OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 5 May 1988 *

Mr President,
Members of the Court,

1. Société coopérative des asphalteurs belges (hereinafter referred to as 'Belasco') and the seven members of that association seek, primarily, a declaration as to the nullity of the Commission Decision of 10 July 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.371 — roofing felt) [1] and, in the alternative, the cancellation or at least a reduction of the fines imposed on them.

2. In the contested decision the Commission took the view, essentially, that the seven member companies of Belasco had infringed Article 85(1) of the EEC Treaty by entering into an agreement which came into operation on 1 January 1978 and remained in force until at least 9 April 1984 and also collective measures designed to implement and supplement the agreement, including their joint participation in agreements with non-member undertakings concerning discounts on the sales prices of the products in question. Belasco itself was accused of having participated in the implementation of the agreement in question.

3. In support of their action, the applicants put forward, in the first place, numerous factual arguments intended to prove that, in its decision, the Commission gave an incorrect picture of the market and of the relevant products and also of the implementation of the contested agreement and its effects. From the legal standpoint, they allege in particular that the Commission committed three errors in its appraisal of the facts, in relation to the relevant market, the impact of the Belgian rules on prices and their own role in the negotiations concerning the takeover of a competing undertaking, UPM, a former member of Belasco, which caused the procedure to be initiated by lodging a complaint with the Commission.

4. In the second place they allege an infringement of essential procedural requirements in so far as the statement of the reasons on which the decision is based is incorrect, contradictory and inadequate. Most of the passages in the Commission's decision criticized by the applicants relate to matters challenged elsewhere, in particular the practical effects of the measures implementing the agreement.

5. The same applies to the allegation of infringement of Article 85(1) of the EEC Treaty, whereby the applicants assert that besides the fact that there was no appreciable effect on competition between the Member States there was no evidence of the factual and legal circumstances which constitute an infringement within the meaning of that article.

6. Finally, in the alternative, in the event of the Court's considering that the conditions

* Original language: French.
1 — OJ 1986, L 232, p 15.

for the application of Article 85(1) were met in their case, the applicants allege an infringement of Article 15(2) of Regulation No 17 [2] and of the principle of equality, justifying the cancellation or, at any event, a reduction of the fines imposed.

7. It appears from this brief summary of the arguments put forward, for the details of which I refer you to the Report for the Hearing, that the same factual elements and the same arguments underlie several of them. Therefore, in order to avoid excessive repetition and cross-reference I shall not consider them in the order in which they are put forward but shall endeavour to place them under four main chapter headings based on the conditions for applying Article 85(1) of the EEC Treaty.

8. In two subsequent chapters, I shall consider whether the agreement at issue had as its object or effect the prevention, restriction or distortion of competition within the common market and whether it was liable to affect trade between the Member States. However, I shall first devote a chapter to the precise identification of the products with which the Commission's decision is concerned and to definition of the place held by the applicants on the market for such products, since in order to reach a correct decision as to whether there was a distortion of the conditions of competition of the kind referred to in Article 85(1) and an effect on intra-Community trade it is necessary to take account of the economic context in which the agreement and the measures for its implementation were applied and of the actual framework within which competition would have prevailed in their absence.

2 — Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87).

9. A last chapter will be devoted to the complaints made regarding the imposition of the fines.

10. The scheme of this Opinion will therefore be as follows:

A — The market and the relevant products

B — The distortion of competition

C — The effect on trade between the Member States

D — The application of Article 15 (2) of Regulation No 17

1. The intentional nature of the infringements

2. Their duration

3. Their seriousness

4. Observance of the principle of equality.

A — The market and the relevant products

11. The applicants consider that the market in roofing felt, as defined by the Commission in its decision, is merely a small part of the much broader market in flexible waterproof roof products, which includes in

addition 'synthetic' products, made principally from polymers and containing little or no bitumen. That is the market which the Commission should have considered in order to make a correct appraisal of the competitive situation and of the applicants' market share.

12. The Commission denies that it made any error of assessment by not including synthetic products in its definition of the relevant market and asserts that, even if it had taken it into account, the market shares of the applicants would have been unchanged between 1978 and 1980 and would have undergone only slight changes between 1981 and 1984, remaining at all times well above 50%.

13. It must first be observed with regard to that difference of opinion that, as rightly pointed out by the Commission, the definition of the relevant products does not have exactly the same significance in the context of Article 85 as it has in the context of Article 86. In the latter case, it serves to determine whether an undertaking occupies in the 'relevant' market represented by certain products a place such that it must be regarded as occupying a dominant position in the common market or a substantial part thereof. The dominant position, an essential condition for the application of Article 86, is appraised with reference only to a given market.

