COMMISSION DECISION

of 21 December 1988

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/31.866, LdPE)

(Only the Spanish, German, English, French, Italian and Dutch texts are authentic)

(89/191/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (1), as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the Commission decision of 24 March 1988 to initiate a proceeding on its own initiative,

Having given the parties concerned the opportunity to make know their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (2),

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

PART I

THE FACTS

(1) This Decision concerns the application of Article 85 of the EEC Treaty to collusive arrangements amounting to a cartel of almost all the producers supplying the bulk thermoplastic LdPE (low density polyethylene) in the Community in pursuance of which they held regular secret meetings in order to coordinate their commercial behaviour, plan concerted price initiatives, fix target and/or minimum prices, agree target sales quotas and monitor the progress of the said collusive arrangements.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

A. Introduction

1. *The undertakings*

(2) The undertakings to which this Decision is addressed are all major petrochemical producers. Most are located inside the Community and although a small number have their headquarters outside the Community, they all trade inside the Community and in some cases have plant in one or more of the Member States.

The 17 undertakings to which this Decision is addressed are:

Atochem
BASF
BP
Bayer
Chemie Holding (formerly known as Chemie Linz)
Dow
DSM
Enichem
Hoechst
ICI
Monsanto
Montedison
Neste Oy
Orkem (formerly known as CdF Chimie) (3)
Repsol Quimica (formerly known as Alcudia)
Shell
Statoil

(3) A statement of objections was addressed to one other undertaking — Exxon Chemicals International Inc. (formerly known as Essochem), on the basis of a suspected peripheral involvement with the cartel — but proceedings were discontinued following the filing by that undertaking of evidence which was considered

(3) In September 1988 (during the course of the oral hearing in this case) CdF Chimie changed its name to Orkem. In the reasoning of this Decision the undertaking will be referred to by its former name of 'CdF', the title used in the statement of objections. Other undertakings which changed their name between the date of the alleged infringement and the opening of proceedings were referred to in the statement of objections under their new style: Chemie Holding and Repsol Quimica.

by the Commission to provide a reasonably acceptable explanation for the matters alleged against it.

2. *The product*

(4) LdPE — first developed by ICI in 1936 — is among the principal bulk thermoplastic polymer products. It is one of the chief industrial outlets for ethylene, itself obtained by reforming (or cracking) naphtha (derived from crude oil) into its constituent parts.

Almost all the LdPE producers in Europe derive their supply of ethylene from their own integrated crackers, although only a few are linked to oil refineries upstream.

LdPE is produced in pellet form and is easily transported.

The dominant end-use application for LdPE (and its newer associated product, LLdPE or linear low density polyethylene) is in flexible film which accounts for some 70 % of consumption in Western Europe. The major end-user is the packaging industry.

3. *The LdPE market in Western Europe*

(5) LdPE is marketed on a world-wide basis, annual world consumption being in the region of 10 million tonnes, of which Western Europe accounts for around 4 million tonnes, the United States 3 million tonnes and Japan 1 million tonnes.

Total demand in Western Europe in 1986 was estimated at 3 940 000 tonnes, almost all of which was met by European-based producers. Imports, principally from new Middle East production facilities, accounted for only 7 % of total Western European LdPE consumption.

The European producers — which numbered 14, down from 22 in 1974 — exported some 660 000 tonnes to overseas markets.

Estimated production capacity in Western Europe in 1986 was 4 750 000 tonnes, some 1 250 000 tonnes of capacity having been closed since 1980 in industry restructuring. Operating rates during the past three years have been between 87 and 91 % of nameplate capacity equivalent to almost 100 % effective plant utilization.

There is a considerable inter-State trade in LdPE, with some 50 % of trade in Western Europe taking place across national boundaries.

(6) LdPE may be considered a commodity in that some 70 to 80 % of sales by volume are grades which are, or can be, made by most producers. For the limited volume of speciality grades the price premium over standard grades is relatively low.

Seven of the LdPE producers also produce LLdPE which can replace LdPE for many applications. The change-over to the newer product has however been slower in Europe than in the United States: LLdPE accounted for only some 15 % of the combined LdPE/LLdPE market in Europe in 1986 compared with 35 % in the United States.

The largest LdPE producer in Europe is currently Enichem with a market share of 12 % in 1986, followed by BP, Exxon and Dow with 11 %, 10 % and 9 % respectively.

Germany is the largest national market for LdPE in the Community accounting in 1986 for almost 20 % of Western European consumption followed by Italy (14,3 %), France (13,6 %) and the United Kingdom (12,2 %).

4. *Overcapacity*

(7) The Commission accepts that over much of the period covered by this Decision the LdPE market in Europe was characterized by structural overcapacity. Almost all the producers had until 1982 reported substantial losses in this sector.

Besides overcapacity, among other factors accounting for the situation were:

— a sharp fall in demand in 1980 and 1981 following a boom year in 1979,

— a volatile feedstock price,

— uncertainty following the installation of production capacity in the Middle East.

It is also accepted that for considerable periods the prevailing price levels were such that the producers were operating at below break-even point. However, capacity cutting and plant closures, industry restructuring, and an upturn in demand since 1984 have largely eliminated overcapacity and for the past few years the industry has been operating profitably.

5. *Commission investigations*

(8) The existence of a possible infringement first came to light in late 1983 during investigations concerning another thermoplastics product. Between 21 November and 6 December 1983 investigation visits were made to ICI, DSM and Shell on the basis of authorizations specifically relating to suspected agreements contrary to Article 85 in the bulk thermoplastics PVC, polystyrene, HdPE and LdPE. Subsequently during 1984 information was obtained from DSM and ICI by decisions adopted pursuant to Article 11 (5) of Regulation No 17. In January 1987 further unannounced investigations were made pursuant to Article 14 (3) of Regulation No 17 at the premises of Atochem, CdF, Dow, Enichem and

Repsol. Subsequent investigations were made at BASF, Bayer, BP and Exxon. The Commission was also obliged to adopt a series of decisions under Article 11 (5) following the refusal or failure of a large number of undertakings to provide information. In most cases the undertakings maintained their initial refusal.

B. Details of the infringement

1. *The origin of the cartel*

(9) Following the rapid escalation of oil prices in 1973 and 1974, and a fall-off in industrial demand, the Western European market for LdPE began to demonstrate a substantial excess of capacity from about the second half of 1974.

Planning documents and reports dating from September 1976 found at DSM (but of unknown authorship) show that a scheme to share out the available market between the Western European LdPE producers on the basis of equal loading of their respective plants had been attempted but had been found unsatisfactory. Subsequently the main efforts of producers up to September 1976 had been devoted to attempting coordinated price initiatives.

Price initiatives had been planned in meetings of so-called 'Heads of State' (senior directors) which were apparently held in Zurich. The domestic producers in each national market were responsible for leading prices upward with 'importers' (i.e. producers not possessing LdPE production facilities in that national market) to follow within a short time.

When this scheme proved only a limited success, a working party of a number of producers was set up and charged with producing a new plan for the control of production and of market shares. The group produced a report but certain differences remained and were to be referred to a 'Heads of State' meeting in Zurich on 17 September 1976.

(10) The chairman of the working party therefore produced a compromise plan for this meeting in which he proposed a new volume control scheme to be fully effective by 1 April 1977. The quotas or ideal market shares were to be based on each producer's ranked capacity, a national figure reached by applying a formula which penalized new capacity brought on stream after mid-1974.

He also proposed general rules for any future price initiatives if a tonnage control system were to be agreed. The object was to achieve a European price with little or no difference between countries, but still allowing importers to sell at a small discount compared with the domestic producers. The next suggested price initiative was for a minimum level of DM 1,70 per kilogram to be effective on 1 October 1976. A list of the equivalent prices in each national currency was annexed to the report.

(11) Regular monthly meetings of experts were suggested to exchange statistics, monitor progress and resolve differences. To assist their task, the chairman envisaged the continued use of the Fides statistical exchange system as a backup.

Fides is an industry-wide statistical service run by a Zurich-based accounting firm. Subscribing producers supply each month individual data on their production, sales and stock movements to the central office which collates the information from the different producers and draws up global anonymized statistics for the Western European market. From these each producer can determine its own market share but not those of competitors. The system contains confidentiality safeguards but there is nothing to prevent competitors exchanging detailed information themselves in some other forum. The official Fides totals could then be used, as was envisaged, to check the accuracy of the figures exchanged by the producers.

The composition of the proposed experts' group was as follows: ATO, BASF, Bayer or Hoechst, CdF, Carbide Group [1], Dow, DSM, ICI, Pekema and two unidentified 'Italian' representatives.

The detailed tables attached to the working party report which served as a basis for calculating ranked capacity and showed each producer's market share in the past three years indicate that virtually the whole of the Western European LdPE industry was involved in the exercise. Only Exxon and Shell do not appear to have cooperated in the scheme at the time.

2. *The system of regular meetings*

(12) A number of producers argue that the 1976 proposals were never implemented but the documentary envidence obtained by the Commission belies this claim.

[1] However it was Unifos, a 50:50 joint venture set up in 1961 between Union Carbide and Kemanobel, which was identified as a participant in meetings. Other Union Carbide-owned companies producing LdPE were sold to BP in 1978 and in view of Regulation (EEC) No 2988/74 no proceedings were opened against Union Carbide.

A two-level system of meetings with bosses or directors (the term 'Heads of State' seems to have been dropped) deciding broad strategy and the experts monitoring detailed implementation was indeed set up exactly as envisaged by the chairman of the working party.

