as to the unlawful nature of the meetings of polypropylene producers not only on the

13 — See in that connection paragraphs 77 to 79 of my Opinion in *Hüls*.

14 — The Commission contends that that plea is based on a misapprehension of the judgment appealed against and is for that reason inadmissible.

appellant's participation in them but chiefly on the fact that 'the purpose of those meetings was, in particular, to set price and sales volume targets and that they were part of a system.' Furthermore, that finding is the culmination of a series of paragraphs and of the appraisal of matters of fact underpinning the Court's judgment and extending from paragraphs 83 to 90 of the judgment appealed against. [15]

Consequently, point (c) of the second ground of appeal must be rejected as inadmissible because it is based on a false supposition.

(b) Points (d), (e), (h), (l) and (m) of the second ground of appeal

17. Monte maintains that the court trying the case on its merits erred by failing to have regard to a series of factors which would have supported the finding that the appellant's conduct did not stem from an unlawful agreement or concerted practice but merely amounted to individual action dictated by conditions then prevailing on the polypropylene market. In such a situation there could not, in Monte's submission, be deemed to be an infringement of Article 85 of the Treaty.

18. In particular, the appellant, referring to paragraphs 132 to 134 of the judgment appealed against, maintains at point (d) of the second ground of appeal that the Court of First Instance arbitrarily applied the principle '*post hoc, ergo propter hoc*', deeming there to be a causal link between Monte's pricing policy and the preceding meetings of polypropylene producers. In actual fact, those meetings could not have had price-fixing as their objective, since attempts to increase prices were in any event the only choice for the undertakings which for a long period of time were selling at a loss, owing to the unfavourable economic situation.

19. Similar arguments are put forward in relation to point (h) of the second ground of appeal concerning the Commission's allegations as to an artificial reduction in supplies on the polypropylene market and the establishment of a system of production quotas as between producers. Referring to paragraphs 143, 199 and 200 of the judgment appealed against, the appellant maintains that, in light of market conditions, any agreement of that nature was impossible.

20. Of the same legal nature, moreover, is the appellant's head of claim under point (e) of the second ground of appeal. In

15 — Under the terms of Article 168a of the Treaty and Article 51 of the EEC Statute of the Court of Justice, an appeal can only be on a point of law. Inadequacy of the reasoning on which the findings of the Court of First Instance are based may also be deemed to be a point of law and, in particular, an 'infringement of Community law' in the terms of Article 51 aforesaid of the EEC Statute of the Court of Justice.
In the ground of appeal under consideration Monte is essentially pleading inadequacy of the reasoning underpinning the lower court's judgment with regard to the finding of illegality. Accordingly, that ground of appeal is admissible.

relation to the findings of the lower court at paragraphs 232 and 233 of its judgment, Monte considers there to have been an infringement of the principle that, where there are two possible interpretations of conduct, there should be a presumption in favour of that interpretation according to which the conduct is lawful. Accordingly, in the present case, since the appellant's conduct could equally stem from an agreement or concerted practice or be a consequence of market conditions, the latter interpretation should have been accepted.

21. The Commission also considers those three parts of the second ground of appeal to be inadmissible. It contends in particular that, in its submissions under points (d) and (h), the appellant is seeking, by offering a different explanation of its conduct from that adopted by the Court of First Instance, to place a different complexion on the meetings of polypropylene producers and thus to call in question findings of fact by the court trying the case on its merits.

22. In the alternative, the Commission contends that the above submissions are ill-founded. In that connection it points out that the Court of First Instance substantiated its conclusions (in particular in paragraphs 128 to 137 and 175 to 202 respectively) as to the illegality of the subject-matter of the meetings of polypropylene producers and the collaboration by Monte in those agreements.

23. As regards point (e) of the second ground of appeal, the Commission relies, in support of its objection of inadmissibility, on Article 119 of the Rules of Procedure of the Court and on the fact that it contains no legal argument challenging the judgment appealed against but merely reiterates the arguments already advanced before the Court of First Instance for the purpose of a reappraisal of the action originally brought. In support of that argument, the Commission refers to the Court's relevant case-law. [16]

24. In the final two limbs of the second ground of appeal which I shall now examine complaints are made which are closely linked to the appraisal by the lower court of Monte's conduct and the consequences drawn therefrom. At point (l) of the second ground of appeal, the appellant, referring to paragraphs 175 to 177 of the judgment appealed against, contends that the Court of First Instance was wrong to regard as secret the data concerning Monte's level of production since access to that information was almost universally available. In the appellant's submission, for there to be an infringement of Article 85 of the Treaty, the Commission would have had to prove that there had been an exchange of that information between the polypropylene producers prior to its disclosure by other sources, and that knowledge of it impeded competition.

16 — See judgment in Case C-354/92 P *Eppe* v *Commission* [1993] ECR I-7027, and orders in Case C-244/92 P *Kupka-Floridi* v *ECSC* [1993] ECR I-2041 and Case C-338/93 P *De Hoe* v *Commission* [1994] ECR I-819.

25. The Commission replies that it is unable to see which part of the contested judgment Monte is challenging, meaning evidently that the complaint to that effect is couched in imprecise terms and that, in any event, that submission raises a question of appraisal of the facts and that the claim is made for the first time on appeal, in breach of Article 113(2) of the Rules of Procedure of the Court. In light of the foregoing, the Commission considers that point (l) of the second ground of appeal is manifestly inadmissible.

26. Finally, the appellant maintains at point (m) of the second ground of appeal that the Court of First Instance erroneously concluded, at paragraphs 253 and 254 of the judgment appealed against, that the conduct of the polypropylene producers had any appreciable effect on trade between the Member States. On that point the Commission once again raises an objection of inadmissibility, citing the Court's abovementioned case-law. [17]

27. As regards the second ground of appeal, the Commission, referring to the foregoing matters, points out that a challenge on appeal may be founded only on grounds of the infringement of rules of law, and that it is inadmissible to call in question findings of fact or factual appraisals by the court trying the case on its merits. [18]

28. As long as the rules and general principles of the law concerning the burden of proof have been observed, [19] the Court of First Instance has sole competence to draw the legal consequences from the facts submitted to it for judgment. [20] The appellate jurisdiction has recourse to the case-file only if a party alleges that the Court trying the case on its merits has distorted the natural meaning of the facts.

29. In the present case and in regard, primarily, to points (d), (e) and (h) of the abovementioned ground of appeal, I observe that it is sought to call in question the appraisal by the Court of First Instance as regards the content of the meetings of polypropylene producers, that is to say of the evidence. Monte is not arguing that the lower court distorted the natural meaning of the evidence submitted before it. Basing itself on the economic situation in the markets at the time of those meetings, it seeks to put forward its own interpretation

17 — See judgment in *Eppe* v *Commission* and orders in *Kupka-Floridi* v *ECSC*, and *De Hoe* v *Commission*, cited above, at footnote 16.

