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

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* Language of the case: Italian.

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In Case T-14/89,

Montedipe SpA, a company incorporated under Italian law, having its registered office in Milan (Italy), represented by G. Celona, a lawyer with right of audience before the Corte di Cassazione della Repubblica Italiana, P. M. Ferrari, of the Rome Bar, and by G. Aghina and F. Capelli, of the Milan Bar, with an address for service in Luxembourg at the Chambers of G. Margue, 20 Rue Philippe II,

applicant,

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

defendant,

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

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

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

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

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

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

gives the following

Judgment

Facts and background to the action

1 This case concerns a Commission decision fining 15 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 (subsequently Montepolimeri SpA and now Montedipe SpA), Hoechst AG, Imperial Chemical Industries PLC and Shell International Chemical Company Limited (called 'the big four'), which together account for 64% of the market, Enichem Anic SpA in Italy, Rhône-Poulenc SA in France, Alcudia in Spain, Chemische Werke Hüls and BASF AG in Germany and Chemie Linz AG in Austria. Following the expiry of the controlling patents held by Montedison, seven new producers came on stream in western Europe in 1977: Amoco and Hercules Chemicals NV in Belgium, ATO Chimie SA and Solvay et Cie SA in France, SIR in Italy, DSM NV in the Netherlands and Taqsa in Spain. Saga Petrokjemi AS & Co, a Norwegian producer, came on stream in the middle of 1978, and Petrofina SA in 1980. The arrival of the new producers, with nameplate capacity of some 480 000 tonnes, brought a substantial increase in installed capacity in western Europe which for several years was not matched by the increase in demand in that market. This led to low rates of utilization of production capacity, which, however, rose progressively between 1977 and 1983, increasing from 60% to 90%. According to the Decision, supply and demand were roughly in balance from 1982. However, during most of the period covered by the investigation (1977-1983), the polypropylene market was reported to be characterized by either low profitability or substantial losses, owing in particular to the extent of the fixed costs and to the increase in the cost of the raw material, propylene. According to the Decision (point 8), in 1983 Montepolimeri SpA, after taking over the business of Enichem Anic SpA, held 18% of the European polypropylene market, Imperial Chemical Industries PLC, Shell International Chemical Company Limited and Hoechst AG each held 11%, Hercules Chemicals NV slightly below 6%, ATO Chimie SA, BASF AG, DSM NV, Chemische Werke Hüls, Chemie Linz AG, Solvay et Cie SA and Saga Petrokjemi AS & Co from 3 to 5% and Petrofina SA about 2%. The Decision states that there was a substantial trade in polypropylene between Member States because each of the EEC producers operating at that time supplied the product in most, if not all, Member States.

3 Montedipe SpA was one of the producers supplying the polypropylene market before 1977 and held controlling patents which expired in most European countries between 1976 and 1978. It was the main producer of polypropylene and its market share was between about 14.2 and 15%.

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

— ATO Chimie SA, now Atochem ('ATO'),

— BASF AG ('BASF'),

— DSM NV ('DSM'),

— Hercules Chemicals NV ('Hercules'),

— Hoechst AG ('Hoechst'),

— Chemische Werke Hüls ('Hüls'),

— Imperial Chemical Industries PLC ('ICI'),

— Montepolimeri SpA, now Montedipe ('Monte'),

— Shell International Chemical Company Limited ('Shell'),

— Solvay et Cie SA ('Solvay'),

— BP Chimie ('BP').

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

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

Amoco,

Chemie Linz AG ('Linz'),

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

Petrofina SA ('Petrofina'),

Enichem Anic SpA ('Anic').

Linz, which is an Austrian undertaking, contested the Commission's jurisdiction and declined to reply to the request for information. In accordance with Article 14(2) of Regulation No 17, the Commission officials then carried out investi-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2

The undertakings named in Article 1 shall forthwith bring the said infringement to an end (if they have not already done so) and shall henceforth refrain in relation to their polypropylene operations from any agreement or concerted practice which may have the same or similar object or effect, including any exchange of information of the kind normally covered by business secrecy by which the participants are directly or indirectly informed of the output, deliveries, stock levels, selling prices, costs or investment plans of other individual producers, or by which they might be able to monitor adherence to any express or tacit agreement or to any concerned practice covering prices or market sharing inside the EEC. Any scheme for the exchange of general information to which the producers subscribe (such as Fides) shall be so conducted as to exclude any information from which the behaviour of individual producers can be identified and in particular the undertakings shall refrain from exchanging between themselves any additional information of competitive significance not covered by such a system.

Article 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 4

...

Article 5

...'

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

Procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 6 August 1986, the applicant brought this action seeking annulment of the Decision. Thirteen of the fourteen other addressees of the Decision have also brought actions for its annulment (Cases T-1/89 to T-4/89, T-6/89 to T-13/89 and T-15/89).

18 By a separate document lodged on the same day, Montedipe requested the President of the Court of Justice, under Article 83 of the Rules of Procedure of the Court of Justice, to order the suspension of the operation of the Decision pursuant to Article 185 of the EEC Treaty. By Order of 24 September 1986 the President of the Court of Justice upheld that application on condition that the applicant, within 15 days of the date of notification of the Order, entered into a bank guarantee accepted by the Commission for the payment of the fine imposed by Article 3 of the Decision and any interest for late payment, and reserved the costs (Case 213/86 R *Montedipe* v *Commission* [1986] ECR 2623).

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

20 By order of 15 November 1989, the Court of Justice referred this case and the 13 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').

21 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.

22 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.

23 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.

24 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.

25 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.

26 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.

27 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.

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

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

Forms of order sought by the parties

30 Montedipe claims that the Court should:

(i) annul the Commission's decision of 23 April 1986 (IV/31.149 — Polypropylene) in so far as it is addressed to the applicant;

(ii) in the alternative, annul the Commission's decision of 23 April 1986 in so far as it imposes a fine on the applicant;

(iii) in the further alternative, annul the decision of 23 April 1986 in so far as it imposes on the applicant a fine of ECU 11 000 and reduce the fine to a nominal or in any event fair amount, or one which at least takes account of the rules on limitation of actions;

(iv) in any event:

— order the Commission to pay all the costs;

— order the Commission to reimburse the applicant for all the costs incurred during the administrative procedure;

— order the Commission to pay compensation for all the harm associated with the implementation of the contested decision or the establishment of a bank guarantee for its implementation, including interest and an allowance for inflation on the sums paid in implementation or for the establishment of the guarantee.

As a preliminary matter, the applicant requests that by way of measures of inquiry witnesses be heard to establish the accuracy of the accounting data submitted by the applicant in the attached tables concerning its losses on polypropylene production.

Witnesses:

— Montepolimeri's financial controller during the material period,

— Montepolimeri's chief accountant during the material period;

— the members of Montepolimeri's audit committee during the material period.

The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

Substance

31 It is necessary to examine, *first*, the applicant's grounds of challenge relating to a breach of the rights of the defence allegedly committed by the Commission in so far as it (1) lacked impartiality in its preparation of the Decision, (2) altered its original objections and (3) based the Decision on documents which were not part of the proceedings; *secondly*, the grounds of challenge relating to proof of the infringement concerning (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty whereby it is contended that the Commission (A) did not correctly define the infringement, (B) did not correctly assess the anti-competitive effect, (C) did not correctly assess

how trade between Member States was affected and (D) failed to take into account a number of elements of justification; *thirdly*, the grounds of challenge based on a breach of the principle of freedom of assembly; *fourthly*, the grounds of challenge relating to the reasoning of the Decision; and, *fifthly*, the grounds of challenge relating to the determination of the fine, which is alleged to be (1) partially time-barred, (2) disproportionate to the duration of the alleged infringement and (3) disproportionate to the gravity of the alleged infringement.

The rights of the defence

1. *Lack of impartiality in the preparation of the Decision*

32 The applicant contends that the Commission failed in its duty to act objectively and displayed pre-conceived ideas in this case. The Commission refused from the start to contemplate the possibility that the meetings of polypropylene producers could have had a purpose other than the implementation of a cartel. Accordingly, it took into account only the factors which supported that view and disregarded those which opposed it or did not support it. That is confirmed by the fact that before the formal adoption of the Decision the Commission had already given the press information on it.

33 It adds that a comparison of the minutes of the hearings with the Decision shows clearly that significant statements made by the hearing officer and the Commission's representatives are not mentioned in the Decision. That is true with regard to the clarity with which the Commission formulated its objections, the possibility that the Commission might abandon certain of them, the role of the target prices and the existence of vigorous competition during the period under examination. It is for that reason that in its reply the applicant asks the Court to examine the hearing officer's report in order to determine whether the Commission intentionally disregarded the factors which told against its view.

34 The applicant concludes that the Commission's lack of objectivity is further confirmed by the fact that it was only on a second reading that the draft decision submitted by the Member of the Commission responsible for competition matters could be adopted by the Commission.

35 The Commission denies that it approached the case with preconceived ideas and displayed partiality in selecting the evidence favourable to its argument. It states that it is not true that it divulged the contents of the Decision in advance, and points out that the information which appeared in the press could just as well have been provided by the undertakings themselves. It considers that in any event that is not a ground for annulment of the Decision (judgments of the Court of Justice in Case 27/76 *UBC* v *Commission* [1978] ECR 207, paragraph 286, and Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission* [1975] ECR 1663, paragraphs 91 and 103).

36 As regards the remarks made by the hearing officer, it argues that the Decision need not reflect the views expressed by each of the Commission's officials during the administrative procedure. It adds that the application for production of the hearing officer's report was rejected by the Court of Justice in its order of 11 December 1986 in Case 212/86 R *ICI* v *Commission* (not published in the Reports of Cases). It adds that in any event this plea is inadmissible since it was raised for the first time at the stage of the reply.

37 Finally, the Commission states that the fact that the Decision was not adopted by the Commission at its fist reading cannot in any event constitute evidence of lack of objectivity on the part of the Commission or the lack of foundation for the Decision.

38 The Court notes first of all that the request made by the applicant to the Court at the stage of the reply that it should examine the hearing officer's report constitutes a new application which must be declared inadmissible under Article 44(1) of the Rules of Procedure of the Court of First Instance and Article 40(1) of the Rules of Procedure of the Court of Justice.

39 The Court points out, in relation to the hearing officer, that the relevant provisions of his 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.'

40 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.

41 Consequently, the applicant cannot derive an argument from the fact that the hearing officer's report was not transmitted to the members of the Advisory Committee or those of the Commission. On this question the Court of Justice has held that the hearing officer's report is in the nature of an opinion for the Commission, which is in no way bound to follow it, and that the report does not therefore constitute a decisive factor which must be taken into account by the Community court in performing its judicial review (order of 11 December 1986 in Case 212/86-R, cited above, paragraphs 5 to 8). Respect for the rights of the defence is ensured to the requisite legal standard if the various bodies involved in drawing up the final decision have been properly informed of the arguments put forward by the undertakings in response to the objections notified to them by the Commission and to the evidence presented by the Commission in support of those objections (judgment of the Court of Justice in Case 322/81 *Nederlandsche Banden-Industrie-Michelin NV* v *Commission* [1983] ECR 3461, paragraph 7 at p. 3498).

42 Since the hearing officer's report has no decisive nature which the Community courts must take into account in exercising their review jurisdiction, *a fortiori* the Commission is in no way obliged to align itself with the observations which may have been made by the hearing officer or other representatives of the Commission at the hearing and which the Members of the Commission may have been informed of through the minutes of the hearing.

43 Furthermore, it should be observed that even if the information concerning the Decision which was divulged before its adoption was provided to the press by the Commission there is nothing to justify the conclusion that the content of the Decision would have been different if that information had not been made public.

44 Moreover, the fact that the Decision was not adopted on its first reading cannot in any event be regarded as evidence of any lack of objectivity on the part of the Commission.