The precise date when meetings began is not however known. According to information supplied by ICI under Article 11 of Regulation No 17 on 5 June 1984, meetings of LdPE producers had begun in the mid-1970s and 'probably by 1979' were being held twice a month 'with different levels of management in attendance'. Some undertakings argue that there is no actual proof that such meetings were held before 1979 or even later. There is however no reason to doubt the statements of ICI that meetings had begun 'in the mid-seventies' even if details are not available. Price initiatives took place during the period up to 1979 which indicates that the plan had been put into effect. Indeed a memorandum found at Exxon shows that as early as January 1977 ICI was attempting to enlist Exxon's commitment for a price move to DM 1,53 per kilogram on 1 February (the 1 October 1976 price target of DM 1,70 per kilogram had presumably not been reached). The Exxon memorandum refers to LdPE industry meetings which 'apparently have been held frequently during the past months in an attempt to establish a "mechanism" allowing significant upward price movement' and also involved 'planned industry volume actions'. Further local meetings of the United Kingdom LdPE producers appear to have begun in 1976.

ICI in its answer identified the undertakings which took part in at least some of the international meetings at ATO (the predecessor of Atochem), BASF, Bayer, BP, CdF, Danubia, Dow, DSM, Enichem, Enpetrol, ICI, Neste Oy, Hoechst, Norpolefin, Montedison, Saeta and Unifos (acquired by Neste Oy in 1985) (1).

The attendance list was largely confirmed by DSM which named ATO, BASF, CdF, Dow, DSM, ICI, Montedison, Enichem, Pekema (part of the Neste Oy group since 1978) and Saga.

(13) The bosses' or directors' meetings were held each month with more technical experts' sessions during the interval between the meetings at senior level.

At the beginning of 1982 some question seems to have arisen as to whether the experts' meetings should still be held.

It was decided by the directors in the meeting of 20 January 1982 that experts' sessions should continue given their 'real usefulness'. The experts (the meeting note states) would not be able to alter policies agreed by the directors but were to agree the details of their implementation.

(14) Only two detailed notes of meetings were however discovered, both being found at Repsol during the investigations made in January 1987.

The first was a detailed note of a directors' level meeting held in Zurich on 20 January 1982 and the second related to an experts' session in Milan on 10 May 1982.

The note of the directors' level meeting of 20 January 1982 includes a timetable of senior level meetings scheduled for the rest of the year together with the name of the undertaking charged with organizing each meeting: the note implicates ATO, BASF, CdF, Dow, Enoxy (later a division of Enichem), ICI, Montedison, Chemie Linz, Pekema, Unifos and 'the Spanish producers' as the organizers of future meetings. (Pekema was already part of Neste Oy and Unifos was later also absorbed by the Neste group.)

In the 10 May 1982 experts' meeting the nine participants were ATO, BASF, CdF, Dow, Enoxy, ICI, Montepolimeri (a Montedison group company), Repsol and Chemie Linz.

According to a note of a meeting between Dow and Repsol in Zurich on 30 October 1984, eight LdPE producers were due to meet in Zurich on 13 November 1984 for what was seen as probably the last meeting: ATO, BASF, (a query was put against the name of this undertaking), Bayer, CdF, Dow, DSM, Enichem and Pekema. Repsol was also formally invited. It is not known whether the meeting actually took place as planned. The importance of the document however is that, irrespective of whether the particular meeting was in fact held or not, it shows that the producers named were still engaged in a continuing framework of collusion.

(15) In spite of the clear documentary evidence of their attendance at meetings, almost all of the undertakings have at least until a late stage in the procedure denied any knowledge thereof or have on various grounds declined to address themselves to the Commission's requests and decisions under Article 11 (5) of Regulation No 17.

Of the undertakings to which this Decision is addressed, only Shell and Monsanto are not identified

(1) Enpetrol was the parent of Repsol and Saeta was another Spanish producer (no longer in existence). Danubia was then a production company owned 50 % by Chemie Linz and 50 % by BASF. Norpolefin was the production company for Saga Petroleum, later incorporated into Statoil. It seems curious that ICI should name two production companies (Danubia and Norpolefin) with no selling function but there is in fact ample other evidence that both Chemie Linz and Saga participated in their own right.

as participants in the system of international meetings.

Shell did not attend plenary sessions but it admits that occasionally telephone contacts on its sales volumes took place with ICI and that the Shell United Kingdom sales company took part in local meetings from late 1977 onwards.

Monsanto also attended United Kingdom national meetings, as did BP, which also acknowledges its participation in two international meetings in 1980 and other contacts with competitors but denies that such international meetings or contacts concerned any anticompetitive arrangements.

The United Kingdom local meetings were in existence by 1976 and were originally attended by ICI, Shell Chemicals (UK) Ltd, BXL (acquired by BP from Union Carbide in 1978 and subsequently known as BP Chemicals Ltd) and Monsanto. From 1980 the local producers were joined by importers but their identity is not known. According to BP, Monsanto ceased to attend in about 1980.

Repsol was in close contact with the other Spanish producers, including Dow's Spanish subsidiary and also with Dow's European headquarters in Zurich.

The only other reference to local meetings in the documents concerns Italy. According to Repsol's note of the May 1982 meeting in Milan they were at that stage being held every week.

It is not even known whether at the present time meetings have ceased. Price initiatives are still being reported in the trade press. The majority of the European LdPE producers were still involved in some form of collusion in November 1984, a year after the Commission's investigations commenced. Indeed, as late as December 1985, a senior officer of Enichem telephoned Exxon to say that 'the polyethylene industry is going to try for DM 2 per kilogram (on) February 1 and I wanted you to know'. The circumstances of the communication to Exxon indicate some manner of continuing concertation among other producers.

3. *The subject matter of the meetings*

(16) A number of producers assert (without however producing any notes, minutes or memoranda to support their arguments) that the meetings were concerned only with discussions of common problems of so general a nature as to involve no possible restrictions on competition. Others claim that if vague proposals were sometimes made for concerted action on pricing or quotas they were never implemented.

These arguments are clearly rebutted by the documentary evidence found by the Commission. The 1976 planning documents show that the senior meetings which were already in existence at the time were concerned with agreeing concerted price initiatives. The experts' meetings which were proposed were intended to monitor the detailed progress of plans agreed at director level. Even in the absence of any minutes of meetings that subsequently took place, the Commission might be entitled to conclude that their purpose and subject matter were as envisaged in the working party reports.

At the initial stages of the investigation in 1983 and 1984 both DSM and ICI firmly denied that any records of meetings were available and with the exception of Repsol (where meeting notes were discovered by the Commission in January 1987) the undertakings to which this Decision is addressed have all been unable or unwilling to produce any documentation on meetings.

The Commission is not however obliged in the present case to rely only on circumstantial evidence as to the subject matter of the meetings. The detailed notes of two meetings found at Repsol show conclusively that those meetings (a) were concerned with the fixing of target prices, the coordination of selling prices, and the administration of a quota or volume control system and (b) were part of a regular system of twice-monthly meetings.

The anticompetitive purpose of the meetings is confirmed by a document of 4 July 1983 discovered at DSM relating to price fixing in the bosses' meetings in 1983, as well as an ICI document referring to a Paris meeting in August 1982 which mentions the fixing of a new target price for LdPE.

(17) From the documentary evidence it can therefore be established that the meetings of bosses and experts were concerned with:

(a) negotiating annual sales targets or quotas for each producer;

(b) setting target prices, i.e. the level to which the producers would attempt to raise prices by means of a concerted price initiative with a list of prices in each national currency;

(c) agreeing the measures to be taken to support the implementation of concerted price initiatives;

(d) monitoring the detailed implementation of the quota system or other volume control mechanisms and the progress of agreed price initiatives.

4. *Quota schemes*

(18) The chairman of the working party had in September 1976 proposed a compromise scheme for volume control intended to divide the market according to each producer's ranked capacity, calculated by discounting by 25, 50 or 75 % new capacity added at various times after mid-1974. It would appear that it was the installers of this new capacity who were blamed for the overcapacity problem.

According to both DSM and ICI's original replies to Article 11 decisions in 1984 this was a mere proposal which was never put into effect.

(19) Documents later discovered at Repsol (but probably originating from ICI) show however that sales targets had been agreed for 1980 for each producer using a formula based on ranked capacity, a concept which had featured in the original 1976 proposal. Targets were allocated which took account of newly-added capacity under an agreed formula but any increment in the quotas resulting from new capacity was scaled down to match forecast market growth.

For 1981 a modification of the targets calculated according to the agreed procedures was proposed to take account of low demand. Under the formula, the targets added together would have come to 4,27 million tonnes. Total demand was however forecast as only 3,65 million tonnes for 1981. While it would appear (from a document found at ICI) that in April of 1981 final agreement had still not been reached on quotas for the year, some form of volume control and reporting was clearly in force by the end of the year with both a monthly and an annual quota and forward estimates being given of each producer's monthly sales: (notes of directors' meeting of 20 January 1982). During 1981 a compensation scheme to penalize producers which had exceeded their monthly allocation was also proposed but it is doubtful whether it was ever put into effect. The Commission also discovered at Repsol documents referring to a proposed 1982 peace formula with suggested percentage quotas for each producer compared against actual sales in 1981 (1).

During 1982 some form of quota scheme was again being operated: the notes of the directors' meeting of 20 January 1982 state that 'The monthly quotas will be allocated as usual subject (for the moment) to a 10 % safety margin' (translated from Spanish original). (The 10 % margin was presumably a compromise measure adopted because of some disagreements on a definitive quota system.) In the later experts' meeting of 10 May the nine participants exchanged details of their estimated sales for the two preceding months. Their total sales were compared with the global Fides total. This exchange was clearly in pursuance of some form of volume control.

The likely existence of a volume control mechanism in 1984 is demonstrated by a document found at CdF which purports (i) to compare each producer's actual sales during January to October 1984 with the same period in 1983 and (ii) to reconcile the totals with the global Fides statistics reported for the periods in question. (The comparison with the Fides totals would appear to be a check on the accuracy of sales figures declared by the producers and echoes the reference in the 1976 planning document to using Fides as a backup.) CdF claims to be unable to identify the provenance of the document or to give any other information in relation thereto.