18 — See judgment in Case C-136/92 *Commission* v *Brazzelli Lualdi & Others* [1994] ECR I-1981 and Order in Case C-19/95 P *San Marco Impex Italiana* v *Commission* [1996] ECR I-4435. As stated in paragraphs 48 and 49 of *Commission* v *Brazzelli Lualdi and Others*, 'the Court of First Instance thus has exclusive jurisdiction to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it'. See also judgment in Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraphs 10, 19 and 42.

19 — As to the distribution of the burden of proof see paragraph 53 et seq. below.

20 — See Cases cited above (footnote 18) *Commission* v *Brazzelli Lualdi and Others*, paragraph 66, and *San Marco Impex Italiana* v *Commission*, paragraph 40.

of the facts, giving them a different legal complexion. More specifically the Court of First Instance made the following findings on the basis of its appraisal of the facts: first, that the subject matter of the meeting of polypropylene producers was the determination of target prices and sales volumes (paragraph 91 of the judgment appealed against); secondly, that the appellant was amongst the producers which collaborated in endeavours to determine prices and target prices and sales volumes (paragraphs 137, 150 and 201 of the judgment appealed against). For its part, the appellant retorts that its conduct as regards prices and sales volumes could not but be autonomous in the light of market conditions. It does not allege that the Court of First Instance erred in applying the rules of law but that it did not reach the same conclusion as Monte from an appraisal of the facts. However, that line of argument is tantamount to seeking re-examination of the facts of the case by the appellate jurisdiction and consequently falls outwith the latter's competence. [21]

30. Analogous considerations must, I consider, apply to point (m) of the second round of appeal. Certainly, the requirement that trade between the Member States must be affected laid down in Article 85 of the Treaty constitutes a point of law which is reviewable by the Court. [22] Indeed, as is apparent from the abovementioned Article 51 of the EEC Statute of the Court of Justice, and from Article 112(1)(c) of the Rules of Procedure of the Court, the appeal must clearly set out the parts of the judgment appealed against and the legal arguments in support of the appeal. [23]

31. I would observe that the calling in question of the holding by the Court of First Instance that the infringement in which Monte participated was capable of having an effect on trade between the Member States (paragraph 253 of the judgment appealed against) is supported solely by a different appraisal of the facts by the appellant and not on any legal defect in the judgment appealed against. The Court is thus being asked to reappraise the facts of the case and to come to a different determination from that of the Court below. Accordingly, the submission in that behalf, in the terms in which it is framed, must be rejected as inadmissible.

32. It remains to examine point (l) of the second ground of appeal. At the outset it

21 — See paragraph 26 et seq. of my Opinion in *Hüls*.

22 — See judgment in Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 69. Certainly, the judgment concerned Article 86 of the Treaty but there is no reason why different conditions should apply to the same requirement of an effect on trade laid down in Article 85. It should also be pointed out that, irrespective of whether a question arises on that point, it is not necessary for the alleged conduct to have in fact appreciably affected the trade in question. It is sufficient, as the Court of First Instance correctly held at paragraph 253 of the judgment appealed against, for it to be shown that that conduct was capable of producing the effect in question. See judgments in Case 322/81 *NV Nederlandsche Banden Industrie Michelin* v *Commission* [1983] ECR 3461, paragraph 134 and in Case C-41/90 *Hofner and Elser* [1991] ECR I-1979, paragraph 32.

23 — See recent order in Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, paragraph 29 and the Order cited above at footnote 16 in *San Marco Impex Italiana* v *Commission*, paragraphs 36 and 37.

should be recalled that, under Article 113(2) of the Rules of Procedure of the Court, the appeal cannot change the subject-matter of the proceedings before the Court of First Instance. The competence of the Court of Justice in hearing an appeal is limited to a review of the legal solution adopted at first instance on the basis of the valid pleas and submissions raised before the lower court. [24] In the present case I would observe that paragraphs 175 to 177 of the judgment challenged by the appellant in the submission under consideration concerned the truth or untruth of information relating to sales volumes which were exchanged at the meeting of polypropylene producers and not whether that information was secret or public. Moreover, the pleadings at first instance do not reveal that any submission in that behalf was validly made before the Court of First Instance. Accordingly, that submission made for the first time at the appeals stage is, for that reason, to be rejected as inadmissible.

(c) points (a), (b), (f) and (g) of the second ground of appeal

33. The appellant submits that the Court of First Instance erred in not accepting that the arrangements which the polypropylene producers came to were justified by the circumstances with the result that no question of the application of Article 85(1) of the Treaty could arise. [25]

34. At point (a) of the second ground of appeal, Monte submits that the Court of First Instance did not take into account, as it ought to have done, the distortion of competition owing to factors other than the conduct of the polypropylene producers and, in particular, owing to the tripling of oil prices (the raw material for polypropylene production) at the end of the 1970s, stemming from the abuse of its dominant position on the market by the oil cartel. In so doing the Court of First Instance, in the appellant's submission, departed from the Court's case-law, according to which it is necessary to appraise factors other than the conduct of the undertaking but affecting that conduct. The appellant refers in that connection to the Opinion of Advocate General Mayras in *Suiker Unie & Others* v *Commission* and *Van Landewyck & Others* v *Commission* and to the Opinion of Advocate General VerLoren van Themaat in *Stichting Sigaretten Industrie & Others*. [26] The appellant infers from those Opinions and from the judgments in those cases that it is essential to examine whether there was already 'actual' competition, irrespective of the conduct of the undertakings of the market, in order for there to be a definitive determination of the undertaking's liability under Article 85 of the

24 — See *Commission* v *Brazzelli Lualdi and Others* (paragraph 59), and order in *San Marco Impex Italiana* v *Commission* (paragraph 49).

25 — At least that is the main thrust of the appellant's line of argument in that connection. Owing, however, to the imprecise terms in which they are couched the submissions in that behalf are open to differing interpretations and approaches as will subsequently be seen.

26 — Judgment in Joined Cases 40/73 to 48/73, 50/73, 54/73, 111/73, 113/73 & 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 507, in Joined Cases 209-215/78 & 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125 and in Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigaretten Industrie and Others* v *Commission* [1985] ECR 3831.

Treaty. Thus, the principle is also applicable in Community competition law that there can be no damage to an asset if the asset did not exist at the time of the damage. According to the appellant, under that logic, consideration ought to have been given to the following circumstances under which it deployed its activity during the relevant period. Whether, apart from the increase in prices of raw materials, owing to the abovementioned abuse of its dominant position by the oil cartel, Monte's conduct was dictated, on the one hand, by the Italian Government which compelled it to take part in the meetings of polypropylene producers and, on the other hand, by the advantageous position in which purchasers of polypropylene were placed, which was the reason why, moreover, the objective of a reduction of the losses made by the undertakings in the sector was never achieved.

