JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
17 December 1991 *

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In Case T-4/89,

BASF Aktiengesellschaft, a company incorporated under German law, having its registered office at Ludwigshafen (Federal Republic of Germany), represented by F. Hermanns and U. F. Kleier, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 8 rue Zithe,

applicant,

v

Commission of the European Communities, represented by Anthony McClellan, Principal Legal Adviser, and B. Jansen, a member of its Legal Service, acting as

Agents, with an address for service in Luxembourg at the office of R. Hayder, a national civil servant seconded to its Legal Service, Wagner Centre, Kirchberg,

defendant,

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

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

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

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

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

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

gives the following

Judgment

Facts and background to the action

1 This case concerns a Commission decision fining fifteen producers of polypropylene for infringing Article 85(1) of the EEC Treaty. The product which is the subject-matter of the contested decision (hereinafter referred to as 'the Decision'), polypropylene, is one of the principal bulk thermoplastic polymers. It is sold by the producers to processors for conversion into finished or semi-finished products. The

largest producers of polypropylene have a range of more than 100 different grades covering a wide range of end uses. The major basic grades of polypropylene are raffia, homopolymer injection moulding, copolymer injection moulding, high-impact copolymer and film. The undertakings to which the Decision is addressed are all major petrochemical producers.

2 The west European market for polypropylene is supplied almost exclusively from European-based production facilities. Before 1977, that market was supplied by ten producers, namely Montedison (which became Montepolimeri SpA), Hoechst AG, Imperial Chemical Industries PLC and Shell International Chemical Company Limited (called 'the big four'), which together account for 64% of the market, Enichem Anic SpA in Italy, Rhône-Poulenc S. A. 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 N. V. in Belgium, ATO Chimie S. A. and Solvay et Cie S. A. in France, SIR in Italy, DSM N. V. in the Netherlands and Taqsa in Spain. Saga Petrokjemi AS & Co, a Norwegian producer, came on stream in the middle of 1978, and Petrofina S. A. in 1980. The arrival of the new producers, with nameplate capacity of some 480 000 tonnes, brought a substantial increase in installed capacity in western Europe which for several years was not matched by the increase in demand in that market. This led to low rates of utilization of production capacity, which, however, rose progressively between 1977 and 1983, increasing from 60% to 90%. According to the Decision, supply and demand were roughly in balance from 1982. However, during most of the period covered by the investigation (1977-1983), the polypropylene market was reported to be characterized by either low profitability or substantial losses, owing in particular to the extent of the fixed costs and to the increase in the cost of the raw material, propylene. According to the Decision (point 8), in 1983 Montepolimeri SpA held 18% of the European polypropylene market, Imperial Chemical Industries PLC, Shell International Chemical Company Limited and Hoechst AG each held 11%, Hercules Chemicals N. V. slightly below 6%, ATO Chimie S. A., BASF AG, DSM N. V., Chemische Werke Hüls, Chemie Linz AG, Solvay et Cie S. A. and Saga Petrokjemi AS & Co from 3 to 5% and Petrofina S. A. about 2%. The Decision states that there was a substantial trade in polypropylene between Member States because each of the then EEC producers supplied the product in most, if not all, Member States.

3 BASF AG was one of the producers which was supplying the market before 1977. Its position on the polypropylene market was that of a medium-sized producer whose market share was between 4.1 and 4.7%.

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 S. A., now Atochem ('ATO'),

BASF AG ('BASF'),

DSM N. V. ('DSM'),

Hercules Chemicals N. V. ('Hercules'),

Hoechst AG ('Hoechst'),

Chemische Werke Hüls ('Hüls'),

Imperial Chemical Industries PLC ('ICI'),

Montepolimeri SpA, now Montedipe ('Monte'),

Shell International Chemical Company Limited ('Shell'),

Solvay et Cie S. A. ('Solvay'),

BP Chimie ('BP').

No investigations were carried out at the premises of Rhône-Poulenc S. A. ('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 S. A. ('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's officials then carried out investigations at the premises of Anic and Saga Petrochemicals UK Ltd, the United Kingdom subsidiary of Saga, and of the selling agents of Linz established in the United Kingdom and in the Federal Republic of Germany. No request for information was sent to Rhône-Poulenc.

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

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

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

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

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

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

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

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

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

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

'*Article 1*

ANIC SpA, ATO Chemie SA (now Atochem), BASF AG, DSM N. V., Hercules Chemicals N. V., Hoechst AG, Chemische Werke Hüls (now Hüls AG), ICI PLC, Chemische Werke LINZ, Montepolimeri SpA (now Montedipe), Petrofina S. A., Rhône-Poulenc S. A., 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 N. V., a fine of 2 750 000 ECU, or Fl 6 657 640;

(v) Hercules Chemicals N. V., 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 S. A., a fine of 600 000 ECU, or Bfrs 26 306 100;

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

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

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

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

Article 4

. . .

Article 5

. . .'

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

Procedure

17 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 28 July 1986, the applicant brought this action seeking annulment of the Decision. Thirteen of the fourteen other addressees of the Decision have also brought actions for its annulment (Cases T-1/89 to T-3/89 and T-6/89 to T-15/89).

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

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

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

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

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

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

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

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

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

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

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

Forms of order sought by the parties

29 BASF AG claims that the Court should:

(i) annul the Commission decision of 23 April 1986, notified on 28 May 1986, relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene);

(ii) in the alternative, annul or reduce the fine imposed on the applicant under Article 3 of that decision; and

(iii) order the defendant to pay the costs.

The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

Substance

30 It is necessary to examine, *first*, the applicant's grounds of challenge relating to a breach of the rights of the defence allegedly committed by the Commission in so far as (1) it failed to disclose to the applicant documents on which it based the Decision, (2) the final record of the hearings was not transmitted to the Members of the Commission or to the Advisory Committee and (3) it did not communicate to the applicant the hearing officer's report; *secondly*, the grounds of challenge relating to proof of the infringement concerning (1) the findings of fact made by the Commission and (2) the application to those facts of Article 85(1) of the EEC Treaty, whereby it is contended that the Commission (A) did not correctly define the infringement, and (B) imputed collective responsibility to the applicant; and *thirdly*, the grounds of challenge relating to the determination of the fine, which is alleged to be (1) disproportionate to the duration of the alleged infringement and (2) disproportionate to the gravity of the alleged infringement.

The rights of the defence

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

31 The applicant contends that when the Commission notified it of the statement of objections it did not send it 14 documents on which it based the Decision and that the Commission thus made it impossible for it to explain their contents. The documents concerned are the notes of the meeting of 10 March 1982 and that of 13 May 1982 drawn up by a Hercules employee (Decision, point 15(b)), a document dated 6 September 1977 allegedly found at the premises of Solvay (Decision, point 16, penultimate paragraph), Shell's reply to the statement of objections (Decision, point 17), two sets of minutes of Shell internal meetings held on 5 July and 12 September 1979 (Decision, points 29 and 31), a Solvay internal document (Decision, point 32), a reminder sent by Solvay to its sales offices on 17 July 1981 (Decision, point 35), an ICI internal note referring to the 'firm climate' (Decision, point 46), a Shell document headed 'PP W. Europe — Pricing' and 'Market quality report' (Decision, point 49), a document on market sharing found at the premises of ATO (Decision, point 54), the note of the meeting of 10 March 1982 drawn up by an ICI employee (Decision, point 58), an undated ICI note intended as a briefing for a meeting with Shell in or about May 1983 (Decision, point 63, second paragraph) and, finally, a planning document relating

to the first quarter of 1983 found at the premises of Shell (Decision, point 63, third paragraph).

32 The applicant maintains that according to the case-law of the Court of Justice (judgment in Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraphs 21 to 30) the Commission cannot, without infringing the rights of the defence, rely on such documents, even if they are to be found somewhere in the administrative file which was made available to the undertakings in question. There is every reason to suppose that in the absence of the objections which those documents are said to prove the Decision would not have been adopted in its present form.

33 In reply to the Commission's assertion that the Decision was not based on those few documents that were not provided to BASF, the applicant states that precisely because it does not have those documents it is not in a position to dispute that assertion, and it is therefore for the Commission to show in detail that it is well founded.

34 The Commission replies that, contrary to the applicant's contention, the first and ninth document which it cites were disclosed with the statement of objections and the second, tenth and thirteenth documents were made available to it during the access-to-file procedure; there was no need to make the other documents available to the applicant, either because they were of no relevance to the proceedings against it or because they merely confirmed other documents of which BASF was already aware. In so far as it is addressed to the applicant, the Decision is not based on those documents.

35 It acknowledges that as the result of an error an ICI note concerning an 'experts'' meeting of 10 March 1982, mentioned in the Decision (point 58), was not disclosed but states that that note merely confirmed a note drawn up by Hercules of the same meeting which was attached to the main statement of objections

(Appendix 23). The same is true of an ICI note mentioned in point 63 of the Decision which was intended as a briefing for a meeting with Shell. That document was cited only as proof of Shell's participation in the quota system. Those documents thus contain no new material in relation to the objections communicated to BASF.

