JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
24 October 1991 *

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In Case T-2/89,

Petrofina SA, a company incorporated under Belgian law, having its registered office at Brussels, represented by G. Vandersanden and L. Defalque, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of J. Biver, 8 Rue Zithe,

applicant,

v

Commission of the European Communities, represented by Anthony McClellan, Principal Legal Adviser, acting as Agent, assisted initially by L. Gyselen, a member of its Legal Service, acting as Agent, subsequently by N. Coutrelis, of the Paris Bar, with an address for service in Luxembourg at the office of R. Hayder, a national civil servant seconded to 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. Edward, H. Kirschner and K. Lenaerts, Judges,

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

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

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

gives the following

Judgment

Facts and background to the action

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

2 The west European market for polypropylene is supplied almost exclusively from European-based production facilities. Before 1977, that market was supplied by ten producers, namely Montedison (now Montepolimeri SpA), Hoechst AG, Imperial Chemical Industries PLC and Shell International Chemical Company Limited (called 'the big four'), which together account for 64% of the market, Enichem Anic SpA in Italy, Rhône-Poulenc SA in France, Alcudia in Spain, Chemische Werke Hüls and BASF AG in Germany and the nationalized Austrian producer Chemie Linz AG. Following the expiry of the controlling patents held by Montedison, seven new producers came on stream in western Europe in 1977: Amoco and Hercules Chemicals N.V. in Belgium, ATO Chimie SA and Solvay et Cie SA in France, SIR in Italy, DSM N.V. 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 (1977-83), 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 N.V. slightly below 6%, ATO Chimie SA, BASF AG, DSM N.V., 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 then EEC producers supplied the product in most, if not all, Member States.

3 The applicant did not enter the polypropylene market until 1980 through the company Montefina jointly owned with Montepolimeri and until March 1982 it did not carry on any marketing activities other than through Montefina, which marketed polypropylene on behalf of both parent companies. It position on the polypropylene market was that of a very small producer whose market share was between 0.2 and 2.1%.

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 N.V. ('DSM'),

— Hercules Chemicals N.V. ('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.

6 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.

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

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

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

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

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

12 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.

13 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.

14 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 N.V., Hercules Chemicals N.V., 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 ECU 750 000, or LIT 1 103 692 500;

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

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

(iv) DSM N.V., a fine of ECU 2 750 000, or HFL 6 657 640;

(v) Hercules Chemicals N.V., a fine of ECU 2 750 000, or BFR 120 569 620;

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

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

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

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

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

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

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

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

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

(xv) Statoil Den Norske Stats Oljeselskap AS (now incorporating SAGA Petrokjemi), a fine of ECU 1 000 000 or UKL 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, was sent to them.

Procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 23 July 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, T-3/89, T-4/89 and T-6/89 to T-15/89).

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 Petrofina SA claims that the Court should:

1. Primarily, annul the Commission's decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene);

2. In the alternative, reduce the fine of ECU 600 000 imposed on the applicant;

3. Order the defendant to pay all the costs.

The Commission contends that the Court should:

1. Dismiss the application;

2. Order the applicant to pay the costs.

Substance

30 The Court 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 (1) it disclosed documents too late and did not set out in the statement of objections all the objections set out in the Decision, (2) it used before the Court documents which were not mentioned in the Decision, (3) the final minutes of the hearing were not disclosed to the members of the Commission nor to the members of the Advisory Committee, and (4) the hearing officer's report was not communicated to the applicant; *secondly*, the grounds of challenge relating to proof of the infringement, which concern (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty whereby it is contended that the Commission (A) did not correctly define the infringement, (B) did not correctly assess how trade between Member States was affected, and (C) imputed collective responsibility to the applicant; *thirdly*, the grounds of challenge relating to the reasoning of the Decision which relate to the allegation that the reasoning was (1) insufficient, (2) contradictory and (3) wrong; *fourthly*, the grounds of challenge relating to the determination of the fine, which is alleged to be (1) disproportionate to the duration of the alleged infringement and (2) disproportionate to the gravity of the alleged infringement.

The rights of the defence

1. *Documents disclosed too late and new objections*

31 The applicant states that the Commission sent to the undertakings with a letter of 31 October 1984, that is to say less than two weeks before the first series of hearings, a bundle of new tables and documents without complying with the conditions laid down in Article 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 1963-1964, p. 47). Petrofina was thus unable to defend itself, especially since the Commission had forbidden those documents from being communicated to the undertakings' commercial departments.

32 It contends, next, that the sending by the Commission of letters setting out new evidence and fresh arguments when the undertakings had already replied to the statement of objections constitutes a breach of the principle that the statement of objections must contain all the matters alleged against the undertakings in question, or else a fresh procedure should be opened, and of Article 2(4) and Article 4 of Regulation No 99/63.

33 According to the Commission, the purpose of the letters in question was simply to round off the Commission's arguments on legal and factual matters without raising fresh objections. Even if the letters had had the effect of amending the objections, the procedure would still not have been vitiated since the undertakings were invited to put forward their views within a reasonable period, with the second series of hearings taking place several months afterwards and the restrictions on disclosing documents to the commercial departments being lifted.

34 The Court finds that the first part of this ground of challenge is unfounded as a matter of fact since, following the criticism from the applicant and other producers, the Commission organized a second series of hearings from 8 to 11 July 1985 and on 25 July 1985 after disclosing for a second time to the undertakings concerned, by letters of 29 March 1985, all the evidence in its possession and after lifting, in the same letter, the restrictions on the disclosure of that evidence to the undertakings' commercial departments.

35 As regards the second part of this ground of challenge, it must be pointed out that in a letter of 29 May 1985 replying to the Commission's letters of 29 March 1985, the applicant stated that 'it is legitimate and logical to consider that the Commission's letters of 29 March 1985, which were sent after the completion of a procedure which identified all the matters involved in this case, determined the burden of the prosecution, as far as both the objections and legal arguments were concerned', without submitting that the letters of 29 March 1985 contained new objections necessitating the opening of a new procedure.

36 Moreover, the applicant failed to indicate before the Court how those letters contained new objections, even though it stated in the reply that in its letters of 29 March 1985 the Commission had from that date focused its argument on the existence of one or more agreements within the meaning of Article 85(1) of the EEC Treaty without, however, ruling out certain elements constituting a concerted practice. In this regard, the Court observes that this dual characterization had already been applied in the general statement of objections addressed to the applicant (see in particular points 127 and 138 thereof).

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

2. *Use before the Court of documents not mentioned in the Decision*

38 In the reply the applicant contends that the Commission acted in breach of the rights of the defence when referring to a number of documents for the first time in the defence in order to use them against it in the proceedings. Those documents were, according to the applicant, a series of appendices originating from third parties and a telex from Petrofina dated 11 March 1982 which had been appended to the statement of objections but which had not been mentioned in the Decision, which gave reason to believe that the Commission had been persuaded by the explanations given by the applicant during the administrative procedure.

39 The Court holds that, although the Decision must specify the evidence on which the Commission's case hangs, it is not necessary for it to enumerate exhaustively all the evidence available but it may refer to it in general terms. The Decision may

not under any circumstances contain new objections in addition to those contained in the statements of objections addressed to the applicant nor fresh evidence in addition to that mentioned in those statements of objections or appended to them. In the present case, it is not alleged that the Decision contains fresh objections or that it is based on new evidence or does not mention the evidence on which the Commission's case hangs. As far as, in particular, the telex message of 11 March 1982 is concerned, it is sufficient to point out that the fact that it was not mentioned in the Decision does not mean that the Commission did not use it as evidence since the objections in support of which it was relied upon during the administrative procedure were maintained in the Decision.

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

3. *Non-disclosure of the minutes of the hearings*

41 The applicant states that the members of the Commission and the members of the Advisory Committee reached their decisions without having available the final minutes of the hearings held before the Commission and that those minutes contained information which was very important for Petrofina's case. Moreover, the members of the Advisory Committee could not have had the provisional minutes of the hearings until only a week before they delivered their opinion.

42 The Commission states that Regulation No 99/63 does not specify the instances in which the minutes of hearings, provisional or definitive, must be sent. In any event, the members of the Commission and the members of the Advisory Committee were able to reach a decision with full knowledge of the facts so that the Decision would not have been any different in the absence of the alleged procedural irregularity (judgment of the Court of Justice in Case 30/78 *Distillers Company Ltd* v *Commission* [1980] ECR 2229, paragraph 26). Although the Advisory Committee had only the provisional minutes, the competent authorities of the Member States had the possibility of attending the hearings, which they used for the most part in the present case. The Commission further points out that Petrofina does not allege that the provisional minutes were not a fair and accurate report of the hearings and that the members of the Commission had at their disposal not only the provisional minutes but also the observations which the undertakings had made on them.

43 This Court observes that the Court of Justice has held that the preliminary nature of the minutes of the hearing submitted to the Advisory Committee and the Commission may only amount to a defect in the administrative procedure capable of vitiating, on the grounds of illegality, the Decision which results from that procedure if the document in question was drawn up in such a way as to mislead its addressees in a material respect (judgment in Case 44/69 *Buchler & Co* v *Commission* [1970] ECR 733, at paragraph 17).

44 As far as the minutes that were forwarded to the Commission are concerned, it must be noted that the Commission received, besides the provisional minutes, the remarks and observations of the undertakings on those minutes and that it must therefore be concluded that the members of the Commission were informed of all the relevant facts before adopting the Decision.