35. In its response the Commission observes that the appellant's plea invoking the exceptional circumstances caused by the tripling of the oil price is a submission made for the first time on appeal. Consequently, that submission must be rejected as inadmissible since it is seeking, in breach of Article 113 of the Rules of Procedure of the Court, to change the subject-matter of the proceedings at first instance. In the Commission's view, that submission is also ill-founded. There is no rule or general principle of law which permits the rules on competition to be infringed by an undertaking in order to react to analogous practices by its competitors or by third parties. With regard to the judgment in *Suiker Unie and Others* v *Commission* relied on by the appellant, the Commission counters by arguing, on the one hand, that what was examined in that case were the effects on competition of a Member State's legislation, a factor not relevant in the present case, and on the other, that, in any event, that decision was no longer applied in the subsequent judgments of the Court, cited above, in *Van Landewyck* v *Commission* and *Stichting Sigarettenindustrie and Others* v *Commission*. At the same time the Commission points out that an infringement of Article 85 of the Treaty cannot be excused either by the fact that the Italian Government gave instructions to Monte to participate in the meetings of polypropylene producers or by the difficulties encountered in practice by those producers in operating the agreed price initiatives.

36. At point (b) of the second ground of appeal, Monte alleges a flaw in the reasoning at paragraphs 257 and 265 of the judgment appealed against, inasmuch as the Court of First Instance did not apply the principle of the rule of reason. The appellant alleges that the Court of First Instance adopted a restrictive interpretation of that principle in reviewing only the effects of that conduct by the undertakings and whether the benefits of that conduct to competition were likely to have outweighed any harmful effects. In the appellant's submission, the proper approach is to seek the *ratio legis* of the rules on competition and subsequently to examine whether conduct is or is not contrary to those rules. For the purpose of such examination it was also necessary to have regard to the circumstances in which that conduct of the undertakings was adopted. In the present case it was necessary to take into account all the unfavourable factors which compelled

polypropylene producers to sell at a loss. By way of logical conclusion, endeavours to reduce losses which, owing to market conditions, were destined to fail could not be deemed to be in contravention of the rules on competition.

37. Furthermore, the respondent contends that the lower court's reasoning in response to Monte's arguments as to application of the principle of the rule of reason was correct, inasmuch as it found at paragraph 264 of its judgment that the Commission had proved to the requisite legal standard that the agreements and concerted practices between polypropylene producers had an anti-competitive effect. Moreover, following the same line of argument, the Court of First Instance correctly considered that, even if the principle of the rule of reason applied in the Community legal order, the Commission was justified in not analysing the effects of the conduct in question on competition because the agreements described at subparagraphs (a), (b) and (c) of Article 85(1) in connection with price-fixing, control of production and market-sharing constituted a clear breach of the rules on competition such as to be deemed to be an infringement *per se* of those rules. In both European and American law, the Commission adds, horizontal agreements on prices are deemed to be unlawful even if the undertakings are producing at a loss.

38. At point (f) of the second ground of appeal, the appellant, referring to paragraph 295 of the judgment appealed against, submits that the Court of First Instance did not take into account, as it ought to have done, the 'duty of reciprocal conduct as between undertakings compelled by necessity to sell at a loss.' The polypropylene undertakings wished to avoid selling at a price below cost lower than necessary. In that context the endeavours to increase prices were intended to reduce losses and to avoid the specifically unlawful practice of 'predatory pricing'.

39. The Commission considers that that part of the second ground of appeal is as a matter of principle inadmissible, first, because it seeks reappraisal of the facts and, secondly, because, by raising for the first time the aspect of sales at lower than necessary prices, it is changing the legal subject-matter of the proceedings in breach of Article 113(2) of the Rules of Procedure of the Court. In any event, the submission in that behalf is, in the Commission's view, ill-founded. In that connection it refers to the lower court's finding that the only sale below cost which can constitute unfair competition is that operated by an undertaking in order to reinforce its position *vis-à-vis* its competitors. Conversely, there can be no question of unfair competition where sales below cost price are dictated by the workings of the market.

40. With further regard to Article 85(1) of the Treaty, the appellant submits at point (g) of the second ground of appeal, in which it refers to paragraphs 132 and 237 of the judgment appealed against, that the polypropylene producers were treated unfairly by the Court of First Instance to the benefit of purchasers of that product. It states in that connection that the producers

were squeezed between the suppliers of oil and purchasers of polypropylene. Consequently, the announcement of a small increase in prices to purchasers who, exploiting their advantageous position, could easily have refused them, cannot be regarded, in Monte's submission, as a restriction on competition. Such treatment disproportionately protects the interests of one category of undertakings to the detriment of another and is therefore contrary to Article 2 of the Treaty.

41. The Commission counters that the submission in that behalf, even if it were not held to be inadmissible on account of the general terms in which it is couched, is in any event ill-founded. Article 85 applies to undertakings which enter into agreements or concerted practices restrictive of competition and its application has the natural consequence, in certain cases, of favouring purchasers. Consequently, the Commission cannot see where the unfavourable treatment lies. It adds, moreover, that the Court of First Instance correctly considered that the favourable situation of purchasers in a certain sector of trade does not relieve sellers of the obligation to observe Article 85.

42. In the foregoing allegations the appellant is claiming a misapplication by the Court of First Instance of Article 85 of the Treaty. According to that view of the matter, the Court of First Instance took no account of, or at any rate misinterpreted, a series of factors demonstrating that there was no, or at least no substantial, restriction of competition as a result of the conduct of polypropylene producers; consequently, Article 85 should not have been applied in the present case. In that context, the submissions in that behalf are inadmissible only if, on the one hand, they are not raised for the first time at the appeal stage and, on the other, if they may be taken as meaning that an agreement in principle found to exist does not fall on other grounds within the scope of Article 85. [27] This clarification is rendered necessary by the fact that Monte seeks in its second ground of appeal to represent its conduct as the result of individual action and, at the same time, to justify any agreement or concerted practice found to exist. [28]

43. That being the case and in light of the foregoing considerations, I consider that only if the submissions in that behalf are understood as putting forward a ground to justify conduct which otherwise would fall within the scope of Article 85, can those submissions be deemed to be admissible. Conversely, if those same arguments were to be construed as an attempt by Monte to demonstrate that it did not enter into

27 — As regards that second limb these submissions differ from those examined in the preceding section. In fact, from a legal point of view, a ground of appeal arguing that it could not have been the purpose of meetings of polypropylene producers to fix prices and sales volumes differs from a ground of appeal which does not cast doubt on the fact of that collaboration *per se* but relies on special circumstances which justify or necessitate agreements between the undertakings. Only in the latter case does a point of law arise which is reviewable on appeal.