5. *Target prices*

(20) One of the tasks of the meetings of producers was to fix a target price for LdPE and to plan a coordinated effort or initiative intended to secure the implementation of that price level as at a particular date.

Price initiatives attempted before September 1976 had been only partially successful and the new proposal attempted to reinforce the existing mechanism by combining periodic price initiatives with permanent volume control.

The documentation obtained by the Commission indicates that the bosses decided on the strategy of future price initiatives leaving the details to be worked out by the LdPE product managers in the experts' sessions.

(21) Thus the Repsol note of the experts' meeting in Milan on 10 May 1982 shows that the target for June had originally been agreed as DM 2,00 per kilogram but Dow was suggesting an increase to DM 2,05 per kilogram as a result of a price increase for ethylene. During this meeting the participants, having first exchanged estimates of their respective deliveries in the previous two months, reported on the general price tendency in the national markets as well as the individual prices practised by each producer.

(1) It would seem that Spain was considered a special case for the purposes of the quota system: reference is made in the documents to an in-out agreement for Spain in connection with quotas but no further details are available.

The document discovered at DSM dated 4 July 1983 provides a similar insight as to how price initiatives were planned. In the most recent bosses' meeting (15 June 1983 in Helsinki) the price level of DM 2,00 — 2,05 (1) had been foreseen for September 1983, with August prices remaining at the July level. The DSM note describes contacts which had subsequently taken place with BASF and suggests that DSM support the proposal which BASF was likely to make in the July 1983 bosses' session to bring the price initiative forward to 1 August rather than wait until 1 September.

The 1976 planning document and the notes of meetings found at Alcudia show that while the DM price was used as the European target the equivalent price was calculated for each national market in the appropriate currency.

(22) The Commission required the undertakings involved in the present case to provide all documentation showing their internal price objectives, price lists or pricing instructions to national sales offices. In most cases the undertakings claimed either that any such documentation had been destroyed as a matter of routine or that it had never existed since all instructions were given by telephone. Others claimed that all pricing decisions were taken on a customer-by-customer basis and that no overall policy was ever defined. The Commission does not accept that in so price-sensitive a sector the undertakings can have had no specific pricing objectives or that no written records were maintained, particularly since the few undertakings visited in November 1983 had very full documentation.

It has not therefore proved possible to compare the internal price objectives of all the producers with the known target prices or with each other.

(23) Nevertheless the Commission, in spite of the absence in the records of most of the producers of any documents showing their price objectives, has been able to identify over 20 industry price initiatives for LdPE in the period covered by this Decision. Details are set out in Table 1.

Periodic initiatives by the industry to raise the European price to a particular target level are regularly reported in the specialist trade press. These reports describe prevailing market conditions and almost invariably identify the new target price level and the date on which the increases are to become effective.

The specialist press reports of a particular price push or initiative correspond with indications in the documentation of those producers for which pricing records were available that a particular target had been set by the industry and concerted efforts were planned to implement it.

(24) The Commission was able to obtain the price documentation for the relevant period from a certain number of undertakings, particularly ICI and DSM for the period before October 1983 and to a lesser extent, Dow.

All these three producers participated in the international bosses' and experts' meetings.

The internal price lists of these three producers would themselves be strongly indicative of collusion even were they not known to have attended meetings. The price documentation shows a pattern of identical list prices being introduced to take effect on the same date. In a number of cases the price lists of ICI, DSM and Dow — for 'a' and 'b' class customers in each national currency — are identical not only as regards the actual prices themselves but also as regards the exact order in which they are set out.

These identical price lists show a close temporal link with the known dates of meetings and in some cases (e.g. the DSM note of 4 July 1983) and express connection is made between the meetings and the introduction of new list prices.

The Commission is not able, in the virtually complete absence of price documentation from the producers, to show that all of them simultaneously introduced identical price lists or even applied the German mark European target prices. The link between concerted price initiatives and the system of meetings in which they almost all participated is however clearly demonstrated.

(25) The producers do not deny that industry price initiatives took place. For the most part however they claim that such initiatives were not the result of concerted action but were a spontaneous and independent reaction to price leadership in an oligopolistic market. They attribute parallel pricing behaviour to the economic theory of 'barometric price leadership', where one or other of the larger producers sets a price which approximates to that which would emerge in any event under conditions of full competition and is then followed by the others without any illicit contact taking place.

In order to accept the validity of such arguments the Commission would have to ignore the considerable documentary evidence as to:

(i) the purpose of the bosses' and experts' meetings as foreseen in the 1976 planning documents;

(ii) the detailed note of meetings found at Repsol as well as the DSM note of 4 July 1983;

(1) The targets are for 'a' and 'b' category customers respectively.

(iii) the participation in the meetings of almost all the producers of LdPE;

(iv) the identical price lists found at several producers;

(v) the wording of the producers' internal reports which strongly suggest that price initiatives were part of a concerted plan.

In the light of their attendance at meetings, it is idle for the producers to claim (as some do) that they heard of impending price increases by reading commercial journals and decided independently to support them.

6. *Price initiatives*

(26) The pricing documentation which is available from DSM, Dow and ICI in particular shows a pattern of simultaneous and identical increases in list prices on the occasion of price initiatives. Local sales offices were strictly enjoined neither to sell below list prices nor to allow orders to overflow from one month to the next at the old prices. Customers attempting to buy heavily in advance of an anticipated price initiative were to be discouraged. Volume restriction schemes were to be operated in support of the initiatives.

The Commission is aware that in spite of the efforts of the producers to ensure common price discipline the concerted price initiatives in LdPE often met with only mixed success or in some cases were considered a complete failure.

Various factors might account for the gap between list and prevailing market price levels. In some cases customers bought heavily at the old price in advance of expected or announced price initiatives. Some producers might be tardy in applying the new lists in particular national markets; others might offer special discounts or rebates to selected customers; others might try to steer a middle course between increasing prices to the target level and retaining their market share; low prices in one national market might also have a negative effect on a neighbouring market; in 1981 in particular the sharp drop in demand created difficulties for concerted price actions.

It is also true that a number of producers who took part in the meetings were named as aggressive in certain markets by other producers who considered themselves as strong supporters of price initiatives and were prepared to lose volume in order to force through an increase. (Undercutting of prices might be the subject of discussion in the experts' meetings, as the Repsol note of the Milan meeting shows.)

(27) Nevertheless the initiatives frequently involved an upward move in prices as can be seen from Table 2. Customers were usually faced with a known marker or reference price in the market. While individual customers might receive special conditions or discounts, the setting of a particular price as the target meant inevitably that the opportunities for negotiation by customers were circumscribed.

C. The proof of the existence of the cartel and the participation of each producer

1. *The core evidence for the existence of the cartel*

(28) It is inherent in the nature of the infringement with which the present case is concerned that any decision will to a large extent have to be based upon circumstantial evidence: the existence of the facts constituting the infringement of Article 85 may have to be proved by logical deduction from other proven facts.

In the present case besides circumstantial evidence the Commission has also obtained a substantial body of direct documentary evidence relating to the facts in issue.

The question whether an infringement of Article 85 has occurred falls to be considered in the light of *(inter alia)*:

(a) the proposal detailed in the 1976 working party documents for a new price fixing and volume control mechanism to be administered in a two-tier system of regular meetings;

(b) the existence of a system of meetings corresponding in its essentials with the plan outlined;

(c) the purpose and the subject matter of several of those meetings as shown by the documentation found at Repsol, DSM and ICI;

(d) the proven participation in those meetings of the majority of the undertakings to which this Decision is addressed;

(e) the documentation relating to market sharing and volume control schemes of the very type envisaged in the 1976 planning documents;

(f) the phenomenon of uniform price increases over the period when the undertakings were regularly meeting.

(29) The undertakings have during the administrative procedure attempted to treat each single item of evidence in isolation from the rest; it is argued (for

example) that there is no evidence that the 1976 plan was ever implemented; that it is not proved that the meetings were concerned with collusive discussions; that price initiatives are not shown to have any connection with meetings. Hypotheses are advanced for each item of evidence which (it is argued) are consistent with the non-existence of a cartel or the non-participation of the particular producer concerned. In many cases however the arguments advanced by the undertakings in relation to a particular document are inconsistent with the express terms of the document itself.

The Commission considers that the various items of direct and circumstantial evidence in the present case must be considered together. In particular, the system of regular meetings cannot be divorced from the overall plan proposed in 1976, nor can the price initiatives be isolated from the existence of the meetings; and the relatively few meetings for which documentation is available may be taken as typifying the other regular meetings. Taken in this light, each element of proof reinforces the others with respect to the facts in issue and leads to the conclusion that a market-sharing and price-fixing cartel was being operated in LdPE.

2. *The participation of the individual producers*

(30) The core evidence showing the existence of the cartel is provided by the 1976 planning documents, the evidence of a system of regular meetings between ostensible competitors and the documents relating to quota and compensation schemes.

As regards the practicalities of proof, the Commission considers that besides demonstrating the existence of a cartel by convincing evidence, it is also necessary to prove that each suspected participant adhered to the common scheme. This does not however mean that documentary proof must exist to show that each participant took part in every manifestation of the infringement. It is highly improbable that in a case of this nature the documentary evidence will be duplicated at each participant. Nor will each item of relevant documentary evidence conveniently name all the participants in the cartel. In the present case it has not been possible, given the absence of pricing documentation, to prove the actual participation of every producer in concerted price initiatives. The Commission has therefore considered in relation to each suspected participant whether there is sufficient reliable evidence to prove its adherence to the cartel as a whole rather than proof of its participation in every aspect thereof.