45 Finally, the Court considers that the question whether the Commission arrived at a premature judgment on the basis of preconceived ideas is indissociable from the question whether the findings of fact made by the Commission in the Decision are supported by the evidence which it has produced. Since this is a question of substance related to proof of the infringement, it must be examined at a later stage together with the other questions relating to proof of the infringement.

2. *Alteration of the original objections*

46 The applicant maintains that in the Decision the Commission upheld objections which were not made in the statements of objections notified to it. In the latter the Commission proceeded on the basis that the addressees had fixed and observed prices on which they had agreed or had implemented a concerted practice. In the letter which it sent on 29 March 1985 to the addressees of the statement of objections the Commission then stated, in reliance on the judgments of the Court of Justice in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 111 to 114, and Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck* v *Commission* [1980] ECR 3125, paragraph 86, that it was not necessary to define the objections legally as concerning agreements or concerted practices. Finally, in the Decision the Commission now states that the conduct of the undertakings in question contained the elements making up a true 'agreement' within the meaning of Article 85, except as regards certain marginal aspects, which have the character of a 'concerted practice'.

47 The Commission replies that it is clear from the case-law of the Court of Justice (judgments in Case 41/69, cited above, at paragraphs 91 to 93, and Joined Cases 209 to 215 and 218/78, cited above, at paragraph 68) that the Decision is not required to be a replica of the statement of objections and that it was entitled to re-draft or supplement its arguments. It states, however, that in the Decision it did not change its assessment of the nature of the cartel.

48 This Court finds that the legal assessment made by the Commission in the Decision, as interpreted by the applicant, is in no way new since it was already contained in the general statement of objections addressed to the applicant and the other undertakings to which the Decision was addressed, in particular in points 1 and 128. Point 1 is worded as follows:

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

and point 128 states that:

'To the extent that the continuing collaboration between the parties in the framework of the meetings may, in relation to some questions and at some periods, have lacked the degree of precision required to constitute an "agreement" properly called, there was still a concerted practice.'

49 That view was repeated in the letter sent by the Commission to the addressees of the statement of objections on 29 March 1985, which states that:

'The measure of consensus on pricing and volume . . . leads to the conclusion that the unlawful collusion between the participants in the meetings can properly be

categorized as "agreement" or "agreements" in the sense of Article 85(1), which had both the object and the effect of restricting competition. ... There may be cases ... where there are elements of both "agreements" and "concerted practices". ... Thus in the present case some of the arrangements of the producers attending meetings may have fallen short of actual detailed "agreement" but they nevertheless still took certain steps with the intention of co-ordinating their commercial policies. ... [T]he particular manifestation of collusion might be considered a concerted practice. ... The Commission is of the opinion that in substance little turns on the precise form which the alleged collusion took, and that the producers participated in a prohibited cartel which presents the aspects of both "agreements" and "concerted practices".'

The purpose of the letter of 29 March 1985 was to supplement the general statement of objections as regards the legal classification of the infringement, since it states:

'By letter dated 28 September 1984 the legal representatives of a number of the polypropylene producers involved in the present proceedings maintained that in its objections the Commission had not clearly expressed the legal position against which the producers had to defend themselves and had exacerbated the situation by shifting its position during the hearing. ... I do not accept that argument. The facts were treated in extenso in the objections and the legal issues, although succinctly expressed, were clearly delineated. ... [F]or the avoidance of any doubt, and at the risk of repetition, I will set out the following matters for your consideration' (this is followed by eight pages of explanation, including two on the legal classification of the infringement)

and the letter closes in the following terms:

'You may submit your written observations on the matters covered by this letter within six weeks from the date of receipt. A further oral hearing is foreseen in the near future for three undertakings which were not in a position to make their presentation in November, and if you wish to attend, the opportunity may be given for you then to expand your written comments not only on this matter but also on my separate letter to you of today's date dealing with certain other issues.'

50 Consequently, the Commission at most re-drafted and supplemented its arguments in the Decision, but did not alter its original objections.

51 This ground of challenge must therefore be dismissed.

3. *Allegation that the Decision was based on material extraneous to the proceedings*

52 The applicant observes in its reply that at a press conference representatives of the Commission justified the Decision and the amount of the fine on the basis that during the material period the undertakings had benefited from an increase in prices of between 15 and 40%. The applicant concludes from that that the Decision was adopted on that basis, on the grounds of factors which did not appear in the statement of objections, the case file or the Decision itself. It considers that in the absence of those factors at least the amount of the fines should have been lower.

53 The Commission considers that that is a new plea in law raised for the first time at the stage of the reply, and adds that in any event that argument has already been rejected by the Court of Justice in its order of 11 December 1986 (Case 212/86 R *ICI* v *Commission*, not published in the Reports of Cases), in which it refused to order production of the Commission's file.

54 This Court considers that the statements made at the press conference following the adoption of the Decision, to the effect that the infringement resulted in an increase of between 15 and 40% in the general level of prices, contradict the grounds set out in the Decision itself. Accordingly, they may be used only in order to show that the Decision is based in reality on grounds other than those stated, which would constitute a misuse of powers (see the order of the Court of Justice in Case 212/86 R *ICI* v *Commission*, cited above). The only way in which this Court can determine whether there was a misuse of powers in this case is to examine whether the grounds stated for the Decision support its operative part, in particular as regards the amount of the fine. This plea must therefore be

considered with the other questions relating to the proof of the infringement and the determination of the fine.

Proof of the infringement

55 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.

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

1. *The findings of fact*

A. The floor-price agreement

(a) The contested decision

57 The Decision (point 16, first, second and third paragraphs; see also point 67, first paragraph) states that during 1977, after seven new polypropylene producers came on stream in western Europe, the established producers initiated discussions with a view to avoiding a substantial drop in price levels and attendant losses. As part of those discussions the major producers, Monte, Hoechst, ICI and Shell, initiated a 'floor-price agreement' which was to be in operation by 1 August 1977. The original arrangement did not involve volume control but if it proved successful tonnage restrictions were envisaged for 1978. That agreement was to run for an

initial period of four months and details of it were communicated to other producers, including Hercules, whose marketing director noted as the basis for floor prices for the major grades for each Member State a raffia grade market price of DM 1.25/kg.

8 According to the Decision (point 16, fifth paragraph), ICI and Shell admit that there were contacts with other producers as to how the price slide could be checked. According to ICI, a price level may have been suggested below which prices should not be permitted to fall. It is confirmed by ICI and Shell that discussions were not limited to the 'big four'. Precise details of the operation of the floor-price agreement could not be ascertained. However, by November 1977, when the raffia price was reported as having fallen to around DM 1.00/kg, Monte announced an increase to DM 1.30/kg due to take effect on 1 December, and on 25 November the trade press quoted the other three majors as expressing their support for the move, with similar increases planned from the same date or later in December.

9 According to the Decision (point 17, first and second paragraphs), it was at about this time that the system of regular meetings of the polypropylene producers began, and ICI claims that meetings were not held until December 1977 but has admitted that contact was occurring between producers before that date, probably by telephone and on an *ad hoc* basis. Shell says that its executives 'may have had discussions concerning price with Montedison in or about November 1977 and Montepolimeri may have suggested the possibility of increasing prices and may have sought (Shell's) views on its reactions to any increase'. In the third paragraph of point 17 of the Decision it is stated that while there is no direct evidence of any group meetings being held to fix prices before December 1977, the producers were already informing meetings of a trade association of customers, the EATP, held in May and November of 1977, of the perceived need for common action to be taken to improve price levels. In May 1977 Hercules had stressed that the 'traditional industry leaders' should take the initiative, while Hoechst had indicated its belief that prices needed to rise by 30 to 40%.

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

(b) Arguments of the parties

61 The applicant maintains that the Commission puts forward only one piece of evidence to support the allegation that an agreement on floor prices was concluded in 1977, namely a handwritten note made by Hercules's marketing director (main statement of objections, Appendix 2). That document shows at most that there were contacts between six or seven producers concerning the determination of a price level which could cover production and sales costs so as to attenuate the serious financial difficulties faced by those undertakings at the time.

62 Those contacts cannot, it says, be regarded as proof of the existence of a structured and detailed agreement, and certainly not of a plan setting out in detail the tasks allocated to each participant in the agreement.

63 The applicant adds that those contacts cannot be linked to the meetings which subsequently took place since the concept of floor prices which was discussed in the course of those contacts was not taken up in the later meetings.

64 The applicant derives further support from the fact that the prices discussed during the 1977 contacts were never achieved on the market.

5 The Commission replies that the applicant has put forward no arguments challenging the content of the Hercules note, which, describing the floor-price agreement (main statement of objections, Appendix 2), states that the 'major producers made agreement'.

6 It adds that that note must be viewed in the context of the contacts maintained by the producers at the time, of which Shell and ICI have acknowledged the existence.

7 The Commission further states that the producers were each able to determine their own profitability threshold and therefore had no reason to consult each other on that issue.

(c) Assessment by the Court

8 The Court observes that the text of the note made by the Hercules employee to which the Commission refers is clear and unambiguous. It states:

'Major producers have made agreement (Mont., Hoechst, Shell, ICI) 1. No tonnage control; 2. System floor prices — DOM less for importers; 3. Floor prices from July 1. definitely Aug. 1st when present contracts expire; 4. Importers restrict to 20% for 1000 tonnes; 5. Floor prices for 4 month period only — alternative is for existing; 6. Com.[panies] to meet Oct. to review progress; 7. Subject [of the] scheme working — Tonnage restrictions would operate next year.'

[There then follows a list of prices for three grades of polypropylene in four national currencies, including DM 1.25/kg for raffia.]

69 It is to be observed that, faced with that evidence, the applicant has put forward nothing to weaken the evidentiary value given by the Commission to that note. Although the word 'agreement' may in some cases refer to an identity of views it should be observed that in the note it is part of the expression 'made agreement', which can only mean 'concluded an agreement' and thus refers to something more than identity of views, a common intention among the applicant and three other producers on floor prices.

70 Nor does the fact that the agreed floor prices could not be achieved tell against the applicant's participation in the floor-price agreement, since even if that fact is assumed to be established, it would at the most tend to show that the floor prices were not implemented, not that they were not agreed. However, far from asserting that the floor prices were achieved, the Decision (point 16, last paragraph) states that the price of raffia had fallen to around DM 1.00/kg in November 1977.

71 Moreover, the Court considers that floor prices are no different in nature from price targets, which, according to the Decision, were subsequently fixed by the polypropylene producers.

72 It follows that the Commission has established to the requisite legal standard that in mid-1977 a common purpose emerged among several polypropylene producers, including the applicant, concerning the fixing of floor prices.

B. The system of regular meetings

(a) The contested decision

3 The Decision (point 17) states that the system of regular meetings of polypropylene producers began at about the end of November 1977. It goes on to state that ICI claims that meetings were not held until December 1977 (that is to say, after Monte's announcement) but admitted that contact was occurring between producers before that date.

4 According to the Decision (point 18, first paragraph), at least six meetings were held during 1978 between senior managers responsible for the overall direction of the polypropylene business of some of the producers ('bosses'). This system soon evolved to include a lower tier of meetings attended by managers possessing more detailed marketing knowledge ('experts') (ICI's reply to the request for information under Article 11 of Regulation No 17, main statement of objections, Appendix 8). The Decision asserts that the applicant was a regular participant at those meetings at least until the end of September 1983 (point 105, fourth paragraph) and that it held the chairmanship until August 1982 (point 19, second paragraph).

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

6 According to the Decision (point 68, second and third paragraphs), at the end of 1982 the 'big four' began to meet in restricted session the day before each bosses' meeting. These so-called 'pre-meetings' provided a forum in which the four major producers could agree a position between themselves prior to the full meeting in order to encourage moves towards price stability by adopting a united approach. ICI admitted that the topics discussed in pre-meetings were the same as those dealt with by the bosses' meetings which followed, but Shell denied that the 'big four' meetings were in any sense preparatory to a plenary meeting or involved coordination on a common stance before the next meeting. The Decision states, however, that the records of some of those meetings (in October 1982 and May 1983) disprove this claim of Shell.

