ANTITRUST CASES – CONCERTED PRACTICES

Joined cases C-2/01 P and C-3/01 P Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities v Bayer AG [excerpt]

The applicant, Bayer AG (hereinafter Bayer or the Bayer Group), is the parent company of one of the main European chemical and pharmaceutical groups and has a presence through its national subsidiaries in all the Member States of the Community. For many years, it has manufactured and marketed under the trade name Adalat or Adalate a range of medicinal preparations whose active ingredient is nifedipine, designed to treat cardio-vascular disease.

In most Member States, the price of Adalat is directly or indirectly fixed by the national health authorities. Between 1989 and 1993, the prices fixed by the Spanish and French health services were, on average, 40% lower than prices in the United Kingdom.

Because of those price differences, wholesalers in Spain exported Adalat to the United Kingdom from 1989 onwards. French wholesalers followed suit as from 1991. According to Bayer, sales of Adalat by its British subsidiary, Bayer UK, fell by almost half between 1989 and 1993 on account of the parallel imports, entailing a loss in turnover of DEM 230 million for the British subsidiary, representing a loss of revenue to Bayer of DEM 100 million.

Faced with that situation, the Bayer Group changed its delivery policy, and began to cease fulfilling all of the increasingly large orders placed by wholesalers in Spain and France with its Spanish and French subsidiaries. That change took place in 1989 for orders received by Bayer Spain and in the fourth quarter of 1991 for those received by Bayer France.

Following complaints by some of the wholesalers concerned, the Commission started an administrative investigation procedure concerning alleged infringements of Article 101(1) TFEU. According to the Commission, Bayer France and Bayer Spain infringed Article 101(1) of the Treaty by imposing an export ban as part of their commercial relations with their respective wholesalers. It maintains that such an agreement constituted an appreciable restriction of competition and had an equally appreciable effect on trade between Member States. The Court of First Instance has annulled the Commission’s decision. The case below is the action for annulment against that Court’s ruling.

Arguments of the parties

BAI, in subparagraph (ii) of the first part of its third plea, and the Commission, in its second plea, accuse the Court of First Instance of interpreting Article 101(1) of the Treaty in an excessively restrictive manner, in that it wrongly held that an agreement concerning an export ban could not be considered to have been concluded unless the manufacturer requires a particular line of conduct from wholesalers or seeks to obtain their adherence to its policy seeking to prevent parallel imports. More particularly, they argue that it was not necessary to prove that Bayer imposed an express export ban on wholesalers in order to establish the existence of an agreement prohibited by Article 101(1) of the Treaty.

BAI, referring in particular to the judgments in Sandoz and Ford, argues that an agreement within the meaning of Article 101(1) of the Treaty must be regarded as having been concluded simply because wholesalers are continuing to obtain supplies from a manufacturer which has manifested its intention to prevent parallel imports, since, by doing so, they accept, de facto, the commercial policy of that manufacturer.

Similarly, the Commission emphasises that, for there to be an agreement within the meaning of Article 101(1) of the Treaty, it is sufficient for the undertakings in question to have expressed their common intention to behave on the market in a given way. It accuses the Court of First Instance of failing to take into consideration the fact that, in this case, Bayer had expressed sufficiently clearly its wish to see the wholesalers change their method of ordering and delivery and that, therefore, that fact taken in combination with the change in the wholesalers' conduct was capable of expressing a common intention between Bayer and the wholesalers. The Commission refers in that regard to the judgments in AEG and Ford, in which the Court did not examine whether the manufacturer had required a given line of conduct from those with whom it was dealing, or had tried to obtain their acquiescence to the measures which it had adopted.

BAI, EAEPC and the Kingdom of Sweden argue that, where a producer places quotas on wholesalers by reference to the needs of the national market which they supply, that may constitute a hindrance to exports where it is combined with an additional obligation to give priority to supplying a particular market. No express prohibition was necessary. Such a restriction on supplies inescapably has the effect of an export ban and thus an artificial partitioning of markets, since supplies are no longer sufficient to allow exports. The Kingdom of Sweden further observes that, in accordance with Community case-law, particularly the judgment in Ford, Bayer's conduct could be described as a partial refusal to sell, applied uniformly and systematically in relation to all wholesalers established in France and Spain, such conduct being capable of being regarded as a contractual provision contrary to Article

101(1) of the Treaty.

Bayer and EFPIA maintain that this plea should be dismissed because it stems from an incorrect reading of the judgment under appeal. The Court of First Instance did not in any way make the existence of an agreement on an export ban subject to the question whether Bayer had demanded or actively attempted to obtain the adherence of the wholesalers to an export ban. Furthermore, they argue, this plea does not, in reality, raise any argument of law but challenges a finding of fact, made by the Court of First Instance in paragraph 157 of the judgment under appeal in order to dismiss a factual allegation made by the Commission itself, according to which the actual conduct of the wholesalers did not constitute sufficient proof to establish that they had tolerated the policy designed to hinder parallel exports. Therefore, they argue, this plea is inadmissible.

Concerning the alleged misinterpretation of the judgments in AEG and Ford, which was examined by the Court of First Instance, both Bayer and EFPIA argue that the situation in this case is different from that in those cases and they therefore deny that the Court of First Instance departed from that case-law.

Findings of the Court

It does not appear from the judgment under appeal that the Court of First Instance took the view that an agreement within the meaning of Article 101(1) of the Treaty could not exist unless one business partner demands a particular line of conduct from the other.

On the contrary, the Court of First Instance set out from the principle that the concept of an agreement within the meaning of Article 101(1) of the Treaty centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention. The Court further recalled, in paragraph 67 of the same judgment, that for there to be an agreement within the meaning of Article 101(1) of the Treaty it is sufficient that the undertakings in question should have expressed their common intention to conduct themselves on the market in a specific way.

Since, however, the question arising in this case is whether a measure adopted or imposed apparently unilaterally by a manufacturer in the context of the continuous relations which it maintains with its wholesalers constitutes an agreement within the meaning of Article 101(1) of the Treaty, the Court of First Instance examined the Commission's arguments, to the effect that Bayer infringed that article by imposing an export ban as part of the ... continuous commercial relations [of Bayer France and Bayer Spain] with their customers, and that the

wholesalers' subsequent conduct reflected an implicit acquiescence in that ban.

Concerning the argument that the Court of First Instance wrongly considered it necessary to prove an express export ban on the part of Bayer, it is clear from the Court's analysis concerning the system for monitoring the distribution of the consignments of Adalat delivered that it did not in any way require proof of an express ban.

Concerning the appellants' arguments that the Court of First Instance should have acknowledged that the manifestation of Bayer's intention to restrict parallel imports could constitute the basis of an agreement prohibited by Article 101(1) of the Treaty, it is true that the existence of an agreement within the meaning of that provision can be deduced from the conduct of the parties concerned.