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

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

38 It follows that, of the documents mentioned by the applicant, only the note of the meeting of 10 March 1982 drawn up by a Hercules employee (Decision, point 15 b) and the ICI internal note on the 'firm climate' (Decision, point 46) may be used as evidence against the applicant, since they were mentioned in points 60 and 71 respectively of the main statement of objections addressed to the applicant, of

which they also form Appendices 23 and 35. The other documents referred to by the applicant may not be considered to be evidence admissible against it in the present case.

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

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

40 The applicant states that under Article 9(4) of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47) 'the essential content of the statements made by each person shall be recorded in minutes which shall be read and approved by him'. According to BASF, neither the members of the Commission nor the Advisory Committee were provided with the final version of the minutes of the hearings. They were thus unable to form a correct idea of the arguments exchanged, since they had not all attended the hearings and could not study all the written submissions of the undertakings concerned. The Decision was therefore not adopted with full knowledge of all relevant information.

41 The applicant adds that it is not in a position to ascertain whether the Decision would have been different had the members of the Commission had the final version of the minutes available to them. Even if it would not, says the applicant, that should not be decisive, since to hold that infringements of procedural guarantees could be justified by the fact that the Decision would have been no different had they been observed would be to disregard the real import of those guarantees. It lies in the fact that interested parties have a right to the observance of those guarantees, subject to annulment of the decision. It can at most be accepted that the onus should be on the Commission to prove that the procedural defect had no influence on the decision. A simple assertion on the part of the Commission cannot suffice.

42 The Commission observes that Article 9(4) of Regulation No 99/63 gives no indication as to the bodies to which the Commission must provide the provisional or final minutes of hearings. It is true that the members of the Advisory Committee had only the provisional minutes, but the competent authorities of all the Member States were represented at the hearings, with the exception of Greece and Luxembourg at the second session. It matters little in that regard that the official present at the hearings was not necessarily the State's representative on the Advisory Committee. Moreover, the Commission notes that BASF has not denied that the provisional version of the minutes gave an accurate account of the essential statements of the parties.

43 The Commission states that in adopting their decision the members of the Commission had available to them the provisional minutes of the hearings and all the remarks made by the parties in regard to them.

44 In any event, the Commission considers that the Decision would not have been different if the final version of the minutes of the hearings had been available (judgment of the Court of Justice in Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26).

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

46 As regards the minutes forwarded to the Commission, it must be pointed out that along with the provisional minutes the Commission received the remarks and observations made in relation to those minutes by the undertakings, and it must

therefore be concluded that the members of the Commission were aware of all the relevant information before they adopted the Decision.

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

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

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

49 In its application the applicant contended that the hearing officer's report should have been made available to the agents of the undertakings; in its reply, however, it acknowledges the order of 11 December 1986 (Case 212/86 R *ICI* v *Commission*, not published in the Reports of Cases before the Court, paragraphs 5 to 8) in which the Court of Justice held that the parties were not entitled to receive the hearing officer's report and states that it is not necessary to consider this issue again.

50 According to the Commission, there is no provision requiring the opinion of the hearing officer to be provided to the addressees of the Commission's decision. It takes the view that the hearing officer plays an important role in the internal decision-making process of the Commission and that undertakings cannot seek to be involved in that process without imperilling the independence of the hearing officer and his ability to state his views candidly.

51 This Court holds that the rights of the defence do not require that undertakings involved in proceedings under Article 85(1) of the EEC Treaty should be able to comment on the hearing officer's report, which is a purely internal Commission

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

52 It is to be noted in this regard that the purpose of the hearing officer's report is neither to supplement or correct the undertakings' arguments nor to set forth fresh objections or adduce fresh evidence against the undertakings but to express the opinion of a Commission official with a view to the adoption of a decision by the Commission. It follows that respect for the rights of the defence does not give the undertakings the right to demand disclosure of the hearing officer's report so as to be able to comment upon it (see the judgment of the Court of Justice in Joined Cases 43 and 63/82 *Vereniging ter Bevordering van het Vlaamse Boekwezen, VBVB, and Vereniging ter Bevordering van de Belangen des Boekhandels, VBBB* v *Commission* [1984] ECR 19, paragraph 25 at p. 58).

53 Consequently, this ground of challenge must be dismissed.

Proof of the infringement

54 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.

55 It is therefore necessary to verify first of all whether the Commission has established to the requisite legal standard its findings of fact as regards (I) the period from 1977 to the end of 1978 or the beginning of 1979 and (II) the period from the end of 1978 or the beginning of 1979 to November 1983 concerning (A) the system of regular meetings, (B) the price initiatives, (C) the measures designed to facilitate the implementation of the price initiatives and (D) the fixing of target tonnages and quotas, taking into account (a) the contested decision, (b) the arguments of the parties, before going on to (c) an assessment of them; it will then be necessary to review the application of Article 85(1) of the EEC Treaty to those facts.

1. *The findings of fact*

I. The period from 1977 to the end of 1978 or the beginning of 1979

A. The contested decision

56 The Decision (point 78, fourth paragraph, and point 104, third paragraph) asserts that the system of regular meetings of polypropylene producers began at about the end of 1977 but that it is not possible to identify the precise date on which each individual producer began to attend. It states that BASF, one of the producers which are not proved to have 'supported' the December 1977 price initiative, claims to have attended only 'sporadically' before 1980 (the French text of the Decision has 'from 1978' instead of 'before 1980', as a result of a clerical error).

57 However, the Decision (point 105, first and second paragraphs) states that the precise date on which each producer began to attend regular plenary meetings cannot be established with certainty. The date on which Anic, ATO, BASF, DSM and Hüls began to participate in the arrangements cannot have been later than 1979 since all these five producers are shown to have been involved in the market-sharing or quota systems which were first in force in that year.

B. Arguments of the parties

58 The applicant submits that the evidence put forward by the Commission is not sufficient to prove its participation in the meetings since December 1977. It considers that its participation in the meetings can be placed in issue in these proceedings only from the time at which its participation began to be regular. As is pointed out in point 81 of the Decision, there is an infringement of competition law only once an undertaking has begun to take part regularly in a 'system of regular and institutionalized meetings'.

59 The applicant states that it was present at the meetings on a regular basis only from June 1982, although it acknowledges having participated sporadically before 1 December 1980, a period in respect of which it has no recollection of the places and dates of meetings, and admits having participated in four specific meetings of the 19 which the Commission alleges to have been held between the beginning of 1981 and June 1982.

60 The applicant is concerned to show that the Commission has misquoted ICI's reply to the request for information (main statement of objections, Appendix 8). It points out that with regard to the meetings held in 1978 ICI stated quite clearly that these were *ad hoc* meetings and not 'regular' or 'institutionalized' meetings; that ICI did not state that the applicant was present at those meetings and, finally, that it stated that it could provide the dates and locations of 'bosses" and 'experts" meetings only from 1 January 1980 onwards. The applicant considers that the passage in ICI's reply to the request for information in which it describes it as a 'regular participant' in the meetings is 'essential' in so far as an undertaking can only be said to have been a regular participant if it took part in at least the majority of the meetings. It is apparent from BASF's reply to the request for information (particular objections, BASF, Appendix 1) that that was not the case before June 1982.

61 In its reply, the applicant points out that the Commission has put forward no evidence to prove its participation in the meetings during the period in question and expresses surprise that the Commission has maintained its objections in respect of that period.

62 The Commission states that although it cannot precisely identify the date on which BASF began to participate in the meetings, it considers that it can place it with some certainty at an indefinite time between 1977 and 1979.

63 As evidence it puts forward the replies of the applicant and ICI to the requests for information sent to them. In the first, the applicant stated that 'before 1 December 1980 representatives of our company participated in meetings of European polypropylene producers at irregular intervals. It is impossible for us to recall the dates and locations of these meetings.' In the second, ICI numbered BASF among the regular participants in the meetings without any qualification as regards time (unlike Anic and Rhône-Poulenc, for example, which according to ICI participated only during a specific period, and unlike Hercules, which took part only irregularly in the meetings) and placed the beginning of those meetings in December 1977.

C. Assessment by the Court

64 The Court finds that the only evidence put forward by the Commission to prove BASF's participation in the meetings during the period in question is the applicant's reply to request for information (particular objections, BASF, Appendix 1) and ICI's reply to the same request (main statement of objections, Appendix 8).

65 As regards the first reply, it may be observed that the reference to the period 'before 1 December 1980' is not by itself sufficient to prove BASF's participation in the meetings during the period now in question. Consequently, it must be determined whether ICI's reply to the request for information corroborates the conclusions drawn by the Commission from the applicant's reply on this point.