(b) Arguments of the parties

77 The applicant does not deny having participated in the periodic meetings of polypropylene producers. However, it argues that the Commission has misrepresented the scope of the meetings by regarding them as evidence of an agreement or concerted practice. It states that the sole purpose of the meetings was to discuss the catastrophic state of the market.

78 The applicant asserts that the Commission based itself blindly on ICI's notes of the producers' meetings in order to support its view that price and quota agreements were concluded during the meetings. These, however, were internal notes containing the personal remarks and assessments of their author, which were neither known to nor approved by the other participants.

79 The Commission, for its part, states that the meetings in which the applicant took part formed part of a system which became more rigidly structured as time went on.

80 It states that the purpose of the meetings was to decide on price initiatives, to agree on sales volume targets, to compare market shares and to adopt accompanying measures such as the 'account leadership' system. The purpose was thus to agree on the harmonization of the sales strategies of the participants in the meetings.

81 The Commission adds that the applicant puts forward no valid reason to doubt the reliability of the documents produced by the Commission, in particular the notes of meetings drawn up by employees of ICI.

(c) Assessment by the Court

The Court notes that the applicant does not deny its participation in the periodic meetings of polypropylene producers and that it must therefore be held that it participated in all the meetings which the Commission alleges to have been held.

In this regard, the Court considers that the Commission was fully entitled to take the view, based on the information which was provided by ICI in its reply to the request for information (main statement of objections, Appendix 8) and was borne out by numerous meeting notes, that the purpose of the meetings was, in particular, to fix target prices and sales volumes. That reply contains the following passages:

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

and

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

84 The Court observes that the contents of the notes obtained from ICI are confirmed by various documents, such as a number of tables relating to the sales volumes of the various producers and price instructions broadly corresponding in their amount and date of entry into force to the target prices mentioned in those meeting notes. Similarly, the replies of the various producers to the requests for information addressed to them by the Commission bear out in the aggregate the contents of those notes.

85 Consequently, the Commission was able to take the view that the meeting notes found at the premises of ICI reflected fairly objectively what went on at those meetings which were chaired, from August 1982 onwards, by different members of ICI's staff, which increased the need for them properly to inform those members of ICI's staff who did not attend particular meetings about what had transpired at them by making notes of them.

86 In those circumstances it is for the applicant to provide another explanation of the subject-matter of the meetings in which it participated, by putting forward specific evidence such as notes taken by its own employees at meetings which they attended or the testimony of those persons. It must be observed that the applicant has not put forward or offered to put forward such material before the Court.

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

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

As regards the particular role played by the 'big four' in the system of meetings, it must be noted that Monte does not deny that meetings between the 'big four' took place on 15 June 1981 in the absence of Hoechst, on 13 October and 20 December 1982, and on 12 January, 15 February, 13 April, 19 May and 22 August 1983 (Decision, Table 5, and main statement of objections, Appendix 64).

After December 1982, those meetings of the 'big four' took place the day before the 'bosses" meetings, and their purpose was to determine the steps which they could take together in order to bring about a rise in prices, as is shown by the summary note prepared by an ICI employee in order to inform one of his colleagues about what had transpired at a pre-meeting on 19 May 1983 which the 'big four' had attended (main statement of objections, Appendix 101). That note mentions a proposal to be submitted to the 'bosses" meeting on 20 May.

It follows that the Commission has established to the requisite legal standard that the applicant participated regularly in the regular meetings of polypropylene producers between the end of 1977 and September 1983, that until August 1982 the meetings were chaired by members of the applicant's staff, that the purpose of those meetings was, in particular, to set price and sales volume targets and that they were part of a system.

C. The price initiatives

(a) The contested decision

According to the Decision (points 28 to 51), a system for fixing price targets was implemented through price initiatives of which six could be identified, the first

lasting from July to December 1979, the second from January to May 1981, the third from August to December 1981, the fourth from June to July 1982, the fifth from September to November 1982 and the sixth from July to November 1983.

93 With regard to the first of those price initiatives, the Commission (Decision, point 29) states that it has no detailed evidence of any meetings held or price initiatives undertaken in the first part of 1979. However, a note of a meeting held on 26 and 27 September 1979 shows that a price initiative had been planned based on a raffia grade price of DM 1.90/kg applicable from 1 July and DM 2.05/kg from 1 September. The Commission has price instructions from certain producers, including Monte, showing that those producers had given orders to their sales offices to apply this price level or its equivalent in national currencies from 1 September, in most cases before the planned price increase was announced in the trade press (Decision, point 30).

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

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

comparing 'achieved prices' for October and November 1980 with what are referred to as 'list prices' for January 1981 of DM 1.50/1.70/2.00. The original plan was to apply these levels from 1 December 1980 (a meeting was held in Zurich on 13 to 15 October) but this initiative was postponed to 1 January 1981.

The Decision (point 33) then refers to Monte's participation in two meetings in January 1981, at which it was decided that a price increase, fixed in December 1980 for 1 February 1981, was required in two stages on the basis of DM 1.75/kg for raffia: the 1 February target was to remain at DM 1.75/kg and a target of DM 2.00/kg was to be introduced 'without exception' from 1 March. A table was drawn up in six national currencies of the target prices for six principal grades, to come into effect on 1 February and 1 March 1981.

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

As regards the third price initiative, the Decision (point 35) states that Shell and ICI had already foreseen a further price initiative in September/October 1981 in

June of that year when the slowing down of the first-quarter price rise had become apparent. Shell, ICI and Monte met on 15 June 1981 to discuss methods of implementing higher prices in the market. Within a few days of this meeting both ICI and Shell instructed their sales offices to prepare the market place for a major rise in September based on a plan to move the raffia price to DM 2.30/kg. Solvay also reminded its Benelux sales office on 17 July 1981 to warn customers of a substantial price increase due to take effect on 1 September, the exact amount of which was to be decided in the last week of July, when an experts' meeting was planned for 28 July 1981. The original plan to go for DM 2.30/kg in September 1981 was revised, probably at this meeting, with the planned level for August back to DM 2.00/kg for raffia. The September price was to be DM 2.20/kg. A hand-written note obtained at the premises of Hercules and dated 29 July 1981 (the day after the meeting, which Hercules probably did not attend) lists these prices as the 'official' prices for August and September and refers in cryptic terms to the source of the information. More meetings were held in Geneva on 4 August and in Vienna on 21 August 1981. Following these sessions, new instructions were given by producers to go for a price of DM 2.30/kg on 1 October. BASF, DSM, Hoechst, ICI, Monte and Shell gave virtually identical price instructions to implement these prices in September and October.

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

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

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

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

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).

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

105 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).

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

107 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.

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

109 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. Monte, on the other hand, had already on 17 May instructed its sales offices to apply an increase to come into force in June and to be carried on in July.

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.

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

11 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.

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

113 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.

114 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

115 The applicant comprehensively denies participating in all the price initiatives mentioned in the Decision.

116 It states first of all that ICI's notes of the meetings cannot be sufficient to prove the existence of agreements within the meaning of Article 85(1) of the EEC Treaty and that in any event those notes contain frequent allusions to the absence of consensus between the producers present, as in the case of the notes of the meetings of 2 September, 21 September and 2 November 1982 or the meetings of 27 May and 15 June 1981, or the notes of the bilateral meetings between certain producers (main statement of objections, Appendices 29, 30, 32, 64, 95 and 99 respectively).

117 The applicant goes on to state that the absence of price agreements is confirmed by the fact, established by an audit carried out by Coopers & Lybrand, an independent firm of accountants, that almost all the sales of the different producers, in particular the applicant, were made at prices significantly below both the target prices alleged to have been agreed upon by the producers and the applicant's price instructions, which were internal theoretical objectives intended for its own sales offices.

18 It asserts that it has thus set out an impressive set of facts which show that it never considered itself bound by the results or proposals arrived at in the meetings and that it determined its own conduct on the market in complete independence.

19 The applicant considers that by inferring from the fact that new price objectives were sent out after the meetings that those objectives had been set in the meetings the Commission applied 'post hoc' reasoning and disregarded the case-law of the Court of Justice (Joined Cases 29 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679). In so doing it also disregarded basic concepts of economics, such as the fact that the prices contemplated by the producers could differ only slightly because of the constant — and virtually identical for all of them — increase in production costs or the fact that smaller undertakings follow the prices of the leading undertaking.

20 It argues that the price initiatives were the result not of the meetings but of the actual situation which the producers faced. The sole objective was a balance between costs and revenues, and it could be achieved only by attempting to increase prices. If those attempts were repeated, it was because on each occasion they were rejected by movements in the market. None of the undertakings had any interest in increasing its market share, since that merely increased its losses. In those circumstances there was no longer any competition on the market and the rules intended to safeguard competition under normal circumstances could no longer apply.

21 It adds that although each undertaking must determine its own conduct independently, that does not mean that independence must necessarily entail diversity. It therefore denies that the parallelism in the internal price instructions issued by the producers has any probative value.

22 Finally, it submits that the producers were conscious of their complete inability to control market forces, which led them to assess the possibilities offered by the market in an identical manner.

123 The Commission points out that it was on the basis of conclusive documents that it established the existence of the producers' commitment to the price initiatives and Monte's participation in that commitment. The allusions to the absence of consensus concern producers other than Monte and mention recriminations directed at them show the existence of commitments and prove in particular Monte's commitment.

124 It adds that the fact that the prices obtained were different from the target prices is not conclusive inasmuch as a common strategy for negotiation with customers itself restricts competition, because even if it does not guarantee that the prices actually invoiced will be identical it defines the point of departure for negotiations and thus indirectly affects their result.

125 The Commission observes that it is not true to say that the Decision is based on the simultaneity and similarity of price instructions among themselves and with the target prices. That similarity in fact merely confirms the documentary evidence. The 'price leadership' argument raised by the applicant is worthless for the same reason.

126 It disputes the argument by which Monte seeks to show that the conduct of the undertakings can be attributed to the market situation and was not the result of the meetings between competing producers. If, in a situation of over-production, a single undertaking increases its prices it will make no sales and will be obliged to reverse its decision. Accordingly, it can hope to increase its prices only if it ensures that its competitors will try to do the same.

127 The Commission does not deny that the target price was different from the price which customers were actually charged or that the situation of the market influenced negotiations with customers. The fact that remains that mutual agreement to take a certain price as the point of departure for negotiations sets the framework for those negotiations and results in actual prices which are different from those which would have resulted from negotiations without any prior commitment.

(c) Assessment by the Court

28 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'.

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

30 In this regard, it must be noted that the applicant has raised two arguments to show that it did not, at the regular meetings of polypropylene producers, subscribe to the price initiatives agreed upon. It argues first that it took no account of the outcome of the meetings in determining its conduct on the market as regards prices, the entirely competitive nature of which is clear from the Coopers & Lybrand audit, and, secondly, that the economic context in which its price instructions were issued explains their correspondence to those of the other producers.

131 Neither of those arguments can be accepted as evidence capable of corroborating the applicant's assertion that it did not subscribe to the agreed price initiatives. Even if the first argument were supported by the facts it would not gainsay the applicant's participation in the fixing of price targets at the meetings but would at most tend to show that the applicant did not put into effect the results of those meetings. Indeed, the Decision in no way asserts that the applicant charged prices which always corresponded to the price targets agreed upon at the meetings, which shows that the contested decision does not rely on the applicant's implementation of the outcome of meetings in order to establish that it participated in the fixing of those price targets.

132 In any event, the applicant cannot effectively argue that its price instructions were purely internal since, although they were indeed purely internal inasmuch as they were sent by headquarters to the sales offices, they were nevertheless sent with a view to their being carried out and therefore in order to produce directly or indirectly external effects, which negates their internal character.