14. In the context of Article 85, it is necessary above all to define the products actually covered by an agreement and on whose market that agreement had the object or effect of restricting competition. The position and importance of the undertakings concerned in that market are not taken into account until later in order to determine whether the restrictions of competition intended or caused by the agreement and the effect on trade which it is likely to bring about must be regarded as limited or not 'appreciable'.

15. As regards the 'relevant products', the roofing felts to which the Belasco agreement and the measures for its implementation related, the Commission made a distinction in points 3 and 4 of its decision between:

Bituminous felt and similar products, referred to as 'Belasco products';

Bitumen-based products 'enhanced' by the addition of plastics, referred to as 'new products'; and

Tar-coated felts.

16. In point 5 it adds that the members of Belasco also market 'ancillary products' which are sold to the same customers and are used largely in conjunction with roofing felt.

17. The applicants' statement that the agreement applied only to the old-type so-called 'Belasco products' and not to the

'new' products or the 'enhanced' products which did not appear on the market until the end of the 1970s seems to me to be contradicted by the very wording of clause 1b of the chapter entitled 'Object of the agreement' which defines products as 'felts of all kinds . . . impregnated with bitumen, both those now known in the trade as roofing felt". . . and such materials of the same kind as may be manufactured in the future to satisfy the same needs'.

18. In that context, the fact that the Commission's decision was not addressed to Derbit, a company which produces only 'new' products (point 30 of the decision), does not mean, as the applicants claim, that the decision does not apply to those products or, *a fortiori*, that the contested agreement does not cover them, but is accounted for by the fact that Derbit, which is not a member of Belasco, did not participate, as a non-member, in the agreements concluded with the members. There is thus no contradiction in that respect in the statement of reasons for the Commission decision, which correctly defined the relevant products.

19. That does not mean that all the measures taken to implement the agreement necessarily extended to the new products. The agreement was applied to them to a 'limited' — but 'increasing' — extent, as the Commission stated expressly (point 74(xi) of the decision).

20. As regards the question whether the products thus defined form a separate market or are part of a wider market on which they compete directly with other products performing the same functions or serving the same purposes, I should like to point out in the first place that the applicants themselves accept that there is not a single waterproofing and roofing market and that they distinguish between the tile and slate market and the market in flexible roof-waterproofing products.

21. Interchangeability as regards function and use are not the only criteria by virtue of which products which are intrinsically different belong generally to the same market. Other criteria to be taken into account are the properties and prices of the products concerned, since in principle only those products which are regarded by users as similar, particularly because of those various factors, form part of the same market.

22. It may in fact happen that products which can in principle be used for the same purposes cannot in practice, by reason of other features, be employed without distinction by the users.

23. The applicants themselves recognize that synthetic products have their own characteristics and sometimes differ fundamentally from traditional bituminous materials, particularly with respect to their composition and the manner in which they are laid.

24. In the Commission's view, the special laying method calls for highly qualified and specially trained personnel so that the transition for a user (general contractors or roofing contractors) from bituminous coatings to synthetic products cannot take

place overnight, and in particular involves substantial retraining of personnel. The document from the Centre scientifique et technique de la construction (CSTC) produced by the applicants as Annex C to their application and Annex 1 to their reply expressly confirms that view, at least as regards a substantial category of the products in question, namely those with an elastomer or plastomer base (See paragraph 3.21, p. 12).

25. The Commission also states — and the applicants themselves acknowledged at the hearing — that the prices for synthetic products are considerably higher, which means that they do not represent real alternatives in economic terms for waterproofing work usually done using bituminous coverings.

26. In those circumstances I do not think that it was wrong to take the view that synthetic products are used for specific applications and are not really competing products which could be substituted for bitumen-coated felts.

27. Moreover, in practice the applicants do not seem to feel that they are in competition with the manufacturers of synthetic products as is evidenced on the one hand by the fact that at the frequent general meetings of contractors, the members of Belasco, although very attentive to what was taking place on the market, took very little notice of them and, on the other, the fact that they put forward no argument in that connection in the administrative phase before the adoption of the Commission decision which they contest.

28. It is not therefore surprising that they left it until their reply (p. 46) to gives figures concerning the impact which the inclusion of synthetic products in the relevant market would have on their market share as defined by the Commission in point 8 of its decision.

29. Having recognized that it is very difficult to make an evaluation in that regard, they state that, from 1981 to 1983, their market share would be curtailed by 10 to 15% if account were taken of all the substitutable products, the result of which would be that in 1981 it would merely be between 47 and 50% and in 1983 between 42 and 45% instead of 58.7% and 59.6% respectively.