66 The Court observes that ICI's reply to the request for information classifies the applicant among the regular participants in the 'experts" and 'bosses" meetings without indicating from what date. In that reply it is stated:

'The regular participants at meetings of "Experts" and "Bosses" were as follows: ATO, BASF, Chemie Linz, DSM, Hoechst, Hüls, ICI, Montepolimeri, Petrofina, Saga, Solvay. The following producers participated regularly during those periods between 1979 and 1983 while they were engaged in the West European polypropylene industry: Anic — polypropylene business taken over by Montepolimeri; SIR — believed to be no longer in business; Rhône-Poulenc — polypropylene business sold to BP. In addition, Alcudia and Hercules attended meetings on an irregular basis.'

67 Since it has no precise information regarding the beginning of the applicant's participation in these meetings, The Commission refers to a second passage in ICI's reply:

'Because of the problems facing the polypropylene industry . . . a group of producers met in about December 1977 to discuss what, if any measures could be pursued in order to reduce the burden of the inevitable heavy losses about to be incurred by them . . . . It was proposed that future meetings of those producers who wished to attend should be called on an "*ad hoc*" basis in order to exchange and develop ideas to tackle these problems.'

It infers from that passage that the applicant's participation in the meetings began in December 1977. The Commission considers that that interpretation of ICI's reply to the request for information is corroborated by the fact that if ICI stated the period during which the undertakings had participated in the meetings (1979-1983) only in respect of the undertakings named in the second sentence of the first passage quoted, it was in order to make it apparent that the undertakings named in the first sentence of that passage participated in the meetings from the start.

68 The Court observes that the passage in ICI's reply to the request for information in which it classifies the applicant among the regular participants in the meetings expressly refers to its participation in 'bosses" and 'experts" meetings. The passage cited by the Commission in support of the assertion that the applicant participated in the meetings from December 1977 onwards concerns '*ad hoc*' meetings and not the 'bosses" and 'experts" meetings, in respect of which another passage in ICI's reply to the request for information, in which it is stated:

'By late 1978/early 1979 it was determined that the "ad hoc" meetings of Senior Managers should be supplemented by meetings of lower level managers with more marketing knowledge. This two-tier level of representation became identified as (a) "Bosses" and "Experts"',

indicates that they began in late 1978 or early 1979 as a result of the addition of 'experts" meetings to the '*ad hoc*' 'bosses" meetings.

69 That interpretation of ICI's reply to the request for information is confirmed if the first two sentences in the first passage quoted above are read on equal terms. Such a reading is justified by the fact that the distinction to be drawn between the undertakings mentioned in the first sentence and those mentioned in the second is

not the beginning but the end of their participation in the meetings, since all the undertakings mentioned in the second sentence left the market before the end of the infringement. Those two sentences must therefore be interpreted in the light of each other, regard being had to the fact that the 'bosses" and 'experts" meetings did not begin before late 1978 or early 1979.

70 The Court should also point out that at the hearing the Commission admitted, first, that it had some doubts as to the date when BASF began to participate in the meetings, despite its reading of ICI's reply to the request for information; secondly, that it is not sure that BASF took part in the meetings during the period in question and, finally, that that was why the Commission could not identify a specific date from which BASF participated in the infringement.

71 The Commission's doubts may be seen in point 105, second paragraph, of the Decision, in which it is stated that the date on which the applicant began to participate in the arrangements cannot have been later than 1979.

72 It follows from the foregoing that the Commission cannot put forward any evidence to prove BASF's participation in the infringement before the end of 1978 or the beginning of 1979 and that it has therefore not proved such participation to the requisite legal standard.

II. The period from the end of 1978 or the beginning of 1979 to November 1983

A. The system of regular meetings

(a) The contested decision

73 The Decision (point 78, fourth paragraph) states that BASF claims to have attended meetings only 'sporadically' before 1980. It concludes (point 105, second

paragraph) that the date on which BASF began to participate in the arrangements cannot have been later than 1979, since it is shown to have been involved in the market-sharing or quota systems which were first in force in that year.

74 The Decision (point 104, third paragraph, and point 105, second and fourth paragraphs) asserts that ICI has stated that BASF was a regular participant in the meetings and that the system of regular meetings of polypropylene producers continued until at least the end of September 1983. It finds that BASF participated in that system (point 18, first and third paragraphs).

75 According to the Decision (point 21), the purposes of the regular meetings of polypropylene producers included the fixing of price and sales volume targets and the monitoring of their observance by producers.

(b) Arguments of the parties

76 The applicant reiterates that only regular participation in the meetings can be regarded as constituting an infringement and that its presence at the meetings became regular only from June 1982, although it does acknowledge having attended meetings sporadically before 1 December 1980 and having attended four of the 19 meetings which the Commission alleges were held between the beginning of 1981 and June 1982.

77 It further maintains that the Commission has put forward no evidence to prove its participation in the meetings in the first half of 1979. It expresses surprise, therefore, that the Commission persists in its objections as regards that period and disputes the evidentiary value of the material put forward by the Commission in order to assert the contrary, that is to say the note of a meeting held on 26 and 27 September 1979 (main statement of objections, Appendix 12), a table headed 'Producers' Sales to West Europe' (main statement of objections, Appendix 55) and the price instructions which preceded that meeting (letter of 29 March 1985, Appendix BASF).

78 In regard to that evidence the applicant argues first that the note of the meeting of 26 and 27 September 1979 does not mention its name and therefore does not establish its presence at that meeting. It further states that the table has no evidentiary value because it is not known for what purpose it was drawn up and whether producers other than ICI had access to it. Moreover, there is no indication that it was the result of collusion between producers or that BASF was aware of it. Finally, it maintains that the fact that its price instructions corresponded to those of other producers may be explained by the increase in the price of raw materials. It argues that the fact that there is a period of a month and a half separating the instructions given by the various producers is corroboration of their independent nature.

79 The applicant admits having participated regularly in the meetings from 9 June 1982 onwards.

80 The Commission states that there are several items of evidence showing the applicant's participation in the meetings from the beginning of the period in question.

81 First of all, there are the replies of ICI and BASF to the request for information (main statement of objections, Appendix 8, and particular objections, BASF, Appendix 1, respectively). In the first of these, ICI asserts that the applicant was a regular participant in the meetings throughout the period in question, and in the second BASF acknowledged that 'before 1 December 1980 representatives of our company participated in meetings of European polypropylene producers at irregular intervals. It is impossible for us to recall the dates and locations of these meetings.' It may be inferred therefrom that BASF participated in the meetings from the beginning of the period under examination, even if it disputes the regularity of its participation in the meetings before December 1980.

82 Next, the Commission cites the identical nature of the price instructions issued by the applicant on 24 and 27 July 1979 and those issued by Monte, Shell, ICI,

Hoechst, Linz and ATO for 1 September 1979 (letter of 29 March 1985, Appendix A). According to the Commission, such convergence cannot be explained by an increase in the price of raw materials and therefore proves the applicant's participation in the meetings at which those prices were fixed.

83 Finally, the Commission refers to an undated table headed 'Producers' Sales to West Europe', found at the premises of ICI (main statement of objections, Appendix 55), which sets out for all the polypropylene producers in western Europe the sale figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual' and 'revised target'. That table contains information which must be kept strictly secret as confidential business information and could not have been drawn up without BASF's participation.

84 Finally, it states that the fact that the applicant can remember only four meetings in which it participated in 1981 in no way refutes the information given by ICI regarding the regularity of the applicant's participation in the meetings.

(c) Assessment by the Court

85 The Court observes that ICI's reply to the request for information (main statement of objections, Appendix 8) classifies the applicant, unlike two other producers, among the regular participants in the 'bosses" and experts" meetings without any qualification as regards time. That reply must be interpreted as meaning that the applicant participated in meetings from the beginning of the system of 'bosses" and 'experts" meetings, which was instituted in late 1978 or early 1979.

86 ICI's reply to the request for information is corroborated, first, by the applicant's own answer to the request for information (particular objections, BASF, Appendix 1), which states that 'before 1 December 1980 representatives of our company

participated sporadically in meetings of European polypropylene producers'; secondly, by the mention, next to the applicant's name, in various tables found at the premises of ICI, ATO and Hercules (main statement of objections, Appendices 55 to 62), of its sales figures for various months and years, when, as most of the applicants admitted in their replies to a written question put by the Court, the tables found at the premises of ICI, ATO and Hercules could not have been drawn up on the basis of statistics from the FIDES data exchange system. Indeed, in its reply to the request for information ICI stated in relation to one of the tables that 'the source of information for actual historic figures in this table would have been the producers themselves'. Thirdly, ICI's reply is confirmed by the fact that the price instructions issued by the applicant on 24 and 27 July 1979 correspond to those issued by other producers (letter of 29 March 1985, Appendix A), which supports the inference that they are the result of collusion between the producers in or about June 1979.

87 As regards more specifically the first eleven months of 1980, the Decision (point 32 and Table 3) states that seven meetings of producers were held, but does not state who took part. The applicant's denial of participation in those meetings is lacking in credibility since in its reply to the request for information it states that it took part sporadically in meetings during that period but cannot identify their dates and locations. That is all the more true inasmuch as the applicant stated before the Court that it had used the word 'sporadically' in its reply to the request for information because it was not in a position to identify the dates and locations of meetings prior to 1 December 1980 and that it knew only that certain of its representatives had attended only a few meetings.