45 As far as the provisional minutes forwarded to the Advisory Committee are concerned, it must be observed that the applicant has not indicated how those minutes did not constitute a fair and accurate report of the hearings and that it has not therefore proved that the document in question was drawn up in such a way as to mislead the members of the Advisory Committee in a material respect.

46 It must also be observed that the applicant has likewise not explained why the period of one week which the members of the Advisory Committee had to examine the provisional minutes was insufficient for this task and misled them in a material respect.

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

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

48 The applicant contends that the hearing officer's report ought to have been distributed to the members of the Commission and to the members of the Advisory Committee. The undertakings in question ought to have been given the oppor-

tunity of studying and commenting on the report. This, in the applicant's view, is indispensable if the hearing officer is to be independent and play a constructive role.

49 After summarizing the role and task of the hearing officer, the Commission states that the hearing officer is meant to contribute to the internal decision-making process of the Commission and to ensure that the Commission is fully informed of all the facts of the case. The sending of his report to the undertakings would compromise his independence and the constructive nature of his role. The forwarding of the report to the Commission is at the discretion of the member responsible for matters of competition, who may, at the request of the hearing officer, attach the hearing officer's opinion to the draft decision set before the Commission. The Commission concludes by stating that the transmission of the report to the members of the Advisory Committee would serve no useful purpose.

50 The 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.'

51 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.

52 Consequently, the applicant may not rely on the fact that the hearing officer's report was not transmitted to the Advisory Committee or to the members of the Commission.

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

54 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.

55 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 *Vereniging ter Bevordering van het Vlaamse Boekwezen, VBVB, and Vereniging ter Bevordering van de Belangen des Boekhandels, VBBB* v *Commission* [1984] ECR 19, paragraph 25 at p. 58).

56 Consequently, this ground of challenge must be dismissed.

Proof of the infringement

57 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.

58 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 (I) the period from 1980 to March 1982 and (II) the period from March 1982 to November 1983, with regard to (A) the system of regular meetings, (B) the price initiatives, (C) the measures designed to facilitate the implementation of the price initiatives and (D) 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*

I — Relating to the period from 1980 to March 1982

(a) The contested decision

59 The Decision (point 105, third paragraph) states that Petrofina (via Montefina) did not enter the market until 1980 and that even if its representatives only began to attend meetings regularly in March 1982 (the Decision states that Petrofina's position on this point is ambiguous), it was involved from 1980 in the quota arrangements.

60 The Decision (paragraph 33) states, however, that Petrofina participated in two meetings in January 1981 at which it was decided that a two-stage price increase, fixed in December 1980, was necessary for 1 February 1981 on the basis of DM 1.75/kg for raffia: the 1 February target remained 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 due to come into effect on 1 February and 1 March 1981.

61 Petrofina did not have a separate marketing function outside Montefina until March 1982. Montefina sold the production of the Feluy plant, which belonged to it, on behalf of both the parent companies, Montepolimeri and Fina. However, for the purposes of calculating quotas, the entitlement of each of the parent companies was usually treated separately during this period. Petrofina was thus a participant in its own right in quota arrangements from 1980. Even if this were not the case, Petrofina must still assume joint responsibility for any participation in the cartel by Montefina until March 1982 (Decision, point 102, third paragraph; see also point 78, fifth and eighth paragraphs).

62 By the end of February 1980, volume targets, expressed in tonnages, had been agreed for 1980 by the producers, based on an expected market of 1 390 000 t. 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 of ICI. This original estimated total market of 1 390 000 t 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 t. With the exception of ICI and DSM, achieved sales were largely in line with target shares.

63 According to the Decision (point 56), the sharing of the market for 1981 was the subject of prolonged and complex negotiations. At the January 1981 meetings, it was agreed that, as a temporary measure to help 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, these 'aspirations' largely exceeded forecast demand (Decision, point 56). In spite of various compromise schemes put forward by Shell and ICI, no definitive agreement on quotas could be 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 splitting of the available market based on the 1980 quota (Decision, point 57).

(b) Arguments of the parties

64 The applicant states first of all that it attended some of the meetings in question only from May 1982.

65 It states next that the Commission has not adduced any evidence to prove its participation in the fixing of target prices since the Commission was forced to admit, in reply to a question from the Court, that Petrofina had not participated in the January 1981 meetings.

66 Finally, the applicant states that it never participated in the fixing of quotas and that the appearance of its name in a series of tables found at the premises of ICI and ATO (main statement of objections, Appendices 55 to 61), setting out for each undertaking data relating to its sale figures and 'targets' for the years 1980 and 1981, cannot be sufficient to prove its participation in a cartel, particularly since the figures contained in the tables produced by the Commission contain serious errors as far as its sale figures and effective capacity are concerned, which, in its view, demonstrates that it did not provide those figures.

67 The Commission, on the other hand, points out that in the Decision (point 105, third paragraph), it stated that, as regards the period prior to March 1982, Petrofina's position in relation to the meetings was necessarily ambiguous since at that time its polypropylene sales were entrusted to Montefina which was the joint marketing company for Petrofina and Monte. Although it is not certain that Petrofina was represented separately at the meetings before March 1982, the fact that its situation was generally treated separately from that of Monte in the market-sharing schemes would suggest that it participated in the cartel from 1980.

68 Consequently, it maintains that the applicant's participation in the cartel in the period in question may be inferred from its participation in the quota system during that period.

69 In this regard, the Commission contends that the applicant's participation in the quota system may be inferred from the fact that its name is mentioned in various tables of figures relating to the allocation of quotas in 1980 and 1981.

70 As far as 1980 is concerned, those documents consist first of all of a table dated 26 February 1980 headed 'Polypropylene — Sales target 1980 (kt)', found at the premises of ATO (main statement of objections, Appendix 60), comparing for all producers in western Europe a '1980 target', 'opening suggestions', 'proposed adjustments' and 'agreed targets 1980'. At the hearing the Commission explained that Petrofina's participation in the drawing up of that table is clear from the reference made therein to an adjustment originating from Petrofina ('Based on 1979 + Petrofina adjust'). The quota allocated to Petrofina in that table corresponded to the quota appearing in a second table, dated 8 October 1980, stemming from ICI (main statement of objections, Appendix 57), comparing, for all western Europe producers, '1980 Nameplate Capacity' and the '1980 quota'.

71 As far as 1981 is concerned, the documents consist, first of all, of a table dated 9 October 1980 originating from ICI (main statement of objections, Appendix 58) comparing for all western Europe producers, as regards the year 1980, the 'effective capacity', the 'aspirations', the 'market shares', the 'hence actuals' and the 'hence loading' as percentages of 'effective capacity', and, as far as 1981 is concerned, the 'effective capacity', the 'market share proposal ICI 1981', the '1981 sales at 1980 loading of 1981 cap.', the 'tonnages of 1980 share' and the 'Pro-rated to 1981 Market'. In its reply to the request for information (main statement of objections, Appendix 8), ICI stated with reference to that table that:

'the document was prepared within ICI as an internal working document in order to make an estimate of the volume "aspirations" of the West European polypropylene producers for 1981, and to compare such "aspirations" with previous "Target Tonnages" and "actual" sales achievements thus enabling ICI to take part in discussions on "Target Tonnages" for 1981.

The source of information for actual historic figures in this table would have been the producers themselves. However, figures for Amoco/Hercules, and certain other producers e.g. the reference to "Spanish", would have been estimated from industry figures generally available from Fides.

The hand written figures in the 1980 "actual" column: detailed precisely actual sales for the year 1980 (in contrast to the rounded figures given in the typed column); clarified the Amoco/Hercules figures; and corrected a mistaken figure for Petrofina'.

The documents consist, secondly, of a table found at the premises of ICI (main statement of objections, Appendix 59) comparing for all producers their sales in tonnages and market shares under the following headings: '1979 actual', '1980 target', '[1980] actual' and '1981 aspirations'. The Commission observes that the sales figures for Petrofina in those two tables match.

72 The Commission states that if the sales figures contained in the aforementioned tables were to prove to be wrong, as the applicant claims, the fact remains that Petrofina does not dispute the target figures appearing in the various tables which corroborate one another. The Commission also states that, even on the assumption

that the figures relating to Petrofina appearing in the tables contained in Appendices 58, 61 and 65 to 67 to the main statement of objections do not correspond to the achieved figures, this does not mean that there was no concertation. The concertation is to be inferred from the very existence of the tables in question and not from the answer to the question whether or not the targets which they contain were actually achieved on the market. Therefore, any dissimilarity between those figures and the results actually recorded by Petrofina on the market do not rob the tables in which those figures are contained of their probative value. Moreover, the disputed figures consisted only of a few figures contained in the tables in question. Consequently, they could not render all the tables in which they were contained uncreditworthy.

(c) Assessment by the Court

73 As it had already done in the eighth paragraph of point 78 of the Decision, the Commission admitted, in reply to a written question from the Court and at the hearing, that it possessed no evidence of Petrofina's participation in the regular meetings of polypropylene producers before March 1982 and that the mentioning of Petrofina's attendance at two meetings in January 1981, in the third paragraph of point 33 of the Decision, was the result of a material error.

74 In those circumstances, it must be concluded that it has not been proved to the requisite legal standard that the applicant participated in the regular meetings of polypropylene producers between 1980 and March 1982, which it denied doing in its reply and at the hearing and that ICI's reply to the request for information contains an error on this point, as was explained by the applicant without being contradicted by the Commission.

75 Furthermore, owing to the applicant's non-participation in the regular meetings of polypropylene producers during the period in question and owing to the lack of evidence concerning its pricing behaviour, it must be concluded that it has likewise not been established to the requisite legal standard that the applicant took part with other polypropylene producers in the fixing of target prices between 1980 and March 1982.