28 — Of significance in that connection is point (f) of the ground of appeal where reference is made to the duty of fair conduct as between undertakings obliged to sell at a loss. The Court of First Instance examines the whole issue from the point of view of whether there may be any justificatory ground on which to preclude the unlawful nature of the 'participation' (see paragraph 296 of the judgment at first instance), whereas the appeal pleading refers generally and in imprecise terms to 'endeavours' to increase prices. Subsequently, however, in its reply, the appellant categorically repudiates any interpretation implying any admission by it of having participated in the relevant mutual arrangements and states that, in any event, it adopted an individual line of conduct which was dictated by factors existing at the time.

unlawful agreements with the other polypropylene producers, but determined its line of conduct individually, then it is calling in question the appraisal by the Court of First Instance of the facts and the plea in that connection would be inadmissible. [29]

44. The issue essentially arising in regard to the abovementioned grounds of appeal is whether the correct interpretation of Community law requires the prohibitions and penalties provided for in Article 85 of the Treaty in cases of price-fixing and the setting of sales volumes not to be applied on the occurrence of certain special circumstances. The focal point of the appellant's line of argument in that regard is its invocation of the rule of reason, of American origin, and of the need to seek the *ratio legis* of the rules on competition. In accordance with those two hermeneutic principles, appraisal of the lawfulness of conduct which *prima facie* would appear to be contrary to the rules on competition must be conducted *in concreto* and after taking account of all the factors having an influence on the business of the undertakings and trade in general. In the appraisal of the lawfulness of conduct, it is first necessary to examine whether and to what extent competition was actually affected or, conversely, was not affected or was even favourably affected. What is therefore required is an analysis of all the factors which go to make up an economic network, that is to say the market, and the influence of each of those factors. In accordance with that reasoning, the Commission's investigation and the corresponding review by the Court of First Instance must extend, in accordance with the specific characteristics of each case, to the effect which, actually or potentially, the undertakings' conduct had on the market, to the causes which led to that conduct and to the objective pursued thereby. [30]

45. The question accordingly arises as to whether the abovementioned interpretative approach finds any place in the Community legal order. In my view, the answer to that question must be in the negative. I shall make merely one point which I consider is of particular importance for an understanding of the Court's case-law and underscores the differences between American and European competition law. No comparison of the two systems can be soundly based which ignores two of their most significant differences. On the one hand, American legislation has no provision analagous to Article 85(3) of the Treaty which intro-

29 — As regards point (f) of the second ground of appeal, the following matters should be emphasized: At first instance the appellant maintained that the need for 'fair conduct' between the polypropylene producers justified conduct contrary to Article 85 of the Treaty. That plea is purely legal in nature and may be reviewed on appeal. On the other hand, Monte's argument that the polypropylene producers resorted to the unlawful conduct established in order to deal with the problem of sales at lower than necessary below cost cannot be examined on its merits because it was raised for the first time on appeal.

30 — That interpretation is drawn from the first part of the American Sherman Act 1890. Consideration of the factors referred to therein result in conduct not being deemed unlawful unless it affects competition to an 'unreasonable degree'. See below for exceptions to this rule.

duces into European law a special procedure for legitimising conduct which otherwise would constitute an infringement of the provisions on competition. Secondly, the USA constitutes a single market with a single currency and to that extent the need to introduce legal rules in order to safeguard the free movement of goods is less imperative than in Europe.

46. In any event, and irrespective of the general position which may be adopted on the issue of the interpretation of the provisions concerning competition, I believe it is indubitably the case that certain types of conduct from their very content constitute a breach of competition rules which is so flagrant as to render, as a matter of principle, otiose further examination of whatever factual circumstances may have dictated the line of conduct in question or the effects resulting therefrom. That view of the matter appears to be shared by Europe and the USA and for the most part concerns the same infringements. Those include especially agreements or concerted practices [31] constituted by price fixing, control of production and market shares (see Article 85(1)(a), (b) & (c) of the Treaty). [32] In American terminology such cases are referred to as *per se* infringements of the rules on competition. [33]

47. Inasmuch, therefore, as the undertakings concerned have either not sought or have not succeeded in bringing themselves within the exceptions contained in paragraph 3 of Article 85 of the Treaty, the agreements entered into by them for the purpose of fixing prices and sales volumes, and the concerted practices to the same effect, are in themselves unlawful under Article 85(1).

48. Doubts as to the correctness of that view of the matter might arise from the Court's own case-law [34] which is also relied on by the appellant. That case-law seems to admit the possibility of not applying Article 85(1) where national legislation in practice removes free competition. Thus, in appraising the liability of the undertakings involved, regard is had to the effect of an extraneous factor on the shaping of that conduct. Thus, it may be maintained, at least in theory, that that case-law should be extended to all relevant extraneous factors. For example, regard would be had to the fact that free competition has been ren-

31 — According to European Terminology

32 — Price fixing agreements are the most important and the ones which deeply concern us here. The Court has described such agreements as constituting 'by their very nature' or '*per se*' restriction on trade. See for example judgments in Case 123/83 *Clair* [1985] ECR 391, paragraph 22, and in Case 243/83 *Binon* [1985] ECR 2015, paragraph 44.

33 — See in that connection judgments in *United States* v *Yrenton Potteries Company* (1927) and in particular *United States* v *Socony Vacuum Oil Company* (1940) which rejected price agreements as a legitimate answer to 'the evils of competition'. For further details on recent American case law see 54 American Jurisprudence, second edition, Monopolies, Restraints of Trade and Unfair Trade Practices, New York 1996, and particularly paras. 46 et seq. and 70 et seq.

34 — See *Suiker Unie and Others* v *Commission*, *Van Landewyck and Others* v *Commission and Stichting Sigaretten Industrie and Others* v *Commission*, cited above at footnote 25.

dered inoperative on account of the conduct of third parties towards the undertakings impugned. I do not consider that that view of the matter taken by the appellant can be upheld. First and foremost, *Suiker Unie and Others*, dealing as it does with an exceptional case, must be interpreted strictly. [35] The phenomenon of national legislation negating competition must be regarded, from the standpoint of Community law, as entirely exceptional and directly connected to the current stage of European unification and the important role which rules of national law continue to play in the European economic sphere. Moreover, the extension of the decision in *Suiker Unie* in the direction contended for on behalf of the appellant would bring about a situation in which a judgment on the lawfulness of any conduct which is in principle contrary to Article 85 would depend on market conditions; that would be to subvert the whole rationale of free competition, at least in so far as European law is concerned. Moreover, it is for the competent Community bodies and not for individuals to adopt legal measures to deal with situations in which competition is affected by the conduct of certain undertakings. [36]

49. In light of the foregoing the appellant's submissions must be dealt with as follows: first, the consequences of free competition, however harmful they may prove to be for a category of undertakings, do not amount to unfair competition. They result from the rules of supply and demand and cannot, therefore, be used to justify agreements on prices, even if the producers participating in the agreements sell at below cost. Secondly, the favourable market position of certain undertakings on account of those conditions does not give their competitors the right to infringe Article 85. Equally irrelevant to the application of Article 85 are instructions from a government of a Member State to certain undertakings to participate in meetings whose subject-matter contravenes the rules on competition.

