# JUDGMENT OF THE COURT (Sixth Chamber)

8 July 1999 *

In Case C-235/92 P,

**Montecatini SpA** (formerly Montedison SpA, then Montepolimeri SpA, then Montedipe SpA), whose registered office is in Milan, Italy, represented by G. Aghina and G. Celona, of the Milan Bar, and P.A.M. Ferrari, of the Rome Bar, with an address for service in Luxembourg at the Chambers of G. Margue, 20 Rue Philippe II,

appellant,

supported by

**DSM NV**, whose registered office is in Heerlen, Netherlands, represented by I.G.F. Cath, of The Hague Bar, with an address for service in Luxembourg at the Chambers of L. Dupong, 14a Rue des Bains,

intervener in the appeal,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 10 March 1992 in Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, seeking to have that judgment set aside,

* Language of the case: Italian.

the other party to the proceedings being:

**Commission of the European Communities**, represented by G. Marenco, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch, G.F. Mancini (Rapporteur), J.L. Murray and H. Ragnemalm, Judges,

Advocate General: G. Cosmas,

Registrars: H. von Holstein, Deputy Registrar, and D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 March 1997,

after hearing the Opinion of the Advocate General at the sitting on 15 July 1997,

gives the following

## Judgment

1 By application lodged at the Registry of the Court of Justice on 22 May 1992, Montecatini SpA (formerly Montedison SpA, then Montepolimeri SpA, then Montedipe SpA) ('Monte') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 10 March 1992 in Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155 ('the contested judgment').

### Facts and procedure before the Court of First Instance

2 The facts giving rise to this appeal, as set out in the contested judgment, are as follows.

3 Several undertakings active in the European petrochemical industry brought an action before the Court of First Instance for the annulment of Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1, 'the Polypropylene Decision').

4 According to the Commission's findings, which were confirmed on this point by the Court of First Instance, before 1977 the market for polypropylene was supplied by 10 producers, four of which (Monte, Hoechst AG, Imperial Chemical Industries plc ('ICI') and Shell International Chemical Company Ltd ('Shell') ('the big four')) together accounted for 64% of the market. Following the expiry of the

controlling patents held by Monte, new producers appeared on the market in 1977, bringing about a substantial increase in real production capacity which was not, however, matched by a corresponding increase in demand. This led to rates of utilisation of production capacity of between 60% in 1977 and 90% in 1983. Each of the EEC producers operating at that time supplied the product in most, if not all, Member States.

5 Monte was one of the producers supplying the market in 1977. It was the main producer of polypropylene and consequently one of the big four. It had a market share on the west European market of between 14.2 and 15%. In 1983, when it took over the business of Enichem Anic SpA, its share was 18% of the west European market in polypropylene.

6 Following simultaneous investigations at the premises of several undertakings in the sector, the Commission addressed requests for information to a number of polypropylene producers under Article 11 of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). It appears from paragraph 6 of the contested judgment that the evidence obtained led the Commission to form the view that between 1977 and 1983 the producers concerned had, in contravention of Article 85 of the EC Treaty (now Article 81 EC), regularly set target prices by way of a series of price initiatives and developed a system of annual volume control to share out the available market between them according to agreed percentage or tonnage targets. This led the Commission to commence the procedure provided for by Article 3(1) of Regulation No 17 and to send a written statement of objections to several undertakings, including Monte.

7 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that Monte had infringed Article 85(1) of the Treaty by participating, with other undertakings, and in Monte's case from about mid-

1977 until at least November 1983, in an agreement and concerted practice originating in mid-1977 by which the producers supplying polypropylene in the territory of the EEC:

— 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;

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

— 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;

— introduced simultaneous price increases implementing the said targets;

— 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 1 of the Polypropylene Decision).

8 The Commission then ordered the various undertakings concerned to bring that infringement to an end forthwith and to refrain thenceforth from any agreement or concerted practice which might have the same or similar object or effect. The Commission also ordered them to terminate any exchange of information of the kind normally covered by business secrecy and to ensure that any scheme for the exchange of general information (such as Fides) was so conducted as to exclude any information from which the behaviour of specific producers could be identified (Article 2 of the Polypropylene Decision).

9 Monte was fined ECU 11 000 000, or ITL 16 187 490 000 (Article 3 of the Polypropylene Decision).

10 On 6 August 1986, Monte lodged an action for annulment of that decision before the Court of Justice. The written procedure took place entirely before the Court of Justice. By order of 15 November 1989, it referred the case to the Court of First Instance, pursuant to Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1).

11 Before the Court of First Instance, Monte sought annulment of the Polypropylene Decision in so far as it was addressed to it, in the alternative its annulment in so far as it imposed a fine on it, and in the further alternative its annulment in so far as it imposed on the applicant a fine of ECU 11 000 000 and a reduction of the fine to a nominal or in any event fair amount, or one which at least took account of the rules on limitation periods; it also sought in any event an order that the Commission pay all the costs, an order that the Commission reimburse it for all the costs incurred during the administrative procedure, and an order that the Commission pay compensation for all the harm associated with the implementation of the Polypropylene Decision or the establishment of a bank guarantee for its implementation, including interest and an allowance for inflation on the sums paid in implementation or for the establishment of the guarantee.

12 The Commission contended that the application should be dismissed and the applicant ordered to pay the costs.

13 By a letter lodged at the Registry of the Court of First Instance on 6 March 1992, Monte asked the Court of First Instance to reopen the oral procedure and order measures of inquiry, as a result of the statements made by the Commission at the press conference held on 28 February 1992, after delivery of the judgment of the Court of First Instance in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315 ('the *PVC* judgment of the Court of First Instance').

## The contested judgment

*Proof of the infringement — Findings of fact*

The floor-price agreement

14 At paragraphs 68 and 69 of the contested judgment, the Court of First Instance found that the text of the note made by a Hercules employee to which the Commission had referred to establish the existence of a floor-price agreement was clear and unambiguous, and that Monte had put forward nothing to weaken its evidential value.

15 According to paragraph 70, the fact that the agreed floor prices could not be achieved did not tell against Monte's participation in the floor-price agreement, since even if that fact were assumed to be established, it would at most tend to

show that the floor prices were not implemented, not that they were not agreed. At paragraph 71, the Court of First Instance considered that floor prices were no different in nature from the price targets subsequently fixed by the polypropylene producers.

16 The Court of First Instance concluded, at paragraph 72, that the Commission had established to the requisite legal standard that in mid-1977 a common purpose had emerged among several producers, including Monte, concerning the fixing of floor prices.

The system of regular meetings

17 At paragraph 82, the Court of First Instance noted that Monte did not deny its participation in the periodic meetings of polypropylene producers and that it had therefore to be held that it participated in all the meetings which the Polypropylene Decision alleged had been held. At paragraph 83, the Court of First Instance considered that the Commission was fully entitled to take the view, based on the information which was provided by ICI in its reply to the request for information and was borne out by numerous meeting notes, that the purpose of the meetings was, in particular, to fix target prices and sales volumes.

18 The Court of First Instance also observed, at paragraph 84, that the contents of the notes obtained from ICI were confirmed by various documents, such as a number of tables relating to the sales volumes of the various producers and price instructions broadly corresponding in their amount and date of entry into force to the target prices mentioned in those meetings notes and — in the aggregate — by the replies of the various producers to the requests for information addressed to them by the Commission. Consequently, according to paragraph 85, the Commission was able to take the view that the meeting notes found at the premises of ICI reflected fairly objectively what went on at those meetings. At paragraph 86 the Court of First Instance considered that in those circumstances it was for Monte to provide another explanation of the subject-matter of the meetings in which it participated, by putting forward specific evidence, but it observed that Monte had not put forward or offered to put forward such material before the Court.

19 According to paragraph 88 of the contested judgment, the Commission was also fully entitled to deduce from ICI's reply concerning the regularity of the 'Bosses" and 'Experts" meetings, as well as from the identical nature and purpose of the meetings, that they were part of a system of regular meetings.

20 With regard to the particular role played by the 'big four' in the system of meetings, the Court of First Instance noted, at paragraph 89, that Monte did not deny that meetings between those undertakings had taken place on the dates indicated by the Commission. According to paragraph 90, after December 1982, those meetings had taken place the day before the 'bosses" meetings and their purpose was to determine the steps which they could take together in order to bring about a rise in prices, as was shown by the summary note prepared by an ICI employee about what had transpired at a pre-meeting on 19 May 1983 which the 'big four' had attended.

21 At paragraph 91, the Court of First Instance concluded that the Commission had established to the requisite legal standard that Monte had participated regularly in the regular meetings of polypropylene producers between the end of 1977 and September 1983, that until August 1982 the meetings were chaired by members of Monte's staff, that the purpose of those meetings was, in particular, to set price and sales volume targets and that they were part of a system.

The price initiatives

22 At paragraph 128, the Court of First Instance found that the records of the regular meetings of polypropylene producers showed that the producers which participated in those meetings had agreed to the price initiatives mentioned in the Polypropylene Decision. According to paragraph 129, since it had been established to the requisite legal standard that Monte had participated in those meetings, it could not 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.

23 At paragraph 131, the Court of First Instance considered that Monte's contention that it took no account of the outcome of the meetings when determining its conduct on the market as regards prices could not be accepted as evidence capable of corroborating its assertion that it did not subscribe to the price initiatives agreed at the meetings, but would at the most tend to show that it did not put into effect the results of those meetings. At paragraph 132, the Court of First Instance pointed out that Monte could not effectively argue that its price instructions were purely internal, since, although they were indeed internal inasmuch as they were sent by headquarters to the sales offices, they were nevertheless sent with a view to their being carried out and therefore in order to produce directly or indirectly external effects, which negated their internal character.

24 With regard to the economic context of the price initiatives, the Court of First Instance considered, at paragraph 133, that this could not explain the manner in which the price instructions issued by the different producers corresponded to each other and to the price targets set at the producers' meetings. According to paragraph 134, nor could the identical nature of the constraints faced by the producers in connection with certain factors of production explain the virtual simultaneity of the price instructions issued by Monte and by the other producers.

25 Moreover, according to paragraph 135, there could be no question of any form of 'price leadership' on the part of a producer, since the Commission had proved to the requisite legal standard that this producer had participated with others in consultation on prices. At paragraph 136, the Court of First Instance added that the Commission was fully entitled to deduce from ICI's reply to the request for information that those initiatives were part of a system of fixing target prices.

26 The Court of First Instance concluded, in paragraph 137, that the Commission had established to the requisite legal standard that Monte was one of the producers amongst whom there had emerged common intentions concerning the price initiatives mentioned in the Polypropylene Decision, that those initiatives were part of a system and that the effects of those price initiatives continued until November 1983.

The measures designed to facilitate the implementation of the price initiatives

27 At paragraph 143, the Court of First Instance considered that the Polypropylene Decision was to be interpreted as asserting that at various times each of the producers had adopted at the meetings together with the other producers a set of measures 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. At paragraph 144, the Court of First Instance concluded that, in participating in the meetings during which that set of measures was adopted, Monte had subscribed to it, since it had not adduced any evidence to prove the contrary.

28 As regards the question of 'account leadership', the Court of First Instance found, at paragraph 145, that it was clear from the notes of the meetings of 2 September 1982, 2 December 1982 and of spring 1983, which were all attended by Monte, that during those meetings the producers present at them had agreed to that system. According to paragraph 146, the study produced by Monte, because of its excessively limited scope, did not show that it had not played the role of 'account leader' for customers for which it had been so designated.