76 The question is therefore whether the applicant's participation in the infringement between 1980 and March 1982 may nevertheless, as the Commission claims, be established on the strength of the fact that its name appears in the tables containing sales volume targets for that period.

77 It is apparent from the documents produced by the Commission (main statement of objections, Appendices 57 to 61 and 65 to 67) that commercial information was exchanged by the producers and discussed at meetings with a view to setting sales volume targets. The terms used in those documents (such as 'opening suggestions', 'proposed adjustments', 'agreed targets' justify the conclusion that the producers had arrived at a common purpose.

78 However, in the absence of any evidence of Petrofina's participation in the regular meetings of polypropylene producers during the period in question, the Court finds that the Commission has not demonstrated that the applicant participated in the drawing up of the tables relating to sales volume targets or, therefore, in the setting of those targets. The fact that the name of the applicant or of Montefina is mentioned in those tables must be regarded as insufficient evidence since at the material time all Petrofina's polypropylene production was marketed by Montefina, a joint subsidiary of the applicant and Monte, and since the data relating to Montefina's production capacity and sales and to Petrofina's aspirations must have been known to its partner in the joint enterprise and must have been disclosed by its partner at the regular meetings of polypropylene producers with a view to participating effectively in the setting of sales volume targets. The Court observes in this regard that in the table dated 8 October 1980 (main statement of objections, Appendix 57) there appears, beside the name of Montefina, as the '1980 Quota', the remark '20 to Petrofina — balance included in Montedison'. It must be concluded that the latter undertaking, being aware of the terms of the agreement sharing sales volumes between itself and the applicant within their joint subsidiary, simply drew the consequence as regards the level of the quota accruing to the applicant by extrapolating it from the quota due to it in the overall production of Montefina at the end of the discussions in which Monte took part.

79 Furthermore, the Decision did not find, nor consequently establish to the requisite legal standard, that the undertaking Montefina, as an autonomous entity, participated in the regular meetings of polypropylene producers or in the fixing of price or sales volume targets. It follows that the Commission has not established to the requisite legal standard 'any participation in the cartel by Montefina until March 1982' (Decision, point 102, third paragraph, last sentence) and that the applicant cannot be held to have 'joint responsibility' for any such participation. This conclusion applies *a fortiori* since the Commission stated at the hearing that the purpose of the last sentence of the third paragraph of point 102 of the Decision was to hold the applicant jointly responsible not for any anti-competitive actions undertaken by its partner in the jointly owned subsidiary, from which it would benefit through that company, but for the actions of Montefina itself which amounted to participation in the infringement which the Decision found the applicant to have committed.

80 It follows from the foregoing that the Commission has not established to the requisite legal standard that either the applicant or the undertaking Montefina participated in the system of regular meetings of polypropylene producers having as their purpose, in particular, the setting of price and sales volume targets or in the setting, with other polypropylene producers, of price or sales volume targets for the period from the beginning of 1980 to March 1982.

II — Relating to the period from March 1982 to November 1983

A — The system of regular meetings

(a) The contested decision

81 In the Decision (point 18 and point 105, third and fourth paragraphs) the complaint is made that Petrofina participated in the system of regular meetings of polypropylene producers by regularly attending meetings between March 1982 and September 1983, the first meeting identified in the period in question being that of 10 March 1982 (point 58, third paragraph).

82 The Decision (point 21) states that the purpose of those regular meetings was in particular the setting of price and sales volume targets and the monitoring of their observance by the producers.

(b) Arguments of the parties

83 The applicant denies having participated in a meeting of producers on 10 March 1982. In its view, the fact that it did not attend that meeting is clear from the note of that meeting found at the premises of Hercules (main statement of objections, Appendix 23). It claims that that note contains a serious error concerning its production capacity (50 instead of 30 kilotonnes/year). Furthermore, it denies having participated in two other meetings on 20 August and 2 November 1982.

84 It contends that when it attended meetings its participation was passive and that its purpose was solely to gather information in order to secure a place on the market. This is borne out by its competitive behaviour in the market place, as evidenced by a number of documents, in which its competitors describe its conduct as aggressive or disruptive, as regards both prices and sales volumes. Those assertions are also borne out by an audit carried out by an independent firm of auditors, Coopers & Lybrand (hereinafter referred to as 'the Coopers & Lybrand audit'), and by an econometric study of the German market carried out by Professor Albach of the University of Bonn.

85 The Commission contends that Petrofina regularly participated in the meetings and that it had itself admitted, in its reply to the request for information (Appendix 1 to the particular statement of objections addressed to Petrofina), that from March 1982 some members of staff of its Chemical Sales Division had attended the meetings. The Commission considers that the first meeting attended by Petrofina was the meeting of 10 March 1982 (main statement of objections, Appendix 23).

(c) Assessment by the Court

86 In Petrofina's reply to the request for information, it is stated that 'from March 1982 some members of staff of the Chemical Sales Division of our company attended the meetings referred to in your letter' (particular objections, Petrofina, Appendix 1). That reply contains a list of 25 meetings — out of 29 alleged meetings — covering a period from 18 May 1982 to 30 September 1983 in respect of which the applicant has identified its representatives.

87 As regards the applicant's participation in a meeting of 10 March 1982, two points must be made. First, although that meeting is not referred to in the list of meetings in respect of which the applicant has identified its representatives, it dates from a time when the applicant has admitted having attended meetings ('from March 1982'). Secondly, the applicant does not deny having taken part in another meeting, on 13 May 1982 — which is not referred to in Petrofina's list either — whereas in the second paragraph of point 37 of the Decision the Commission states that Petrofina did participate in that meeting.

88 The error concerning Petrofina's production capacity contained in the note of the meeting of 10 March 1982 (main statement of objections, Appendix 23) is not such as to undermine the Commission's conclusions since the same error is contained in a number of other documents relating to periods during which Petrofina has admitted having participated in meetings. In this regard, the price instruction issued by the applicant on 11 March 1982 may be safely regarded as additional evidence of Petrofina's attendance at that meeting inasmuch as it coincides with the target price set at that meeting.

89 It must therefore be concluded that the applicant participated regularly in the periodic meetings of polypropylene producers between March 1982 and the end of September 1983, even though it denies having participated in the meetings of 20 August and 2 November 1982.

90 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 (main statement of objections, Appendix 8) and which was borne out by numerous notes of meetings, that the purpose of the meetings was, in particular, to fix target prices and sales volumes. Indeed, that reply contains the following statements: '"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'.

91 Furthermore, the Commission was fully entitled to deduce from ICI's reply to the request for information, in which it is stated: 'Only "Bosses" and "Experts" meetings came to be held on a monthly basis . . . By late 1978/early 1979 it was determined that the "ad hoc" meetings of Senior Managers should be supplemented by meetings of lower level managers with more marketing knowledge', as well as from the identical nature and purpose of the meetings in question, that they were part of a system of regular meetings.

92 It must also be noted that Petrofina's allegedly passive participation in the meetings is disproved by the statements of the applicant itself, which admits having sometimes provided some information on monthly sales tonnages, and by the notes of certain meetings, such as that of 13 May 1982 (main statement of objections, Appendix 24) at which Petrofina explained its internal relations with Monte within their jointly owned subsidiary, Montefina, and by the note dated 8 December 1982 made by an ICI employee (main statement of objections, Appendix 77) of a telephone conversation between ICI and Hercules recounting a Petrofina proposal relating to quotas for the first quarter of 1983.

93 It follows that the Commission has established to the requisite legal standard that the applicant participated regularly in the periodic meetings of polypropylene producers between March 1982 and September 1983, that the purpose of those meetings was, in particular, to set price and sales volume targets, that those meetings were part of a system and that the applicant's participation in those meetings was not purely passive.

B — The price initiatives

(a) The contested decision

94 According to the Decision (paragraph 28), a system for fixing target prices was implemented through price initiatives.

95 According to the Decision (points 37 to 39), Petrofina participated in the price initiative of June-July 1982, which took place in the context of a restoration of a balance between supply and demand on the market. That initiative was decided upon at the meeting of producers of 13 May 1982 in which Petrofina participated and at which a detailed table of price targets for 1 June was drawn up for the various grades of polypropylene in the various national currencies (DM 2.00/kg for raffia).

96 The meeting of 13 May 1982 was followed by price instructions from ATO, BASF, Hoechst, Hercules, Hüls, ICI, Linz, Monte and Shell corresponding, with a few insignificant exceptions, to the target prices set at the meeting (Decision, point 39). It is admitted in the Decision, however, that price instructions from the applicant were not available. At the meeting of 9 June 1982 the producers could report only modest price increases.

97 According to the Decision (paragraph 40), the applicant also participated in the 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 at 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).

98 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).

99 According to the Decision (point 44), at the meeting on 21 September 1982, 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.

100 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).

101 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.

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

103 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.

104 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 in grade and currency.

105 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.

106 The Decision (point 51, second and third paragraphs) states that ATO and Petrofina were present at all relevant meetings but that they both claim that if any internal price instructions were given for the period they were given by word of mouth. However, 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.

107 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.

108 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

109 The applicant contends that, owing to the passive nature of its presence at the meetings, the Commission cannot infer that it participated in price agreements.

110 The applicant further contends that it never fixed its prices with reference to the target prices and that the material advanced as evidence by the Commission does not prove the contrary.