50. In light of the foregoing I believe that the Court of First Instance correctly based its judgment solely on the subject-matter of the meetings of polypropylene producers in holding that the criteria for the application of Article 85(1) were satisfied. Likewise, it was right to hold that the conduct of the undertaking constituted *per se* an infringement of the rules on competition (paragraphs 264 and 265 of the judgment appealed against). Finally, it was right in law to reject the submission referred to at point (f) of the second ground of appeal (paragraphs 295 and 296 of the judgment at first instance) as well as Monte's other pleas now under examination.

In conclusion, the points of the second ground of appeal under examination must be rejected as unfounded in their entirety.

35 — Though not entirely abandoned, the exception formulated for the first time in *Suiker Unie and Others* is difficult to apply in practice, inasmuch as the Court is particularly strict when asked to acknowledge the existence of national legislation which deprives undertakings of the possibility of freely shaping their activity and compels them to adopt conduct contrary to Community rules on competition; the most significant example of all is illustrated by *Stichting and Others* v *Commission*, cited above (footnote 25). There can be no doubt, moreover, of the liability of undertakings where their anticompetitive conduct is merely favoured by the national authorities (see judgments in Case 229/83 *Leclerc and Others* [1985] ECR 1, and Case 231/83 *Cullet and Others* [1985] ECR 305.

36 — To hold otherwise would be indirectly to confer an individual right of 'self-determination' on undertakings enabling them to take appropriate steps to deal with competitions of unfair competition caused by the conduct of their competitors.

(d) Point (i) of the second ground of appeal

51. As regards this point, the appellant maintains that the Court of First Instance has introduced a new species of infringement of Article 85(1) of the Treaty in addition to those concerning agreements and concerted practices expressly provided for in that article. That new species of infringement is described by the term 'common purposes' (paragraphs 105, 201 and 230 of the judgment appealed against) and is without legal foundation. Moreover, in the appellant's submission, the Court of First Instance erred in not basing its judgment as to the unlawfulness of the agreements of the polypropylene producers on whether those agreements had 'as their object or effect the prevention, restriction or distortion of competition' in the words of paragraph 85(1) of the Treaty, but examined instead the 'purpose' of those meetings, a criterion which is not laid down in the Community provisions.

52. I would merely state in that connection, with the Commission, that the Court of First Instance correctly applied the rules contained in Article 85; on the one hand, it cites the 'common purpose' of the polypropylene producers as the factor from which the existence of an agreement between them may be inferred. Secondly, when mention is made of the 'purpose' of the meetings of producers, what is essentially being referred to is the subject-matter of those meetings, on which the Court expressly based its judgment (see paragraph 91 of the judgment appealed against).

Consequently, the ground of appeal under examination must be rejected as ill-founded.

(2) *Distribution of the burden of proof*

53. In the third ground of appeal Monte, referring to paragraphs 82, 86, 89, 129, 144, 146 and 149 of the judgment appealed against, submits that the Court of First Instance infringed the rules governing the burden of proof, on the presumption of innocence of the accused person and of the personal nature of liability. At the same time, the Court of First Instance, in the appellant's submission, attributed to it non-existent admissions and, without any proof, accepted the existence of a common plan agreed by the polypropylene producers and erred in dismissing Monte's plea that its conduct was dictated by pressures and threats from terrorist organisations. The Court of First Instance was wrong, in the appellant's submission, to take the view that the appellant itself admitted participating in all the meetings of polypropylene producers and was also wrong to require it to provide another explanation of the content of the meetings at which it parti-

cipated. In that connection the Court of First Instance relies on minutes kept by Monte's representatives whose existence cannot be inferred from the existing evidence. Thus, the Court of First Instance reversed the burden of proof by adopting a presumption of guilt equating participation in a meeting with participation in all the illegalities committed in the course of that meeting. Furthermore, according to Monte, the Court of First Instance accepted as proven its participation in the account leadership system, since the evidence produced by the appellant to show that that system did not operate as far as it was concerned did not refer to all the customers for whom Monte had been designated account leader. In the appellant's submission, the Commission bore the burden of proving that the account leadership system was in fact applied in practice. However, seeking proof of the contrary from Monte, the Court of First Instance incorrectly allocated the burden of proof. In addition, in the appellant's submission, the operation of an independent pricing policy by it constitutes sufficient evidence of its non-participation in the initiatives for the determination of target prices and thus, it maintains, the Court of First Instance failed to draw the necessary conclusions from that submission.

54. The Commission's view is that the burden of proof was properly distributed between parties. Since the appellant's participation in the meeting of the polypropylene producers has been established and since minutes were available of the meeting organised by ICI which was also involved in them, it was for Monte to provide a different interpretation of the subject-matter of those meetings. The Court of First Instance states in its judgment that Monte could have relied in that connection on minutes taken by its representatives and their relevant notes and records.

55. Furthermore, the Commission maintains that the Court of First Instance, on the basis of a set of evidence, found there to be an agreement between the polypropylene producers for the purpose of adopting measures intended to put into effect the price-fixing initiatives and thus there was no need for further evidence of the application of that agreement to customers; the failure to give effect to the agreement in practice is legally irrelevant to the establishment of the liability of the undertakings involved. By dint of the same reasoning, the difference between prices achieved on the market and agreed prices is inherent in the notion of target prices and does not constitute evidence that the appellant did not participate in the agreements in question.

56. It should, first and foremost, be pointed out that the issue arising in this ground of appeal essentially concerns the manner in

which infringements of Article 85 are established and, consequently, the apportionment of the burden of proof. The appellant's arguments turn on that question, notwithstanding the wider scope indicated in the title of that ground of appeal in the notice of appeal.[37] The criticism levelled at the judgment at first instance is that it was inferred from the appellant's presence at meetings of the polypropylene producers that it participated in all the infringements. The lower court is then accused of reversing the burden of proof and the presumption of innocence by requiring the accused undertaking to prove both that the meetings in question discussed other subjects and that it did not participate in the various individual infringements.