29 At paragraphs 147 and 148, the Court of First Instance found that the implementation, at least in part, of this system was evidenced by the note of the meeting of 3 May 1983 and by that of another meeting in spring 1983 as well as by ICI's reply to the request for information. The Court of First Instance further observed, at paragraph 149, that Monte did not specifically deny having taken part in the decision to adopt other measures designed to facilitate the implementation of the price initiatives.

30 At paragraph 150, the Court of First Instance concluded that the Commission had established to the requisite legal standard that Monte 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 Polypropylene Decision.

Target tonnages and quotas

31 The Court of First Instance first pointed out, at paragraph 175, that it had already found that Monte had participated from the outset in the periodic meetings of polypropylene producers at which discussions relating to the sales volumes of the various producers were held and information exchanged on that subject. At paragraph 176, it pointed out that, along with that participation, Monte's name appeared in various tables found on the premises of polypropylene producers, whose contents clearly showed that they were drawn up for the purpose of determining sales volume targets. The Commission was therefore entitled to take the view that the data contained in those tables, which must have been drawn up on the basis of information from the producers themselves rather than Fides statistics, had, as far as Monte was concerned, been provided by it in the course of the meetings. With regard to the assertion that that information was untrue, the Court of First Instance pointed out, first, at paragraph 177, that that was undermined by the reference in one of the tables to a comparison between the figures provided by certain producers and the Fides figures. Secondly, in the view of the Court of First Instance, the fact that that information might have been untrue tended to confirm that it was intended to be used as the basis for a decision following negotiations whose purpose was to reconcile interests which were individually opposed but in overall terms convergent. At paragraph 178, the Court of First Instance held that the terms used in the tables relating to the years 1979 and 1980 justified the conclusion that the producers had arrived at a common purpose.

32 As regards the year 1979 in particular, the Court of First Instance indicated, at paragraph 179, that the note of the meeting of 26 and 27 September 1979 and the table headed 'Producers' Sales to West Europe', taken from the premises of ICI, indicated that the scheme originally planned for 1979 had had to be made tighter for the last three months of the year.

33 In paragraph 180, the Court of First Instance found that, as regards the year 1980, it was clear from the table dated 26 February 1980 found at the premises of Atochem SA and from the note of the January 1981 meetings that sales volume targets were set for the whole of the year; it pointed out in that regard that although the figures from the two sources were different, that was because the producers' forecasts had had to be revised downwards. At paragraph 181, it added that according to the note of the meetings in January 1981, Monte had

provided its sales figures for 1980 so that they could be compared with the sales volume targets fixed and accepted for 1980.

34 In paragraphs 182 to 187, the Court of First Instance pointed out that, for 1981, the complaint against the producers was that they took part in negotiations in order to reach a quota agreement, that they communicated their 'aspirations', that they had 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 had taken the previous year's quota as a theoretical entitlement for the rest of the year, that they had reported their sales each month to the meetings, and, finally, had monitored whether the sales matched the theoretical quota allocated to them. According to the Court of First Instance, the existence of those negotiations and the communication of 'aspirations' were attested by various pieces of evidence such as tables and an ICI internal note; the adoption of temporary measures during February and March 1981 was apparent from the note of the meetings of January 1981; 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 was established by the combination of a table dated 21 December 1981, an undated table entitled 'Scarti per società' found at the premises of ICI, and an undated table also found there; according to the Court of First Instance, the participation of Monte in those various activities was apparent from its participation in the meetings at which those activities took place, and from the fact that its name appeared in the various documents mentioned above.

35 At paragraphs 188 to 192, the Court of First Instance stated that, for 1982, the complaint against the producers was that they took part in negotiations in order to reach an agreement on quotas, that they communicated their tonnage 'aspirations', that, failing a definitive agreement, they communicated 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. According to the Court of First Instance, the existence of those negotiations and the communication of their 'aspirations' were evidenced by a document entitled 'Scheme for discussions "quota system 1982"', by an ICI note entitled 'Polypropylene 1982, Guidelines', by a table dated 17 February 1982 and by a table written in Italian which was a complex proposal; the measures adopted for the first half of the year

were established by the note of the meeting on 13 May 1982 and by Monte's statement at that meeting; the implementation of those measures was evidenced by the notes of the meetings of 9 June, 20 and 21 July and 20 August 1982; the measures adopted for the second half were proved by the note of the meeting of 6 October 1982 and the continuation of the measures was confirmed by the note of the meeting of 2 December 1982.

36 The Court of First Instance also found, at paragraph 193, that, as regards the years 1981 and 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.

37 In respect of 1983, the Court of First Instance found, at paragraphs 194 to 200, that it was clear from the documents produced by the Commission that at the end of 1982 and the beginning of 1983 the polypropylene producers had discussed a quota system for 1983, that Monte had participated in the meetings at which the discussions took place, that on those occasions it had supplied data relating to its sales and that in Table 2 attached to the note of the meeting of 2 December 1982 the word 'acceptable' appeared beside the quota assigned to Monte's name, so that Monte had participated in the negotiations held with a view to arriving at a quota system for 1983. According to the Court of First Instance, the Commission was entitled to conclude from the combination of the note of the meeting on 1 June 1983 and the note of an internal meeting of the Shell group on 17 March 1983, which were confirmed by two other documents mentioning the figure of 11% as Shell's market share, that those negotiations had led to the introduction of such a system. Moreover, according to the Court of First Instance, the fact that Monte's sales did not always correspond to the quotas allocated to it was irrelevant, since the Commission's decision did not rely on the actual implementation by Monte of the quota system on the market in order to prove its participation in that system. The Court of First Instance added that, 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.

38 The Court of First Instance concluded, in paragraph 201, that the Commission had established to the requisite legal standard that Monte was one of the polypropylene producers amongst whom common purposes had 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 were mentioned in the Polypropylene Decision and which formed part of a quota system.

*The application of Article 85(1) of the Treaty*

Legal characterisation

39 The Court of First Instance observed, at paragraphs 228 and 229 of the contested judgment, that the Commission had characterised each factual element as either, principally, an agreement or, in the alternative, a concerted practice for the purposes of Article 85(1) of the Treaty. At paragraph 230, referring to Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661 and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, it held that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it was sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way. The Commission was accordingly entitled to treat the common intentions existing between Monte and the other polypropylene producers, which related to floor prices in 1977, price initiatives, measures designed to facilitate the implementation of the price initiatives, sales volume targets for the years 1979 and 1980 and the first half of 1983 and measures for restricting monthly sales by reference to a previous period for 1981 and 1982, as agreements. Furthermore, the Court of First Instance indicated, in paragraph 231, that 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. In that connection, and referring to Case 243/83 *Binon* v *Agence et Messagerie de la Presse* [1985] ECR 2015, the Court of First Instance observed that Article 85 of the Treaty was also applicable to agreements which were no longer in force but which continued to produce their effects after they had formally ceased to be in force.

40 For a definition of the concept of concerted practice, the Court of First Instance referred, at paragraph 232, to Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663. In the case before it, it found, at paragraph 233, that Monte had participated in meetings concerning the fixing of price and sales volume targets, and including the exchange of information between competitors on the subject, and that it had thus taken part in concerted action the purpose of which was to influence the conduct of the producers on the market and to disclose to each other the course of conduct which each itself contemplated adopting on the market. The Court of First Instance added, at paragraph 234, that Monte had not only pursued 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, according to the Court of First Instance, 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 Monte about the course of conduct which it had decided upon or which it contemplated adopting on the market. The Court of First Instance concluded, in paragraph 235, that the Commission was justified, in the alternative, having regard to their purpose, in categorising the regular meetings in which Monte had participated between the end of 1977 and September 1983 as concerted practices within the meaning of Article 85(1) of the Treaty.

41 As regards the question whether there was a single infringement, described in Article 1 of the Polypropylene Decision as 'an agreement and concerted practice', having pointed out, in paragraph 236, that, in view of their identical purpose, the various concerted practices and agreements formed part of schemes of regular meetings, target-price fixing and quota fixing, the Court of First Instance stated, in paragraph 237, that 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. According to the Court of First Instance, it would thus have been artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements. The fact was that Monte had taken 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.

42 The Court of First Instance therefore held, at paragraph 238, that the Commission was entitled to characterise that single infringement as 'an agreement and a concerted practice', since the infringement involved at one and the same time factual elements to be characterised as 'agreements' and factual elements to be characterised as 'concerted practices'. According to the Court of First Instance, given such a complex infringement, the dual characterisation by the Commission in Article 1 of the Polypropylene Decision was to be understood not as requiring, simultaneously and cumulatively, proof that each of those factual elements presented 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 characterised as agreements and others as concerted practices for the purposes of Article 85(1) of the Treaty, which lays down no specific category for a complex infringement of that type.

Restrictive effect on competition

43 With regard to Monte's line of argument seeking to demonstrate that its participation in the regular meetings of polypropylene producers had had no anti-competitive effect, the Court of First Instance pointed out, in paragraph 246, that in any event the purpose of those meetings was to restrict competition within the common market, in particular by fixing price and sales volume targets, so that its participation in those meetings was therefore not free of anti-competitive purpose within the meaning of Article 85(1) of the Treaty.

Effect on trade between Member States

44 The Court of First Instance pointed out, in paragraph 253, that in the light of Article 85(1) of the Treaty the Commission was not required to demonstrate that the applicant's participation in an agreement and a concerted practice had had an appreciable effect on trade between Member States, but only that the agreements and concerted practices were capable of having an effect on trade between Member States. In that connection, referring to *Van Landewyck and Others* v

*Commission*, the Court of First Instance held that the restrictions on competition found to exist were likely to distort trade patterns from the course which they would otherwise have followed. At paragraph 254, the Court of First Instance concluded that the Commission had established to the requisite legal standard that the infringement in which Monte had participated was apt to affect trade between Member States, and it was not necessary for the Commission to demonstrate that Monte's individual participation had affected trade between Member States.

Justifying factors

45 With regard to Monte's arguments that the Commission should have examined the agreements in relation to their economic context, and in any event, should have applied the 'rule of reason', the Court of First Instance recalled, at paragraph 264, that the Commission had proved to the requisite legal standard that the agreements and concerted practices had an anti-competitive object for the purposes of Article 85(1) of the Treaty. In the view of the Court of First Instance, the question whether they were anti-competitive in effect was therefore relevant only to assessment of the amount of the fine. At paragraph 265, the Court of First Instance pointed out that the fact that the infringement was a clear one precluded the application of a rule of reason, assuming such a rule to be applicable in Community competition law, since in that case it had to be regarded as an infringement *per se* of the competition rules.

46 At paragraph 271, the Court of First Instance observed that Monte could not assert that Article 85(3) of the Treaty should have been applied to the agreements which it had entered into and the concerted practices in which it had participated. Pursuant to Article 4(1) of Regulation No 17, Monte should have first notified the agreements and concerted practices to the Commission if it had wished to rely on Article 85(3) of the Treaty, which it did not do. According to paragraph 272, Monte could not therefore assert that it was the victim of discrimination in relation to undertakings whose agreements had been exempted under that provision.