However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. To hold that an agreement prohibited by Article 101(1) of the Treaty may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision.

For an agreement within the meaning of Article 101(1) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers.

Therefore, the Court of First Instance was right to examine whether Bayer's conduct supported the conclusion that the latter had required of the wholesalers, as a condition of their future contractual relations, that they should comply with its new commercial policy.

Concerning the judgment in Sandoz, relied upon by the appellants, it is undisputed that, in that case, the manufacturer had sought the cooperation of wholesalers in order to eliminate or reduce parallel imports, their cooperation being necessary, in the circumstances of that case, in order to attain that objective. In such a context, the insertion by the manufacturer of the words export prohibited on invoices amounted to a demand for a particular line of conduct on the part of the wholesalers. That is not the case here.

The appellants have also relied on the judgments in AEG and Ford, arguing that, in those judgments, in the context of apparently unilateral measures adopted by the manufacturer in relation to its distributors, the Court held that there was an agreement within the meaning of Article 101(1) of the Treaty without enquiring as to the existence of a demand on the part of

that manufacturer.

However, the need to demonstrate the conclusion of an agreement within the meaning of Article 85(1) of the Treaty did not arise in those cases. The question there was whether the measures adopted by the manufacturers formed part of the selective distribution agreements previously concluded between the manufacturers and their distributors and, therefore, whether those measures had to be taken into account in order to assess the compatibility of those agreements with the competition rules.

In AEG, the manufacturer had, in applying a selective distribution agreement which had previously been adjudged compatible with Article 101(1) of the Treaty, begun to refuse to approve distributors who met the qualitative criteria of that agreement, and did so in order to maintain a high level of prices or to exclude certain modern channels of distribution. It was thus a question of establishing whether the Commission could base its investigation on the conduct adopted by the manufacturer when applying a selective distribution agreement in order to determine whether that agreement, as applied in a particular case, was contrary to Article 101(1) of the Treaty.

In Ford, the Court stated its judgment that [t]he applicants and the Commission all agree that the main issue in this case is whether the Commission was entitled to refuse an exemption under Article 1013) of the Treaty for Ford AG's main dealer agreement by reason of the fact that that undertaking had discontinued supplies of right-hand-drive cars to its German distributors.

Therefore, the existence of an agreement capable of infringing Article 101(1) of the Treaty having already been established, the Court was able to confine itself in those cases to examining the question whether measures subsequently adopted by the manufacturer formed part of the agreement in question and whether they ought, therefore, to be taken into account when examining the compatibility of that agreement with Article 101(1). Such a question does not therefore correspond to that raised in this case, which is whether the very existence of an anti-competitive agreement has been established. The appellants cannot therefore rely on AEG and Ford in support of their argument that an agreement prohibited by Article 101(1) of the Treaty has come into existence.

As for the arguments of the Kingdom of Sweden and EAEPC, who argue that a demand arises from the combined effect of Bayer's quota policy and the obligation which wholesalers are under to maintain national stocks, without there being any need for an express demand that exports be limited, it is sufficient to note that such an argument merely serves to demonstrate the unilateral nature of Bayer's commercial policy, which could be carried out without the

cooperation of the wholesalers. As it has already been established that the judgments in AEG and Ford do not apply to this case, the interveners cannot rely on them in support of their arguments either. Therefore, the mere fact that there is a hindrance to parallel imports is not sufficient to demonstrate the existence of an agreement prohibited by Article 101(1) of the Treaty.

In the light of the above, the argument based on the need for the manufacturer to require a particular line of conduct from the wholesalers must be rejected.

Case 48-69 Imperial Chemical Industries Ltd. v Commission of the European Communities [excerpt]

1 IT IS COMMON GROUND THAT FROM JANUARY 1964 TO OCTOBER 1967 THREE GENERAL AND UNIFORM INCREASES IN THE PRICES OF DYESTUFFS TOOK PLACE IN THE COMMUNITY .

2 BETWEEN 7 AND 20 JANUARY 1964, A UNIFORM INCREASE OF 15 PER CENT IN THE PRICES OF MOST DYES BASED ON ANILINE, WITH THE EXCEPTION OF CERTAIN CATEGORIES, TOOK PLACE IN ITALY, THE NETHERLANDS, BELGIUM AND LUXEMBOURG AND IN CERTAIN THIRD COUNTRIES .

3 ON 1 JANUARY 1965 AN IDENTICAL INCREASE TOOK PLACE IN GERMANY .

4 ON THE SAME DAY ALMOST ALL PRODUCERS IN ALL THE COUNTRIES OF THE COMMON MARKET EXCEPT FRANCE INTRODUCED A UNIFORM INCREASE OF 10 PER CENT ON THE PRICES OF DYES AND PIGMENTS EXCLUDED FROM THE INCREASE OF 1964 .

5 SINCE THE ACNA UNDERTAKING DID NOT TAKE PART IN THE INCREASE OF 1965 ON THE ITALIAN MARKET, THE OTHER UNDERTAKINGS DID NOT MAINTAIN THE ANNOUNCED INCREASE OF THEIR PRICES ON THAT MARKET .

6 TOWARDS MID-OCTOBER 1967, AN INCREASE FOR ALL DYES WAS INTRODUCED, EXCEPT IN ITALY, BY ALMOST ALL PRODUCERS, AMOUNTING TO 8 PER CENT IN GERMANY, THE NETHERLANDS, BELGIUM AND LUXEMBOURG, AND 12 PER CENT IN FRANCE .

7 BY A DECISION OF 31 MAY 1967 THE COMMISSION COMMENCED PROCEEDINGS UNDER ARTICLE 3 OF REGULATION NO 17/62 ON ITS OWN INITIATIVE CONCERNING THESE INCREASES FOR PRESUMED INFRINGEMENT OF ARTICLE 101 (1) OF THE EEC TREATY AGAINST SEVENTEEN PRODUCERS OF DYESTUFFS ESTABLISHED WITHIN AND OUTSIDE THE COMMON MARKET, AND AGAINST NUMEROUS SUBSIDIARIES AND REPRESENTATIVES OF THOSE UNDERTAKINGS .

8 BY A DECISION OF 24 JULY 1969, THE COMMISSION FOUND THAT THE INCREASES WERE THE RESULT OF CONCERTED PRACTICES, WHICH INFRINGED ARTICLE 101(1) OF THE TREATY, BETWEEN THE UNDERTAKINGS

- BADISCHE ANILIN - UND SODA-FABRIK AG (BASF), LUDWIGSHAFEN,
- CASSELLA FARBWERKE MAINKUR AG, FRANKFURT AM MAIN,
- FARBENFABRIKEN BAYER AG, LEVERKUSEN,
- FARBWERKE HOECHST AG, FRANKFURT AM MAIN,
- SOCIETE FRANCAISE DES MATIERES COLORANTES SA, PARIS,
- AZIENDA COLORI NAZIONALI AFFINI S . P . A . (ACNA), MILAN,
- CIBA SA, BASEL,
- J . R . GEIGY SA, BASEL,
- SANDOZ SA, BASEL, AND
- IMPERIAL CHEMICAL INDUSTRIES LTD ., (ICI), MANCHESTER .