30. That assertion calls for the following observations:

(1) It relates only to the years 1981 to 1983, so that it may be inferred from it that the applicants' market share was in fact unchanged from 1978 to 1980;

(2) even reduced to that level, their market share could not be described as 'minimal' (see p. 36 of the application);

(3) for them to have brought about a reduction of 10 to 15% in the applicants' market share, the synthetic products would have had to represent between 20 and 30% of the market thus defined; however, whilst the applicants have produced no evidence to support

the figures they put forward, the Commission has shown, on the basis of a market study produced by a German firm, that at the end of 1981 the share of the market accounted for by synthetic products did not exceed 10%; the applicants' representative also admitted at the hearing that at the material time synthetic products actually represented only 8 to 10% of that market;

(4) furthermore, it is apparent from the Buytaert report produced by the applicants themselves that the Commission in fact underestimated the members' share of the market which it took into account (see Annex III to the defence).

31. In view of those considerations, I must conclude that the Commission is right to maintain that even if it had taken account of the synthetic products in defining the relevant market, the market share of the Belasco members from 1981 to 1984 would only have fallen short by 5 to 7% of the levels indicated in its contested decision and at all times exceeded 50%.

32. In view of the substantial size of the market shares — even thus rectified — minimal variations of that kind would certainly not have rendered necessary a different legal assessment of the facts and circumstances of this case. If error there was — *quod non* — regarding definition of the relevant market and of the shares of that market held by the applicants, it cannot of itself justify a declaration that the contested decision is void.

B — The distortion of competition

33. As the Court has held,

'. . . in order to decide whether an agreement is to be considered as prohibited by reason of the distortion of competition which is its object or effect, it is necessary to consider the competition within the actual context in which it would occur in the absence of the agreement in dispute. To that end, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and the importance of the parties on the market for the products concerned, and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements'. [3]

It must be possible, by reference to the last-mentioned factors, to establish whether the barriers to competition are appreciable, since agreements which give rise to insignificant restrictions of competition are not caught by the prohibition contained in Article 85(1).

34. Article 85(1) concerns agreements whose object or effect is to distort competition. In its judgment in *Société technique minière*, [4] the Court stated that the fact that those were not cumulative but alternative requirements

'indicated by the conjunction "or", leads first to the need to consider the precise purpose of the agreement, in the economic

3 — See in particular the judgments in Case 99/79 *Lancôme* v *Etos* [1980] ECR 2511, paragraph 24, and Case 31/80 *L'Oréal* v *De Nieuwe AMCK* [1980] ECR 3775, paragraph 19.

4 — Case 56/65 *Société technique minière* v *Maschinenbau Ulm GmbH* [1966] ECR 235.

context in which it is to be applied' [1966] ECR 249).

35. The description given by the Commission in points 12 to 21 of its decision of the agreement concluded by the members of Belasco faithfully reflects the content of the agreement (as reproduced in Annex and 3 to the statement of objections appended as Annex I to the defence).

36. The purpose of the agreement is defined as follows by the parties to it:

(1) To adopt a price list and minimum prices for all deliveries in Belgium, without any exception, of the products specified below and for the execution of all work by the parties using the products governed by the present agreement.

(2) To establish a price list and minimum conditions for the execution and guaranteeing of all board-roofing work as described in the present agreement.

(3) To allocate quotas between members.

(4) To lay down penalties for breaches of the agreement or of validly adopted resolutions.

(5) To set up a guarantee fund to cover commitments.

(6) To defend and further the collective interests of the parties as far as possible; in particular in negotiations with foreign countries and by joint advertising for the products manufactured by them and for asphalting work using such products.

(7) To study and promote ways of standardizing and rationalizing the production and distribution of tar- and bitumen-coated felt.

37. The other clauses to which the Commission draws particular attention are in Article 1(8) of the agreement, which defines the powers and duties of the general meeting of members, which is responsible in particular for the implementation of the agreement, in Article 2, which provides that an accountant will monitor compliance with quotas and prices, in Article 3, which fixes the delivery quotas allocated to each of the members and provides for a compensation system, in Article 5, which describes certain 'duties' of the parties, providing in particular, in paragraph (4), that the general meeting reserves the right to fix the sale price of ancillary products, and in Article 6, which governs the conduct of the members in the event of the insolvency of one of their number.

38. There can be no doubt that the agreement as a whole and most, if not all, of the clauses mentioned indeed had as their *object* the restriction of competition and, in

view of the position held by the members of Belasco on the Belgian market for the relevant products, that they displayed, according to the words used by the Court in *STM*, *ante*,

a 'sufficiently deleterious effect on competition'

for it to be concluded that they have had an appreciable effect on normal competition.

39. For example, the collective fixing of price lists and sales conditions and the sharing of the market by the fixing of delivery quotas are expressly covered by Article 85(1)(a) and (c) of the EEC Treaty.