133 As regards the second argument put forward by the applicant, the Court considers that the economic context of the price initiatives cannot explain the manner in which the price instructions issued by the different producers correspond to each other and to the price targets set at the producers' meetings. The identical nature of the constraints faced by the various producers and the situation of market crisis cannot explain the fact that their price instructions, expressed in different national currencies, were identical, since the identical nature of those constraints was restricted to certain factors of production, such as the price of raw materials, and did not relate to general expenses, wage costs or tax rates, which meant that the profitability threshold for the various producers was significantly different. That is shown, for example, by the note of the meeting of the 'European Association for Textile Polyolefins' of 22 November 1977 (main statement of objections, Appendix 6), according to which in order to reach the profitability threshold Hoechst sought a price of DM 1.85/kg, ICI a price of DM 1.60/kg, Rhône-Poulenc a price of FF 3.50 and Shell a price of DM 1.50/kg.

34 Nor can the identical nature of those constraints explain the virtual simultaneity of the price instructions issued by the applicant and by the other producers.

35 Moreover, there can be no question of any form of 'price leadership' on the part of a producer, since the Commission has proved to the requisite legal standard that this producer participated with others in consultation on prices.

36 It should be added that 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.

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

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

(a) The contested decision

38 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.

139 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.

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

(b) Arguments of the parties

141 The applicant submits that it did not participate in the 'account leadership' system and that no such system was ever implemented, even if it was discussed. On the

basis of a study drawing on the notes of the meetings of 2 September and 2 December 1982 (main statement of objections, Appendices 29 and 33) it states that its sales to customers which are mentioned in those notes, whose 'account leader' it is said to have been, accounted for only 0 to 18% of their purchases. In those circumstances it would have been impossible for it to play the role of 'account leader' in relation to those customers.

142 The Commission refers to the evidence mentioned in the Decision in order to assert that the participants in the meetings agreed on the establishment of the 'account leadership' system, and even if it is true that the system was only imperfectly implemented the fact remains that it was adopted at the meetings.

(c) Assessment by the Court

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

144 It must be concluded that in participating in the meetings during which that set of measures was adopted (in particular those of 13 May, 2 and 21 September 1982 (main statement of objections, Appendices 24, 29, 30], the applicant subscribed to it, since it has not adduced any evidence to prove the contrary. In this regard, the adoption of the system of 'account leadership' is clear from the following passage appearing in the record of the meeting of 2 September 1982:

'about the dangers of everyone quoting exactly DM 2.00 A."s point was accepted but rather than go below DM 2.00 it was suggested & generally agreed that

others than the major producers at individual accounts should quote a few pfs higher. Whilst customer tourism was clearly to be avoided for the next month or two it was accepted that it would be very difficult for companies to refuse to quote at all when, as was likely, customers tried to avoid paying higher prices to the regular suppliers. In such cases producers would quote but at above the minimum levels for October'.

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

145 As regards the question of 'account leadership', the Court finds that it is clear from the notes of the meetings of 2 September 1982 (main statement of objections, Appendix 29), 2 December 1982 (main statement of objections, Appendix 33) and of spring 1983 (main statement of objections, Appendix 37), which were all attended by the applicant, that during those meetings the producers present at them agreed to that system.

146 It should be added that the study produced by the applicant concerns only seven customers for which the Commission alleges that Monte was designated 'account

leader', Eurofil, Seal, Sisal, T. Radici, Polymekon, Its Artea and Seeber, although its name appears alongside those of nine other customers, that is to say, in the table attached to the note of the meeting of 2 September 1982, Baumhüter, De Magistris, Uco, Bexer, Alfa and Bellotex and, in the table attached to the note of the meeting of 2 December 1982, Sekisni, Campanini, De Magistris and Sergal. Consequently, the Court considers that the excessively limited scope of the study means that the conclusions which the applicant seeks to draw from it cannot be supported.

147 The implementation, at least in part, of this system is evidenced by the note of the meeting of 3 May 1983 (main statement of objections, Appendix 38), in which it is stated *inter alia*:

'*Belgium.* A long discussion took place on the 5 Belgian A/Cs. (...) Generally speaking raffia prices appeared to be from [BFr] 32.50 to 34.50 and fibre prices from 37 to 37.50. The point was made that some other accounts were lower than the target customers. It was agreed that contenders would quote BFr 36 in May with non-contenders offering 38'.

'*Denmark.* A long discussion took place on Jacob Holm who is asking for quotations for the 3rd quarter. It was agreed not to do this and to restrict offers to the end of June. April/May levels were at Dkr 6.30 (DM 1.72). Hercules were

definitely in and should not have been so. To protect BASF, it was agreed that CWH[üls] + ICI would quote Dkr 6.75 from now to end June (DM 1.85)...'

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

'In the Spring of 1983 there was a partial attempt by some producers to operate the "Account Leadership" scheme... Since Hercules had not declared to the "Account Leader" its interest in supplying Jacob Holm, the statement was made at this meeting in relation to Jacob Holm that "Hercules were definitely in and should not have been so". It should be made clear that this statement refers only to the Jacob Holm account and not to the Danish market. It was because of such action by Hercules and others that the "Account Leadership" scheme collapsed after at most two months of partial and ineffective operation. The method by which Hüls and ICI should have protected BASF was by quoting a price of DK 6.75 for the supply of raffia grade polypropylene to Jacob Holm until the end of June.'

48 That implementation is further corroborated by the note of a meeting in spring 1983 (main statement of objections, Appendix 37) which includes, under the heading 'Key Accounts', figures for the applicant's deliveries to various undertakings for which it had been designated 'account leader' either at the meeting of 2 September 1982 or at that of 2 December 1982, such as Baumhüter, Campanini, Polymekon, Eurofil and Bellotex.

49 The Court further observes that the applicant does not specifically deny having taken part in the decision to adopt other measures designed to facilitate the implementation of the price initiatives.

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

E. Target tonnages and quotas

(a) The contested decision

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

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

153 Volume targets (in tonnes) were set for 1979 based in part at least on sales in the preceding three years. Tables found at the premises of ICI show the 'revised target' for each producer for 1979 compared with actual tonnage sales achieved during that period in Western Europe (Decision, point 54).

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

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

156 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 described by ATO as a 'quasi-consensus' and, among the majors, ICI and Shell remained at about 11% with Hoechst slightly below at 10.5%. Monte, always the largest producer, had advanced slightly to take a 15% market share compared with 14.2% the previous year.

157 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. ICI considered it crucial to the success of any new plan that the 'big four' should present a united front to the other producers. Shell's view as communicated to ICI was that Shell, ICI and Hoechst ought each to have a quota of 11%. The ICI proposal for 1983 would have given the Italian producers 19.8%, Hoechst and Shell 10.9% each and ICI itself 11.1% (Decision, point 62). 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.

158 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).

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

(b) Arguments of the parties

160 The applicant acknowledges that discussions took place on several occasions concerning various proposals for the introduction of target prices. However, there was no agreement but only exchanges of information, and even these were not checked and were often untrue, as is shown by the differences between the figures made available through the FIDES data exchange system and the statistics drawn up subsequently. The producers always pursued their individual interests and never regarded themselves as bound. The Commission itself attached numerous reservations to the Decision, recognizing that the allocation of target quotas was not accompanied by any penalty mechanism in the event of non-compliance with the alleged quotas, but it nevertheless concludes, wrongly, that a quota system existed.

161 It submits that the Commission has not proved that the alleged cartel had any effect on the market. In fact there were significant differences between the target

quotas allegedly allocated to Monte and its market share as subsequently calculated. Similar differences, sometimes greater, may be observed in respect of the other producers as well (main statement of objections, Appendix 17).

52 The applicant goes on to state that the market share of each producer fluctuated significantly during this period, which shows that they were all pursuing independent policies.

53 Finally, it points out that the Commission is neglecting the fact that in a situation of stagnant demand and excessive supply every producer knows that if it wishes to increase prices it must give up some of its sales.

54 The Commission, on the other hand, maintains that quota agreements were concluded for 1979, 1980 and 1983. For 1981 and 1982 it considers that no final agreement was reached but that provisional solutions were adopted.

55 As regards 1979, the Commission considers that it is clear beyond doubt from the table headed 'Producers' Sales to West Europe' (main statement of objections, Appendix 55) that Monte participated in a quota system. That table sets out for the various producers the sales in 1976, 1977 and 1978 which were used as the basis for the allocation of market shares for 1979. The table also contains a column showing a 'revised target' for that year. The Commission thinks that the target quotas for 1979 were drawn up in 1979, not in 1980. That document is also corroborated by a note of a producers' meeting held on 26 and 27 September 1979 (main statement of objections, Appendix 12) which shows that the question of target tonnages was discussed and that the participants recognized that a strict quota system was essential.

166 As regards 1980, the Commission contends that an agreement on quotas was made. It bases this contention essentially on a table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60) and headed 'Polypropylene — Sales target 1980 (kt)', which compares for all the producers of western Europe a '1980 target', 'opening suggestions', 'proposed adjustments' and 'agreed targets 1980'. That document shows the process whereby quotas were drawn up. This analysis is confirmed, in the Commission's view, by the note of the two January 1981 meetings (main statement of objections, Appendix 17) at which sales volume targets were compared with the quantities actually sold by the producers. It emphasizes that the aim of the quota system was to stabilize market shares. That is why, in its view, the agreements related to market shares, which were then converted into tonnages for use as reference figures, since if they were not converted it would not have been possible to determine from which point in time a participant in the cartel had to restrain his sales in order to comply with the agreements. For that purpose, it was essential to forecast the total volume of sales. Since the initial forecasts for 1980 proved to be too optimistic, the total volume of sales originally anticipated had to be adjusted several times, leading to adjustments in the tonnages allocated to each of the undertakings. According to the Commission, that constitutes proof of a quota agreement for 1980.

167 The Commission recognizes that there was no quota agreement covering the whole of 1981. It states, however, that the producers agreed as a temporary measure to limit their monthly sales for February and March to one twelfth of 85% of the targets which had been agreed for the previous year, as is shown by the note of the two January 1981 meetings. During the rest of the year there was a system of continuous monitoring of the volumes placed on the market by the producers.

168 In 1982 the situation was the same as in 1981. Although no quota agreement was reached, the producers' market shares were monitored at the meetings on 9 June and 20 August 1982 (main statement of objections, Appendices 25 and 28) and at the meetings in October, November and December 1982 (main statement of

objections, Appendices 31 to 33). The Commission maintains that market shares were relatively stable during that period. That is made clear in an ATO document (main statement of objections, Appendix 72) which describes the situation as one of 'quasi-consensus'. The Commission also refers to the findings made in points 58 and 59 of the Decision.

69 The Commission goes on to assert that it has the sales figures which the various producers sought to achieve and their proposals in that respect for themselves and other producers which they prepared at ICI's request and provided to it with a view to the conclusion of an agreement on quotas for 1983 (main statement of objections, Appendices 74 to 76 and 78 to 84). The various proposals were then processed by computer to obtain an average which was compared with the aspirations of each producer (main statement of objections, Appendix 85). To those documents the Commission adds an ICI internal note headed 'Polypropylene framework 1983' in which ICI outlines a future agreement on quotas and another ICI internal note headed 'Polypropylene framework' (main statement of objections, Appendix 87), which show that that company considered a quota agreement indispensable.

70 The Commission submits that there are several consistent indications of the existence of an agreement for the first quarter. In that regard it refers first of all to table 2 attached to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33). That table indicates a quota for each producer, marked, in most cases, with an asterisk referring to the note 'acceptable' at the foot of the table. It may be inferred that an important step had been taken in the direction of an agreement on quotas since all the producers had approved the principle of such an agreement and most of them had accepted the individual quota allocated to them. It also appears from an ICI internal note of December 1982 (main statement of objections, Appendix 35) that from the beginning of 1983 an agreement on quotas was regarded by ICI as indispensable for the proper functioning of the cartel. Those documents show that considerable efforts were made in order to reach agreement on quotas for the first quarter of 1983.