9 IT THEREFORE IMPOSED A FINE OF 50 000 U . A . ON EACH OF THESE UNDERTAKINGS, WITH THE EXCEPTION OF ACNA, FOR WHICH THE FINE WAS FIXED AT 40 000 U . A .

10 BY APPLICATION LODGED AT THE COURT REGISTRY ON 1 OCTOBER 1969 IMPERIAL CHEMICAL INDUSTRIES LTD . HAS BROUGHT AN APPLICATION AGAINST THAT DECISION .

SUBSTANTIVE SUBMISSION AS TO THE EXISTENCE OF CONCERTED PRACTICES

<u>ARGUMENTS OF THE PARTIES</u>

51 THE APPLICANT COMPLAINS THAT THE COMMISSION HAS NOT PROVED THE EXISTENCE OF CONCERTED PRACTICES WITHIN THE MEANING OF ARTICLE 101(1) TFEU IN RELATION TO ANY OF THE THREE INCREASES MENTIONED IN THE CONTESTED DECISION .

52 THAT DECISION STATES THAT PRIMA FACIE EVIDENCE THAT THE INCREASE OF 1964, 1965 AND 1967 TOOK PLACE AS THE RESULT OF CONCERTED ACTION IS TO BE FOUND IN THE FACTS THAT THE RATES INTRODUCED FOR EACH INCREASE BY THE DIFFERENT PRODUCERS IN EACH COUNTRY WERE THE SAME, THAT WITH VERY RARE EXCEPTIONS THE SAME DYESTUFFS WERE INVOLVED, AND THAT THE INCREASES WERE PUT INTO EFFECT OVER ONLY A

VERY SHORT PERIOD, IF NOT ACTUALLY ON THE SAME DATE .

53 IT IS CONTENDED THAT THESE INCREASES CANNOT BE EXPLAINED SIMPLY BY THE OLIGOPOLISTIC CHARACTER OF THE STRUCTURE OF THE MARKET .

54 IT IS SAID TO BE UNREALISTIC TO SUPPOSE THAT WITHOUT PREVIOUS CONCERTATION THE PRINCIPAL PRODUCERS SUPPLYING THE COMMON MARKET COULD HAVE INCREASED THEIR PRICES ON SEVERAL OCCASIONS BY IDENTICAL PERCENTAGES AT PRACTICALLY THE SAME MOMENT FOR ONE AND THE SAME IMPORTANT RANGE OF PRODUCTS INCLUDING SPECIALITY PRODUCTS FOR WHICH THERE ARE FEW, IF ANY, SUBSTITUTES, AND THAT THEY SHOULD HAVE DONE SO IN A NUMBER OF COUNTRIES WHERE CONDITIONS ON THE DYESTUFFS MARKET ARE DIFFERENT .

55 THE COMMISSION HAS ARGUED BEFORE THE COURT THAT THE INTERESTED PARTIES NEED NOT NECESSARILY HAVE DRAWN UP A COMMON PLAN WITH A VIEW TO ADOPTING A CERTAIN COURSE OF BEHAVIOUR FOR IT TO BE SAID THAT THERE HAS BEEN CONCERTATION .

56 IT IS ARGUED THAT IT IS ENOUGH THAT THEY SHOULD PREVIOUSLY HAVE INFORMED EACH OTHER OF THE ATTITUDE WHICH THEY INTENDED TO ADOPT SO THAT EACH COULD REGULATE HIS CONDUCT SAFE IN THE KNOWLEDGE THAT HIS COMPETITORS WOULD ACT IN THE SAME WAY .

57 THE APPLICANT ARGUES THAT THE CONTESTED DECISION IS BASED ON AN INADEQUATE ANALYSIS OF THE MARKET IN THE PRODUCTS IN QUESTION AND ON AN ERRONEOUS UNDERSTANDING OF THE CONCEPT OF A CONCERTED PRACTICE, WHICH IS WRONGLY IDENTIFIED BY THE DECISION WITH THE CONSCIOUS PARALLELISM OF MEMBERS OF AN OLIGOPOLY, WHEREAS SUCH CONDUCT IS DUE TO INDEPENDENT DECISIONS ADOPTED BY EACH UNDERTAKING, DETERMINED BY OBJECTIVE BUSINESS NEEDS, AND IN PARTICULAR BY THE NEED TO INCREASE THE UNSATISFACTORILY LOW RATE OF PROFIT ON THE PRODUCTION OF DYESTUFFS .

58 IT IS ARGUED THAT IN FACT THE PRICES OF THE PRODUCTS IN QUESTION DISPLAYED A CONSTANT TENDENCY TO FALL BECAUSE OF LIVELY COMPETITION BETWEEN PRODUCERS WHICH IS TYPICAL OF THE MARKET IN THOSE PRODUCTS, NOT ONLY AS REGARDS THE QUALITY OF THE PRODUCTS AND TECHNICAL ASSISTANCE TO CUSTOMERS, BUT ALSO AS REGARDS PRICES,

PARTICULARLY THE LARGE REDUCTIONS GRANTED INDIVIDUALLY TO THE PRINCIPAL PURCHASERS .

59 THE FACT THAT THE RATES OF INCREASE WERE IDENTICAL WAS THE RESULT, IT IS SAID, OF THE EXISTENCE OF THE " PRICE-LEADERSHIP " OF ONE UNDERTAKING .

60 IT IS ALSO ARGUED THAT THE LARGE NUMBER OF DYESTUFFS PRODUCED BY EACH UNDERTAKING MAKES IT IMPOSSIBLE IN PRACTICE TO RAISE PRICES PRODUCT BY PRODUCT .

61 A FURTHER ARGUMENT IS THAT DIFFERENT PRICE INCREASES FOR INTERCHANGEABLE PRODUCTS EITHER COULD NOT PRODUCE ECONOMICALLY SIGNIFICANT RESULTS BECAUSE OF THE LIMITED LEVEL OF STOCKS AND OF THE TIME NECESSARY FOR ADAPTING PLANT TO APPRECIABLY INCREASED DEMAND, OR WOULD LEAD TO A RUINOUS PRICE WAR .

62 FINALLY, IT IS SAID THAT DYESTUFFS FOR WHICH THERE ARE NO SUBSTITUTES FORM ONLY A SMALL PART OF THE PRODUCERS' TURNOVER .