In the present case the core evidence in fact not only demonstrates the existence of a common scheme but also identifies virtually all the participants in the cartel. Almost all of the undertakings were named in the 1976 working party documents, and DSM and ICI identified most of those which attended meetings. Confirmation of this evidence is found in the documents found in the 1987 investigations, particularly at Repsol. Most of the producers — Atochem, BASF, Bayer, CdF, Chemie Linz (now Chemie Holding), Dow, DSM, Enichem (or Enoxy), ICI, Montedison, Repsol itself, Pekema and Unifos (the last two now combined in Neste Oy) — are implicated in the system of regular meetings. Others — BP, Hoechst, Monsanto, Shell and Saga (later Statoil) — are identified in the documents relating to quotas in a way which, taken with other evidence [1], indicates their involvement in the scheme, albeit in some cases to a lesser degree than other producers.

(31) Although in the context of Article 85 a cartel is the combination of the participants towards a common unlawful end, so that the infringement is essentially a joint enterprise for which the undertakings bear a shared responsibility, the Commission has also considered the role played by each producer and the evidence of the participation of each in the cartel. Full particulars were supplied to each producer in the course of the administrative procedure.

The producers can be classified in two broad categories: those which took part in meetings of the cartel, and those which played only a peripheral role.

Atochem, BASF, Bayer, CdF, Chemie Linz (now Chemie Holding), Dow, DSM, Enichem, Hoechst, ICI, Montedison, Pekema and Unifos (now combined in Neste Oy), Repsol and Saga (now Statoil) fall into the first category. They all took part in plenary meetings. Apart from Chemie Linz, Repsol and Saga they had all been suggested as members of the experts' group in 1976. The precise regularity with which each attended meetings cannot be ascertained owing to the refusal of the undertakings to provide the relevant information.

In any event, since the cartel was a venture continuing over a number of years, the fact that some members may have missed certain meetings or even took part

[1] In the case of BP and Shell, both admit regular participation in United Kingdom local meetings. Monsanto is also identified as a participant in those local meetings. Hoechst for its part does not deny taking part in the plenary meetings and Statoil neither admits nor denies that Saga — identified by DSM as a likely participant in meetings — took part in such gatherings.

less frequently than others is of no practical importance.

DSM for instance claimed to have attended no meetings between the beginning of 1981 and mid-1983 but both the quota documentation and its own price instructions show it must have been fully active in the cartel during this period.

Atochem, Bayer, CdF, Dow, DSM, Enichem, Pekema and probably BASF as well were still planning meetings as late as November 1984. Repsol — which was in contact with Dow — was also invited. Since by this time Montedison and Hoechst had divested themselves of their LdPE activities and ICI's United Kingdom LdPE business had been transferred to BP, most of the industry was still engaged in collusion. Only BP, Chemie Linz, ICI, Shell and Statoil of the Western European producers were not due to attend the 13 November meeting and of them only BP does not seem to have been still involved in some form of information exchange (in the CdF document comparing 1983 and 1984 sales BP and Exxon are marked 'E', presumably meaning 'estimated' (1)).

The fact that internal pricing documentation was almost non-existent at most of the undertakings first visited in 1987 does not exonerate them from this aspect of the cartel's operation. The Commission does not accept that these producers could have conducted business in this price-sensitive product without any internal direction of their pricing policy. The degree of responsibility of each participant does not depend upon the documents which — fortuitously or otherwise — are available at that undertaking but rather on its participation in the cartel seen as a whole. The available notes of meetings which they attended show that such meetings were to a large extent concerned with price collusion, and in any case, the volume control mechanism in which almost all the producers are shown to have been implicated cannot be separated from the price initiatives.

(32) The cases of BP, Shell and Monsanto require special examination. Their involvement with the cartel can be considered only a partial one. The question is whether that involvement was sufficient to implicate them in the infringement, albeit as minor actors.

It is clear that mere knowledge of the existence of a cartel does not constitute involvement in the infringement. On the other hand where an undertaking is in direct or indirect contact with the cartel and attaches itself to the unlawful enterprise it may still be a party to a concerted practice even if it does not play a major role in the overall cartel.

BP, Shell and Monsanto were all allocated quotas in 1981 and are also mentioned in connection with the 'peace formula' for 1982. They claim that the attribution of a quota to each of them does not mean they were necessarily implicated in the system itself. Producers establishing a quota system have (they argue) to take account of the expected sales of outsiders in order to make the system workable. It appears, however, that even if they did not report on a monthly basis, their actual sales for the year 1981 were communicated to the cartel with reasonable accuracy.

There are indications in both BP and Shell documents that these two producers were aware of impending industry price initiatives and were planning their own policy on that basis. Any parallelism in pricing however is attributed by these undertakings to the need to follow the market: they claim that their knowledge of price initiatives planned by others was obtained solely from legitimate market intelligence or from published sources.

(33) In the absence of any evidence of attendance at meetings or other contacts, the Commission might well have given these three undertakings the benefit of any doubt.

The fact remains however that BP, Shell (UK) Ltd and Monsanto all attended regular United Kingdom local meetings. On BP's and Shell's own admission, at these meetings the market leader (i.e. ICI) communicated its proposed price increases to the others with the clear intention of seeking their support.

In the case of BP it is unnecessary to determine the disputed question of whether or not it ever took part in plenary cartel meetings, given its admission in relation to United Kingdom local meetings from 1978 to 1982. Whatever BP's attitude towards the quota system (ICI assumed it would not be willing to join the compensation scheme) there is evidence that from time to time it had foreknowledge of and supported price initiatives. This is confirmed by the regular correlation between BP's own posted price and the known target prices during periods for which sufficient documentation is available to make a comparison possible. In view of its participation in the local meetings, the Commission cannot accept that its knowledge of the intentions of the cartel came only from legitimate sources.

Shell also admits that while it did not attend plenary meetings, it was occasionally in telephone contact with ICI which was seeking confirmation of its

(1) This tends to confirm BP's contention that from late 1983 onwards it undertook an internal review of all contacts with competitors in order to prevent competition law problems.

estimation of the Shell companies' sales in the European market. Shell claims to have given no precise information but (unlike Exxon) it did not rebuff the approaches of ICI and the information it gave must have facilitated the work of the cartel in controlling volumes.

Shell's involvement can also be considered as cooperation with the cartel. Its admitted telephone contacts with ICI and the participation of the Shell UK operating company in local meetings at the very least constituted a channel for a two-way flow of information to the mutual benefit of Shell and members of the cartel. Shell was informed of planned price initiatives and so could adjust its own conduct accordingly, and the cartel was informed of Shell's sales for the purposes of administering the volume control schemes.

No documentary evidence was available of Monsanto's commercial policy or pricing policy but its participation in local meetings in which, at the very least, ICI informed the others of its proposed prices, coupled with the documents linking it (albeit partially) with the quota scheme, is sufficient to implicate it in the infringement.

D. Procedural issues

(34) In the course of the administrative procedure several undertakings asserted that the Commission had infringed their rights of defence by rejecting their demands for full access to its administrative files.

The Commission's position on this question was set out in the covering letter sent with the statement of objections to all undertakings involved in the case, each of which received all the documentation necessary to support the allegations made in the statement of objections together with a full set of replies made under Article 11 of Regulation No 17. The Commission also provided an inventory of the documents on file, indicating those to which each undertaking might have access if it is so wished; but it was made clear that for reasons of confidentiality no undertaking would be allowed sight of internal commercial documentation obtained from its competitors under Articles 11 and 14 of Regulation No 17, with the exception of the documents attached to the statement of objections. The Commission subsequently and of its own initiative provided each undertaking with further documents which might be of assistance to the defence.

After the expiry of the time allowed for replying to the statement of objections, the majority of the undertakings made a joint approach to the Commission and, on the basis of reciprocal waivers of confidentiality, demanded that the Commission permit each to inspect all the documents obtained by the Commission from the other signatories. The Commission immediately informed these undertakings that they each had copies of the documents which they had supplied to the Commission and if they considered that any useful purpose would be served by reciprocal disclosure it would have no objection to their arranging any such exchange of documents amongst themselves.

It should be pointed out that any waiver by undertakings of confidentiality for their internal business documents is subject to the overriding public interest in ensuring that competitors are not informed of each other's commercial activities and intentions in such a way that competition between them is restricted.

Had there existed in the Commission files any document not disclosed to all the undertakings which could have cast doubt upon the allegations made in the statement of objections the undertaking from which it originated would no doubt have drawn attention to it during the administrative procedure. No such documents were forthcoming.

The Court of Justice has emphasized on frequent occasions (see e.g. Judgment of 17 January 1984 in Joined Cases 43 and 63/82 *VBVB and VBBB* v. *Commission*, [1984] ECR 19) that there is no provision requiring the Commission to divulge the whole contents of its administrative files to the undertakings. The rights of the defence are fully protected if the undertakings have had the opportunity to make known their views on the documents relied upon by the Commission to support its findings in any subsequent decision. To the extent that in a decision the Commission bases its findings on documents not disclosed to the parties, that decision may be annulled. In the present case the Commission has gone beyond the requirements set by the Court of Justice and has disclosed to the undertakings not only the documentations supporting the allegations made in the statement of objections but has also provided them with documents (originating from one or other of them) which were not cited in the statement of objections but which were considered to be of possible assistance to the defence. These documents were relied upon by the undertakings and full account has been taken of them in this Decision.

PART II

LEGAL ASSESSMENT

A. Article 85

1. *Article 85 (1)*

(35) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings or concerted practices which may affect trade between Member States and which

have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions and share markets or sources of supply.