88 For the rest of the period in question (from 1 December 1980 to June 1982), the applicant's assertion that it took part in only four meetings is not credible, since its statements regarding its participation in the meetings are lacking in precision and are inaccurate on certain points, as in the case of the meeting of 13 May 1982, the

note of which (main statement of objections, Appendix 24) attests the presence of BASF although that meeting is not one of the meetings in which it admitted having participated in its reply to the request for information.

89 The Commission was also entitled to take the view, based on the material provided by ICI in its reply to the request for information, which is borne out by numerous notes of meetings, that the purpose of the meetings was, in particular, to fix target prices and sales volumes. That reply states: '"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'.

90 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 onwards, 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.

91 Besides the foregoing passages, 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.

92 It follows that the Commission has established to the requisite legal standard that the applicant participated regularly in the system of regular meetings of polypropylene producers from the end of 1978 or the beginning of 1979 until September 1983, that the purpose of those meetings was, in particular, to fix price and sales volume targets and that they were part of a system.

B. The price initiatives

(a) The contested decision

93 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.

94 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 BASF, which show that those producers had given orders to national sales offices to apply that price level or its equivalent in national currency from 1 September, in most cases before the announcement of the planned increase in the trade press (Decision, point 30).

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

96 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 and Saga in addition to 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.

97 The Decision (point 33) records the participation of BASF in one of the two meetings held 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. Documents found at the premises of BASF show *inter alia* that it took steps to introduce the target prices set for February and March.

98 According to the Decision (point 34), the plan to move to DM 2.00/kg on 1 March does 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.

99 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.

00 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%.

101 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 Hercules 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).

102 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.

103 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).

104 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).

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

106 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).

107 Like ATO, DSM, Hercules, Hoechst, Hüls, ICI, Linz, Monte and Saga, the applicant supplied the Commission with price instructions issued to its local sales offices, which corresponded not only with each other in terms of amount and timing but also with the target-price table attached to ICI's account of the experts' meeting held on 2 September 1982 (main statement of objections, Appendix 29) (Decision, point 45, second paragraph).

108 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.

109 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 reaffirmed complete commitment to the DM 1.85/kg increase. On that occasion, it was agreed that Shell would lead publicly in a specialized industry journal, European Chemical News (ECN).

110 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. 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.

111 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.

112 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.

13 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.

14 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.

15 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

16 With regard to the July-December 1979 price initiative the applicant maintains that the fact that its price instructions correspond to those of the other producers may be explained by the proved increases in prices of raw materials, in particular propylene, to which all the producers were subject in the same manner. It adds that the fact that there was a long period (from 20 June to 8 August 1979) separating the instructions issued by the various producers (letter of 29 March 1985, Appendix A) confirms their independent nature and stresses that the

Commission has not proved its participation in the meeting of 26 and 27 September 1979. Finally, the applicant argues that its price instructions were purely internal and that the Commission cannot infer from them the implementation of a target price fixed at a meeting.

117 The applicant subdivides the January-May 1981 price initiative into three separate initiatives. For the January-February price initiative it begins by pointing out that it is not mentioned in Table 7B of the Decision, concerning that price initiative, and that at the time when that initiative was decided upon it did not attend any producers' meeting. Its price instructions of 22 December 1980 and 20 and 25 February 1981 (letter of 29 February 1985, Appendix BASF C) were issued in reaction to the news of an increase in raw materials prices published on 18 December 1980. The applicant further maintains that the mention of the phrase 'target list prices' in an ICI price instruction (main statement of objections, Appendix 16) does not prove that a meeting was held at which that target was fixed, because that phrase is one peculiar to ICI, an internal indication to its sales offices of the price level at which they should aim, and because the instruction makes no reference to any meeting.

118 As regards the March-April price initiative, the applicant disputes the evidentiary value of the price instructions produced by the Commission (letter of 29 February 1985, Appendix BASF C) on the ground that the inclusion of the word 'agreed' does not show whether BASF accepted a price increase following the exchange of information or whether BASF's attempt to raise its prices was dictated independently by other factors before it first participated in the meetings. Moreover, the price table attached to the note of the two meetings in January 1981 (main statement of objections, Appendix 17) is not conclusive either, since there is no evidence that it was ever discussed.

119 As regards the May 1981 price initiative, it points out that the Commission has admitted that it does not have notes of meetings and is thus proceeding solely on the basis of the price instructions issued by BASF on 30 April and 6 May 1981 (letter of 29 February 1985, Appendix BASF D). These, however, may be explained by the increase in the cost of raw materials, the probable amount of

which was published in ECN on 20 April 1981 (main statement of objections, Appendix 20). The applicant also disputes the evidentiary value of the price instructions of various producers for May and June (main statement of objections, Appendix 19), arguing that they do not support the inference of collusion between producers — let alone the participation of BASF in such collusion — since information on prices had been made public before those instructions were issued.

120 The applicant dos not deny having taken part in the price initiatives in 1982 and 1983. It reiterates, however, that its price instructions were purely internal, as is confirmed by an audit carried out by an independent firm of accountants concerning the net selling prices (after deduction of any rebates) charged by the producers during the period of reference (hereinafter referred to as the 'Coopers & Lybrand audit'). The conclusions of that audit show that those instructions had no effect on the prices actually charged on the market.

121 The Commission submits that the fact that the price instructions issued by the applicant on 24 and 27 July 1979 are identical to those issued by Monte, Shell, ICI, Hoechst, Linz and ATO for 1 September 1979 cannot be explained by an increase in the price of raw materials and therefore proves the existence of concertation on prices. That conclusion follows in particular from the note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12), which refers to the 1979 price initiative, since it states '2.05 remains the target'.

122 The Commission goes on to consider that BASF took part in the price initiative of late 1980/early 1981. It bases that view on a telex of 22 December 1980 in which BASF indicates a price of DM 1.77/kg applicable on 20 January 1981, which, says the Commission, is the result of an agreement with the other producers, as is confirmed by the note of the two meetings in January 1981, in the second of which BASF took part. That note is accompanied by a price table which corresponds to the price instructions issued by BASF and a number of other producers (letter of 29 February 1985, Appendix C).

123 As regards March and April 1981, the Commission acknowledges that it has no direct evidence of BASF's participation in the meetings, but it asserts that the fact that BASF's price instructions correspond to those of the other producers for the same period (letter of 29 February 1985, Appendix D) shows that the contacts between the producers had not suddenly been interrupted. The Commission considers that that proof is not shaken by the fact that the price increases contemplated by certain producers had been published in the 20 April issue of ECN (main statement of objections, Appendix 20) because BASF's price instruction of 6 May 1981 simply confirmed an identical price instruction which BASF had already issued on 27 March 1981.

124 The Commission states that the situation is exactly the same as regards September and October 1981 (letter of 29 February 1985, Appendix E).

125 It further considers that BASF took part in all the price initiatives in 1982 and 1983. In support of that assertion it refers to the notes of the meetings from May 1982 to the end of September 1983 (main statement of objections, Appendices 24 to 40) and on the concordant price instructions issued by BASF and the other producers following those meetings (letter of 29 February 1985, Appendices F to I).

(c) Assessment by the Court

126 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'.

127 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 would not have supported those initiatives, unlike other participants at the meetings.

128 In this regard, it must be noted that the applicant does not specifically deny having participated in the price initiatives which took place in the second half of 1981 and in 1982 and 1983, and the fact that its price instructions correspond to those issued by various producers also shows that it participated in the implementation of those price targets by the producers.

129 The Court considers that the applicant's arguments intended to show that it did not subscribe to the agreed price initiatives cannot be upheld, for the following reasons.

130 The applicant's arguments based on the identical nature of the constraints faced by the various producers 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, as 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), in which the applicant did not participate.

According to that note, 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.

131 As regards the purely internal nature of the applicant's price instructions and the target prices which it set, the Court observes that although those instructions were internal in the sense that they were sent by the head office to the sales offices, they were sent with a view to being implemented and thus having external effects, as is expressly confirmed by the price instruction issued by BASF on 26 September 1983 (main statement of objections, Appendix 42), which states:

'Wir müssen Sie also bitten, unsere Kunden dahin gehend zu informieren, daß ein weiterer Preisschritt für Lieferungen ab 1. November von 0,15 DM/kg unvermeidbar ist.'

('We must therefore ask you to inform clients that a further price increase of 0.15 DM/kg for deliveries from 1 November is unavoidable.')

Similarly, purely internal price objectives lose that character as soon as they are discussed with other producers. Consequently, the applicant's arguments are not such as to cast doubt on its participation in the successive price initiatives.

132 The appearance in ECN of news regarding prices is not such as to deprive the fact that the applicant's price instructions corresponded to those of other producers of evidentiary value, since it is established that several producers issued price instructions before that news appeared, producers' meetings took place at the time in question and it is clear, moreover, from the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) that when a price initiative was decided upon it was announced in the specialized press. That note states that:

'Shell was reported to have committed themselves to the move and would lead publicly in ECN'.