47 Monte had stated that the measures taken by the producers had had extraordinarily beneficial effects, at the price of very heavy losses for the producers, but the Court of First Instance observed, at paragraphs 279 and 280, that, even assuming that there had been a positive market trend and that it had any relevance in the case, Monte had not in any event proved that the trend was attributable to the agreements which it had entered into and the concerted practices in which it had participated. According to the Court of First Instance, Monte's argument to the effect that the established producers could have blocked the entry onto the market of the newcomers, instead of channelling their entry, failed to take into account the fact that those newcomers were large undertakings which could afford to incur losses, even heavy losses, for several years in order to penetrate the polypropylene market.

48 At paragraphs 286 to 287, the Court of First Instance observed that the principle of burden-sharing among undertakings by common agreement, relied upon by Monte with regard to a situation of necessity, was contrary to the concept of competition which Article 85 of the Treaty was intended to uphold. Accordingly, in the view of the Court of First Instance, it was not for undertakings to put that principle into operation without referring to the competent Community authority and observing the procedures laid down for that purpose.

49 At paragraphs 295 and 296, the Court of First Instance observed that the sale of goods below cost price might constitute a form of unfair competition where it was intended to reinforce the competitive position of an undertaking to the detriment of its competitors, but not if sale below cost price resulted from the operation of supply and demand, as was the case here. Consequently, according to the Court of First Instance, participants in a cartel which sought to raise prices from a level below cost to a level at or above cost could not argue, in justification of their conduct, that the cartel sought to eliminate unfair competition.

50 At paragraph 301, the Court of First Instance considered that the analogy drawn by Monte with associations of producers or consumers of raw materials, which it claimed had stabilised markets, was entirely baseless, since the agreements in

question were public measures regulating the market which could not be compared to the agreements entered into in this case by the polypropylene producers.

51 The Court of First Instance observed, at paragraphs 310 and 311, that the obligations to which Monte said it was subject under a collective agreement preserving jobs and the declaration that it was in a critical situation enabling it to benefit from the aid paid in connection with the application of Law No 675 of 12 August 1977, which prevented it from carrying out the job cuts which it had planned, all came into existence more than three years after the conclusion of the floor-price agreement and had been consented to by Monte in order to obtain the benefits which corresponded to the commitments it had entered into. Consequently, according to paragraph 312, Monte could not assert that its obligations had placed it in a position which made its participation in agreements and concerted practices contrary to Article 85 of the Treaty inevitable. Lastly, at paragraph 313, the Court of First Instance declared the argument based on Monte's alleged blackmail by the 'Red Brigades', which had been put forward in its reply, inadmissible as a new plea in law within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance and Article 42(2) of the Rules of Procedure of the Court of Justice.

*Amount of the fine*

The limitation period

52 At paragraph 330, the Court noted that under Article 1(2) of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), the five-year limitation period applying to the Commission's power to impose fines begins to run, in the case of continuing or repeated infringements, on the day on which the infringement ceases. It follows from paragraphs 331 and 332 that, in this case, Monte had participated without interruption in a single and

continuous infringement (in Italian, which was the language of the case, 'un'infrazione unica e continuata') from the conclusion of the floor-price agreement in mid-1977 until November 1983 and could not therefore rely on the limitation period relating to the imposition of fines.

Duration of the infringement

53 At paragraph 336, the Court of First Instance pointed out that it had already found that the Commission had properly assessed the duration of the period during which Monte had infringed Article 85(1) of the Treaty.

The gravity of the infringement

54 The Court of First Instance held, in paragraph 346, that, according to the case-law of the Court of Justice, in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission had to take into consideration not only the particular circumstances of the case but also the context in which the infringement occurred and had to ensure that its action had the necessary deterrent effect, especially as regards those types of infringement which were particularly harmful to the attainment of the objectives of the Community; it was also open to the Commission to have regard to the fact that infringements of a specific type, whose unlawfulness had been established, were still relatively frequent on account of the profit that some of the undertakings concerned were able to derive from them and, consequently, it was open to the Commission to raise the level of fines so as to reinforce their deterrent effect; the fact that in the past the Commission had imposed fines of a certain level for certain types of infringement did not mean that it was estopped from raising that level within the limits indicated in Regulation No 17 if that was necessary to ensure the implementation of Community competition policy (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825).

55 In view of those considerations, the Court of First Instance found, at paragraph 347, that the Commission had rightly described the fixing of target prices and of sales volumes as well as the adoption of measures designed to facilitate the implementation of target prices as a particularly grave and clear infringement.

56 At paragraphs 351 to 355, the Court of First Instance noted that in order to determine the amount of the fine, the Commission had first defined the criteria for setting the general level of the fines imposed on the undertakings to which the Polypropylene Decision was 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). As regards that last category of criteria, which it found to be relevant and sufficient, the Court of First Instance considered that the Commission had sufficiently individualised the way in which it took account of the criteria relating to the role played by each of the undertakings in the collusive arrangements and the period of time during which they participated in the infringement in Monte's case and had not applied the criteria relating to the respective deliveries of the various polypropylene producers to the Community and their total turnover unfairly.

57 At paragraphs 361 to 363, the Court of First Instance found that the Commission had correctly established the role played by Monte and that it was entitled to take account of that role in determining the amount of the fine. Moreover, according to the Court of First Instance, the facts established showed, by their intrinsic gravity — in particular the fixing of price and sales volume targets — that Monte had not acted rashly or even through lack of care but intentionally. In that regard the Court of First Instance observed that the undertakings involved accounted for virtually the whole of the market concerned, which showed clearly that the infringement which they had committed together might have restricted competition.

58 The Court of First Instance noted, at paragraph 369, that the Commission had distinguished two types of effect: first the price instructions from the producers to their sales offices; secondly, the movements in prices charged to various customers. According to paragraph 370, the first type of effect had been proved to the requisite legal standard by the Commission from the many price instructions given by the various producers. With regard to the second type of

effect, the Court of First Instance pointed out, at paragraph 371, that it was clear from the Polypropylene Decision that the Commission had taken into account, in mitigation of the penalties, the fact that the price initiatives generally had not achieved their objective in full and that there were no measures of constraint to ensure compliance with quotas or other measures. The Court of First Instance concluded, at paragraphs 372 and 373, that the Commission had rightly taken full account of the first type of effect and that it had taken account of the limited character of the second type of effect to an extent that Monte had not shown was insufficient, that the statement of the grounds for the Commission's decision supported its conclusion and that there was nothing to indicate that the Commission had based the Polypropylene Decision on consideration of more far-reaching effects than those set out in the statement of grounds for the Decision, contrary to Monte's assertions. There could therefore be no question of any misuse of powers.

59 The Court of First Instance found, at paragraph 379, that the Commission had taken account of the fact that the undertakings had incurred substantial losses on their polypropylene operations over a considerable period, and that it thereby took account of the unfavourable economic conditions prevailing in the sector with a view to determining the general level of the fines. It added, at paragraph 380, that the maximum limit of 10% of turnover laid down in Article 15(2) of Regulation No 17 applied in all circumstances.

60 At paragraphs 385 and 386, the Court of First Instance observed that the various facts put forward by Monte as justification, which related in particular to the national political and social context or the beneficial effects of the cartel, were not such as to efface the unlawful nature of its conduct, since it could not be accepted that participation in an unlawful cartel constituted a legitimate form of self-defence. According to the Court of First Instance, the Commission could have taken account of those facts in determining the amount of the fine as mitigating circumstances, but was not obliged to do so. In that connection, in so far as the applicant appealed to the exercise by the Court of First Instance of its unlimited jurisdiction, the latter observed that the criteria set out in point 108 of the Polypropylene Decision entirely justified the general level of the fines imposed, having regard in particular to the particularly manifest nature of the infringement committed.

61 In conclusion, at paragraph 388, the Court of First Instance held that the fine imposed on Monte was appropriate having regard to the gravity and duration of the breach of the competition rules found to have been committed. According to the Court of First Instance, since the Polypropylene Decision was not unlawful or defective in any way the Commission could not incur liability.

*Reopening of the oral procedure*

62 In dealing with the request to reopen the oral procedure, referred to in paragraph 389, having again heard the views of the Advocate General, the Court of First Instance considered, at paragraph 390, that it was not necessary to order the reopening of the oral procedure in accordance with Article 62 of its Rules of Procedure or to order measures of inquiry as requested by Monte.

63 At paragraph 391 of the grounds of the judgment the Court of First Instance held as follows:

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

64 The Court of First Instance dismissed the application and ordered Monte to pay the costs.

## The application for revision and the order of the Court of First Instance

65 On 11 June 1992 Monte lodged an application for revision of the contested judgment at the Registry of the Court of First Instance, pursuant to Article 41 of the EC Statute of the Court of Justice and Article 125 of the Rules of Procedure of the Court of First Instance.

66 By order of 4 November 1992 in Case T-14/89 REV *Montecatini* v *Commission* [1992] ECR II-2409, the Court of First Instance dismissed the application for revision as inadmissible.

## The appeal

67 In its appeal Monte requests the Court of Justice:

— first, to declare the appeal admissible;

— principally, to annul in full the contested judgment and to refer the case back to another Chamber of the Court of First Instance for a fresh examination of the facts, where that was omitted, and application of the proper principles of law where they were infringed:

— in the alternative, partially to annul the contested judgment with referral as above;

— in any event, order the Commission to pay the costs in relation to the proceedings before both Courts.

68 By order of the Court of Justice of 30 September 1992, DSM NV ('DSM') was given leave to intervene in support of the orders sought by Monte. DSM requests the Court to:

— annul the contested judgment;

— declare the Polypropylene Decision non-existent or annul it;

— declare the Polypropylene Decision non-existent or annul it as regards all addressees of that decision, or at least as regards DSM, irrespective of whether or not those addressees appealed against the judgment concerning them, or whether or not their appeals were rejected;

— in the alternative, refer the case back to the Court of First Instance on the issue whether the Polypropylene Decision is non-existent or should be annulled;

— in any event, order the Commission to pay the costs of the proceedings, both in relation to the proceedings before the Court of Justice and to those before

the Court of First Instance, including the costs incurred by DSM in its intervention.

69 The Commission contends that the Court should:

— dismiss the appeal in its entirety;

— uphold the dismissal by the Court of First Instance of the application;

— order Monte to pay the costs in relation to the proceedings before both Courts;

— reject the intervention as a whole as inadmissible;

— alternatively, reject the forms of order sought in the intervention to the effect that the Court should declare the Polypropylene Decision non-existent or annul it as regards all its addressees, or at least as regards DSM, irrespective of whether those addressees appealed against the judgment of the Court of First Instance concerning them, or whether their appeals were rejected, and reject the remainder of the intervention as unfounded;

— in the further alternative, reject the intervention as unfounded;

— in any event, order DSM to pay the costs arising out of the intervention.

70 In support of its appeal, Monte puts forward five pleas alleging infringement of Community law, within the meaning of the first paragraph of Article 51 of the EC Statute of the Court of Justice based, first, on the fact that the Court of First Instance failed to verify of its own motion whether the Polypropylene Decision existed; secondly, on infringement of Article 85 of the Treaty; thirdly, on the way the facts were established; fourthly, on infringement of the rules applicable to limitation periods; and, fifthly and in the alternative, on the determination of the amount of the fine.

71 At the Commission's request and with no objection on Monte's part, by decision of the President of the Court of Justice of 27 July 1992 proceedings were stayed until 15 September 1994 to enable the appropriate conclusions to be drawn from the judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555 ('the *PVC* judgment of the Court of Justice'), which was delivered on the appeal against the *PVC* judgment of the Court of First Instance.