111 It states, first of all, that it was not present at the meeting of 10 March 1982 at which the Commission claims a target price of 2.00 DM/kg for 1 April was fixed and therefore the telex sent to its sales departments on 11 March 1982 (particular objections, Petrofina, Appendix 2) had nothing to do with that meeting.

112 It states, secondly that the Commission misinterpreted the note of the meeting held on 21 September 1982 (main statement of objections, Appendix 30) and that its conduct on the market after that meeting shows that its attendance of the meetings had no effect.

113 It states, thirdly, that the telex which it sent on 20 July 1983 to its sales departments (particular objections, Petrofina, Appendix 5) had nothing to do with the target price referred to during the meeting of 20 May 1983 (main statement of objections, Appendix 39) since the content of that telex message could be explained by a technical fault.

114 The applicant further states that the Commission has not produced any price instructions from Petrofina matching the target prices so as to prove any implementation of those target prices. It adds that a number of documents prove that throughout the period when it was present on the polypropylene market it was regarded as a 'persistent troublemaker' and that the graphs which it has produced prove that it did not align its actual prices with the target prices in 97% of cases and that the margin below the target prices is as great as 30%. It refers in this regard to the Coopers & Lybrand audit.

115 Finally, the applicant considers that there is a contradiction between the finding that it participated in the fixing of target prices by the polypropylene producers and the decision not to proceed against the undertakings Amoco and BP although it is stated in the Decision that at certain times those undertakings appeared to have aligned their prices on the targets decided on in meetings (point 78, last paragraph).

116 In addition, it challenges the fact that the period from October to November 1983 was taken into account. It states that the meetings were brought to an end after mid-October at the latest and that the rises at the end of the year were totally independent of the producer meetings which had taken place previously, as is shown by Professor Albach's study.

117 The Commission states that the Decision relies upon a number of pieces of evidence to prove the applicant's participation in the price initiatives for 1982 and 1983. It states that Petrofina's participation in price agreements is generally proved by its participation in meetings the notes of which show that their purpose was to fix target prices.

118 It contends, first, that the note of the meeting of 10 March 1982 (main statement of objections, Appendix 23), in which Petrofina took part, proves that an agreement was reached on a target price of DM 2.00/kg for 1 April 1982. That agreement was implemented by Petrofina the following day by a telex sent to its sales departments in the Federal Republic of Germany instructing them to apply that price from 1 April 1982. It contends that the negotiating margin left to the

sales forces with regard to customers does not disprove the implementation of the agreement since the 'price targets' were simply intended to serve as a uniform basis for negotiations with customers.

119 The Commission states, secondly, that the note of the meeting of 13 May 1982 (main statement of objections, Appendix 24) proves that Petrofina participated in the setting of a target price of DM 2.00/kg for 1 June 1982.

120 It contends, thirdly, that the note of the meeting held on 21 September 1982 proves that Petrofina participated in an arrangement to support the target prices. At that meeting Petrofina indicated that it had agreed to only two exceptions to the target prices, justifying this by the fact that the prices corresponded to lower prices confirmed in meeting.

121 Finally, the Commission states that the note of the meeting of 1 June 1983 proves that Petrofina consented to an agreement on a target price of DM 1.85/kg for 1 July 1983 since at that meeting 'those present reaffirmed complete commitment to the 1.85 move to be achieved by 1st July'.

122 The Commission goes on to state that on 20 July 1983 Petrofina issued a price instruction corresponding to the target price set at that meeting and that this price instruction is evidence of its participation in the implementation of the target prices.

123 It further observes, in response to the Coopers & Lybrand audit, that it has never claimed that the producers all fixed a uniform cartel price and that therefore the applicant's argument that the target prices and the prices which it actually charged diverged is irrelevant.

124 In the rejoinder the Commission states that the interpretations which Petrofina proposes to place on the various abovementioned documents are perhaps credible

in themselves but that they are irrelevant when account is taken of the actual context in which those documents came into being, namely the overall agreement on prices and quotas as described in the Decision.

125 The Commission rejects the applicant's argument that the applicant was treated differently than Amoco and BP and states that, since those undertakings did not participate in the regular meetings of polypropylene producers, the 'central core' of the evidence of their participation in the alleged agreement on prices is absent in their case.

126 Finally, it states that, although the meetings were ended after September 1983, the cartel continued to produce its effects during the months of October and November 1983, which therefore had to be taken into account.

(c) Assessment by the Court

127 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'.

128 Since it has been established to the requisite legal standard that the applicant regularly participated in those meetings after March 1982, it cannot assert that it did not support the price initiatives which were decided on, planned and monitored at those meetings, without providing any evidence to corroborate that assertion. In the absence of such evidence, there is no reason to believe that the applicant would not have supported those initiatives, unlike other participants at the meetings.

129 In this regard, the applicant refers to two arguments seeking to demonstrate that it did not subscribe to the agreed price initiatives. It states first of all that its participation in the meetings was purely passive and, secondly, that it took no account at all of the decisions reached at the meetings when determining its conduct on the market with regard to prices.

130 Neither of those two arguments can be accepted as evidence capable of corroborating the applicant's assertion that it did not subscribe to the agreed price initiatives. The Court points out that the Commission has established to the requisite legal standard that the applicant's participation in the meetings was not purely passive so that the first argument put forward by the applicant is not founded upon the facts. As regards the second argument, it must be observed first of all that, even if it was supported by the facts, it would not be capable of disproving the applicant's participation in the setting of target prices at the meetings but would at the most tend to show that the applicant did not implement the decisions reached at those meetings. Moreover, the Decision nowhere states that the applicant charged prices which always corresponded to the target prices agreed at the meetings, which indicates that the contested decision is likewise not based on the implementation by the applicant of the decisions reached at the meetings for the purpose of proving its participation in the fixing of those target prices.

131 In the same context, it must be pointed out that the Commission does not dispute the analyses made by Petrofina nor the conclusions of the Coopers & Lybrand audit designed to show that the prices actually charged and the target prices diverged considerably and that it likewise does not dispute that it is apparent from a series of documents produced by the applicant that throughout the period during which it was present on the polypropylene market the applicant was regarded as a 'persistent troublemaker'. However, it must be pointed out that the analyses which

the producers themselves carried out, at the meetings of 21 September, 6 October, 2 November and 2 December 1982, to ascertain the effect of their price initiatives on the prices charged on the market seem to indicate that they regarded the results as positive on the whole (main statement of objections, Appendices 30 to 33).

132 In any event, the Court finds that the applicant's implementation of the results reached at the meetings was more real than it claims, even though the Commission was able to produce only one single written price instruction from Petrofina, a telex of 11 March 1982, matching the agreed target prices. The other written instruction produced by the Commission, a telex of 20 July 1983, must be disregarded since it may indeed be explained by the occurrence of a technical fault in Petrofina's plant which is said to have led to a temporary fall in production, which the applicant attempted to mitigate by increasing its prices in order to temporarily reduce demand.

133 As regards the first telex, it must be observed that it was sent on the day following the meeting at which a target price for April had been set and which Petrofina had attended, contrary to its denials, and that it corresponds perfectly with that target. Even though the telex message shows that Petrofina left its sales departments a narrow margin for negotiation, it is sufficient to prove that the applicant used the target prices set at the meetings as a basis for negotiating prices with its customers.

134 Since the applicant has explained that the price instructions sent to its sales departments were given by word of mouth and since it has submitted no evidence to substantiate the suggestion that its oral instructions did not correspond to the results reached at the meetings, the Court considers that the Commission was entitled to deduce from the fact that the single written price instruction issued by the applicant corresponded to the target price fixed at a previous meeting at which the applicant had participated that the price instructions given by word of mouth by the applicant must likewise have corresponded on the whole to the target prices fixed at the meetings in which it had participated.

135 It must also be pointed out that the applicant's case and those of Amoco and BP are not comparable in so far as, unlike the applicant, those two undertakings did not participate in the regular meetings of polypropylene producers from March 1982 until the end of September 1983, so that they could not take part in the price initiatives which were decided on, planned and monitored at those meetings. It follows that the applicant cannot rely on the treatment of those undertakings in the Decision in order to conclude that its participation in those initiatives has not been proved to the requisite legal standard.

136 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.

137 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.

138 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 points 37 to 51 of the Decision, that those initiatives were part of a system and that their effects continued until November 1983.

C — The measures designed to facilitate the implementation of the price initiatives

(a) The contested decision

139 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.

140 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.

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

(b) Arguments of the parties

142 The applicant claims that, since its role was a passive one, it never implemented the system of 'account leadership' and never had the intention of doing so. For this reason it seeks to refute the various pieces of evidence put forward by the Commission in support of its accusations.

143 The applicant states first of all, with regard to the note of the meeting of 2 September 1982 (main statement of objections, Appendix 29), in which its name appears as — according to the Commission — an 'account leader' for three of its customers, that the Coopers & Lybrand audit proves that it always delivered to Ostend Stores at competitive prices; that in September 1982, Fibrilo was no longer its customer and that Waltex never appeared on the list of its customers. Those assertions are borne out by an internal ICI note dating from the end of December 1982 (main statement of objections, Appendix 35), in which it is stated: 'despite the appointment of A/C leaders, there does not appear to have been any improvement in December over November'.

144 It states, secondly, that the note of the meeting of 21 September 1982 (main statement of objections, Appendix 30), according to which information relating to prices and the volumes of their commitments for October were exchanged by the producers, lacks credibility in its regard since the information concerning it was inaccurate because its sales in the Federal Republic of Germany were made at prices broadly lower than the prices indicated.