63 TAKING THESE MARKET CHARACTERISTICS INTO ACCOUNT AND IN VIEW OF THE WIDESPREAD AND CONTINUOUS EROSION OF PRICES, EACH MEMBER OF THE OLIGOPOLY WHO DECIDED TO INCREASE HIS PRICES COULD, IT IS ARGUED, REASONABLY EXPECT TO BE FOLLOWED BY HIS COMPETITORS, WHO HAD THE SAME PROBLEMS REGARDING PROFITS .

THE CONCEPT OF A CONCERTED PRACTICE

64 ARTICLE 101 DRAWS A DISTINCTION BETWEEN THE CONCEPT OF " CONCERTED PRACTICES " AND THAT OF " AGREEMENTS BETWEEN UNDERTAKINGS " OR OF " DECISIONS BY ASSOCIATIONS OF UNDERTAKINGS "; THE OBJECT IS TO BRING WITHIN THE PROHIBITION OF THAT ARTICLE A FORM OF COORDINATION BETWEEN UNDERTAKINGS WHICH, WITHOUT HAVING REACHED THE STAGE WHERE AN AGREEMENT PROPERLY SO-CALLED HAS BEEN CONCLUDED, KNOWINGLY SUBSTITUTES PRACTICAL COOPERATION BETWEEN THEM FOR THE RISKS OF COMPETITION .

65 BY ITS VERY NATURE, THEN, A CONCERTED PRACTICE DOES NOT HAVE ALL THE ELEMENTS OF A CONTRACT BUT MAY INTER ALIA ARISE OUT OF COORDINATION WHICH BECOMES APPARENT FROM THE BEHAVIOUR OF

THE PARTICIPANTS .

66 ALTHOUGH PARALLEL BEHAVIOUR MAY NOT BY ITSELF BE IDENTIFIED WITH A CONCERTED PRACTICE, IT MAY HOWEVER AMOUNT TO STRONG EVIDENCE OF SUCH A PRACTICE IF IT LEADS TO CONDITIONS OF COMPETITION WHICH DO NOT CORRESPOND TO THE NORMAL CONDITIONS OF THE MARKET, HAVING REGARD TO THE NATURE OF THE PRODUCTS, THE SIZE AND NUMBER OF THE UNDERTAKINGS, AND THE VOLUME OF THE SAID MARKET .

67 THIS IS ESPECIALLY THE CASE IF THE PARALLEL CONDUCT IS SUCH AS TO ENABLE THOSE CONCERNED TO ATTEMPT TO STABILIZE PRICES AT A LEVEL DIFFERENT FROM THAT TO WHICH COMPETITION WOULD HAVE LED, AND TO CONSOLIDATE ESTABLISHED POSITIONS TO THE DETRIMENT OF EFFECTIVE FREEDOM OF MOVEMENT OF THE PRODUCTS IN THE COMMON MARKET AND OF THE FREEDOM OF CONSUMERS TO CHOOSE THEIR SUPPLIERS

68 THEREFORE THE QUESTION WHETHER THERE WAS A CONCERTED ACTION IN THIS CASE CAN ONLY BE CORRECTLY DETERMINED IF THE EVIDENCE UPON WHICH THE CONTESTED DECISION IS BASED IS CONSIDERED, NOT IN ISOLATION, BUT AS A WHOLE, ACCOUNT BEING TAKEN OF THE SPECIFIC FEATURES OF THE MARKET IN THE PRODUCTS IN QUESTION .

THE CHARACTERISTIC FEATURES OF THE MARKET IN DYESTUFFS

69 THE MARKET IN DYESTUFFS IS CHARACTERIZED BY THE FACT THAT 80 PER CENT OF THE MARKET IS SUPPLIED BY ABOUT TEN PRODUCERS, VERY LARGE ONES IN THE MAIN, WHICH OFTEN MANUFACTURE THESE PRODUCTS TOGETHER WITH OTHER CHEMICAL PRODUCTS OR PHARMACEUTICAL SPECIALITIES .

70 THE PRODUCTION PATTERNS AND THEREFORE THE COST STRUCTURES OF THESE MANUFACTURERS ARE VERY DIFFERENT AND THIS MAKES IT DIFFICULT TO ASCERTAIN COMPETING MANUFACTURERS' COSTS .

71 THE TOTAL NUMBER OF DYESTUFFS IS VERY HIGH, EACH UNDERTAKING PRODUCING MORE THAN A THOUSAND .

72 THE AVERAGE EXTENT TO WHICH THESE PRODUCTS CAN BE REPLACED BY OTHERS IS CONSIDERED RELATIVELY GOOD FOR STANDARD DYES, BUT IT CAN BE VERY LOW OR EVEN NON-EXISTENT FOR SPECIALITY

DYES .

73 AS REGARDS SPECIALITY PRODUCTS, THE MARKET TENDS IN CERTAIN CASES TOWARDS AN OLIGOPOLISTIC SITUATION .

74 SINCE THE PRICE OF DYESTUFFS FORMS A RELATIVELY SMALL PART OF THE PRICE OF THE FINAL PRODUCT OF THE USER UNDERTAKING, THERE IS LITTLE ELASTICITY OF DEMAND FOR DYESTUFFS ON THE MARKET AS A WHOLE AND THIS ENCOURAGES PRICE INCREASES IN THE SHORT TERM .

75 ANOTHER FACTOR IS THAT THE TOTAL DEMAND FOR DYESTUFFS IS CONSTANTLY INCREASING, AND THIS TENDS TO INDUCE PRODUCERS TO ADOPT A POLICY ENABLING THEM TO TAKE ADVANTAGE OF THIS INCREASE .

76 IN THE TERRITORY OF THE COMMUNITY, THE MARKET IN DYESTUFFS IN FACT CONSISTS OF FIVE SEPARATE NATIONAL MARKETS WITH DIFFERENT PRICE LEVELS WHICH CANNOT BE EXPLAINED BY DIFFERENCES IN COSTS AND CHARGES AFFECTING PRODUCERS IN THOSE COUNTRIES .

77 THUS THE ESTABLISHMENT OF THE COMMON MARKET WOULD NOT APPEAR TO HAVE HAD ANY EFFECT ON THIS SITUATION, SINCE THE DIFFERENCES BETWEEN NATIONAL PRICE LEVELS HAVE SCARCELY DECREASED .

78 ON THE CONTRARY, IT IS CLEAR THAT EACH OF THE NATIONAL MARKETS HAS THE CHARACTERISTICS OF AN OLIGOPOLY AND THAT IN MOST OF THEM PRICE LEVELS ARE ESTABLISHED UNDER THE INFLUENCE OF A " PRICELEADER ", WHO IN SOME CASES IS THE LARGEST PRODUCER IN THE COUNTRY CONCERNED, AND IN OTHER CASES IS A PRODUCER IN ANOTHER MEMBER STATE OR A THIRD STATE, ACTING THROUGH A SUBSIDIARY .