2. *The nature and structure of the agreement*

(36) From at least 1976 almost all the producers of LdPE supplying the Community have been party to a complex of collusive schemes, arrangements and measures pursuant to a common plan and worked out in the framework of a system of regular meetings.

These meetings concerned arrangements which restricted competition in the LdPE market including:

— the setting of target prices,

— the modalities of concerted price initiatives intended to raise price levels up to the agreed targets,

— the division of the Western European market according to ideal market shares or target quotas,

— the exchange of detailed information on their market activities in order to facilitate the coordination of their commercial behaviour.

(37) It is not necessary, in order for a restriction to constitute an agreement within the meaning of Article 85, that the parties should consider it legally binding. Indeed, in a secret cartel where the parties are well aware of the illegality of their behaviour they clearly cannot intend their collusive arrangements to have any contractual force. An agreement within the meaning of Article 85 may exist where the parties reach a consensus on a plan which limits or is likely to limit their commercial freedom by determining the lines of their mutual action or abstention from action in the market. No enforcement procedures such as might be foreseen in the case of a civil law contract are required. Nor is it necessary for such an agreement to be made in writing.

In the present case, the continuing restrictive arrangements of the LdPE producers over a period of years clearly originate in the proposal made in 1976 and constitute its implementation in practice.

The Commission considers that the complex of schemes and arrangements agreed by the producers therefore constitutes a single continuing agreement prohibited by Article 85 (1).

(38) In the context of this overall plan the producers from time to time planned various price initiatives, and the annual quota system may also have been revised to take account of changes in the industry. In relation to one or other aspect of the arrangements a particular producer or group of producers may from time to time have had reservations or been dissatisfied about some specific point. On some matters — particularly quotas — temporary compromise arrangements may have been operated. The collusion is however to be considered not so much as a series of discrete agreements, but as the execution of a broad continuing agreement with the same participants, the same procedures and the same common object, namely to establish a mechanism for volume control and concertation on pricing.

In other words, the agreement to which the Commission takes objection relates to a continuing enterprise or partnership between the producers to prevent, restrict or distort competition in the LdPE market over a period of several years.

The agreement was a continuing one and the fact that some producers may have been absent from a particular meeting, were possibly less frequent participants in meetings than others, or in the absence of evidence are not shown to have implemented the price initiatives does not detract from the common nature of the enterprise in which they were engaged.

The essence of the present case is the combination of the producers over a long period towards a common unlawful end, and each participant must not only take responsibility for its own direct role as an individual, but also share responsibility for the operation of the cartel as a whole.

3. *Concerted practices*

(39) The Commission thus considers that the operation of the cartel constituted an agreement within the meaning of Article 85 (1).

Article 85 (1) refers to both agreements and concerted practices but cases may arise (particularly in the case of a complicated and long-running cartel with numerous adherents) where collusion presents some of the elements of both forms of prohibited cooperation.

A concerted practice relates to a form of cooperation between undertakings which, without having reached a stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation for the risks of competition.

(40) The object of the Treaty in creating a separate concept of concerted practice is to forestall the possibility of undertakings evading the application of Article 85 (1) by colluding in an anti-competitive manner falling short of a definite agreement by (for example) informing each other in advance of the attitude each intends to adopt, so that each may regulate its commercial conduct in the knowledge that its competitors will behave in the same way: Judgment of the Court of Justice of 14 July 1972 in *Imperial Chemical Industries Ltd* v. *Commission*, Case 48/69 (1972) ECR 619.

In its later Judgment of 16 December 1975 in relation to the European Sugar Cartel — *Suiker Unie and others* v. *Commission*, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (1975) ECR 1663 — the Court of Justice in expanding upon the above definition of a concerted practice held that the criteria of coordination and cooperation laid down by the case-law of the Court, which in no way requires the working-out of an actual plan, must be understood in the light of the concept, inherent in the provisions of the Treaty relating to competition, that each economic operator must determine independently the commercial policy which he intends to adopt in the market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors but it does strictly preclude any direct or indirect contact between them the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

Collusive conduct falling short of an agreement may thus equally fall within the ambit of Article 85.

(41) The Court's definition of a concerted practice is particularly apt to cover the involvement of BP, Monsanto and Shell which were on the periphery of the cartel but cooperated with it and knowingly associated themselves with its overall objectives. Their contacts with the cartel must both have enabled them to adapt their own market behaviour to that of the other participants and permitted the others to take account of their intentions.

The importance of the concept of a concerted practice does not therefore result so much from the distinction between it and an agreement as from the distinction between forms of collusion falling under Article 85 (1) and mere parallel behaviour with no element of concertation. Nothing therefore turns in the present case upon the precise form taken by the collusive arrangements.

4. *The object and effect of the agreement*

(42) Article 85 (1) expressly mentions as restrictive of competition agreements which directly or indirectly fix selling prices or share markets between producers; these are the essential characteristics of the agreement under consideration here.

The basic purpose behind the institution of the system of regular meetings and the continuing collusion of the producers was to create a permanent mechanism for controlling the tonnage sold and achieving concerted price increases.

By planning common action on price initiatives with target prices effective from an agreed date, the producers aimed to eliminate the competitive risks which would be involved in any unilateral attempt to increase prices.

The control of volumes also had as its objective the creation of artificial market conditions favourable to price rises and was thus inextricably linked to the price initiatives.

In pursuit of these objectives, the producers were aiming at the organization of the LdPE market on a basis which substituted an institutionalized and systematic collusion between producers for the free operation of competitive forces and amounted to a cartel.

(43) The Commission is well aware of the circumstances of the industry, in particular that for a considerable period the LdPE operations of most producers were loss-making and that often price initiatives were planned only to keep in line with feedstock price rises.

Such considerations do not however relieve the agreement of its anti-competitive object.

If competitive conditions in a particular product area (e.g. a large number of suppliers) are such that it is difficult for producers to operate profitably, the remedy does not lie in collusion by the producers to raise price levels. In this respect the argument advanced by Montedison in particular, to the effect that if any meetings occurred they were prompted by a desire on the part of the industry to ensure fair competition (i.e. the prevention of unprofitable price cutting) must be rejected.

The fact that such price cutting may have occurred cannot in any circumstances justify an infringement of the Community rules on competition: Judgment of the Court of Justice of 17 January 1984 in *VBVB and VBBB* v. *Commission, loc. cit.* pp. 63—64.

(44) It is not strictly necessary, given the manifestly anti-competitive object of the agreement, for an adverse effect upon competition to be demonstrated.

In view of the non-availability of price instructions from the majority of producers the Commission did not attempt to demonstrate that all the producers applied uniform and simultaneous increases in list prices during the period covered by this Decision. Moreover, it remains a matter of speculation whether in the long term price levels would have been significantly lower in the absence of collusion.

The Commission does not however accept the assertion of the producers that their arrangements were entirely without effect on competition.

(45) In the first place, and quite apart from the success or otherwise of any concerted price initiatives, the producers put into effect a continuing machinery for monitoring their individual actions in the context of a perceived mutual solidarity.

Secondly, the setting by the industry of a European target price level meant that the free play of market forces in establishing a competitive price level was restricted. In normal circumstances, if conditions of supply and demand favoured a price increase, the leading producers would test the market with different price levels and the market would eventually stabilize at the appropriate level. Where a single target or list price is set, the operation of this process is restricted or prevented. In the present case, the establishment of a single list or reference price limited the opportunities for customers to negotiate. Any discounts or special conditions would still be determined by reference to the list price.

In the third place, actual price levels rose towards the target levels on the occasion of many identified price initiatives. Even if the producers did not reach the targets in full, many documented initiatives were still judged successful by producers either in stopping a trend to lower prices or in substantially improving prices. It is however apparent from the producers' internal reports that the success or otherwise of price initiatives depended to a considerable extent on factors outside their control. Given the characteristics of the market it would be futile to attempt concerted price initiatives unless conditions were favourable to an increase. It is unlikely however that if the arrangements were wholly ineffective, as the producers argue, they would have continued their regular meetings and concerted price initiatives for some eight years.

Finally as regards the quota scheme, the details available to the Commission show that far from being a vague proposal that was put forward but never followed, quota systems were indeed put into practice, albeit with some modification or with deviations from ideal shares, and were closely monitored during meetings.

5. *Effect upon trade between Member States*

(46) The agreement between the LdPE producers was likely to have an appreciable effect upon trade between Member States.

The collusive agreement in the present case extended to all Member States and covered virtually all trade in the Community in this major industrial product. Most producers supply the product throughout the Community and with imbalances of supply and demand in the different national markets there is a considerable intra-Community trade.

The fixing of target prices must have distorted the pattern of trade between Member States and the effect on price levels of differences in efficiency between producers. Arrangements intended to discourage so-called 'customer tourism' — such as a freeze on customers or turning away inquiries — were clearly intended to prevent the development of new trading relationships.

The volume control system does not appear to have involved a further explicit breakdown into quotas for each Member State. Nevertheless the very existence of such constraints would operate to restrict the competitive opportunities open to a producer. Furthermore, it is likely that the producers exchanged information concerning their sales on a national level in local meetings. The distinction sometimes drawn in the documents between national or domestic producers and importers is also significant as indicating separate treatment on a national basis.

6. *Jurisdiction*

(47) Article 85 of the EEC Treaty applies to restrictive agreements which may affect trade between Member States even if some of the undertakings involved have their headquarters outside the Community.

In the present case these undertakings not only concerted with each other but also took part with Community-based producers in a much wider agreement which restricted competition within the Community (1).

(1) The activities of the cartel relating to sales of LdPE in non-member States are outside the scope of this Decision.

Dow is a United-States-owned company but is one of the largest LdPE undertakings operating in the Community and its European LdPE production facilities are located in the Netherlands and in Spain.