## Admissibility of the intervention

72 The Commission considers that DSM's intervention must be declared inadmissible. DSM explained that, as an intervener, it had an interest in having the contested judgment concerning Monte set aside. According to the Commission, annulment cannot benefit all addressees of a decision, but only those who bring an action for its annulment. That is precisely one of the distinctions between annulment and non-existence. Failure to observe that distinction would mean that time-limits for bringing an action would cease to be mandatory in actions for annulment. DSM cannot therefore seek the benefit of an annulment because it failed to appeal against the judgment of the Court of First Instance which concerned it (judgment of 17 December 1991 in Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833). By its intervention DSM is simply seeking to circumvent a time-bar.

73 The order of 30 September 1992, cited above, granting DSM leave to intervene was made at a time when the Court of Justice had not yet decided the issue of

annulment or non-existence in its *PVC* judgment. According to the Commission, following that judgment, the allegations of procedural defects, even if well founded, could lead only to annulment of the Polypropylene Decision and not to a finding of non-existence. Accordingly, DSM has ceased to have any interest in intervention.

74 The Commission also objects in particular to the admissibility of DSM's submission that the judgment of the Court of Justice should include provisions declaring non-existent or annulling the Polypropylene Decision as regards all its addressees, or at least as regards DSM, irrespective of whether or not those addressees appealed against the judgment of the Court of First Instance concerning them or whether or not their appeals were rejected. That submission is inadmissible, since DSM is seeking to introduce an issue which concerns it alone, whereas an intervener can only take the case as he finds it. Under the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, an intervener may only support the form of order sought by another party, without introducing his own. In the Commission's view, that point in DSM's submissions confirms that it is seeking to use the intervention in order to get round the expiry of the time-limit for appealing against the judgment of the Court of First Instance in *DSM* v *Commission* concerning it.

75 As regards the objection of inadmissibility raised against the intervention as a whole, the Court observes first of all that the order of 30 September 1992 by which it gave DSM leave to intervene in support of the form of order sought by Monte does not preclude a fresh examination of the admissibility of its intervention (see, to that effect, Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333).

76 Under the second paragraph of Article 37 of the EC Statute of the Court of Justice, the right to intervene in cases before the Court is open to any person establishing an interest in the result of the case. Under the fourth paragraph of Article 37, an application to intervene is to be limited to supporting the form of order sought by one of the parties.

77 The forms of order sought by Monte in its appeal include, in particular, the annulment of the contested judgment on the ground that the Court of First Instance failed to find the Polypropylene Decision non-existent. It is clear from paragraph 49 of the *PVC* judgment of the Court of Justice that, by way of exception to the principle that acts of the Community institutions are presumed to be lawful, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent.

78 Contrary to the Commission's contention, DSM's interest did not die on delivery of the judgment by which the Court of Justice annulled the *PVC* judgment of the Court of First Instance and held that the defects found by the latter were not such as to warrant treating the decision challenged in the *PVC* cases as non-existent. The *PVC* judgment did not concern the non-existence of the Polypropylene Decision and therefore did not bring DSM's interest in obtaining a finding of such non-existence to an end.

79 As regards the Commission's objection to DSM's submission that this Court should declare the Polypropylene Decision non-existent or annul it as regards all its addressees, or at least as regards DSM, that claim specifically concerns DSM and is not identical to the forms of order sought by Monte. It does not therefore satisfy the conditions laid down in the fourth paragraph of Article 37 of the EC Statute of the Court so that it must be held inadmissible.

**Pleas in law relied upon in support of the appeal**

80 In support of its appeal, Monte, referring to paragraphs 389 to 391 of the grounds of the contested judgment, claims first that, inasmuch as it failed to verify the existence of the Polypropylene Decision, the Court of First Instance infringed the rules governing the burden of proof and failed in its obligation to undertake of its own motion the verifications necessary. Secondly, referring to paragraphs 57 to 202 and 203 to 315 of the contested judgment, Monte claims

that, when finding the facts put forward for its assessment and reviewing the application of Article 85(1) of the Treaty to those facts, the Court of First Instance infringed Article 85 of the Treaty. Thirdly, with regard again to paragraphs 57 to 202 referred to above, the appellant claims that in finding the facts put forward for its assessment the Court of First Instance infringed the principles applicable to matters of evidence and the assessment of the individual responsibility of those participating in the infringement. Fourthly, referring to paragraphs 236 and 237, and to paragraphs 328 to 337 of the contested judgment, Monte claims that the Court of First Instance infringed the rules applicable to limitation periods. Fifthly, and in the alternative, Monte claims that, in refusing to reduce the fine imposed on it, the Court of First Instance infringed the rules applicable to the determination of the amount of the fine.

*Failure to find the Polypropylene Decision non-existent or to annul it for breach of essential procedural requirements*

81 By its first plea, Monte claims that the Court of First Instance infringed the principles governing the burden of proof and the principle that a court should verify of its own motion whether a contested act exists and set aside any illegal act. Monte states that, following the *PVC* case before the Court of First Instance and the statements made by the Commission's spokesperson, which were reproduced in the press, it had become clear that when the Polypropylene Decision was signed and therefore adopted, some texts did not in fact exist and that there were sometimes significant differences between the texts which were ready when signature took place and the texts notified, owing to changes made by the Commission's services after the decision was adopted. Such a manner of proceeding is all the more serious where what is involved is a decision imposing a fine, as was the case here.

82 Moreover, in this case Monte has every reason to believe that the Italian version of the Polypropylene Decision was not adopted on 26 April 1986. That defect entails the non-existence of that decision and the Court of First Instance should have verified that point of its own motion, in accordance with a principle that is well-established in the legal orders of the Member States. All the most serious forms of nullity entail non-existence which takes effect *ex tunc* and no limitation period applies.

83 Monte maintains that the Commission itself recognised that the *PVC* and *Polypropylene* cases were identical when it requested that this case be stayed until the *PVC* judgment of the Court of Justice was delivered. In contending that the defects which, in accordance with the principles laid down in that judgment, entail nullity and not the non-existence of the decision should have been pleaded in the application at first instance, the Commission is forgetting that, in the *PVC* judgment, the Court of Justice annulled the Commission's decision although that defect was not the subject of a specific complaint. Even if the issue were non-existence rather than nullity, in its *PVC* judgment the Court of Justice considered that that did not affect the possibility open to the Court of annulling the contested decision.

84 Non-existence does not constitute an independent category of defect in an administrative act, but rather a particular species of defect within the category of nullity. Acts vitiated by very significant defects are only considered to be non-existent within very strict limits and in extreme cases (see the Opinion of Advocate General Trabucchi in Joined Cases 15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73 *Schots-Kortner and Others* v *Council* [1974] ECR 177). In this case, there was no need to rely on a finding, of the Court's own motion, of a defect entailing nullity, because that defect was relied on in the appeal, although under the title of non-existence.

85 In the event, as in the *PVC* cases, there is serious evidence to suggest that the text of the decision in Italian was drawn up after the Decision was adopted and that the decision was altered before it was notified to Monte. The Court of First Instance should therefore have asked the Commission to produce the original text of its Decision, as the Court of Justice should do now.

86 DSM states that new developments have taken place in other cases before the Court of First Instance. They confirm that it is incumbent on the Commission to prove that it has followed its own essential procedural requirements and that, to clarify the issue, the Court of First Instance must, of its own motion or at the request of a party, order measures of inquiry in order to examine the relevant documentary evidence. In the '*Soda-Ash*' cases (Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775 and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847), the Commission contended that the Supplement to Reply lodged

by ICI in those cases after the *PVC* judgment of the Court of First Instance contained no evidence that the Commission had infringed its Rules of Procedure, and that the request for measures of inquiry lodged by ICI amounted to a new plea in law. The Court of First Instance nevertheless put questions to the Commission and ICI as to the conclusions to be drawn from the *PVC* judgment of the Court of Justice and also asked the Commission, by reference to paragraph 32 of the *PVC* judgment of the Court of Justice, whether it was able to produce extracts from the minutes and the authenticated texts of the contested decisions. Following other developments in the procedure, the Commission finally admitted that the documents produced as authenticated were only authenticated after the Court of First Instance had ordered their production.

87 According to DSM, in the '*Low-density polyethylene* ("*LdPE*")' cases (Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 and T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729), the Court of First Instance also ordered the Commission to produce a certified copy of the original version of the contested decision. The Commission admitted that authentication had not taken place at the meeting at which the College of Commissioners adopted that decision. DSM observes that the procedure for authenticating acts of the Commission must therefore have been introduced after March 1992. It follows that the same defect of lack of authentication must affect the Polypropylene Decision.

88 DSM adds that the Court of First Instance adopted a similar approach to that taken in the *Polypropylene* cases in Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, at paragraphs 24 to 27, and Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957, at paragraphs 28 to 31, when it rejected the applicants' pleas on the ground that they had failed to produce the slightest evidence which might rebut the presumption of validity of the decision that they were contesting. In Case T-43/92 *Dunlop Slazenger International* v *Commission* [1994] ECR II-441, the applicant's argument was rejected on the ground that the decision had been adopted and notified in accordance with the Commission's Rules of Procedure. In none of those cases did the Court of First Instance reject the applicants' plea of irregularity in the adoption of the challenged act on the ground that the Commission's Rules of Procedure had not been complied with.

89 The only exceptions are to be found in the orders in Case T-4/89 *BASF* v *Commission* [1992] ECR II-1591 and Case T-8/89 Rev. *DSM* v *Commission* [1992] ECR II-2399; however, even in those cases the applicants did not rely on the *PVC* judgment of the Court of First Instance as a new fact, but on other facts. In Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, the Court rejected the plea that the Commission had infringed its own Rules of Procedure, because it had not been properly raised before the Court of First Instance. In the Polypropylene proceedings, however, the same plea had been raised before the Court of First Instance and was rejected on the ground that there was not sufficient evidence.

90 DSM considers that the Commission's defence in this case is based on procedural arguments that are irrelevant, given the content of the contested judgment, which in essence turns on the burden of proof. According to DSM, if, in the *Polypropylene* cases, the Commission has not itself produced evidence as to the regularity of the procedures followed, that is because it is not in a position to show that it complied with its own Rules of Procedure.

91 The Commission maintains that, following the *PVC* judgment of the Court of Justice, Monte's criticism has been overtaken by events. Even if were to be accepted that non-existence should be found of the Court's own motion, it is clear from that judgment that Monte could have relied on the alleged procedural defects only for the purpose of seeking the annulment of the Polypropylene Decision. Grounds for annulment must be relied on in the originating application, and that was not done.

92 The Commission points out that, even if it were to be considered that a claim for a declaration of non-existence includes a claim of nullity, Monte's criticism in the appeal, to the effect that the Court of First Instance should have acted of its own motion, relates to the case of non-existence, not to that of nullity. It adds that the proceedings in the Polypropylene cases did not bring factual evidence to light analogous to that which came to light in the *PVC* cases.

93 As regards DSM's arguments, the Commission states that these are fundamentally flawed, since they fail to take account of the differences between the *PVC* cases and this case, and are based on a misconstruction of the *PVC* judgment of the Court of Justice.

94 Moreover, the Commission maintains its view that the applicants in the *Soda-Ash* cases had not produced sufficient evidence to justify the order by the Court of First Instance that the Commission produce documents. At all events, in those cases and the *LdPE* cases, also cited by DSM, the Court of First Instance reached its decision in the light of the particular circumstances of the case before it. In the Polypropylene proceedings, supposed deficiencies in the Polypropylene Decision could have been pointed out in 1986, but no one did so.