79 ACCORDING TO THE EXPERTS THIS DIVIDING-UP OF THE MARKET IS DUE TO THE NEED TO SUPPLY LOCAL TECHNICAL ASSISTANCE TO USERS AND TO ENSURE IMMEDIATE DELIVERY, GENERALLY IN SMALL QUANTITIES, SINCE, APART FROM EXCEPTIONAL CASES, PRODUCERS SUPPLY THEIR SUBSIDIARIES ESTABLISHED IN THE DIFFERENT MEMBER STATES AND MAINTAIN A NETWORK OF AGENTS AND DEPOTS TO ENSURE THAT USER UNDERTAKINGS RECEIVE SPECIFIC ASSISTANCE AND SUPPLIES .

80 IT APPEARS FROM THE DATA PRODUCED DURING THE COURSE OF THE PROCEEDINGS THAT EVEN IN CASES WHERE A PRODUCER ESTABLISHES DIRECT CONTACT WITH AN IMPORTANT USER IN ANOTHER MEMBER STATE,

PRICES ARE USUALLY FIXED IN RELATION TO THE PLACE WHERE THE USER IS ESTABLISHED AND TEND TO FOLLOW THE LEVEL OF PRICES ON THE NATIONAL MARKET .

81 ALTHOUGH THE FOREMOST REASON WHY PRODUCERS HAVE ACTED IN THIS WAY IS IN ORDER TO ADAPT THEMSELVES TO THE SPECIAL FEATURES OF THE MARKET IN DYESTUFFS AND TO THE NEEDS OF THEIR CUSTOMERS, THE FACT REMAINS THAT THE DIVIDING-UP OF THE MARKET WHICH RESULTS TENDS, BY FRAGMENTING THE EFFECTS OF COMPETITION, TO ISOLATE USERS IN THEIR NATIONAL MARKET, AND TO PREVENT A GENERAL CONFRONTATION BETWEEN PRODUCERS THROUGHOUT THE COMMON MARKET .

82 IT IS IN THIS CONTEXT, WHICH IS PECULIAR TO WAY IN WHICH THE DYESTUFFS MARKET WORKS, THAT THE FACTS OF THE CASE SHOULD BE CONSIDERED .

THE INCREASES OF 1964, 1965 AND 1967

83 THE INCREASES OF 1964, 1965 AND 1967 COVERED BY THE CONTESTED DECISION ARE INTERCONNECTED .

84 THE INCREASE OF 15 PER CENT IN THE PRICES OF MOST ANILINE DYES IN GERMANY ON 1 JANUARY 1965 WAS IN REALITY NOTHING MORE THAN THE EXTENSION TO ANOTHER NATIONAL MARKET OF THE INCREASE APPLIED IN JANUARY 1964 IN ITALY, THE NETHERLANDS, BELGIUM AND LUXEMBOURG .

85 THE INCREASE IN THE PRICES OF CERTAIN DYES AND PIGMENTS INTRODUCED ON 1 JANUARY 1965 IN ALL THE MEMBER STATES, EXCEPT FRANCE, APPLIED TO ALL THE PRODUCTS WHICH HAD BEEN EXCLUDED FROM THE FIRST INCREASE .

86 THE REASON WHY THE PRICE INCREASE OF 8 PER CENT INTRODUCED IN THE AUTUMN OF 1967 WAS RAISED TO 12 PER CENT FOR FRANCE WAS THAT THERE WAS A WISH TO MAKE UP FOR THE INCREASES OF 1964 AND 1965 IN WHICH THAT MARKET HAD NOT TAKEN PART BECAUSE OF THE PRICE CONTROL SYSTEM .

87 THEREFORE THE THREE INCREASES CANNOT BE ISOLATED ONE FROM ANOTHER, EVEN THOUGH THEY DID NOT TAKE PLACE UNDER IDENTICAL CONDITIONS .

88 IN 1964 ALL THE UNDERTAKINGS IN QUESTION ANNOUNCED THEIR INCREASES AND IMMEDIATELY PUT THEM INTO EFFECT, THE INITIATIVE

COMING FROM CIBA-ITALY WHICH, ON 7 JANUARY 1964, FOLLOWING INSTRUCTIONS FROM CIBA-SWITZERLAND, ANNOUNCED AND IMMEDIATELY INTRODUCED AN INCREASE OF 15 PER CENT . THIS INITIATIVE WAS FOLLOWED BY THE OTHER PRODUCERS ON THE ITALIAN MARKET WITHIN TWO OR THREE DAYS .

89 ON 9 JANUARY ICI HOLLAND TOOK THE INITIATIVE IN INTRODUCING THE SAME INCREASE IN THE NETHERLANDS, WHILST ON THE SAME DAY BAYER TOOK THE SAME INITIATIVE ON THE BELGO-LUXEMBOURG MARKET .

90 WITH MINOR DIFFERENCES, PARTICULARLY BETWEEN THE PRICE INCREASES BY THE GERMAN UNDERTAKINGS ON THE ONE HAND AND THE SWISS AND UNITED KINGDOM UNDERTAKINGS ON THE OTHER, THESE INCREASES CONCERNED THE SAME RANGE OF PRODUCTS FOR THE VARIOUS PRODUCERS AND MARKETS, NAMELY, MOST ANILINE DYES OTHER THAN PIGMENTS, FOOD COLOURINGS AND COSMETICS .

91 AS REGARDS THE INCREASE OF 1965 CERTAIN UNDERTAKINGS ANNOUNCED IN ADVANCE PRICE INCREASES AMOUNTING, FOR THE GERMAN MARKET, TO AN INCREASE OF 15 PER CENT FOR PRODUCTS WHOSE PRICES HAD ALREADY BEEN SIMILARLY INCREASED ON THE OTHER MARKETS, AND TO 10 PER CENT FOR PRODUCTS WHOSE PRICES HAD NOT YET BEEN INCREASED . THESE ANNOUNCEMENTS WERE SPREAD OVER THE PERIOD BETWEEN 14 OCTOBER AND 28 DECEMBER 1964 .

92 THE FIRST ANNOUNCEMENT WAS MADE BY BASF, ON 14 OCTOBER 1964, FOLLOWED BY AN ANNOUNCEMENT BY BAYER ON 30 OCTOBER AND BY CASTELLA ON 5 NOVEMBER .