133 As regards the argument drawn by the applicant from the fact that the Coopers & Lybrand audit shows that its price instructions had no effect on the prices charged, it should be pointed out that lack of effect cannot undermine the evidence put forward by the Commission to show that the price initiatives were the result of the fixing of price targets by the various producers.

134 Finally, the Court considers that the Commission could reasonably take the view that the price table attached to the note of the two meetings held in January 1981 (main statement of objections, Appendix 17) had been discussed at those meetings and was the result of them.

135 Furthermore, the Commission was fully entitled to deduce from ICI's reply to the request for information (main statement of objections, Appendix 8), in which it is stated that '"Target prices" for the basic grade of each principal category of polypropylene as proposed by producers from time to time since 1 January 1979 are set forth in Schedule . . . ', that those initiatives were part of a system of fixing target prices.

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

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

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

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

(a) The contested decision

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

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

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

141 According to the Decision (point 42, first paragraph), at the meeting of 2 September 1982 the BASF representative warned of the danger of all the producers quoting the same price of DM 2.00/kg; it was agreed that, if approached, producers other than the major suppliers to a particular client would quote above DM 2.00/kg so as to assist the implementation of the target.

142 Although it recognizes that there were no local meetings in Germany, the Decision (point 20) asserts that BASF remained in close contact with Hoechst and Hüls and adopted with them a common position in some matters such as quotas.

(b) Arguments of the parties

143 As regards production restrictions, the applicant states that the notes of the meetings of 13 May and 21 September 1982 (main statement of objections, Appendices 24 and 30) at most show that such proposals were made, but certainly not that they had any success whatsoever. With regard to the second of these notes, the applicant argues that although it was obliged to reduce its production in October 1982, that was for purely technical reasons. Moreover, the reduction had no effect on the market since it was made up for by a reduction in stocks. That explanation is consistent with the text of the note, according to which BASF's representative said not that the production unit *should* be closed down but that it *would* be closed down.

144 As regards the 'account leadership' system, the applicant states that although the note of the meeting of 2 September 1982 (main statement of objections, Appendix 29) suggests that there were attempts to set up such a system, the producers were never able to reach agreement on that point. In any event, BASF rejected the system from the start and did not take part, as is indicated by the fact that BASF's name is not mentioned in that note. At the hearing the applicant stated that it was in his personal capacity that its representative gave his ideas on 'account leadership' at that meeting. It adds that table 3 attached to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33), in which BASF appears as the 'account leader' for three customers, is not conclusive since these are manifestly proposals by the author of the table which were never approved by the applicant. Furthermore, the customers mentioned in it are unimportant.

145 The Commission observes that it did not, in the Decision, accuse the applicant of having reduced its production, as the latter asserts. It states, however, that it appears from the note of the meeting of 21 September 1982 (main statement of objections, Appendix 30) that BASF indicated its willingness to support the price initiative agreed upon at that meeting by reducing its production. The Commission adds that even if such reductions were not in fact made, the simple fact that a producer announces its intention to reduce its production for any reason whatever constitutes the divulgation of confidential business information, which is prohibited.

146 The Commission asserts that BASF's participation in the 'account leadership' system may be seen in the notes of the meetings of 2 September and 2 December 1982 (main statement of objections, Appendices 29 and 33) and of the two meetings held in spring 1983 (main statement of objections, Appendices 37 and 38). At the first meeting BASF warned the other producers of the danger of quoting an identical price to all customers. As a result of that point it was proposed and agreed that producers other than the major suppliers to a particular client would quote it a few pfennigs more. Table 3 of the note of the meeting of 2 December 1982 shows that BASF was named 'account leader' for three of its customers, in France, the Federal Republic of Germany and Denmark. The note of a meeting in spring 1983 confirms those assertions (main statement of objections, Appendix 37).

147 Furthermore, the Commission accuses BASF of acting not only as an 'account leader' but also as a 'contender'. Those accusations are corroborated by ICI's reply to the request for information (main statement of objections, Appendix 8), in which ICI describes the functioning of the system for BASF's Danish client (Jacob Holm, in respect of which ICI and Hüls acted as 'contenders'), a description which is confirmed by the note of the meeting of 3 May 1983 (main statement of objections, Appendix 38). The Commission further argues that the applicant's argument that Jacob Holm was an unimportant client in respect of which BASF had no need of protection may be doubted since in the notes of meetings, such as that of 1 June 1983 (main statement of objections, Appendix 40), the name of Jacob Holm is constantly cited in a prominent position in relation to the applicant, which shows that it was one of the applicant's key customers.

(c) Assessment by the Court

148 The Court observes, first of all, that although the German producers did not organize local meetings in Germany they nevertheless maintained close contacts among themselves, as a result of which the applicant even went so far as to prepare a quota proposal on behalf of the German producers, as is shown by the note of a telephone conversation between an ICI employee and the applicant's representative (main statement of objections, Appendix 83), in which it is stated: 'A: [the applicant's representative] phoned to give me his company's figure for September sales + to pass on the German producers' view of how the market might be shared in 1983' (a detailed table follows).

149 Secondly, the note of the meeting of 2 September 1982 (main statement of objections, Appendix 29), in which the applicant participated, indicates that the commitment of the undertakings to applying the price targets was to go as far as accepting the loss of sales volume, as is confirmed by the note of the meeting of 21 September 1982 (main statement of objectives, Appendix 30), in which the applicant also participated, which states: 'In support of the move, BASF, Hercules and Hoechst said they would be taking plant off line temporarily', an assertion

which supports the objection made in the Decision concerning 'the exchange of information on planned temporary plant closures which might be helpful in reducing overall supply (point 27, fourth indent).

150 Thirdly, the Court observes that at the meeting of 2 September it was the applicant's representative (Mr A) who warned against the danger in all the producers quoting the same price to their customers and that it was he who proposed a solution to the problem. The note of that meeting (main statement of objections, Appendix 29) states:

'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'.

151 Furthermore, the applicant's name appears in table 3 attached to the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) as the 'account leader' for three clients (one in Germany, Boussac in France and Jacob

Holm in Denmark) and in the note of a meeting held in spring 1983 (main statement of objections, Appendix 37) devoted mainly to an examination of the system of 'account leadership'. Moreover, in the note of the meeting of 3 May 1983 (main statement of objections, Appendix 38) it is stated: 'To protect BASF, it was agreed that CWH[üls] + ICI would quote Dkr 6.75 from now to end June (DM 1.85).'

152 It follows from those various pieces of evidence that BASF participated actively in the 'account leadership' system and that it cannot exculpate itself by arguing that it was in his personal capacity that its representative spoke at the meeting of 2 September 1982.

153 The applicant's argument that the customers for which it is accused of being the 'account leader' were unimportant, so that it could not have been their 'account leader', cannot be upheld. The relevant question is not whether or not the three customers of the applicant were important customers but whether or not it was one of their main suppliers. The applicant has neither asserted nor proved that it was not one of the main suppliers of those customers.

154 With regard more generally to the measures designed to facilitate the implementation of the price initiatives, 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.

155 It must be concluded that in participating in the meetings during which those measures were adopted the applicant took part in them like the other participants, since it has not adduced any evidence to support its assertion that it did not take part.

156 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.

D. Target tonnages and quotas

(a) The contested decision

157 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.

158 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.

159 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).

160 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.

161 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).

162 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 of medium-sized producers such as BASF had reached a relative equilibrium and were stable in comparison with previous years in the case of the majority of producers.

163 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 aspirations of each producer. Those steps enabled ICI to propose guidelines for a new framework agreement for 1983. Those proposals were discussed at the meetings of November and December 1982. A proposal initially restricted to the first quarter of the year was discussed at the meeting on 2 December 1982. The note of that meeting drawn up by ICI shows that ATO, DSM, Hoechst, Hüls, ICI, Monte and Solvay, as well as Hercules, found their allocated quota 'acceptable' (Decision, point 63). Those facts are borne out by the ICI note of a telephone conversation with Hercules of 3 December 1982.

164 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).

165 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

166 The applicant considers that the note of the meeting of 26 and 27 September 1982 (main statement of objections, Appendix 12) does not prove its participation in a quota agreement for 1979 since nothing in that note proves its participation in that meeting and the note shows the absence of agreement on quotas at that time.

167 It contends that the table headed 'Producers' Sales to West Europe' (main statement of objections, Appendix 55) has no evidentiary value since it is not known who was the author, to whom it was sent and for what purpose it was drawn up, and there is thus nothing to indicate that it was the result of previous concertation between producers or that it was ever brought to BASF's knowledge. The most that can be concluded from the table is that someone gave some consideration to polypropylene sales in western Europe.

168 As regards 1980, the applicant points out that according to the Commission it was at the end of February 1980 that the producers agreed on 'target quotas' for that year. However, the Commission has not asserted that the BASF participated in a producers' meeting that month.