95 If, in its judgments in *Fiatagri and New Holland Ford* v *Commission* and *John Deere* v *Commission,* cited above, the Court of First Instance rejected the applicants' allegations, which were raised timeously, on the ground that there was no evidence to support them, the same solution should *a fortiori* be reached in this case, where the arguments relating to procedural irregularities in the Polypropylene Decision were produced late and without evidence.

96 With regard, first, to the conditions capable of rendering an act non-existent, it is clear in particular from paragraphs 48 to 50 of the *PVC* judgment of the Court of Justice that acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

97 However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting,

requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

98 From the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations.

99 As was the case in the *PVC* actions, whether considered in isolation or even together, the irregularities alleged by Monte, which relate to the procedure for the adoption of the Polypropylene Decision, do not appear to be of such obvious gravity that the decision must be treated as legally non-existent.

100 The Court of First Instance did not therefore infringe Community law as regards the conditions capable of rendering an act non-existent.

101 Secondly, with regard to the refusal by the Court of First Instance to find defects relating to the adoption and notification of the Polypropylene Decision such as to lead to its annulment, it need merely be held that this plea was raised for the first time in the request that the oral procedure be reopened and measures of inquiry be taken. Consequently, the question whether the Court of First Instance was obliged to examine it overlaps with the question whether that Court should have acceded to the request.

102 In that connection, and as regards the request for measures of inquiry, the case-law of the Court (see, in particular, Case 77/70 *Prelle* v *Commission* [1971] ECR 561, paragraph 7, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 53) makes it clear that, if made after the oral procedure is closed, such a request

can be admitted only if it relates to facts which may have a decisive influence and which the party concerned could not put forward before the close of the oral procedure.

103 The same applies with regard to the request that the oral procedure be reopened. It is true that, under Article 62 of its Rules of Procedure, the Court of First Instance has discretion in this area. However, the Court of First Instance is not obliged to accede to such a request unless the party concerned relies on facts which may have a decisive influence on the outcome of the case and which it could not put forward before the close of the oral procedure.

104 In this case, the request to the Court of First Instance for the oral procedure to be reopened and measures of inquiry ordered was based on statements made at a press conference which took place after the *PVC* judgment of the Court of First Instance was delivered.

105 First, indications of a general nature relating to an alleged practice of the Commission that emerged from a judgment delivered in other cases or from statements made on the occasion of other proceedings could not, as such, be regarded as decisive for the purposes of the determination of the case then before the Court of First Instance.

106 Secondly, even when submitting its application, Monte was in a position to provide the Court of First Instance with at least minimum evidence of the expediency of measures of organisation of procedure or inquiry for the purposes of the proceedings in order to prove that the Polypropylene Decision had been adopted in breach of the language rules applicable or altered after its adoption by the College of Members of the Commission, or that the originals were lacking, as certain applicants in the *PVC* cases did (see, to that effect, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 93 and 94).

107 Furthermore, the Court of First Instance was not obliged to order that the oral procedure be reopened on the ground of an alleged duty to raise of its own motion issues concerning the regularity of the procedure by which the Polypropylene Decision was adopted. Any such obligation to raise matters of public policy could exist only on the basis of the factual evidence adduced before the Court.

108 The Court of First Instance did not therefore commit any error of law in refusing to reopen the oral procedure and to order measures of organisation of procedure and of inquiry.

109 Thirdly and finally, inasmuch as the appellant asks the Court of Justice to order measures of inquiry or offers evidence in order to establish the conditions under which the Commission adopted the Polypropylene Decision, suffice it to point out that such measures cannot be considered in an appeal, which is limited to points of law.

110 On the one hand, measures of inquiry would necessarily lead the Court to decide questions of fact and would change the subject-matter of the proceedings commenced before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

111 On the other hand, the appeal relates only to the contested judgment and it is only if that judgment were set aside that the Court of Justice could, in accordance with the first paragraph of Article 54 of the EC Statute of the Court of Justice, deliver judgment itself in the case. As long as the contested judgment is not set aside, the Court is not therefore required to examine possible defects in the Polypropylene Decision.

112 It follows from the foregoing that the first plea in law must be dismissed.

*Infringement of Article 85 of the Treaty*

113 By its second plea in law, Monte claims that the Court of First Instance infringed Article 85 of the Treaty both in relation to the letter of that provision and in the interpretation given to it by the Commission and the Court of Justice.

Distortions of competition

114 By the first limb of this plea, Monte alleges that the Court of First Instance failed to taken into account distortions of competition caused by factors beyond the control of the undertakings, in particular by the economic context. Monte had claimed, in its application to the Court of First Instance, that towards the end of the 1970s the market was characterised by a situation of overcapacity which was aggravated by a tripling of the price of oil by the Organisation of Petroleum-Exporting Countries ('OPEC'), which the Commission had never attempted to challenge. The serious distortions in the polypropylene market were due not to the producers' meetings but to the prices imposed by OPEC and were therefore caused by factors which had nothing to do with the undertakings. Monte refers, in this connection, to the judgment in *Suiker Unie and Others* v *Commission*, cited above, and to the Opinion of Advocate General Mayras in that case.

115 Contrary to the Commission's assertions, the principle laid down in *Suiker Unie and Others* v *Commission*, cited above, has not been superseded by subsequent case-law, in particular *Van Landewyck and Others* v *Commission*, cited above, or Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831.

116 With regard to its obligation to consider the economic context, the Court of First Instance confined itself, when taking the economic context into consideration, to the fact, referred to in paragraph 257 of the contested judgment, that all the polypropylene producers were operating at a loss, neglecting the reasons for, and

the significance and duration of that negative period, which was due to the abovementioned factors. Moreover, the Court of First Instance failed completely to consider the existence of the formal instructions given by the Italian Government for Italian undertakings to maintain contact with each other and with multinationals nor did it consider the superior contractual power of the polypropylene users or the legal and moral obligation incumbent on the undertakings concerned to reduce losses.

117 Given that set of circumstances, each one of which could justify a completely different interpretation of Monte's conduct, the Court of First Instance confined itself to indicating, in paragraph 264, that the Commission had proved to the requisite legal standard that the agreements and concerted practices found had an anti-competitive object. However, Monte contends that no agreement or concerted practice was ever found to have existed, since the Commission could establish only the existence of meetings. It was therefore by disregarding all the factual circumstances that the Court of First Instance was able to uphold the appraisal made of the supposed facts by the Commission. In so doing, it infringed the principle reaffirmed by the Court of Justice in Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667 according to which, where the Commission's reasoning is based on a supposition, it is sufficient for the applicant who is contesting the infringement to prove circumstances which cast the facts established by the Commission in a different light and which thus allow another explanation of the facts to be substituted for the one adopted by the Commission.

118 In reply, the Commission states that no text or general principle authorises undertakings to infringe Article 85 of the Treaty as a reaction to the anti-competitive activity of a third party. According to *Suiker Unie and Others* v *Commission*, cited above, the Commission had to take account of the effects of legislation in a Member State, but the activities of OPEC are not the subject of such legislation. That judgment has, moreover, been overtaken on that point by *Van Landewyck and Others* v *Commission* and *Stichting Sigarettenindustrie and Others* v *Commission* cited above, in which the Court of Justice examined whether, in practice, national legislation excluded any possibility of competition. The increase in the price of petrol did not in itself exclude competition between polypropylene producers, which was, however, reduced by the agreements found by the Commission and the Court of First Instance. In any event, the suggestions made by the Italian administration and the difficulty, in practice, of achieving the price targets sought by the agreement cannot excuse the infringement of Article 85 of the Treaty.

119 It should first be borne in mind that, pursuant to Article 168A of the EC Treaty (now Article 225 EC) and the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice (see, *inter alia*, *Hilti* v *Commission*, cited above, paragraphs 10 and 42).

120 It follows that, inasmuch as it relates to the appraisal by the Court of First Instance of the evidence adduced, this complaint cannot be examined in an appeal.

121 Secondly, in so far as Monte complains that the Court of First Instance did not take account of the economic context in assessing the effects of the infringement, it should be noted that, having considered that the Commission had proved to the requisite legal standard that the agreements and concerted practices held to have existed had an anti-competitive object, the Court of First Instance was properly entitled to decide that it was not necessary to examine whether those agreements and practices had had an effect on the conditions of competition.

122 It is settled case-law that, for the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at p. 342; see also, to the same effect, Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 14 and 15).

123 Similarly, a concerted practice falls under Article 85(1) of the Treaty, even in the absence of anti-competitive effects on the market.

124 First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.

125 Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition.

126 Lastly, that interpretation is not incompatible with the restrictive nature of the prohibition laid down in Article 85(1) of the Treaty (see Case 24/67 *Parke Davis* v *Centrafarm* [1968] ECR 55, p. 71) since, far from extending its scope, it corresponds to the literal meaning of the terms used in that provision.

127 Thirdly, inasmuch as Monte's criticism is intended to show that, as a result of circumstances beyond the control of the undertakings involved, the agreements and concerted practices which were the subject of the Polypropylene Decision could not have had an anti-competitive object, it must be pointed out that, even if well founded, Monte's claims are not such as to prove that the economic context excluded any possibility of effective competition (see, to that effect, the judgments cited above, *Van Landewyck and Others* v *Commission*, paragraph 153, and *Stichting Sigarettenindustrie and Others* v *Commission*, paragraphs 24 to 29).

128 Fourthly, in so far as Monte complains that the Court of First Instance overlooked the suggestions made to Monte by the Italian Government, it is sufficient to point out, without ascertaining whether irresistible pressure exerted by the authorities of a Member State can exclude an undertaking's liability for infringement of Community competition law, that Monte has not even claimed that it suffered such pressure and was therefore constrained to take part in a restrictive arrangement with the other polypropylene producers. That argument is

accordingly not such as to exclude Monte's responsibility for the infringements of Article 85(1) of the Treaty found to have existed.

129 It follows that the first limb of this plea in law must be dismissed.

The rule of reason

130 By the second limb of this plea, Monte claims that, at paragraph 265 of the contested judgment, the Court of First Instance wrongly disregarded the application of the principle of the rule of reason, on the sole ground that the infringement was manifest. Academic writers and the European Parliament have criticised the Commission's attitude, which consists in considering protection of competition in purely formal terms, without looking at the spirit underlying the Community provisions. In that connection the Court of Justice has always maintained that competition cannot be enforced without account being taken of the economic and legislative context and the effects of the alleged infringements.

131 According to Monte, the Commission maintains that the principle of the rule of reason is particular to the legal order of the United States of America and that this principle is confined to a court's obligation to carry out an analysis in order to assess whether the possible advantages accruing for competition are not greater than the possible harm caused to it. In Monte's view, first, it is hard to understand why, in order to apply the law in a rational rather than unreasonable way, recourse must be had to a principle of North American law. Secondly, the *ratio legis* of the rule to be applied must first be sought and then it must be ascertained whether or not the conduct is contrary to that rule. For that purpose it is essential to assess the context in which the conduct was adopted. In this case, to assume that the meetings had anti-competitive aims, far from constituting a finding of fact, would be lacking in all common sense and credibility. It is not even possible to weigh up the harm caused to and advantages accruing for competition, because

a price proposal closer to the cost of production could not be regarded as an act adversely affecting competition where the buyer was able to reject the proposal and threaten to choose another supplier.