145 It states, thirdly, with regard to the note of a meeting held in the spring of 1983 (main statement of objections, Appendix 37), according to which Petrofina did not deliver to certain customers, that it was for reasons extraneous to the application of an 'account leadership' system that it did not deliver to them. In the case of Steen, Petrofina was ousted by the competition, as is shown by the Coopers & Lybrand audit; in the case of Adolff, Petrofina was ousted owing to the quality of a previous delivery; in the case of Ostend Stores, Petrofina delivered such quantities in March that this customer no longer needed to be supplied before June; in the case of Boussac, the note itself indicates that it was for credit reasons that no deliveries were made.

146 Finally, the applicant admits that, in the case of certain customers to which it had delivered, it indicated at meetings the quantities delivered and the prices at which it had delivered, but sometimes inaccurately, as the comparison with the Coopers & Lybrand audit indicates.

147 It also repeats that the note of the meeting of 13 May 1982 (main statement of objections, Appendix 24), stating 'Petrofina — have reduced sales following new agreement with MP', does not have the meaning attributed to it by the Commission since the 'new agreement' mentioned in that note did not consist of a quota agreement but solely of an agreement to exchange capacity with Monte within Montefina, their jointly owned subsidiary, and that therefore it did not restrict its production temporarily in order to facilitate the application of target prices.

148 The Commission again refers to the various pieces of evidence on which it bases its assertion that Petrofina participated in various measures designed to implement the price initiatives.

149 It states that the note of the meeting of 2 September 1982 (main statement of objections, Appendix 29) proves that Petrofina participated in the system of 'account leadership' since its name appears in that note as 'account leader' for three of its customers and that the statement in the Decision (point 27, third paragraph) that all producers were named 'account leader' for customers is based in particular on the note of the meeting held on 2 December 1982 (main statement of objections, Appendix 33). According to the Commission, the note of a meeting held in spring 1983 (main statement of objections, Appendix 37) the note of the meeting held on 3 May 1983 (main statement of objections, Appendix 38) prove that Petrofina participated in the 'account leadership' system since they show that Petrofina was discussing at the meetings the individual situation of its customers and its deliveries.

150 According to the Commission, the note of the meeting held on 21 September 1982 (main statement of objections, Appendix 30) proves that Petrofina participated in an exchange of information between producers, agreed the previous month, concerning their commitments for October and the prices at which they had accepted orders.

151 Finally, the Commission considers that the note of the meeting held on 13 May 1982 (main statement of objections, Appendix 24) proves that the applicant participated in a measure consisting in refusing to sell in the Federal Republic of Germany and France at prices below 1.80 DM/kg in order to support the price initiative and that, even if the explanation provided by Petrofina were to prove to be true, the mere fact that at a meeting of producers Petrofina began to explain its internal relations with Monte within their jointly owned subsidiary Montefina and the influence this had on its conduct on the market shows clearly that its role in the meetings was not simply a passive one and that it exchanged information about its customers with its competitors.

(c) Assessment by the Court

152 As far as the measures designed to facilitate the implementation of the price initiatives are concerned, it must be pointed out that the applicant's arguments are not designed to show that such measures were not agreed but to show that the applicant did not enter into any commitment in this regard or take any part in their implementation.

153 In this regard, the Court holds, on the basis of the meeting notes whose contents have been the subject of argument between the parties (main statement of objections, Appendices 29, 30, 33, 37 and 38), that Petrofina exchanged information about its customers and the prices which it charged compared with the targets set and that it was named 'account leader' for a number of its customers. Furthermore, the applicant admitted in its reply to the request for information (particular objections, Petrofina, Appendix 1) that it had participated in local meetings.

154 As regards the question whether it agreed to restrict its sales, it must be pointed out that whilst the note of the meeting of 13 May 1982 (main statement of objections, Appendix 24) does not perhaps have the meaning attributed to it by the Commission in its pleadings (reduction of sales pursuant to a new agreement), it does at least establish that Petrofina attempted at that meeting to give credence to the idea that it was reducing its sales on account of an agreement to exchange capacity with Monte within Montefina ('Have reduced sales comparing with 1981

following new agreement with M. P.') and that it was refusing business in the Federal Republic of Germany and France below the price of DM 1.85/kg ('Refused business in Germany + France below DM 1.85'). Furthermore, that note reports the applicant's announcement that it would shut down its production plant for 20 days in August ('Plant will be shut down for 20 days in August').

155 In view of those various pieces of evidence, the Court concludes that the applicant has not substantiated its assertion that it did not, like other polypropylene producers, subscribe to measures designed to facilitate the implementation of price initiatives from March 1982. At the most its argument tends to show that its implementation of some of those measures was incomplete, particularly as far as the system of 'account leadership' was concerned, but such a fact, even if proved, cannot refute the fact that the applicant, as an active participant in the meetings at which the measures designed to facilitate the implementation of price initiatives were agreed, assented to those measures, together with other polypropylene producers.

156 It must also be pointed out that point 27 of the Decision, read in the light of the second paragraph of point 26, must be interpreted 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.

157 It follows from the foregoing that the Commission has established to the requisite legal standard that from March 1982 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.

D — Target tonnages and quotas

(a) The contested decision

158 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 were stable in comparison with previous years in the case of the majority of producers.

159 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.

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

(b) Arguments of the parties

161 The applicant denies that the Commission has succeeded in proving that it participated in a quota system. In its view, what the Commission refers to as its participation in a market-sharing scheme consists in fact of the allocation of sales quotas to Petrofina by other producers independently of its will. Petrofina never consented to those quotas and never observed them. As the last producer to come on to the market, it was necessary for Petrofina to secure clientele and increase it, an aim incompatible with any restriction on production.

162 It argues, first, that its participation in such a scheme is disproved by the spectacular breakthrough it made in terms of market share after its arrival on the market and, secondly, that the tables used by the Commission to prove its participation in such a scheme have no probative value since they contain serious errors as regards its sales figures.

163 In this regard, the applicant contends that the note of the meeting of 6 October 1982 (main statement of objections, Appendix 31) does not prove that it participated in the quota system since Petrofina's sales exceeded the figure referred to in that document by more than 12.5%. The applicant also denies that the note of the meeting of 2 November 1982 (main statement of objections, Appendix 32) proves that it participated in the quota system since it did not attend that meeting. Finally, the note of the meeting of 2 December 1982, more particularly its annex

entitled '1983 — Quarter 1 Proposal' (main statement of objections, Appendix 33), is too imprecise as far as Petrofina is concerned and was merely a proposal to which Petrofina had never given its assent since it was not one of the undertakings which had judged that proposal to be 'acceptable'.

164 As far as 1983 is concerned, the applicant states that it abstained voluntarily from participating in the negotiations which probably took place between certain producers for the purpose of reaching a market-sharing arrangement for that year, thus expressly and unequivocally indicating its dissociation from those plans. This is why no proposal from Petrofina is to be found in the documents, which explains why the column intended for Petrofina in the table summarizing the producers' proposals (main statement of objections, Appendix 85, p. 2) remains blank. The previous table (main statement of objections, Appendix 85, p. 1) did not originate from Petrofina and appears to be simply a recast of the following table.

165 In Petrofina's view, the Commission commits the same type of error when referring to another document entitled 'Polypropylene Framework', which, according to Petrofina, was the work of a third party and not of Petrofina. Moreover, the Commission is wrong to set the 'revised' figure in that table against the alleged Petrofina 'target' in Appendix 85 since the column 'Fina' in that document remained blank. Finally, the applicant disputes the probative value of a document dated 8 December 1982 originating from ICI (main statement of objections, Appendix 77) on the ground that the statements attributed to Petrofina's employee in that document are erroneous. The information that the additional 5% which Petrofina would take in the Feluy production plant belonging to Montefina meant a reduction in Monte's share did not in fact prevent Monte's actual capacity from likewise increasing in 1983.

166 The Commission states first of all that Petrofina's participation in the quota agreements is not disproved either by the constant growth of its market share or by its non-observance of the quotas since the agreements concluded between the producers, being dynamic in nature, were revised from time to time in order to take account of changes in market conditions and in particular of the plans of newcomers, such as Petrofina. The Commission states that Petrofina's participation in the quota system for 1982 is clear from various documents.

167 Thus, according to the Commission, the note of the meeting of 20 August 1982 (main statement of objections, Appendix 28) proves that in 1982 Petrofina disclosed the figures for its monthly sales as part of the provisional arrangement by which producers were to restrict their tonnages to the market share achieved in the period January to June. In the Commission's view, it is also clear from the notes of meetings held on 6 October, 2 November and 2 December 1982 (main statement of objections, Appendices 31, 32 and 33) that the producers compared the sales achieved by each of them during the previous month with the theoretical targets calculated by reference to the sales achieved during the first six months of 1982.

168 According to the Commission, Petrofina's participation in the drawing up of a quota system for 1983 is clear from the fact that its name appears in two documents (main statement of objections, Appendices 85 and 87), which appear to date from October or November 1982, setting out for each producer sales figures, proposed market shares, averages, aspirations and actual market shares which are apparently the result of computer processing.

169 The Commission states that Petrofina's participation in the drawing up of a quota system for 1983 is also clear from a document dated 8 December 1982 originating from ICI (main statement of objections, Appendix 77), which constitutes a Petrofina proposal relating to the quotas for the first quarter of 1983. In the Commission's view, it is clear from that document that Petrofina pointed out that it would take a supplementary tranche of 5% in the Feluy production plant and that the 37.5 kilotonnes resulting from a calculation made on an annual basis would then correspond to 9.8 kilotonnes for the first quarter. It also declared that it would revert to this point at the next meeting whilst recognizing that its request meant a reduction in Monte's share.