169 The applicant makes a detailed analysis of the tables produced by the Commission (main statement of objections, Appendices 56 to 61) and concludes that the figures cited as quotas for all the producers, including those for BASF, are not consistent

in those various documents. There is no proof that certain documents were the subject of any decision whatever, while other documents are presented as quota proposals, which does not mean that there was any agreement. As regards the figures cited in the table attached to the note of the meetings in January 1981 (main statement of objections, Appendix 17), the applicant emphasizes that they concern the past and not the future, and thus do not relate to quotas. It adds that there are large discrepancies between the 'target quotas' alleged to have been allocated to it and its actual sales, contrary to what is stated in point 55, fourth paragraph, of the Decision. That is additional evidence that there was no agreement.

170 It goes on to state that the Commission has admitted the absence of any quota agreement for 1981. The system of provisional twelfths alleged to have been followed was merely a proposal which BASF did not support and which did not in any event result in an agreement. As evidence it points simply to the fact that on 27 May 1981 there was no agreement for the restriction of sales volumes, as is confirmed by the note of a meeting on that date between representatives of ICI and Shell (main statement of objections, Appendix 64) and by an ICI proposal (main statement of objections, Appendix 63). Those documents show that discussions were still taking place at that time. That conclusion is not contradicted by the fact that the undertakings may have exchanged information in order to obtain an idea of market trends.

171 As regards 1982, the applicant contends that although there were discussions between producers these did not result in an agreement, because of the widely diverging views held by the various producers. That appears clearly from the notes of the meetings of 20 August, 6 October and 2 December 1982 (main statement of objections, Appendices 28, 31 and 33) and the proposals made by various producers (main statement of objections, Appendices 69 to 71), which diverge greatly.

172 As regards 1983, it points out that the documents provided by the Commission show that the polypropylene producers discussed quota proposals but in no way prove that those proposals resulted in agreement or that BASF subscribed to such an agreement in the first quarter of 1983. The documents put forward by the

Commission do not show any agreement (main statement of objections, Appendices 82 and 83), but simply 'proposals' (main statement of objections, Appendix 33, table 2) or 'acceptable' figures (which does not mean 'accepted') for producers other than BASF.

173 Similarly, the documents produced by the Commission as evidence of the existence of an agreement in the second quarter of 1983, in particular the note of the meeting of 1 June 1983 (main statement of objections, Appendix 40) and a table (main statement of objections, Appendix 84) are not conclusive. The first of these contains only comparisons of figures, and, in respect of the second, BASF states that the Commission cannot infer from the fact that information was exchanged on sales, which BASF admits, that a quota agreement was concluded. Indeed, in the statement of objections the Commission itself proceeded on the basis that the quota agreements and the exchanges of information on sales volumes were not necessarily linked.

174 Finally, as regards the pressure allegedly exerted on certain producers at the meetings, the applicant states that criticism cannot be regarded as pressure and that in any event the Commission should at least have established that the criticisms made of certain producers in fact influenced them.

175 The Commission considers that the applicant's participation in the quota agreements for 1979 is established by an undated table found at the premises of ICI (main statement of objections, Appendix 55) headed 'Producers' Sales to West Europe', which sets out for all the polypropylene producers in western Europe the sales figures in kilotonnes for 1976, 1977 and 1978 and figures under the headings '1979 actual' and 'revised target'. BASF was allocated a 'revised target' of 55 kilotonnes. That table contains information which must be kept strictly secret as confidential business information and could not have been drawn up without BASF's participation. The note of the meeting of 26 and 27 September 1979 (main statement of objections, Appendix 12) confirms that the issue of quotas was the subject of meetings at that time, which demolishes BASF's argument that the table was drawn up without its knowledge outside the meetings.

176 As regards 1980, the Commission contends that an agreement on quotas was made. It bases this contention essentially on a table dated 28 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.

177 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. In view of the close relationship between the price agreements and the advantages resulting from that system BASF's participation in the latter is, in the Commission's view, sufficiently proved.

178 As regards 1982, it states that no definitive quota agreement could be reached, despite the efforts made in this direction which, in its view, are proved by the various quota schemes discovered (main statement of objectives, Appendices 69 and 71). However, a provisional solution was found in the form of a specific orientation of sales according to the figures for the previous year. Market shares thus remained virtually unchanged, a situation described by ATO as one of 'quasi-consensus' (main statement of objections, Appendix 72).

179 As regards 1983, the Commission points out that BASF acknowledges having made quota proposals which it discussed with the other producers but claims that no agreement could be reached, without explaining why. It adds that BASF even acted in that regard as the spokesman for all the German producers, communicating their aspirations to ICI (main statement of objections, Appendix 83).

180 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.

181 The Commission alleges that the note of the meeting of 2 December 1982 (main statement of objections, Appendix 33) shows that the experts examined a proposal on quotas for the first quarter of 1983.

182 The Commission maintains that those proposals resulted in an agreement; in respect of the first quarter it relies 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, BASF must necessarily have

participated in the agreement, even if the Commission has not been able to establish its individual quota.

183 The same reasoning 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 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.

184 The Commission further alleges that pressure was exerted on producers which did not observe the agreements reached. The existence of such pressure may be seen from the notes of meetings held on 9 June, 21 September, 2 December and 21 December 1982 (main statement of objections, Appendices 25, 30, 33 and 34), which show that those producers were subjected to severe criticism. The Commission states in particular that at a meeting on 15 June 1981 attended by Shell, ICI and Monte the disruptive producers were described as 'hooligans' (main statement of objections, Appendix 64a) and that at the meeting of 21 September 1982 it was stated that 'Pressure was needed on Shell Italy to restrain themselves to the agreed levels for October' (main statement of objections, Appendix 30). The Commission concludes that by participating in those meetings BASF gave its support to those actions.

(c) Assessment by the Court

185 It has already been found that from the end of 1978 or the beginning of 1979 the applicant participated in the regular meetings of polypropylene producers at which discussions relating to the sales volumes of the various producers were held and information exchanged on that subject.

186 Alongside BASF's participation in the meetings, it should be pointed out that its name appears in various tables (main statement of objections, Appendices 55 to 61) whose content clearly indicates that they were intended to be used in setting 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 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 content of those tables had been provided by BASF in the meetings in which it participated.

187 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.

188 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.

189 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, 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. Those documents are further supported by a table dated 8 October 1980 (main statement of objections, Appendix 57) comparing two columns, one setting out the '1980 Nameplate Capacity' and the other the '1980 Quota' for the various producers.

190 As regards the differences between the figures set out as 'quotas' in the tables, it is to be noted, first, that they are small and, secondly, that they are due to the adjustment of the tonnages corresponding to the market shares allocated to the various producers. Such adjustments, made necessary by the change in the overall market, must be considered to be a normal operation in a quota system when the participants in the system make a mistake in their estimate of total demand, as was the case for 1980 in this instance.

191 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 thus 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 their sales matched the theoretical quota allocated to them.

92 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').

193 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'.

194 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.

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

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

197 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.

198 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, first, 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 sales-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).

199 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'.

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.

200 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'.

201 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.

202 As regards 1983, the Court finds that it is clear from the documents produced by the Commission (main statement of objections, Appendices 33, 85 and 87) that at the end of 1982 and the beginning of 1983 the polypropylene producers discussed a quota system for 1983, that the applicant participated in the meetings at which those discussions took place and that on those occasions it supplied data relating to its sales.

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

204 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'.

205 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.

206 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).

207 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.

208 The Court further observes that by participating in the meetings at which various producers were criticized after not adhering to what had been agreed, the applicant took part in making those criticisms and by this means exerted pressure on those producers.

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

210 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.

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

A. Legal characterization

(a) The contested decision

211 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).

212 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).

213 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.

214 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).

215 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.

216 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.

217 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).

218 According to the Decision (point 87, first paragraph), the object of the EEC 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).

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

220 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).

221 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.

222 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 realize their common object was fully met. The various price initiatives were a matter of record. It was also undeniable that the individual producers took parallel action to implement them. The steps taken by the producers both individually and collectively were apparent from the documentary evidence: meeting reports, internal memoranda, instructions and circulars to sales offices and letters to customers. It was wholly irrelevant whether or not they 'published' price lists. The price instructions themselves provided not only the best available evidence of the action taken by each producer to implement the common object but also by their content and timing reinforced the evidence of collusion.

(b) Arguments of the parties

223 The applicant considers that in view of the way in which the Commission's position regarding the legal classification of the infringement has changed it is necessary to define precisely the respective scopes of the concepts of 'agreement' and 'concerted practice'. In order for there to be an agreement it is sufficient that the participating undertakings should have arrived at a meeting of minds regarding a practice restrictive of competition, and it is not necessary that that common intention should in fact be implemented. In order for there to be a concerted practice, on the other hand, there must be some practice, that is to say an action or omission on the part of the participants which can be ascribed to collusion and which has or is intended to have effects on the market.