The fact that Chemie Holding, Neste Oy and Statoil have their LdPE production as well as their main business centres outside the Community does not affect their liability in respect of any agreement implemented within the Community. The Community is an important market for all these producers and accounts for a quarter to a half of their total LdPE business.

(48) In so far as the agreements were implemented inside the Community, the applicability of Article 85 (1) of the EEC Treaty to the Austrian, Finnish and Norwegian producers is not precluded by the free trade agreements between the European Economic Community on the one hand and Austria, Finland and Norway on the other: Judgment of the Court of Justice of 27 September 1988 in *Ahlström Osakeyhtiö* and Others v. *Commission*: Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85.

In the case of Repsol, the fact that the evidence of its participation relates to the period before the Accession of Spain to the Community does not exclude Article 85. It may be that (as Repsol argues) the Spanish producers were mainly concerned with protecting their national market. Repsol's sales to the Community however increased substantially between 1982 and 1984. To the extent that its involvement in the cartel affected competition within the Community, EEC competition rules applied to Repsol.

7. *Undertaking identity*

(49) Over the period covered by this Decision the Western European petrochemical industry — including the LdPE sector — has undergone substantial restructuring, a process which has received the support of the Commission.

Some undertakings as part of rationalization programmes transferred their LdPE activities to competitors but still continue to operate in the petrochemical sector. In other cases an industrial grouping has been substantially reorganized on the corporate level.

The particular problem for the application of EEC competition rules is whether after this restructuring an undertaking existing today can be held liable for the involvement in the cartel of its predecessor or of a producer which it has absorbed.

The subjects of EEC competition rules are undertakings, a concept which is not identical with that of legal personality for the purposes of national law. The term 'undertaking' is not defined in the Treaty. It may refer to any entity engaged in commercial activities and in the case of a large industrial group it may be appropriate (according to the circumstances) to apply the term to a parent or to a subsidiary company or to the economic unit formed by the parent and subsidiaries together.

In a case where a producer has been subject to reorganization or has divested itself of its LdPE activity the essential task is:

(i) to identify the undertaking which committed the infringement;

(ii) to determine whether that undertaking in its essential form is still in existence or whether it has been liquidated.

The question of undertaking identity is one to be determined according to Community law and changes in organization under national company laws are not decisive.

It is thus irrelevant that an undertaking may have sold its LdPE business to another: the purchaser does not thereby become liable for the participation of the seller in the cartel. If the undertaking which committed the infringement continues in existence it remains responsible in spite of the transfer.

On the other hand, where the infringing undertaking itself is absorbed by another producer, its responsibility may follow it and attach to the merged entity.

It is not necessary that the acquirer be shown to have carried on or adopted the unlawful conduct as its own. The determining factor is whether there is a functional and economic continuity between the original infringer and the undertaking into which it was merged.

(50) Atochem absorbed its sister company ATO Chimie (whose participation in the cartel dates from the beginning) on 30 September 1983 in the context of the reorganization of the French chemical industry. Until then Atochem had been known as Chloe Chimie, but on the merger took its new name from ATO. Under the express terms of the acquisition the legal personality of ATO was taken over by Atochem under its new denomination, although the main issue for the purposes of EEC competition law is the functional and economic continuity of the undertaking rather than its legal identity. Atochem has in fact continued the economic activity of its predecessor ATO Chimie and indeed after the 1983 reorganization still participated in the cartel.

The Austrian State-owned chemical sector was recently organized with Chemie Linz, the undertaking which participated in the cartel, changing its name to

Chemie Holding AG. As the new name suggests, it now functions as a financial holding company. The former plastics division was transferred to a company called Petrochemie Danubia GmbH in which Chemie Holding now has only a one-third shareholding. Notwithstanding the financial and organizational changes, Chemie Linz (or Chemie Holding) still exists as an undertaking and it is to that undertaking that this Decision is addressed.

(51) Enichem comprises the Italian State-owned chemical sector which over the period of the cartel has undergone continuing organizational change. From 1980 ANIC, the chemical arm of the ENI group, coordinated the sales and commercial activities of the two other companies, SIR and Rumianca. On 1 January 1982 the thermoplastics activities of ANIC, SIR and Rumianca were combined into Enoxy in which ENI and the American oil group Occidental Petroleum each held a 50 % shareholding. After only a year the Enoxy partnership was dissolved with ENI buying out Occidental's share. The operation reverted to the sole ownership of the ENI group where it is now constituted as part of Enichem. Notwithstanding the various reorganizations the functional and economic continuity between ANIC, Enoxy and Enichem (which participated in its own name in the cartel from 1983 onwards) is such that they were the same undertaking for the purposes of Article 85. (The Commission does not however hold Enichem responsible for any possible involvement of SIR or Rumianca prior to 1980.)

Montedison transferred its LdPE activity to Enichem at the end of 1983 but itself remains in existence as an undertaking. The divestiture does not affect the liability of Montedison under Article 85.

(52) Neste Oy comprises two formerly separate producers which participated in the cartel, namely Pekema (Finland) and Unifos (Sweden). Pekema was implicated in the planning of the cartel in 1976. From 1978 on it was controlled by Neste Oy (91,5 % shareholding) and acted as its distributor and indeed from 1981 its managing director was the director of Neste's plastics division. In 1983 Neste Oy acquired the remainder of the shares in Pekema and in November 1985 the two companies were formally merged.

Unifos, named as a participant in meetings, was formerly owned by Kemanobel AB of Sweden (50 %) and Union Carbide Corporation (50 %). Unifos was acquired by the Neste Oy group in April 1984 and is now known as Neste Polyeten AB. But for the acquisition the Commission would have addressed these proceedings to Unifos (rather than to its parents Union Carbide and Kemanobel) since it seems to have operated as an undertaking in its own right. Unifos is now an integral part of the Neste Oy group and its accounts are consolidated in those of the group. It is therefore to Neste Oy that the Decision will be addressed in respect of the involvement of Unifos in the cartel both before and after the acquisition.

(53) Repsol is the new name of Nueva Alcudia, itself formed in 1986 from the merger of EMP's four petrochemical subsidiaries, one of which, also called Alcudia, participated in the cartel. The formal merger of the four subsidiaries did not extinguish the liability of the original Alcudia and this Decision is therefore addressed to Repsol.

Statoil denies responsibility for any participation in the cartel by Saga Petrokjemi. Until 1984 the polyethylene manufacturing capacity of the Norwegian petrochemical industry was owned by IS Norpolefin (an equal partnership between Norsk Hydro, Statoil and Saga Petrokjemi) but Saga Petrokjemi was responsible for operating the plant and for marketing its output. Saga Petrokjemi has had various owners but on 1 January 1984 it ceased to exist as a legal entity and was absorbed into Statoil to form its petrochemicals division. Statoil now performs exactly the same function as Saga Petrokjemi did previously and in its publicity has emphasized the continuity between Saga Petrokjemi and the new division. There is evidence (in the form of the CdF document for 1983/84: see point 19) that after the acquisition Statoil continued to participate in the cartel but this is not the determining factor. What is important is that the undertaking which committed the infringement has continued in existence, albeit now as a division of a larger entity. Statoil has continued the economic activity of Saga Petrokjemi and retained its essential functions (see Commission Decision 86/398/EEC in Case IV/31.149 — Polypropylene [1]). This Decision is therefore addressed to Statoil.

(54) The case of Union Carbide Corporation (not a party to these proceedings) requires special mention. In the 1976 planning documents, it was suggested that one Union Carbide representative should attend the experts' group. At the time two wholly owned Union Carbide subsidiaries (UCC in Belgium and BXL in the United Kingdom) produced LdPE as did Unifos (50:50 Union Carbide/Kemanobel). There is no evidence however to confirm that Union Carbide actually took part in meetings: ICI identified as a participant only Unifos which seems to have been operated as a separate undertaking. Union Carbide withdrew from direct involvement in the Western European LdPE sector in late 1978 while retaining its 50 % share in Unifos. It cannot be excluded that prior to the divestment Union Carbide did in fact represent

[1] OJ No L 230, 18. 8. 1986, p. 1.

UCC Belgium, BXL and Unifos in the cartel. The Commission will not therefore attribute to BP liability for any possible participation of BXL prior to the acquisition. Similarly the participation of Unifos in the cartel will be taken as dating at the earliest from the time Union Carbide disposed of its direct involvement in the LdPE sector in Europe in late 1978.

8. *The addressees of Decisions*

(55) Although the concept of an undertaking as the subject of EEC competition rules does not depend upon company law, for the purposes of enforcement it is always necessary to identify an entity possessing legal personality. There might be considerable difficulties with regard to collection of a fine under Article 192 of the Treaty if the Decision were not addressed to a legal entity. In the case of a large industrial group it is therefore normal to address any Decision to the group holding company or headquarters, although the undertaking itself consists of the unit formed by the parent and all its subsidiaries.

Certain undertakings — Enichem and Montedison, for example — have claimed that the appropriate addressee of any Decision should be the subsidiary company inside the group which is currently responsible for thermoplastics activities. The Commission notes however that in both cases the marketing responsibility is shared by that company with other companies in the same group. For instance while Enichem Anic SpA is responsible for Enichem's LdPE sales in Italy its international marketing operations are directed by the Zurich-based company Enichem International SA and in each Member State LdPE sales are undertaken by the appropriate national subsidiary of Enichem. The Commission therefore considers it appropriate to address this Decision to the main holding company at the head of the Enichem and Montedison groups.