132 The Commission points out that, in response to Monte's argument that, in interpreting Article 85 of the Treaty, the rule of reason should be applied, the Court of First Instance held that the Commission had proved to the requisite legal standard that the agreement had an anti-competitive object for the purposes of that provision. The Court of First Instance rightly added that, assuming the principle to be applicable in Community competition law, the Commission did not have to analyse the effect on competition because there was no doubt that an agreement to fix prices, to limit production and to share out markets constitutes an infringement *per se*. In other words, by reason of the highly damaging nature of such an infringement as regards competition, there is no need to inquire whether there are positive circumstances counterbalancing the negative effects. In any event, the Commission states that in Europe, as in the United States of America, horizontal agreements on prices are prohibited, even when undertakings are operating at a loss. In such a situation restrictive agreements slow down the necessary restructuring of supply which would otherwise be achieved by eliminating marginal undertakings and consolidating the most viable undertakings.

133 On this point, it need merely be stated that, even if the rule of reason did have a place in the context of Article 85(1) of the Treaty, in no event may it exclude application of that provision in the case of a restrictive arrangement involving producers accounting for almost all the Community market and concerning price targets, production limits and sharing out of the market. The Court of First Instance did not therefore commit an error of law when it considered that the clear nature of the infringement in any event precluded the application of the rule of reason.

134 The second limb of this plea must therefore also be dismissed.

The presumption that the meetings between producers were unlawful

135 By the third limb of this plea, Monte claims that the Court of First Instance wrongly considered, at paragraphs 82 and 91 of the contested judgment, that it is *per se* unlawful for an undertaking to take part in meetings with members of the same sector. In disregard of the right of assembly, freedom to hold opinions, freedom of discussion and of association, it thus created an arbitrary presumption that the meetings between producers, which had, however, never been kept secret, were unlawful.

136 According to the Commission, this complaint results from a misreading by Monte of the contested judgment at odds with what the judgment actually said. The complaint is therefore inadmissible, or at least manifestly unfounded. It is clear that the Court of First Instance relates the infringement of the competition rules not to mere participation in meetings but also to their purpose, which was to fix price and sales volume targets.

137 On that point, it should be borne in mind that freedom of expression, of peaceful assembly and of association, enshrined *inter alia* in Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('the ECHR'), constitute fundamental rights which, as the Court of Justice has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU), are protected in the Community legal order (see, to that effect, *Bosman*, cited above, paragraph 79).

138 However, it follows expressly from paragraph 91 of the contested judgment, to which Monte refers, that the regular meetings of polypropylene producers were not held to be contrary to Article 85(1) of the Treaty *per se*, but only inasmuch as their purpose was anti-competitive. Moreover, that purpose had been established by the Court of First Instance on the basis of the evidence referred to in paragraphs 83 to 90 of the contested judgment, not on the basis of a presumption.

139 It follows that the third limb of this plea can not be upheld either.

The arbitrary presumption of a causal link

140 By the fourth limb of this plea Monte claims that, in paragraphs 132 to 134 of the contested judgment, the Court of First Instance arbitrarily presumed that there was a causal link between two successive events. For the Commission's line of argument to make sense, the meetings would have had to have led to conduct on the part of the undertakings different from what their conduct would probably have been in the absence of the meetings. In this case, there was no alternative to the undertakings' conduct, since all the producers had suffered heavy and substantial financial losses which they necessarily had to reduce. The conduct complained of thus corresponded to a compelling economic, legal and ethical requirement on the part of the undertakings. If shipwrecked mariners all swim towards the nearest land in sight that is not the result of an agreement but the expression of a natural survival instinct. The competition rules are aimed at preserving the freedom of undertakings to make choices with regard to external constraints, not in relation to necessities which derive from the very raison d'être of the undertaking, including that of making a profit.

141 The Commission states that Monte's view is that the meetings had a purpose other than that of creating reciprocal commitments. That plea is inadmissible, since it seeks to cast doubt on the findings of fact. In any event it is unfounded, because the Court of First Instance held, like the Commission, that the aim of the meetings was to fix prices and market shares, founding its conclusion on documentary evidence.

142 The Court would observe that, inasmuch as this complaint seeks to cast doubt on the assessment of the Court of First Instance, in paragraph 133 of the contested judgment, according to which the economic context could not explain the manner in which the price instructions issued by the different producers corresponded to each other and to the price targets set at the producers'

meetings, it relates to the assessment of the evidence adduced before the Court of First Instance and cannot be examined by the Court in an appeal.

143 In so far as Monte is criticising the contested judgment on the ground that it did not take into account a situation of necessity which compelled the undertakings who were the addressees of the Polypropylene Decision to adopt the conduct complained of, it must be stated that, although a situation of necessity might allow conduct which would otherwise infringe Article 85(1) of the Treaty to be considered justified, such a situation can never result from the mere requirement to avoid financial loss.

144 Therefore the fourth limb of this plea cannot be upheld either.

Motives capable of justifying the conduct

145 By the fifth limb of this plea Monte states, with regard to paragraphs 232 and 233 of the contested judgment, that the Court of First Instance infringed the principle according to which, in case of doubt between two possible motives underlying certain conduct, the one capable of justifying the conduct should be adopted. If simultaneous conduct may be justified by something other than concerted action, the court can no longer presume that it is caused by an anti-competitive agreement rather than having another cause. Monte refers here to Case 395/87 *Tournier* [1989] ECR 2521. In the present case, it was normal for initiatives by the undertakings to take place with some degree of simultaneity, since that is the practice on the market for the semi-finished product in question, intended for industrial users. The customers involved had to schedule the deliveries required and make their purchasing choices well in advance. In markets of that type it serves a practical purpose for prices to be announced by the undertakings at preestablished intervals for a preestablished length of time. Monte observes that the fact that, after a price alteration was announced, all the other producers indicated their own prices in the days that followed reflects the demands of the

users and is the practice in the sector. Moreover, it is current practice for one or several large undertakings to act as 'price-leaders' and precede the others in fixing prices. That eliminates all suspicion of concerted action. As regards the size of the attempted increases, the latter were made more or less homogenous by the need to abide by market realities.

146 According to the Commission, despite the reference to paragraphs 232 and 233, the alleged infringement cannot relate to any part of the judgment, since neither the Commission nor the Court of First Instance ever had doubts as to how to interpret Monte's conduct. This plea in law is therefore inadmissible, since it is completely unrelated to the contested judgment. The Commission refers here to the judgment of the Court of Justice in Case C-354/92 P *Eppe* v *Commission* [1993] ECR I-7027, and to the orders of the Court of Justice in Case C-244/92 P *Kupka-Floridi* v *Economic and Social Committee* [1993] ECR I-2041 and Case C-338/93 P *De Hoe* v *Commission* [1994] ECR I-819, from which it follows that, in accordance with Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice, an appeal must present legal arguments specifically challenging a particular aspect of the contested judgment. An appeal which simply repeats the arguments already submitted to the Court of First Instance and contains no legal argument in support of the forms of order sought in the appeal does not satisfy that requirement. It amounts to asking simply that the application be reconsidered, which falls outside the jurisdiction of the Court of Justice, and should be dismissed as inadmissible within the meaning of Article 119 of the Rules of Procedure of the Court of Justice. A mere reference to the pleas in law and arguments already submitted to the Court of First Instance, or the mere assertion that the latter could have reached a different decision fall into the same category.

147 In that regard, it must be pointed out, first, that the case-law relied on by Monte concerns a situation in which, given parallel conduct by several undertakings on the market, it must be ascertained whether that phenomenon is the effect of those undertakings concerting together or whether there can be another explanation. It is not therefore relevant in this case, since the Commission proved to the requisite legal standard, according to the findings of the Court of First Instance, that there was concerted action with an anti-competitive purpose.

148 Secondly, the Court of First Instance rightly considered, at paragraph 135 of the contested judgment, that there can be no question of any form of 'price

leadership' on the part of a producer where that producer has participated with others in consultation on prices.

149 It follows from the foregoing that the fifth limb of this plea must also be dismissed.

The assertion that undertakings forced to operate at a loss must act fairly towards one another

150 By the sixth limb of this plea, Monte criticises the dismissal by the Court of First Instance of the argument that the undertakings were bound to act fairly in attempting to reduce their losses and had to avoid predatory pricing. The argument in paragraph 295 of the contested judgment to the effect that the sale of goods below cost price may constitute a form of unfair competition where it is intended to reinforce the competitive position of an undertaking to the detriment of its competitors and not when it results from the operation of supply and demand, does not apply to the case in point. What the undertakings accused each other of doing was selling more than necessary below cost price in order to win customers and force competitors to leave the market. The attempts to increase prices was aimed at reducing losses and avoiding the highly unlawful solution of predatory pricing. Monte never asserted that there was an agreement, not even an agreement no longer to compete unfairly with each other. On the contrary, it has always maintained that conduct determined by the economic context was not and could not be the result of concerted action, since it was the only conduct that was legally and economically imperative.

151 According to the Commission, Monte maintained before the Court of First Instance that an agreement between undertakings no longer to charge prices lower than cost price is not contrary to Article 85 of the Treaty, since it is aimed at excluding a form of unfair competition. That argument was, it is true, formulated in an ambiguous way, but it cannot be disputed that it was put forward and that the Court of First Instance addressed it in paragraph 295 of its judgment. In its appeal, Monte confines itself to complaining that the Court of

First Instance focused on some aspects of the agreement rather than others, and states that the undertakings were selling below cost price at a level that was lower than necessary, so that they agreed amongst each other to sell at a level that was not so low, but nevertheless still below cost price. That argument is inadmissible, because it seeks, first, to have the facts reexamined and, secondly, to change the subject-matter of the proceedings before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice. Before the Court of First Instance Monte did not speak of sales at a level even lower than was necessary. That plea is in any case unfounded, because the Court of First Instance rightly held that the only sales at a price level lower than cost price that can be described as unfair competition are those made by an undertaking occupying a dominant position in order to eliminate any remaining competition on the market.

152 The Court need merely observe here that this complaint, inasmuch as it concerns the fact that the undertakings concerned were selling at a level that was even lower than that resulting from the operation of supply and demand, must be dismissed as inadmissible on the grounds that it is seeking to challenge the assessments of the facts by the Court of First Instance and that it constitutes a new plea in law which changes the subject-matter of the proceedings before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

Discriminatory application of Article 85 of the Treaty to the exclusive benefit of users

153 By the seventh limb of this plea, Monte, referring to paragraphs 132 and 237 of the contested judgment, argues that the Court of First Instance applied Article 85 of the Treaty in a discriminatory manner, exclusively for the benefit of users, whilst the freedom of producers was limited by the fact that they were caught between oil suppliers, who were abusing their dominant position, and customers who had superior contractual power. On that point, it denies that the fact of announcing a slight increase in prices to someone who, having the feel of the market, already knows that he can refuse to accept that increase constitutes a serious distortion of competition. That amounts to a protection of competition

intended solely to safeguard the interests of the user industries to the detriment of others. Such a reading of Article 85 of the Treaty is incompatible with Article 2 of the EC Treaty (now, after amendment, Article 2 EC), which states that the Community is to have as its task to promote a harmonious and balanced development of economic activities, continuous and balanced expansion and increased stability. It is in fact contrary to any *ratio legis* to consider the situation that existed after the increases in the price of oil as the normal balance of supply and demand, when the repercussions of the increases affected only the suppliers of polypropylene. It is, furthermore, contrary to Article 2 of the Treaty to prevent one economic sector from reacting against the predominant power of another sector.