171 The Commission maintains that those proposals resulted in an agreement; in respect of the first quarter it bases its assertions on a Shell internal document (main statement of objections, Appendix 90) which shows that the latter subscribed to a quota agreement for 1983 since it instructed its subsidiaries to reduce their sales in order to comply with its quota ('This compares with W. E. sales in 1Q of 43 kt: and would lead to a market share of approaching 12% and well above the *agreed Shell target* of 11%'). In order to function and to obtain the agreement of all the undertakings concerned such a quota agreement must, says the Commission, apply to all the undertakings in a sector. Consequently, Monte must necessarily have participated in the agreement.

172 The same reasoning also applies in respect of the second quarter of 1983, and is corroborated by the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) and by a table setting out '1983 aspirations' on the basis of sales figures for the first half of 1982 (main statement of objections, Appendix 84), which, in the Commission's view, shows that the exchange of information on quantities sold was used to monitor quotas.

173 The Commission argues that failure to comply with the quotas laid down does not negate the infringement and that those quotas had at least a restraining effect on sales. The Commission's conclusion that there were agreements on quotas was based not on abstract economic deductions but above all on the voluminous documentary evidence which it has submitted. It adds that the setting of quotas was a mechanism which made it possible to increase the effectiveness of the price cartel since it encouraged the various parties to adhere to the agreed price and restrict supply.

174 It adds that the fact that the undertakings exchanged untrue information confirms rather than undermines the conclusion that the figures were intended to provide the basis for quotas, since otherwise the manipulation of those figures would have been pointless.

(c) Assessment by the Court

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

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

77 With regard to the assertion that that information was untrue, as is alleged to be shown in particular by the differences between the figures in the tables and those included in the FIDES system, it should be pointed out first that it is in part undermined by the reference in the table entitled 'Producers' Sales to West Europe' (main statement of objections, Appendix 55) to a comparison between the figures provided by certain undertakings and the FIDES figures. Secondly, it may be noted that the fact that it may have been untrue would tend to confirm that it was intended to be used as the basis for a decision following negotiations whose purpose was to reconcile interests which were individually opposed but in overall terms convergent.

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

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

180 As regards the year 1980, the Court finds that it is clear from the table dated 26 February 1980 found at the premises of ATO (main statement of objections, Appendix 60), which contains a column headed 'agreed targets 1980' and from the note of the January 1981 meetings (main statement of objections, Appendix 17) at which producers, not including the applicant, compared the quantities actually sold ('Actual kt') with the targets set ('Target kt'), that sales volume targets were set for the whole of the year. The fact that the figures representing the applicant's 1980 target differ between the table of 26 February 1980, where that target is 205 kilotonnes, and the note of the meetings in January 1981, where it is 177.6 kilotonnes, does not invalidate that finding since in the course of 1980 the producers' forecasts

of market volume for that year had to be revised downwards, which entailed a proportionate downwards revision in quotas allocated to the applicant and the other producers. In February 1980 the quotas were fixed on the basis of a market of 1390 kilotonnes in the column 'agreed targets 1980', whereas in January 1981 it was apparent that the market amounted only to 1200 kilotonnes.

31 It should be added that it appears from the same note of the meetings in January 1981 that Monte provided its sales figures for 1980 so that they could be compared with the sales volume targets fixed and accepted for 1980.

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

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

'Taking the various alternatives discussed at yesterday's meeting we would prefer to limit the volume to be shared to no more than the market is expected to reach in 1981, say 1.35 million tonnes. Although there has been no further discussion

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

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

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

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

185 The fact that the producers each took their previous year's quota as a theoretical entitlement for the rest of the year and monitored whether sales matched that

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

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

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

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.

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

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

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

Moreover, the applicant itself stated at that meeting that

'Now taking 10% of Feluy output but no problems as strikes in Italy have restricted output & they have increased overseas sales. Stocks low with particular problems on copolymer. Could be further industrial trouble in July when Government announces decisions on Enoxy/MP.'

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

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

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

194 As regards 1983, the Court finds that it is clear from the documents produced by the Commission (main statement of objections, Appendices 33, 85 and 87) that at the end of 1982 and the beginning of 1983 the polypropylene producers discussed a quota system for 1983, that the applicant participated in the meetings at which those discussions took place, that on those occasions it supplied data relating to its sales and that in table 2 attached to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) the note 'acceptable' appears beside the quota assigned to the applicant's name.

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

196 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'.

7 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.

8 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).

9 Moreover, the fact that the applicant's sales did not always correspond to the quotas allocated to it is irrelevant, since the contested decision does not rely on the actual implementation by the applicant of the quota system on the market in order to prove its participation in that system.

200 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.

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

F. Conclusion

202 It follows that the Commission has proved, to the requisite legal standard, that all the findings of fact which it made in the contested decision against the applicant are correct and that, consequently, contrary to the applicant's contention, it did not come to a premature judgment on the basis of preconceived ideas.

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

A. Legal characterization

(a) The contested decision

203 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).

4 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).

5 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.

6 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).

7 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.

8 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.

209 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).

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

211 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).

212 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).

213 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.

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

(b) Arguments of the parties

215 The applicant submits that the Commission has not proved the existence of an 'agreement' between the producers within the meaning of Article 85(1) of the EEC

Treaty. Although it accepts that in order for there to be an 'agreement' it is not necessary that there should be a legally binding contract, it nevertheless considers that the parties must unequivocally demonstrate their intention to be bound and any action actually taken by them must accurately reflect that intention (judgment of the Court of Justice in Case 41/69 *ACF Chemiefarma NV* v *Commission*, cited above, paragraphs 111 to 114). According to the most authoritative legal literature and the literal meaning of the words of the EEC Treaty, both an 'agreement' and a 'concerted practice' require consensus, and thus some expression of intention. Accordingly, any collusion agreed in writing must be placed in the former category, while the expression 'concerted practice' is more appropriately applied to measures carried out tacitly on the basis of an agreement in principle. Once the existence of a written or oral agreement, detailed or in principle, has been proved, it is sufficient, in order for it to be capable of giving rise to prosecution, that its object should be prohibited by Article 85.

216 It argues, however, that the existence of a practice whose effects are of the kind which Article 85 seeks to prevent is not sufficient in order to make its perpetrators liable to penalties if it is not proven that that practice is the result of prior collusion.

217 The applicant states that the Commission instead asserts that there is an 'agreement' as soon as an undertaking is in a situation in which it may hesitate to pursue a line of conduct which is favourable to its own interests because of a prior commitment, regardless of whether it is a legal, social or moral commitment, and that a 'concerted practice' exists where there is practical cooperation on as purely factual level, which thus need not necessarily result from a plan or from a collusive arrangement properly so-called.

218 Finally, it considers that if the Commission refuses to draw a distinction between the two concepts it is in order to disguise its own failure to adduce adequate evidence, by asserting successively that where there is no proof of a practice, 'no matter, there is an agreement', and where there is no proof of an agreement, 'no matter, there is factual conduct'.

219 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.

220 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).

221 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.

222 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 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.

223 It goes on to argue that if the two requirements — concerted action and conduct on the market — were required for the existence of a concerted practice, a whole gamut of practices having as their purpose, but not necessarily as their effect, the distortion of competition on the common market would not be caught by Article 85. Part of the purpose of Article 85 would thus be frustrated. Furthermore, that view is not in accordance with the case-law of the Court of Justice concerning the concept of concerted practice (judgment in Case 48/69 *ICI* v *Commission*, cited above, paragraph 66; judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission*, cited above, paragraph 26; and judgment in Case 172/80 *Züchner* v *Bayerische Vereinsbank AG* [1981] ECR 2021, 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.

224 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.

225 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.

226 The Commission asserts that it is clear from the grounds of the Decision that it found that there was a framework agreement accompanied by factors characteristic of individual agreements and concerted practices, all of which made up a complex situation described in Article 1 of the Decision by the terms 'agreement' and 'concerted practice'.

227 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

228 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'.

229 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.

230 Since it is clear from the case-law of the Court of Justice that in order for there to be an agreement within the meaning of Article 85(1) of the EEC Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (see the judgment in Case 41/69 *ACF Chemiefarma* v *Commission*, cited above, paragraph 112, and the judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission*, cited above, paragraph 86), this Court holds that the Commission was entitled to treat the common intentions existing between the applicant and the other polypropylene producers, which the Commission has proved to the requisite legal standard and which related to floor prices in 1977, price initiatives, measures designed to facilitate the implementation of the price initiatives, sales volume targets for the years 1979 and 1980 and the first half of 1983 and measures for restricting monthly sales by reference to a previous period for 1981 and 1982, as agreements within the meaning of Article 85(1) of the EEC Treaty.

231 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* [1985] ECR 2015, paragraph 17).

232 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* v *Commission*, cited above, paragraphs 173 and 174).

233 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.

234 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.

235 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 the end of 1977 and September 1983 as concerted practices within the meaning of Article 85(1) of the EEC Treaty.

236 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.

237 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.

238 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.

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

B. Restrictive effect on competition

(a) The contested decision

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

(b) Arguments of the parties

241 The applicant maintains that the various studies which it has submitted show that the alleged agreements and concerted practices had no effect on competition, which operated in an entirely normal manner throughout their duration, and that its own conduct on the market was competitive.

242 The Commission denies that the polypropylene producers which participated in the cartel did not adjust their conduct on the market in accordance with the agreements and contacts between them and that these had no effect on competition. All the price instructions available for the applicant correspond perfectly to the agreements made at the meetings, and there is no indication that the situation was different during the periods for which it has no such instructions. That conduct may not always have had the intended result, but even when it did not the producers based their negotiations with customers on the agreed prices.

243 It concludes that the essential factor is not so much the success of the initiatives agreed upon as the objective of restricting competition which those initiatives were intended to help achieve. The same is true of the quota agreements, as is shown by table 8 of the Decision. Although the Commission acknowledges that the cartel did not always have the effect of restricting competition, it points out that that is of little relevance to the application of Article 85(1) of the EEC Treaty, since it is sufficient that the cartel should have had the purpose of restricting competition.

(c) Assessment by the Court

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

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

246 The Court points out that it is clear from its assessments relating to the findings of fact made by the Commission that the purpose of the regular meetings which the applicant attended together with competitors was to restrict competition within the common market, in particular by fixing price and sales volume targets, and that its participation in those meetings was therefore not free of anti-competitive purpose within the meaning of Article 85(1) of the EEC Treaty.

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

C. Effect on trade between Member States

(a) The contested decision

248 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.

249 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).

250 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

251 The applicant states that there was no detrimental effect on trade between Member States and that the Commission completely failed to consider this point, which is nevertheless important in the light of the case-law of the Court of Justice (see in particular Joined Cases 100 to 103/80 *Pioneer* v *Commission* [1983] ECR 1825, paragraphs 86 et seq.).

252 The Commission states that it considered the condition of harm to trade between Member States in points 93 and 94 of the Decision and verified that that condition was in fact met in this case.

(c) Assessment by the Court

253 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).

254 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 was not necessary for it to demonstrate that the applicant's individual participation affected trade between Member States.

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

D. Justifying factors

256 The applicant submits that Article 85(1) of the EEC Treaty should not apply in this case because of the circumstances in which the undertakings to which the Decision was addressed were obliged to act.

(1) The critical economic situation

257 The applicant submits that the Commission should have examined the agreements in relation to their economic context, that is to say the fact that all the polypropylene producers were operating at a loss. The Commission, it says, displayed an entirely formalistic view of the law of competition, as if the rule in Article 85(1) of the EEC Treaty was self-sufficient and should be applied and interpreted per se, instead of regarding it as an instrumental provision intended to achieve the objectives set out in the preamble to the EEC Treaty and give effect to the principles laid down in the first part of the Treaty.