(56) The Royal Dutch/Shell group presents particular problems, consisting as it does of a large number of companies in which the two group holding companies Royal Dutch and Shell hold 60 % and 40 % interests respectively. There is no single headquarters company to which it might be appropriate to address a decision. Shell International Chemical Company Ltd (SICC) is a service company responsible for the coordination and strategic planning of the group's thermoplastic activities and although the various operating companies in the chemical sector have a large degree of management autonomy, SICC represents the centre of Shell's chemical operations. In the present case it was SICC which was in contact with the cartel through ICI, although the United Kingdom local meetings were attended by the local operating company. By reason however of its overall responsibility for the planning and coordination of the activities of the Shell group in thermoplastics Shell International Chemical Company Ltd is considered by the Commission to be the appropriate addressee of this Decision.

(57) Dow argued that the proper Dow party to the present proceedings is Dow Europe SA, the company which directs its European operations from Horgen, Switzerland. Later during the oral hearings it also put forward Dow AG, the company which owns the subsidiaries located in the Community, as an alternative addressee of any possible Decision.

Despite the considerable degree of functional autonomy apparently accorded by the Dow Chemical Company to its regional operations outside the United States (Central and South America, Europe, etc) they are all part of the Dow undertaking and their financial results are consolidated with those of the group. The President of Dow Europe is a Vice-President of the Dow Chemical Company and a member of its Board of Directors. It is therefore to the United States parent — which is the ultimate owner of all the Dow subsidiaries in Western Europe — that this Decision is addressed.

9. *Council Regulation (EEC) No 2988/74* [1]

(58) Several producers have claimed that the Commission is precluded by Regulation (EEC) No 2988/74 from imposing fines on them in relation to any alleged involvement in a cartel before November 1978.

Under that Regulation the imposition of fines is subject to a limitation period of five years. Time runs from the date of the infringement, and in the case of a continuing infringement, from the date the said infringement ceases. The limitation period may be interrupted by action taken by the Commission to investigate any party to the suspected agreement.

The first actions within the meaning of Article 2 of the Regulation taken by the Commission in the present case were investigations under Article 14 of Regulation No 17 on 21 November 1983.

Under Regulation (EEC) No 2988/74, any infringement which ceased prior to 21 November 1978 would not therefore be the subject of fines.

[1] OJ No L 319, 29. 11. 1974, p. 1.

In the present case however the undertakings cannot benefit from the Regulation [1]. For limitation to apply, two related conditions would have to be met: (a) any objectionable agreement or practice must have been definitively terminated by November 1978 and (b) that agreement must be wholly separate from any conduct after November 1978.

(59) The limitation claim fails on both grounds. In the first place the documentary evidence shows that far from being terminated by 1978 the plan envisaged in the 1976 working party report was in full vigour with regular price initiatives during 1978 and continuing for many years thereafter. Secondly, it cannot be accepted that the conduct of the undertakings subsequent to November 1978 bore no relation to the original plan worked out in 1976. Given their common object and the fact that the method of operation of the cartel was precisely that proposed in the plan, the Commission considers that the 1976 agreement and the later behaviour complained of were all part of the same continuing infringement.

10. *Duration of the infringement*

(60) Although collusive arrangements in LdPE already existed before the 1976 proposal for a new framework of meetings, the Commission will proceed on the basis that the present infringement commenced in about September 1976.

This is the date of the working party report and it is clear that the new system of two-tier meetings began about that time.

It is not however possible to establish with certainty the date on which each individual producer began to attend meetings. Most of them — against the weight of the documentary evidence — deny all knowledge of meetings. The 1976 document however indicates the identity of those which had been involved in planning the collusive arrangements and the proposed membership of the experts' group.

Saga (later to become Statoil's petrochemical division) did not enter the market until 1978. With this exception, and the special circumstances of BP and Neste Oy/Unifos, the participation of all the undertakings appears to date from 1976.

(61) While few details of individual meetings are available it is also apparent that the cartel continued after the Commission carried out its first investigations into the LdPE sector in late 1983.

The document found at CdF shows that some form of volume control or monitoring was being operated and information exchanged in October 1984. From the Repsol note it is apparent that meetings were still being planned by eight or more producers as late as November 1984. In December 1985 Enichem was informing Exxon of a proposed price increase by the industry in circumstances strongly suggestive of a continuing collusion between Enichem and other producers.

In the absence of information from the producers it is not even possible to establish whether or not the collusion — in some form or other — has ever ended.

The phenomenon of initiatives involving several producers simultaneously attempting to raise price levels to a particular level is still reported in the trade press. Although there is no concrete evidence of cartel meetings, it is likely — as the contact between Enichem and Exxon showed — that such initiatives are the manifestation of a continuing mutual solidarity between producers and are not a spontaneous occurrence.

The Commission will however make a distinction between duration for the purposes of assessing fines under Article 15 (2) of Regulation No 17 and for the purposes of a termination order under Article 3.

B. Remedies

1. *Article 3 of Regulation No 17*

(62) Where the Commission finds that there is an infringement of Article 85, it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

The undertakings have all denied that any infringement of Article 85 occurred. Most have continued to dispute — against the weight of the evidence — that their regular meetings even touched on matters affecting competition. Others deny any knowledge of meetings. While a few undertakings have informed the Commission that steps have been taken to ensure that their representatives avoid suspect contacts with competitors, it is not known whether meetings or at least some communication between firms on prices and volumes have in fact ever ceased.

[1] With the exception of Union Carbide which transferred its European LdPE business to BP in late 1978.

It is therefore necessary to include in any decision a formal requirement that those undertakings still active in the LdPE sector terminate the infringement and refrain in the future from any collusive arrangements having a similar object or effect.

2. *Article 15 (2) of Regulation No 17*

(63) Under Article 15 (2) of Regulation No 17, the Commission may by decision impose on undertakings fines of from ECU 1 000 to ECU 1 million or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1). In fixing the amount of the fine, regard is to be had to both the gravity and to the duration of the infringement.

The undertakings to which this Decision is addressed intentionally infringed Article 85. They deliberately set up and operated a secret and institutionalized system of regular meetings to fix prices and volume targets in an important industrial product. Several of the undertakings concerned — BASF, Hoechst and ICI — had already been the subject of fines imposed by the Commission for collusion in the chemicals industry (Dyestuffs — Commission Decision 69/243/EEC [1]).

The Commission also takes account of the evidence that at least Atochem, Bayer, CdF, Dow, DSM, Enichem and Pekema (there is some doubt about BASF) were still deliberately involved in a framework of collusion and meetings at least one year after it began its investigations in November 1983. (No additional penalty will be imposed on Enichem for its activities going up to the end of 1985).

(64) In fixing the general order of fines to be imposed the Commission has also taken into account the following considerations:

— collusion on pricing and market sharing are by their very nature serious restrictions of competition,

— LdPE is a major industrial product with sales of over ECU 3 000 million annually in Western Europe,

— the undertakings participating in the infringement accounted for some 90 % of this market,

— the collusion was institutionalized in a system of regular cartel meetings which set out to organize in detail the market for LdPE,

— the meetings were held in conditions of great secrecy.

It is however accepted in mitigation of fines that over a large part of the period covered by this Decision the undertakings concerned reported substantial losses in the LdPE sector.

The Commission also takes into account the fact that the majority of undertakings have already been the subject of substantial fines for their participation in another cartel in the thermoplastics sector (polypropylene) during much the same period as that covered by this Decision.

(65) In assessing the fines to be imposed on individual undertakings, the Commission has considered the degree of involvement of each one and has taken into consideration the role (so far as can be ascertained) played by each in the collusive arrangements and their respective importance in the LdPE market.

However, no substantial distinction can be made amongst the producers attending the meetings on the basis of the perception of other producers as to each individual's degree of commitment or otherwise to the arrangements. Individual interests may have diverged from time to time but all the producers attending the meetings — whatever their respective importance in the market — were involved in a common venture.

In the case of Repsol, however, the Commission considers that a substantially lower order of fine can be imposed than on other producers, despite its participation in cartel meetings, in view of the seperate nature of the Iberian market prior to the accession of Spain and Portugal, the 'in-out' arrangement for Repsol, and its relatively low level of sales into the Community.

The fines on Chemie Holding, Neste Oy and Statoil will also take into account the fact that a large proportion of their total European sales are made outside the Community. Similarly, while DOW is one of the leading LdPE producers, some half of its LdPE sales were made in Spain which until 1986 was not a Member State of the Community.

(66) The Commission will also draw a distinction in assessing fines between the full numbers of the cartel and those which could be said to have operated only on the periphery.

The fines imposed on Shell and BP will reflect the considerably lesser degree of their involvement compared with the producers attending plenary cartel meetings.

In the case of Monsanto, the Commission considers that in view of its peripheral involvement, its minor importance as a producer and the lapse of some seven years between its last participation in United Kingdom local meetings and the opening of proceedings, it would be appropriate to impose only a moderate fine.

(67) The absence of detailed information as to the producers' participation in meetings has made it impossible to determine the precise date on which

[1] OJ No L 195, 7. 8. 1969, p. 11.

their involvement in the infringement ended, if indeed it ever did. In some cases — Hoechst and Montedison — their participation is excluded by reason of their leaving the LdPE sector. In other cases — BP, ICI, and possibly Shell — participation in meetings or other direct contacts may well have ended with the investigations in October 1983. Atochem, Bayer, CdF, Dow, DSM, Enichem and the Neste Oy subsidiary Pekema were still actively involved in collusion in late 1984, as was Repsol to a lesser degree.

The Commission will therefore assess fines on the basis that, for most of the undertakings involved, participation in the infringement continued until November 1984,

HAS ADOPTED THIS DECISION:

Article 1

Atochem SA, BASF AG, BP Chemicals Ltd, Bayer AG, Chemie Holding AG, The Dow Chemical Company, DSM NV, Enichem SpA, Hoechst AG, Imperial Chemical Industries PLC, Monsanto Company, Montedison SpA, Neste Oy, Orkem SA (formerly CdF Chimie SA), Repsol Quimica SA, Shell International Chemical Co. Ltd, Statoil — Den Norske Stats Oljeselskap AS infringed Article 85 of the EEC Treaty, by participating (for the periods identified in this Decision) in an agreement and/or concerted practice originating in about September 1976 by which the producers supplying LdPE in the Community took part in regular meetings in order to fix target prices and target quotas, plan concerted initiatives to raise price levels and monitor the operation of the said collusive arrangements.