40. The applicants maintain, however (p. 15 of their reply) that the 'common price list . . . served as a basis for . . . joint applications for price rises which enabled non-members, apprised thereof, to take a competitive stance with respect to those prices'. In other words, the common price list was merely an instrument designed to facilitate joint applications for price rises and was not intended to eliminate competition between the members of the association. Moreover, on each occasion the members gave non-members a first-class gift by informing them of the common prices so that they could offer their products at a lower price and thus compete.

41. You will not be surprised, Members of the Court, to learn that I am not persuaded by that argument.

42. If the common price list had served only that purpose, it would not have been necessary to attach to it common rules concerning discounts. The fact is that its object was to avoid price competition as between members.

43. Moreover, the Commission is correct to emphasize that even though the Belgian authorities actually recommended that trade associations should make joint applications on behalf of their members they did not make it an unavoidable obligation to do so and did not require that the maximum increases authorized by them should necessarily be applied in full or immediately.

44. There is no contradiction between that conclusion and the fact that the Commission showed in Annex II to its defence and in Annex III to its rejoinder that in fact the time-limits for implementing the authorized rises varied considerably and that the rises were not applied uniformly and in full to all the products. The very fact that both the time-limits and the rates of increase for the products were identical for all the members of Belasco shows clearly that the members must have consulted each other on each occasion as to the apportionment of the authorized rises amongst the various products and as to the best time to bring them into force.

45. In the light of the foregoing, it can no longer be claimed that the alignment of the price lists of Belasco's members was attributable to the Belgian legislation on prices or that the Commission, which expressly stated its views on that claim in point 74(i) of its decision, committed an error of appraisal in that regard.

46. As regards the disclosure of the members' common intentions on prices to non-members of Belasco, it is clear that the intention was to encourage them to apply those prices as well.

47. For the rest, there are only three clauses whose restrictive nature is actually denied by the applicants (see pp. 8 and 9 of the application); they relate to:

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

(2) joint advertising of products bearing the Belasco trade mark;

(3) the adoption of standardization and rationalization measures.

48. The object of the first of those clauses is, as the Commission has rightly pointed out (point 73(ii) of the decision), to prevent circumvention of the agreed price rules and therefore is certainly not merely a transposition into the agreement of a provision of Belgian legislation on unfair competition [5] whose objective is consumer protection.

49. Whilst the other two clauses may perhaps not be intrinsically restrictive, as the Commission concedes (pp. 27 and 28 of its defence), they nevertheless contribute, by reason of their inclusion in an agreement of the type at issue, to the reinforcement of the restrictive intent by limiting in particular the parties' freedom to compete with each other by differentiating their products (point 73(v) and (vi) of the decision).

50. Seen in that light, the Commission's appraisal of, in particular, the last of those clauses does not seem to me to be any way inconsistent with the fact that Belasco's main activity is the preparation of IBN standards issued under the auspices of the Institut Belge de Normalisation. It also took care to make clear in its decision (point 73(v)) that Belasco members' participation in that activity was not at issue. In this regard, the complaint of an incorrect, contradictory statement of reasons cannot therefore be accepted.

51. The same applies in the case of the new products. There is no contradiction between recognition of the fact that they 'were developed independently by each producer' (third paragraph of point 74(xi) of the decision) and the finding that in the context of an agreement such as the one at issue the joint determination of certain of their characteristics is restrictive of competition, particularly since, in the absence of stan-

5 — Law of 14 July 1971 on commercial practices (*Moniteur belge*, 30.7.1971, p. 9087).

dardization, such coordination is an essential precondition for any joint price fixing.

52. As regards the other clauses, it is rather their implementation and their specific effects which are the subject of the applicants' complaints.

53. However, it must be noted, on the one hand, that under Article 10 of the agreement itself the resolutions passed at the meetings of the parties to it become an integral part of it. It may therefore simply be concluded that the resolutions adopted for the implementation of the contested clauses share the latter's restrictive character.

54. On the other hand, it follows from paragraphs 154 and 155 of the judgment in *Van Landewyck* of 29 October 1980[6] that where undertakings have adopted provisions whose object is to restrict competition appreciably, it is unnecessary to consider how far those provisions have actually been put into effect.

55. It might therefore be tempting to take consideration of the restrictive nature of the purpose of the contested agreement no further.

56. But in the present case the 'agreement', as defined by the Commission in point 72 of its decision, comprises not only an agreement between undertakings, namely the Belasco agreement, but also a whole series of other agreements and measures and decisions adopted to implement and supplement it. Moreover, the Commission decision relates not only to that 'agreement' but also to agreements between members and non-members on price discounts, dating from May and October 1978 (Articles 2 and 3 of the decision).

57. The Commission devoted points 22 to 68 of its decision to a factual description of the decisions adopted and the agreements concluded by Belasco members, including those with non-members, with a view to giving effect to the agreement. In doing so it relied extensively on Belasco internal documents, minutes of meetings of the contracting parties and reports by the accountant. In point 74 it gives its legal assessment of those decisions and agreements in relation to the requirements of Article 85(1).