224 According to the applicant, the conceptual difference between those two concepts is accompanied by a difference in evidentiary requirements. In order to prove an agreement it is necessary to prove the meeting of minds between the parties. For a concerted practice, on the other hand, it is sufficient to prove the existence in fact of concordant actions which it must be possible to ascribe to collusion, and the burden of proving the latter is also on the Commission.

225 In the applicant's view, that distinction between 'agreement' and 'concerted practice' is particularly important in this case. First of all, as regards the existence of agreements, the Commission has not established BASF's actual or legal intention to bind itself. In particular, since the Commission alleges the existence of a 'framework agreement' in 1977 it must prove whether, under what circumstances and when BASF committed itself under such an agreement. Secondly, as regards a concerted practice, the simple existence of concertation is not sufficient and the Commission must provide evidence that the undertakings acted in a uniform manner on the market. There is no such evidence here, since, as the Coopers & Lybrand audit shows, there was a considerable divergence between the prices actually charged on the market and the price targets allegedly agreed upon.

226 The applicant submits that it is not possible to understand from the decision whether the Commission accuses the undertakings of having committed a single

infringement of Article 85 (1) of the EEC Treaty, that is to say whether it accuses them of having set 'target prices' together and having tried to impose them (the other conduct — account management, market sharing, etc. — merely being means of imposing those 'target prices' on the market) or whether it regards each of those activities as separate infringements. In the light of the operative part of the Decision, the applicant considers that the second interpretation is preferable. However, it points out that whatever the interpretation chosen, a finding that an undertaking has not engaged in one or other activity must result in a reduction in the fine, since such a finding entails either a diminution in the seriousness of the general infringement or the disappearance of one of the infringements held to have been committed.

227 According to the Commission, the question whether collusion or a cartel is to be described for legal purposes as an agreement or a 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.

228 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).

229 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.

230 In the Commission's view, there is a concerted practice as soon as there is concerted action having as its purpose the restriction of the autonomy of the undertakings in relation to one another, even if no actual conduct has been found on the market. In its view, the argument revolves around the meaning of the word 'practice'. It opposes the argument put forward by BASF 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.

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

232 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.

233 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.

234 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.

235 In that regard the Commission further points out that the infringement did not consist in a series of unrelated acts. The various measures taken in the course of the infringement (on prices, quotas, 'account leadership', etc.) were merely different aspects of a single whole.

(c) Assessment by the Court

236 Contrary to what the applicant asserts, 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'.

237 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.

238 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 N. V.* v *Commission* [1970] ECR 661, paragraph 112, and the judgment in Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck S.à r. l.* v *Commission* [1980] ECR 3125, paragraph 86), this Court holds that the Commission was entitled to treat the common intentions existing between the applicant and other polypropylene producers, which the Commission has proved to the requisite legal standard and which related to price initiatives, measures designed to facilitate the implementation of price initiatives, sales volume targets for 1979, 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.

239 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 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 S. A.* v *Agence et Messagerie de la Presse S. A.* [1985] ECR 2015, paragraph 17).

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

241 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.

242 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.

243 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 1978 or the beginning of 1979 and September 1983 as concerted practices within the meaning of Article 85(1) of the EEC Treaty.

244 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 systems of regular meetings, target-price fixing and quota-fixing.

245 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.

246 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.

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

B. Collective responsibility

(a) The contested decision

248 According to the Decision (point 83, first paragraph), the conclusion that there is one continuing agreement is not altered by the fact that some producers inevitably were not present at every meeting. Any 'initiative' took several months to plan and to implement and it would make little difference to the involvement of a producer if it was absent on occasion. In any case, the normal practice was for absentees to be informed of what had been decided in meetings. All the undertakings to which the Decision is addressed took part in the conception of overall plans and in detailed discussions and their degree of responsibility is not affected by reason of their absence on occasion from a particular session (or in the case of Shell, from all plenary sessions).

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

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

(b) Arguments of the parties

251 The applicant accuses the Commission of using a method of proof based on presumptions and not on facts. Rather than establishing that BASF's own conduct constituted an infringement of competition law the Commission simply stated that other undertakings had acted in an unlawful manner and inferred that BASF had done likewise. The Commission thus ascribed collective responsibility to BASF.

252 The Commission replies that the existence of a framework agreement may be deduced from the fact that all the producers agreed to a system of institutionalized meetings in order to discuss their business strategies. That framework agreement was accompanied by sub-agreements regarding concrete measures. The infringement of Article 85(1) of the EEC Treaty lies in the combination of the framework agreement and the various sub-agreements. In those circumstances, says the Commission, there is no need specifically to prove the applicant's participation in each activity, since this was a single set of arrangements in which each of the participants may be held responsible for the actions of the other parties as if they were their own.

253 The Commission adds that infringements of Article 85(1) of the EEC Treaty are of the kind which can be committed only by several parties acting in concert. Accordingly, each party must be held responsible for its contribution to the infringement committed by the other participants.

(c) Assessment by the Court

254 It follows from the Court's assessments relating to the findings of fact made by the Commission and its legal characterization of them that in the applicant's case the Commission has proved to the requisite legal standard each of the aspects of the infringement found against it in the decision and that it did not therefore attribute to the applicant liability for the conduct of other producers.

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

256 Consequently, this ground of challenge must be dismissed.

3. *Conclusion*

257 It follows from all the foregoing considerations that since the findings of fact made by the Commission in relation to the applicant for the period prior to the end of 1978 or the beginning of 1979 have not been proved to the requisite legal standard, Article 1 of the Decision must be annulled in so far as it finds that the applicant's participation in the infringement dates from an indeterminate time during that period. For the rest, the applicant's grounds of challenge concerning the findings of fact and the application of Article 85(1) of the EEC Treaty by the Commission in the contested decision must be dismissed.

The fine

258 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. *Duration of the infringement*

259 The applicant claims that in fixing the amount of the fine the Commission did not correctly take into account the duration of the infringement, which was much shorter than alleged by the Commission.

260 The Commission states that it took proper account of the duration of the infringement in fixing the amount of the fine.

261 The Court observes that it follows from its assessments regarding the proof of the infringement by the Commission that the duration of the infringement found to have been committed by the applicant was shorter than was held in the Decision, since it began at the end of 1978 or the beginning of 1979 and not at some indeterminate time between 1977 and 1979. However, it follows from those same assessments that the Commission was correct to conclude that the infringement continued until November 1983.

262 It follows that in that respect the amount of the fine imposed on the applicant must be reduced.

2. *The gravity of the infringement*

A. The applicant's limited role

263 The applicant states that the Commission has accused it of, and improperly regarded as proved, certain practices which do not constitute infringements of Article 85(1) of the EEC Treaty but which — had they been committed — would in the eyes of the Commission have furthered or facilitated infringements of that provision. From that the Commission then drew conclusions as to the intensity of BASF's participation in the alleged infringements. Those practices of which BASF is accused were manifestly decisive in the calculation of the fine. Proof that it did not participate in them must consequently result in a reduction in the fine.

264 More specifically, it states that the Commission was wrong to accuse it of having knowingly attempted to conceal the purpose of the meetings by indicating in the statement of its employees' travel expenses a purpose other than the real purpose of the travel. In fact, says the applicant, the purpose indicated in the statement of travel expenses in question was correct, even if it was not the only purpose. It

never had the intention of deceiving the Commission concerning the purpose of its employees' travel.

265 The applicant submits that the Commission is also wrong to state that in the event of exceeding their quotas the undertakings were exposed to possible pressure from other producers in the form of criticism. In none of the notes of meetings is there any reference to criticism of undertakings which had exceeded their alleged quotas. Nor is there any indication that BASF used criticism as a means of exerting pressure on other producers. Finally, and in any event, the Commission has not adduced evidence that the alleged criticism had any influence on the conduct of the undertakings which were subjected to it.

266 The applicant also denies having acted as spokesman for the German producers and disputes the evidence put forward by the Commission in that regard.

267 Finally, it points out that a fine can only be imposed on it if it is established that its own conduct constituted an infringement of competition law. It adds that the concept of collective responsibility cannot be accepted in particular because that would have the result of depriving the criterion of the 'gravity of the infringement' of all significance in the determination of the fine. Consequently, the only remaining element is BASF's participation in the meetings during a period which is shorter than that taken into account by the Commission.

268 The Commission refers to its arguments concerning the proof of the infringement in submitting that the fine imposed should be upheld.

269 It further argues that the concealment of the purpose of the meetings may be explained by other reasons, but that it shows that the applicant was aware that its actions were unlawful.

270 As regards the exertion of pressure on other producers, it considers that the notes of meetings in its possession, such as that of 2 December 1982 (main statement of objections, Appendix 33) and ICI's reply to the request for information (main statement of objections, Appendix 8) clearly show that the prices and volumes actually achieved were constantly compared with the 'target' prices and volumes, and that failure to observe the agreements entered into gave rise to criticism, particularly on the part of the German producers, which led to pressure. As a participant in the cartel BASF supported those actions and must therefore bear responsibility for them just as if they were its individual conduct.

271 Finally, the Commission relies on the note made by an ICI employee of a telephone conversation with a BASF employee on 14 October 1982 (main statement of objections, Appendix 83) in order to assert that BASF was the spokesman for the German producers.

272 The Court finds that it is clear from its assessments relating to proof of the infringement that the Commission correctly established the role played by the applicant in the infringement from the end of 1978 or the beginning of 1979 onwards and that the Commission was thus entitled to take account of that role in determining the amount of the fine.

273 Furthermore, the specific arguments put forward by the applicant in support of its assertion that it played a more limited role than that attributed to it in the Decision must be dismissed as unfounded in fact. First of all, the concealment of the purpose of the trips made by the applicant's representatives who participated in the regular meetings of polypropylene producers contributed as a matter of fact to maintaining the strict secrecy of those meetings. Secondly, the Court should point out that it has held that in the course of the monitoring, carried out in the meetings, of the implementation of the sales volume targets there was criticism of those who had not fulfilled their commitments. It was thus perfectly legitimate for the Commission to consider that all the participants in the meetings in which that criticism was voiced bore responsibility for it. Thirdly, the Court finds that the Commission was entitled to consider that the applicant's representative had acted as spokesman for the German producers, since a note of a telephone conversation

between that representative and a representative of ICI on 14 October 1982 (main statement of objections, Appendix 83) states that:

'A. phoned to give me his company's figure for September sales + to pass on the German producers' view of how the market might be shared in 1983'.

274 Consequently, this ground of challenge must be dismissed.

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

275 The applicant puts forward as a mitigating circumstance the fact that for a very long period the producers incurred substantial losses in their polypropylene operations. Although a loss-making situation is not in itself a justification for the conclusion of agreements contrary to competition law it may have a decisive influence on the fixing of any fines, especially where it is clear that purchasers benefited from very advantageous prices and the producers covered by the Decision merely attempted, without success, to reduce their losses. The applicant recognizes that the Commission implied in the Decision (point 108, last paragraph) that it had taken into account the losses incurred by the producers in mitigation of the fines. However, neither the reasons for the Decision nor its operative part make it possible to assess to what extent that took place, since the Commission imposed the highest fines that have ever been imposed under Article 85(1) of the EEC Treaty.

276 The Commission states that it has already taken the losses incurred by the producers into account as a mitigating factor (Decision, point 108). It therefore

considers that the fines are justified, particularly as it would be an exaggeration to speak of ruinous losses since the imbalance between supply and demand had been made up by 1982, which led Solvay to propose an end to the producers' meetings at the meeting of 13 May 1982 (main statement of objections, Appendix 24).

277 The Court considers that in order to assess this argument it is necessary to examine first of all the way in which the Commission determined the amount of the fine imposed on the applicant.

278 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).

279 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.

280 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.

281 It must be stated in this context that the Commission was not obliged to individualize or to explain the way in which it had taken into account the substantial losses incurred by the various producers in the polypropylene industry, since this was one

of the factors mentioned in point 108 of the Decision which contributed to the determination of the general level of the fines, which the Court has found justified.

282 It follows that this ground of challenge relied on by the applicant cannot be upheld.

C. Failure to take proper account of the effects of the infringement

283 The applicant argues that in confusing the view which the participants may have entertained of the usefulness of their meetings with the actual consequences of those meetings the Commission did not correctly assess the effects of the infringement. Contrary to what the Commission maintains, without the slightest evidence, industrial users of polypropylene did not suffer any harm as a result of the cartel alleged by the Commission to have existed. It is apparent from an expert's opinion prepared by Professor Albach, of Bonn University, that the prices actually achieved on the market corresponded to those which might be expected on the basis of available market data, so that they were the result of competition and not of an agreement. The same study shows that it was not the target prices that were decisive in the formation of market prices but, on the contrary, market prices that were decisive in the fixing of target prices. The study also shows that there were considerable variations in the prices charged to the same customer in the course of the same month. The applicant adds that the Commission's criticisms of Professor Albach's study are either irrelevant or are countered by a further study by the same professor. Finally, the applicant states that Professor Albach's analysis is confirmed by the Coopers & Lybrand audit of the prices charged by the various producers. It concludes that having regard to the heavy losses incurred by the producers for several years the Commission's assertions are clearly quite fantastic.

284 The Commission points out that it described the effects of the cartel in a very qualified manner in the Decision and acknowledged that it had only partially achieved its objectives (Decision, points 91 and 92). However, the cartel was not entirely without effect. With regard to Professor Albach's report, the Commission states that current knowledge of economics does not make it possible to calculate

or simulate competitive prices. Moreover, the study is restricted to the German market. Finally, the calculation of the production cost of polypropylene used for comparative purposes in the study is of no value, mainly because it is impossible accurately to allocate general expenses among the different sections of a single undertaking like BASF. The second study produced by the same expert meets the same objections, says the Commission, particularly as regards methodology.

285 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 the movements in prices charged to individual customers as compared with the target prices set in the course of particular price initiatives was 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).

286 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.

287 As regards effects of the second type, the Commission had no reason to doubt the accuracy of the analyses carried out by the producers themselves during their meetings (see in particular the notes of the meetings of 21 September, 6 October, 2 November and 2 December 1982, main statement of objections, Appendices 30 to 33). These show that the target prices set at the meetings were largely achieved on the market and that, even if the Coopers & Lybrand audit and the economic studies commissioned by certain producers were to prove that the analyses made by the producers themselves at their meetings were wrong, that fact is not

conducive to a reduction of the fine since the Commission indicated in the last indent of point 108 of the Decision that it took into account, in mitigation of the penalties, the fact that price initiatives generally had not achieved their objective in full and that in the last resort there were no measures of constraint to ensure compliance with quotas or other measures.

288 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.

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

D. The applicant's deliveries in the Community

290 At the hearing the applicant maintained that the figures on its sales volume in the Community which the Commission, in reply to a question from the Court, said it took into account in determining the amount of the fine were incorrect because the Commission attributed to it 100% of the turnover of ROW, although the applicant has only a 50% interest in that undertaking's turnover proceeds.

291 The Court observes that in a letter lodged at the Court Registry on 9 January 1991, in response to documents lodged at the Court Registry by the Commission on 27 December 1990, the applicant asserts that it became apparent for the first time in the Commission's reply to a question put by the Court that it had attributed 100% of ROW's turnover to the applicant and had calculated the

amount of the fine accordingly, and that the Decision does not contain any indication regarding consideration of the applicant's turnover proceeds in the determination of the fine.

292 It need merely be pointed out that the figures produced by the Commission in the documents lodged on 27 December 1990 concern the applicant's deliveries in the Community for 1982 and therefore include all deliveries made by ROW, all of whose production is marketed by the applicant. The Commission indicated in a note that all those deliveries were included in the tables of quotas.

293 It should be observed that in its letter lodged on 9 January 1991 the applicant did not contradict that note and that it appears from the tables on sales volume objectives attached to the main statement of objections that ROW's deliveries were systematically and without distinction taken into account in BASF's aspirations, in the quotas allocated to it and in the sales volume figures it provided at the meetings.

294 Furthermore, it must be pointed out that the applicant has not indicated why the fact that it was only a 50% shareholder in ROW, although it marketed all the latter's production, should mean that only 50% of ROW's deliveries in the Community should be taken into account in fixing the fines.

295 It follows that the Commission could reasonably take account of all of ROW's sales in determining the applicant's deliveries in the Community with a view to fixing the amount of the fine imposed on the applicant.

296 It follows from all the foregoing considerations that the fine imposed on the applicant is appropriate having regard to the gravity of the breach of the Community competition rules which the applicant has been found to have committed but must be reduced by reason of the shorter duration of that breach. That reduction must be limited to 15% since the Commission has already, in determining the amount of the fines, taken into account the fact that the mechanism by which the infringement was to operate was not completely established until about the beginning of 1979 (Decision, point 105, last paragraph) and, since it was in some doubt regarding the precise date of the beginning of the applicant's participation in the infringement, it cannot have taken that period into account to any great degree in setting the fine imposed on the applicant.

Costs

297 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3), where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. Since the application has been upheld in part and the parties have each applied for costs, the applicant must pay, in addition to its own costs, half of the Commission's costs, and the Commission must bear half of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls Article 1, seventh indent, of the Commission Decision of 23 April 1986 (IV/31.149 — Polypropylene, Official Journal 1986 L 230, p. 1) in so far as it holds that BASF took part in the infringement from an indeterminate time between 1977 and 1979 and not at the end of 1978 or the beginning of 1979;**

2. **Sets the amount of the fine imposed on the applicant in Article 3 of that Decision at ECU 2 125 000, that is to say DM 4 557 891.25;**

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

4. **Orders the applicant to bear its own costs and to pay half of the Commission's costs, and orders the Commission to bear the remaining half of its own costs.**

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg, 17 December 1991.

H. Jung
Registrar

J. L. Cruz Vilaça
President