Article 2

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

Article 3

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

(i) Atochem SA: a fine of ECU 3 600 000;

(ii) BASF AG: a fine of ECU 5 500 000;

(iii) BP Chemicals Ltd: a fine of ECU 750 000;

(iv) Bayer AG: a fine of ECU 2 500 000;

(v) Chemie Holding AG: a fine of ECU 500 000;

(vi) Dow Chemical Company: a fine of ECU 2 250 000;

(vii) DSM NV: a fine of ECU 3 300 000;

(viii) Enichem SpA: a fine of ECU 4 000 000;

(ix) Hoechst AG: a fine of ECU 1 000 000;

(x) Imperial Chemical Industries plc: a fine of ECU 3 500 000;

(xi) Montedison SpA: a fine of ECU 2 500 000;

(xii) Monsanto Company: a fine of ECU 150 000;

(xiii) Neste Oy: a fine of ECU 1 000 000;

(xiv) Orkem SA: a fine of ECU 5 000 000;

(xv) Repsol Quimica SA: a fine of ECU 100 000;

(xvi) Shell International Chemical Co. Ltd: a fine of ECU 850 000;

(xvii) Statoil — Den Norske Stats Oljeselskap AS: a fine of ECU 500 000.

Article 4

The fines imposed under Article 3 shall be paid within three months of the date of notification of this Decision to the following bank accounts:

Belgium (Monsanto)

No 426-4403003-54 (1) and No 426-4403001-52 (2),
Kredietbank,
Agence Schuman,
2 rond point Schuman,
1040 Brussels;

(1) For paymentes in ecus.
(2) For payments in national currency.

310-0231000-32 (2),
Banque Bruxelles Lambert,
Agence Européenne,
6 rond point Schuman
1040 Brussels.

Germany (Bayer, BASF, Chemie Holding, Hoechst):

No 869-24-64910 (1) and No 262-00-64910 (2),
Sal. Oppenheim und Cie,
Unter-Sachsenhausen 4,
5000 Cologne 1.

France (Atochem, Orkem):

No 0007-729-106-5 (1) and No 0005-770-006-5 (2),
Société Générale,
Agence Internationale,
Direction de l'Etranger,
23 rue de la Paix,
75002 Paris.

Italy (Enichem, Montedison):

No 9130-707 (1),
Istituto Bancario San Paolo di Torino,
Piazza San Carlo 156,
10121 Turin;

No 26952/018 (2),
Cassa di Risparmio delle,
Provincie Lombarde,
Via Bisceglie 120,
20152 Milan.

United Kingdom (BP, ICI, Shell, Statoil):

No 59000204 (1),
Lloyds Bank Ltd,
Overseas Centre,
38A Paradise Street,
Birmingham B1 2AB;

No 108.63.41 (2),
Lloyds Bank Ltd,
International Division,
1 Hay's Lane,
London EC3P 3AB.

Netherlands (Dow, DSM, Neste):

No 54.16.99.369 (1),
Algemene Bank Nederland,
Vijzelstraat 31,
1000 EG Amsterdam;

No 51.48.40.706 (2),
Algemene Bank Nederland,
Kneuterdijk 1,
2501 AP The Hague.

Spain (Repsol):

No 394 000-278 (1) and No 137 004-270 (2),
Banco Español de Crédito,
Departamento Extranjero,
Paseo de la Castellana 7,
28046 Madrid.

(1) For paymentes in ecus.
(2) For payments in national currency.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 11 %.

Should payments be made in the national currency of the Member State where the bank nominated for payment is situated, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 5

This Decision is addressed to:

— Atochem SA, 10 La Défense, Cedex 42, F-92091 Paris,

— BASF AG, Karl-Bosch-Straße 38, D-6700 Ludwigshafen,

— BP Chemicals Ltd, 76 Buckingham Palace Road, UK-London SW1 OSU,

— Bayer AG, Bayerwerk, D-5090, Leverkusen,

— Chemie Holding AG,
  1. St-Peter-Straße 25, A-4021 Linz,
  2. c/o Chemie Linz Italia, via Mascheroni 19, I-20145 Milan,

— The Dow Chemical Company,
  1. 2030 Willard H. Dow Center, Midland, Michigan 48674, United States of America,
  2. c/o DOW Chemical (Nederland) BV, (Benelux), PO Box 48, NL-4530 AA Terneuzen,

— DSM NV, PO Box 65, NL-6400 Heerlen,

— Enichem SpA, Piazza Boldrini 1, I-20097 San Donato-Milanese,

— Hoechst AG, Postfach 80 03 20, D-6230 Frankfurt am Main,

— Imperial Chemical Industries PLC, Imperial Chemical House, Millbank, UK-London SW1 P 3JF,

— Monsanto Company,
  1. 800 N Lindbergh Blvd, St Louis MO 63167, United States of America,
  2. c/o Monsanto Europe SA, 270 – 272 Avenue de Tervuren, B-1150 Brussels,

— Montedison SpA, Via Rosellini 15 – 17, I-20124 Milan,

— Neste Oy,
  1. Kielaniemi, SF-02150 Espoo 15, Finland,
  2. c/o Neste Chemicals Benelux BV, Wilhelminasingel 19, NL-4818 AC Breda,

— Orkem SA, (formerly CdF Chimie SA), Tour Aurore, Place des Reflets, F-92080 Paris-La-Défense 2 Cedex 5,

— Repsol Quimica SA, Juan Bravo 3, 28006 Madrid,

— Shell International Chemical Company Ltd, Shell Centre, UK-London SE1 7PG,

— Statoil — Den Norske Stats Oljeselskap AS,
1. N-3960 Stathelle, Norway,
2. c/o Statoil (UK) Ltd, 25 – 29 Queen Street, Maidenhead, UK-Berks SL6 1NB.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 21 December 1988.

For the Commission
P. SUTHERLAND
Member of the Commission

ANNEX

TABLE 1

LdPE: identified price initiatives

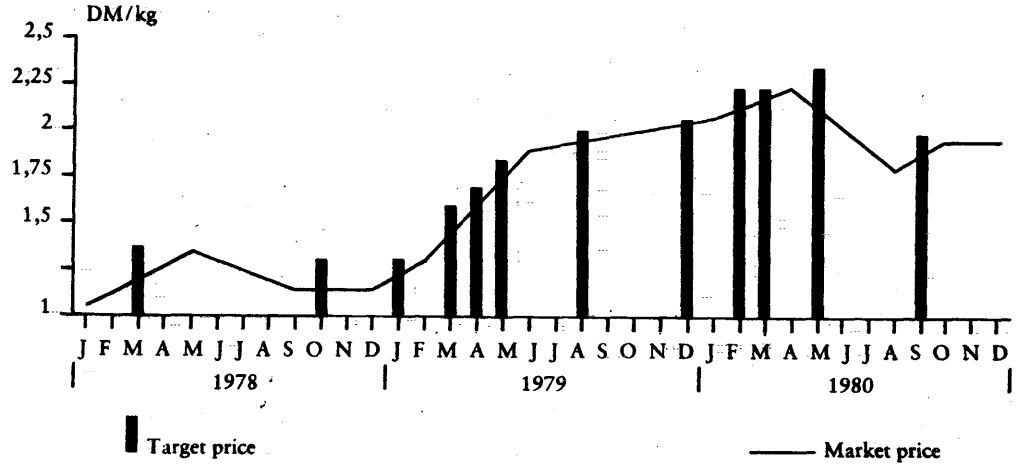
(DM/kg)

Date	Prevailing price	Target price
1 May to 1 October 1976	1,55 (May)	1,70
1 March 1978	1,05	1,38
1 October 1978	1,15	1,30
1 January 1979	1,15	1,35
1 March/1 April/1 May 1979	± 1,30	1,60 (1 March) 1,70 (1 April) 1,85 (1 May)
1 August 1979	1,90	2,00—2,05
1 December 1979	—	2,07—2,12
1 February 1980	2,07	2,30—2,35
1 May 1980	2,25	2,35—2,40
1 September 1980	1,80	1,95—2,00
1 January/1 February 1981	1,95 (December)	2,15—2,20 (1 January) 2,25—2,30 (1 February)
1 May 1981	2,25	2,40—2,45
1 July 1981	2,10	2,15—2,20
1 September 1981	1,95	2,25—2,30
1 October 1981	2,10	2,20—2,25
1 November 1981	—	2,40—2,45 (later modified)
1 November 1981	2,00	2,10—2,15
1 January 1982	2,00	2,10—2,15
1 February 1982	2,00—2,10	2,20—2,25
1 May 1982	1,75	1,90—1,95
1 June 1982	—	2,00—2,05
1 September 1982	1,70—1,75	1,90—2,00
1 January 1983	1,75	1,80 1,90 (February)
1 May 1983	1,60—1,65	1,75—1,80 (May) 1,80—1,85 (June)
1 July 1983	1,75—1,85	1,90—1,95
1 August 1983	1,90	2,00—2,05 (1 August) 2,25—2,30 (1 September) 2,35—2,40 (1 October)
1 January 1984	2,35—2,40	2,50
1 May 1984	2,25	2,30—2,35
1 September 1984	1,95	2,15

TABLE 2a

LdPE — general purpose film grade

(Market prices/targets January 1978 to December 1980)



Source: Technon; producers' documents.

TABLE 2b

LdPE — general purpose film grade

(Market prices/targets January 1981 to December 1984)

Source: Technon; producers' documents.