170 According to the Commission, the existence of an agreement for the first two quarters of 1983 is clear from an internal document found on the premises of Shell (main statement of objections, Appendix 90). According to that document, Shell had instructed its national sales companies to reduce their sales in order to maintain compliance with the quota which had been allocated to it. The Commission further points out that the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) shows that information on sales volumes in May was exchanged.

(c) Assessment by the Court

171 It must be repeated that the applicant participated regularly from March 1982 until 30 September 1983 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. Any errors in some of the information exchanged are irrelevant since the errors are insignificant and may be due to Petrofina's intention to conceal its true figures in order to mislead its competitors.

172 Concurrently with Petrofina's participation in the meetings, its name appears in various tables (main statement of objections, Appendices 71, 85 and 87) whose contents clearly show that the tables were drawn up for the purpose of determining sales volume targets. Most of the applicants have admitted in their replies to a written question from the Court that it would not have been possible to draw up the tables found on the premises of ICI, ATO and Hercules on the basis of the statistics available under the Fides data exchange system. 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 been provided by Petrofina in the course of the meetings in which it participated.

173 The constant increase in Petrofina's market share and the systematic exceeding of the quotas allocated are not factors capable of proving that the applicant deliberately abstained from entering into negotiations on quotas since neither of those factors appears to have been an issue at the meetings and, therefore, if the applicant did not observe the agreed targets, it nevertheless let the others believe that it was observing them.

174 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.

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

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

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

176 The measures adopted for the second half of 1982 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'.

177 The Court finds that, as regards 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.

178 As regards 1983, the Court finds, in the first place, that it is clear from the documents produced by the Commission (main statement of objections, Appendices 33, 77, 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 provided data relating to its sales.

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

180 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'.

181 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.

182 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).

183 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.

184 Having regard to the foregoing considerations, it must be concluded that the Commission has established to the requisite legal standard that from March 1982 the applicant was one of the polypropylene producers amongst whom common purposes emerged in relation to the restriction of their monthly sales by reference to a previous period (until the end of 1982) and to the sales volume targets for the first six months of 1983 which are mentioned in the Decision and which formed part of a quota system.

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

A — Legal characterization

(a) The contested decision

185 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).

186 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).

187 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.

188 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).

189 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.

190 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.

191 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).

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

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

194 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).

195 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.

196 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 realize 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

197 The applicant contends first of all that the Commission acted in breach of the letter and spirit of Article 85(1) of the EEC Treaty in not demonstrating the existence of either an agreement or a concerted practice and in taking the view that it was sufficient to find that 'collusion' exhibiting elements of both concepts had taken place. Furthermore, according to Petrofina, during the proceedings the Commission constantly changed its position on the question of the qualification of the infringement before finally concluding that this question is of minor importance. The applicant considers that the concept of 'agreement' and 'concerted practice' must be carefully distinguished (judgment of the Court of Justice in Case 48/69 *ICI* v *Commission*, cited above) and that it is for the Commission to substantiate its argument that the elements constituting one or other of those forms of collusion exist in its case.

198 An agreement presupposes a real meeting of minds on the reciprocal rights and obligations of those subscribing to it. If no intention to assume an obligation is demonstrated, the existence of such an intention can be assessed only by examining the way in which the agreement is implemented. In the present case, the applicant categorically denies having participated in an agreement and contends that the Commission has not proved that it bound itself to restrict competition by participating in agreements adopted in common.

199 A concerted practice, on the other hand, presupposes, according to the applicant, that conduct on the market by the undertakings does actually occur. If it is readily assumed that a concerted practice has both an anti-competitive object and an anti-competitive effect, it would appear difficult for a concerted practice to have an anti-competitive object without having any anti-competitive effect. It would then no longer be a 'practice' but a tacit arrangement falling within the ambit of an agreement. By denying that it is necessary for there to be an anti-competitive effect on the market, the Commission arrives at a position where it describes mere participation by an undertaking in meetings with competitors as a concerted practice within the meaning of Article 85 of the EEC Treaty, irrespective of the undertaking's intention to join in anti-competitive conduct and notwithstanding the absence of steps to implement such conduct or of any effect on the market. Relying on the case law of the Court of Justice (judgment in Case 48/69 *ICI* v *Commission*, cited above, Opinion at pp. 671 to 673, and judgment in Case 49/69 *BASF* v *Commission* [1972] ECR 713, paragraphs 22 to 33; judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission*, cited above, paragraphs 567 to 576; judgment in Joined Cases 209 to 215 and 218/78 *Heintz Van Landewyck* v *Commission* [1980] ECR 3125, Opinion at p. 3310; judgment in Joined Cases 100 to 103/80 *Musique Diffusion Française SA and Others* v *Commission* ('*Pioneer*') [1983] ECR 1825 and judgment in Case 243/83 *Binon* [1985] ECR 2015, at paragraph 17) and on American case law relating to the Sherman Act, the applicant contends that, in order for there to be a concerted practice, three elements must be present: first, proof of parallel behaviour common to a number of undertakings on the market; secondly, proof of a common intention to that end, deducible from a number of factors, the mere presence of a representative of an undertaking at a meeting not being sufficient; and, thirdly, a link between the conduct on the market thus found and the common intention of the undertakings. In the present case, the Commission has not proved that the alleged cartel had any effects on the market or that the applicant manifested conduct on the market such as to demonstrate its participation in a concerted practice or its agreement to any anti-competitive object.

200 Thus, according to the applicant, it was for the Commission to demonstrate that the elements constituting either an agreement or a concerted practice were present in its case, which the Commission failed to do in finding that there was 'collusion', which exhibits elements of both concepts.

201 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.

202 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).

203 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.

204 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.

205 The Commission goes on to argue that if the two requirements — concerted action and conduct on the market — were required for the existence of a concerted practice, as the applicant maintains, 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 thwarted. Furthermore, that view of the applicant is not in accordance with the case-law of the Court of Justice concerning the concept of concerted practice (judgment in Case 48/69 *ICI* v *Commission*, cited above, paragraph 66; judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission*, cited above, paragraph 26; and judgment in Case 172/80 *Züchner* v *Bayerische Vereinsbank AG*, 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. The American case law on the Sherman Act follows the same line.

206 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.

207 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.

208 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

209 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'.

210 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.

211 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* [1970] ECR 661, paragraph 112, and the judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* [1980], 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 price initiatives, measures designed to facilitate the implementation of the price initiatives, measures for restricting monthly sales by reference to a previous period between March 1982 and the end of that year as well as to sales volume targets for the first half of 1983, as agreements within the meaning of Article 85(1) of the EEC Treaty.

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

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

214 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.

215 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.

216 The Commission was therefore justified, in the alternative, having regard to their purpose, in categorizing the regular meetings of polypropylene producers in which the applicant participated between March 1982 and September 1983 as concerted practices within the meaning of Article 85(1) of the EEC Treaty.

217 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.

218 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.

219 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.

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

B — The effect on trade between Member States

(a) The contested decision

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

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

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

(b) Arguments of the parties

224 The applicant contends that its participation in an agreement having an appreciable effect on trade between Member States has not been demonstrated. It is even disproved by Petrofina's spectacular penetration of the markets of five Member States with a period of five years.

225 The Commission replies that even if it is assumed that Petrofina's spectacular penetration of the market of various Member States has been proved, it was still entitled to conclude that trade between Member States and the structure of competition were affected inasmuch as the cartel inevitably diverted trade patterns from the course which they would otherwise have followed (judgment of the Court of Justice in Joined Case 209 to 215 and 218/78 *Van Landewyck* v *Commission*, cited above, paragraph 172).

(c) Assessment by the Court

226 Contrary to the applicant's assertions, the Commission was not required to demonstrate that its participation in an agreement and a concerted practice had had an appreciable effect on trade between Member States. All that is required by Article 85(1) of the EEC Treaty is that anti-competitive agreements and concerted practices should be capable of having an effect on trade between Member States. In this regard, it must be concluded that the restrictions on competition found to exist were likely to distort trade patterns from the course which they would otherwise have followed (see the judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission*, cited above, paragraph 172).

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

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

C — Collective responsibility

(a) The contested decision

229 According to the Decision (point 83, first paragraph), the conclusion that there is one continuing agreement is 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. In any case, the normal practice was for absentees to be informed of what had been decided in meetings. All the undertakings to which the Decision is addressed took part in the conception of overall plans and in detailed discussions and their degree of responsibility is not affected by reason of their absence on occasion from a particular session (or in the case of Shell, from all plenary sessions).

230 The Decision goes on to state (point 83, second paragraph) that the essence of the present case is the combination over a long period of the producers towards a common end, and each participant must take responsibility not only for its own direct role but also for the operation of the agreement as a whole. The degree of involvement of each producer is not therefore fixed according to the period for which its pricing instructions happened to be available but for the whole of the period during which it adhered to the common enterprise.

231 That consideration applies also to Anic and to Rhône-Poulenc, which left the polypropylene sector before the date of the Commission's investigations. No pricing instructions to sales offices were available at all from either of these two undertakings. Their attendance at meetings and their participation in the volume target and quota schemes can, however, be established from the documentary evidence. The agreement must be viewed as a whole and their involvement is established even if no price instructions from them were found (Decision, point 83, third paragraph).