57. It should be observed at the outset that in the present case the infringements of Article 85 of the Treaty are constituted solely by the subject-matter of the meetings of the polypropylene producers, which were specifically the determination of target prices and projected sales volumes. That viewpoint is based, in my view, on a correct understanding of the concept of 'concerted practice'. Under that approach, in certain circumstances, the concerted practice may be equated with the concertation itself with the result that for it to be established there is no need for any subsequent market activity.[38]

58. In that context, it was for the Commission to prove that the meetings in question concerned the subject-matter in question. In that connection, it chiefly produced and relied on minutes of meetings organised by ICI (see paragraphs 83 to 85, 128 and 144 of the judgment appealed against). Thus, it did not infer the subject-matter of the meetings from suppositions but from actual evidence. At the same time the Commission bore the burden of proving the participation in those meetings of each one of the undertakings involved (see findings of the Court of First Instance at paragraph 82 of the judgment appealed against),[39] which it did.

59. By way of logical consequence, the appellant bore the burden of disproving the evidence adduced by the Commission by producing other evidence to show that it did not participate in the meetings in question or attributing a different subject-matter to them. The Court of First Instance indicates that such evidence would have been constituted by 'specific evidence such as notes taken by its own employees (that is to say Monte's) or the testimony of those persons' (paragraph 86). This part of the judgment appealed against makes it clear that the Court of First Instance was indicating certain evidence which could have been relied on by Monte, though it did not of course determine whether such evidence existed.

60. Thus, the Court of First Instance did not request the appellant to prove anything

37 — A significant example of this is the total absence of any argument referring to threats from terrorist organizations as one of the grounds dictating Monte's conduct. The examination of this ground which evidently turns on paragraphs 304, 309 and above all 313 of the judgment appealed against systematically concerns the possible existence of circumstances which render lawful the conduct which would otherwise in principle be unlawful (see above paragraph 14 et seq.).

38 — See analysis in my Opinion in *Anic* v *Commission*, also delivered today, at paragraph 11 et seq.

39 — The calling in question by Monte of the number of meetings of polypropylene producers attended by it goes to the appraisal of facts by the Court of First Instance and thus is inadmissible at the appeal stage.

different or further-reaching than that which applicants are lawfully required to prove in order that the grounds of their action may be upheld.

61. The Court of First Instance follows the same reasoning in connection with the finding of participation by each one of the undertakings involved in the aforesaid infringement. It draws from participation in meetings having an unlawful subject-matter the conclusion that the undertakings concerned participated in the corresponding agreements and concerted practices, unless the undertaking concerned produces evidence in support of its plea to the contrary (paragraphs 129 and 144 of the judgment appealed against).

62. With regard to that aspect of the issue it should at the outset be acknowledged that it is theoretically possible to participate in a meeting at which certain of the participants agree on an unlawful course of conduct whilst at the same time not all the participants agree to take part in that unlawful action. It may therefore be argued that mere participation in a meeting having an unlawful subject-matter is not in itself sufficient to entail a finding on the part of the person merely attending an infringement of the rules of competition. [40] The Commission then bears the burden of adducing evidence to establish that the conduct passed beyond the stage of mere attendance at a meeting to the stage of active participation in the unlawful action.

63. None the less, I believe that there is no place for that reasoning in cases such as the present one in which the undertaking concerned was proved to have participated in a series of meetings having an unlawful subject-matter over a period of several years. Proof of attendance at repeated meetings having the same unlawful subject-matter is, moreover, sufficient in itself for a finding that the Commission established to the requisite standard collaboration in the unlawful conduct. It is then for the undertaking to produce evidence capable of leading to the contrary conclusion.

64. It remains to examine whether the matters relied on by Monte constituted evidence of that nature. The matters relied on are, first, that the system of account leadership operated defectively as regards the appellant and, secondly, that it independently determined its prices in the market, irrespective of the target prices agreed.

65. I would observe that the evidence adduced refers to the outcome of matters

40 — See Opinion of Advocate General Sir Gordon Slynn in Joined Cases 100/80 to 103/80 *Musique Diffusion Francais and Others* v *Commission* [1983] ECR 1825 in which judgment was given on 7 June 1983. See also the American Case of *Hunt* v *Mobil Oil Corp.* Supreme Court 1977 465F Supp. 195,231.

agreed upon at the meetings of the polypropylene producers. The failure to implement those arrangements is put forward as evidence of non-participation in those arrangements. In that way Monte is essentially seeking to shift the legal basis of its argument based on a different interpretation of the concepts contained in Article 85 of the Treaty, particularly the concept of 'concerted practice'.

66. However, as has already been observed, [41] it is sufficient for a finding of illegality to show that the subject-matter of the meeting contravened competition rules. Whether or not the decisions taken at those meetings were implemented or not is a different issue and cannot be used as evidence of non-participation in the unlawful activities under consideration.

67. Accordingly, as the Court of First Instance bases its judgment on the fact that at the meetings of the polypropylene producers target prices were determined and measures were taken intended to facilitate the attainment of those prices (paragraphs 137 and 150 of the judgment appealed against), it contravened no rule governing the burden of proof by not having regard to evidence of the collaboration or otherwise in the object of the meetings in question, which are submissions going to the faithful implementation or otherwise of the results of those meetings. Those submissions by the appellant are in fact devoid of relevance. Nor is the case altered by the fact that the target prices by their very nature are subject to derogations. What is relevant is the subject-matter of the agreements and the parties to them.

68. Finally, in light of the foregoing I do not consider that the Court of First Instance reversed the presumption of innocence even on the supposition that that rule applied in the context of the present proceedings. [42] Since the Commission produced evidence

41 — See paragraph 56 of my Opinion.

42 — The presumption of innocence which is enshrined in Article 6(2) of the European Convention on Human Rights (see also Article 14(2) of the International Covenant on Civil and Political Rights) in principle concerns the accused in criminal proceedings. In that context it is extremely doubtful whether reference to the Human Rights Convention and the case law of the Court of Human Rights and reliance on that principle to its fullest extent is possible in administrative proceedings before the Commission in competition matters. In any event the obligation on the Commission to approve the infringement of competition rules essentially for the person concerned secures corresponding protection at least at the stage of a judicial appraisal of the evidence. Thus annulment of a decision imposing a fine on the basis that the Commission did not provide adequate reasoning in the light of the evidence adduced protects undertakings from charges of conduct concerning which there are doubts as to the probative value of the evidence.

establishing the unlawfulness of the appellant's conduct, the subsequent judgment by the Court of First Instance was not based on mere supposition, as Monte seems to be arguing. Moreover, for its part, the appellant did not produce evidence of corresponding weight such as to create reasonable doubts as to the correctness of the Commission's reasoning. Accordingly, and in light of the foregoing, I consider that the third ground of appeal must be rejected as ill-founded in its entirety.