258 In its reply it states that even if the interpretation of certain rules of the EEC Treaty for repressive purposes were not incompatible with the objectives and general principles set out in the preamble and the first part of the Treaty, it would in any event be necessary to apply the rule of reason according to which the real criterion of the lawfulness of a restrictive practice is whether the restriction which it entails merely regulates competition, or even encourages it, or whether it has the effect of suppressing competition. In order to resolve that question a court must normally examine the facts specific to the sector of activities concerned by the restriction, its situation before and after the restriction was imposed, the nature of the restriction and its actual or probable effects.

259 The applicant submits that if the Commission had applied the rule of reason in this case it would necessarily have concluded that the attempt by producers to survive in a situation of market collapse has the effect of safeguarding competition, not restricting it. On the basis of an analysis of the case-law of the Supreme Court of the United States and of the Court of Justice the applicant asserts that the prohibitions laid down in Article 85 of the EEC Treaty cannot be defined in the abstract but must be appraised in relation to their economic context. Consequently, the Commission must gather information to show that the structure of the market has in fact been altered, that benefits to consumers have been reduced and that effective competition in the common market and intra-Community trade have been affected.

260 The Commission replies that reliance on the rule of reason constitutes a new plea in law; it leaves the question of its admissibility to the Court's discretion.

261 On the substance of the plea, it disputes the applicant's analysis of the American and Community case-law on the rule of reason. It accepts that the application of Article 85(1) requires examination of the cartel's economic context and its probable or actual effects. In this case that examination is contained in points 2 to 13 and 89 to 94 of the Decision.

262 The Commission nevertheless adds that a cartel which, like the one in issue in this case, concerns the prices which each of the undertakings charge on the sale of their own products constitutes an infringement per se of the EEC Treaty, even on a very broad interpretation of the rule of reason.

263 The Court considers that in view of the economic and teleological nature of the arguments set out in the application, reliance on the rule of reason at the stage of the reply does not constitute a new plea, but merely an extension of the argument contained in the application.

264 It should be recalled that the Commission has proved to the requisite legal standard that the agreements and concerted practices held to have existed had an anti-competitive object for the purposes of Article 85(1) of the EEC Treaty. The question whether they were anti -competitive in effect is therefore relevant only to assessment of the amount of the fine, and must accordingly be examined along with that issue.

265 Furthermore, the fact that the infringement of Article 85(1) of the EEC Treaty, in particular subparagraphs (a), (b) and (c), is a clear one precludes the application of a rule of reason, assuming such a rule to be applicable in Community competition law, since in that case it must be regarded as an infringement per se of the competition rules.

266 Accordingly, this ground of challenge cannot be upheld.

(2) The application of Article 85(3) of the EEC Treaty

267 The applicant points out in its reply that, as is shown by Decision 84/387 of 19 July 1984, concerning a restructuring agreement between ICI and BP (IV/30.863 — BPCL/ICI, Official Journal 1984 L 212, p. 1), the Commission was

well aware of the critical situation in the petrochemical industry, which, faced with over-capacity and strong competition from outside the Community, was suffering heavy losses and was obliged to reduce production capacity.

268 It argues that the polypropylene sector had the same characteristics and was facing the same difficulties, as the Commission indicated in its Decision (points 6 to 11). It goes on to state that from 1973-74 to 1983-84 its prices remained the same despite inflation. Those characteristics were regarded as sufficient to justify the conclusion of an agreement in the Synthetic Fibres case (Decision of 4 July 1984, IV/30.810 — Synthetic fibres, Official Journal 1984 L 207, p. 17) and in the BPCL/ICI case. The remedies which the Commission authorized the undertakings to implement in those two cases are in reality similar to those envisaged by the polypropylene producers (production restrictions subject to verification). The applicant concludes that since the facts which led the Commission to approve the agreements entered into in those cases were identical to the facts of the present case it should have adopted the same attitude.

269 The Commission argues that the argument alleging discrimination in relation to other cartels entered into in situations of crisis constitutes a new plea in law; it leaves the question of its admissibility to the Court's discretion.

270 On the substantive issue it argues that the applicant cannot claim the benefit of exemption under Article 85(3) of the EEC Treaty since the agreement was not notified to the Commission. Indeed, it was not notified precisely because it was clear that the cartel had features which distinguished it fundamentally from the agreements cited by Monte and precluded any possibility of obtaining exemption from the Commission. One such feature was the fixing of prices, which the Commission had said in previous decisions that it could not accept in any circumstances.

271 The Court observes that the applicant cannot assert that Article 85(3) of the EEC Treaty should have been applied to the agreements which it entered into and the concerted practices in which it participated. Article 4(1) of Regulation No 17 states that 'agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty which come into existence after the entry into force of this Regulation and in respect of which the parties seek application of Article 85(3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85(3) may be taken.' The applicant did not notify the agreements and concerted practices found to have existed.

272 Accordingly, the applicant cannot assert that it is the victim of discrimination in relation to undertakings whose agreements have been exempted under Article 85(1) of the EEC Treaty.

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

(3) The beneficial effects of the measures taken by the producers

274 The applicant states that the extraordinarily beneficial effects of the measures taken by the producers have been acknowledged by the Commission itself. There were an increase in sales within and outside Europe, an increase in production and a decrease in imports. Those effects were achieved at the price of very heavy losses for the producers, which shows that their conduct had neither the object nor the effect of restricting or distorting competition. It infers from that that the function attributed to price competition by the Court of Justice in the ICI judgment (Case 48/69, cited above) was entirely fulfilled, although it points out that the Court of Justice has stated that price competition should not be allowed to become a fetish (judgments in Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875 and Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151). Where a price has become impossible because it does not cover costs there can no longer be any question of protection of competition.

75 It argues that if the cartel had really been intended, as the Commission asserts, to channel the entry into the market of the new producers, there would not have been any anti-competitive conduct on the part of the undertakings. On the contrary, they could easily have barred the way to the new producers. Accordingly, the undertakings' conduct must be considered to have been very competitive.

76 The Commission observes first of all that the agreements cannot have had the beneficial effects which Monte ascribes to them and that if the market developed in a positive manner it was not because of but in spite of the agreements.

77 It goes on to point out that the Court of Justice has held any agreement restricting inter-brand price competition to be unlawful (judgment in Case 48/69 *ICI* v *Commission*, cited above) and that the judgments cited by Monte concern vertical agreements and intra-brand competition.

78 Finally, it states that one purpose of the cartel was to channel the massive arrival on the market of the new producers and minimize the price consequences of the resulting over-capacity.

79 The Court observes that even assuming that the positive market trend described by the applicant must be considered to have been proved and assuming that such a trend has any relevance in this case, the applicant has not in any event proved that that trend was attributable to the agreements which it entered into and the concerted practices in which it participated.

80 The applicant's argument to the effect that the established producers could have blocked the entry onto the market of the newcomers fails to take into account the fact that those newcomers were large undertakings which could afford to incur losses, even heavy losses, for several years in order to penetrate the polypropylene market, since they had other areas of business from which they could cover their losses.

281 Consequently, this ground of challenge must be dismissed.

(4) The principle of solidarity and burden-sharing

282 The applicant disputes the Commission's right to assert that the situation of necessity does not justify the conduct of the undertakings. In this case the undertakings applied the principle of solidarity and burden-sharing. That principle, which is accepted in relation to steel makers under the ECSC Treaty (Article 58), should be accepted in the context of the EEC Treaty. In the absence of any provision in the EEC Treaty corresponding to Article 58 of the ECSC Treaty it is necessary for undertakings to take such measures of self-discipline.

283 It submits that the manner in which the Commission regards competition as the opposite of solidarity is contrary to the judgment of the Court of Justice in *CRAM and Rheinzink* (Joined Cases 29 and 30/83, cited above). In the light of that judgment the applicant considers that even if — *quod non* — the polypropylene producers had sat down around a table and entered into a contract under which they undertook to do all that was possible to sell their goods at prices covering their costs, and once that objective was attained they had each gone their own way, their conduct would have been beyond reproach from the point of view of Article 85 of the EEC Treaty.

284 The Commission replies that the EEC Treaty does not contain any provision analogous to Article 58 of the ECSC Treaty does not mean that the Community legislator left it to undertakings to give concrete form to the principle of solidarity and burden-sharing.

285 It submits that the applicant's reading of the judgment of the Court of Justice in *CRAM and Rheinzink* (Joined Cases 29 and 30/83, cited above) is almost the reverse of what that judgment in fact says. That judgment confirmed the illegality of a reciprocal assistance contract, even though the Court suggested that it might take a different view of assistance agreements restricted to cases of *force majeure*. That possibility is irrelevant in this case. The Commission maintains that solidarity and competition are mutually antagonistic and that only the authorities may occasionally take action to reconcile them.

96 The Court observes that the principle of burden-sharing among undertakings by common agreement is contrary to the concept of competition which Article 85 of the EEC Treaty is intended to uphold. Accordingly, it is not for undertakings but for the Community authorities alone, where appropriate at the request of undertakings, to reconcile them in exceptional circumstances and in accordance with the procedures laid down for that purpose in the EEC Treaty.

97 Consequently, undertakings may not put that principle into operation without referring to the competent authority and observing the procedures laid down for that purpose. In that regard it must be pointed out in particular that in July 1982 the applicant and eight other polypropylene producers were invited by the Commission to attend a meeting on the problem of restructuring in the plastics industry, that a working group was formed and a report prepared, and that following that report the undertakings considered that a crisis cartel was not justified.

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

(5) Unfair competition

99 The applicant submits that Article 85 of the EEC Treaty is aimed at maintaining effective competition between undertakings (judgment of the Court of Justice in Joined Cases 177 and 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR 1797) and cannot have the effect of forcing undertakings to institute or maintain among themselves a situation of unfair competition.

100 It states that the conduct of undertakings which systematically sell goods at a price below cost in order to preserve their market share or at least survive amounts to reciprocal unfair competition, according to the principles upheld in all the Member States, inasmuch as unfair competition tends to eliminate the very conditions necessary for competition. Such a situation of sales at a loss constitutes predatory pricing, according to the applicant. There can thus be no restriction of competition within the meaning of Article 85(1) where the limitations on competition are made

necessary by the principle of fair trading or, *a fortiori*, where the purpose of the alleged infringement is to make possible the very existence of the undertaking or of one of its businesses (judgment of the Court of Justice in Case 56/65 *STM* v *Maschinenbau Ulm* [1966] ECR 235). By using its powers to oppose the restructuring of an industry, thus running the risk of causing its destruction, the Commission manifestly committed a misuse of its powers.

291 The applicant considers that in this case the reasons which led the polypropylene producers to meet so often were the same as those which led them to enter into voluntary restraint agreements. Those reasons are acceptable from the point of view of Article 85(1) of the EEC Treaty and flowed from their desire to replace the law of the jungle with economic rationality and business fair play. In this case undertakings which were in a situation of chronic losses and found themselves obliged to charge self-destructive prices tried gradually to reduce their liabilities and did not commit themselves to specific conduct in the present or the future. Article 85 is intended to ensure the continuation of normal market conditions, not competition which would completely disrupt such conditions (judgment of the Court of Justice in Case 172/80, cited above).

292 The Commission is ready to accept that an agreement under which businesses undertake not to pursue forms of unfair competition is not prohibited by Article 85, on condition, however, that it does not have the effect of restricting competition altogether. The problem lies in the definition of unfair competition. It is not true that the sale of goods below cost price is in itself a form of unfair competition.