(b) Arguments of the parties

232 According to the applicant, the Commission made it impossible for it to defend its rights by holding it collectively responsible by stating in the Decision (point 83, second paragraph) that 'each participant must take responsibility not only for its own direct role but also for the operation of the agreement as a whole' whereas it had to show that each of the elements constituting the infringement defined in Article 85(1) of the EEC Treaty were present in its case. In actual fact, the Commission held the applicant generally and collectively responsible for the conduct of other producers.

233 The Commission maintains that it has shown that in the applicant's case each of the elements constituting the infringement were present and that it has not therefore held it answerable for the conduct of other producers.

(c) Assessment by the Court

234 It follows from the Court's assessments relating to the findings of fact and the application of Article 85(1) of the EEC Treaty by the Commission that in the applicant's case the Commission has proved to the requisite legal standard each of the aspects of the infringement found against it in the Decision and that it did not therefore attribute to the applicant liability for the conduct of other producers.

235 The second and third paragraphs of point 83 of the Decision do not contradict that finding, since it is mainly concerned with justifying the finding of the infringement in the case of undertakings in respect of which the Commission discovered no price instructions for the entire period during which they participated in the system of regular meetings.

236 Consequently, this ground of challenge must be dismissed.

3. *Conclusion*

237 It follows from all the foregoing considerations since the findings of fact made by the Commission against the applicant as regards the period from the beginning of 1980 to March 1982 have not been proved to the requisite legal standard, Article 1 of the Decision must be annulled in so far as it states that the applicant participated in the infringement in that period. For the rest, the applicant's grounds of challenge relating to the findings of fact and the application of Article 85(1) of the EEC Treaty by the Commission in the contested decision must be dismissed.

The statement of reasons

1. *Insufficient reasoning*

238 The applicant contends that the statement of reasons for the Decision is deficient owing to its generality since it does not address the specific arguments put forward by Petrofina, in particular those concerning the lack of price instructions from Petrofina, the lack of participation in any arrangement concerning quotas and the fact that it attended the meetings solely as an observer.

239 The Commission considers that the refutation of this ground of complaint necessitates an analysis of the factual reasoning of the Decision which has already been undertaken in its arguments relating to proof of the infringement.

240 The Court finds that it is clear from its assessments relating to the findings of fact and the application of Article 85(1) of the EEC Treaty by the Commission in the contested decision that the Commission took proper account of the applicant's arguments relating to the alleged lack of price instructions from the applicant, its contention that it did not participate in any arrangement concerning quotas and the assertion that it attended the meetings solely as an observer. It must be repeated that the Commission rightly rejected those arguments, in particular in the last sentence of the second paragraph of point 83, in point 52 et seq. and in the first paragraph of point 84 of the Decision. It follows that this ground of challenge must be dismissed.

2. *Contradictory reasoning*

241 The applicant contends that the reasoning of the Decision is contradictory in two places. First, after having admitted, at least implicitly, that it must prove the existence of either express assent to a plan to restrict competition or conduct on the market pursuant to such a plan, the Commission does not prove either element and contradicts itself in stating that 'the instances of allegedly "unruly" or "disruptive" pricing by an individual producer from time to time attempting to gain market position at the expense of the others (before whom the "transgressor" could be called upon to explain himself) does not negate the overwhelming evidence of a concerted plan to regulate the market' (Decision, point 85, second paragraph). That contradiction in the reasoning is particularly important for Petrofina since, after adopting aggressive conduct on the market, Petrofina was described as a trouble-maker by the other undertakings. Secondly, the Commission contradicted itself by admitting first of all that Petrofina had not issued price instructions (Decision, point 45, second paragraph) and then stating that the producers all issued price instructions to their national sales offices and that those price instructions prove that the price initiatives were implemented (Decision, point 90).

242 The Commission considers that the refutation of this argument necessitates an analysis of the factual reasoning of the Decision which has already been undertaken in its arguments relating to proof of the infringement.

243 The Court finds that the applicant's argument is based on a reading of the Decision which artificially isolates some reasons stated in the Decision whereas, since the Decision constitutes a whole, each of its reasons must be read in the light of the others in order to overcome the contradictions apparent in the Decision.

244 It follows from the Court's assessments relating to proof of the infringement that the reasons stated in the Decision do not contradict themselves and that this ground of challenge is therefore unfounded.

3. *Incorrect reasoning*

245 The applicant contends that the reasoning of the Decision is incorrect in so far as the Commission states that 'the very existence of a quota or target would operate to restrict the opportunities open to a producer' (Decision, point 94), whereas Petrofina explains that it made a spectacular penetration of the market during the reference period by pursuing stoutly competitive conduct.

246 The Commission considers that it has already refuted this ground of challenge in its arguments relating to proof of the infringement.

247 As it has already held, the Court finds that the restrictions of competition found to exist were capable of affecting trade between Member States. The reasoning in question was not therefore incorrect. Consequently, this ground of challenge is unfounded.

The fine

248 The applicant complains that the Decision contravened Article 15 of Regulation No 17 by not adequately assessing the duration and the gravity of the infringement which it was found to have committed.

1. *The duration of the infringement*

249 The applicant contends that when determining the amount of the fine the Commission did not take account correctly of the duration of its participation in the infringement, which it claims was much shorter, in particular because it ended at the time of the Commission's investigations and not in November 1983.

250 The Commission states that it took proper account of the duration of the infringement when determining the amount of the fine.

251 It follows from the Court's assessments relating to proof of the infringement that the duration of the infringement held to have been committed by the applicant was shorter than was found to the be the case in the Decision, since it began in March 1982 and not at the beginning of 1980. However, it is clear from those same assessments that the Commission was entitled to take the view that the infringement continued until November 1983.

252 It follows that the amount of the fine imposed on the applicant must be reduced on this ground.

2. *The gravity of the infringement*

A — The applicant's limited role

253 The applicant maintains that the infringement did not have the gravity found by the Commission since its role in the meetings was that of the passive observer anxious to ascertain market conditions. It never had the intention either to adopt anti-competitive conduct or to adopt practical implementing measures, and this caused producers to describe its conduct as disruptive.

254 The Commission contends that the cartel was organized in a calculated and deliberate way, that it was of a particularly grave kind (horizontal fixing of prices and horizontal sharing of markets) and comprised practically all the polypropylene producers in the Community, which thus gave it considerable power. The passive nature of Petrofina's participation in the cartel, even if proved, cannot exempt it from the imposition of a fine. It points out that the Court has held that any concrete participation in an infringement — even passive acquiescence which facilitates the infringement — is sufficient to warrant the imposition of a fine (judgment in Joined Cases 32/78 and 36 to 82/78 *BMW Belgium SA and Others* v *Commission* [1979] ECR 2435, paragraph 49 et seq.; judgment in Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131, paragraph 18). As regards the determination of the amount of the fine, the Commission states that, in order to observe the principle of proportionality, it expressly took account of the role played by the applicant in the collusive arrangements (Decision, point 109).

255 The Court finds that it is clear from its assessments relating to proof of the infringement that the Commission has correctly established the role played by the applicant in the infringement from March 1982 and that it was therefore entitled to take the view in the Decision that the passive nature of the applicant's role had not been established.

256 It follows that this ground of challenge cannot be upheld.

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

257 The applicant submits that it is clear from the case law of the Court of Justice (judgment in Case 45/69 *Boehringer Mannheim GmbH* v *Commission* [1970] ECR 769, paragraph 55 et seq.; judgment in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission*, cited above, paragraph 50 et seq.; and judgment in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* v *Commission*, cited above, paragraph 100) that the Commission must indicate the precise criteria on which it bases its decision in determining the amount of the fine imposed on each undertaking. The Commission must individualize the elements constitutive of the infringement as well as the criteria applied in determining the fine. In the present case, the Commission gave no indication in this regard and even admitted that the assessment of an individual fine is based on a set of factors which very often are not quantifiable and that it cannot therefore indicate a precise parameter of calculation with regard to a particular factor. Unable to link the amount of the fines to the anti-competitive effects found on the market, the Commission, in fixing the heaviest fines which it has ever passed, has no other means than to refer to the gravity of the infringement without defining this more precisely and without referring to any other objective criterion. This approach is irreconcilable with the principle of legal certainty and verges on the arbitrary since it is impossible to ascertain the relationship which must exist between the degree of individual involvement in the infringement and the imposition of a fine whose amount is proportional and equitable. Such individualization of the criteria was all the more necessary since the Commission itself states that substantial fines are justified in this case on account of the particular gravity of the infringement.

258 The applicant contends in particular that in the present case the Commission ought to have taken account of the heavy losses which it incurred, the lack of any price instructions from it and the differences between its sales prices and the alleged

'target prices', its exceptional penetration of the market, the size of the investments made and, finally, its small size on the polypropylene market.

259 The Commission states that when imposing the penalties in this case it acted in accordance with its established policy and the fining principles enunciated by the Court of Justice. It points out that since 1979 it has applied a consistent policy of enforcing competition laws by imposing heavier fines, in particular for the categories of infringements well established in Community law and for particularly serious infringements, like those in this case, so as to reinforce the deterrent effect of penalties. That policy has been approved by the Court of Justice (judgment in Joined Cases 100 to 103/80 *Musique Diffusion Française SA and Others* v *Commission* ('*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 International Belgium N.V.* v *Commission*, cited above, paragraph 52).

260 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 has confirmed that it may reach a different judgment, depending on the cases, on the penalties it considers necessary, even if the cases in question involve comparable situations (judgment in Joined Cases 32/78 and 36 to 82/78 *BMW Belgium SA* v *Commission*, cited above, paragraph 53, and judgment in Case 322/81 *Michelin* v *Commission*, cited above, paragraph 111 et seq.).

261 In the present case, the Commission states once more that it determined the amount of the fines by taking account of general matters, described in point 108 of the Decision, and specific matters, described in point 109 of the Decision. The general considerations played a role in the determination of a general ceiling of the fine; the specific considerations enabled the Commission to spread that fine fairly and proportionately between the various producers concerned. By their very nature, the general considerations did not have to be individualized. The Commission points out, however, that it took account of factors put forward in this regard by Petrofina. As regards the specific considerations, the Commission considers that it has already replied to the arguments advanced by Petrofina. This approach has been approved by the Court of Justice (judgment in Case 45/69 *Boehringer Mannheim GmbH* v *Commission*, cited above, paragraph 55).

262 This 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).

263 The Court considers that the criteria set out in point 108 of the Decision amply justify the general level of the fines imposed on the undertakings to which the Decision is addressed. In this regard, particular emphasis must be placed on the clear nature of the infringement of Article 85(1) of the EEC 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.

264 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.

265 Amongst the factors which the applicant accuses the Commission of not having taken account, it must be stated that the Commission was not obliged to individualize the manner in which it took account the substantial losses incurred by the various producers in the polypropylene sector owing, in particular, to the size of the investments made, or of the alleged differences between the applicant's sale prices and the target prices fixed and its exceptional penetration of the polypropylene market, since these were factors which contributed to the determination of the general level of the fines, which the Court has found justified.

266 As regards the alleged absence of price instructions from the applicant, it is clear from the Court's assessments relating to the findings of fact made by the Commission in order to prove the infringement that it has not been established that such instructions were not issued and that the Commission was not therefore obliged to take account of this factor when determining the amount of the fine.

67 As regards the alleged failure to take account of Petrofina's small size on the polypropylene market, it must be stated that the applicant's argument, which seeks to demonstrate that it could not exert any influence on the market, must be rejected. The relevant question is not whether the applicant's participation was capable of exerting an influence on the market but whether the infringement in which it participated could exert an influence on the market. In this regard, the Court has held that the Commission was entitled to include amongst the criteria applied in the determination of the general level of the fines the fact that the undertakings participating in the infringement represented almost the entire polypropylene market, which clearly indicates that the infringement which they committed together must have had an influence on the market. Moreover, in so far as the applicant's argument seeks to demonstrate that the Commission did not take account of its relative size on the polypropylene market, it must also be dismissed since the Commission indicated in point 109 of the Decision that it had taken account, as a criterion for weighting the amount of the fines imposed on each of the undertakings, of their respective deliveries of polypropylene in the Community, and the manner in which that criterion was applied to the applicant's case has not been contested by the applicant.

268 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.

269 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.

270 It follows that this ground of challenge of the applicant must be dismissed.

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

271 The applicant maintains that according to a general principle of law the gravity of an infringement should always depend on its effects. That principle is, in its view, borne out by the case law of the Court of Justice relating to fines in respect of cartels (judgment in Case 41/69 *ACF Chemiefarma N.V.* v *Commission*, cited above, paragraph 175 et seq. and judgment in Case 45/69 *Boehringer Mannheim GmbH* v *Commission*, cited above, paragraph 52 et seq.; judgment in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission*, cited above, paragraph 42 et seq.; judgment in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* v *Commission*, cited above, paragraph 89 et seq.; judgment in Case 19/77 *Miller International Schallplatten GmbH* v *Commission*, cited above; judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission*, cited above; judgment in Case 85/76 *Hoffman-La Roche & Co AG* v *Commission* [1979] ECR 461; judgment in Joined Cases 32/78 and 36 to 82/78 *BMW Belgium SA* v *Commission*, cited above; judgment in Case 322/81 *Michelin* v *Commission*, cited above, and judgment in Joined Cases 100 to 103/80 *Musique Diffusion Française* v *Commission* ('*Pioneer*'), cited above). In the present case, the Commission has not proved the effects of the cartel on the market and has even expressed doubts about this matter. It has also refrained from refuting the econometric studies produced by Petrofina demonstrating the absence of any effect of the cartel. The fine imposed is excessive for that reason.

272 The Commission states that it has already taken account, in determining the amount of the fine, of the fact that the cartel did not fully achieve its purpose, although it was not bound to do so owing to the anti-competitive object of the cartel.

273 The Court observes 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. That 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 the 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).

274 The first type of effect has been proved by the Commission to the requisite legal standard from the many price instructions given by the various producers, which

are consistent with one another and with the target prices fixed at the meetings, which were manifestly meant to serve as the basis for the negotiation of prices with customers.

275 The fact that the Commission obtained only one price instruction issued by the applicant, which directly reflected the outcome of a meeting in which the applicant had participated, cannot weaken that conclusion since the effects taken into consideration by the Commission in determining the general level of the fines are not those produced by the actual conduct which a particular undertaking claims to have adopted but those produced by the whole of the infringement in which the undertaking participated with others.

276 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 an audit carried out by an independent firm of accountants, Coopers & Lybrand, 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.

277 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.

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

D — Insufficient reasoning

279 The applicant contends that, as far as the determination of the amount of the fines is concerned, the Commission has not replied to its arguments relating to the competitive spirit in which it participated in the meetings, the competitive purpose with which it set its prices, its spectacular penetration of the market, the fact that it never acted as 'account leader' or as 'contender' and the fact that it helped to the best of its ability to elucidate the matter. All those factors should have been taken into account in determining the level of the fine and the Decision should have indicated how they had been taken into account.

280 In the Commission's view, Petrofina is merely repeating arguments which are already known or is emphasizing factors which have already been taken into account by the Commission in the setting of the amount of the fine.

281 The Court holds that it follows from its assessments relating to the findings of fact made by the Commission in order to prove the infringement that the various arguments to which, according to the applicant, the Commission has not replied are not supported by the facts.

282 As regards the last argument mentioned by the applicant, it must be observed that it is clear from a reading of the Decision as a whole that the applicant was not counted as one of the very small number of producers which cooperated in the investigation, to which reference is made in the last paragraph of point 109 of the Decision, and that it was justifiably not so included since it did not cooperate in elucidating the matter to an extent exceeding that required by Community law.

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

E — Contradictory reasoning

284 The applicant considers that there is a contradiction in the Decision in so far as it states, on the one hand, that the role played by each of the undertakings in the collusive arrangements, the length of time they participated in the infringement, their respective deliveries of polypropylene to the Community and their individual total turnover were taken into consideration (point 109, first paragraph) but, on the other hand, that the Commission does not accept that any substantial distinction can be made between the other producers on the basis of their individual degree of commitment to the agreed arrangements (point 109, sixth paragraph).

285 The Court holds that the role played by each of the undertakings in the collusive arrangements must be distinguished from their degree of commitment to the common arrangements. The undertakings' role is related to the number of aspects of the infringement in which the undertakings participated, whereas their level of commitment relates to the intensity of their participation in those aspects of the infringement.

286 It follows that these two reasons stated in the Decision are not contradictory and this ground of challenge must therefore be dismissed.

F — The principle of equal treatment

287 The applicant considers that the Decision contravenes the principles of fairness and non-discrimination in so far as it treats Amoco and BP, on the one hand, and the applicant, on the other hand, differently. The fact that Petrofina, unlike the two other undertakings, participated, albeit passively, in the meetings, cannot be sufficient in itself to justify that difference of treatment. Moreover, the Commission may not find a deliberate intention to restrict competition in the applicant's case when, on the basis of the same incriminating evidence, it did not find any reprehensible intention on the part of Amoco and BP.

288 The Commission states that the difference of treatment between Amoco and BP, on the one hand, and the applicant, on the other hand, is justified by the circumstance that the first two undertakings did not attend the meetings and that the Commission did not therefore possess sufficient evidence against them in order to establish their deliberate intention to restrict competition.

289 The Court holds that in order for there to be a breach of the principle of equal treatment it is necessary for comparable situations to have been treated differently. In the present case, however, the situation of Petrofina, on the one hand, and of Amoco and BP on the other hand, were not comparable since, having regard to the fact that the latter two undertakings had not participated in any regular meeting of polypropylene producers, the Commission was entitled to consider that it did not have sufficient evidence of their participation in concertation having an anti-competitive object, unlike in the applicant's case. The existence of such concertation constitutes the basis of the system of proof applied in the Decision. Consequently, the Court holds that the difference of situation ascertained between those undertakings and the applicant justified the different treatment which they received.

290 Consequently, this ground of challenge cannot be upheld.

291 It follows from all the foregoing considerations that the fine imposed on the applicant is appropriate having regard to the gravity of the breach of the Community competition rules which the applicant has been found to have committed. However, it must be reduced by half owing to the shorter duration of the infringement since, although the ascertained duration of the infringement has been reduced by more than half (by 26 months), during the remaining 21 months it was very intensive.

Costs

292 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. However, under Article 87(3), where each party

succeeds on some and fails on other heads the Court may order that the costs be shared or that each party bear its own costs. Since the application has been upheld in part and the parties have each applied for costs, each party must be ordered to pay its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls the third indent of Article 1 of the Commission Decision of 23 April 1986 (IV/31.149 — Polypropylene, Official Journal L 230, p. 1) in so far as it holds that Petrofina took part in the infringement between 1980 and March 1982;**

2. **Sets the amount of the fine imposed on the applicant in Article 3 of that decision at ECU 300 000, that is to say BFR 13 153 050;**

3. **For the rest, dismisses the application;**

4. **Orders the parties to bear their own costs.**

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 24 October 1991.

H. Jung
Registrar

J. L. Cruz Vilaça
President