93 THESE INCREASES WERE SIMULTANEOUSLY APPLIED ON 1 JANUARY 1965 ON ALL THE MARKETS EXCEPT FOR THE FRENCH MARKET BECAUSE OF THE PRICE FREEZE IN THAT STATE, AND THE ITALIAN MARKET WHERE, AS A RESULT OF THE REFUSAL BY THE PRINCIPAL ITALIAN PRODUCER, ACNA, TO INCREASE ITS PRICES ON THE SAID MARKET, THE OTHER PRODUCERS ALSO DECIDED NOT TO INCREASE THEIRS .

94 ACNA ALSO REFRAINED FROM PUTTING ITS PRICES UP BY 10 PER CENT ON THE GERMAN MARKET .

95 OTHERWISE THE INCREASE WAS GENERAL, WAS SIMULTANEOUSLY INTRODUCED BY ALL THE PRODUCERS MENTIONED IN THE CONTESTED

DECISION, AND WAS APPLIED WITHOUT ANY DIFFERENCES CONCERNING THE RANGE OF PRODUCTS .

96 AS REGARDS THE INCREASE OF 1967, DURING A MEETING HELD AT BASEL ON 19 AUGUST 1967, WHICH WAS ATTENDED BY ALL THE PRODUCERS MENTIONED IN THE CONTESTED DECISION EXCEPT ACNA, THE GEIGY UNDERTAKING ANNOUNCED ITS INTENTION TO INCREASE ITS SELLING PRICES BY 8 PER CENT WITH EFFECT FROM 16 OCTOBER 1967 .

97 ON THAT SAME OCCASION THE REPRESENTATIVES OF BAYER AND FRANCOLOR STATED THAT THEIR UNDERTAKINGS WERE ALSO CONSIDERING AN INCREASE .

98 FROM MID-SEPTEMBER ALL THE UNDERTAKINGS MENTIONED IN THE CONTESTED DECISION ANNOUNCED A PRICE INCREASE OF 8 PER CENT, RAISED TO 12 PER CENT FOR FRANCE, TO TAKE EFFECT ON 16 OCTOBER IN ALL THE COUNTRIES EXCEPT ITALY, WHERE ACNA AGAIN REFUSED TO INCREASE ITS PRICES, ALTHOUGH IT WAS WILLING TO FOLLOW THE MOVEMENT IN PRICES ON TWO OTHER MARKETS, ALBEIT ON DATES OTHER THAN 16 OCTOBER .

99 VIEWED AS A WHOLE, THE THREE CONSECUTIVE INCREASES REVEAL PROGRESSIVE COOPERATION BETWEEN THE UNDERTAKINGS CONCERNED .

100 IN FACT, AFTER THE EXPERIENCE OF 1964, WHEN THE ANNOUNCEMENT OF THE INCREASES AND THEIR APPLICATION COINCIDED, ALTHOUGH WITH MINOR DIFFERENCES AS REGARDS THE RANGE OF PRODUCTS AFFECTED, THE INCREASES OF 1965 AND 1967 INDICATE A DIFFERENT MODE OF OPERATION .

HERE, THE UNDERTAKINGS TAKING THE INITIATIVE, BASF AND GEIGY RESPECTIVELY, ANNOUNCED THEIR INTENTIONS OF MAKING AN INCREASE SOME TIME IN ADVANCE, WHICH ALLOWED THE UNDERTAKINGS TO OBSERVE EACH OTHER' S REACTIONS ON THE DIFFERENT MARKETS, AND TO ADAPT THEMSELVES ACCORDINGLY .

101 BY MEANS OF THESE ADVANCE ANNOUNCEMENTS THE VARIOUS UNDERTAKINGS ELIMINATED ALL UNCERTAINTY BETWEEN THEM AS TO THEIR FUTURE CONDUCT AND, IN DOING SO, ALSO ELIMINATED A LARGE PART OF THE RISK USUALLY INHERENT IN ANY INDEPENDENT CHANGE OF CONDUCT ON ONE OR SEVERAL MARKETS .

102 THIS WAS ALL THE MORE THE CASE SINCE THESE ANNOUNCEMENTS,

WHICH LED TO THE FIXING OF GENERAL AND EQUAL INCREASES IN PRICES FOR THE MARKETS IN DYESTUFFS, RENDERED THE MARKET TRANSPARENT AS REGARD THE PERCENTAGE RATES OF INCREASE .

103 THEREFORE, BY THE WAY IN WHICH THEY ACTED, THE UNDERTAKINGS IN QUESTION TEMPORARILY ELIMINATED WITH RESPECT TO PRICES SOME OF THE PRECONDITIONS FOR COMPETITION ON THE MARKET WHICH STOOD IN THE WAY OF THE ACHIEVEMENT OF PARALLEL UNIFORMITY OF CONDUCT .

104 THE FACT THAT THIS CONDUCT WAS NOT SPONTANEOUS IS CORROBORATED BY AN EXAMINATION OF OTHER ASPECTS OF THE MARKET .

105 IN FACT, FROM THE NUMBER OF PRODUCERS CONCERNED IT IS NOT POSSIBLE TO SAY THAT THE EUROPEAN MARKET IN DYESTUFFS IS, IN THE STRICT SENSE, AN OLIGOPOLY IN WHICH PRICE COMPETITION COULD NO LONGER PLAY A SUBSTANTIAL ROLE .

106 THESE PRODUCERS ARE SUFFICIENTLY POWERFUL AND NUMEROUS TO CREATE A CONSIDERABLE RISK THAT IN TIMES OF RISING PRICES SOME OF THEM MIGHT NOT FOLLOW THE GENERAL MOVEMENT BUT MIGHT INSTEAD TRY TO INCREASE THEIR SHARE OF THE MARKET BY BEHAVING IN AN INDIVIDUAL WAY .

107 FURTHERMORE, THE DIVIDING-UP OF THE COMMON MARKET INTO FIVE NATIONAL MARKETS WITH DIFFERENT PRICE LEVELS AND STRUCTURES MAKES IT IMPROBABLE THAT A SPONTANEOUS AND EQUAL PRICE INCREASE WOULD OCCUR ON ALL THE NATIONAL MARKETS .

108 ALTHOUGH A GENERAL, SPONTANEOUS INCREASE ON EACH OF THE NATIONAL MARKETS IS JUST CONCEIVABLE, THESE INCREASES MIGHT BE EXPECTED TO DIFFER ACCORDING TO THE PARTICULAR CHARACTERISTICS OF THE DIFFERENT NATIONAL MARKETS .

109 THEREFORE, ALTHOUGH PARALLEL CONDUCT IN RESPECT OF PRICES MAY WELL HAVE BEEN AN ATTRACTIVE AND RISK-FREE OBJECTIVE FOR THE UNDERTAKINGS CONCERNED, IT IS HARDLY CONCEIVABLE THAT THE SAME ACTION COULD BE TAKEN SPONTANEOUSLY AT THE SAME TIME, ON THE SAME NATIONAL MARKETS AND FOR THE SAME RANGE OF PRODUCTS .

110 NOR IS IT ANY MORE PLAUSIBLE THAT THE INCREASES OF JANUARY 1964, INTRODUCED ON THE ITALIAN MARKET AND COPIED ON THE

NETHERLANDS AND BELGO-LUXEMBOURG MARKETS WHICH HAVE LITTLE IN COMMON WITH EACH OTHER EITHER AS REGARDS THE LEVEL OF PRICES OR THE PATTERN OF COMPETITION, COULD HAVE BEEN BROUGHT INTO EFFECT WITHIN A PERIOD OF TWO OR THREE DAYS WITHOUT PRIOR CONCERTATION .

111 AS REGARDS THE INCREASES OF 1965 AND 1967 CONCERTATION TOOK PLACE OPENLY, SINCE ALL THE ANNOUNCEMENTS OF THE INTENTION TO INCREASE PRICES WITH EFFECT FROM A CERTAIN DATE AND FOR A CERTAIN RANGE OF PRODUCTS MADE IT POSSIBLE FOR PRODUCERS TO DECIDE ON THEIR CONDUCT REGARDING THE SPECIAL CASES OF FRANCE AND ITALY .

112 IN PROCEEDING IN THIS WAY, THE UNDERTAKINGS MUTUALLY ELIMINATED IN ADVANCE ANY UNCERTAINTIES CONCERNING THEIR RECIPROCAL BEHAVIOUR ON THE DIFFERENT MARKETS AND THEREBY ALSO ELIMINATED A LARGE PART OF THE RISK INHERENT IN ANY INDEPENDENT CHANGE OF CONDUCT ON THOSE MARKETS .

113 THE GENERAL AND UNIFORM INCREASE ON THOSE DIFFERENT MARKETS CAN ONLY BE EXPLAINED BY A COMMON INTENTION ON THE PART OF THOSE UNDERTAKINGS, FIRST, TO ADJUST THE LEVEL OF PRICES AND THE SITUATION RESULTING FROM COMPETITION IN THE FORM OF DISCOUNTS, AND SECONDLY, TO AVOID THE RISK, WHICH IS INHERENT IN ANY PRICE INCREASE, OF CHANGING THE CONDITIONS OF COMPETITION .

114 THE FACT THAT THE PRICE INCREASES ANNOUNCED WERE NOT INTRODUCED IN ITALY AND THAT ACNA ONLY PARTIALLY ADOPTED THE 1967 INCREASE IN OTHER MARKETS, FAR FROM UNDERMINING THIS CONCLUSION, TENDS TO CONFIRM IT .

115 THE FUNCTION OF PRICE COMPETITION IS TO KEEP PRICES DOWN TO THE LOWEST POSSIBLE LEVEL AND TO ENCOURAGE THE MOVEMENT OF GOODS BETWEEN THE MEMBER STATES, THEREBY PERMITTING THE MOST EFFICIENT POSSIBLE DISTRIBUTION OF ACTIVITIES IN THE MATTER OF PRODUCTIVITY AND THE CAPACITY OF UNDERTAKINGS TO ADAPT THEMSELVES TO CHANGE .

116 DIFFERENCES IN RATES ENCOURAGE THE PURSUIT OF ONE OF THE BASIC OBJECTIVES OF THE TREATY, NAMELY THE INTERPENETRATION OF NATIONAL MARKETS AND, AS A RESULT, DIRECT ACCESS BY CONSUMERS TO THE SOURCES OF PRODUCTION OF THE WHOLE COMMUNITY .

117 BY REASON OF THE LIMITED ELASTICITY OF THE MARKET IN DYESTUFFS, RESULTING FROM FACTORS SUCH AS THE LACK OF TRANSPARENCY WITH REGARD TO PRICES, THE INTERDEPENDENCE OF THE DIFFERENT DYESTUFFS OF EACH PRODUCER FOR THE PURPOSE OF BUILDING UP THE RANGE OF PRODUCTS USED BY EACH CONSUMER, THE RELATIVELY LOW PROPORTION OF THE COST OF THE FINAL PRODUCT OF THE USER UNDERTAKING REPRESENTED BY THE PRICES OF THESE PRODUCTS, THE FACT THAT IT IS USEFUL FOR USERS TO HAVE A LOCAL SUPPLIER AND THE INFLUENCE OF TRANSPORT COSTS, THE NEED TO AVOID ANY ACTION WHICH MIGHT ARTIFICIALLY REDUCE THE OPPORTUNITIES FOR INTERPENETRATION OF THE VARIOUS NATIONAL MARKETS AT THE CONSUMER LEVEL BECOMES PARTICULARLY IMPORTANT ON THE MARKET IN THE PRODUCTS IN QUESTION

118 ALTHOUGH EVERY PRODUCER IS FREE TO CHANGE HIS PRICES, TAKING INTO ACCOUNT IN SO DOING THE PRESENT OR FORESEEABLE CONDUCT OF HIS COMPETITORS, NEVERTHELESS IT IS CONTRARY TO THE RULES ON COMPETITION CONTAINED IN THE TREATY FOR A PRODUCER TO COOPERATE WITH HIS COMPETITORS, IN ANY WAY WHATSOEVER, IN ORDER TO DETERMINE A COORDINATED COURSE OF ACTION RELATING TO A PRICE INCREASE AND TO ENSURE ITS SUCCESS BY PRIOR ELIMINATION OF ALL UNCERTAINTY AS TO EACH OTHER' S CONDUCT REGARDING THE ESSENTIAL ELEMENTS OF THAT ACTION, SUCH AS THE AMOUNT, SUBJECT-MATTER, DATE AND PLACE OF THE INCREASES .

119 IN THESE CIRCUMSTANCES AND TAKING INTO ACCOUNT THE NATURE OF THE MARKET IN THE PRODUCTS IN QUESTION, THE CONDUCT OF THE APPLICANT, IN CONJUNCTION WITH OTHER UNDERTAKINGS AGAINST WHICH PROCEEDINGS HAVE BEEN TAKEN, WAS DESIGNED TO REPLACE THE RISKS OF COMPETITION AND THE HAZARDS OF COMPETITORS' SPONTANEOUS REACTIONS BY COOPERATION CONSTITUTING A CONCERTED PRACTICE PROHIBITED BY ARTICLE 101(1) OF THE TREATY .

Case C-199/92 P Hüls AG v Commission of the European Communities [Excerpt]

1 By application lodged at the Registry of the Court of Justice on 14 May 1992, Hüls AG (`Hüls') 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-9/89 Hüls v Commission [1992] ECR II-499 (`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 (Montedison SpA (`Monte'), Hoechst AG, Imperial Chemical Industries plc (`ICI') and Shell International Chemical Company Ltd (`Shell')) 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 Hüls was one of the producers which supplied the market in 1977, with a market share on the west European market of between 4.5 and 6.5%.

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 that the evidence obtained led the Commission to form the view that between 1977 and 1983 the producers concerned had, in contravention of Article 81 EC (ex Article 85), 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 inf5ringement procedure.

7 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that Hüls had infringed Article 101(1) TFEU by participating, with other undertakings, and in Hüls's case from some time between 1977 and 1979 until at least November 1983, in an agreement and concerted practice originating in mid-1977 by which the producers supplying polypropylene in the territory of the EEC:

- 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 Hüls was fined ECU 2 750 000, or DEM 5 898 447.50 (Article 3 of the Polypropylene Decision). On 2 August 1986, Hüls lodged an action for annulment of that decision before the Court of Justice which, by order of 15 November 1989, 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).

Proof of the infringement - Findings of fact

The system of regular meetings

14 With regard to the system of regular meetings of polypropylene producers in the

period from 1977 to the end of 1978 or the beginning of 1979, the Court of First Instance considered, first of all that the only evidence put forward by the Commission to prove Hüls's participation in the meetings during the period in question was ICI's reply to the request for information. Court of First Instance observed that ICI's reply to the request for information, in which it classified Hüls among the regular participants in the meetings, was expressly referring to its participation in `bosses'' and `experts'' meetings without indicating from what date. On the basis of ICI's reply to that request for information, the Court of First Instance noted, at paragraph 99, that those meetings had begun in late 1978 or early 1979 and that the passages of ICI's reply cited by the Commission in support of its allegation that Hüls participated in the meetings from December 1977 onwards concerned ad hoc meetings, not those meetings. The Court of First Instance concluded that the Commission could not put forward any evidence to prove Hüls's participation in the infringement before the end of 1978 or the beginning of 1979 and that it had therefore not proved such participation to the requisite legal standard.

15 For the period from the end of 1978 or the beginning of 1979 to November 1983, the Court for First Instance found that ICI's reply to the request for information classified Hüls, unlike two other producers, amongst the regular participants in the `bosses'' and `experts'' meetings without any limitation in time. The Court of First Instance interpreted that reply as dating Hüls's participation in the meetings from the beginning of the system of `bosses'' and `experts'' meetings, which was established at the end of 1978 or the beginning of 1979. The Court of First Instance noted that that reply by ICI was borne out by the fact that in various tables found at the premises of ICI, Atochem SA and SA Hercules Chemicals NV there appeared beside Hüls's name its sales figures, whereas it would not have been possible to draw up those tables on the basis of the statistics available under the Fides statistical system and that, in its reply to the request for information, ICI had moreover stated, with regard to one of those tables that `the source of information for actual historic figures in this table would have been the producers themselves'. To that evidence the Court of First Instance added, the fact that Hüls's reply to the request for information was incomplete in so far as it had omitted to mention its participation in a meeting in 1981 the note of which showed that Hüls was one of the participants. Moreover, the Court of First Instance observed, that Hüls had admitted before the Court that it had participated regularly in the meetings during 1982 and 1983 whereas in its reply to the request for information it stated that it had not participated in the meetings before mid-1982.

16 The Court of First Instance concluded, that the Commission was entitled to consider that Hüls had participated regularly in the periodic meetings of polypropylene producers from

the end of 1978 or the beginning of 1979 until September 1983. The Court of First Instance found that the Commission was therefore entitled to take the view, based on the material provided by ICI in its reply to the request for information, which was borne out by numerous notes of meetings, that the purpose of the meetings was, in particular, to fix target prices and sales volumes. According the contested judgment, the Commission was also fully entitled to deduce from ICI's reply as to 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.

17 The Court of First Instance added, that the arguments put forward by Hüls to show that its participation in the meetings could not be regarded as offensive could not be accepted. According to the Court of First Instance, the same applied to the claim that as a small producer Hüls could not afford to stay away from the meetings, since it could have reported them to the Commission and asked it to order them to be brought to an end. That was also true of its strategy of withdrawing from basic products in order to concentrate on special products which, according to Hüls, caused a conflict of interests between itself and the other producers, since the Court of First Instance found that the discussions relating to sales volume targets concerned special products as well. With regard to the strategy of disinformation and mental reservation adopted by Hüls, the Court of First Instance pointed out that Hüls at least gave is competitors the impression that it was participating in the meetings in the same spirit.

18 the Court of First Instance concluded that it was for Hüls to adduce evidence to show that its participation in the meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit which was different from theirs. In that connection the Court of First Instance found, that Huls's arguments founded on its conduct on the market did not constitute evidence proving that it had no anti-competitive intention. Even on the assumption that its competitors knew that its conduct on the market was independent of what occurred at the meetings, the mere fact that it exchanged with them information which an independent operator would keep strictly confidential as business secrets was sufficient to show that it acted in an anti-competitive spirit.

19 The Court of First Instance concluded, that the Commission had established to the requisite legal standard that the applicant participated regularly in the system of regular meetings of polypropylene producers from the end of 1978 or the beginning of 1979 until September 1983, that the purpose of those meetings was, in particular, to fix price and sales volume targets and that they were part of a system.

The measures designed to facilitate the implementation of the price initiatives

23 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. the Court of First Instance found that, in participating in the meetings during which that set of measures was adopted, Hüls had subscribed to it, since it had not adduced any evidence to prove the contrary.

24 As regards the `account leadership' system, the Court of First Instance found, at that Hüls had participated in the four meetings at which that system was discussed by producers and that it was apparent from the notes of those meetings that Hüls had provided at them certain information relating to its customers. According to paragraph 192, the implementation of that system was attested by the note of the meeting of 3 May 1983 and by ICI's reply to the request for information. The Court of First Instance indicated, that those items of evidence were not weakened by Hüls's arguments concerning the significant switches of supplier by customers which took place during 1982 and 1983, by the fact that Hüls's name appeared in brackets in a table annexed to the note of the meeting of 2 December 1982 and by the differences between that table and the table annexed to the note of the meeting of 2 September 1982.

25 The Court of First Instance noted, moreoverthat Hüls admitted in its reply to the request for information that it had participated in local meetings in Denmark and that those meetings, as attested by the note of the meeting of 2 November 1982, were intended to ensure that the agreed measures were applied at the local level. Lastly, the Court of First Instance considered, at paragraph 198, that the note of the meeting of 2 December 1982, combined with ICI's reply to the request for information, proved without doubt that certain producers, including the German producers, had exerted pressure on recalcitrant producers.

26 the Court of First Instance concluded that the Commission had established to the requisite legal standard that Hüls 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.

199 Since none of the pleas in law put forward by Hüls have been upheld, the appeal must be dismissed in its entirety.