293 It points out that there is a distinction to be drawn between sales below cost price as a means of acquiring a monopoly (which alone may be described as 'predatory pricing') and sales below cost price caused by an unexpected change in the market situation. Since the latter phenomenon is not a form of unfair competition, a cartel which seeks to eliminate it does not lie outside the prohibition laid down in Article 85. Accordingly, the applicant's assertion that the arrangements seeking to prevent sales below cost price were lawful is clearly unfounded, as is its comparison with voluntary restraint codes.

The Commission ads that it is not correct to say that Article 85 does not protect competition when supply and demand are not in balance. Accordingly, the reference in the *Züchner* case (judgment of the Court of Justice in Case 172/80, cited above) to the 'normal conditions of the market' must be understood not in the sense of a market which is 'in balance' but in the sense of a market which is not 'artificially' distorted.

The Court observes that the sale of goods below cost price may constitute a form of unfair competition where it is intended to reinforce the competitive position of an undertaking to the detriment of its competitors. There can be no question of unfair competition where sale below cost price results from the operation of supply and demand, which was the case here, as the applicant acknowledges.

Consequently, participants in a cartel which seeks to raise prices from a level below cost to a level at or above cost cannot argue, in justification of their conduct, that the cartel sought to eliminate unfair competition.

It follows that this ground of challenge must be dismissed.

(6) The analogy with lawful raw materials cartels

The applicant refers to the associations of producers or consumers of raw materials which, with unfortunate exceptions such as OPEC, have played a valuable role of market stabilization and have never been prosecuted under competition legislation. Indeed, the Community is a party to some of those agreements.

299 It submits that the need for constant exchange of information and frequent consultations between polypropylene producers was a typical characteristic of that product, which is a quasi-raw material. The disastrous situation of the industry was thus not the only factor behind that need.

300 The Commission observes that the international agreements to which Monte refers are matters of public regulation of the market, not initiatives of undertakings.

301 The Court considers that the analogy drawn by the applicant is entirely baseless, since the agreements to which it refers are public measures regulating the market which cannot be compared to the agreements entered into in this case by the polypropylene producers.

302 It follows that this ground of challenge must be rejected.

(7) The Italian legal, political and social context

303 The applicant argues that States may impose constraints on the market in such a manner that competition itself is subverted (judgment of the Court of Justice in Joined Cases 40 to 48, 54 to 56, 111, 113 and 14/73 *Suiker Unie*, cited above) and that to speak of the normal conduct of undertakings is meaningless. In this case, for example, Monte was bound by a collective agreement preserving jobs and subject to Law No 675 of 12 August 1977 on 'measures for the coordination of industrial policy', with the result *inter alia* that it was prevented from carrying out the job cuts which it had planned.

304 It adds in its reply that it was the victim of blackmail by the 'Red Brigades', which said that they wanted to 'put the restructuring project on trial and demonstrate its disastrous consequences for the working class'.

According to the applicant, it thus faced the following alternatives: pursue the conduct complained of by the Commission or carry out a restructuring of the undertaking, with the risks which that entailed, having regard to the attacks by the 'Red Brigades' (two Monte executives had been assassinated by them because they were responsible for the restructuring projects).

The Commission does not accept the applicant's argument that it was unable to avoid entering into arrangements with other polypropylene producers because it was forced to do so by the Italian legal system. Obligations imposed by national law cannot in any event prevail over those which flow from Article 85 (judgments of the Court of Justice in Case 13/77 *INNO* v *ATAB* [1977] ECR 2115, paragraphs 34 and 35, and Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 40).

The Commission argues, first, that the obligations allegedly placed on Monte by Italian law came into existence only in 1981, while the cartel began in 1977, and, secondly, that Monte voluntarily undertook those obligations, as regards both the collective agreement and Law No 675, which made the grant of subsidies subject to the preservation of jobs.

It observes in that regard that in the *Fedetab* and *SSI* judgments (Joined Cases 209 to 215 and 218/78, cited above, and Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831) the Court of Justice held that restrictions on competition were all the more serious where competition was already reduced by public legislation.

The Commission submits that the 'Red Brigades' argument constitutes a new plea in law, but leaves the issue of its admissibility to the discretion of the Court. It adds that if the Decision does not address that question it is because the matter was not raised during the administrative procedure. Finally, it points out that the

assassination of Monte's director-general took place in 1981, while the cartel began in 1977.

310 The Court observes that the obligations to which the applicant says it was subject under Italian law all came into existence more than three years after the conclusion of the floor-price agreement. The collective agreement preventing the applicant from making job cuts was concluded on 19 February 1981 and the applicant was declared to be in a critical situation on 26 March 1981, enabling it to benefit from the aid paid in connection with the application of Law No 675 of 12 August 1977, in return for which it was required to preserve jobs.

311 Moreover, both the collective agreement and the declaration by the Italian government that the applicant was in a critical situation were measures to which the applicant consented in order to obtain the benefits which corresponded to the commitments it entered into.

312 Consequently, the applicant cannot assert that the obligations which it incurred as a result under Italian law placed it in a position which made its participation in agreements and concerted practices contrary to Article 85(1) of the EEC Treaty inevitable.

313 Finally, the Court considers that the argument based on the applicant's alleged blackmail by the 'Red Brigades' is a new plea in law within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance and Article 42(2) of the Rules of Procedure of the Court of Justice, and must therefore be declared inadmissible. That plea in law is based on a fact which came to light in 1981, well before the beginning of these proceedings.

314 The applicant's grounds of challenge cannot therefore be upheld.

3. *Conclusion*

It follows from all the foregoing that the proof of the infringement is based solely on the grounds set out in the Decision and that all the applicant's grounds of challenge relating to the findings of fact and to the application of Article 85(1) of the EEC Treaty by the Commission in the contested decision must be dismissed.

Freedom of association

The applicant points out that the Commission considers meetings of producers, the exchange of information and the creation of an informal association are harmful for competition, whatever the purposes of those activities. Having established the purpose of one of those meetings or one of those contacts the Commission concludes that all the contacts and meetings had the same purpose. In that regard Monte argues that the Commission defined the purpose of the meetings on the basis of ICI's reply to the request for information (main statement of objections, Appendix 8), but distorting it completely. Furthermore, it described the meetings as 'secret' simply because they had not been authorized beforehand by any competent authority.

According to the applicant, that is an infringement of the right enjoyed by undertakings under the constitutions of all the Member States to meet and exchange opinions and information. That is true *a fortiori* where the survival of an industry and the possibility of meeting employment commitments made to government authorities depend on those activities.

The Commission replies that the issue is not whether there has been an infringement of the liberties relied on by the applicant but whether there has been a breach of Article 85. The applicant cannot deny that the purpose of the meetings of the polypropylene producers was that indicated by the Commission. That much is clear from the voluminous documentary evidence and from ICI's reply to the request for information (main statement of objections, Appendix 8), which the

Commission has in no way distorted. It adds that the secret nature of the meetings has been clearly established.

319 The Court observes that the purpose of the freedom of association is to allow persons to meet freely. Its purpose is not to justify every infringement which may be committed in the course of meetings or as a result of them.

320 During the meetings complained of in the Decision Article 85(1) of the EEC Treaty was infringed by the participants inasmuch as they entered into price and quota agreements, *inter alia.*

321 This ground of challenge cannot therefore be upheld.

The statement of reasons

322 The applicant argues that the Commission, without stating adequate reasons, rejected all the evidence submitted by the parties to show that the alleged cartel had no effects on the market; the evidence in question is the Coopers & Lybrand audit, an econometric study of the German market by Professor Albach of Bonn University and various documents describing the divergent conduct of the undertakings.

323 The Commission notes that on the points raised by Monte the reasoning set out in the Decision is clear and explicit (Decision, points 72 to 74 and 90 to 94) and that the applicant has not stated in what respect it is inadequate.

324 This Court observes that the Court of Justice has consistently held (see in particular its judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck*, cited above, paragraph 66, and its judgment in Joined Cases 240 to 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie*, cited above, paragraph 88) that, although under Article 190 of the EEC Treaty the Commission is obliged to state

the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and of law raised by every party during the administrative proceedings. It follows that the Commission is not obliged to answer those points of fact and law which it considers irrelevant.

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

Consequently, this ground of complaint must be dismissed.

The fine

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

1. *The limitation period*

The applicant maintains that, even if there was a floor-price agreement in 1977, it is covered by the five-year limitation period laid down by Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (Official Journal 1974 No L 319, p. 1) since, owing to the different nature of the floor-price agreement and the meetings which, as the Commission acknowledges, were held after December 1977, the Commission cannot presume that the infringement was of a continuing or repeated character within the meaning of Article 1(2) of that regulation.

329 The Commission maintains that the 1977 agreement is not covered by the limitation rule since there is a clear factual link between all the arrangements agreed to throughout the period of the cartel; consequently, this was a single, continuous infringement. There is no difference between the concepts of 'floor prices' and those of 'minimum prices' or 'target prices'.

330 The Court notes that under Article 1(2) of Regulation No 2988/74 the five-year limitation period applying to the Commission's power to impose fines begins to run, in the case of continuing or repeated infringements, on the day on which the infringement ceases.

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

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

2. *Duration of the infringement*

333 The applicant argues that the Commission is unable to ascertain the date of the commencement of the infringement or the date on which it came to an end, and cannot therefore maintain that the infringement lasted for a period of seven years.

334 The Commission states that the relatively long duration of the infringement — which continued from mid-1977 until at least November 1983 — justifies heavy penalties.

5 It states that it has evidence of meetings before 1979 and of the continuation of the effects of the cartel until November 1983, since price instructions were issued in September for October and November.

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

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

3. *The gravity of the infringement*

A. The Commission's new policy on fines

8 The applicant accepts that the Commission has a discretion in assessing the amount of the fines to be imposed, but states that it cannot exercise that discretion in an arbitrary manner (judgments of the Court of Justice in Case 188/82 *Thyssen* v *Commission* [1983] ECR 3721 and Case 15/83 *Denkavit Nederland* [1984] ECR 2171). In the exercise of that discretion the Commission must assess not only the existence of the infringement but also its context.

9 It considers that the Commission is wrong to assert that it is best placed to assess all the relevant factors. As evidence it cites the great number of cases in which the Court of Justice has annulled or reduced the fines imposed on undertakings (judgments in Joined Cases 8 to 11/66 *Cimenteries CBR* v *Commission* [1967] ECR 75, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461 and Joined Cases 240 to 242, 261, 262, 268 and 269/82, cited above).

340 The applicant argues that the deterrent function of the fine is not one of the factors to be taken into account in determining the amount of the fine under Article 15(2) of Regulation No 17. Accordingly, the Commission's 'main duty' is not 'at all times and in all cases to impose effective penalties in order to ensure application of competition law', as it affirms on the basis of its unacceptable 'per se' theory, which disregards the objectives and context of the conduct and does not take account of the seriousness of the circumstances.

341 It goes on to argue that the Decision is clearly discriminatory by comparison with previous decisions of the Commission, in particular that given in the Meldoc case on the diary industry in the Netherlands (Decision of 26 November 1986, IV/31.204 — Meldoc, Official Journal 1986 L 348, p. 50). It considers that this discrimination is particularly blatant inasmuch as there were a multiplicity of reasons in this case which should have prompted the Commission to avoid imposing a fine, such as the justifying factors of the situation of necessity and self-defence, the undertakings made to the Italian State not to reduce the work-force, the absence of any negative effect, the existence of considerable benefits for the market and the undeniable lacunae in the evidence.

342 The Commission states that in imposing sanctions in this case it acted in accordance with its established policy and with the principles laid down by the Court of Justice in relation to fines. It states that since 1979 it has pursued a policy of ensuring observance of the competition rules by imposing heavier penalties, especially for well established categories of infringements of competition law and for particularly serious infringements, such as that in issue here, *inter alia* so as to increase the deterrent effect of penalties. That policy has been approved by the Court of Justice (judgment in Joined Cases 100 to 103/80 *Pioneer*, cited above, paragraphs 106 to 109), which has also held on several occasions that the imposition of penalties entails the assessment of a complex set of factors (judgments in Joined Cases 100 to 103/80 *Pioneer*, cited above, paragraph 120, and in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 52).

343 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. The Court of Justice has also held that the Commission may, depending on the particular case, arrive at a different view of the appropriate penalties even if the cases concern comparable circumstances (judgments in Joined Cases 32 and 36 to 82/78 *BMW* v *Commission* [1979] ECR 2435, paragraph 53, and in Case 322/81 *Michelin* v *Commission*, cited above, paragraphs 111 et seq.).

The Commission observes that the fundamental aspect of its new fines policy is the adoption of a stricter approach in assessing the seriousness of the infringements committed and in determining the degree of deterrence necessary to prevent repeated infringements by the same or other undertakings. It states that in its *Thirteenth Report on Competition Policy* it clearly signalled its intention to reinforce the deterrent effect of fines by increasing their general level in cases of serious infringements and defined in detail the types of infringements which would be regarded as particularly serious and the factors that would be taken into account in determining the amount of fines.

Finally, the Commission submits that the applicant's arguments concerning discrimination in comparison with previous cases seeks to compare things which are not comparable. For example, the Meldoc case was entirely different from this one since it concerned a regional cartel between small undertakings involving an agricultural product.

This Court holds that it is clear from the case-law of the Court of Justice that the Commission's power to impose fines on undertakings which intentionally or negligently commit an infringement of Article 85(1) of the EEC Treaty is one of the means conferred on the Commission in order to enable it to carry out the supervisory task conferred on it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the EEC Treaty and to guide the conduct of undertakings in the light of those principles. It was for that reason that the Court of Justice held that in assessing the gravity of an infringement for the purpose of fixing the amount of the fine the Commission must take into consideration not only the

particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community. The Court went on to state that it was open to the Commission to have regard to the fact that, although infringements of a specific type were established as being unlawful at the outset of Community competition policy, they were still relatively frequent on account of the profit that some of the undertakings concerned are able to derive from them and, consequently, it was open to the Commission to raise the level of fines so as to reinforce their deterrent effect. The Court concluded that the fact that in the past the Commission had imposed fines of a certain level for certain types of infringement did not mean that it was estopped from raising that level within the limits indicated in Regulation No 17 if that was necessary to ensure the implementation of Community competition policy (judgment in Joined Cases 100 to 103/80 *Pioneer*, cited above, paragraphs 105 to 109).

347 In view of those considerations, the Court finds that the Commission rightly described the fixing of target prices and of sales volumes as well as the adoption of measures designed to facilitate the implementation of target prices as a particularly grave and clear infringement, intended to distort the normal formation of prices on the polypropylene market.

348 This ground of challenge must therefore be dismissed.

B. The statement of the reasons for the fine

349 The applicant submits that there is no sufficient statement of reasons in the Decision as regards the fine. The Commission may have correctly defined the principles which govern the determination of fines, but it has completely neglected to state how those principles were applied in this case. It adds that the Court of Justice has held (judgments in Case 73/74 *Papiers Peints* [1975] ECR 1491 and in Joined Cases 8 to 11/66 *Cimenteries CBR*, cited above) that where the Commission's competition decisions do not fit into a well-established line of decisions particular care is necessary in stating the reasons for them. The Commission itself has admitted that this is such a decision.

50 The Commission argues that points 107 et seq. of the Decision contain a sufficient statement of the reasons for the amount of the fine.

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

52 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 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.

53 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.

54 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.

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 under-

takings — , 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.

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

C. The intrinsic gravity of the infringement

357 The applicant considers that the 'intentional' nature of an infringement of Article 85 cannot constitute an aggravating factor in the determination of the fine since it is in fact a fundamental precondition for the imposition of a fine. Furthermore, it is not the conduct but the infringement that must be intentional; that is to say, there must be a deliberate breach of Community law (judgment of the Court of Justice in Case 26/75 *General Motors* v *Commission* [1975] ECR 1367).

358 In that regard it submits that the Commission cannot rely on the secret nature of the meetings as an indication of the intentional nature of the producers' actions, since the target prices were published in the trade press, there were contacts between the undertakings and the Commission to discuss the state of the market and the first meetings took place at the general meeting of EATP. It submits that the allegedly 'flagrant' nature of the infringement cannot constitute a ground for increasing the fine either.

359 The Commission asserts that the breach of Article 85(1) was a calculated and deliberate one and that horizontal price-fixing and horizontal market-sharing have long been counted among the most serious types of infringement of competition law. Moreover, the infringement was a flagrant one inasmuch as it was clear and manifest. The undertakings acted intentionally, and it is irrelevant, according to the Court of Justice, whether the infringement was committed by carelessness and

whether or not the applicant was aware of infringing the prohibition laid down in Article 85 (judgment in Case 19/77 *Miller International* v *Commission* [1978] ECR 131; the Commission states that the Opinion of Advocate General Mayras in Case 26/75 *General Motors*, cited above, is to the same effect, contrary to what the applicant has asserted). The agreements were secret and were known neither to the trade press nor to the Commission, since only the prices were published and in their contacts with the Commission the undertakings did not mention their agreements.

60 It adds that the seriousness of the infringement was increased by the fact that virtually all the polypropylene manufacturers in the Community were involved and that consequently the size, the economic power and the total market share of the participants were exceptionally large.

61 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 throughout the duration of its participation and that the Commission was thus entitled to take account of that role in determining the amount of the fine.

62 The Court also finds that the facts established show, by their intrinsic gravity — in particular the fixing of price and sales volume targets — that the applicant did not act rashly or even through lack of care but intentionally.

63 It should be observed in that regard that the undertakings which participated in the infringement held in the Decision to have been committed account for virtually the whole of the market concerned, which shows clearly that the infringement which they committed together may have restricted competition.

364 Consequently, this ground of challenge must be dismissed.

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

365 The applicant argues that the Commission should have taken into account Monte's actual conduct on the market as regards both price and volume and the cartel's total lack of effect on the market and on trade between Member States.

366 It adds that the conduct objected to caused no harm to customers, who made no protest or complaint. Moreover, those customers displayed very positive results during the period in question, unlike the polypropylene producers, whose industry was devastated and most of whom would have gone out of business if they had not taken the initiatives now in issue.

367 The Commission observes that Monte's protestations about the cartel's lack of effect are to no avail, since the cartel had a real effect on prices and the Commission took account, in determining the amount of the fines, of the fact that the price initiatives generally did not achieve their objective in full (Decision, point 108). This was already more than the Commission was obliged to do, since not only arrangements which have anti-competitive effects but also those which have anti-competitive objects are caught by Article 85. For the rest, it refers to its findings of fact and its arguments regarding the effect of the infringement on competition and on trade between Member States.

368 The Commission states that the applicant cannot, without contradicting itself, assert that the cartel had no effect on prices and at the same time argue that it had beneficial consequences for the whole polypropylene industry, which it made it possible to save.

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

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

371 As regards effects of the second type, 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.

372 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.

373 It follows from the foregoing that the statement of the grounds for the Decision supports its conclusion both as regards the proof of the infringement in relation to the applicant and the extent of the effects of the infringement which were taken into account in determining the amount of the fine. Consequently, there is nothing to indicate that the Commission based its Decision on consideration of more far-reaching effects than those set out in the statement of grounds, contrary to what the applicant has asserted, in reliance on comments made by officials of the Commission at a press conference concerning the Decision. It follows that the Decision was not adopted on grounds other than those set out in it and there can therefore be no question of any misuse of powers.

374 Consequently, this ground of challenge must be dismissed.

E. The claim that insufficient account was taken of the situation of economic crisis

375 The applicant maintains that the Commission did not take into account the situation of manifest crisis affecting the polypropylene industry at the time or the substantial losses which were its result. As regards the scope of those losses, the applicant asks that witnesses be called to demonstrate the truth of the accounting figures which it submitted. It considers that the Commission should have taken account of those losses, at least as a mitigating factor (judgment of the Court of Justice in Case 27/76 *United Brands*, cited above)

376 It adds that in pointing out that the fine did not exceed the limit of 10% of turnover laid down in Article 15(2) of Regulation No 17 the Commission failed to consider that that theoretical limit cannot apply to undertakings which have suffered substantial losses.

377 The Commission replies that it accepted, in mitigation of the amount of the fines, that the undertakings concerned had incurred substantial losses on their polypropylene operations over a very long period, although it takes the view that it was under no obligation to take those losses into account.

378 It considers that penalties may be proportionate to turnover not only where the undertakings have made profits but also where they have incurred losses.

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

380 Moreover, the limit of 10% of turnover laid down in Article 15(2) of Regulation No 17 is not a criterion to be used in fixing the amount of fines but a maximum limit which applies as such in all circumstances.

381 Finally, the Court considers that the applicant's request that witnesses be called to establish the truth of the accounting figures which it has submitted is nugatory inasmuch as the Court holds that the Commission took sufficient account of those figures, whose accuracy it did not dispute.

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

F. The failure to take into account mitigating circumstances

383 The applicant argues that the various factors of justification raised by it, which relate in particular to the national political and social context or the beneficial effects of the cartel, should have been taken into account as mitigating circumstances.

384 As regards the Italian national context, the Commission points out that the factors relied on by the applicant are mainly subsequent to the beginning of the cartel and are irrelevant from the legal point of view.

385 The Court observes that the various facts put forward by the applicant as justification are not such as to efface the unlawful nature of its conduct, since it cannot be accepted that participation in an unlawful cartel constitutes a legitimate form of self-defence. Consequently, it was at most in determining the amount of the fine that the Commission could have taken account of those facts as mitigating circumstance, without being obliged to do so.

386 In so far as the applicant appeals to the exercise by the Court of its unlimited jurisdiction, the Court observes that the criteria set out in point 108 of the Decision entirely justify the general level of the fines imposed on the undertakings to which the Decision is addressed, having regard in particular to the particularly manifest nature of the infringement committed.

387 Consequently, this ground of challenge must be dismissed.

G. Conclusion

388 It follows from all the foregoing considerations that the fine imposed on the applicant is appropriate having regard to the gravity and duration of the breach of the Community competition rules found to have been committed. Since the Commission's Decision is not unlawful or defective in any way, the Commission cannot incur liability.

The reopening of the oral procedure

389 By a letter lodged at the Court Registry on 6 March 1992 the applicant asked the Court to reopen the oral procedure and order measures of inquiry as a result of the statements made by the Commission at the press conference held by it following the delivery of judgment in Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89.

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

391 It must be stated that the judgment delivered in the abovementioned cases (judgement of 27 February 1992 in Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315) does not in itself justify the reopening of the oral procedure in this case. The Court observes that a measure which has been notified and published must be presumed to be valid. It is thus for a person who seeks to allege the lack of formal validity or the inexistence of a measure to provide the Court with grounds enabling it to look behind the apparent validity of the measure which has been formally notified and published. In this case the applicants have not put forward any evidence to suggest that the measure notified and published had not been approved or adopted by the members of the Commission acting as a college. In particular, in contrast to the PVC cases (judgement in Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89, cited above, paragraphs 32 et seq.), the applicants have not put forward any evidence that the principle of the inalterability of the adopted measure was infringed by a change to the text of the Decision after the meeting of the college of Commissioners at which it was adopted.

Costs

392 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the application has been unsuccessful and the Commission has applied for costs to be awarded against the applicant, the latter must be ordered to pay the costs, including those of the proceedings brought before the Court of Justice under Article 83 of the Rules of Procedure of the Court of Justice.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs, including the costs of the proceedings brought before the Court of Justice under Article 83 of the Rules of Procedure of the Court of Justice.

Cruz Vilaça Schintgen

Lenaerts Kirschner Edward

Delivered in open court in Luxembourg on 10 March 1992.

H. Jung
Registrar

J. L. Cruz Vilaça
President