(3) *Prescription*

69. In its fourth ground of appeal Monte, referring to paragraphs 236 and 237 of the judgment appealed against, alleges that the lower court erred in applying the provisions concerning prescription formulated in Council Regulation No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (hereinafter 'Regulation No 2988/74').[43]

70. The appellant's arguments in that connection are twofold: first, it was not proven that the infringement was continuous during the whole of the period between 1977 and 1983; accordingly, the irregularities under consideration were in part time-barred. Secondly, the reasoning of the lower court, the appellant submits, as to the fact of a single infringement is inadequate. Thus, whilst the Court of First Instance recognises as a common feature of all the conduct under consideration the pursuit of 'a single economic aim, namely to distort the normal movement of prices on the market in polypropylene' (paragraph 237 of the judgment appealed against), the appellant maintains that the market situation could be regarded as anything other than 'normal'. At the same time, in Monte's submission, the Court of First Instance had insufficient evidence on which to base its participation in the infringement during the whole period of its duration, in the same way as it did not clarify in how many meetings of polypropylene producers it took part and for which period the appellant participated.

71. The Commission replies that the appellant's arguments in this regard are inadmissible since they go to the appraisal at first instance of the facts of the case. It also refers to its observations in connection with the unlawful nature of the conduct in question.

72. At the outset it should be pointed out that, under Article 1(1)(b) of Regulation No 2988/74, the Commission's power to impose fines and sanctions for breaches of

43 — Council Regulation (EEC) No 2988/74 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.

the provisions on transport and competition within the European Economic Community are subject to a five-year prescription period. Under Article 1(2) of Regulation No 2988/74 that period begins to run on the date on which the infringement was committed. As regards continuing infringements the prescription period begins to run only from the date on which the infringement was brought to an end. Moreover, under Article 2(1) of Regulation No 2988/74, the prescription period is interrupted by any action taken by the Commission or by any Member State, acting at the request of the Commission, in order to establish or sanction the infringement. The prescription period is interrupted on the date on which the decision is notified to at least one of the undertakings participating in the infringement; under Article 2(2) the interruption of the prescription period applies to all the undertakings participating in the infringement. [44]

73. In the present case the appellant challenges the reasoning on which the Court of First Instance based its judgment as to the fact of a single infringement. The classification of an infringement as a single one indeed relates to factual circumstances proof and legal classification of which are taken for granted, but it is not without having its legal importance particularly as regards the issue of prescription. [45] That much is to be expressly inferred from the abovementioned provisions of Regulation No 2988/74. In that context the reasoning on which the Court of First Instance based its judgment as to the fact of a single infringement is a matter reviewable on appeal. [46]

74. The Court of First Instance essentially based its judgment in that connection on the common economic aim served by the activities of the polypropylene producers (paragraph 237 of the judgment appealed against). It also emphasises the systematic nature of those activities and that the rule which was infringed was each time the same (paragraph 236 of the judgment appealed against). As the Court of First Instance finally held, it was a single infringement of the same legal rule by successive and repeated acts which served the same purpose and formed part of the same economic or, more generally, existential context. In my opinion that definition is correct. [47] Consequently, I do not consider that the judgment appealed against reveals any defects on this issue.

75. Moreover, I do not believe the appellant's observations to be of relevance in

44 — It should be pointed out that, apart from the five-year prescription period which as stated above may be interrupted by a series of procedural actions, Community law does not provide for any other prescription period which could preclude completion of the sanction procedure laid down in Regulation No 17. Contrary therefore to Monte's submissions at the hearing, the fact that some of the infringements in question date back to 1977 cannot have any legal relevance in the sense of excluding or limiting its own liability for infringement.

45 — See in that connection my Opinion in *Anick* v *Commission*, paragraph 61 et seq.

46 — The term 'single infringement' should be regarded in the context of the present case as synonymous with the legally more accurate term of 'continuous infringement'. It is the latter term which is correctly used in Regulation No 2988/74.

47 — See my Opinion in *Anick* v *Commission*, paragraph 78 et seq.

regard to whether the market situation was 'normal' or not. That argument concerns the problem whether or not there was in the present case an infringement of Article 85 of the Treaty and does not go to the interpretation of the term 'single infringement' or to the computation of the prescription period. Consequently, the plea in that behalf by the appellant must be rejected as irrelevant.

76. Furthermore, the reasoning of the judgment appealed against as to Monte's participation in the meetings of polypropylene producers is lawful. The judgment at first instance successively examines the duration and content of that participation. It was therefore correctly held at paragraph 237 of the judgment appealed against that the appellant 'took part — over a period of years —' in a single infringement. Accordingly, the ground of appeal in that connection must be rejected, in regard to that limb as well, as being unfounded.

77. Finally, the appellant's plea that the prescription period was not interrupted because the unlawfulness of the conduct of the polypropylene producers was not established cannot avail it. The plea in that connection, apart from being inadmissible on appeal, is entirely unconnected with the issue of prescription. [48]

On those grounds I consider that the fourth ground of appeal must be rejected in its entirety.

48 — The question whether an infringement is established is an issue which logically precedes both that of the prescription period and *a fortiori* of the interruption of that period.

(4) *Amount of the fine*

78. In its fifth ground of appeal, Monte repudiates the reasoning of the judgment appealed against and submits that the lower court failed to take into account, as it ought to have done, a number of criteria for calculating the amount of the fine imposed. In particular, in the appellant's submission, the Court of First Instance failed to take into account the mitigating circumstance which should have led to a reduction in the fine, namely the fact that the infringement did not have any effect. In that connection, Monte challenges paragraphs 70, 347, 379 and 385 of the judgment appealed against. Moreover, in the appellant's submission, the Court of First Instance did not take into consideration in determining the fine the individual effect of the activity of that undertaking over and above the global effect of the infringement in general. The appellant bases its reasoning on paragraph 254 of the judgment appealed against. Moreover, Monte maintains that the Court of First Instance ought to have had regard, in determining the amount of the fine, to the fact that the conduct of the polypropylene producers could have been covered by the exception provided for in Article 85(3) of the Treaty. Finally, in the appellant's submission, the Court of First Instance erred by not directing its mind to whether it was correct to regard the 'deliberate' nature of the infringement as an aggravating circumstance.

79. For its part, the Commission contends first and foremost that it did take into

account in determining the fine the fact that the price-fixing initiatives did not succeed in their objectives, as is apparent from paragraphs 365 to 374 and 386 of the judgment appealed against. At the same time, the Commission points out that paragraph 70 of the judgment appealed against, on which Monte bases its allegations, concerns the findings of an infringement and not the appraisal of its gravity. Similarly paragraph 254 concerns the effect of trade on Member States as a result of the conduct of the polypropylene producers as a factor underpinning the unlawfulness of the conduct in question. Monte is therefore wrong to rely on that paragraph in support of its plea that the individual responsibility of each undertaking was not correctly considered for the purpose of determining the fine imposed. Finally, the Commission raises an objection of inadmissibility against Monte's arguments that regard ought to have been had to a certain number of further factors for the purpose of determining the fine. In that connection it relies on Article 113(2) of the Rules of Procedure of the Court which precludes pleas from being raised for the first time at the appellate stage.

80. In regard to the abovementioned pleas, it should at the outset be noted that the power to impose fines for infringements of Article 85(1) of the Treaty is provided for by Article 15(2) of Regulation No 17. Under that provision the criteria to be taken into consideration in determining the amount of the fine are the seriousness of the infringement and its duration. Of those two criteria the need for further elucidation arises in connection with the seriousness of the unlawful conduct. In that connection the Court has held that 'the gravity of infringements must be determined by reference to numerous factors such as, in particular, the particular circumstances of the case, its context and the dissuasive element of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up.' [49]

81. In that context the Court of First Instance has sole jurisdiction to review the manner in which the Commission in each case appraises the gravity of the unlawful conduct. The matters for review by the appellate jurisdiction are merely whether the Court trying the substantive issues had regard to all the factors which were essential in that case in appraising the gravity of the conduct in the light of Article 85. Appellate review does not extend to cover the appraisal by the Court of First Instance of the facts as found in that connection.

82. In the light of the foregoing, in the context of the present case, Monte's pleas are in principle admissible, inasmuch as the Court of First Instance did not take into consideration certain factors relevant to the correct determination of the amount of the fine to be imposed and in particular, on the

49 — See Order in Case C-137/95 *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54. Cf also judgments in Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769 and in Joined Cases 96-102/82, 104/82, 105/82, 108 to 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 52 and the judgment in *SA Musique Diffusion Francais and Others* v *Commission* (paragraph 120, cited above at footnote 40).

one hand, the fact that the unlawful conduct did not produce any effects in practice and, on the other, the individual part played by the appellant in the commission of the infringement.

83. In regard to the first limb of those arguments, it should be pointed out that the reliance by Monte on paragraph 70 of the judgment appealed against raises an argument which is not relevant to the issue currently under examination. In fact, as the Commission correctly observes on this point, that paragraph of the judgment appealed against concerns establishment of the infringement of Article 85(1) on account of the finding of a price-fixing agreement and does not touch on the different issue as to the appraisal of the effects of the infringement for the purpose of determining the fine imposed on each undertaking. [50]

84. Moreover, the appellant is misconstruing paragraphs 365 to 374 of the judgment appealed against which expressly refer to the appraisal of the effects of the infringements, distinguishing between two specific effects: first, that the target prices were used as the basis for transactions with customers and, secondly, that the price-fixing initiatives did not in general fully achieve their objective. In that connection the Court of First Instance held 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 that 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' (paragraph 372 of the judgment). It clearly follows that the Court of First Instance took account, in determining the fine and after full consideration, of the effects of the infringement. Consequently, the appellant's plea to the contrary must be rejected as unfounded.

85. In regard to the appellant's argument as to the individual part played by it in the commission of the infringement, it must be pointed out at the outset that paragraph 254 of the judgment, which is repudiated in this ground of appeal, deals with the issue of the effect on trade between Member States, that is to say with one of the essential preconditions for establishment of an infringement laid down in Article 85(1) of the Treaty; the argument is thus not germane to the question of determination of the fine. Thus, the plea in that behalf cannot avail the appellant. Moreover, the plea that the Court of First Instance did not have regard to the part played by each undertaking in the commission of the infringement is based on an incorrect supposition. Paragraph 354 of the judgment states in that connection that: 'As regards the first two criteria (...) — the role played by each of the undertakings in the collusive arrangements (...) it must be noted that, since the statement of reasons relating

50 — Also without any relevance is the reference by Monte to paragraph 379 of the judgment appealed against which concerns the problem of the appraisal in determining the amount of the fine, of the losses sustained over a long period by the undertaking active in the polypropylene sector. That question, though it is closer in logic to the question of market conditions, is manifestly extraneous to the effects which the infringement of Article 85 had and the plea in that behalf is thus also not relevant.

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 individualised the way in which it took account of those criteria in the applicant's case.' [51]

Accordingly, the appellant's plea alleging failure to take into account the individual part played by it in the infringement must be rejected as inadmissible. [52]

86. As regards the remaining pleas raised by Monte, the Commission's objection of inadmissibility falls to be examined first. I shall now examine the plea that the Court of First Instance should have taken into account, in determining the amount of the fine, the fact that the conduct of the polypropylene producers could have been covered by the exemption provided for in Article 85(3) of the Treaty. In fact reliance was placed on that provision at first instance but only as a ground excluding, according to Monte, application of Article 85(1) (see in that connection paragraphs 267 to 273 of the judgment). It does not appear, however, that any such plea was raised in support of a reduction of the fine imposed on Monte. Accordingly, that plea, raised for the first time on appeal, is inadmissible in accordance with Article 113(2) of the Rules of Procedure of the Court.

87. Finally, the appellant's plea that the Court of First Instance erred in not examining whether it was correct also to take account as an aggravating circumstance of the 'deliberate' nature of the infringement is unfounded. As is apparent from paragraphs 357 to 364 of the judgment appealed against, the lower court upheld the Commission's finding that Monte acted intentionally. The 'deliberate' nature of the infringement is relevant for the purpose of determining the part played by Monte in the unlawful acts found to have been committed. According to the Court of First Instance, the part played by the Commission was taken into account by the Commission in calculating the amount of the fine. Accordingly, the Court of First Instance adjudicated, albeit tacitly, on the issue raised by the appellant, and its adjudication is correct. [53]

It follows from the foregoing that the fifth ground of appeal raised by Monte must be rejected in its entirety.

51 — See also paragraph 361 of the judgment which states that 'The Court finds that (...) the Commission has correctly established the role played by the applicant in the infringement throughout the duration of its participation and that the Commission was thus entitled to take account of that role in determining the amount of the fine.'

52 — Nevertheless, the appellant appears to persist in maintaining that individualization of the amount of the fine is linked to the effects of the conduct of each undertaking. However, in appraising the gravity of an infringement the relevant factor is the effects of the infringement as a whole, as laid down in Article 85(1). Moreover, it is true — and this constitutes individualisation of the fine — it is necessary to assess the role of each undertaking in the commission of the infringement. That, however, is a different issue from that of the effects of the unlawful conduct (see analysis in my Opinion in *Commission* v *ANIC*, paragraph 103 et seq.).

53 — As has already been stated, the gravity of the infringement committed as a criterion for determining the amount of the fine may be inferred from many factors (see order in *SPO and Others* v *Commission*, cited above at footnote 49). The 'deliberate' nature of the infringement may be regarded, in certain circumstances, as one of the factors to be appraised.

IV — Conclusion

88. In light of all the foregoing I propose that the Court should:

(1) Dismiss in its entirety the appeal brought by Montecatini SpA;

(2) Dismiss the intervention;

(3) Order the intervener to pay its costs;

(4) Order the appellant to pay the remainder of the costs.