154 The Commission observes, on the substance, that, whilst the generic formulation of this complaint is not sufficient to render it inadmissible, Article 85 of the Treaty applies to undertakings which conclude agreements which restrict competition and that this application in such cases, where those agreements relate to sales, will benefit buyers. The Commission therefore fails to see wherein any discrimination might reside. In any event, the Court of First Instance rightly held that the existence of 'a buyer's market' provided no exemption from the obligation to comply with Article 85 of the Treaty.

155 On that point, it need merely be noted, first, as the Commission rightly pointed out, that a Commission decision relating to anti-competitive arrangements between sellers may be of benefit to buyers without the decision producing any form of discrimination. Secondly, application of Article 85(1) of the Treaty to such arrangements is not precluded solely because buyers are in a favourable situation on the market.

156 Accordingly, the seventh limb of this plea cannot be upheld.

Failure to take the economic reality into consideration

157 By the eighth limb of this plea, Monte maintains, by reference to paragraphs 143, 199 and 200 of the contested judgment, that the Court of First Instance did not take the economic reality into consideration when it upheld the charge of 'artificial reduction of supply and the introduction of a quota system'. It states that the undertakings were operating at a loss, with only 60% of their capacity utilised, and could sell more only by increasing their losses. Producers had to accept the conditions imposed by buyers. The existence of a quota system, in the present case, is not only an unproved infringement but also an infringement that was incapable of being achieved, because limiting its sales quota was only open to an undertaking free to choose its production level. That situation cannot occur when an increase in quota would mean increasing losses by subsequently reducing the price, whilst a reduction in quota would not mean increasing the price but only increasing the losses deriving from low utilisation of plant.

158 The Commission indicates that Monte is essentially maintaining the same objections as those it set out in the fourth limb of this plea. First, those allegations are inadmissible because they seek to cast doubt on the findings of fact. Secondly, they are unfounded, since Monte's participation in the agreement is based on documentary evidence.

159 The Court finds that this limb of the second plea essentially covers the same complaints as those examined under the first and fourth limbs. It must therefore be dismissed because the grounds are the same.

New infringement elements: common intentions and anti-competitive purpose

160 By the ninth limb of this plea, Monte refers to paragraphs 150, 201, 230 and 264 of the contested judgment and maintains that, in upholding the Commission's argument, the Court of First Instance introduced new elements into the infringement, in particular 'common intentions' and 'scopo anticoncorrenziale' (anti-competitive purpose). The former element is irrelevant when not arising from an agreement or undertakings concerting together. With regard to 'anti-competitive purpose', Monte considers that such a possibility leads to penalising conduct which is *per se* lawful and which had no prohibited effect but which might perhaps have had 'anti-competitive' objectives. That is equivalent to penalising mere intentions. Having not found any anti-competitive object or effect, the Court of First Instance introduced a third condition enabling Article 85 of the Treaty to be applied, namely anti-competitive purpose.

161 According to the Commission, by 'common intentions', the Court of First Instance intended to refer to the fundamental element enabling the existence of an agreement within the meaning of Article 85 of the Treaty to be established. As regards 'anti-competitive purpose', the Italian text of the contested judgment uses an alternative term ('scopo') to designate the object of preventing, restricting or distorting competition. 'Scopo' is thus the equivalent of 'object'. That plea is consequently unfounded.

162 With regard, first to 'common intentions', the Court observes that it is clear from the contested judgment that this expression was used to describe conduct which may be characterised in law as an agreement for the purposes of Article 85(1) of the Treaty. According to the settled case-law of the Court of Justice, cited in paragraph 230 of the contested judgment, such an agreement results from the intention of the undertakings concerned to conduct themselves on the market in a specific way (see, in particular, the judgments cited above, *ACF Chemiefarma* v *Commission*, paragraph 112, and *Van Landewyck and Others* v *Commission*, paragraph 86). Accordingly, far from creating new forms of infringement, the Court of First Instance properly used the term 'common intentions' to designate conduct that may be characterised as an agreement.

163 Secondly, as regards the term 'scopo anticoncorrenziale', this was used, at paragraph 264 of the contested judgment, as a synonym for 'anti-competitive object', which appears to correspond to the concept of object in Article 85(1) of the Treaty, according to a comparison of the various language versions of that provision, in particular the Danish version ('formål'), German ('bezwecken'), Finnish ('tarkoituksena'), Irish ('gcuspóir'), Dutch ('strekken'), Portuguese ('objectivo') and Swedish ('syfte').

164 That plea in law must therefore be dismissed.

The fact that data divulged by the trade press were wrongly regarded as being secret

165 By the 10th limb of this plea, Monte complains that the Court of First Instance, in paragraphs 175 to 177 of the contested judgment, wrongly regarded data such as production figures, which are commonly divulged by the trade press, as being secret. Access to those 'secrets' was open to anyone. The Commission ought to have proved that the data were collected in an informal way well before they were divulged by the press and to have explained that knowledge of the data had the effect of causing distortions of competition, which it failed to do.

166 The Commission contends that this plea is inadmissible on several grounds. Neither the data to which Monte alludes nor the part of the contested judgment which it criticises can be ascertained, since the reference to paragraphs 175 to 177 is not sufficient for that purpose. Moreover, this plea seeks to raise questions of fact which would not seem to have been raised before the Court of First Instance. Monte is therefore seeking to change the subject-matter of the proceedings, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

167 Since this complaint concerns the assessment of the facts by the Court of First Instance, it must be dismissed as inadmissible

Effect on trade

168 Under the 11th limb of this plea, Monte observes, by reference to paragraphs 253 and 254 of the contested judgment, that trade was not affected at all, since an undertaking could do nothing other than continue to sell at a loss for six years if it wished to remain on the market. If Monte had ceased its activities, patterns of trade would have been altered, but to no purpose.

169 According to the Commission, this limb of the plea does not comprise any argument which can be regarded as finding fault with the reasoning of the Court of First Instance. It amounts to asserting that the Court of First Instance should have reached a different decision. The plea is therefore inadmissible, in accordance with *Eppe* v *Commission*, *Kupka-Floridi* v *Economic and Social Committee* and *De Hoe* v *Commission*, cited above.

170 The Court finds that this complaint is based on a misunderstanding of the concept of effect on trade between Member States. According to settled case-law, that condition is satisfied where it is possible to foresee with a sufficient degreė of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (see to this effect *inter alia* Case 99/79 *Lancôme* v *Etos* [1980] ECR 2511, paragraph 23.

171 It follows that the Court of First Instance did not commit any error of law, so that this last complaint must also be rejected. The second plea in law must therefore be dismissed in its entirety.

*Infringements of Community law in the finding of facts*

172 By its third plea in law, referring to paragraphs 82, 86, 89, 129, 144, 146 and 149 of the contested judgment, Monte claims that, in finding the facts, the Court of First Instance reversed the burden of proof, infringed the principles of the presumption of innocence and the personal nature of fault, attributed to Monte non-existent confessions and admissions, asserted without proof that the producers had subscribed to a common plan, and erroneously rejected Monte's argument that 'Red Brigade' terrorism was one of the factors that gave rise to Monte's conduct.

173 The Court of First Instance wrongly held that Monte had not denied taking part in the regular producers' meetings and that it had therefore to be considered to have participated in all the meetings. The Court of First Instance was also wrong in going on to hold that it was for Monte to produce another explanation of what was discussed at the meetings in which it had taken part. It thus reversed the burden of proof and introduced a presumption of guilt, since participation in a meeting meant, as far as the Court of First Instance was concerned, adherence to all the initiatives which were supposed to have been adopted at the meetings. It was therefore for the party charged with the infringement to produce proof of its innocence. On this point Monte also observes that, in accordance with a principle common to all civilised legal orders, a court may not use a purported admission by taking from it only aspects that are favourable to the charge. It was unlawful for the Court of First Instance to seize on the acknowledgment of the existence of those meetings, lending them a tenor that Monte has always denied. Monte has, on the other hand, shown that the alleged 'account leadership' system did not operate, as far as it was concerned, for a large number of its supposedly preferential customers, and the Commission was not able to show that it had been applied to other customers. Monte points out that it also adduced evidence that the movement in its prices was independent in relation both to its list prices and to the alleged target prices or the prices indicated in the trade press. It adds that the Court of First Instance criticised it for not producing notes of the meetings taken by its employees, without having any evidence that such notes existed.

174 According to the Commission, once Monte's participation in the meetings was proved and there were notes of the meetings found on ICI's premises, it was for

Monte to produce another explanation of the tenor of those meetings. That is an application of elementary rules governing the burden of proof. As for notes taken by Monte's employees, the Commission states that the Court of First Instance did not assert that they existed, but made reference to them as an example of material on which Monte could have relied in order to justify its participation in the meetings. The Commission also states that Monte seems to wish to assert that it did not participate in any restrictive arrangements, even lawful arrangements, but such participation is clear from the documentary evidence. With regard to the system of 'account leadership', the Court of First Instance correctly held, on the basis of the documentary evidence available, that Monte had taken part in the system. According to the Commission, Monte is overlooking the fact that the conclusion of the Court of First Instance relates to the existence of an agreement, not to its implementation, and that that finding was founded on a certain amount of evidence. Even if the agreement may have failed in practice, this did not in any event disprove its existence. This plea is therefore unfounded.

175 The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which, according to the Court's settled case-law, cited above in paragraph 137, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.

176 It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, *Öztürk*, Series A No 73, and of 25 August 1987 *Lutz*, Series A No 123-A).

177 On the question whether Monte's complaints are well founded, it must be pointed out, first, that Monte did not deny, before the Court of First Instance, having taken part in the meetings referred to in the Polypropylene Decision, but maintained that those meetings were not of the kind and scope described in that decision.

178 In those circumstances, the Court of First Instance was entitled to consider that Monte did not dispute the fact that it had taken part in the meetings in question, without thereby distorting Monte's statements.

179 Secondly, it must be borne in mind that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (*Baustahlgewebe* v *Commission*, cited above, paragraph 58).

180 Contrary to Monte's allegations, the Court of First Instance did not rely on presumptions for the purpose of establishing the anti-competitive character of the meetings in question, but on the evidence mentioned in paragraphs 83 to 85 of the contested judgment. Its assessment of that evidence cannot be questioned in an appeal.

181 Since, according to the findings of the Court of First Instance, the Commission had been able to establish that Monte had taken part in meetings between undertakings of a manifestly anti-competitive nature, the Court of First Instance was entitled to consider that it was for Monte to provide another explanation of the tenor of those meetings. It follows that the Court of First Instance did not unduly reverse the burden of proof and did not set aside the presumption of innocence.

182 In that connection, as the Commission rightly pointed out, the reference to notes taken by Monte's employees at meetings, in paragraph 86 of the contested judgment, must be understood as simply an example of the evidence that Monte could have adduced to support its arguments as to the nature and tenor of the meetings, so that the Court of First Instance did not apply any presumption as to the existence of such notes.

183 Thirdly, inasmuch as Monte seeks to challenge the findings in paragraphs 145 to 148 of the contested judgment concerning its participation on the 'account leadership' system and the implementation, at least in part of that system, its complaint relates to the assessment by the Court of First Instance of evidence adduced before it and cannot therefore be examined in an appeal.