58. The existence of those documents and the accuracy of the quotations from them are beyond dispute. Therefore, the applicants concede:

(i) that common price lists for Belasco products were in fact adopted;

(ii) that they gave advance notice of their intentions in that regard to other Belgian manufacturers;

(iii) that they also consulted each other on numerous occasions regarding the prices of new and ancillary products;

6 — Joined Cases 209 to 215 and 218/78, [1980] ECR 3125, at p. 3270.

(iv) that they established the principle of stability of clientele whereby each member must retain its own customers and not approach those of other members;

(v) that there was an agreement and attempts at making agreements between the members on one side and members and non-members on the other regarding discounts to be granted against the common price list;

(vi) that a quota system under the control of the accountant was in fact introduced.

59. The applicants' general line of defence regarding the majority of those facts is to contend that the decisions did not come into effect or that they were not complied with in practice and that the systems set up did not function according to their wishes.

60. In a number of cases the Commission itself acknowledges that fact, particularly as regards observance of the common prices for ancillary products (see point 74(v)), the principle of stability of clientele (point 74(vi) and the sales prices for new products (point 74(xi)).

61. As regards the quota system, the Commission ascertained that the sales of two of the seven members of Belasco considerably exceeded the quotas allocated to them (point 26). That does not mean however that, as a whole, the system did not operate or that those two members were able to disregard it with impunity and without having to pay compensation to the other members.

62. The applicants maintain that the figures in Annex IV to the statement of objections under the heading 'Accounts outstanding' do not relate to any penalties payable for any quota infringements but record adjustments in the apportionment of the operating costs of Belasco to be borne by the members (p. 28 of the reply). However, the Commission has shown convincingly (p. 17 of the rejoinder and Annexes VI and VII thereto) that if that had been the case one member company would not have borne any operating costs at all but would have been in credit to the tune of BFR 119 858, whereas another company would have borne almost a third of the operating costs for 1983.

63. The members of Belasco also claim that the defence measures against competition from IKO, discussed at its general meetings, proceeded no further than the stage of declarations of intent and that the proposals had not been put into effect. The Commission has, however, contrived to prove, by quotations from the voluminous minutes of general meetings, that 'the action decided upon' and 'the action taken' against that company enabled three parties to the agreement to take customers away from that company (points 60 and 74(vii) of the decision, paragraph 36 of the statement of objections and minutes of the general meeting reproduced in Annex VIII to the rejoinder).

64. As regards the agreed rules on discounts, the Commission has shown that the agreement entered into on or before 30 October 1978 was applied until it collapsed in July or August 1980, as a result of the insolvency of UPM on 4 July 1980. Even if two of ATAB's customers and one of Asphaltco's customers received during that period discounts in excess of the ceiling fixed by the agreement, and in general the rules on discounts were observed to a much lesser extent as from 1981 (point 74(iii) and the first agreement with non-members (of May 1978) came to grief (point 54), it cannot be denied that such rules were introduced. The complaints of those who observed it survive as proof.

65. Need it be recalled that

'for the purposes of Article 85(1) it is unnecessary to take account of the actual effects of an agreement where its object is to restrict, prevent or distort competition'?[7]

66. The various decisions for implementation of the agreement were undeniably restrictive in their objectives. As far as their effects are concerned, account need be taken of them, as the Commission itself pointed out in point 76 of its decision, only when the seriousness of the infringements committed is assessed for the purpose of determining the size of the fines to be imposed.

C — The effect on trade between Member States

67. The Court has consistently held, as was recalled in particular in the judgment in *Remia* of 11 July 1985,[8] that

'in order that an agreement between undertakings may affect trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of an objective set of factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of the aim of a single market in all the Member States'.

68. It must be observed that the contested agreement expressly provided for collective action against foreign competitors since it entrusted to the general meeting of members the task of taking 'protective and defensive measures . . . if for any reason alien to the membership the object pursued by the present contract . . . should be threatened, for example in the event of competition from foreign companies becoming stronger . . .' (Article 1(8)(b). Recourse to concerted action in an endeavour to avoid any increase in competition from other Member States reflects a wish to 'freeze' the pattern of trade and to resist the movement towards a single market. Similarly, the members of Belasco undertook to refrain, without the prior authorization of the general meeting of members, from using their plant or

7 — Case 123/88 *BNIC* v *Clair* [1985] ECR 391, paragraph 22; see also Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 39.

8 — Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22; see also Case 56/65, *supra*, at p. 249.

equipment on behalf of third parties (middle of the first paragraph in the introductory part of the agreement) and from selling or leasing such plant or, in the event of plant being replaced, from lending or transferring it (Article 5(3)). Those provisions were intended in particular to make it impossible for foreign companies to set up operations in Belgium using existing production capacity.

69. One might be tempted to object that foreign producers or importers could have profited by the fact that relatively high prices were maintained on the Belgian market by the members of Belasco as a result of their agreement and encroached upon the latter's market shares by undercutting them. However, there is a sufficient probability that such foreign competitors would have found that the customers approached by them received particularly attractive counter-offers from Belasco members. Thanks to the remunerative prices which those members had succeeded, at least in part, in obtaining from their usual customers they were necessarily in a position to make short-lived sacrifices in order to preclude penetration of the Belgian market by a foreign competitor.

70. It may perhaps be concluded, in view of the increase of imports into Belgium which occurred in spite of that situation, that the action of Belasco members was not wholly effective. The fact nevertheless remains that the intention to preclude an increase in imports did exist and that in the absence of the agreement they would perhaps have increased much more.

71. In points 61 and 62 of its decision the Commission has also shown that concerted 'attacks' against importers and foreign manufacturers were in fact proposed or decided upon. It is true that the Commission was unable to say what specific action was taken following those proposals and decisions.

72. That fact cannot, however, be relied upon to remove the measures in question from the scope of the prohibition contained in Article 85(1), since a 'potential' effect on trade established with 'a sufficient degree of probability' is in itself enough to meet that criterion.

73. There is thus no contradiction between the Commission's acknowledgment that it has no information regarding any action taken following those decisions and proposals and the statement made in point 88 of the decision that 'it has been shown . . . that such action was by no means hypothetical' which merely means that the relevant provisions of the agreement were not left entirely dormant but were applied, the question whether they produced any results being entirely separate.

74. When UPM became insolvent in 1980, the applicants were extremely concerned to provide assistance in order to ensure that that company would not be taken over by competing undertakings, in particular foreign undertakings. Here again there is no contradiction between the Commission's finding (in points 63, 64 and 74(viii) of the decision) and the applicants' statement — not challenged by the Commission — that they bear no responsibility in relation to UPM's insolvency: the Commission did not challenge the reasons for the insolvency or

the reasons for the failure of the attempts to save UPM — what it did challenge was the fact that as soon as there was any likelihood of UPM's being purchased by non-member competitors, the members of Belasco acted together, wholly in accordance with the letter and the spirit of the abovementioned provisions of their agreement. Since the only matter of contention was their conduct in the face of a possible takeover of UPM by a foreign industrialist, the Commission cannot be criticized for not taking account of the role played in those events by the regional economic authorities.

75. The applicants also claim that their decisions on prices and quotas related only to the products manufactured by them and not to any imported product.

76. That is correct and in that respect the present case is to be distinguished quite clearly from the case involving the Netherlands cement traders' association (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977) cited in the Commission decision.

77. As Mr Advocate General Mayras emphasised in his Opinion in that case (at p. 1000), the cement traders affiliated to the association in question also sold two-thirds of the imported cement (domestic production only covered two-thirds of the Netherlands cement requirements) and applied their system of guide prices and general sales conditions to such sales.

78. The fact nevertheless remains that the Court has consistently held

'that the fact that a[n] ... agreement ... only covers the marketing of products in a single Member State does not rule out the possibility that trade between Member States may be affected', [9]

particularly where that agreement covers the entire territory of a Member State.

79. The Belasco agreement did cover the whole of Belgian territory. Clause 1 of chapter 1, 'Object of the agreement' expressly provides that the minimum sales conditions and price lists to be adopted are to apply 'to every delivery in Belgium, without exception'.

80. Moreover, the agreement at issue here expressly provides for the adoption of protective and defensive measures against increasing competition from foreign undertakings. The agreement was therefore liable to affect trade between Member States. The question remains whether the effect could be described as appreciable. In my view, that is the most delicate issue in this case. In circumstances such as these, the answer depends above all on the position in the relevant market held by the parties to the agreement (see in particular paragraph 27 of the decision in *Papiers peints*) and their collective ability to react to attempts by foreign competitors to penetrate the market.

81 Furthermore, as the Court emphasised in its judgment of 1 February 1978 in *Miller:* [10]

9 — Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 25.

10 — Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131; see also Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263, paragraph 20.

'In prohibiting agreements which may affect trade between Member States and which have as their object or effect the restriction of competition Article 85 (1) of the Treaty does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect' (paragraph 15).

82. In *Miller*, the Court considered it sufficient that the Commission had established, on the basis of certain facts, that the danger of an appreciable effect existed. It seems to me that it has done so in this case as well.

83. As stated earlier, the agreement applied to the whole of Belgian territory and the deliveries by Belasco members represented, in square metres, almost 60% of the apparent consumption of roofing felt in Belgium in 1983 and their output accounted for around 70% of Belgian production. Even if the Commission had been obliged to include synthetic products in its definition of the relevant market, the sales of Belasco members would still have represented more than 50% of the market.

84. It is therefore undeniable that foreign producers wishing to export to the Belgian market were confronted by a very daunting bloc of national producers committed to a concerted fight against any increase in imports. Even though the action successfully undertaken against IKO related to a Belgian competitor, it proves that the members of Belasco were perfectly capable of taking effective action against a competitor.

85. All in all, I consider therefore that it is legitimate to conclude that the agreement was liable to affect trade between Member States appreciably.

D — The application of Article 15(2) of Regulation No 17

86. Under Article 15(2) of Regulation No 17 the Commission may impose on undertakings and associations of undertakings fines of up to ten per cent of their turnover for the previous financial year, where the infringement was committed 'intentionally or negligently'. When it determines the amount of the fine, 'regard shall be had both to the gravity and to the duration of the infringement'.

87. In support of their alternative claim that the fines imposed should be cancelled or reduced, the applicants draw attention to the fact that the Commission did not express a view on the arguments relating to the intentional nature and the duration of the infringements allegedly committed which they put forward in their response to the statement of objections.

88. They add that the Commission did not assess the gravity of the infringements by reference to their effects on the market and that it discriminated against them by comparison with the undertakings which were not members of Belasco upon which no fine was imposed.

89. The first assertion is defeated merely by a glance at the decision itself. In point 109 the Commission refers expressly to the arguments raised during the proceedings concerning the claim that the members of Belasco acted in good faith, and dismisses them outright. In point 106 it made a clear reference to the duration of the infringement, as viewed by it.

90. In general, moreover, the Court has always held that the obligation to state reasons, as laid down in Article 190 of the Treaty, 'does not require the Commission to discuss all the matters of fact and of law which may have been dealt with during the administrative proceedings'. [11]

91. Therefore, all that remains to be considered is whether the Commission's assessment of those two matters is substantively correct.

1. *The intentional nature of the infringements*

92. It must first be remembered that, according to Article 15(2), it is sufficient for the infringement of Article 85 to have been committed 'negligently'. That minimal condition is in any event satisfied in this case.

93. In the second place, it is apparent from the previous decisions of the Court and from *Miller*, cited above, [12] and the *BMW* judgment of 12 July 1979 [13] in particular, that for an infringement to be regarded as having been committed 'intentionally' it is irrelevant whether or not those concerned were aware that they were infringing the prohibition contained in Article 85, provided that they could not have been unaware that the contested measures and acts, adopted or assented to by them, had as their object the restriction of competition.

94. That was certainly the case here since the object of the agreement, as defined in the agreement itself, provides more than enough evidence of the members' intention both to restrict competition amongst themselves and to counter any competition on the part of non-members, including undertakings established abroad.

2. *The duration of the infringements*

95. Under the heading of the agreement 'Term and expiry of the contract', we read:

'The present contract is entered into for a period of six years commencing on 1 January 1978 and ending on 31 December 1983. If not terminated it shall automatically be renewed for a period of five years on each expiry date'.

96. Despite their protestations that the agreement was never renewed, not even automatically, the applicants have still not yet produced any notice of termination. The Commission therefore had good grounds for concluding that it remained in force at

11 — See most recently Joined Cases 142 and 156 *British American Tobacco Ltd. and R. J. Reynolds Industries Inc.* v *Commission* [1987] ECR 4487.

12 — [1978] ECR 131, paragraph 18.

13 — Joined Cases 32 and 36 to 82/78 *BMW* v *Commission* [1979] ECR 2435, paragraph 44.

least until 9 April 1984, the date of its first investigative action, particularly since discussions on 'amendments to be made to the current agreement' continued beyond 1 January 1984, a general meeting of members having been held four times after that date (see paragraph 53 of the statement of objections and paragraph 120 of the rejoinder).

97. I would add that even if the Commission were wrong to consider that the agreement lasted until 9 April 1984, a reduction of the fines is not a necessary sequel since the error of appraisal involved less than 100 days out of a total of six years. In the first place, the duration of the infringements is not one of the factors taken into account in determination of the amount of the fines. In the second place it cannot be stated categorically that even if the agreement had been formally terminated on 31 December 1983 its effects would not have extended beyond that date. In such a case Article 85 would have continued to apply. [14]

3. *The gravity of the infringements*

98. The applicants' criticisms that the Commission did not appraise the gravity of the infringements in relation to their effects on the market are without foundation.

99. On the one hand, the Commission devoted a chapter of its decision, namely points 76 to 82, to consideration of the specific effects of the agreement, with express reference to the assessment of the gravity of the infringements. It is immediately apparent from that part of the decision that in that context the Commission did not take account of those measures for the implementation of the Belasco agreement in respect of which it acknowledged that it had been unable to identify any repercussions.

100. In the second place, in the part of the decision devoted to an assessment of the factors involved in determination of the amount of the fine, the Commission stated first that certain of the contested measures constituted 'the most serious of all such infringements' [of the competition rules] (point 105), then referred to the effects of the agreement 'noted above' (point 106) and stated that 'the in-some-respects less restrictive nature of the members' treatment of new products . . . has also been taken into account in assessing the gravity of the infringement . . . ' (point 107).

101. On the basis of those findings, it is also possible to reject the argument as to an inadequate statement of grounds allegedly deriving from the Commission's failure to reply to the arguments concerning the effects of the agreement on the market put forward by the applicants in their response to the statement of objections.

102. The question remains, however, whether those findings are truly reflected in the amount of the fines imposed by the Commission.

103. In that regard it must first be stated that the gravity of the infringements is only one of the factors to be taken into account

14 — See in that connection Case 243/83 *Binon* v *AMP* [1985] ECR 2015, paragraph 17.

in the determination of the amount of the fines. It is apparent from point 104 of the contested decision that the Commission also took account, in addition to the duration of the infringement, 'of each firm's aggregate turnover and turnover from roofing felt in Belgium and, in Belasco's case, its annual expenditure'.

104. Also, the Commission — and similarly the Court in the exercise of the unlimited jurisdiction conferred on it by Article 17 of Regulation No 17 pursuant to Article 172 of the EEC Treaty — has a wide margin of discretion in evaluating the exact impact which one or other of those factors may have on the amount which it finally decides to adopt. That applies also to the factors to be considered in assessing the gravity of the infringements.

105. Finally, Article 15 of Regulation No 17 merely gives a minimum (1 000 units of account) and a ceiling (10% of the turnover achieved in the preceding financial year by each of the undertakings participating in the infringement) for the amount of the fines which the Commission may impose.

106. In this case, since the fines are between 0.75% and 2.5% of the aggregate turnover achieved in 1983 by the undertakings concerned, as reproduced in Annex I to the Commission decision, it cannot be claimed that the Commission did not take sufficient account of possibly 'attenuating' circumstances. Since the Commission considered that all the undertakings should be regarded as equally responsible for the cartel (point 108 of the decision), the different percentages are accounted for by the fact that the Commission also took into consideration the turnover deriving from the business of supplying roofing felt in Belgium.

4. *Observance of the principle of equality*

107. The allegation of breach of the principle of equality is likewise unfounded.

108. It is true that the Court has, as the applicants point out, consistently held that

'that principle requires that similar situations shall not be treated differently unless differentiation is objectively justified'. [15]

109. But in the present case the Commission has duly demonstrated that the respective situations of the members of Belasco and of Belasco itself, on the one hand, and of non-members, on the other, could not be precisely compared.

110. The non-member companies, International Roofing, UPM and Al Asfalt, were never parties to the contested agreement and the sole infringements found to have been committed by them related only to the agreements on discounts which they had

15 — See also Case 215/85 *BALM* v *Société coopérative Raiffeisen* [1987] ECR 1279, paragraph 23.

concluded with the members in May and October 1978 and their actual observance of which was not, moreover, established. Furthermore, by contrast with the members' agreement, those agreements did not relate to new products and lasted only until July or August 1980.

111. The Commission was thus entitled to decide not to impose fines on IR and Al Asfalt — although it did require them to cease forthwith the infringements that they had committed (in so far as they were still in existence) and to refrain in the future from entering into any agreement or engaging in any concerted practice or measure likely to have a similar effect (see Article 5 of the decision).

112. As regards UPM, which had in the past been a member of Belasco and had entered into the 1966 agreement but not the 1978 agreement, there was no need for the Commission to impose any requirement on it in that regard since it had been declared insolvent on 4 July 1980.

113. Since the principle of equality prohibits not only different treatment of situations which are identical but also identical treatment for situations which are different, [16] it does not seem to me that that principle can justify either a reduction or, *a fortiori*, cancellation of the fines imposed on the members of Belasco and on Belasco itself, whose participation in the agreements with non-members is in reality a relatively modest element among the matters complained of as constituting the infringement of Article 85(1) which they were found to have committed.

Conclusion

114. It follows from the foregoing that the Commission applied Article 85(1) of the EEC Treaty correctly to the agreements and decisions in question and did not infringe Article 15 of Regulation No 17 or the principle of equality by imposing the fines at issue on the members of Belasco and Belasco itself.

115. I suggest therefore that the Court dismiss the application in its entirety and order the applicants to pay the costs, including those of the intervener.

16 — See in particular Case 58/86 *Coopérative agricole d'approvisionnement des Avirons* v *Receveur des douanes de Saint-Denis and Directeur régional des douanes de la Réunion*, [1987] ECR 1525, paragraph 15.