184 Fourthly, the Court of First Instance rightly considered that the argument that the 'Red Brigades' were allegedly blackmailing Monte had to be held inadmissible, pursuant to Article 42(2) of the Rules of Procedure of the Court of Justice, as a new plea put forward for the first time in the reply. The Court of First Instance found that the plea was based on a fact which had not come to light in the course of the procedure, but in 1981, well before the proceedings had begun.

*The limitation period*

185 According to Monte, which refers to paragraphs 236, 237 and 336 of the contested judgment, the Court of First Instance infringed Article 1(1) of Regulation No 2988/74 on limitation periods and misapplied the rules on the burden of proof as regards the question whether the conduct in question was continuous for the purposes of limitation. As Judge Vesterdorf, who was designated Advocate General before the Court of First Instance, acknowledged, there was no proof of the continuous nature of the conduct between 1977 and 1983. That meant, therefore, that prosecution of any infringement was time-barred for a period of five years preceding the letter of formal notice. That limitation period cannot be interrupted by decisions addressed to other undertakings, since Monte's complicity in any of their infringements has not been proved. Such complicity cannot consist in merely participating in meetings.

186 In its reply, Monte added that, pursuant to that regulation, the Court of First Instance, in dismissing the objection of limitation, should have based its reasoning on the continuous nature of the infringement and on Monte's continuous participation. From the contested judgment it would appear, however,

that the only factor common to all the allegedly unlawful conduct found by the Court of First Instance was pursuit of a single economic purpose, that of distorting the normal movement of prices on the market in polypropylene, which in turn constitutes continuous conduct. Consequently, the only unifying factor in the conduct was, for the Court of First Instance, the aim to 'distort the normal movement of prices'. Monte observes that a market with the characteristics already described cannot be described as 'normal', so that the efforts to reduce losses could not constitute the only unifying intention underlying the conduct of the undertakings. Furthermore, the Court of First Instance did not point to any fact that would enable Monte's conduct to be considered continuous or repeated. Lastly, the Court of First Instance ought to have specified the number of meetings in which Monte had participated. In the absence of such details, the application of the limitation rules in respect of multiple, continuous or repeated infringements has not been properly explained.

187 The Commission considers this plea to be inadmissible on several counts. First, it is impossible to understand Monte's reasoning and its criticism of the contested judgment. While the Court of First Instance described the facts as a single infringement and emphasised the link between the conduct of the various undertakings, the plea put forward appears to allege reversal of the burden of proof on the question whether the conduct was continuous, reference is then made to the Opinion of the Advocate General, and lastly to the fact that decisions addressed to other undertakings may not interrupt a limitation period. The Commission points out, in this connection, that argument by way of reference is not admissible. Secondly, in so far as the plea relates to the characterisation of the facts as a single infringement, this is a question of fact which the Court of Justice may not review in an appeal.

188 According to the Commission, Monte argued for the first time in its reply that, in dismissing the objection as to limitation, the Court of First Instance accepted the concept of 'continuous conduct'. The Commission leaves it to the Court to decide on the admissibility of those arguments.

189 The Court observes, first, that, contrary to Monte's assertions, the Court of First Instance considered, in paragraph 202 of the contested judgment, that the Commission had proved to the requisite legal standard that all the findings of fact

which it made in the contested decision against Monte were correct. Nothing in the contested judgment indicates that the various aspects of conduct ascribed to Monte were interrupted at any time.

190 It is not for the Court of Justice, when hearing an appeal, to review whether that factual assessment was correct.

191 The Court of First Instance then found, at paragraphs 230, 231 and 235 of the contested judgment, that Monte had taken part in activities characterised as agreements and concerted practices covering the period between 1977 and September 1983 the effects of which continued to last, in the case of the agreements, until November 1983. At paragraphs 236 and 237, it considered that those agreements and concerted practices, in view of their identical purpose, formed part of schemes involving regular meetings, target-price fixing and quota fixing which, in turn, 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. It considered that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements, when it was in fact a single infringement, which progressively manifested itself in both agreements and concerted practices.

192 Monte's only criticism in this regard is to the effect that the economic purpose common to all the efforts of the undertakings involved, which the Court of First Instance described as 'distorting the normal movement of prices', was irrelevant in the case of the polypropylene market, which could not be considered normal.

193 That point cannot be accepted, since the term 'normal movement of prices' must be understood as meaning the movement of prices in the absence of the anti-competitive conduct ascribed to the undertakings. The fact that the polypropylene market was at the time in a situation of imbalance which could not be described as normal is therefore irrelevant.

194 Lastly, at paragraph 331, the Court of First Instance considered that Monte had taken part in a single and continuous infringement (in Italian, which was the language of the case, 'un'infrazione unica e continuata') from the conclusion of the floor-price agreement in mid-1977 until November 1983.

195 In that connection, it need merely be held that, although the concept of a continuous infringement has different meanings in the legal orders of the Member States, in any event it comprises a pattern of unlawful conduct implementing a single infringement, united by a common subjective element.

196 The Court of First Instance was therefore right in holding that the activities which formed part of schemes and pursued a single purpose constituted a continuous infringement of the provisions of Article 85(1) of the Treaty, so that the five-year limitation period provided for in Article 1 of Regulation No 2988/74 could not begin to run until the day on which the infringement ceased, which, according to the findings of the Court of First Instance, was in November 1983.

197 In those circumstances, it is not necessary to examine the objections relating to interruption of the limitation period since it must be concluded that the Court of First Instance did not commit any error of law in holding that Monte could not argue that penalisation of its infringement was time-barred.

198 The fourth plea in law must therefore also be dismissed.

*Determination of the amount of the fine*

199 By its fifth plea in law, put forward in the alternative, Monte claims, having regard to paragraphs 70, 374, 379 and 385 of the contested judgment, that the Court of First Instance did not give reasons for holding that in calculating the amount of the fine the Commission had taken into account the facts put forward as justification, that it unfairly treated an unnotified agreement or practice as highly unlawful conduct, and that it did not give reasons for refusing substantially to reduce the fine. An infringement which has had no effect on the market is certainly less serious than an infringement which has had such an effect. Besides its deterrent effect, a fine also serves the purpose of restoring a situation of balanced competition, by imposing on the undertaking responsible for the infringement a financial sacrifice which stands in proportion to the gain from its unlawful conduct. According to Monte, it follows that, where the finding of an infringement is not corroborated by proof that the alleged agreements were actually implemented nor by information showing what the undertakings responsible gained from them, the fine must be calculated with particular care, since, in such a case, its function is purely deterrent. The Court of First Instance wrongly omitted to take this into consideration in its assessment as to whether the fine was proportionate.

200 Monte further observes that it is difficult to understand how the Court of First Instance could have assessed whether the fine was appropriate without resolving the question, which logically should be examined first, as to how serious the infringement of Article 81 EC was. As for the assessment of the restrictive effects of any agreement, the Commission should have taken into account the particular situation of the market, which was a buyers' market. It was also bound to assess the specific part played by each undertaking in those effects when it examined the possibility of imposing a fine and calculating its amount. Since Article 15(2) of Regulation No 17 is a penal provision, it cannot be applied without a strict assessment of the individual responsibility of the person charged.

201 In accepting the Commission's argument that it was not necessary to examine whether or not the presumed agreements were eligible for exemption under Article 81(3) EC, the Court of First Instance neglected to consider that that examination was in any event necessary, at least in order to establish the level of

the fine. An agreement that is, in substance, eligible for exemption cannot be penalised in the same way as another that is not. The Court of First Instance should have addressed that defect in the reasoning of the Polypropylene Decision.

202 Nor does the Court of First Instance appear to have considered in its entirety the plea in law concerning the intentional nature of the infringement. In that connection, Monte states that the subjective element of the infringement is an indispensable condition for imposing a fine, not merely an aggravating circumstance as the Commission considers it to be. The Court of First Instance did not examine that aspect of the plea concerning the intentional nature of the infringement. Having concluded that Monte had acted intentionally, the Court of First Instance should also have examined whether that circumstance constituted an aggravating factor such as to entail an increased penalty. According to Monte, a finding as to the intentional nature of the infringement is an important element in the evaluation of the degree of gravity of the infringement and thus in the determination of the amount of fine to be imposed. Consequently, the failure by the Court of First Instance to take this element into consideration constitutes a defect in the reasoning of the judgment.

203 The Commission points out first of all that the paragraphs to which Monte refers are not quite relevant, since none of its arguments concerns paragraphs 365 to 374, in which the Court of First Instance addresses very carefully the question of effects. Paragraph 386 is also very important, since that paragraph, as well as paragraph 385 (the only paragraph cited by Monte), shows that the Court of First Instance accepted the list of circumstances taken into consideration by the Commission, including the mitigating factor that the price initiatives did not generally achieve their objective in full, as well as the level of the fine imposed in view of those circumstances.

204 Next, at paragraph 254, the Court of First Instance considered that, in assessing evidence of damage to trade between Member States, it was necessary to take into consideration the effects of the agreement, not the effects of each individual undertaking's participation in the agreement. In that connection, the Commission observes that this is a matter of determining whether one of the conditions for the existence of an infringement exists. That reasoning by the Court of First Instance does not, however, show in any way that the individual responsibility of the

undertaking was not correctly taken into consideration in the determination of the amount of the fine.

205 Lastly, with regard to the arguments that no account was taken of the possibility of obtaining an exemption decision for the agreement under Article 81(3) EC, and the failure to assess whether the intentional nature of the infringement could constitute an aggravating circumstance, the Commission submits that these were not raised before the Court of First Instance and are accordingly inadmissible pursuant to Article 113(2) of the Rules of Procedure of the Court of Justice. In any case, the Court of First Instance underscored several times the particular seriousness of the infringement, so that the question of any possible exemption was never in point.

206 The Court would point out first of all that, as is made expressly clear in paragraphs 369, 371 and 372 of the contested judgment, the Court of First Instance held that the Commission had rightly taken account of the limited nature of the effects produced by the infringement on the movement in the prices charged to various customers. Monte's complaint in this connection is therefore unfounded.

207 Second, it is true that, where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (see, to that effect, *Suiker Unie and Others* v *Commission*, cited above, paragraph 622). However, the Court of First Instance found, at paragraph 361 of the contested judgment, that the Commission had correctly established the role played by Monte in the infringement and that it was entitled to take account of that role in determining the amount of the fine to be imposed on it. The Court of First Instance cannot therefore be held to have committed an error of law in that respect.

208 Third, the objection that the Court of First Instance did not consider whether the agreement could be exempted under Article 81(3) EC is inadmissible because it is

a new plea which changes the subject-matter of the proceedings before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

209 Fourth and last, it is clear from paragraph 362 of the contested judgment that, according to the Court of First Instance, the facts established showed, by their intrinsic gravity, that Monte did not act rashly or even through lack of care but intentionally. It is therefore clear that, when addressing the fine imposed on Monte, the Court of First Instance took into account the intentional element of the infringement as an aggravating circumstance, so that Monte's criticism is unfounded.

210 It follows that the fifth plea in law must also be dismissed.

211 Since none of the pleas in law put forward by Monte has been upheld, the appeal must be dismissed in its entirety.

## Costs

212 According to Article 69(2) of the Rules of Procedure, applicable to the appeal procedure by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since Monte's pleas have failed, it must be ordered to pay the costs. DSM must bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Montecatini SpA to pay the costs;**

3. **Orders DSM NV to pay its own costs.**

Kapteyn Hirsch Mancini

Murray Ragnemalm

Delivered in open court in Luxembourg on 8 July 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber