JUDGMENT OF THE COURT

15 October 2002 *

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In Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P,

Limburgse Vinyl Maatschappij NV (LVM), established in Brussels (Belgium), represented by I.G.F. Cath, advocaat, with an address for service in Luxembourg (C-238/99 P),

DSM NV and **DSM Kunststoffen BV**, established in Heerlen (the Netherlands), represented by I.G.F. Cath, with an address for service in Luxembourg (C-244/99 P),

Montedison SpA, established in Milan (Italy), represented by G. Celona and P.A.M. Ferrari, avvocati, with an address for service in Luxembourg (C-245/99 P),

Elf Atochem SA, established in Paris (France), represented by X. de Roux, avocat, with an address for service in Luxembourg (C-247/99 P),

Degussa AG, formerly Degussa-Hüls AG, before that Hüls AG, established in Marl (Germany), represented by F. Montag, Rechtsanwalt, with an address for service in Luxembourg (C-250/99 P),

Enichem SpA, established in Milan, represented by M. Siragusa and F.M. Moretti, avvocati, with an address for service in Luxembourg (C-251/99 P),

Wacker-Chemie GmbH, established in Munich (Germany),

Hoechst AG, established in Frankfurt am Main (Germany),

both represented by H. Hellmann, Rechtsanwalt, with an address for service in Luxembourg (C-252/99 P),

Imperial Chemical Industries plc (ICI), established in London (United Kingdom), represented by D. Vaughan QC, D. Anderson QC, K. Bacon, Barrister, and R.J. Coles and S. Turner, Solicitors, with an address for service in Luxembourg (C-254/99 P),

appellants,

APPEALS against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 20 April 1999 in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by J. Currall and W. Wils, acting as Agents, assisted by M.H. van der Woude, avocat (C-238/99 P and C-244/99 P), by R.M. Morresi, avvocato (C-245/99 P and C-251/99 P), by E. Morgan de Rivery, avocat (C-247/99 P), by A. Böhlke, Rechtsanwalt (C-250/99 P and C-252/99 P), and by D. Lloyd-Jones QC (C-254/99 P), with an address for service in Luxembourg,

defendant at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet (President of Chamber), C. Gulmann (Rapporteur), D.A.O. Edward, A. La Pergola, P. Jann, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman-Hubeau, Head of Division, and L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 June 2001, at which Limburgse Vinyl Maatschappij NV (LVM), DSM NV and DSM Kunststoffen BV were represented by I.G.F. Cath (C-238/99 P and

C-244/99 P), Montedison SpA by G. Celona and P.A.M. Ferrari (C-245/99 P), Elf Atochem SA by C.-H. Léger, avocat (C-247/99 P), Degussa AG by F. Montag (C-250/99 P), Enichem SpA by M. Siragusa and F.M. Moretti (C-251/99 P), Wacker-Chemie GmbH and Hoechst AG by H. Hellmann and H.-J. Hellmann, Rechtsanwalt (C-252/99 P), Imperial Chemical Industries plc (ICI) by D. Vaughan, D. Anderson, R.J. Coles, S. Turner and S.C. Berwick, Solicitor (C-254/99 P), and the Commission by J. Currall and W. Wils, assisted by M.H. van der Woude (C-238/99 P and C-244/99 P), by R.M. Morresi (C-245/99 P and C-251/99 P), by E. Morgan de Rivery (C-247/99 P), by A. Böhlke (C-250/99 P and C-252/99 P) and by D. Lloyd-Jones (C-254/99 P),

after hearing the Opinion of the Advocate General at the sitting on 25 October 2001,

gives the following

Judgment

1 By applications lodged at the Registry of the Court of Justice between 24 June and 8 July 1999, Limburgse Vinyl Maatschappij NV ('LVM'), DSM NV and DSM Kunststoffen BV, Montedison SpA ('Montedison'), Elf Atochem SA ('Elf Atochem'), Degussa AG ('Degussa'), formerly Degussa-Hüls AG and before that Hüls AG ('Hüls'), Enichem SpA ('Enichem'), Wacker-Chemie GmbH ('Wacker-Chemie'), Hoechst AG ('Hoechst') and Imperial Chemical Industries plc ('ICI') brought appeals pursuant to Article 49 of the EC Statute of the Court of Justice

against the judgment of the Court of First Instance of 20 April 1999 in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Maatschappij and Others* v *Commission* [1999] ECR II-931 ('the contested judgment'), by which the Court of First Instance, *inter alia*, reduced the fine imposed on Elf Atochem and that imposed on ICI by Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 — PVC) (OJ 1994 L 239, p. 14, hereinafter 'the PVC II decision') and dismissed the remainder of the applications for annulment of that decision.

I — Factual background to the dispute

2 Following investigations conducted in the polypropylene sector on 13 and 14 October 1983 pursuant to Article 14 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), the Commission of the European Communities commenced an inquiry concerning polyvinylchloride ('PVC'). It subsequently undertook various investigations at the premises of the undertakings concerned and sent them several requests for information.

3 On 24 March 1988 it instituted on its own initiative a proceeding under Article 3(1) of Regulation No 17 against 14 PVC producers. On 5 April 1988 it sent each of those undertakings a statement of objections as provided for in Article 2(1) of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47). All the undertakings to which that statement was addressed submitted observations in June 1988. Except for Shell International Chemical Company Ltd ('Shell'), which had not requested a hearing, they were heard in September 1988.

4 On 1 December 1988 the Advisory Committee on Restrictive Practices and Dominant Positions ('the Advisory Committee') delivered an opinion on the Commission's draft decision.

5 At the end of the proceeding, the Commission adopted Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.865, PVC) (OJ 1989 L 74, p. 1, hereinafter 'the PVC I decision'). By that decision, it penalised the following PVC producers for infringement of Article 85(1) of the Treaty (now Article 81(1) EC): Atochem SA, BASF AG ('BASF'), DSM NV, Enichem, Hoechst, Hüls, ICI, LVM, Montedison, Norsk Hydro A/S ('Norsk Hydro'), Société artésienne de vinyle SA, Shell, Solvay & Cie ('Solvay') and Wacker-Chemie.

6 All those undertakings except Solvay brought actions to have that decision annulled by the Community judicature.

7 The Court of First Instance declared Norsk Hydro's application inadmissible by order of 19 June 1990 (Case T-106/89 *Norsk Hydro* v *Commission*, not published in the European Case Reports).

8 The other cases were joined for the purposes of the oral procedure and the judgment.

9 By judgment of 27 February 1992 in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315 ('the judgment of the Court of First Instance of 27 February 1992'), the Court of First Instance declared the PVC I decision non-existent.

10 On appeal by the Commission, the Court of Justice, by judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555 ('the Court's judgment of 15 June 1994'), set aside the judgment of the Court of First Instance of 27 February 1992 and annulled the PVC I decision.

11 On 27 July 1994 the Commission adopted the PVC II decision in relation to the producers which had been the subject of the PVC I decision, with the exception of Solvay and Norsk Hydro. That new decision imposed on the undertakings to which it was addressed fines of the same amounts as those imposed by the PVC I decision.

12 The PVC II decision contains the following provisions:

'*Article 1*

BASF AG, DSM NV, Elf Atochem SA, Enichem SpA, Hoechst AG, Hüls AG, Imperial Chemical Industries plc, Limburgse Vinyl Maatschappij NV, Montedison SpA, Société [a]rtésienne de [v]inyle SA, Shell International Chemical Co., Ltd, and Wacker Chemie GmbH infringed Article 85 of the EC Treaty (together with Norsk Hydro [A/S] and Solvay & Cie) by participating for the periods identified in this Decision in an agreement and/or concerted practice originating in about August 1980 by which the producers supplying PVC 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 PVC sector in the Community (apart from Norsk Hydro [A/S] and Solvay which are already the subject of a valid termination order) shall forthwith bring the said infringement to an end (if they have not already done so) and shall henceforth refrain in relation to their PVC 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 professional 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 price or market-sharing inside the Community. Any scheme for the exchange of general information to which the producers subscribe concerning the PVC 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) BASF AG: a fine of ECU 1 500 000;

(ii) DSM NV: a fine of ECU 600 000;

(iii) Elf Atochem SA: a fine of ECU 3 200 000;

(iv) Enichem SpA: a fine of ECU 2 500 000;

(v) Hoechst AG: a fine of ECU 1 500 000;

(vi) Hüls AG: a fine of ECU 2 200 000;

(vii) Imperial Chemical Industries plc: a fine of ECU 2 500 000;

(viii) Limburgse Vinyl Maatschappij NV: a fine of ECU 750 000;

(ix) Montedison SpA: a fine of ECU 1 750 000;

(x) Société [a]rtésienne de [v]inyle SA: a fine of ECU 400 000;

(xi) Shell International Chemical Company Ltd: a fine of ECU 850 000;

(xii) Wacker Chemie GmbH: a fine of ECU 1 500 000.'

II — The actions brought before the Court of First Instance and the contested judgment

13 By applications lodged at the Registry of the Court of First Instance between 5 and 14 October 1994, LVM, Elf Atochem, BASF, Shell, DSM NV and DSM Kunststoffen BV (collectively 'DSM'), Wacker-Chemie, Hoechst, Société artésienne de vinyle, Montedison, ICI, Hüls and Enichem brought actions before the Court of First Instance.

14 Each of the parties sought annulment of the PVC II decision in whole or in part and, in the alternative, annulment or reduction of the fine imposed on it. Montedison also claimed that the Commission should be ordered to pay damages.

15 By the contested judgment, the Court of First Instance:

— joined the cases for the purposes of the judgment;

— annulled Article 1 of the PVC II decision in so far as it found that Société artésienne de vinyle had participated in the infringement complained of after the first half of 1981;

— reduced the fines imposed on Elf Atochem, Société artésienne de vinyle and ICI to EUR 2 600 000, EUR 135 000 and EUR 1 550 000 respectively;

— dismissed the remainder of the applications;

— ruled on the costs.

III — Forms of order sought in the appeals

16 LVM and DSM claim that the Court should:

— annul in whole or in part the contested judgment and end the procedure or, in the alternative, refer the case back to the Court of First Instance for resumption of the proceedings;

— annul in whole or in part the PVC II decision;

— annul the fines imposed on the appellants or reduce the amounts thereof;

— order the Commission to pay the costs of the proceedings at first instance and on appeal.

17 Montedison claims that the Court should:

— annul the contested judgment;

— annul the PVC II decision;

— refer the case back to the Court of First Instance;

— reduce the amount of the fine to a minimal sum;

— order the Commission to pay the costs of the proceedings at first instance and on appeal.

18 Elf Atochem claims that the Court should:

— annul the contested judgment and give a final ruling on the dispute;

— order the Commission to pay the costs.

19 Degussa claims that the Court should:

— annul the contested judgment in so far as it dismisses its application and orders it to pay the costs;

— annul Articles 1, 2 and 3 of the PVC II decision in so far as they concern it;

— order the Commission to pay the costs of the proceedings at first instance and on appeal.

20 Enichem claims that the Court should:

— annul the parts of the contested judgment challenged by it and consequently annul the PVC II decision;

— in the alternative, annul those parts of the contested judgment which adversely affect it and consequently annul or reduce the fine imposed;

— order the Commission to pay the costs of the proceedings at first instance and on appeal.

21 Wacker-Chemie and Hoechst claim that the Court should:

— annul paragraphs 4 and 5 of the operative part of the contested judgment in so far as they concern them;

— annul the PVC II decision in so far as it concerns them;

— in the alternative, reduce the amount of the fines imposed on them;

— in the further alternative, refer the case back to the Court of First Instance for a new ruling;

— order the Commission to the pay the costs or, in the event of a referral back to the Court of First Instance, reserve the issue of costs for a decision by that court.

22 ICI claims that the Court should:

— annul the contested judgment in so far as it concerns ICI;

— annul the PVC II decision in so far as it concerns ICI or, failing that, refer the case back to the Court of First Instance;

— annul the fine, which was reduced to EUR 1 550 000 by the Court of First Instance, or further reduce the amount thereof;

— order the Commission to pay the costs of the proceedings at first instance and on appeal.

23 The Commission contends that the Court should:

— dismiss the appeals;

— order the appellants to pay the costs.

IV — The pleas in law for annulment of the contested judgment

24 LVM and DSM raise nine — essentially identical — pleas in law for annulment of the contested decision:

— infringement of the principle of *res judicata*;

— infringement of the principle *non bis in idem*;

— infringement of the principle that decisions must be adopted within a reasonable time;

— invalidity of the procedural measures preceding the PVC I decision;

— need for new administrative procedural measures following annulment of the PVC I decision;

— insufficient statement of reasons for the dismissal of the plea in law alleging infringement by the Commission of Article 190 of the EC Treaty (now Article 253 EC) with respect to its decision to adopt the PVC II decision following annulment of the PVC I decision;

— infringement of the privilege against self-incrimination;

— infringement of the rights of the defence as a result of insufficient access to the Commission's file;

— expiry of the limitation period applying to proceedings.

25 DSM also relies on two further pleas in law:

— failure to observe the principle of the inviolability of the home;

— infringement of professional secrecy and of the rights of the defence.

26 Montedison raises, in essence, 11 pleas in law for annulment:

— failure to respond to its plea concerning a definitive transfer to the Community judicature of the power to impose penalties following the decision of the Commission;

— need for new administrative procedural measures following annulment of the PVC I decision;

— failure by the Court of First Instance to consider the economic context;

— expiry of the limitation period applying to proceedings;

— infringement of the right to a fair hearing, of Articles 48(2) and 64 of the Rules of Procedure of the Court of First Instance and of the principle of personal liability, resulting from the way in which the oral procedure was organised;

— infringement of the right to a fair hearing and of Article 48(2) of the Rules of Procedure of the Court of First Instance during the examination of the evidence;

— infringement of Articles 10(1) and 32(1) of the Rules of Procedure of the Court of First Instance;

— failure by the Commission to observe the scope of the obligation to state reasons for the method of calculating the fine;

— disproportionality and unfairness of the fine having regard to the gravity and duration of the infringement;

— infringement of the principle of equal treatment with respect to the amount of the fine;

— erroneous dismissal as inadmissible of its claims seeking payment of damages by the Commission.

27 Elf Atochem raises, in essence, four pleas in law for annulment:

— failure to respond to its plea alleging differences between the PVC I and PVC II decisions;

— invalidity of the procedural measures preceding the PVC I decision;

— need for new administrative procedural measures following annulment of the PVC I decision;

— infringement of the rights of the defence as a result of insufficient access to the Commission's file.

28 Degussa raises, in essence, six pleas in law for annulment:

— infringement of the principle that decisions must be adopted within a reasonable time;

— invalidity of the procedural measures preceding the PVC I decision;

— need for new administrative procedural measures following annulment of the PVC I decision;

— failure to respond to its complaint of a lack of intervention by the Hearing Officer prior to the adoption of the PVC II decision;

— infringement of the rights of the defence as a result of insufficient access to the Commission's file;

— failure by the Commission to take account of the scope of the obligation to state reasons for the method of calculating the fine.

29 Enichem raises 13 pleas in law for annulment:

— infringement of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance;

— infringement of the principle of *res judicata*;

— invalidity of the procedural measures preceding the PVC I decision;

— need for new administrative procedural measures following annulment of the PVC I decision;

— erroneous reasons for the dismissal of the plea alleging infringement by the Commission of Article 190 of the EC Treaty with respect to its decision to adopt the PVC II decision following annulment of the PVC I decision;

— error in law by the Court of First Instance as regards the conclusions to be drawn from its finding of a lack of any correlation between two documents on which the Commission's allegation was based;

— attribution of collective responsibility;

— infringement of the rights of the defence as a result of insufficient access to the Commission's file;

— incorrect attribution of the infringement to the appellant as the holding company of a group and incorrect exclusion by the Court of First Instance of the relevance of the holding company's turnover to the calculation of the amount of the fine;

— infringement of Article 15(2) of Regulation No 17 resulting from an error on the part of the Court of First Instance as regards the correlation between the turnover in the business year preceding the PVC II decision and the amount of the fine;

— failure by the Commission to observe the scope of the obligation to state reasons for the method of calculating the fine;

— misinterpretation and misapplication of Community law and inadequate assessment of the evidence concerning the relationship between the fine imposed on the appellant and the appellant's market share;

— infringement of the principle of proportionality in fixing the amount of the fine.

30 Wacker-Chemie and Hoechst raise six pleas in law for annulment:

— infringement of Articles 10(1) and 32(1) of the Rules of Procedure of the Court of First Instance;

— incomplete examination of the facts;

— inconsistent and insufficient grounds for the contested judgment with respect to consideration of the documentary evidence;

— distortion of the evidence;

— need for new administrative procedural measures following annulment of the PVC I decision;

— infringement of Article 85(1) of the Treaty and Article 15(2) of Regulation No 17.

31 ICI raises, in essence, nine pleas in law for annulment:

— infringement of the principle of *res judicata*;

— infringement of the principle of *non bis in idem*;

— infringement of the principle that decisions must be adopted within a reasonable time;

— invalidity of the procedural measures preceding the PVC I decision;

— need for new administrative procedural measures following annulment of the PVC I decision and incompleteness of the file submitted for deliberation by the college of Commissioners at the time of adoption of the PVC II decision;

— erroneous reasoning for the rejection of the plea alleging infringement by the Commission of Article 190 of the Treaty with respect to its decision to adopt the PVC II decision following annulment of the PVC I decision;

— infringement of professional secrecy and of the rights of the defence;

— expiry of the limitation period applicable to proceedings;

— failure by the Court of First Instance to annul or reduce the fine as a result of the infringement of the principle that decisions must be adopted within a reasonable time.

V — The appeals

32 Having heard the parties and the Advocate General on the point, the Court considers that the present cases, on account of the connection between them, should be joined for the purposes of the final judgment in accordance with Article 43 of the Rules of Procedure of the Court of Justice.

A — *Pleas in law concerning procedure and form*

1. The plea raised by Montedison, Wacker-Chemie and Hoechst alleging infringement of Articles 10(1) and 32(1) of the Rules of Procedure of the Court of First Instance

33 Montedison, Wacker-Chemie and Hoechst observe that the Third Chamber (Extended Composition) of the Court of First Instance, which delivered the contested judgment, was composed of only three members although that Chamber included five members during the oral procedure.

34 They allege that the Court of First Instance thus deviated from the rules governing the normal composition of an extended chamber by misapplying Article 32(1) of its Rules of Procedure. The Court of First Instance considered as absent or prevented from attending within the meaning of that provision one of the members of that Chamber who had ceased to sit as a judge as a result of the expiry of his term of office on 17 September 1998 after the oral procedure. However, the case of the expiry of a judge's term of office is not covered by the provision applied. The contested judgment was therefore delivered by a chamber which was not properly constituted, in breach of Articles 10(1) and 32(1) of the Rules of Procedure of the Court of First Instance.

35 It should be observed that Article 10(1) of its Rules of Procedure requires the Court of First Instance to set up Chambers composed of three or five judges.

36 In accordance with Article 15 of the EC Statute of the Court of Justice, which also applies to the Court of First Instance pursuant to Article 44 of that Statute, decisions of the Court of First Instance are valid only when an uneven number of its members is sitting in the deliberations, and decisions of Chambers composed of three or five judges are valid only if they are taken by three judges.

37 Article 32(1) of the Rules of Procedure of the Court of First Instance provides that where, by reason of a judge being absent or prevented from attending, there is an even number of judges, the most junior judge is to abstain from taking part in the deliberations unless he is the Judge-Rapporteur, in which case the judge immediately senior to him is to abstain from taking part in the deliberations.

38 It thus makes clear how the rules laid down in Article 15 of the EC Statute of the Court of Justice are to be applied. For the purpose of the application of those rules, it is not the permanent or temporary nature of the inability to attend which

is decisive. If a temporary absence or inability to attend justifies the change in the composition to allow an uneven number of members to sit, the same must apply, *a fortiori*, to the case of a permanent inability to attend as a result of, for example, the expiry of a member's term of office.

39 In the present case, the Third Chamber (Extended Composition) of the Court of First Instance could therefore reach a valid decision in a reduced composition of three members after the expiry, subsequent to the oral procedure, of the term of office of one of the five members of which it was initially composed.

40 It follows that this plea must be rejected.

2. The plea in law raised by LVM, DSM, Enichem and ICI alleging infringement of the principle of *res judicata*

41 Before the Court of First Instance, LVM, DSM, Enichem and ICI submitted that the Commission could not adopt the PVC II decision without disregarding the authority of *res judicata* attaching to the Court's judgment of 15 June 1994.

42 They allege that the Court of First Instance, in paragraph 77 et seq. of its judgment, failed to observe the principle of *res judicata* by dismissing the plea which they had raised on the basis thereof.

43 In their view, by ruling on the dispute in accordance with Article 54 of the EC Statute of the Court of Justice, after having annulled the judgment of the Court of First Instance of 27 February 1992, the Court of Justice, in its judgment of 15 June 1994, gave final judgment in respect of all the pleas raised by the undertakings in question.

44 In that connection, it should be observed that, in paragraph 77 of the contested judgment, the Court of First Instance rightly pointed out that the principle of *res judicata* extends only to matters of fact and law actually or necessarily settled by the judicial decision in question (Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 14, and Case C-277/95 *Lenz* v *Commission* [1996] ECR I-6109, paragraph 50).

45 It stated further, in paragraph 78 of the contested judgment, that, in its judgment of 15 June 1994, the Court of Justice found that the Court of First Instance had erred in law by declaring the PVC I decision non-existent and that, therefore, the judgment of the Court of First Instance of 27 February 1992 had to be set aside. It also pointed out in paragraphs 78 and 81 of the contested judgment that the Court of Justice, when giving its final ruling on the dispute in accordance with Article 54 of the EC Statute of the Court of Justice, annulled the PVC I decision for infringement of essential procedural requirements on the ground that the Commission had infringed the first paragraph of Article 12 of its Rules of Procedure by failing to carry out the authentication of the PVC I decision in accordance with that article.

46 Therefore, it was fully entitled to conclude, in paragraph 82 of the contested judgment, that the Court's judgment of 15 June 1994, which expressly ruled out the need to examine the other pleas in law raised by the applicants, did not settle those pleas.

47 It rightly added in paragraph 84 of the contested judgment that, where the Court of Justice itself gives final judgment on the dispute in accordance with Article 54

of the EC Statute of the Court of Justice by accepting one or more pleas raised by the applicants, it does not automatically settle all the points of fact and law raised by them.

48 Accordingly, the Court's judgment of 15 June 1994 imposed on the Commission only the obligation — pursuant to Article 176 of the EC Treaty (now Article 233 EC), which requires an institution whose act has been declared void to take the necessary measures to comply with the judgment of the Court — to eliminate the illegality in the measure intended to replace the annulled measure (see, to that effect, Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris* v *Commission* [1988] ECR 2181, paragraph 28).

49 LVM and DSM cannot validly maintain that the second paragraph of Article 174 of the EC Treaty (now the second paragraph of Article 231 EC) also precludes a new Commission decision. That provision is not relevant in this case. It refers only to the possibility open to the Court of expressly retaining some of the effects of a measure which it has declared void, whereas the situation under examination in the present case is covered by Article 176 of the Treaty.

50 Nor can LVM and DSM rely on Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, in which the Court of Justice, having partially annulled a decision of the Commission, referred the matter back to the latter. The judgment in that case cannot be interpreted *a contrario* to exclude, in the absence of an express reference back to the institution concerned, any opportunity for that institution to eliminate the established illegality or, in the case of total annulment, to substitute a new decision for the annulled act. The scope of the obligation imposed on the institution in question by Article 176 of the Treaty is the same irrespective of whether or not the Community judicature has referred the matter back to it.

51 Enichem claims that its assessment is supported by Article 17 of Regulation No 17, which grants the Court of Justice unlimited jurisdiction to hear actions against decisions whereby the Commission has fixed a fine. In such circum-

stances, the Court deals with the whole of the case brought before it. That is what it did in this case, as is clear from the summary in paragraph 56 of its judgment of 15 June 1994 of the procedural and substantive pleas submitted to it. Since the Court gave no indication as to how the case was subsequently to be dealt with, for example by referring it back to the Court of First Instance, that judgment encompassed all of the arguments advanced before it.

52 That argument cannot be upheld. Article 17 of Regulation No 17 deals only with the scope of the power of the Community judicature to review the amount of the penalties imposed in competition matters, which it may annul, reduce or increase. The power conferred in that respect alone does not mean that the review of legality exercised in other respects covers all of the pleas raised if the Community judicature has ruled only on some of them.

53 It follows that this plea raised in the appeal must be rejected.

3. The plea raised by LVM, DSM and ICI alleging infringement of the principle of *non bis in idem*

54 Before the Court of First Instance, LVM, DSM and ICI maintained that the Commission had infringed the principle of *non bis in idem* by adopting a fresh decision after the Court of Justice had annulled the PVC I decision.

55 They observe that, in paragraph 96 of the contested judgment, the Court of First Instance held that the Commission cannot bring proceedings against an undertaking under Regulation No 17 and Regulation No 99/63 for infringement of Community competition rules or penalise it by the imposition of a fine for

anti-competitive conduct which the Court of First Instance or the Court of Justice has already found to be either proven or unproven by the Commission. However, they object to the Court of First Instance's subsequent findings in paragraphs 97 and 98 of the contested judgment that, first, the annulment by the Court of Justice of the PVC I decision meant that the adoption of the PVC II decision did not result in the applicants' incurring a penalty twice for the same offence and that, second, the Commission did not take action against the applicants twice in relation to the same set of facts, since the Court of Justice did not rule, in its judgment of 15 June 1994, on any of the substantive pleas raised by the appellants.

56 According to LVM and DSM, the principle of *non bis in idem* applies in the case of annulment of a first decision where that annulment was ordered on the basis of a lack of evidence or of non-compliance with essential procedural requirements. The principle serves to protect the undertaking against action being taken or penalties being imposed twice, irrespective of the reason for the failure of the first measures taken against it. That interpretation is borne out by Article 4(1) of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed in Rome on 4 November 1950, which has in the meantime entered into force and according to which '[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State'. In the Court's judgment of 15 June 1994, the appellants were 'acquitted' within the meaning of that provision.

57 ICI also submits that the principle of *non bis in idem*, which is a fundamental principle of Community law applicable to competition law (Case 7/72 *Boehringer Mannheim* v *Commission* [1972] ECR 1281), has been enshrined in Article 4(1) of Protocol No 7 to the ECHR. ICI complains that, for the purposes of dismissing the plea based on that principle, the Court of First Instance found that ICI had been relieved from having to pay the fine imposed by the PVC I decision after the latter had been annulled. According to ICI, that fact was irrelevant. The decisive question was whether the PVC II decision was based on the same conduct as that with which the Court's judgment of 15 June 1994 was concerned (see the judgment of the European Court of Human Rights of 23 October 1995 in the case of *Gradinger*, Series A, No 328 C, paragraph 55). That was the position in the present case.

58 ICI further submits that Article 4 of Protocol No 7 to the ECHR applies in the case of a final conviction, that is to say, where no further ordinary remedies are available or where the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them. That was the position in the present case since no further remedies were available to the appellant following delivery of the Court's judgment of 15 June 1994.

59 In that regard, it should be observed that, as is apparent from the grounds of the contested judgment, the principle of *non bis in idem*, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision.

60 The application of that principle therefore presupposes that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed.

61 Thus, the principle of *non bis in idem* merely prohibits a fresh assessment in depth of the alleged commission of an offence which would result in the imposition of either a second penalty, in addition to the first, in the event that liability is established a second time, or a first penalty in the event that liability not established by the first decision is established by the second.

62 On the other hand, it does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged, since the annulment decision cannot in such circumstances be regarded as an 'acquittal' within the meaning given to that

expression in penal matters. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them.

63 Accordingly, since the Court of Justice, in its judgment of 15 June 1994, annulled the PVC I decision, including the penalties imposed thereby, without ruling on any of the substantive pleas raised by the appellants, the Court of First Instance was correct in finding that the Commission, by adopting the PVC II decision after curing the defect formally declared unlawful, had neither penalised the undertakings twice nor initiated a second procedure against them on the basis of the same facts.

64 LVM and DSM further submit that, with respect to the finding, in the context of the examination of the plea alleging infringement of the principle of *non bis in idem*, that the PVC I decision was to be deemed never to have existed as a result of its annulment, the Court of First Instance's reasoning was inconsistent with that set out in paragraph 1100 of the contested judgment in relation to the plea alleging expiry of the limitation period.

65 That submission is unfounded. The question of law dealt with by the Court of First Instance in paragraph 1100 of the contested judgment concerned the conditions governing suspension of the limitation period provided for in Article 3 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), which states that '[t]he limitation period in proceedings shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities'.

66 In paragraph 1098 of the contested judgment, the Court of First Instance stated that the specific purpose of Article 3 is to enable the limitation period to be suspended where the Commission is prevented from acting for an objective reason not attributable to it and connected precisely with the fact that an action is pending.

67 By adding, in paragraph 1100 of the contested judgment, that '[i]t is the very fact that an action is pending before the Court of First Instance or the Court of Justice which justifies the suspension, and not the conclusions reached by those courts in their judgment', it merely established that the scheme for suspension of the limitation period provided for in Regulation No 2988/74 is independent of the effect of an order annulling the decision. Moreover, in the same paragraph, it found essentially that, in fact, that suspension mechanism makes sense only in the case of actual annulment of a Commission decision, that is to say, where that decision is then deemed never to have existed.

68 It was not therefore inconsistent that, in relation to two different questions, the Court of First Instance, on the one hand, took account of the effect of the judgment annulling the PVC I decision as regards the principle of *non bis in idem* and, on the other hand, took into consideration the very fact that proceedings were pending before the Community judicature, independently of the content of the judgment ordering annulment and its effect on the PVC I decision, in relation to the scheme for suspension of the limitation period.

69 It follows that this plea in law must be rejected.

4. The plea raised by LVM, DSM, Elf Atochem, Degussa, Enichem and ICI alleging invalidity of the procedural measures taken prior to adoption of the PVC I decision

70 Before the Court of First Instance, LVM, DSM, Elf Atochem, Degussa, Enichem and ICI submitted that the annulment of the PVC I decision had affected all of the measures preparatory to that decision. Those measures could not therefore constitute valid measures preparatory to the PVC II decision.

71 They complain that, in paragraphs 183 to 193 of the contested judgment, the Court of First Instance rejected their plea to that effect by holding that the measures preparatory to the PVC I decision were not affected by the annulment of that decision.

72 In that connection, the Court of First Instance, relying on settled case-law to the effect that it is the grounds of a judgment ordering annulment which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part (*Asteris*, cited above, paragraph 27, and Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993, paragraph 31) rightly held, in paragraph 184 of the contested judgment, that, in order to determine the scope of the Court's judgment of 15 June 1994, it was necessary to refer to the grounds of that judgment.

73 Annulment of a Community measure does not necessarily affect the preparatory acts (*Spain* v *Commission*, cited above, paragraph 32), since the procedure for replacing such a measure may, in principle, be resumed at the very point at which the illegality occurred (*Spain* v *Commission*, paragraph 31).

74 In paragraph 189 of the contested judgment, the Court of First Instance stated that the Court of Justice, by its judgment of 15 June 1994, had annulled the PVC I decision on account of a procedural defect affecting only the manner in which it was finally adopted by the Commission.

75 It was therefore entitled to conclude that, since the procedural defect had occurred at the final stage of adoption of the PVC I decision, the annulment did not affect the validity of the measures preparatory to that decision which were

taken before the stage at which the defect was found (see, with respect to a directive, Case 331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 34).

76 It follows that this plea must be rejected.

5. The pleas raised by all the appellants alleging the need for new administrative procedural measures following the annulment of the PVC I decision and by ICI alleging the incompleteness of the file submitted for deliberation by the college of Commissioners at the time of adoption of the PVC II decision

77 Before the Court of First Instance, the appellants argued, in essence, that, even if the defect established by the Court's judgment of 15 June 1994 had occurred at the final stage of the adoption of the PVC I decision, the Commission could have remedied the defect only if it had complied with certain procedural guarantees before adopting the PVC II decision, since the latter was a new decision. Thus, they submitted before the Court of First Instance that the administrative procedure should either have been resumed in its entirety from the stage of notification of the statement of objections or that it should have included a fresh hearing of the undertakings concerned, a fresh consultation of the Advisory Committee and a fresh intervention by the Hearing Officer. It also submits that, accordingly, the file submitted for deliberation by the college of Commissioners did not contain documents which, had they been included, would have allowed the adoption of a decision in full knowledge of the questions of law and fact which would then have been raised.

78 In their appeals, the appellants complain that the Court of First Instance did not accept their pleas on those various points, which it is necessary to consider in turn.

(a) The absence of a fresh statement of objections

79 Montedison submits that, in accordance with Regulation No 17 and Regulation No 99/63, the Commission should have opened a fresh administrative procedure commencing with a fresh statement of objections before adopting the PVC II decision, since that was a new decision even though its content was identical to that of the PVC I decision.

80 It follows from the consideration, in paragraphs 41 to 53 of this judgment, of the plea alleging infringement of the principle of *res judicata* that the annulment of the PVC I decision by the Court's judgment of 15 June 1994 did not affect the validity of the prior procedural measures, including in particular the statement of objections.

81 The Commission was therefore not obliged, solely as a result of that annulment, to present the undertakings concerned with a new statement of objections.

82 Accordingly, the complaint submitted by Montedison cannot be accepted.

(b) The absence of a fresh hearing of the undertakings concerned

83 Each of the appellants submits that the annulment of the PVC I decision meant that a fresh hearing of the undertakings pursuant to Article 19(1) of Regulation No 17 was necessary for the adoption of the PVC II decision. LVM and DSM argue that that requirement arises from the fundamental principle of observance

of the rights of the defence, the scope of which cannot be defined or limited by provisions of secondary law on account of the primacy of the fundamental principles of Community law.

84 The appellants also complain of the Court of First Instance's finding, in paragraphs 251 and 252 of the contested judgment, that a new hearing was not required in the absence of new objections.

85 In that regard, it should be stated that the Court of First Instance rightly observed, in paragraph 246 of the contested judgment, that, in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with, even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9).

86 It also correctly pointed out, in paragraph 247 of the contested judgment, that Article 19(1) of Regulation No 17 and Article 4 of Regulation No 99/63, which apply that principle, require the Commission to deal in its final decision only with those objections on which the undertakings and associations of undertakings concerned have had the opportunity to put their case.

87 It was therefore entitled to conclude, in paragraph 249 of the contested judgment, that observance of the rights of the defence requires that each undertaking or association of undertakings concerned be given the opportunity to be heard as to the objections raised against each of them which the Commission proposes to deal with in the final decision finding infringement of the competition rules. In so doing, it did not lay down any limitation by the provisions of Regulation No 17 and Regulation No 99/63 of the fundamental principle of observance of the rights of the defence but in fact stated its content in relation to competition law.

88 Having gone on to declare that the PVC II decision did not contain any new objection as compared with the text of the PVC I decision, the Court of First Instance did not err in law in ruling, in paragraph 252 of the contested judgment, that no new hearing was required prior to adoption of the PVC II decision.

89 Three series of arguments have been put forward to no avail in opposition to that ruling.

90 First, LVM, DSM, Elf Atochem, Degussa, Enichem and ICI maintain that a new hearing would have enabled them to submit appropriate observations as to the consequences of the annulment of the PVC I decision. Thus, they could have commented on the need for, and the expediency of, the adoption of the PVC II decision, on issues such as the passage of time, the principles of *res judicata* and *non bis in idem*, developments in the case-law subsequent to the adoption of the PVC I decision and the access to the file which re-opening of the proceedings necessarily entails, on the obligation to have the Hearing Officer consider certain matters, on the obligation to consult the Advisory Committee, on the implications of Article 20 of Regulation No 17 and on the development of the PVC market since 1988.

91 In that connection, it must be pointed out that the assertion of a right to submit observations on the need for, and the expediency of, the adoption of a new decision after the annulment of the PVC I decision exceeds the parameters of the rights of the defence as laid down by Regulations Nos 17 and 99/63, which are limited to questions concerning the truth and relevance of the facts and matters alleged and the documents used by the Commission to support its claim that there has been an infringement of competition law (*Hoffmann-La Roche*, cited above, paragraph 11). The rights of the defence were observed prior to adoption of the PVC I decision. At the initial hearings, the undertakings concerned were able to submit their observations on the objections raised by the Commission, which then served as the basis of the assessment for the purposes of adoption of the PVC II decision.

92 Developments in the case-law or in the economic context cannot in themselves render new hearings necessary, any more than if they occur in the course of administrative proceedings prior to a final decision.

93 By the same token, the questions of law which may arise in the context of the application of Article 176 of the Treaty, such as those relating to the passage of time, the possibility of resuming proceedings, the access to the file required on resumption of the proceedings, the intervention of the Hearing Officer and the Advisory Committee and the possible implications of Article 20 of Regulation No 17, do not render a new hearing necessary since they do not alter the substance of the objections, being at most amenable to subsequent judicial review.

94 Second, LVM and DSM dispute the finding by the Court of First Instance that the PVC II decision contains no new objection as compared with the PVC I decision. In that regard, they allege that 'important amendments' were made in the PVC II decision as compared with the PVC I decision, namely a new operative part, amendments to the statement of reasons as regards the facts and law and a new chapter concerning prescription. More generally, LVM and DSM consider that the relevant legal test is not whether it is possible to qualify new facts and circumstances as 'objections' but only whether there are new facts and circumstances in respect of which the undertakings have not yet submitted observations. In this case, the new facts include the issues referred to in paragraph 90 of this judgment, in respect of which the appellants wished to submit observations, and the amendments to the PVC II decision.

95 Elf Atochem asserts that the Commission was required to hold new hearings by virtue of the sole fact that, according to the appellant, the PVC II decision contains 'new facts' as compared with the PVC I decision. First, the PVC II decision excludes Norsk Hydro and Solvay, which are no longer the subject of the

proceedings. Second, those two companies nevertheless continue to be referred to with respect to the collective conduct alleged against the undertakings to which the PVC II decision is addressed, so that the two successive decisions of the Commission concern alleged agreements or concerted practices in respect of which the participants proceeded against in 1994 are different from those proceeded against in 1998. Third, the PVC II decision contains arguments relating to limitation, which are intended to justify the right to adopt a new decision. According to Elf Atochem, it is in any event of little relevance whether the new decision contains new objections. A new hearing is always required. The Commission cannot simply repeat the objections contained in a previous annulled decision. Every decision adopted by the Commission must contain its own set of objections.

96 In that regard, it should be observed that, contrary to what LVM and DSM claim, the differences between the operative parts of the PVC I and the PVC II decisions and the arguments relating to limitation do not constitute a new objection upheld by the Commission in the PVC II decision. The appellants do not state which of the alleged amendments of fact and law indicate, in their view, that new objections were taken into account; nor do they show how those amendments actually relate to such objections.

97 Moreover, contrary to the claims made both by LVM and DSM and by Elf Atochem, the mere existence of differences between the two successive decisions of the Commission did not in itself render new hearings necessary, since those differences did not involve the consideration of new objections.

98 Where, following the annulment of a decision in a competition matter, the Commission chooses to rectify the illegality or illegalities found and to adopt a new identical decision which is not vitiated by those illegalities, that decision relates to the same objections as those in respect of which the undertakings have already submitted observations. Elf Atochem cannot therefore validly maintain that the PVC I and the PVC II decisions each refer to separate sets of complaints.

99 It must additionally be stated that the differences between the PVC I and PVC II decisions with respect to Norsk Hydro and Solvay are merely the result of the scheme of legal remedies available against a decision adopted in a competition matter with respect to several enterprises.

100 Although drafted and published as a single decision, such a decision must be regarded as a group of individual decisions establishing, in relation to each of the undertakings to which it is addressed, the breach or breaches which that undertaking has been found to have committed and, where appropriate, imposing on it a fine. It can be annulled only with respect to those addressees which have successfully brought an action before the Community judicature, and remains binding on those addressees which have not applied for its annulment (see, to that effect, Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 49 et seq.).

101 In this case, Solvay did not bring an action against the PVC I decision and the action brought against that decision by Norsk Hydro was declared inadmissible by the order in *Norsk Hydro*, cited above.

102 Therefore, since the PVC I decision had become final in relation to those two undertakings, they could no longer be addressees of the PVC II decision. Nevertheless, to the extent that they were involved in the objections raised with respect to all the undertakings initially implicated, their respective roles could be taken into account by the Commission in the PVC II decision in so far as they related to the objections raised against the addressees of that decision for the purposes of establishing the infringements found to have been committed by those addressees, each within the limits of its own liability. The PVC I and PVC II decisions do not therefore relate to agreements or concerted practices in respect of which the participants proceeded against in 1994 are different from those proceeded against in 1988. They concern the same agreements or concerted practices in respect of the same undertakings which, solely by virtue of the application of procedural rules, were penalised by two successive decisions.

103 The arguments relating to limitation in respect of the PVC II decision, alleged by Elf Atochem to constitute a third difference as compared with the PVC I decision, are clearly unrelated to any new objection, since they do not concern any conduct other than that in respect of which the undertakings had already submitted observations.

104 Finally, Wacker-Chemie and Hoechst complain that the Court of First Instance did not accept the need for new hearings in the absence of new objections even though the PVC II decision extended the duration of the infringement found to have been committed, was unfounded as regards the order to terminate the infringement made in Article 2 of the decision and did not determine the amount of the fine in accordance with Article 15(2) of Regulation No 17.

105 Solely as a result of the date of adoption of the PVC II decision, the duration of the infringement found to have been committed was extended by five and a half years as compared with the infringement established as at the date of adoption of the PVC I decision.

106 However, Articles 1 and 3 of the PVC II decision, like Articles 1 and 3 of the PVC I decision respectively, stated that the appellants had participated in the infringement found to have been committed and imposed fines on those undertakings. As regards, in particular, Wacker-Chemie and Hoechst, point 54 of the account of the facts contained in each of the PVC I and PVC II decisions states that the amount of the fines was assessed on the basis that their participation in the cartel continued 'until at least May 1984'. Consequently, the adoption of the PVC II decision on 27 July 1994 did not have the effect of prolonging the infringement penalised as compared with the PVC I decision, since the duration of the infringement actually taken into account was the same.

107 Wacker-Chemie and Hoechst submit that the order to terminate the infringement presupposes the existence of proof that the infringement was continuing at the time of adoption of the PVC II decision and that, in the absence of such proof, the

legal basis of that order had been eliminated as a result of the passage of time. They further assert that they had definitively terminated their activity on the PVC market before the adoption of the PVC II decision, and could not therefore be required to terminate any infringement.

108 However, it should be observed that, in point 50 of the of the account of the facts contained in both the PVC I and the PVC II decisions, the Commission stated that, notwithstanding assurances given by some undertakings during the administrative procedure, it did not know 'whether meetings or at least some communication between firms on prices and volumes have in fact ever ceased'. It therefore concluded that it was necessary 'to include in any decision a formal requirement that those undertakings still active in the PVC sector terminate the infringement'. It therefore ordered the undertakings, in Article 2 of the PVC II decision as previously in Article 2 of the PVC I decision, to terminate the infringement immediately 'if they have not already done so'. The order made was thus directed only at those undertakings which were still committing the infringement at the time of adoption of the decision. Just as in the PVC I decision, the order made in the PVC II decision was therefore simply irrelevant as regards those undertakings which had already terminated the infringement by the date of its adoption. It was also irrelevant in relation to Wacker-Chemie and Hoechst if, as they maintain, they had definitively terminated their activities on the PVC market, since Article 2 of the PVC II decision, like Article 2 of the PVC I decision, refers to undertakings 'still involved in the PVC sector'.

109 Finally, with respect to the determination of the amount of the fine, Wacker-Chemie and Hoechst submit that a fine imposed some considerable time after the alleged offences need not lead to the same result as a penalty imposed immediately after the infringement and that the Commission should have determined the turnover for the last business year prior to the PVC II decision in accordance with Article 15(2) of Regulation No 17, which provides that the maximum fine which can be imposed is 10% of the turnover realised in the preceding business year.

110 In that connection, it must be pointed out that the obligation to take into account the turnover for the preceding business year arises at the stage of the final decision of the Commission for the purposes of determining the maximum amount of the fine. The need to ascertain that turnover therefore arises after the hearing of the undertakings, which is designed to enable them to submit their observations on the objections raised against them. Furthermore, it arises only if, at the end of the hearing, the Commission considers that the infringement has been established. Accordingly, the appellants' argument is irrelevant for the purposes of establishing, in the present case, the existence of an obligation to hold a new hearing.

111 It follows that the objection concerning the absence of a new hearing of the undertakings concerned must be rejected.

(c) The objection that the Advisory Committee was not re-consulted

112 All of the appellants submit that the annulment of the PVC I decision necessitated a fresh consultation of the Advisory Committee, pursuant to Article 10(3) of Regulation No 17, for the purposes of adopting the PVC II decision.

113 They complain that the Court of First Instance, in paragraphs 256 and 257 of the contested judgment, held that a fresh consultation of the Advisory Committee would only have been required if a new hearing had itself been necessary.

114 In that connection, it should be observed that Article 1 of Regulation No 99/63 states that:

'Before consulting the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission shall hold a hearing pursuant to Article 19(1) of Regulation No 17'.

115 In paragraph 256 of the contested judgment, the Court of First Instance rightly observed that, pursuant to that provision, the hearing of the undertakings concerned and the consultation of the Advisory Committee are necessary in the same situations (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 54).

116 It has already been established in this case that the annulment of the PVC I decision did not affect the validity of the administrative procedural measures preceding the adoption of that decision and that new hearings were not required.

117 Thus, in accordance with Article 10(3) of Regulation No 17 and Article 1 of Regulation No 99/63, the PVC II decision in fact 'followed up' a procedure establishing an infringement under Article 85 of the Treaty and was preceded by the hearings of the undertakings concerned and by delivery of the opinion of the Advisory Committee on 1 December 1988.

118 In those circumstances, since the PVC II decision did not contain substantial amendments as compared with the PVC I decision, on a draft of which the Advisory Committee had been consulted pursuant to Article 10(5) of Regulation No 17, the Court of First Instance was right to hold, in paragraph 257 of the

contested judgment, that fresh consultation of the Advisory Committee was not required (see, by analogy, with respect to consultation of the Parliament during the legislative process, Case C-392/95 *Parliament* v *Council* [1997] ECR I-3213, paragraph 15).

119 It follows that the complaint concerning the absence of any fresh consultation of the Advisory Committee must be rejected.

(d) The absence of any fresh intervention by the Hearing Officer

120 Degussa, Enichem and ICI claim that the Commission should also have involved the Hearing Officer, whose new role had in the interim been defined by the Commission's decision of 24 November 1990 on the hearings in proceedings relating to Articles 85 and 86 of the EEC Treaty and Articles 65 and 66 of the ECSC Treaty (*XXth Report on Competition Policy*, p. 350, hereinafter 'the decision of 24 November 1990').

121 They object to the finding by the Court of First Instance, in paragraph 253 of the contested judgment, that, since the Commission was not required to hold a new hearing of the undertakings concerned, it could not be in breach of its decision of 24 November 1990, which was not applicable *ratione temporis* to the oral stage of the administrative procedure which preceded adoption of the PVC II decision.

122 In that connection, it should be pointed out that the Commission created the office of hearing officer with effect from 1 September 1982 in accordance with the 'Notice on procedures for applying the competition rules of the EEC and the

ECSC Treaties (Articles 85 and 86 (EEC) and 65 and 66 (ECSC))' published in the *Official Journal of the European Communities* of 25 September 1982 (OJ 1982 C 251, p. 2).

123 In the notice cited above, it defined the office as follows:

'The Hearing Officer shall ensure that the hearing is properly conducted and thus contribute to the objectivity of the hearing itself and of any decision taken subsequently. He shall seek to ensure in particular that in the preparation of draft Commission decisions in competition cases due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned.

In performing his duties he shall see to it that the rights of the defence are respected, while taking account of the need for effective application of the competition rules in accordance with the regulations in force and the principles laid down by the Court of Justice.'

124 The functions of the hearing officer were set out in a text published as an annex to the *XIIIth Report on Competition Policy*, relating to 1983. The wording of Article 2 of that report was identical to that of the initial definition. The text was itself replaced by the decision of 24 November 1990 and the terms of Article 2 of that decision were likewise identical to those of the initial definition.

125 It follows from what was actually involved in the task entrusted to the Hearing Officer who intervened in the procedure prior to adoption of the PVC I decision that the intervention in question was necessarily linked to the hearing of the undertakings with a view to the possible adoption of a decision.

126 Accordingly, having correctly held that a new hearing was not necessary following the annulment of the PVC I decision, the Court of First Instance was right to conclude, in paragraph 253 of the contested judgment, that a fresh intervention by the Hearing Officer in the circumstances provided for in the decision of 24 November 1990, which had meanwhile become applicable, was no longer required.

127 It follows that the complaint concerning the absence of any fresh intervention by the Hearing Officer must be rejected.

(e) The composition of the file submitted to the college of Commissioners for deliberation

128 ICI considers that, as a result of defects in the administrative procedure prior to adoption of the PVC I decision, the college of Commissioners was unable to consider all the relevant documents, particularly a fresh report by the Hearing Officer and a fresh report on the outcome of consultation of the Advisory Committee. The college of Commissioners, the composition of which was different from that of the college which adopted the PVC I decision, thus had at its disposal only the submissions of the parties lodged six years earlier, the report of the Hearing Officer drawn up around that time and the opinion of the Advisory Committee, also dating from 1988.

129 It complains that the Court of First Instance dismissed this plea in paragraph 316 of the contested judgment.

130 It should be noted in that regard that, in paragraph 315 of the contested judgment, the Court of First Instance correctly pointed out that, after the annulment of the PVC I decision, the Commission did not commit any error in law by not carrying out a fresh hearing of the undertakings concerned before adopting the PVC II decision.

131 Furthermore, it follows from paragraphs 122 to 127 and 114 to 119 of this judgment that neither a fresh intervention by the Hearing Officer nor a fresh consultation of the Advisory Committee was required.

132 Accordingly, contrary to what ICI maintains, the file submitted to the college of Commissioners did not have to contain, *inter alia*, a new report by the Hearing Officer or a fresh report on the consultation of the Advisory Committee.

133 The Court of First Instance was therefore right to rule, in paragraph 316 of the contested judgment, that ICI's argument concerning the composition of the file was based on a false premiss and that its plea was accordingly without legal foundation.

134 It therefore follows from all the above considerations that these pleas must be rejected.

6. The plea raised by LVM, DSM, Montedison and ICI alleging expiry of the limitation period for penalising infringements

135 LVM, DSM, Montedison and ICI complain that, in paragraph 1089 et seq. of the contested judgment, the Court of First Instance misapplied Regulation No 2988/74. It wrongly ruled that the five-year limitation period applying to the right to penalise infringements had been suspended for the duration of the judicial proceedings against the PVC I decision pursuant to Article 3 of Regulation No 2988/74, which provides that the limitation period in proceedings

is to be suspended for as long as 'the decision of the Commission' is the subject of proceedings pending before the Community judicature.

136 According to the appellants, that provision is not applicable to the Commission's final decision on an infringement and the imposition of a fine. From its adoption, such a decision is covered by the rules on the limitation period for the enforcement of sanctions laid down in Articles 5 and 6 of Regulation No 2988/74. Therefore, an action brought against such a decision does not suspend the limitation period for penalising infringements. Article 3 of Regulation No 2988/74 applies only to actions brought against the measures interrupting the limitation period which are listed in Article 2 of the Regulation. More precisely, according to LVM and DSM, it applies only to actions against measures of the Commission which, taking the form of a decision, are open to challenge. LVM and DSM claim that the final decision does not interrupt the limitation period, since it does not appear in the exhaustive list contained in Article 2 of Regulation 2988/74. They conclude that an action brought against that decision cannot suspend the limitation period. ICI submits that no act subsequent to notification of the statement of objections, which is the last of the interruptive acts listed in Article 2 of Regulation No 2988/74, can have the effect of suspending the limitation period.

137 It should be observed that, according to Article 4(2) of Regulation No 2988/74, the limitation period for the enforcement of sanctions begins to run only on the day on which 'the decision becomes final', that is to say, either from expiry of the period for bringing an action against the decision on the infringement and the fine, where no action has been brought, or from the decision of the Community judicature giving a final ruling on an action which has been brought, where that action is dismissed, since it is clear that the question of the limitation period for enforcement is devoid of purpose where the decision is annulled.

138 Consequently, the rules relating to the interruption and suspension of the limitation period for the enforcement of sanctions, as laid down in Articles 5 and 6 of Regulation No 2988/74, no longer apply once the Commission has adopted the final decision.

139 For as long as that decision is not final, the limitation period in proceedings is governed by the rules on proceedings laid down in Articles 1 to 3 of that regulation.

140 In accordance with Articles 1(1)(b) and (2) and 2(3) of Regulation No 2988/74, the limitation period in proceedings expires if the Commission has not imposed a fine or a penalty within five years from the date on which it began to run where, during that time, no interruptive action is taken or, at the latest, within ten years from the date on which it began to run where interruptive action has been taken. Nevertheless, pursuant to Article 2(3), the limitation period thus defined is extended by the time for which limitation is suspended pursuant to Article 3.

141 Contrary to the appellants' assertion, it cannot in any way be inferred from the wording of Articles 2 and 3 of Regulation No 2988/74 that 'the decision of the Commission' referred to in Article 3 which is the subject of judicial proceedings before the Community judicature suspending the limitation period can only be one of the acts referred to in Article 2 as interrupting that limitation period or that the list of those acts is exhaustive. In that regard, the Court of First Instance rightly pointed out, in paragraph 1097 of the contested judgment, that some of the measures listed in Article 2(1), in particular written requests for information, inspection authorisations and statements of objections, are preparatory measures and not decisions. Furthermore, the list contained in that article is prefaced by the adverb 'in particular' and is in no way exhaustive.

142 Above all, as the Court of First Instance pointed out in essence in paragraph 1098 of the contested judgment, Articles 2 and 3 of Regulation No 2988/74, relating respectively to interruption and suspension of the limitation period in proceedings, have different aims.

143 Article 2 deals with the consequences of the implementation of investigative measures and proceedings demonstrating efforts on the part of the Commission to take active steps against the undertakings concerned.

144 Article 3, on the other hand, protects the Commission against the effect of the limitation period in situations in which it must await the decision of the Community judicature in proceedings beyond its control before knowing whether the contested act is or is not vitiated by illegality. Article 3 therefore deals with cases in which the inaction of the institution is not the result of a lack of diligence.

145 Such situations arise both in the case of actions against the interruptive measures listed in Article 2 of Regulation No 2988/74 which are open to challenge and in the case of an action against a decision imposing a fine or penalty.

146 Accordingly, the wording and the purpose of Article 3 cover both actions brought against the challengeable measures referred to in Article 2 and actions brought against a final decision of the Commission.

147 Consequently, an action brought against a final decision imposing penalties suspends the limitation period in proceedings pending delivery by the Community judicature of a final ruling on that action.

148 Montedison cannot validly maintain that the effect of suspension of the limitation period in proceedings is that the power of the Commission to conduct

investigations and impose penalties is unlimited because it is reinstated after the delivery of each judgment. The Commission remains affected by the limitation period in proceedings since, once the judgment ordering annulment is delivered, the suspended limitation period begins to run again and remains subject to the period of five or ten years provided for by Article 2(3) of Regulation 2988/74, without the period of suspension being taken into account.

149 ICI cannot reasonably complain that the Court of First Instance ruled, in paragraph 1098 of the contested judgment, that the limitation period is suspended 'where the Commission is prevented from acting for an objective reason not attributable to it', by submitting that the bringing of an action against a decision imposing penalties in no way prevents the Commission from adopting such a decision. Were that assertion to be upheld, it would mean that the institution would withdraw the contested decision in order to replace with it another decision taking account of the aspects challenged. It would effectively deny the Commission the very right to have the Community judicature establish, where appropriate, the legality of the contested decision.

150 Likewise, ICI cannot validly argue that a decision imposing penalties is fully enforceable until it has been judicially annulled. By definition, measures to enforce a decision penalising an infringement cannot be regarded as acts relating to the preliminary investigation of, or the taking of action against, an infringement. Such measures, the legality of which is, moreover, dependent on that of the decision which is the subject of the action, cannot therefore interrupt the limitation period in the event of annulment of a judicially contested decision.

151 ICI cannot claim that the interpretation arrived at by the Court of First Instance effectively allows the Commission to benefit from its own wrongful conduct. Where a measure is annulled, the Commission suffers all the consequences of that annulment, which is necessarily linked to an error made by it. The suspension of the limitation period merely protects the Commission from the effects of the annulment for a period the duration of which is not attributable to it.

152 LVM and DSM submit that, if the action against the PVC I decision must be seen as having suspensive effect, the annulment of that decision must be regarded as having rendered the suspension, like the decision itself, retroactively non-existent.

153 However, the Court of First Instance rightly held, in paragraph 1100 of the contested judgment, first, that Article 3 of Regulation No 2988/74 has meaning only where a decision finding an infringement and imposing a fine, which forms the subject-matter of the action, is annulled and, second, that any annulment of a measure which the Commission has adopted is necessarily imputable to it, in the sense that it reveals an error on the Commission's part. The Court of First Instance was therefore entitled to conclude that to exclude suspension of the limitation period where the action leads to recognition of an error attributable to the Commission would deprive Article 3 of the regulation of all meaning. As it pointed out, it is the very fact that an action is pending before the Court of First Instance or the Court of Justice which justifies the suspension, and not the conclusions reached by those courts in their judgment.

154 Montedison considers that, even in the event of suspension of the limitation period, the new measure interrupting that limitation period had to be taken within five years of the previous one.

155 However, that assessment effectively denies the very consequence of the premiss on which it is based. In the event that the limitation period is suspended, the suspension period which elapses extends the limitation period of five or ten years by the same length of time, in accordance with Article 2(3) of Regulation No 2988/74.

156 LVM, DSM, Montedison and ICI maintain that, in the present case, the limitation period expired on 5 April 1993, five years after notification of the statement of objections, which took place on 5 April 1988. Montedison states that the PVC I decision cannot constitute the previous interruptive measure since

it was annulled by the Court's judgment of 15 June 1994. ICI adds that, in any event, the period of 10 years provided for in Article 2(3) of Regulation No 2988/74 expired in relation to it 10 years after the date of cessation of its participation, namely in October 1993.

157 In that regard, the Court of First Instance rightly held, in paragraph 1101 of the contested judgment, that the limitation period had been suspended for as long as the PVC I decision was the subject of proceedings pending before the Court of First Instance and the Court of Justice. It then correctly pointed out that, even if only the date of the last action lodged before the Court of First Instance, namely 24 April 1989, were to be taken into account, and no account were taken of the time which elapsed between delivery of the judgment of the Court of First Instance and the date on which the matter was referred to the Court of Justice, the limitation period would have to be regarded as having been suspended for a minimum period of 4 years, 11 months and 22 days. Therefore, on the basis that, as the appellants maintain, the statement of objections notified on 5 April 1988 was the last measure interrupting the limitation period, and without having to examine whether a subsequent measure such as the PVC I decision had interrupted the limitation period for a second time, the Court of First Instance correctly concluded that the Commission's power to impose fines did not become time-barred on 27 July 1994, the date on which the PVC II decision was adopted.

158 Montedison further contests the finding by the Court of First Instance, in paragraph 1092 of the contested judgment, that the investigations carried out by the Commission at the premises of ICI, Shell and DSM on 21, 22 and 23 November and 6 December 1983 interrupted the limitation period in the proceedings brought against it. It submits that those investigations could not have had that effect in relation to it, inasmuch as it had terminated its activities on the PVC market 10 months beforehand.

159 However, it should be noted that, under Article 2(2) of Regulation No 2988/74, the interruption of the limitation period applies in relation to all of the undertakings which participated in the infringement.

160 Moreover, the sole fact that an undertaking has terminated a particular economic activity cannot release it from the liability which it may incur as a result of an infringement committed in connection with that activity before its termination.

161 Montedison further asserts that the interruption of the limitation period presupposed the existence of some notification measure or written authorisation to carry out investigations. It claims that the existence of such measures prior to notification of the statement of objections was not established.

162 In that respect, it is sufficient to observe that Article 2(1) of Regulation No 2988/74 provides that the limitation period in proceedings is interrupted by 'any action taken by the Commission... for the purpose of the preliminary investigation or proceedings in respect of an infringement'. That provision does not therefore make the interruption of the limitation period dependent on a notified measure or a written authorisation to carry out investigations.

163 It therefore follows from all of the above considerations that this plea must be rejected.

7. The plea raised by LVM, DSM, Degussa and ICI alleging infringement of the principle that decisions are to be adopted within a reasonable time

164 In paragraphs 120 to 136 of the contested judgment, the Court of First Instance rejected the plea alleging infringement of the principle that decisions are to be

adopted within a reasonable time, which had been raised independently of the plea alleging expiry of the limitation period. It had been submitted before it that there had been a failure to act within a reasonable time with respect to the adoption of the PVC I decision and, *a fortiori*, with respect to that of the PVC II decision.

165 LVM, DSM, Degussa and ICI allege various errors of law committed by the Court of First Instance in its consideration of that plea. In short, they consider that the period to be taken into consideration under the principle of reasonable time covers, in addition to the administrative procedure, all judicial proceedings brought in the present case.

(a) The complaints based on Article 6 of the ECHR

166 LVM and DSM complain that the Court of First Instance failed to respond in a reasoned manner to their argument that Article 6 of the ECHR is as such applicable to proceedings in competition matters, and that it restricted itself to referring to paragraph 56 of its judgment in Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739. Thus, they also complain that, in paragraph 121 of the contested judgment, the Court of First Instance reclassified as a general principle of Community law the fundamental principle that decisions are to be adopted within a reasonable time but then failed to apply Article 6 of the ECHR. In its judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 26 to 44, the Court of Justice, without stating the nature of the principle in detail, ruled that Article 6 of the ECHR is directly applicable and that, in that case, the length of the proceedings before the Court of First Instance was not justified.

167 However, it should be stated that, in paragraph 120 of the contested judgment, the Court of First Instance rightly observed that, as it had already ruled in paragraph 53 of the judgment in *SCK and FNK*, cited above:

— in accordance with settled case-law, fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Community judicature (see, in particular, Opinion 2/94 of the Court of Justice [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14);

— for that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and the guidelines supplied by international treaties and conventions on the protection of human rights on which the Member States have collaborated or to which they are signatories;

— the ECHR has special significance in that respect (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and *Kremzow*, cited above, paragraph 14);

— furthermore, Article F.2 of the Treaty on European Union (now, after amendment, Article 6(2) EU) provides that '[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

168 In paragraph 121 of the contested judgment, it then stated that it was necessary to examine whether the Commission had infringed the general principle of Community law that decisions adopted following administrative proceedings in competition matters must be adopted within a reasonable time.

169 In referring in that connection to paragraph 56 of its judgment in *SCK and FNK*, in which it held that:

— it is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy;

— it is therefore unnecessary to rule on the question whether Article 6(1) of the ECHR is, as such, applicable to administrative proceedings before the Commission relating to competition policy,

the Court of First Instance responded implicitly but necessarily to the plea based on the direct applicability of Article 6 of the ECHR.

170 As to the substance, the Court of First Instance, referring to the wording of Article F.2 of the Treaty on European Union, correctly held that, in the Community legal system, the fundamental rights guaranteed by the ECHR are protected as general principles of Community law.

171 Contrary to the appellants' assertion, it did not disregard the judgment in *Baustahlgewebe*, cited above, in paragraphs 20 and 21 of which the Court of Justice, having referred to the content of Article 6(1) of the ECHR, described as a general principle of Community law the right of all persons to a fair hearing and, in particular, the right to a hearing within a reasonable period of time.

172 It follows that the complaints based on Article 6 of the ECHR must be rejected.

(b) The complaints relating to the penalty for infringement of the principle that decisions are to be adopted within a reasonable time

173 LVM, DSM, Degussa and ICI object to the ruling of the Court of First Instance, in paragraph 122 of the contested judgment, that:

— infringement of the principle that the Commission must act within a reasonable time, if established, would justify annulment of the PVC II decision only in so far as it also constituted an infringement of the rights of defence of the undertakings concerned;

— where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure and can therefore be regarded only as a cause of damage capable of being relied on before the Community judicature in the context of an action based on Article 178 and the second paragraph of Article 215 of the EC Treaty (now Article 235 EC and the second paragraph of Article 288 EC).

174 LVM, DSM and Degussa consider that, in the event of unreasonable delay attributable to the Commission, the latter ceases to be competent to initiate proceedings. According to LVM and DSM, the present case can be distinguished from *Baustahlgewebe*, which concerned unreasonable delay on the part of the Court of First Instance. Degussa submits that, in the present case, the sole legal consequence of the unreasonable delay which is capable of guaranteeing the enforcement of the fundamental right in question is the nullity of the decision adopted. The three appellants seek at the very least a reduction of the fines imposed.

175 ICI submits that, in the event of an infringement of the principle that decisions must be adopted within a reasonable time, it is contrary to the established case-law of the European Court of Human Rights to make annulment of the decision dependent on proof of damage (judgments of the European Court of Human Rights of 15 July 1982 in the case of *Eckle*, Series A No 51, paragraph 66, and of 10 December 1982 in the case of *Corigliano*, Series A No 57, paragraph 31).

176 In that respect, it should be pointed out that the question of the penalty for infringement of the reasonable period principle, already dealt with in *Baustahlgewebe* with respect to judicial proceedings, is relevant only where such an infringement has been established.

177 In stating the reasons referred to above, as set out in paragraph 122 of the contested judgment, the Court of First Instance first took a preliminary view on that question before examining whether, in the present case, there had been an infringement of the reasonable period principle. Since it came to the conclusion that that principle had not been infringed, the findings in question do not form the necessary basis for the operative part of the judgment.

178 It is therefore necessary to assess the arguments submitted by the appellants in the context of the present complaints only if, contrary to the contested judgment, it must be held that there was actually an infringement of the reasonable period principle.

(c) The complaints relating to observance of the principle that action must be taken within a reasonable period

179 In competition matters, the principle that action must be taken within a reasonable period must be observed in administrative proceedings conducted pursuant to Regulation No 17 which may lead to the penalties provided for therein. In the event of an action brought against an administrative decision, it must also be observed in the judicial proceedings before the Community judicature (*Baustahlgewebe*, paragraph 21).

(i) Complaints regarding the administrative procedure conducted by the Commission

— Division of the administrative procedure into two stages

180 LVM, DSM and Degussa complain that, in paragraph 124 of the contested judgment, the Court of First Instance divided the administrative procedure into two stages: one beginning with the investigations carried out in the PVC sector in November 1983 and based on Article 14 of Regulation No 17, the other beginning on the date of receipt by the undertakings concerned of the statement of objections and leading to the adoption of the PVC II decision, excluding the

period covered by the examination by the Community judicature of the legality of the PVC I decision and of the validity of the Court of First Instance's judgment of 27 February 1992 delivered as a result of actions brought against the PVC I decision.

181 In that connection, it should be observed that, contrary to what the appellants maintain, an administrative procedure may involve an examination in two successive stages.

182 The first stage, covering the period up to notification of the statement of objections, begins on the date on which the Commission, exercising the powers conferred on it by Articles 11 and 14 of Regulation No 17 in the context of a preliminary investigation, takes measures involving a complaint that an infringement has been committed and having a significant impact on the situation of the suspected undertakings (see, to that effect, with respect to a preliminary investigation in a criminal case, the judgment of the European Court of Human Rights of 16 July 1971 in the case of *Ringeisen*, Series A No 13, p. 40, paragraph 110; see also the judgment of that court in *Corigliano*, cited above, paragraph 34, and its judgment of 22 May 1998 in *Hozee* v *Netherlands*, *Reports of Judgments and Decisions* 1998-III, p. 1091, paragraph 43). This stage must enable the Commission, after investigation, to adopt a position on the course which the procedure is to follow.

183 The second stage covers the period from notification of the statement of objections to adoption of the final decision. It must enable the Commission to reach a final decision on the alleged infringement.

184 Since each of those two stages has its own internal logic, the complaint must be rejected.

— Failure to consider the duration of the administrative procedure in the light of all the criteria for assessing what constitutes a reasonable period

185 LVM and DSM allege that the reasoning of the Court of First Instance was incorrect and that it failed to comply with its legal obligation to consider the reasonableness of the relevant period in the light of all the assessment criteria, namely the complexity of the case, its importance for the undertakings concerned and the conduct of those undertakings and of the competent authorities.

186 They claim that, with respect to the first stage of the administrative procedure, the Court of First Instance, in paragraphs 128 to 130 of the contested judgment, examined the reasonableness of the period in question by reference only to the criterion of the complexity of the case, thereby totally failing, without any explanation, to have regard to the criteria of the importance of the case and the conduct of the authorities. They also submit that, with respect to the second stage of the administrative procedure, the Court of First Instance, in paragraphs 132 and 133 of the contested judgment, merely examined the reasonableness of the time taken in the light of what was at stake in the case, thereby again failing to consider the other criteria.

187 In that regard, it should be borne in mind that the reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (*Baustahlgewebe*, paragraph 29).

188 However, that list of criteria is not exhaustive and the assessment of the reasonableness of the period in question does not require a systematic examination of the circumstances of the case in the light of each of them where the duration of the proceedings appears justified in the light of one of them. The

purpose of those criteria is to determine whether the time taken in the handling of a case is justified. Thus, the complexity of the case or the dilatory conduct of the applicant may be deemed to justify a duration which is prima facie too long. Conversely, the time taken may be regarded as longer than is reasonable in the light of just one criterion, in particular where its duration is the result of the conduct of the competent authorities. Where appropriate, the duration of a procedural stage may be regarded as reasonable from the outset if it appears to be consistent with the average time taken in handling a case of its type.

189 The Court of First Instance was therefore not obliged to assess the reasonableness of the time taken in the light of all of the criteria referred to by LVM and DSM, since, in paragraphs 124 to 133 of the contested judgment, it considered that the duration of the first procedural stage, namely four years and four months, was justified by the complexity of the case and that the second, lasting 10 months, could not even be considered excessive.

190 It follows that the complaint must be rejected.

— Infringement of the principle that decisions are to be adopted within a reasonable time on account of the duration of the administrative procedure

191 LVM, DSM, Degussa and ICI object to the finding of the Court of First Instance, in paragraph 134 of the contested judgment, that the PVC II decision had been adopted within a reasonable time even though the first stage of the administrative procedure lasted 52 months and a period of inaction by the Commission of approximately 41 months had been pleaded before it. ICI states that the Commission took no action whatever between June 1984 and January 1987. It refers to judgments of the European Court of Human Rights in cases where,

respectively, a period of four years elapsed while a matter was pending before the trial court and a period of 15 months elapsed during a period of preliminary investigation before indictment (judgments of the European Court of Human Rights of 10 July 1984 in *Guincho*, Series A No 81, and of 27 June 1968 in *Neumeister*, Series A No 8). It also refers to paragraphs 45 and 46 of the judgment in *Baustahlgewebe*, which concerned a period of 32 months between the end of the written procedure before the Court of First Instance and the decision to open the oral procedure and a further period of 22 months between the close of the oral procedure and delivery of the judgment. LVM and DSM observe that the European Court of Human Rights has held that a period of inactivity of more than three years is excessive (judgment of the European Court of Human Rights of 13 July 1983 in *Zimmermann and Steiner*, Series A No 66, paragraph 29). It established a yardstick of two years for criminal matters in its judgment of 28 March 1990 in *B* v *Austria*, Series A No 175, a case lasting 33 months. According to the established case-law of the European Court of Human Rights, a reasonable period cannot therefore exceed two years.

192 It should be observed in that respect that the reasonableness of a period cannot be assessed by reference to a precise maximum limit determined in an abstract manner but, rather, must be appraised in the light of the specific circumstances of each case.

193 An initial general examination is carried out to determine whether the period in question is prima facie too long having regard to the procedure being conducted. If it is, a more specific examination is required as to whether there have been any actual delays which cannot be justified by the circumstances of the case.

194 As regards an administrative procedure relating to competition law, the Court of First Instance has exclusive jurisdiction to establish and assess the relevant facts except where those facts are clearly distorted and then, subject to review by the Court of Justice, to define their legal nature with regard to observance of the principle that decisions should be adopted within a reasonable time (see, to that effect, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 49).

195 In the present case, the Court of First Instance held, in paragraphs 125 and 133 of the contested judgment, that the first stage of the administrative procedure lasted four years and four months and the second 10 months.

196 With respect to the first stage, it held as follows, in paragraphs 128 to 130 of the contested judgment:

'128 The facts which had to be elucidated by the Commission were highly complex owing to the type of conduct in question and its range across the geographical market concerned, covering the whole area of activity in the common market of the principal PVC producers.

129 Another factor contributing to the difficulty in establishing the facts was the confused mass of documents collected by the Commission. The documents obtained from its investigations at the premises of various petrochemical product manufacturers during the period concerned and the replies of the latter to the questions put by the Commission under Article 11 of Regulation No 17 constituted a particularly bulky file. Moreover, amongst the myriad documents obtained during the administrative procedure, the Commission had to distinguish between those belonging to the PVC file and those belonging to the file investigated in parallel in the neighbouring PEBD [low density polyethylene] sector, itself the subject, like other thermoplastic products at the same period, of an investigation and a procedure for determining infringements imputed to undertakings amongst which many are also parties to this case. It should also be noted that the file of the case which led to the [PVC II] Decision contained, on a first administrative numbering, a series of documents comprising 1072 pages, and, on another numbering, more than 5000 pages, excluding internal Commission documents.

130 Finally, the complexity of the facts to be elucidated arose from the difficulty of establishing proof of the participation of undertakings in the alleged concerted practice and from the number of undertakings involved. On that point, the [PVC II] Decision states that "17 undertakings took part in the infringement during the period covered..." (point 2, second subparagraph, of the Decision) and that 14 undertakings had been addressees of the original decision.'

197 With respect to the second stage of the administrative procedure, the Court of First Instance, in paragraph 132 of the contested judgment, stressed its importance for the undertakings concerned from the point of view of, first, taking cognisance of the subject-matter of the procedure initiated against them and of the conduct of which it was accused by the Commission and, second, the specific interest of those undertakings in that second stage of the procedure being conducted with particular diligence by the Commission.

198 In paragraph 133 of the contested judgment, with regard to the 10-month duration of that second stage of the administrative procedure, the Court of First Instance stated as follows:

'133 ... That is not sufficient to justify a complaint of undue delay. The objections were notified to the undertakings concerned at the beginning of April 1988. The undertakings replied to the statement of objections in June 1988. Apart from Shell, which did not so request, the undertakings to which the statement of objections was addressed were heard between 5 and 8 September 1988 and on 19 September 1988. The Advisory Committee on Restrictive Practices and Dominant Positions delivered its opinion on the preliminary draft Commission decision on 1 December 1988, and the Commission adopted its original decision 20 days later. The [PVC II] Decision itself was adopted 42 days after delivery of the judgment of 15 June 1994.'

199 In the light of all those findings and assessments set out in the contested judgment, it is apparent that the Court of First Instance, in paragraphs 127 and 134 of the that judgment, was right to deem the duration of the conduct by the Commission of each of the two stages of the administrative procedure preceding adoption of the PVC II decision to be reasonable before correctly concluding, in paragraph 135 of that judgment, that, throughout the whole of that administrative procedure, the Commission complied with the principle that it must act within a reasonable time.

200 Accordingly, this complaint examined must be rejected.

(ii) The complaint that the Court of First Instance failed to consider the judicial proceedings prior to adoption of the PVC II decision from the standpoint of the principle that action must be taken within a reasonable time

201 LVM, DSM, Degussa and ICI complain that, in paragraph 123 of the contested judgment, the Court of First Instance failed, in its assessment of compliance with the principle that action must be taken within a reasonable period, to consider the duration of the two sets of judicial proceedings which led, respectively, to the judgment of the Court of First Instance of 27 February 1992 and to the Court's judgment of 15 June 1994, even though the appellants had submitted that that duration was attributable to the Commission in view of the procedural infringements which it was found to have committed at the end of the proceedings in question. They complain that the Court of First Instance thus limited its assessment to the duration of the administrative procedure before the Commission.

202 In that regard, it must be observed that, in paragraph 123 of the contested judgment, the Court of First Instance ruled as follows with respect to the requested examination of the two sets of judicial proceedings preceding the adoption of the PVC II decision:

> '123 In this case, the administrative procedure before the Commission lasted for a total of some 62 months. The period during which the Community judicature examined the legality of the [PVC I] decision and the validity of the judgment of the Court of First Instance [of 27 February 1992] cannot be taken into account in determining the duration of the procedure before the Commission.'

203 By that reasoning, it rejected the argument that the duration of the judicial proceedings leading to the annulment of the Commission's first decision could be attributed to that institution simply because the illegality leading to the annulment was itself attributable to it.

204 In that respect, it merely drew the appropriate conclusions from the fact that, before it, the appellants:

— did not allege that the duration of the judicial proceedings leading to the annulment of the PVC I decision had been excessive;

— neither attempted to show nor even pleaded any specific delay in those proceedings which was attributable either to the Community judicature or to the Commission itself on account of its conduct during those proceedings.

205 Accordingly, this complaint must be rejected.

(iii) The complaint of infringement by the Court of Justice of the principle that action is to be taken within a reasonable time on account of the length of the judicial proceedings culminating in the contested judgment

206 Degussa maintains that the length of the judicial proceedings leading to the contested judgment is, in itself, contrary to the general principle that action must be taken within a reasonable time. It complains that the Court of First Instance divided the proceedings before it into two distinct stages, each comprising separate written and oral procedures. That division by the Court of First Instance, which was in no way justified, caused the proceedings to last four and a half years. Thus, the Court of First Instance itself infringed the principle that action is to be taken within a reasonable time.

207 As already pointed out in paragraph 179 of this judgment, the general principle of Community law that action is to be taken within a reasonable time is applicable in the context of judicial proceedings brought against a decision of the Commission imposing fines for infringement of competition law (*Baustahlgewebe*, paragraph 21).

208 The Court of Justice must therefore examine, at the appeal stage, Degussa's complaint directed specifically against the duration of the proceedings before the Court of First Instance which culminated in the contested judgment.

209 Those proceedings began with the lodging between 5 and 14 October 1994 of the applications for annulment of the PVC II decision and ended on 20 April 1999, the date on which the contested judgment was delivered. Thus, they lasted approximately four and half years.

210 Such a duration appears prima facie considerable. However, as pointed out in paragraph 187 of this judgment, the reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (*Baustahlgewebe*, paragraph 29).

211 In the present case, it should be borne in mind that the actions before the Court of First Instance were brought by 13 undertakings in five different languages.

212 On 6 April 1995 the Court of First Instance held a meeting with the parties pursuant to Article 64 of its Rules of Procedure. In view of the complexity of the procedural situation, linked, in particular, to the prior stages already completed and to the number and the importance of the pleas raised, it was decided, with the parties' agreement, that the written procedure should be suspended and that the oral procedure should be limited to examination of procedural submissions.

213 By order of 25 April 1995, the cases were joined for the purposes of that oral procedure.

214 The oral procedure took place on 13 and 14 June 1995, but did not ultimately enable the hoped-for procedural solution to be implemented.

215 By order of 14 July 1995, it was therefore ordered that the written procedure should be resumed and that the cases be disjoined.

216 The written procedure followed the normal course, ending on 20 February 1996. It was then made subject to the rules governing languages provided for in Article 35 of the Rules of Procedure of the Court of First Instance.

217 On 7 May 1997, in view of the pleas for annulment based on the undertakings' having been given insufficient access to the Commission's file on which the PVC II decision was founded, the Court of First Instance granted the appellants, in the context of measures of organisation of procedure, access to that file, save for internal Commission documents and documents containing business secrets or other confidential information.

218 Having consulted the file in June and July 1997, all the appellants except for Wacker-Chemie and Hoechst lodged observations at the Registry of the Court of First Instance in July and September 1997. The Commission lodged its observations in reply in December 1997.

219 By order of 22 January 1998, after the parties had been heard, the cases were rejoined for the purposes of the oral procedure, which took place between 9 and 12 February 1998.

220 The contested judgment was delivered on 20 April 1999, ruling on all of the numerous procedural and substantive pleas after a statement of grounds comprising 1269 paragraphs.

221 It follows from the findings set out above that the duration of the judicial proceedings leading to the contested judgment was justified in the light of the particular complexity of the case.

222 Consequently, this complaint must be rejected.

(iv) The complaint of infringement of the principle that decisions are to be adopted within a reasonable time on account of the total duration of the administrative and judicial proceedings in the present case

Arguments of the parties

223 With reference to the case-law of the European Court of Human Rights (judgments of 27 June 1968 in *Wemhoff*, Series A No 7, paragraphs 18 and 19; *Neumeister*, cited above, paragraph 19; of 28 June 1978 in *König*, Series A No 27, paragraphs 98 and 99; and of 24 September 1997 in *Garyfallou AEBE* v

Greece, *Reports of Judgments and Decisions* 1997-V, p. 1821, paragraphs 40 to 43), LVM, DSM, Degussa and ICI submit that the reasonableness of a period must be assessed in the light of the total duration of the procedure, that is to say, the duration of the preliminary administrative procedure and that of any judicial proceedings. In the present case, the entire procedure must therefore be taken into account, including the present appeal proceedings.

224 Degussa maintains that, in view of the probable duration of the present appeal proceedings, the procedure is unlikely to be finally closed until after approximately 20 years. The absolute limit of what still constitutes an acceptable length of procedure will thus be exceeded.

225 The Commission considers that the idea of a uniform procedure for all cases is incompatible with the guarantee of judicial independence as it emanates, according to the Court's case-law, from the general principle of Community law, inspired by Article 6 of the ECHR, under which every person has the right to a fair trial. That right also comprises the right to a tribunal that is independent of the executive power in particular (Joined Cases C-174/98 P et C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 17).

226 It would run counter to the principle of the procedural independence of the courts if the duration of the administrative procedure were to determine that of the judicial proceedings, which would be the case if the permissible duration of the judicial proceedings were to depend on the time already taken by the administrative authorities.

227 The necessary distinction between administrative and judicial proceedings in accordance with the separation of powers also stems from Article 2(3) of Regulation No 2988/74, which does not include the duration of any judicial proceedings in the limitation period.

228 The Commission submits that Regulation 2988/74, adopted to give effect to a principle laid down by the Court in Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769, paragraph 6, introduced an exhaustive set of rules governing the passage of time in the competition cases with which it deals and complying with the principles of legal certainty and the right to a fair hearing. It is therefore unnecessary to introduce a new set of rules based on 'undue delay'.

Findings of the Court

229 In the context of the present case, the Court does not consider it necessary to rule on the question whether and, if so, under what circumstances an infringement of the principle that decisions are to be adopted within a reasonable time can be established, after a comprehensive assessment, on the basis of the total duration of administrative and judicial proceedings including the final appeal proceedings before the Court of Justice.

230 Even assuming that the consideration of the plea alleging infringement of the reasonable period principle requires not only a separate examination of each procedural stage but also a comprehensive assessment of the administrative procedure and any judicial proceedings as a whole, it must be held in this case that the principle that decisions are to be adopted within a reasonable time has not been infringed despite the exceptional duration of the period which has elapsed between the commencement of the administrative procedure and delivery of this judgment.

231 In that respect, it should be pointed out that the total duration of that period can be explained and justified by the conjunction of a complex administrative procedure and four successive sets of judicial proceedings.

232 The longest part of the period in question was concerned with the judicial assessment of the case, which provided those appellants raising the plea under consideration here with the opportunity to exercise fully their rights of defence. In particular, the measures of organisation of procedure taken by the Court of First Instance during the second half of 1991 enabled them to obtain the desired clarifications as to the circumstances in which the PVC I decision had been adopted. Furthermore, the measure of organisation of procedure taken by the Court of First Instance during 1997 allowed them to have full access to the Commission's file and to submit any relevant observations.

233 More generally, the judicial proceedings were made subject to the language rules applicable to the Community judicature. In particular, they involved the submission of a very large number of pleas, some of which raised new and complex legal issues. All of them were considered extensively.

234 It should be observed that the aim of promptness — which the Commission, at the stage of the administrative procedure, and the Community judicature, at the stage of judicial proceedings, must seek to achieve — must not adversely affect the efforts made by each institution to establish fully the facts at issue, to provide the parties with every opportunity to produce evidence and submit their observations, and to reach a decision only after close consideration of the existence of infringements and of the penalties (see, with respect to the reasonable period referred to in Article 5(3) of the ECHR, *Wemhoff*, cited above, paragraph 17, and, with respect to Article 6(1) of the ECHR, *Neumeister*, paragraph 21).

235 For all the reasons set out above, the plea alleging infringement of the principle that decisions are to be adopted within a reasonable period of time must be rejected in its entirety.

8. The plea raised by DSM alleging a failure to observe the principle of the inviolability of the home

236 Before the Court of First Instance, DSM pleaded the illegality of all the investigations carried out in this case on the basis of written authorisations under Article 14(2) of Regulation No 17 or decisions under Article 14(3).

237 It alleged, in that respect, that there had been a failure to observe the principle of the inviolability of the home within the meaning of Article 8 of the ECHR concerning the right to respect for private and family life, home and correspondence, as interpreted by the European Court of Human Rights (judgment of 16 December 1992 in *Niemietz*, Series A No 251-B, paragraph 31).

238 It also disputed the validity of the way in which all of the investigations had been conducted, submitting that they infringed professional secrecy in view of the nature and volume of the documents actually examined for that purpose.

239 In paragraph 411 of the contested judgment, the Court of First Instance declared that it was open to DSM, in so far as documents obtained by the Commission were used against it, to challenge the legality of investigation decisions addressed to other undertakings since it was not established that it would have been able to challenge the legality of those decisions in the context of a direct action. In

paragraphs 412 and 414, the Court of First Instance held that, in the context of its action for annulment of the final decision, DSM could challenge the legality of the authorisations to investigate, which are not measures that may be challenged by an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), and the manner in which the Commission conducted its investigations.

240 As regards the substance, the Court of First Instance considered, in paragraph 417 of the contested judgment, that the plea must be understood as alleging infringement of the general principle of Community law ensuring protection against intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, which are disproportionate or arbitrary (*Hoechst*, cited above, paragraph 19; Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 30; Joined Cases 97/87, 98/87 and 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 16).

241 In paragraph 419 of the contested judgment, it observed that the decisions to investigate sent by the Commission to certain undertakings in 1987 were identical or similar to that which it sent to Hoechst in the same year in the case leading to the judgment in *Hoechst*, in which the application for annulment was dismissed. The Court of First Instance concluded therefrom that, in so far as the pleas and arguments put forward by LVM and DSM were identical or similar to those put forward at that time by Hoechst, there was no reason to depart from the case-law of the Court of Justice. It therefore rejected the complaint against the decisions at issue in this case.

242 In paragraphs 421 and 422 of the contested judgment, it also rejected the complaint made against the investigations carried out pursuant to simple authorisations and, in paragraphs 424 to 426 of that judgment, the complaint raised against the manner in which those investigations were carried out.

243 Accordingly, in paragraph 427 of the contested judgment, the Court of First Instance rejected the plea in its entirety.

244 DSM objects to the finding of the Court of First Instance in paragraph 420 of the contested judgment that the development of the case-law of the European Court of Human Rights concerning Article 8 of the ECHR had no direct impact on the merits of the solutions adopted in *Hoechst*, *Dow Benelux* and *Dow Chemical Ibérica*, cited above.

245 On the contrary, according to DSM, the result of the judgment in *Niemietz*, cited above, was that, in the context of investigations under Article 14 of Regulation No 17, the Commission must exercise its powers in compliance with the guarantees provided for by Article 8 of the ECHR and with the interpretation given thereto by the European Court of Human Rights.

246 DSM states that its complaint in that respect was based on a twofold infringement of Article 8 of the ECHR, as interpreted in the *Niemietz* judgment. First, the authorisation pursuant to which an investigation of its premises was carried out on 6 December 1983 was drafted in general terms. Second, that investigation infringed professional secrecy to a disproportionate degree.

247 The application of the criteria of Article 8 of the ECHR for the purposes of assessing the necessity and the proportionality of the authorisation of the investigation and the manner in which it was conducted was therefore at issue before the Court of First Instance.

248 DSM maintains that, had the Court of First Instance applied Article 8 of the ECHR, it would have concluded that the Commission could not use as evidence the documents found on the appellant's premises, in particular annexes P 5, P 6, P 9, P 11, P 13, P 14, P 18, P 21, P 24, P 29, P 39, P 41 and P 71.

249 In that respect, it should be observed that:

— the case-law of the European Court of Human Rights relating to the interferences by the public authorities referred to in Article 8(2) of the ECHR, on which the appellant relied, concerns measures taken by those authorities against the will of a suspect by way of coercion;

— the judgments in *Hoechst*, *Dow Benelux* and *Dow Chemical Ibérica*, which DSM considers to have been superseded by that case-law, examined generally the nature and scope of the powers of investigation conferred by Article 14 of Regulation No 17 before ruling on the validity of decisions to investigate under Article 14(3), which, in the circumstances described in Article 14(6), permit recourse to coercive measures in the event of opposition from an undertaking to an investigation ordered by a decision.

250 However, it is clear from the wording of the appeal (paragraphs 7.8 to 7.12) that it is directed solely against the examination by the Court of First Instance of the investigation carried out on the premises of DSM on 6 December 1983 pursuant to an authorisation dated 29 November 1983. It therefore relates only to the application of Article 14(2) of Regulation No 17, which does not permit recourse to coercive action in the event of a refusal by an undertaking to submit to such an investigation, as the Court of First Instance rightly observed in paragraph 421 of the contested judgment.

251 Accordingly, the complaint made by DSM against paragraph 420 of the contested judgment must be rejected as irrelevant without its being necessary to rule on the merits of the statement in that paragraph that the development of the case-law of

the European Court of Human Rights relating to Article 8 of the ECHR has no direct impact on the merits of the solutions adopted in *Hoechst*, *Dow Benelux* and *Dow Chemical Ibérica*. The ground of judgment challenged relates only to the examination by the Court of First Instance, in paragraph 419 of the contested judgment, of the decisions to investigate sent by the Commission pursuant to Article 14(3) of Regulation No 17, which are not mentioned in the appeal.

252 With respect to the authorised investigations, the Court of First Instance, analysing, in paragraph 417 of the contested judgment, the plea for annulment taken as a whole, rightly held first of all, on the basis of the judgments in *Hoechst* (paragraph 19), *Dow Benelux* (paragraph 30) and *Dow Chemical Ibérica* (paragraph 16), that that plea must be understood as alleging infringement of the general principle of Community law ensuring protection against intervention by the public authorities in the sphere of private activities of any person, whether natural or legal.

253 In paragraph 421 of the contested judgment, it specifically stated that investigations carried out on a simple authorisation are based on the voluntary cooperation of the undertakings (*Hoechst*, paragraph 31; *Dow Benelux*, paragraph 42; *Dow Chemical Ibérica*, paragraph 28). In that respect, it rightly held that the penalty provided for in Article 15(1)(c) of Regulation No 17 applies only if, having agreed to cooperate in the investigation, the undertaking fails to produce the books or other business documents requested in full.

254 Next, having regard to the authorisation of 29 November 1983, which, admittedly, was drafted in terms which would have benefited from greater precision but which contained the essential information — the subject-matter and purpose of the investigation — required by Article 14(2) of Regulation No 17, namely, in the present case, the gathering of information on the

agreements suspected of being contrary to Article 85 of the Treaty, concerning producers of thermoplastics, including PVC, and relating to pricing and to the distribution of market shares amongst the participants, the Court of First Instance was entitled to hold in paragraph 422 of the contested judgment, in its assessment of the facts, that the plea alleging undue interference by the public authority was unfounded, in the absence of any evidence that the Commission went beyond the cooperation offered by the undertaking.

255 Finally, with respect to the complaint concerning the manner in which the investigations were carried out, the Court of First Instance was able to hold, in paragraph 425 of the contested judgment, without distorting the facts, that the allegedly excessive volume of documents of which the Commission obtained copies — which is, moreover, not otherwise defined by DSM — could not in itself constitute a defect in the conduct of the investigation, particularly when the Commission was carrying out an inquiry into an alleged agreement between all the European producers in a given sector.

256 It therefore did not err in law by rejecting the appellant's plea in so far as it challenged the validity of the authorised investigation carried out on its premises on 6 December 1983 and the measures taken in conducting that investigation.

257 It follows that this plea raised in the appeal must itself be rejected.

9. The plea raised by LVM and DSM alleging infringement of the privilege against self-incrimination

258 Before the Court of First Instance, LVM and DSM disputed the legality, in particular under Article 6 of the ECHR, of all the information obtained from the

undertakings by the Commission pursuant to Article 11(2) or (5) of Regulation No 17 irrespective of the addressees of the requests for information or decisions requiring information.

259 They submitted that Article 6 of the ECHR, as interpreted by the European Court of Human Rights (judgment of 25 February 1993 in *Funke*, Series A No 256 A, paragraph 44; see also the opinion of the European Commission of Human Rights of 10 May 1994 in *Saunders* v *United Kingdom*, *Reports of Judgments and Decisions* 1996-VI, p. 2095, paragraphs 69, 71 and 76), lays down a right to remain silent and in no way to contribute to one's own incrimination, without any distinction being made according to the type of information requested. That right precludes the situation in which an undertaking is itself required to provide evidence of infringements which it has committed in any form, including documentary form.

260 None of the undertakings' responses was provided voluntarily. All of them were given under threat of the penalties provided for in Article 15(1)(b) of Regulation No 17.

261 LVM and DSM therefore submitted that none of the undertakings' responses could be adduced as evidence. All of the responses should have been excluded from consideration. They requested that the PVC II decision be annulled inasmuch as it was based on evidence obtained in breach of the privilege against self-incrimination.

262 In their appeals, LVM and DSM claim that the Court of First Instance erred in law when examining their plea alleging breach of the privilege against self-incrimination resulting from Article 6 of the ECHR. They state that their plea for annulment of the contested judgment is directed against paragraphs 439 to 459 thereof.

263 First of all, they complain that, in paragraphs 447 to 449 of the contested judgment, the Court of First Instance, on the issue of the scope of the right asserted by them, ruled to the same effect as the judgment in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraphs 34 and 35, thereby affording lesser protection to that right than results from recent developments in the case-law of the European Court of Human Rights.

264 They complain further that, in paragraph 453 of the contested judgment, the Court of First Instance, having regard to *Orkem*, cited above, held that the illegality of the questions challenged by LVM and DSM, established in paragraph 451 of that judgment, did not affect the legality of the PVC II decision because the undertakings had either refused to answer those questions or denied the facts on which they were being questioned.

265 LVM and DSM submit that, contrary to the finding of the Court of First Instance, their plea related not only to those questions posed by the Commission in the decisions requiring information referred to in paragraphs 451 to 453 of the contested judgment, which remained unanswered, but also to the answers of certain undertakings which the Commission used as evidence. In that respect, they rely on six answers, namely two given by ICI and four given by BASF, Elf Atochem, Solvay and Shell respectively, to which they specifically referred in the replies lodged by them in the proceedings before the Court of First Instance.

266 They maintain that application of the legal criteria resulting from the case-law of the European Court of Human Rights should have led to those six answers being excluded from use as evidence.

267 It should be pointed out that, in paragraphs 441 and 442 of the contested judgment, to which the appellants raised no reasoned objection, the Court of First

Instance declared the plea inadmissible, in so far as it sought to have the decisions requiring information which were addressed to each of them declared illegal, on the ground that the undertakings in question did not bring actions for annulment of those decisions within two months of their notification.

268 Accordingly, in paragraphs 443 to 459 of the contested judgment, the merits of the plea were considered only to the extent that it alleged infringement of the privilege against self-incrimination by virtue of:

— either the requests for information made under Article 11(2) of Regulation No 17, irrespective of the addressees, inasmuch as such measures could not be challenged by way of a direct action for annulment;

— or those decisions requiring information which were addressed, under Article 11(5) of Regulation No 17, to undertakings other than the appellants and against which the appellants were unable to bring an action for annulment.

269 The complaint made against the requests for information and against the decisions requiring information addressed to other undertakings implicitly consists of two aspects, namely the criticism (a) that the Commission obtained information incriminating those undertakings in their responses and (b) that it obtained information incriminating LVM and DSM in those same responses.

270 It should be observed that the Court of First Instance, which was not asked to examine the question whether the appellants had standing to raise the first aspect of that complaint, considered the merits of their plea as a whole, as defined and analysed in the preceding two paragraphs of this judgment.

271 In so doing, it did not follow the finding in paragraph 30 of the *Orkem* judgment that neither the wording of Article 6 of the ECHR nor the decisions of the European Court of Human Rights indicate that that article recognises any right not to give evidence against oneself.

272 On the contrary, in paragraphs 444 to 449 of the contested judgment, it in fact upheld the principles laid down in paragraphs 27, 28 and 32 to 35 of the *Orkem* judgment, in accordance with which, in particular:

— Regulation No 17 does not give an undertaking under investigation any right to evade the investigation on the ground that the results thereof might provide evidence of an infringement by it of the competition rules;

— on the contrary, it imposes on the undertaking an obligation to cooperate actively, which implies that it must make available to the Commission all information relating to the subject-matter of the investigation;

— in the absence of any right to remain silent expressly embodied in Regulation No 17, certain limitations on the Commission's powers of investigation during the preliminary inquiry are nevertheless implied by the need to safeguard the rights of the defence, which is a fundamental principle of Community law;

— in that connection, whilst, in order to ensure the effectiveness of Article 11(2) and (5) of Regulation No 17, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove.

273 The *Orkem* judgment thus acknowledged as one of the general principles of Community law, of which fundamental rights are an integral part and in the light of which all Community laws must be interpreted, the right of undertakings not to be compelled by the Commission, under Article 11 of Regulation No 17, to admit their participation in an infringement (see *Orkem*, paragraphs 28, 38 *in fine* and 39). The protection of that right means that, in the event of a dispute as to the scope of a question, it must be determined whether an answer from the undertaking to which the question is addressed is in fact equivalent to the admission of an infringement, such as to undermine the rights of the defence.

274 The parties agree that, since *Orkem*, there have been further developments in the case-law of the European Court of Human Rights which the Community judicature must take into account when interpreting the fundamental rights, as

introduced by the judgment in *Funke*, cited above, on which the appellants rely, and the judgments of 17 December 1996 in *Saunders* v *United Kingdom* (*Reports of Judgments and Decisions* 1996-VI, p. 2044) and of 3 May 2001 in *J.B.* v *Switzerland* (not yet published in the *Reports of Judgments and Decisions*).

275 However, both the *Orkem* judgment and the recent case-law of the European Court of Human Rights require, first, the exercise of coercion against the suspect in order to obtain information from him and, second, establishment of the existence of an actual interference with the right which they define.

276 Examined in the light of that finding and the specific circumstances of the present case, the ground of appeal alleging infringement of the privilege against self-incrimination does not permit annulment of the contested judgment on the basis of the developments in the case-law of the European Court of Human Rights.

277 First, the requests for information under Article 11(2) of Regulation No 17 were examined in paragraphs 455 to 457 of the contested judgment.

278 In that regard, the appellants have raised no express arguments against the grounds set out in therein, on the basis of which the Court of First Instance rejected the complaint made by them.

279 They do not show how the Court of First Instance erred in law, in paragraph 456 of the contested judgment, by basing that rejection on the finding that an undertaking is not obliged to reply to a request for information since the penalty provided for in Article 15(1)(b) of Regulation No 17 applies only where, having agreed to reply, the undertaking provides inaccurate information. The Court of First Instance thus correctly drew the appropriate distinction between a request for information and a decision requiring information, which additionally subjects an undertaking to a penalty in the event of a refusal to reply.

280 The complaint against the requests for information must therefore be rejected.

281 Second, the decisions requiring information adopted under Article 11(5) of Regulation No 17 were considered in paragraphs 451 to 454 of the contested judgment.

282 The Court of First Instance stated that it was undisputed that the questions contained in the decisions and challenged by the appellants were the same as those annulled by the Court of Justice in *Orkem* and that they were therefore vitiated by the same illegality. However, it found that the undertakings had either refused to answer those questions or denied the facts on which they were questioned. It concluded that the illegality of the questions at issue did not affect the legality of the PVC II decision and stated that the appellants had neither identified any answer given specifically to those questions nor indicated the use made of those answers by the Commission in the PVC II decision.

283 In thus ruling on the decisions adopted under Article 11(5) of Regulation No 17, it implicitly rejected, as a matter of law, the appellants' complaint concerning

those questions posed in that legal context which did not involve answers of the undertakings which led them to admit the existence of the infringement with which the investigation was concerned. According to the Court of First Instance, those questions were therefore not illegal in terms of the *Orkem* judgment.

284 With respect to the questions in those decisions which it held to be illegal, the Court of First Instance found essentially, without referring exclusively to those which remained unanswered, that they did not lead to answers constituting admissions or incriminations of third parties since they were countered either by refusals to answer or by denials.

285 It then proceeded to carry out an appraisal of the facts which does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (see, in particular, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 78, and the order of 13 November 2001 in Case C-430/00 P *Dürbeck* v *Commission* [2001] ECR I-8547, paragraph 24).

286 In their appeals, in support of their assertion that the answers of some undertakings contributed to the gathering of evidence, LVM and DSM merely refer, without providing any specific explanations, to the six answers given by other undertakings on which they relied in the replies lodged by them in the proceedings before the Court of First Instance.

287 They do not state whether those answers were given in response to the requests for information, that is to say, without any compulsion, or in pursuance of the decisions requiring information, that is to say, under a legal obligation.

288 To the extent that the answers in question were given in response to the requests for information, their use could not be considered unlawful by the Court of First Instance, for the reasons set out in paragraph 456 of the contested judgment (see paragraph 279 of this judgment).

289 To the extent that they were given in pursuance of the decisions requiring information, LVM and DSM do not indicate any aspects of those answers which were in fact used to incriminate the addressees themselves or the appellants, even on the assumption that the appellants' complaint relates to the plea based on the right not to incriminate oneself.

290 The appellants thus make it impossible for the Court of Justice to determine whether the Court of First Instance distorted the facts in its assessment of the answers given to the questions contained in the decisions which it ruled to be illegal.

291 Nor do they show that the answers given to the other questions contained in the decisions which it did not consider to be illegal were used for the purposes of incrimination.

292 It follows that the complaint against the decisions requiring information must likewise be rejected without its being necessary to rule on the question whether the Court of First Instance erred in law in holding, in paragraphs 446 to 449 of the contested judgment and by reference to the *Orkem* judgment, that such decisions are illegal only in so far as a question obliges an undertaking to supply answers leading it to admit that there has been an infringement.

293 It follows from the above that this plea must be rejected in its entirety.

10. The plea in law raised by DSM and ICI alleging failure to comply with the obligation of professional secrecy and infringement of the rights of the defence

294 Before the Court of First Instance, DSM and ICI pleaded infringement of the obligation of professional secrecy as provided for in Article 20 of Regulation No 17, which provision is also intended to protect the rights of the defence. They complained that, in the context of the procedure relating to the PVC sector, during the authorised investigation carried out at the premises of ICI in November 1983, the Commission obtained from ICI fresh copies of documents — namely 'planning documents', a document called 'Sharing the Pain' and ICI's note of 15 April 1981 — of which it had knowledge and of which it had obtained copies during a previous authorised investigation carried out at the same premises on 13 and 14 October 1983 in the context of a different procedure relating to the polypropylene sector.

295 DSM put forward the same complaint with regard to the monthly and quarterly reports on all polymers produced and sold at that time, that is to say, polypropylene, PEDB and PVC. Those documents, contained in annexes P 5, P 6, P 9, P 11, P 13, P 14, P 18, P 21, P 24, P 29, P 39, P 41 and P 71, were likewise obtained by the Commission on 13 and 14 October 1983 in the context of the procedure concerning polypropylene and then requested once again from ICI and DSM during the authorised investigations carried out in the context of the procedure relating to the PVC sector at the premises of those two undertakings on 21 to 23 November 1983 and 6 December 1983 respectively.

296 DSM argued that the conduct complained of also infringed Article 6 of the ECHR, which, although it contains no specific rules governing the obtainment and use of evidence, does not preclude a review of whether a proceeding as a

whole, including the way in which the evidence is presented, is fair (judgments of the European Court of Human Rights of 20 November 1989 in *Kostovski*, Series A No 166, paragraph 39; of 22 April 1992 in *Vidal*, Series A No 235 B, paragraph 33; and of 16 December 1992 in *Edwards*, Series A No 247 B, paragraph 34).

297 DSM and ICI complain that the Court of First Instance rejected their arguments in accepting the legality of the use of the documents in issue in the form of fresh copies of those documents obtained in the context of the procedure relating to the PVC sector. They claim that that conclusion is inconsistent with the case-law established in *Dow Benelux*, in Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785 and in Case C-36/92 P *SEP* v *Commission* [1994] ECR I-1911).

298 In that connection, it should be observed that, under Articles 20(1) and 14(2) and (3) of Regulation No 17, information obtained during investigations must not be used for purposes other than those indicated in the order or decision pursuant to which the investigation is carried out (*Dow Benelux*, paragraph 17).

299 That requirement is intended to protect, in addition to the professional secrecy expressly referred to in Article 20(1) of Regulation No 17, the undertakings' defence rights (see *Dow Benelux*, paragraph 18), which not only form part of the fundamental principles of Community law but are also enshrined in Article 6 of the ECHR.

300 Those rights would be seriously endangered if the Commission were able to rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof (*Dow Benelux*, paragraph 18).

301 On the other hand, it cannot be concluded that the Commission is precluded from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty (*Dow Benelux*, paragraph 19).

302 In this case, after rightly referring to the principles laid down by the Court of Justice in *Dow Benelux*, which are supported by the cases relied on by DSM, namely *Asociación Española de Banca Privada* (paragraph 43) and *SEP* (paragraph 29), the Court of First Instance held in paragraph 474 of the contested judgment that the Commission did not introduce into this case of its own motion documents which it had obtained in another case, but obtained those documents again in the context of authorisations to investigate which primarily concerned PVC.

303 Based on that finding of fact, the Court of First Instance then correctly examined the plea as posing the question whether the Commission, having obtained documents in one matter and used them as evidence to open another proceeding, was entitled, on the basis of authorisations or decisions concerning that second proceeding, to request fresh copies of those documents and then use them as evidence in the second matter.

304 As regards that question, it rightly took the view, in paragraph 476 of the contested judgment, that, since the Commission had obtained those documents anew on the specific basis of authorisations to investigate directed primarily at PVC, in accordance with Article 14(2) of Regulation No 17, and had used them for the purpose indicated in those authorisations, it had observed the rights of defence afforded to undertakings under that provision.

305 Undertakings are in no way deprived of the protection afforded by Article 20 of Regulation No 17 if the Commission makes a new request for a document. From the point of view of the defence of their rights, they are in the same position as where the Commission no longer has the document, since it is forbidden to make direct use as evidence in a second proceeding of a document obtained in a previous proceeding.

306 It is necessary to point out, as the Court of First Instance did in paragraph 477 of the contested judgment, that the fact that the Commission has obtained documents in a given matter for the first time does not confer such absolute protection that those documents cannot be requested under statutory powers in another matter and used as evidence.

307 It follows that the Court of First Instance did not err in law by concluding that there was no infringement of Article 20 of Regulation No 17 or of the fundamental principle of observance of the rights of the defence.

308 Accordingly, this plea must be rejected.

11. The plea raised by LVM, DSM, Elf Atochem, Degussa and Enichem alleging infringement of the rights of the defence as a result of insufficient access to the Commission's file

309 LVM, DSM, Elf Atochem, Degussa and Enichem argue that the Court of First Instance erred in law by rejecting the plea raised before it by which they alleged infringement of the fundamental principle of observance of the rights of the

defence as a result of the insufficient access granted by the Commission to its file during the administrative procedure.

310 They observe that the Court of First Instance held that the Commission did not grant them proper access to its file during the administrative procedure.

311 They nevertheless complain that it made annulment of the PVC II decision conditional on its being established that the non-disclosure of documents could have influenced the course of the procedure and the content of that decision to the detriment of the undertaking concerned.

312 According to the appellants, for the purposes of annulment, it is not necessary for the non-disclosure actually to have influenced the procedure. In the view of LVM and DSM, having regard to the right of equal access to the file emanating from Article 6 of the ECHR (judgment in *Edwards*, cited above, paragraph 36; decision of the European Commission of Human Rights of 6 October 1977 in *Lynas* v *Switzerland*, application No 7317/75, *Yearbook of the European Convention on Human Rights*, p. 413), the mere establishment of incomplete access to the file must lead to annulment of the Commission's decision. To the same effect, Enichem submits that the failure to disclose all documents in the file, apart from confidential or internal documents, constitutes in itself an infringement of the rights of the defence. According to Degussa, it is sufficient for the Commission to fail to make available documents which may be relevant to the undertakings' defence.

313 LVM, DSM, Elf Atochem, Degussa and Enichem complain that the Court of First Instance then itself examined the documents which had not been accessible during the administrative procedure in order to determine whether their non-disclosure could have influenced the course of the procedure and the content of the PVC II decision to the detriment of the undertaking concerned.

314 LVM and DSM claim that such an approach contradicts the Court of First Instance's own finding that an infringement of the rights of the defence at the stage of the administrative procedure cannot be remedied in the judicial proceedings. Like Degussa and Enichem, they consider that, in examining the documents in question, the Court of First Instance acted as investigator, instead of the Commission, and remedied the procedure *a posteriori*.

315 In that regard, it must be observed that access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their views effectively on the conclusions reached by the Commission in its statement of objections (see Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 75, and the case-law cited therein).

316 The right of access to the Commission's file is therefore designed to ensure effective exercise of the rights of the defence (see *Hercules Chemicals*, cited above, paragraph 76). Those rights are not only fundamental principles of Community law but are also enshrined in Article 6 of the ECHR, as is pointed out in paragraph 299 of this judgment.

317 Infringement of the right of access to the Commission's file during the procedure prior to adoption of the decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed (*Hercules Chemicals*, paragraph 77).

318 In such a case, the infringement committed is not remedied by the mere fact that access was made possible during the judicial proceedings relating to an action in

which annulment of the contested decision is sought. Where access has been granted at that stage, the undertaking concerned does not have to show that, if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that it would have been able to use those documents for its defence (*Hercules Chemicals*, paragraphs 78 and 81).

319 In the present case, it is common ground that during the administrative procedure the Commission granted access to only part of its administrative file, as the Court of First Instance stated in paragraph 1010 of the contested judgment before going on to find, in paragraph 1019, that the Commission had not therefore given the applicants proper access to the file.

320 The parties also agree that, by letter of 7 May 1997, the Court of First Instance, in the context of measures of organisation of procedure, granted each of the appellants access to the Commission's file apart from internal documents of the Commission and documents containing business secrets or other confidential information. It invited the appellants to submit their comments for the purpose of showing how, in their view, the failure to disclose certain documents could have affected their defence. The appellants submitted such comments to it.

321 In the light of the principles referred to in paragraphs 315 to 318 of this judgment, the Court of First Instance first of all rightly held, in paragraph 1011 of the contested judgment, that the undertakings have a right of access to the file, that that right is one of the procedural safeguards intended to protect the rights of the defence and that respect for those rights is a fundamental principle of Community law.

322 It did not err in law by going on to rule, in paragraph 1020 of the contested judgment, that the fact that the Commission had not granted proper access to its

file could not of itself warrant annulment of the PVC II decision. It merely expressed in different terms the notion that that fact is, in principle, capable of leading to such annulment (see paragraph 317 of this judgment).

323 Similarly, in pointing out in paragraph 1021 of the contested judgment that it was necessary to consider whether the appellants' ability to defend themselves had been affected by the conditions in which they had had access to the Commission's administrative file, it laid down the criterion that the rights of defence of the undertaking concerned must have been infringed (see also paragraph 317 of this judgment).

324 Finally, in ruling in the same paragraph of the contested judgment that it is sufficient for a finding of infringement of the rights of the defence for it to be established that the non-disclosure of the documents in question 'might have influenced' the course of the procedure and the content of the decision to the detriment of an applicant, it merely laid down the condition that the applicant concerned must show only that it could have used the documents in question for its defence (see paragraph 318 of this judgment).

325 Thus, far from remedying the procedure *a posteriori*, it rightly restricted its review to the sole question whether the documents at issue could have been relied on by an undertaking in its defence.

326 It correctly concluded, in paragraph 1022 of the contested judgment, that the decision would have to be annulled if its review showed that that had been the case.

327 By explaining at that point that the infringement of the rights of the defence committed at the stage of the administrative procedure could not be remedied during the proceedings before the Court of First Instance, whose judicial review

cannot be a substitute for a thorough investigation of the case in the course of the administrative procedure, it merely confirmed, without any contradiction, that the scope of its power of review was limited. It confirmed that limitation again, in particular in paragraph 1035 of the contested judgment, by stating that the purpose of its review was to determine whether the failure to disclose documents or extracts could have affected the appellants' ability to conduct their defence.

328 It follows that the complaints raised by the appellants against the framework of the Court of First Instance's analysis are unfounded.

329 Degussa further maintains that the documents not disclosed during the administrative procedure, which were considered in paragraph 1060 et seq. of the contested judgement, should indeed have been regarded as relevant to the defence. Those documents demonstrate, in particular, fierce competition, aggressive conduct of PVC producers with regard to prices, poor functioning of the compensation mechanism between producers and only limited success of the price initiatives, which were regarded in some cases as having been failures. It was therefore by no means inconceivable that the Commission would take those circumstances into account in favour of the appellant. In accordance with the Commission's practice, proof that implementation of a prohibited agreement has been a failure generally leads to a reduction in the amount of the fine.

330 In that connection, it should be borne in mind that the appraisal of the facts by the Court of First Instance does not — save where the clear sense of the evidence produced before it is distorted — constitute a question of law which is subject, as such, to review by the Court of Justice (see paragraph 285 of this judgment).

331 In the present case, the appraisal by the Court of First Instance dealt with the question whether the documents at issue could have been used by the appellant for its defence. It was therefore concerned with a question of fact.

332 The disputed paragraphs of the contested judgment, considered in the light of Degussa's objections and the statement of reasons in the PVC II decision, do not reveal any distortion of the facts.

333 In paragraph 1061 of the contested judgment, the Court of First Instance states that the documents relied upon are not intended directly to cast doubt on others supplied by the Commission in support of its conclusions but to demonstrate the existence of fierce competition incompatible with those conclusions.

334 However, it goes on to state as follows in paragraphs 1062 and 1063 of the contested judgment:

'1062 The [PVC II] decision shows, however, that those circumstances were fully taken into account. Thus the [Commission] does not claim that prices increased consistently during the infringement period, or even that they remained stable during that period. On the contrary, the tables annexed to the [PVC II] decision show that prices did not cease to fluctuate, reaching their lowest level during the first three months of 1982. The Commission thus expressly recognised that the price initiatives had met with limited success and were occasionally regarded as failures ([PVC II] decision, points 22 and 36 to 38). It also indicated some of the reasons for those results: in addition to factors outside producers' control (anticipated purchases by consumers, imports from non-member countries, fall in demand, especially in 1981 and 1982, special discounts...), it found that certain producers sometimes gave preference to their sales volumes to the detriment of their prices ([PVC II] decision, points 22 and 38) and that, given the characteristics of the market, it would have been futile to attempt concerted price initiatives unless conditions were favourable to an increase ([PVC II] decision, point 38). Nor did the Commission ignore the existence of "aggressive" conduct on the part of some undertakings ([PVC II] decision, point 22). Likewise, it acknowledged that the "sharing the pain", Alcudia and DSM documents, whilst evidencing the existence of a

compensation mechanism between producers, also supported the conclusion that those mechanisms did not function correctly ([PVC II] decision, point 11). It was in the light of those considerations as a whole that the Commission determined the amount of the fine to be imposed on the applicants.

1063 Moreover, both Appendices P1 to P70 and the documents sent by the Commission to the parties in May 1988 already supplied a plentiful documentary basis enabling the applicants to argue, as indeed they have done, the existence of the circumstances which they allege today.'

335 Having regard to that reasoning in the contested judgment, which is confirmed by a reading of the cited points of the PVC II decision, it appears that Degussa has not only failed to establish any distortion of the facts but is also raising an irrelevant complaint, inasmuch as:

— the Commission took into account the circumstances which, according to Degussa, could have been useful to its defence;

— Degussa was able to rely on those circumstances during the administrative procedure, and indeed did so, as a result of the numerous documents containing passages showing that the PVC producers did not pursue a uniform pricing policy and found themselves in relatively fierce competition with each other, which documents it expressly acknowledges receiving from the Commission on 3 May 1988 as documents 'capable of being used in defence'.

336 Accordingly, Degussa's complaint against the appraisal by the Court of First Instance must be rejected.

337 Finally, Enichem contests the examination by the Court of First Instance of the documents selected by it from amongst those made available during the judicial proceedings and which led the Court of First Instance to conclude that the rights of the defence had not been infringed.

338 It complains that the Court of First Instance excluded a great many of those documents without even examining them on the ground that they were dated prior to or after the investigation period. It concedes that that assessment relates to findings of fact made by the Court of First Instance and that such findings cannot be contested in the context of an appeal. However, it criticises the method used by the Court of First Instance to exclude the documents in question. The Court of First Instance applied a formalistic temporal criterion which was unrelated to the substance. According to the appellant, such a criterion is unacceptable. It submits that some documents contained information relevant to the assessment of the conduct of the producers, especially its own, in particular during the period and in respect of the facts which were the subject of the investigation. It adds that information in that regard could also be gleaned from documents not dating from the investigation period, for example, where they make reference to that period or permit a comparison between the preceding period and the subsequent period.

339 In that regard, it should be recalled that, in paragraph 1040 of the contested judgment, the Court of First Instance excluded the documents and extracts of documents concerning a period prior to the origin of the cartel or after the date of the end of the infringement used by the Commission in calculating the amount of the fine. For that purpose, it stated that it is not the date of the document which is important but the relevance of the extract relied upon by the applicant concerned with regard to the period of the infringement.

340 Enichem, under the guise of a challenge to a criterion of assessment applied to the documents in question, is in fact attempting to challenge the assessment of each of those documents carried out by the Court of First Instance with regard to their content, even though that assessment cannot be reviewed on appeal unless there has been distortion of the evidence (see paragraph 285 of this judgment).

341 However, it does not state precisely which passages of the documents expressly identified confirm its submission that it could have used them for its defence irrespective of their dates or the period which they cover.

342 Thus, it does not enable the Court of Justice to review whether the Court of First Instance distorted the facts in its assessment.

343 It follows that the complaint must be rejected.

344 Consequently, this plea must be rejected in its entirety.

12. The plea raised by Montedison alleging infringement of the right to a fair hearing, of Articles 48(2) and 64 of the Rules of Procedure of the Court of First Instance and of the principle of personal liability as a result of the organisation of the oral procedure

345 Montedison submits that the invitation to submit a common oral defence at the hearing, insisted upon by the Court of First Instance, was incompatible with the

right to a fair hearing laid down in Article 6 of the ECHR, and that no provision is made by Article 64 et seq. of the Rules of Procedure of the Court of First Instance for a common defence. Such a defence requires, where necessary, the exclusion of arguments, evidence and submissions which are not shared by all of the applicants. Moreover, the insistence on the presentation of such a defence is tantamount to a presumption of those parties' guilt.

346 As a result of the organisation of a common defence, the Court of First Instance completely ignored two of Montedison's principal arguments. Furthermore, the Court of First Instance did not consider it necessary to examine the evidence put forward in Montedison's application even though, in the appellant's view, it was apparent from that evidence that none of the documents gathered by the Commission showed that it had participated in the infringements discovered. In the end, the Court of First Instance admitted only one piece of evidence against Montedison and considered only one argument submitted by that appellant with respect to the evidence favourable to it and, when doing so, also erred in law as to the content of that argument.

347 In that regard, it should be observed that, in its pleading, Montedison relies on Article 48(2) of the Rules of Procedure of the Court of First Instance, which relates to new pleas in law introduced in the course of proceedings. However, that provision is irrelevant to the complaint submitted.

348 In accordance with Article 64(2) of the Rules of Procedure of the Court of First Instance, the purpose of measures of organisation of procedure is, *inter alia*, to ensure efficient conduct of the oral procedure.

349 In compliance with the principle of hearing both parties and the rights of the defence, which are also enshrined in Article 6 of the ECHR, the Court of First Instance may thus invite the parties to submit collectively their common pleas in

law, in order to avoid repetition of identical arguments, with each party continuing to have the opportunity to submit its own arguments in a complementary manner.

350 In this case, the cases were joined for the purposes of the oral procedure by order of 22 January 1998.

351 In its appeal, Montedison neither establishes nor even claims that 'the invitation to submit a common oral defence insisted upon by the Court of First Instance' was coupled with any prohibition precluding it from presenting individually the arguments which it did not share with the other parties. Contrary to its assertion, the sole fact that identical pleas in law are submitted collectively in no way implies a presumption of guilt on the part of the undertakings concerned.

352 Accordingly, the complaint in respect of the conduct of the oral procedure cannot be accepted.

353 It is therefore unnecessary to consider further Montedison's allegation that the Court of First Instance did not consider the evidence put forward in its application and based its decision on just one piece of evidence relating to Montedison, since the appellant formulates its complaint not as a separate plea in law but solely for the purpose of establishing an injury to its rights of defence resulting from an alleged defect in the conduct of the oral procedure and thus justifying annulment of the contested judgment. That complaint is based on a premiss which, although essential for the plea to succeed, is erroneous.

354 It follows that this plea must be rejected.

13. The plea raised by Montedison alleging infringement of the right to a fair hearing and of Article 48(2) of the Rules of Procedure of the Court of First Instance during the consideration of the evidence

355 Montedison complains that the Court of First Instance infringed both its right to a fair hearing and Article 48(2) of the Rules of Procedure of the Court of First Instance when considering the evidence.

356 First, it observes that, in paragraphs 903 and 904 of the contested judgment, the Court of First Instance established the existence of a quota or compensation mechanism on the basis of a document making only indirect reference to Montedison, and that it stressed that ICI had demanded an increase in quotas. In that connection, it did not take into consideration the explanation provided by Montedison on pages 46 and 47 of its application.

357 It should be noted that, in paragraph 896 of the contested judgment, the Court of First Instance accurately summarised the arguments contained in Montedison's application, on which it relies in its appeal. It observed that the appellant disputed the probative value of a document entitled 'Alcudia' and maintained that no Italian undertaking had adhered individually to a compensation system, adding that, even if such a mechanism had in fact been put into operation, it would only have been one of those rationalisation measures taken under bilateral agreements which the Commission had itself advocated as a replacement for the crisis cartel. Next, in paragraphs 903 and 904 of that judgment, it expressly responded to that argument and held, on the basis of two documents, one of which was the Alcudia document, that Montedison had participated in the part of the infringement in question.

358 The complaint is thus clearly unfounded. Moreover, it effectively challenges the very assessment of the facts carried out by the Court of First Instance, which falls outside the ambit of the powers of review of the Court of Justice save where the evidence has been distorted (see paragraph 285 of this judgment), which has not in any way been established in this case.

359 This complaint must therefore be rejected.

360 Second, Montedison claims that the Court of First Instance failed to take into account 23 documents, referred to on pages 24 to 31 of its application, which allegedly show that there was aggressive competition which was incompatible with a cartel in respect of prices and market quotas.

361 However, examination of the application submitted by the appellant to the Court of First Instance reveals no reference to the 23 documents relied on, which are in any case identified only by their number. Moreover, Montedison does not specify which part of the contested judgment it is challenging.

362 In those circumstances, its complaint must be rejected.

363 Third, Montedison complains that, in paragraph 906 of the contested judgment, the Court of First Instance excluded the table produced by it, in which it compared the target prices alleged by the Commission and those actually charged by it in order to show that it could not have participated in the price initiatives. It disputes that the Court of First Instance was entitled to do so on the ground that

it had stated neither the source of the figures which it claimed constituted the prices actually charged by it nor the precise date on which those prices were determined. It submits that the source could only have been the compulsory accounts showing all the sales of Montedipe, the subsidiary to which Montedison transferred its PVC production activities with effect from 1 January 1981, and that the prices were the average sale prices charged during the periods in question.

364 However, it must be reiterated that, since Article 48(2) of the Rules of Procedure of the Court of First Instance is irrelevant to the complaint considered here, Montedison is in fact, under the guise of its plea alleging infringement of its right to a fair hearing, seeking to challenge the appraisal of an item of evidence carried out by the Court of First Instance.

365 Since such an appraisal is not open to review by the Court of Justice, unless the evidence in question has been distorted (see paragraph 285 of this judgment), which has not in any way been established in the present case, the appellant's complaint must be rejected.

366 Fourthly and finally, Montedison complains that, in paragraphs 1009 to 1028 of the contested judgment, the Court of First Instance refused to allow it to put forward in its favour four new documents of which it had become aware in the context of the measure of organisation of procedure adopted by the Court of First Instance with respect to access to the Commission's file. In its view, the Court of First Instance was wrong to hold that, since it had not raised any pleas concerning access to the Commission's file, there was no need to take account of the observations submitted by it in pursuance of that measure of organisation of procedure.

367 The appellant submits that those four documents illustrate the disastrous fall in prices in Italy, the aggressiveness of the competition and the fact that the foreign undertakings were not informed of the situation on the Italian market.

368 The appellant maintains that, under Article 48(2) of the Rules of Procedure of the Court of First Instance, an undertaking which, in the course of proceedings, identifies documents relevant to its defence may raise a new plea in law on the basis thereof to the extent that they deal with matters of law or fact coming to light in the course of the procedure.

369 In that connection, it should be noted that, in accordance with the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which come to light in the course of the procedure.

370 That provision in no way excludes the possibility that matters of law or fact may have been discovered in the context of a measure of organisation of procedure granting access to the Commission's file to all the appellants, including those which did not raise a plea in law alleging infringement of their right of access to the file.

371 Indeed, it authorises any new plea in law which is based on such matters. In circumstances such as those referred to in the paragraph above, the possibility cannot therefore be excluded that an applicant may introduce a new plea in law based precisely on an alleged infringement of its right of access to the file.

372 In this case, it is undisputed that, unlike certain other appellants, Montedison did not in its application submit to the Court of First Instance a plea in law alleging infringement of its right of access to the Commission's file.

373 The parties also agree that, in the context of the measures of organisation of procedure, the Court of First Instance informed the parties by letter of 7 May 1997 of its decision to grant each of them access to the Commission's file on the case leading to the PVC II decision, apart from internal documents of the Commission and documents containing business secrets or other confidential information. It then invited the applicants to submit, where appropriate, their comments with a view to showing how the failure to disclose documents could have prejudiced their defence.

374 Finally, it is common ground that, in the context of those measures of organisation of procedure, Montedison had access to the file in question and submitted comments on 28 July 1997 in which it relied on the four documents referred to in its appeal.

375 As is apparent from those comments, Montedison expressly submitted that, if those documents had been available to it for the purposes of preparing its defence with a view to the hearing of the undertakings during the administrative procedure and for the purposes of the actions brought against the PVC I and PVC II decisions, it could have relied on them to show that the accusation levelled against it was unfounded.

376 It is therefore apparent that the appellant raised, in the form of a new plea in law, a plea alleging infringement of its right of access to the Commission's file in accordance with Article 48(2) of the Rules of Procedure of the Court of First Instance.

377 The Court of First Instance thus failed to observe that provision by excluding consideration of the comments submitted by Montedison on the ground, set out in paragraph 1028 of the contested judgment, that it had not raised any plea concerning access to the administrative file.

378 It follows that this plea must be upheld as regards the error in law thus committed and rejected as to the remainder.

379 Consequently, the contested judgment must be partially annulled to the extent that it rejected a new plea in law raised by Montedison alleging infringement of its right of access to the Commission's file.

14. The plea raised by Enichem alleging infringement of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance

380 Enichem points out that in 1995 the parties, at the request of the Court of First Instance, suspended their written pleadings contesting the PVC II decision in view of the organisation of a hearing relating exclusively to the infringements of procedural rules alleged against the Commission. It adds that the Court of First Instance stated that the arguments submitted in the name of all the parties would be taken into account only in favour of those parties which had raised those complaints in their own application.

381 Enichem explains that, upon resumption of the written procedure after that hearing, rather than restating in its reply all the submissions made in its name also, it chose to refer thereto and to attach the texts of the joint submissions.

382 It complains that, in paragraphs 42 and 43 of the contested judgment, the Court of First Instance ruled in essence that, to the extent that it referred to the joint submissions, its reply did not satisfy the requirements of Article 44(1)(c) of the

Rules of Procedure of the Court of First Instance and could not therefore be considered because, even though the other submissions were annexed, the general reference to those submissions could not remedy the failure to state in the reply the material matters of law and fact relied on.

383 It submits that the Court of First Instance thus misapplied Article 44(1)(c) of its Rules of Procedure, inasmuch as:

— the procedural complaints raised in the joint submissions had already been included in its application;

— the arguments put forward at the hearing were part of the procedure and the Court of First Instance was aware of them since they had been pleaded before it;

— the rebuttals submitted by the applicants, in particular Enichem, to the arguments put forward by the Commission in its defence had already been set out in the joint submissions;

— the reference in the reply to the texts of the joint submissions necessarily meant that the appellant adopted the entire content thereof as its own so that the Court of First Instance did not need to seek and identify in the annexes the pleas on which the application or the reply were based.

384 According to Enichem, the result of the conclusion reached by the Court of First Instance was that the part of its reply relating to procedural defects was not taken into account for the purposes of the judgment or that it was curtailed to exclude all of the arguments contained in the joint submissions.

385 It should be stated in that regard that a complete restatement or even a summary, in a written pleading, of arguments previously submitted in an oral procedure in relation to pleas contained in the application is not a precondition for the examination of those arguments by the Court of First Instance. From the oral procedure onwards, those arguments are included in the case submissions and are known to the court before which the case has been brought. They must therefore be examined by that court since, being relevant and relating to pleas already raised, they do not constitute a new plea for the purposes of Article 48(2) of the Rules of Procedure of the Court of First Instance.

386 Thus, it is clear that the general reference, made by Enichem in its reply, to the content of the joint submissions presented on 13 and 14 June 1995 was superfluous.

387 Therefore, by excluding that reply, in paragraph 43 of the contested judgment, 'to the extent that reference is made therein to the joint submissions', the Court of First Instance formally misapplied Article 44(1)(c) of its Rules of Procedure to elements of the oral procedure, inasmuch as it was obliged in any event to examine the arguments properly submitted in that procedure.

388 However, in accordance with Article 51 of the EC Statute of the Court of Justice, a breach of procedure before the Court of First Instance cannot lead to annulment unless it is shown to have adversely affected the interests of the appellant.

389 Enichem restricts itself to asserting in essence, and without further explanation, that the arguments properly submitted in its name in the oral procedure were not taken into account in the contested judgment.

390 It identifies no precise argument of any relevance which was not subjected, in the contested judgment — either as an element of the oral procedure known to the Court of First Instance or expressly restated in a reply submitted by another appellant and not declared inadmissible — to an examination relating to all the parties presenting the joint submissions, including Enichem, and which, had it been examined, could have affected the outcome of the dispute.

391 In those circumstances, this plea must be rejected.

15. The plea raised by Wacker-Chemie and Hoechst alleging incomplete appraisal of the facts

392 Wacker-Chemie and Hoechst complain that, in paragraph 611 of the contested judgment, the Court of First Instance excluded the sales figures of Hoechst set out in a document prepared by a highly reputable accounting firm and certified by two auditors ('the auditors' certificate') on the ground that those figures could not be regarded as sufficiently reliable to call in question those supplied by Hoechst itself in response to a request for information from the Commission. In that regard, they are unsure what possibilities remain open to the parties to a procedure wishing to correct inaccurate statements which have been provided mistakenly if the findings of an accounting firm are insufficient.

393 According to the appellants, if the Court of First Instance considered itself unable to accept the findings of the auditors, it should have taken evidence in relation to the data which it regarded as inaccurate and questionable. Had there still remained any doubts, the Court of First Instance should then have decided the point in favour of the undertaking concerned.

394 Ultimately, the Court of First Instance allegedly failed to consider the figures in question despite their legal relevance. It therefore carried out no assessment whatsoever of the evidence relating thereto and could not do so without having first taken evidence.

395 In that connection, it should be observed that, in paragraph 582 et seq. of the contested judgment, the Court of First Instance examined the findings concerning the existence of an infringement of Article 85(1) of the Treaty.

396 More specifically, in paragraphs 584 to 617 of the contested judgment, it examined those relating to the existence of a quota system.

397 After a detailed assessment, it first of all admitted six documents as evidence of the existence of such a system.

398 It then examined in detail a seventh document, namely a table found at the premises of Atochem SA and entitled 'PVC — first quarter' ('the Atochem table'). According to the Commission, the table, which covered the first months of 1984, confirmed that the quota system had existed at least until April 1984.

399 In order to assess the probative value of the figures contained in the table, the Court of First Instance examined the cross-checks carried out by the Commission between those figures and other information, in particular information relating to sales realised by the German PVC producers, including Hoechst and Wacker-Chemie, in the first quarter of 1984.

400 It first of all observed that, in order to calculate those sales, the Commission had used figures emanating from BASF, Wacker-Chemie and Hüls and the sales figures declared by Hoechst, and had arrived at a total which differed only negligibly from that shown in the Atochem table, which confirmed that that table could not have been drawn up without an exchange of data between the producers.

401 It then pointed out that, in the course of the hearing before the Commission, Hoechst had denied the figures which it had itself provided and produced new ones. However, Hoechst was later forced to acknowledge that those new figures were wrong.

402 Finally, it noted that, on 21 October 1988, Hoechst had supplied a third set of figures which were set out in the auditors' certificate relied upon by that undertaking in connection with the present plea.

403 It is thus apparent that, with respect to the point in question, the Commission's file contained three documents to be compared with the Atochem table in order to verify the cross-checks carried out by the Commission. Those documents, which were all submitted by Hoechst, were in fact assessed by the Court of First Instance as to their probative value.

404 Contrary to what Hoechst maintains, the Court of First Instance, which had at its disposal various items of documentary evidence to enable it to deal with the point in issue, was by no means obliged to adopt of its own motion any further measure for the taking of evidence. It would not have been obliged to adopt such a measure even if at the end of its assessment it had concluded that none of that evidence was of any probative value. It would in those circumstances have been entitled to rule in accordance with the rules governing the burden of proof.

405 It follows that the plea alleging an incomplete examination of the facts must be rejected.

406 The question whether the assessment of the evidence by the Court of First Instance is open to criticism is covered by a separate plea raised by the appellants alleging distortion of the evidence, which will be dealt with below.

16. The plea raised by Wacker-Chemie and Hoechst alleging distortion of the evidence

407 Wacker-Chemie and Hoechst complain that, in paragraph 609 et seq. of the contested judgment, the Court of First Instance distorted the evidence resulting from the figures supplied to the Commission by Hoechst, in particular that contained in the auditors' certificate referred to in connection with the preceding plea. In the western European countries, the results of audits certified by qualified accountants generally have a certain probative value as evidence and enjoy, at the very least, a presumption of accuracy and completeness.

408 As has already been pointed out in paragraph 285 of this judgment, the appraisal of the facts by the Court of First Instance does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice.

409 In order to establish that the total sales of the German producers shown in the Atochem table (198 226 tonnes) could not have been obtained without an exchange of data between the producers, the Court of First Instance, in paragraph 609 of the contested judgment, stated that the difference between that total and the total resulting from the first set of figures voluntarily declared by Hoechst and from the data provided by BASF, Wacker-Chemie and Hüls (198 353 tonnes) was negligible.

410 In the following paragraph of the contested judgment, in order to exclude the second set of figures provided, without any supporting documentation, to the Commission by Hoechst at its hearing, the Court of First Instance stated that those figures were not reliable because they would have involved Hoechst loading its plant at over 105% whilst the other producers achieved only 70% occupation rates. In particular, it noted that Hoechst had itself subsequently acknowledged that those new figures were wrong.

411 As regards the auditors' certificate on which Wacker-Chemie and Hoechst principally base their complaint of distortion of evidence, the Court of First Instance stated, in paragraph 611 of the contested judgment, that, by comparison with the figures originally provided, those appearing in the auditors' certificate contained only a negligible amendment which merely confirmed the accuracy of the figures in the Atochem table. It added that the difference, as compared to the figures in that table, resulted from the simple addition, as 'sales to consumers', of Hoechst's own consumption for its plant at Kalle.

412 The Court of First Instance did not therefore distort the auditors' certificate relied upon by admitting, in paragraph 611 of the contested judgment, the figures initially provided by Hoechst and observing that the certificate did not call those figures into question.

413 Accordingly, this plea must be rejected.

17. The pleas raised by Montedison, Elf Atochem, Degussa, Wacker-Chemie and Hoechst alleging failure to respond to certain pleas as well as contradictory and insufficient grounds of the contested judgment

414 Montedison complains that the Court of First Instance did not deal with its plea alleging a definitive transfer to the Community judicature of the power to impose penalties after the Commission had adopted the PVC I decision, which transfer subsisted following the annulment of that decision. Elf Atochem submits that the Court of First Instance did not respond to its plea alleging differences between the PVC I and PVC II decisions. Degussa complains that the contested judgment failed to respond to its plea based on the absence of any re-intervention by the Hearing Officer prior to the PVC II decision. Lastly, Wacker-Chemie and Hoechst plead that the grounds of the judgment were contradictory and insufficient as regards the examination of the evidence.

415 It is necessary to consider each of those pleas in turn.

(a) The plea raised by Montedison alleging failure to deal with its plea alleging a definitive transfer to the Community judicature of the power to impose penalties following the Commission's decision

416 Montedison complains that the Court of First Instance did not examine the first plea raised by it, alleging infringement of Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17, read in conjunction with Article 87(2)(d) of the EC Treaty (now, after amendment, Article 83(2)(d) EC).

417 It observes that Article 172 of the Treaty and Article 17 of Regulation No 17 confer on the Community judicature unlimited review jurisdiction, that is to say an unlimited power to assess the facts. Since Article 17 of Regulation No 17 confers on the Community judicature, in particular, the power to cancel, reduce or increase the fine, the Commission loses that power once its decision has been contested. The power of assessment is in fact definitively transferred to the Community judicature.

418 The Commission submits that, in the appeal, no passage or part of the contested judgment is cited as being specifically challenged by the complaint. It therefore questions whether the complaint is admissible.

419 In opposition to the appellants' arguments, it maintains that, in paragraphs 65 to 85 of the contested judgment, the Court of First Instance considered — albeit without linking it expressly to Montedison — the plea alleging that it was not possible for the Commission to adopt the PVC II decision on account of the

authority of *res judicata* attaching to the Court's judgment of 15 June 1994. It also observes that, in paragraphs 86 to 99 of the contested judgment, the Court of First Instance, referring expressly to Montedison, ruled on the plea alleging infringement of the principle of *non bis in idem* and thus on the question of readoption of the annulled first decision of the Commission.

420 It adds that the obligation to clarify the arguments is incumbent on each applicant from the first-instance proceedings onwards. Consequently, where the Court of First Instance is not placed in a position enabling it to consider a plea because the applicant did not explain it sufficiently, the contested judgment cannot be challenged in that respect, particularly on the ground of failure to consider the plea in question or of failure to state adequately the grounds for its rejection.

421 Finally, it contends that the appeal merely restates the pleas already raised at first instance. Those pleas, which have already been considered and rejected by the Court of First Instance for appropriate reasons, are inadmissible because they are simply aimed at securing a re-examination of the application submitted to that court (*Baustahlgewebe*, paragraphs 113 to 115).

422 In that respect, it should be observed that Montedison did raise before the Court of First Instance a plea alleging a definitive transfer to the Community judicature of the power to impose fines as a result of the action brought against the PVC I decision. That plea was expressly based on infringement of Articles 172 of the Treaty and 17 of Regulation No 17, in conjunction with Article 87(2)(d) of the Treaty.

423 Where an appellant submits that the Court of First Instance did not respond to a plea, its submission cannot be challenged, in terms of the admissibility of the ground of appeal, on the basis that it does not cite any passage or part of the contested judgment as the specific object of its complaint since, by definition, it is a failure to respond that is being alleged. For the same reason, the submission cannot be challenged on the ground that it simply repeats or reproduces the plea raised at first instance.

424 In the present case, the Commission maintains that the Court of First Instance dealt with the plea in question in paragraphs 65 to 85 and 86 to 99 of the contested judgment.

425 However, the plea raised by Montedison in its application does not correspond to the two pleas considered in those parts of the contested judgment, which allege infringement of the principles of, respectively, *res judicata* and *non bis in idem*. Montedison's plea was founded on a different legal basis, which is clearly explained.

426 The Commission cannot argue that Montedison did not sufficiently explain its plea and that, consequently, it cannot raise any challenge to the contested judgment. Montedison's application contained a long line of argument leading to the conclusion that the effect of the provisions relied upon was to bring about a definitive transfer to the Community judicature of the power to impose penalties.

427 It is therefore apparent that Montedison is justified in alleging a failure to respond to a plea.

428 Accordingly, the contested judgment must be partially annulled as regards that failure to respond.

(b) The plea raised by Elf Atochem alleging a failure to respond to its plea that there were differences between the PVC I and PVC II decisions

429 Elf Atochem complains that the Court of First Instance did not rule on its plea alleging that the PVC II decision was different in substance from the PVC I

decision, in support of which it and other appellants presented lengthy argument before the Court of First Instance, as is apparent from paragraph 222 of the contested judgment. That fact is sufficient, it maintains, to justify annulment of the contested judgment.

430 It should be observed in that regard that, in paragraph 222 of the contested judgment, the Court of First Instance pointed out that Elf Atochem and certain other appellants had argued, in support of their plea based on the right of the undertakings to be heard again, that, compared with the PVC I decision, the wording of the PVC II decision differed on essential points, such as the assessment of the rules on limitation, the removal of two sentences concerning the effects of the agreement, the addition of a section relating to the procedure since 1988 and the omission of Solvay and Norsk Hydro.

431 In holding, in paragraph 252 of the contested judgment, that the text of the PVC II decision did not contain any new objection compared with the text of the PVC I decision, and in stating in that regard that the fact that the PVC II decision was adopted in different factual and legal circumstances does not in any sense mean that it contained new objections, the Court of First Instance implicitly ruled that the differences between the two decisions did not relate to essential points. In paragraph 257 of the contested judgment, it then expressly confirmed that assessment by stating that the PVC II decision contained only 'editorial amendments not affecting the objections'.

432 It thus responded to the argument advanced by Elf Atochem in support of the plea raised before it.

433 This ground of appeal must therefore be rejected.

(c) The plea raised by Degussa alleging a failure to respond to its complaint concerning non-intervention by the Hearing Officer prior to adoption of the PVC II decision

434 Degussa complains that, in paragraph 270 of the contested judgment, the Court of First Instance rejected its plea that new administrative procedural measures were needed following the annulment of the PVC I decision, without considering its complaint of lack of intervention by the Hearing Officer.

435 It is sufficient in that regard to note that, in paragraph 253 of the contested judgment, the Court of First Instance, having established that a new hearing of the undertakings was not necessary following the annulment of the PVC I decision, concluded in essence that a fresh intervention by the Hearing Officer in the circumstances provided for in the decision of 24 November 1990, which had meanwhile become applicable, was not required (see paragraph 126 of this judgment).

436 It did therefore respond to the plea submitted by the appellant.

437 Consequently, this ground of appeal must be rejected.

(d) The plea raised by Wacker-Chemie and Hoechst alleging that the grounds of the contested judgment are contradictory and insufficient as regards consideration of the documentary evidence

438 In parallel with their pleas alleging incomplete assessment of the facts and distortion of the evidence, considered respectively in paragraphs 392 to 405 and 407 to 413 of this judgment, Wacker-Chemie and Hoechst complain that, in

paragraphs 610 and 611 of the contested judgment, the Court of First Instance gave contradictory and insufficient reasons in its consideration of the evidence concerning the existence of a quota system.

439 They claim that the Court of First Instance did not give the parties the opportunity to correct, with the help of the auditors' certificate referred to in their two other pleas mentioned above, the incorrect information which had been provided by mistake. Furthermore, it did not take into account the documents in the procedural file, which would have shown that the figures initially provided by Hoechst were in conformity with those contained in the auditors' certificate. Finally, it failed to recognise the causal link by disregarding the fact that Hoechst had corrected its own sales figures following an amendment by the Commission of the basis of its requests for information and of its measures for taking evidence.

440 It is sufficient to state in that regard that, under the guise of the plea in question, Wacker-Chemie and Hoechst are in fact seeking to challenge the appraisal of the evidence carried out by the Court of First Instance.

441 As is pointed out in paragraph 285 of this judgment, such an appraisal cannot be reviewed by the Court of Justice, unless the evidence has been distorted. However, it has already been stated in paragraph 412 of this judgment, with respect to the consideration of the appellants' plea alleging distortion of the evidence at issue in the present plea, that the complaint of distortion is unfounded, particularly as regards the auditors' certificate.

442 Consequently, this ground of appeal must be rejected.

18. The plea raised by LVM, DSM, Enichem and ICI alleging insufficient or erroneous grounds for the rejection of a plea alleging infringement by the Commission of Article 190 of the Treaty in choosing to adopt the PVC II decision following annulment of the PVC I decision

443 LVM, DSM, Enichem and ICI complain that, in paragraphs 386 to 391 of the contested judgment, the Court of First Instance rejected their plea alleging infringement by the Commission of Article 190 of the Treaty resulting from the provision of an insufficient statement of reasons for its choosing to adopt the PVC II decision following annulment of the PVC I decision.

444 LVM, DSM and ICI consider, in particular, that the Commission should have stated reasons with respect to the obstacles listed in the plea raised before the Court of First Instance and referred to in paragraph 382 of the contested judgment, namely the absence of a fresh statement of objections and hearing of the parties, the use of documents discovered in the course of a separate investigation and evidence obtained in breach of the right not to give evidence against oneself, failure to grant access to the file in accordance with the case-law, the imposition of a fine based on an error of fact and the conclusion that the PVC I decision remained valid against Solvay and Norsk Hydro.

445 Moreover, they consider that the Court of First Instance incorrectly ruled, in paragraph 389 of the contested judgment, that the arguments relating to those alleged obstacles were essentially concerned only with challenging the validity of the Commission's assessment concerning those various points. According to LVM and DSM, the question of the validity of arguments is completely separate from that of the reasoning on which their rejection is based. The Commission therefore infringed its obligation to state reasons regardless of whether or not the arguments raised were ill-founded.

446 ICI argues that the Commission was under no obligation to take a new decision. Its decision to do so without serving a new statement of objections, and with neither a fresh hearing of the undertakings nor fresh consultation of the Advisory

Committee, was not only unusual but wholly unprecedented. In those circumstances, the undertakings were entitled to an explanation concerning those matters. On that point, ICI relies on Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 31 and Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15, in accordance with which the Commission may not provide only a summary of reasons where it deviates from a consistent line of decisions.

447 In that connection, it should be observed that Article 89 of the EC Treaty (now, after amendment, Article 85 EC) entrusts the Commission with the task of ensuring the application of the principles laid down, in particular, in Article 85 of the Treaty and investigating, where necessary on its own initiative, cases of suspected infringement of those principles. That task includes the duty to record any such infringements in a reasoned decision and is a specific element of the general supervisory competence conferred on the Commission by Article 155 of the EC Treaty (now Article 211 EC).

448 In carrying out that task, the Commission has a discretionary power to bring actions in the context of its general competition policy.

449 In paragraph 387 of the contested judgment, the Court of First Instance rightly pointed out that, as the first recital in the preamble to the PVC II decision refers to 'the Treaty establishing the European Community', that decision impliedly but necessarily contains a formal reference to the task assigned to the Commission. It was thus entitled to hold that that reference alone constituted sufficient reasoning for the Commission's interest in finding an infringement and penalising the undertakings concerned. In that context, it rightly held that, since the Commission has a discretionary power in implementing the prerogatives conferred upon it by the Treaty in the area of competition law, it was not required to explain further the grounds which had led it to choose that course.

450 Having correctly stated the limits to the Commission's obligation to state reasons for the adoption of a new decision, the Court of First Instance correctly went on to hold, in paragraph 389 of the contested judgment, that the fact that the Commission gave no explanation for the matters listed in paragraph 382 of the contested judgment and restated in paragraph 444 of this judgment did not constitute insufficient reasoning for the PVC II decision, irrespective of its further observation that the arguments raised in relation to those matters were intended only to challenge the validity of the Commission's assessment.

451 Contrary to what ICI maintains, the Commission did not deviate from a consistent line of decisions in deciding to record the infringements found by it in a new decision following the annulment of the PVC I decision. It simply confirmed its initial decision to penalise those infringements, which did not run counter to Article 176 of the Treaty, since that provision required it only to take measures to comply with the Court's judgment of 15 June 1994, namely to remedy the sole illegality established in that judgment.

452 In any event, the Commission's obligation to state reasons with respect, not to the adoption of the decision, but to the content of the decision adopted is limited to the requirement that it must give a sufficient account of the nature of the infringement alleged against the addressee, of the reasons for the Commission's finding that the conditions of an infringement are fulfilled and of the obligations or penalties which it intends to impose on the undertaking concerned.

453 In this case, it should be observed that:

— no complaint has been raised as to that second limb of the obligation to state reasons;

— the matters in respect of which the appellants allege a failure to state reasons do not include that limb either, since the Commission is not obliged to foresee all issues which might be raised in a subsequent dispute and to respond thereto in advance in its decision;

— the issues relating to those matters may, if necessary, be the subject of a subsequent judicial review.

454 It follows that this plea must be rejected.

19. The plea raised by Montedison, Degussa and Enichem alleging a failure to have regard to the scope of the Commission's obligation to state the reasons for the method of calculating the fine

Arguments of the appellants

455 Montedison, Degussa and Enichem allege in essence that, in paragraphs 1172 to 1184 of the contested judgment, the Court of First Instance disregarded the scope of the Commission's obligation under Article 190 of the Treaty to state the reasons for the method of calculating the fines imposed on them.

456 Montedison argues that the Court of First Instance should have found that the statement of reasons for the PVC II decision was defective as regards the method of calculation used. In its view, the Commission is required to state in its decision

the specific factors which it has taken into account in order to enable the undertakings better to assess, first, whether the Commission has made any error in determining the amount of each fine, and second, whether the amount of each individual fine is justified by the general criteria applied. In order to determine the amount of a fine, it is necessary to establish the gravity of the infringement by reference to numerous factors such as the particular circumstances of the case, its context and the dissuasive effect of fines (order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

457 Degussa complains that the Court of First Instance rejected its plea alleging a lack of accuracy on the Commission's part in calculating the fine on the erroneous ground that indications regarding the calculation of the fine do not form part of the reasoning. Moreover, the Court of First Instance disregarded the terms of Article 190 of the Treaty by concluding, in paragraph 1183 of the contested judgment, that the Commission had done all that it needed to do by producing information as to the method of calculation during the judicial proceedings concerning the PVC I decision. Finally, the Court of First Instance contradicted itself in stating, in paragraph 1180 of the contested judgment, that it was desirable for undertakings to be able to determine the method of calculation of the fine without being obliged to bring court proceedings.

458 Enichem argues that, in rejecting its plea alleging insufficient reasoning, the Court of First Instance wrongly held, in paragraph 1179 of the contested judgment, that points 51 to 54 of the account of the facts set out in the PVC II decision contained a sufficient and relevant indication of the factors taken into account, including, in point 53, the 'respective importance [of the undertakings] in the PVC market'. The importance of a producer may equally well be inferred from its market share as from its turnover. It is therefore not possible to state categorically that the method of calculation of the fine was indicated in an unambiguous manner in the PVC II decision.

459 In that connection, Enichem points out that the Court of First Instance held, in particular in paragraph 1191 of the contested judgment, which relates to a

different plea, that the apportionment of the total fine between the various undertakings was carried out on the basis of their respective market shares. Consequently, that decisive criterion should have been mentioned in the statement of reasons for the PVC II decision.

460 Like Degussa, Enichem observes that the Court of First Instance stated that it would be desirable for undertakings to be able to determine the method of calculation of the fine without their being obliged, in order to so, to bring court proceedings against the decision.

461 In its view, the Commission was in fact obliged to set out its calculations in the body of the decision in order to avoid the undertakings and the Community judicature being forced to guess how the general criteria indicated were translated into figures and to enable the parties to submit observations and to facilitate judicial review by the Community judicature.

Findings of the Court

462 In the context of the application of Article 85(1) of the Treaty, the scope of the obligation to state reasons for the method of calculating the fine, which is imposed on the Commission by Article 190 of the Treaty, must be determined in the light of the second subparagraph of Article 15(2) of Regulation No 17, which provides that 'regard shall be had both to the gravity and to the duration of the infringement'.

463 The essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 73).

464 Contrary to what the appellants claim, either expressly or in essence, that requirement does not oblige the Commission to indicate in its decision the figures relating to the method of calculating the fines; in any event, the Commission cannot, by mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment (*Sarrió*, cited above, paragraphs 76 and 80).

465 In paragraph 1173 of the contested judgment, the Court of First Instance rightly observed that, in the case of a decision imposing fines on several undertakings, the scope of the duty to state reasons must be assessed *inter alia* in the light of the fact that the gravity of the infringement depends on numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (*SPO*, cited above, paragraph 54).

466 In the present case, the Court of First Instance observed, in paragraph 1174 of the contested judgment, that the Commission had set out, in points 51 to 54 of the account of the facts contained in the PVC II decision, the general and individual factors which it had taken into account in determining the fine.

467 In paragraphs 1175 and 1178 of the contested judgment, it found that the PVC II decision made reference to the following assessment criteria:

— the importance of the industrial product in question;

— the value of the sales relating thereto in western Europe;

— the number of undertakings involved;

— the level of participation of, and the role played by, each of the undertakings;

— the respective importance of the undertakings on the PVC market;

— the duration of the participation of each undertaking in the infringement.

468 In paragraph 1176 of the contested judgment, it also observed that the Commission had stated that it had taken into account as mitigating circumstances the fact that:

— the undertakings had suffered substantial losses during much of the infringement period;

— most of them had already had heavy fines imposed upon them for their participation in an infringement in the thermoplastics sector (polypropylene) during much the same period.

469 Given those findings and the scope of the obligation to state reasons as set out above, it was therefore entitled, in paragraph 1179 of the contested judgment, to

conclude that the PVC II decision contained a sufficient and relevant indication of the factors taken into account in assessing the gravity and duration of the infringement committed by each of the undertakings in question.

470 On those grounds alone, it justified its rejection of the plea raised before it.

471 Its decision cannot be regarded as vitiated by an error of law merely because it had also stated, in paragraph 1180 of the contested judgment, that it was desirable, in order to enable undertakings to define their position with full knowledge of the facts, for them to be able to determine in detail, in accordance with such system as the Commission might consider appropriate, the method whereby the fine imposed upon them in a decision establishing an infringement of Community competition rules has been calculated, without their being obliged, in order to do so, to bring court proceedings against the decision.

472 In making that observation, which was not the essential basis for its decision, the Court of First Instance merely pointed out that it is open to the Commission to go beyond the requirements of its obligation to state reasons by enabling undertakings to acquire a detailed knowledge of the method of calculating the fine imposed on them.

473 However, the availability of that possibility is not such as to alter the scope of the requirements resulting from the duty to state reasons (*Sarrió*, paragraph 77).

474 Moreover, contrary to what Degussa claims, the Court of First Instance did not, in paragraph 1183 of the contested judgment, regard as sufficient the fact that, in

the course of the actions challenging the PVC I decision, the Commission had produced a table containing details of the calculation of the fines imposed by that decision which was annexed to the applications in the proceedings brought against the PVC II decision.

475 That fact, introduced by the expression 'indeed', was stated merely for the sake of completeness; the Court of First Instance had already ruled that the duty to state reasons had been complied with.

476 It follows that this plea must be rejected.

20. The plea raised by Montedison alleging erroneous rejection as inadmissible of its claim for an order requiring the Commission to pay damages

477 Montedison complains that, in paragraphs 1262 and 1263 of the contested judgment, the Court of First Instance dismissed as inadmissible its claim for an order requiring the Commission to pay damages on the ground that the application did not satisfy the minimum requirements laid down by its Rules of Procedure.

478 However, throughout the four years of the procedure, the appellant had unceasingly complained of the unlawful conduct of the Commission. Its claim was therefore not only admissible but also well founded. It additionally refers to paragraph 48 of the *Baustahlgewebe* judgment, in which the Court of Justice, finding that judicial proceedings had been excessively protracted, reduced the

amount of the fine for reasons of economy of procedure and thereby, according to Montedison, offset against that amount the amount of the damage suffered, as attributed to the Commission's conduct.

479 It should be noted that, in the action brought before the Court of First Instance, Montedison merely included an unqualified claim for damages in that part of its application which set out the forms of order sought. It did not therefore base that claim on any specific factual or legal reasoning.

480 In those circumstances, the Court of First Instance was right to consider, in paragraph 1262 of the contested judgment, that the application did not enable the pleas in law on which the appellant sought to base its claims for damages to be identified. It therefore correctly held, in paragraph 1263 of the contested judgment, that the application did not satisfy the minimum requirements for the admissibility of an application laid down in Article 19 of the EC Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, in accordance with which an application must contain, *inter alia*, a summary of the pleas in law on which it is based.

481 Moreover, the reasoning subsequently given in support of the claim for damages, which the appellant now bases on the *Baustahlgewebe* judgment, relates to a plea alleging infringement of the principle that action is to be taken within a reasonable period, which it raised neither in its action before the Court of First Instance nor in its appeal.

482 Accordingly, this plea must be rejected.

B — *The pleas on the substance*

1. The plea raised by Montedison alleging a failure by the Court of First Instance to consider the economic context

483 Montedison complains that the Court of First Instance did not consider the economic context, as it is required to do before reaching any decision on a competition matter, especially where that decision imposes a fine (Case 23/67 *Brasserie De Haecht* [1967] ECR 407, at 415).

484 It points out that, at first instance, it put forward the argument, summarised in paragraph 736 of the contested judgment, that the disputed facts were attributable to the oil crisis, which, for some years, forced more than half of the PVC producers to withdraw from the sector. That context was such that the contacts which took place between the producers were perfectly legitimate, not to say indispensable. Those contacts were intended merely to reduce losses.

485 In paragraph 740 of the contested judgment, the Court of First Instance wrongly held that, whilst a market crisis could justify an exemption under Article 85(3) of the Treaty, no such exemption was ever applied for. The situation did not render an exemption necessary since a cartel cannot be created by the aggregate of conduct in which each undertaking is forced to engage for legal and economic reasons.

486 In that connection, it should be noted that, in *Brasserie de Haecht*, cited above, on which the appellant relies, the Court of Justice stated that regard must be had to the effects of agreements, decisions or practices in the economic context in

which they occur and where they might combine with others to have a cumulative impact on competition. In contrast to the present case, the issue in that judgment was whether there were similar agreements which, together, could constitute an economic and legal context in which a given contract had to be considered in order to assess whether trade between Member States might be affected.

487 Moreover, in the context of Article 85(1) of the Treaty, the existence of a crisis in the market cannot in itself preclude the anti-competitive nature of an agreement.

488 The Court of First Instance was therefore right to hold, in paragraph 740 of the contested judgment, that such a situation could not, in the present case, justify the conclusion that the conditions for applying Article 85(1) of the Treaty had not been fulfilled. It correctly observed that the existence of a crisis might in an appropriate case be relied on with a view to obtaining an exemption under Article 85(3) of the Treaty, but observed that the undertakings concerned had at no time applied for such an exemption. As the Commission rightly submits, Montedison's argument that an exemption would render meaningless the notification system provided for in Article 4 of Regulation No 17, since it would enable undertakings subjected to a fine to apply subsequently to the Community judicature for an exemption which they had not previously sought from the Commission.

489 In any event, the Court of First Instance observed that the Commission had taken into consideration the crisis in the industry, in particular in point 5 of the account of the facts contained in the PVC II decision, and that it had taken account of that crisis in calculating the amount of the fine.

490 Montedison further submits that, had the Court of First Instance taken the economic context of the case into consideration, it would have ruled, in

paragraph 745 of the contested judgment, that the fixing of European target prices necessarily distorted competition on the PVC market and restricted buyers' scope for negotiation. The appellant argues, first, that it is for the Commission to prove that the transaction prices would have been lower in the absence of collusion between the producers. Second, it maintains that there exists no provision stating that the competition rules are designed to give producers of finished products an advantage over producers of raw materials, by precluding the proposal to the latter of a price capable of reducing losses.

491 In that connection, it must be observed that the Court of First Instance rightly held, in paragraph 741 of the contested judgment, that it is well established that, for the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the actual effects of an agreement once it appears that its aim is to restrict, prevent or distort competition (see, in particular, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at 342).

492 Therefore, the plea advanced in the appeal is unfounded in so far as it may be construed as requiring proof that competition has actually been affected, since the Court of First Instance held, likewise in paragraph 741 of the contested judgment, that the anti-competitive aim of the conduct complained of had been established.

493 The plea is further unfounded in so far as it is to be understood as complaining that the Court of First Instance, in holding that '[the] fixing [of] European target prices necessarily distorted competition', simply stated that there had been a distortion without considering or admitting the evidence confirming that fact. In paragraphs 745 and 746 of the contested judgment, the Court of First Instance, referring to the evidence expressly cited, listed various effects actually produced by price initiatives of the undertakings concerned on the PVC market, notwithstanding the failure of some of those initiatives.

494 In any event, Montedison cannot validly maintain that the effect of the assessment disputed by it is to give producers of finished products an advantage over producers of raw materials. Article 81(1) of the Treaty is designed to guarantee unfettered freedom of competition at all levels, subject to the penalties for which it provides.

495 Montedison further submits that, in disregarding the economic context, the Court of First Instance distorted the evidence and compensated for the lacunae in that respect, which are clearly apparent from the file, with theories based on presumptions of anti-competitive conduct. Such an approach must be dealt with at the appeal stage as distortion of the evidence (Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 66).

496 The appellant thus complains that the Court of First Instance inferred from the sole fact that meetings were held between producers that there had been price initiatives, exchanges of strategic information and quota-sharing. It also complains that the Court of First Instance regarded the price initiatives as illegal in themselves when they in fact constituted attempts to reduce losses which were invariably undermined as a result of considerably reduced demand in the circumstances of excess supply.

497 It must be observed that, in accordance with established case-law, it follows from Article 168a of the EC Treaty (now Article 225 EC), the first paragraph of Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, in particular, the order in Case C-31/95 P *Del Plato* v *Commission* [1996] ECR I-1443, paragraphs 18 and 19, and the judgment in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 34), failing which the appeal or plea concerned is inadmissible.

498 In particular, where the appellant alleges distortion of the evidence by the Court of First Instance, that obligation requires it to indicate precisely the evidence alleged to have been distorted by that court and to show the errors of appraisal which, in its view, led to that distortion.

499 The Court finds that Montedison has formulated its complaint of distortion in general terms.

500 The appellant merely claims that the alleged distortion is the result of a failure to take into account the economic context and cites as an example, simply by way of an assertion, the conclusions drawn in the contested judgment from the sole fact that meetings were held by the producers. Thus, it neither indicates precisely the elements of the contested judgment which it disputes nor lists the documents which are the subject of its complaint, and does not show, in particular, that the Court of First Instance based its findings only on documents which confirmed the participation of the undertakings in the meetings in question but did not also establish the anti-competitive aim of those meetings.

501 It follows that, to that extent, its complaint is inadmissible.

502 In so far as the remainder of the complaint is aimed at securing acceptance of the argument that the price initiatives were not illegal in themselves since they constituted attempts — invariably unsuccessful — to reduce losses, it overlaps with the previous complaints, already rejected, formulated in the context of this plea with respect to the justification provided by the existence of a crisis on the PVC market and the claim that it is necessary to demonstrate the actual effects on the market of the conduct complained of even where the anti-competitive aim of that conduct has been established.

503 It follows that this plea must be rejected in its entirety.

2. The plea raised by Enichem complaining that collective responsibility was imputed to it

504 Enichem complains that, in paragraphs 768 to 780 of the contested judgment, the Court of First Instance rejected its plea alleging that the Commission imputed collective responsibility to it and thus failed to observe the general principle that liability can only be personal.

505 It argues that the Court of First Instance could not reasonably conclude from the participation of the appellant in certain unspecified informal meetings that it had knowledge of the participating undertakings' common plan or, in the words used in the PVC II decision, of the 'cartel as a whole'. In the absence of regular participation by Enichem in the meetings, the Court of First Instance was not entitled to attribute to it all the infringements on the basis of a presumption that it had knowledge of every manifestation of the cartel.

506 In any event, since the Court of First Instance acknowledged that the planning documents obtained at the premises of ICI, as referred to in paragraph 294 of this judgment, did not establish the time at which a common intention was formed but, rather, represented a plan of ICI, it was not entitled to infer from those documents that Enichem had knowledge of any common plan.

507 In the context of liability limited to individual action, the Court of First Instance should have redefined the scope of the appellant's lesser participation in the cartel by excluding its involvement in the price initiatives or by limiting the period of its involvement. The documents referred to by the Court of First Instance in paragraph 940 of the contested judgment for the purposes of holding that the price initiatives must have been applied in Italy, which the appellant does not dispute, make no specific reference whatever to Enichem and date from 1982 and 1983.

508 It that regard, it has already been pointed out in paragraph 491 of the present judgment that, for the purposes of applying Article 85(1) of the Treaty, it is sufficient that the aim of an agreement should be to restrict, prevent or distort competition, irrespective of the actual effects of that agreement.

509 Consequently, in the case of agreements reached at meetings of competing undertakings:

— that provision is infringed where those meetings have such an aim and are thus intended to organise artificially the operation of the market;

— the liability of a particular undertaking in respect of the infringement is properly established where it participated in those meetings with knowledge of their aim, even if it did not proceed to implement any of the measures agreed at those meetings.

510 The greater or lesser degree of regular participation by the undertaking in the meetings and of completeness of its implementation of the measures agreed is relevant not to the establishment of its liability but rather to the extent of that liability and thus to the severity of the penalty.

511 Enichem's complaint in law constitutes an objection to the application of a presumption of knowledge of all the circumstances of the cartel at issue by reason solely of participation in certain meetings described as informal. It amounts to an allegation of the attribution of presumed liability for a collective action.

512 That complaint is unfounded.

513 In paragraph 768 of the contested judgment, the Court of First Instance observed that, according to the second paragraph of point 25 of the account of the facts contained in the PVC II decision, 'given the absence of pricing documentation [making it impossible] to prove the actual participation of every producer in concerted price initiatives... [t]he Commission has... 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 manifestation thereof'.

514 In paragraph 771 of the contested judgment, it correctly considered that that approach did not involve application by the Commission of the principle of collective responsibility, that is to say, deeming certain undertakings to have participated in actions with which they were not concerned simply because the participation of other undertakings in those actions was established. Such an approach in fact consists in basing the penalty on proven — and not presumed — individual participation in all or part of the collective action.

515 In paragraph 772 of the contested judgment, the Court of First Instance observed that the infringement complained of consisted in the regular organisation over several years of meetings of rival producers, the aim of which was to establish illicit practices intended to organise artificially the functioning of the PVC market.

516 In paragraphs 675, 677, 680 to 686, 931 and 932, it held, following its unfettered assessment of the various items of evidence, which is not the subject of any complaint of distortion, that:

— Enichem had participated in meetings of rival undertakings, including those held between August 1980 and 1984;

— the aim of those meetings was in fact anti-competitive as they were intended to achieve the conclusion of agreements, in particular, on price levels and volume monitoring even though the discussions did not result in firm price commitments.

517 Contrary to the appellant's claim, the Court of First Instance did not infer from the planning documents that the appellant knew of the anti-competitive aim of those agreements as that knowledge in fact resulted from its participation in the meetings.

518 It went on to observe correctly, in paragraph 939 of the contested judgment, that the frequency of an undertaking's presence at the meetings did not affect the fact of its participation in the infringement but rather the extent of that participation.

519 In the same paragraph, it stated that the Commission took into account — in particular, with respect to Enichem, in the third paragraph of point 8 and, with respect to the amount of the fine, in point 53 of the account of the facts contained in the PVC II decision — the fact that, according to the evidence, Enichem participated more or less regularly in the meetings. As to the amount of the fine, the Court of First Instance considered, in the context of an assessment carried out pursuant to its unlimited jurisdiction, that, had the Commission been able to obtain proof of the participation of each of the undertakings at all the producer meetings over almost four years, the fines imposed would appear low in proportion to the seriousness of the infringement.

520 Thus, far from validating the application of a presumption of collective responsibility, the Court of First Instance, having considered the evidence, held that the Commission had established the individual participation of Enichem in the cartel and therefore its — likewise individual — liability therefor, whilst taking into account, with respect to the level of the penalty, its more limited participation in the various constituent elements of the infringement.

521 As to the appellant's denial of actual involvement in the price initiatives, it is sufficient to observe that this seeks to call in question the appraisal by the Court of First Instance of the numerous items of evidence referred to in paragraph 940 of the contested judgment, following which appraisal it merely held that the Italian producers were involved in the price initiatives and that those initiatives were intended to apply in Italy even if the planned increase occasionally failed to materialise, thereby arousing criticism from competitors.

522 In the absence of any complaint of distortion of the evidence considered establishing that those general considerations were wrong, the disputed appraisal cannot be reviewed by the Court in the context of an appeal, as is stated in paragraph 285 above.

523 It follows that this plea must be rejected.

3. The plea raised by Enichem alleging erroneous attribution of the infringement to it as the holding company of a group and wrongful disregard by the Court of First Instance of the relevance of the turnover of the holding company for the purposes of calculating the amount of the fine

524 Before the Court of First Instance, Enichem raised a plea for annulment alleging that, as the holding company of a group, it could not have been an appropriate addressee of the PVC II decision. In that capacity, it did not assume any responsibility with regard to activities in the thermoplastics sector, including PVC.

525 In its assessment, the Court of First Instance first of all made clear, in paragraph 986 of the contested judgment, that, according to the wording of the appellant's reply (p. 15), that plea constituted not an end in itself, but the essential basis for further arguments concerning the amount of the fine, which, in Enichem's view, was calculated by reference to the turnover of the holding company, which was far higher than that of the operating company. However, it observed that, as it was entitled to do, the Commission initially determined the total fine and then divided it between the undertakings by reference to the average market share of each and any mitigating or aggravating circumstances which might apply to any of them individually. It concluded therefrom that, subject to the application of Article 15(2) of Regulation No 17 fixing the maximum fine which the Commission may impose, the turnover of the holding company had not been taken into account in determining the amount of the individual fine imposed on the applicant. To that extent, it considered that the appellant had no interest in raising a plea alleging incorrect identification of the addressee of the PVC II decision. However, it did not declare the plea to be inadmissible.

526 It then considered the plea in depth in paragraphs 987 to 992 of the contested judgment before finally rejecting it.

527 In its appeal, Enichem refers to paragraphs 978 to 992 of the contested judgment as the parts of that judgment which it disputes. It claims that that judgment should be annulled inasmuch as, in paragraph 986, the relevance of the turnover of the holding company to the calculation of the fine imposed on it was excluded. Before expanding on that argument, it explains that the plea is linked to its complaint of an error in the identification of the addressee of the decision, which it seeks to pursue in the appeal. It therefore also claims that the contested judgment should be annulled inasmuch as the Court of First Instance rejected that complaint.

528 As has already been pointed out in paragraph 497 of this judgment, an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal.

529 That requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the contested judgment, confines itself to reproducing the pleas in law and arguments previously submitted to the Court of First Instance. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake (see, in particular, *Del Plato*, cited above, paragraph 20, and *Bergaderm and Goupil*, cited above, paragraph 35).

530 An appeal which, without even reproducing the plea raised before the Court of First Instance, merely states that that plea is repeated falls *a fortiori* outside the scope of the jurisdiction of the Court of Justice.

531 In the present case, the plea raised before the Court of First Instance alleged an error in the identification of the addressee of the PVC II decision, in other words in the determination of the legal person liable for the infringement. That plea was argued at length in the application and subsequently in the reply.

532 The Court of First Instance stated the grounds for its rejection of that plea in paragraphs 987 to 992 of the contested judgment.

533 However, Enichem has failed to put forward any arguments specifically identifying the error in law vitiating those grounds. It confines itself to stating that it wishes to repeat that plea, adding only that it has on several occasions pointed out the illogicality of the Commission's decision to designate it, in its capacity as a holding company, as the addressee of the PVC II decision liable for the infringement.

534 To that extent, the plea repeated in the context of the appeal falls outside the competence of the Court of Justice.

535 With respect to the complaint raised against paragraph 986 of the contested judgment, it must be stated that the grounds given in that paragraph by the Court of First Instance, which are restated in paragraph 525 of this judgment, constituted a response to the closing remarks, worded as follows, concluding the final arguments in Enichem's reply relating to the plea actually raised before the Court of First Instance:

'We shall bring this question to a close by stating that the above is not a sterile debate constituting an end in itself but the essential basis of our subsequent arguments concerning the amount of the fine, which was obviously calculated by reference to the turnover of the holding company, which was far higher than that

of the operating company. Hence the applicant's interest in the annulment of the [PVC II] decision, on account of its having attributed liability for the infringement, and having been addressed, to Enichem and not, in so far as may be appropriate, to Enichem Anic.'

536 Those remarks did not, however, form part of the plea submitted. They merely announced other pleas raised by Enichem against the criteria applied in fixing the amount of the fine and stated the consequence, as regards the turnover figures used for that purpose, of the alleged error in law concerning the identification of the legal person responsible for the infringement.

537 To that extent, the complaint against paragraph 986 of the contested judgment is misplaced, inasmuch as it is directed against grounds given for the sake of completeness which cannot provide any basis for annulment of that judgment (see, in particular, the order in *SPO*, cited above, paragraph 47, and the case-law cited therein).

538 It follows that this plea must be rejected in its entirety.

4. The plea raised by Enichem alleging that the Court of First Instance erred in law as regards the consequences of its finding that there was no correlation between two documents forming the basis of the Commission's accusation

Aspects of the PVC II decision at issue before the Court of First Instance

539 As has previously been pointed out in paragraph 294 of this judgment, two 1980 planning documents were found by the Commission in November 1983 at the

premises of ICI. They were respectively entitled 'Checklist' and 'Response to Proposals'. According to the first paragraph of point 7 of the account of the facts contained in the PVC II decision, they amounted to a blueprint for the cartel, the first document proposing a new framework of meetings to administer a revised quota system and price fixing scheme and the second recording the generally favourable reaction of other producers to the ICI proposal.

540 In the final paragraph of point 7 of the account of the facts contained in the PVC II decision, the Commission stated that the Response to Proposals summarised the response of the PVC producers to the proposals and showed that they were all in favour of the plan, and that the only reservations expressed concerned the wisdom of allowing any flexibility in the individual quotas, as had been mooted in the ICI proposal.

541 In the first paragraph of point 10, it stated that the Response to Proposals showed that the proposal that tonnage quotas be calculated in future on a company basis instead of, as previously, on a national basis had been strongly supported by the producers, as was the suggestion that percentage quotas be based on the producers' 1979 market shares, although anomalies remained to be settled.

542 In the first and final paragraphs of point 25, it considered that:

— the core evidence showing the existence of the cartel was provided by the 1980 planning documents, by the evidence of a system of regular meetings between ostensible competitors and by the documents relating to quota and compensation schemes;

— that core evidence in fact not only demonstrated the existence of a common scheme but also identified virtually all the participants in the cartel since almost all of the undertakings were named in the 1980 documents and BASF and ICI had identified most of those which attended meetings;

— confirmation of that evidence was to be found in the documents discovered in the 1987 investigations, particularly at the premises of Solvay and Atochem.

543 In the second paragraph of point 30, it concluded that the continuing restrictive arrangements applied by the PVC producers over a period of years clearly originated in the proposal made in 1980 and constituted its implementation in practice.

544 In point 48, the Commission considered that the infringement period had commenced in about August 1980. It based that conclusion on the date of the ICI proposals and on the fact that the new system of meetings had begun at about that time. It conceded that it was not possible to establish with certainty the date on which each individual producer had begun to attend meetings. However, in its view, the 1980 document implicated all the producers except Hoechst, Montedison, Norsk Hydro, Shell and LVM in the formation of the original plan. It added that the likely dates when those producers adhered to the plan could, however, be ascertained from other documents.

545 Before the Court of First Instance, Enichem asserted, in the context of its denial of the infringement, that the planning documents had no probative value as regards the origin of the cartel. It maintained that the Response to Proposals was not a

reaction by the other producers to the proposals made by ICI in the Checklist. It claimed that the planning documents could be nothing more than expressions of opinions of persons within ICI. Moreover, the appellant objected that it was not possible to state without evidence, as was done in point 8 of the account of the facts contained in the PVC II decision, that the producers had met 'following the 1980 proposals'.

The disputed grounds of the contested judgment

546 Enichem states that its plea is directed against paragraphs 663 to 673 of the contested judgment.

547 In paragraph 668 of the contested judgment, the Court of First Instance refused to accept that the planning documents were unrelated, for the following reasons:

'The argument that the two planning documents were unconnected cannot be accepted. In the first place, they were both found at ICI's premises and were physically attached to each other. Secondly, the Checklist comprised a list of certain topics which, in a general way, concerned mechanisms for monitoring sales volumes and regulating prices. Those topics are themselves considered, with greater precision, in the Response to Proposals. Moreover, some of the more detailed points occur in both documents. That applies to the reference to a three-month stabilisation period, the possibility of a price rise in the final quarter of 1980, the need to find an arrangement to take account of new production capacity, or again the possibility of variances on predetermined market shares, with the same reference to a threshold of 5% and to the reservations expressed in that regard....'

548 However, in paragraph 670 of the contested judgment, it considered that the actual wording of the planning documents did not support the Commission's conclusion, in the final paragraph of point 7 and the first paragraph of point 10 of the PVC II decision, that the second planning document constituted the response of the other PVC producers to ICI's proposals, any more than it supported the inference that those documents were mere expressions of the opinions of ICI staff members.

549 Nevertheless, the Court of First Instance based its finding, in paragraph 671, that the planning documents constituted, at the very least, the basis on which consultations and discussions between producers took place, and led to the actual implementation of the unlawful measures envisaged, on the following reasons:

'... As the above examination has shown, the Commission has produced numerous documents establishing the existence of the practices described in the [PVC II] decision. The fact also remains that the planning documents, and especially the Checklist, which emanate from a senior ICI executive, clearly reveal the existence of a blueprint for a cartel on the part of that undertaking, which at the time those documents were produced was one of the main European PVC producers; moreover, the practices envisaged in those documents were detected in the West European PVC market in the following weeks....'

550 It added in paragraph 672:

'In that regard, even if the documents produced by the Commission in support of its factual findings concerning practices on the PVC market do not indeed make any reference to the planning documents, the Court considers that the close correlation between those practices and the practices described in those documents sufficiently demonstrates the existence of a link between them.'

551 Finally, in paragraph 673, it held that the Commission was therefore right to conclude that the planning documents could be regarded as being at the origin of the cartel which materialised in the weeks which followed their production.

Arguments of the appellant

552 In its appeal, Enichem states that it does not dispute the Court of First Instance's finding, in paragraph 670 of the contested judgment, that the proposals were nothing more than a plan of ICI which met with a favourable response, not in the approval of the other undertakings as summarised in the Response to Proposals, but rather in their subsequent conduct. Contrary to the Commission's assessment, the Response to Proposals did not therefore determine the date of formation of the agreement.

553 However, the appellant maintains that the Court of First Instance should have taken into consideration the legal effect of its finding, which should have led to the rebuttal of all the Commission's evidence. In Enichem's view, it should have taken note of the alteration of the substance of the accusation which resulted from that finding.

554 In that respect, it complains that the Court of First Instance considered it guilty of the same infringement as that complained of by the Commission.

555 It does not dispute that, in the absence of evidence of formal agreement to the proposals, its conduct, which might seem to reflect the pursuit of a policy common to all the producers, was open to interpretation as an infringement of Article 85(1) of the Treaty.

556 However, it considers that its degree of culpability should in those circumstances have been reduced in view of both the gravity and the duration of the infringement. Involvement in a cartel by virtue of conduct is undoubtedly less serious than formal adhesion to an agreement or a concerted practice. Furthermore, as regards duration, the point in time taken as the start of the infringement period cannot have been August 1980; since the Response to Proposals lost its character as an act of adhesion to the cartel. As the Court of First Instance acknowledged in paragraph 940 of the contested judgment, the first price initiative, dating from November 1980, contained no reference whatever to the Italian producers. As to the tables found at Solvay's premises, containing data in respect of sales by the undertakings concerned in 1980 ('the Solvay tables'), these at most support an accusation that the appellant engaged in an exchange of information with a competitor, and certainly do not establish the existence of a cartel at European level.

557 Consequently, Enichem claims that the contested judgment should be annulled inasmuch as the Court of First Instance, having established the lack of any correlation between the two planning documents, failed to draw all the appropriate conclusions with respect to the gravity and duration of the infringement complained of.

Findings of the Court

558 Article 1 of the PVC II decision fixes the date of the agreement and/or commencement of the concerted practice by which the producers held regular meetings in order to fix target prices and target quotas, plan concerted initiatives to raise price levels and monitor the operation of those collusive agreements at 'about August 1980'.

559 According to the statements in the PVC II decision and those made by Enichem in its application to the Court of First Instance (point V.C.1.), it was in August 1980, taken as the date of commencement as indicated above, that the Checklist was drawn up by a senior ICI executive. That was also the month in which, according to the evidence taken into consideration by the Commission and assessed by the Court of First Instance in paragraph 675 of the contested judgment, the regular meetings of the undertakings began.

560 In point 48 of the account of the facts contained in the PVC II decision, the Commission based its choice of that month as marking the commencement of the infringement on both the date of the ICI proposals and the point in time at which the new system of meetings began.

561 It therefore did not base that choice solely on an assessment concluding that the planning documents dealt with an illegal agreement which had already been formally concluded.

562 Accordingly, the Court of First Instance's finding, in paragraph 670 of the contested judgment, that the wording of the planning documents supported neither the conclusion that the Response to Proposals constituted the reaction of the other PVC producers to ICI's proposals nor the conclusion that those documents were mere expressions of the opinions of ICI staff members does not have the significance attributed to it by Enichem.

563 It neither calls into question the evidence nor leads to an alteration of the substance of the accusation.

564 In paragraph 668 of the contested judgment, the Court of First Instance, assessing in its absolute discretion the evidence before it (as to which no complaint of distortion of that evidence has been levelled against it), ruled that the two

planning documents were related. In particular, in paragraph 671, having likewise carried out a further assessment in its absolute discretion, it held that, at the very least, those documents constituted the basis on which consultations and discussions between producers took place and led to the actual implementation in the following weeks of the unlawful measures envisaged.

565 By approving, in its appeal, the Court of First Instance's finding, in essence, that the planning documents were merely a plan of ICI which met with a favourable response in the subsequent conduct of the undertakings concerned (see paragraph 552 of this judgment), Enichem from then on implicitly, but necessarily, acknowledged that the Court of First Instance was right to conclude, in paragraph 671 of the contested judgment, that there was a link between the planning documents and the measures implemented in the weeks thereafter.

566 That acknowledgement precludes it from challenging the final conclusion, set out in paragraph 673 of the contested judgment, that the planning documents could be regarded as being at the origin of the cartel.

567 The final conclusion of the Court of First Instance simply means that it regarded the planning documents as a manifestation of an initiative conceived in the form of proposals for the subsequent conclusion of agreements, and not as evidencing any agreement already concluded.

568 In the present case, such a conclusion has no special significance in relation to the duration of the infringement, since:

— the infringement was regarded as having begun in 'about' August 1980;

— that was taken as the commencement date both by the Commission and by the Court of First Instance because the meetings between the undertakings began in the course of that month;

— with respect to Enichem, the Court of First Instance, in the exercise of its unfettered discretion, ruled in paragraphs 675, 677, 931 and 932 of the contested judgment that the appellant had participated in meetings held over several years from August 1980;

— moreover, the appellant itself acknowledged before that court, in the arguments in its application concerning the frequency of its participation in those meetings (point V.C.I., seventh paragraph) that 'it is at best possible to maintain that, at the beginning and at the end of the period in question, Enichem participated in some meetings'.

569 That finding is not contradicted in the appeal by the appellant's arguments, as summarised in paragraph 556 of this judgment, relating to paragraph 940 of the contested judgment and to the Solvay tables, which were considered by the Court of First Instance in paragraphs 618 to 636 of the contested judgment.

570 As regards the first argument, suffice it to say that this repeats a challenge previously raised in the appeal, directed against the Court of First Instance's assessment, in paragraph 940 of the contested judgment, of the question of Enichem's involvement in the price initiatives. That challenge has already been considered and rejected in paragraphs 521 and 522 of this judgment.

571 The second argument, relating to the Solvay tables, seeks, like the first, to call in question the Court of First Instance's assessment of the evidence. In accordance with the case-law cited in paragraph 285 of this judgment, it therefore falls outside the appellate jurisdiction of the Court of Justice, save where that evidence has been distorted, which is not alleged in the present case.

572 Finally, Enichem cannot validly argue that the conclusion reached by the Court of First Instance in paragraph 670 of the contested judgment should have resulted in a different assessment by it of the gravity of the infringement on the ground that involvement in a cartel by virtue of conduct is less serious than formal adhesion to an agreement or concerted practice.

573 It is apparent from point 53 of the account of the facts contained in the PVC II decision that, for the purposes of assessing the gravity of the infringement complained of in respect of each undertaking, the Commission did not draw any distinction between formal adhesion and involvement resulting from conduct. In point 53, it stated, first, that it had considered, *inter alia*, the degree of involvement of each of the undertakings in the collusive arrangements and the role played by them therein and, second, that it had not identified any undertaking as the 'ringleader' for the purposes of attributing the major responsibility. As regards Enichem, it has already been held, in paragraph 519 of this judgment, that, in calculating the penalty, both the Commission and the Court of First Instance took into account the fact that Enichem participated more or less regularly in the meetings.

574 It follows that the plea, which is ineffective, must be rejected.

5. The plea raised by Wacker-Chemie and Hoechst alleging infringement of Article 85(1) of the Treaty and Article 15(2) of Regulation No 17

575 Wacker-Chemie and Hoechst submit that the Court of First Instance erred in law in applying Article 85(1) of the Treaty. They also plead infringement of Article 15(2) of Regulation No 17.

576 First, they dispute the grounds contained in paragraphs 609 to 612 of the contested judgment which relate to participation by the German PVC producers in a quota agreement. In that respect, they refer to three other grounds of appeal advanced by them alleging, respectively, incomplete consideration of the facts, distortion of the evidence and contradictory and insufficient grounds of the contested judgment as regards the consideration of the documentary evidence.

577 In that regard, suffice it to say that the first complaint submitted in the context of the present plea is covered by the three pleas to which the appellants merely refer and which have already been rejected in paragraphs 392 to 405, 407 to 413 and 438 to 442 of this judgment.

578 That complaint has no independent existence and is therefore irrelevant.

579 Second, Wacker-Chemie and Hoechst dispute the Court of First Instance's assessment, in paragraphs 662 to 673 of the contested judgment, of the planning documents found by the Commission at ICI's premises in November 1983 (see

paragraph 539 of this judgment), describing those documents as the 'core of the evidence'.

580 They observe that, in paragraph 670 of the contested judgment, the Court of First Instance considered that the wording of those documents, namely the Checklist and the Response to Proposals (see paragraph 539 of this judgment), did not support the Commission's conclusion, in the final paragraph of point 7 and the first paragraph of point 10 of the account of the facts contained in the PVC II decision, that the second planning document constituted the response of the other PVC producers to ICI's proposals any more than it supported the conclusion that those documents were mere expressions of the opinions of ICI staff members (see paragraph 548 of this judgment).

581 They complain that, in paragraph 671 of the contested judgment, the Court of First Instance nevertheless concluded, on the basis of actual conduct on the part of the undertakings which was allegedly consistent with those documents, that the corresponding measures envisaged had been implemented.

582 In that regard, it should be noted that, in paragraph 671 of the contested judgment, the Court of First Instance, having carried out an assessment in its absolute discretion, held that, at the very least, those documents constituted the basis on which consultations and discussions between producers took place and led to the actual implementation in the following weeks of the unlawful measures envisaged (see paragraph 564 of this judgment).

583 That assessment does not have the significance attributed to it by the appellants. It does not constitute the decisive basis for the finding as to the existence itself of measures constituting the cartel.

584 The real significance of the assessment in question is made clear in paragraph 672 of the contested judgment, in which the Court of First Instance merely found 'the existence of a link' between the planning documents and the subsequent anti-competitive practices already established, in fact, by other documents produced by the Commission.

585 The criticism levelled against paragraph 671 of the contested judgment is therefore unfounded.

586 Thirdly and finally, Wacker-Chemie and Hoechst submit that, in any event, the conclusion which they consider the Court of First Instance to have drawn is unfounded since, in their view, it was not established that they had participated in the quota system which was one of the constituent elements of the cartel complained of.

587 Suffice it to say that, by that complaint, the appellants are again seeking to challenge, by way of a mere assertion, the Court of First Instance's assessment of the facts, which does not constitute, save in the event of distortion of the evidence, a question of law which is amenable, as such, to review by the Court of Justice (see paragraph 285 of this judgment). In any event, the plea raised by Wacker-Chemie and Hoechst alleging distortion of the evidence concerning their participation in the quota system has already been considered and rejected in paragraphs 407 to 413 of this judgment.

588 It follows that this plea must be rejected in its entirety.

6. The plea raised by Enichem alleging infringement of Article 15(2) of Regulation No 17 as a result of an error made by the Court of First Instance as regards the correlation between the turnover in the business year preceding the PVC II decision and the amount of the fine

589 Enichem complains that, in paragraphs 1146 to 1148 of the contested judgment, the Court of First Instance erred in law in its assessment of the correlation between the turnover in the business year preceding the Commission's decision, to which Article 15(2) of Regulation No 17 refers, and the amount of the fine.

590 In its view, the Court of First Instance was wrong to exclude its complaint that, in the PVC II decision, the Commission imposed a fine in the same amount as that fixed by the PVC I decision without taking into account the fact that, in the circumstances, the ratio between the turnover established and the fine fixed by the PVC II decision was necessarily different from that between the turnover established and the fine fixed by the PVC I decision.

591 According to the appellant, by imposing the same fine despite the fact that six years had passed since the PVC I decision, the PVC II decision completely overturned the requisite ratio between the size of the undertaking and the fine. The Commission thus infringed Article 15(2) of Regulation No 17 even though the amount of the fine remained below the maximum of 10% of the relevant turnover in each of the two cases.

592 In that regard, it must be stated that, in paragraph 1146 of the contested judgment, the Court of First Instance correctly pointed out that the purpose of the reference to turnover in Article 15(2) of Regulation No 17 is to determine the maximum amount of the fine which may be imposed on an undertaking.

593 That maximum of '10% of the turnover in the preceding business year' relates to the business year preceding the date of the decision (*Sarrió*, paragraph 85).

594 The appellant's objection concerns the alleged failure to take into consideration the change in its turnover between the 1987 business year, which preceded the PVC I decision, and the 1993 business year, which preceded the PVC II decision.

595 Its argument is based on two premisses. First, the turnover realised in the business year preceding the date of each of the two decisions influenced the fine imposed. Second, in the event of the annulment of a decision followed by the adoption of a new decision, the Commission is bound by the level of the penalty imposed by the first decision, in that it is legally required to fix the amount of the fine imposed by the second decision at a level corresponding to the same mathematical ratio as that between the two relevant turnover figures.

596 Without its being necessary to consider the merits of the second premiss, it is sufficient to state, first, that Enichem has not attempted to show that the first premiss is correct and, second, that the file contains no evidence suggesting that the Commission took into consideration the turnover realised in the business year preceding the date of the decision for any purposes other than determination of the maximum amount of the fine incurred.

597 In those circumstances, the Court of First Instance was right to hold, in paragraph 1147 of the contested judgment, that the change in the ratio between, on the one hand, the fine imposed in the PVC I decision and the turnover realised in 1987 and, on the other hand, the fine of an identical amount imposed in the PVC II

decision and the turnover realised in 1993 did not in itself entail an infringement of Article 15(2) of Regulation No 17. It rightly went on to rule that that would be so only if the fine imposed by the PVC II decision had exceeded the maximum fixed by that article. However, it found that the fine was substantially below that maximum.

598 It follows that this plea must be rejected.

7. The plea raised by Enichem alleging infringement of the principle of proportionality in fixing the amount of the fine

599 Enichem complains that, in paragraphs 1218 to 1224 of the contested judgment, the Court of First Instance rejected its plea alleging that the Commission had infringed the principle of proportionality when fixing the amount of the fine.

600 It observes that the fine imposed by the PVC II decision is the same as that imposed by the PVC I decision. However, the real value of that fine, as assessed at the date of each of the two decisions, is very different, so that the fine imposed by the PVC II decision has an unfairly punitive effect. At the 1988 exchange rate, the sum of ECU 2 500 000 represents LIT 3 842 000 000 whereas, at the 1994 exchange rate, it represents LIT 4 835 000 000. That is equivalent, in real terms, to an increase in the fine of 20% although the facts forming the basis for its calculation, in particular the gravity and duration of the infringement, remained the same.

601 In order to comply with the principle of proportionality, the Commission could very easily, in Enichem's view, have adopted a method which would have retained the original value of the fine imposed. It could have authorised payment

at the 1988 exchange rate or assessed the amount of the fine in ecus at the date of the PVC II decision by reference, however, to the value of that fine in the national currency at the 1988 exchange rate.

602 The Court of First Instance was wrong to consider that the risks of fluctuating exchange rates were inevitable. Such fluctuations are a risk inherent in commercial trade which has no relevance to the application of the law. In this case, the undertaking was penalised twice, first by way of the fine and then by way of the financial method used.

603 It must be stated that Enichem's objection is based on the premiss that, in the event of the annulment of a decision followed by the adoption of a new decision, the equivalent value in national currency of the fines fixed by the two successive decisions must, in law, remain the same. In other words, that premiss means that the Commission is legally required to leave unchanged, in terms of absolute value, the amount of the fine fixed in its first decision.

604 However, without there being any need to consider the merits of that premiss, it is sufficient to state that, in holding in paragraph 1222 of the contested judgment that the risks of fluctuating exchange rates remain inevitable, the Court of First Instance was merely pointing out, quite correctly, that currency fluctuations are an element of chance which may produce advantages and disadvantages which undertakings realising part of their sales on export markets have to deal with regularly in the course of their business activities and the very existence of which is not such as to render inappropriate the amount of a fine lawfully fixed (Case C-282/98 P *Enso Española* v *Commission* [2000] ECR I-9817, paragraph 59, and *Sarrió*, paragraph 89).

605 Such an element of chance may also arise where the Commission has chosen a method of calculating fines which enabled it to assess the size and economic

power of each undertaking and the scope of the infringement committed in the light of the economic reality as it appeared at the time the infringement was committed (*Enso Española*, cited above, paragraph 58, and *Sarrió*, paragraph 86). That time may be several years before the date of the decision imposing the penalties; alternatively — as in the present case — several years may have passed between the first decision and the second which, after annulment of the first, imposes a fine of the same amount expressed in ecus.

606 In any event, the maximum amount of the fine, determined by virtue of Article 15(2) of Regulation No 17 by reference to turnover in the business year preceding the adoption of the decision, limits the possible harmful consequences of monetary fluctuations (*Enso Española*, paragraph 59, and *Sarrió*, paragraph 89).

607 In this case, the Court of First Instance observed, in paragraph 1223 of the contested judgment, that the fine imposed by the PVC II decision, even expressed in national currency, remains substantially below that maximum.

608 Accordingly, this plea must be rejected.

8. The plea raised by Montedison alleging that the fine is disproportionate and unfair having regard to the gravity and duration of the infringement

609 Montedison complains that, in paragraphs 1216 to 1224 of the contested judgment, the Court of First Instance rejected its plea alleging that the fine was disproportionate and unfair. According to the appellant, it was wrong to find in that respect that Montedison had failed to demonstrate the disproportionate nature of that fine.

610 Montedison disputes the requirement of proof thus imposed upon it, given its assertion throughout the proceedings that all it had done was to participate in a few meetings over a period of one to three years.

611 It should be observed that the assessment of the proportionality of the fine imposed having regard to the gravity and duration of the infringement, which are the criteria referred to in Article 15(2) of Regulation No 17, falls within the unlimited jurisdiction to review decisions conferred on the Court of First Instance under Article 17 of that regulation.

612 In holding, in paragraph 1216 of the contested judgment, that Montedison had not in any way shown how the fine imposed was disproportionate having regard to the gravity and duration of the infringement, the Court of First Instance did not literally impose any requirement of proof on the appellant.

613 By way of that negative formulation, it merely gave expression to the conclusion which it had reached in the exercise of its unfettered discretion following its assessment of the gravity and duration of the matters established and having regard to Montedison's arguments disputing those facts or casting a different light on them, which it had previously rejected.

614 It is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law (*Sarrió*, paragraph 96).

615 It follows that this plea must be rejected.

9. The plea raised by Montedison alleging infringement of the principle of equal treatment as regards the amount of the fine

616 Montedison complains that the Court of First Instance infringed the principle of equal treatment with respect to the amount of the fine. It considers that the Court of First Instance treated it in the same way as the other applicants which remained active in the sector throughout the period at issue and which seemed to have taken an active part in the conduct described as a cartel. The discrimination is even more evident in view of the substantial reductions accorded by the Court of First Instance to three of the applicants.

617 It should be observed in that regard that even though, in the context of an appeal, it is not open to the Court of Justice to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines (see paragraph 614 of this judgment), the exercise of that jurisdiction in respect of the determination of those fines cannot result in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 85(1) of the Treaty (*Sarrió*, paragraph 97).

618 However, it must be borne in mind that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or plea concerned is inadmissible (see paragraph 497 of this judgment).

619 The Court finds that Montedison's complaint of discrimination is formulated in general terms.

620 The appellant does not state which paragraphs of the contested judgment it disputes. Moreover, with respect to the other undertakings which were allegedly more active than it and which it does not expressly specify, it does not state the aspects of their situations which, compared to its own, show that the alleged discrimination occurred.

621 Accordingly, this plea must be rejected.

10. The plea raised by Enichem alleging misinterpretation and misapplication of Community law and insufficient assessment of the evidence with respect to the ratio between the fine imposed on the appellant and its market share

Arguments of the appellant

622 Enichem submits that it maintained before the Court of First Instance that, in determining the amount of the fine, the Commission wrongly estimated its market share at an average of 6% for the period 1980 to 1982 and at 15% for the years 1983 and 1984. It states that, throughout the proceedings, it claimed to have had an average share of less than 4% for the first period, a share of 12.8% for 1983 and 12.3% for 1984.

623 The appellant complains that, in paragraphs 615 and 616 of the contested judgment, the Court of First Instance considered that the figures put forward by it were unreliable on the ground that it had not stated on what basis it had determined its market share for 1984 and that it had understated that share by giving sales figures which related, not to the sales of European producers, but to European consumption figures, which were necessarily higher since they included imports.

624 According to Enichem, the statements made by the Court of First Instance are incorrect and show that it failed to consider the evidence submitted by it.

625 With respect to the charge that it understated the share, the appellant argues that a product market clearly cannot be defined on the basis of the sales of the producers which the Commission regards as participating in an infringement but, rather, on the basis of all sales on the geographical reference market, which also includes imports.

626 Furthermore, Enichem complains that, in paragraphs 1201 to 1204 of the contested judgment, the Court of First Instance stated that, contrary to what the appellant maintained, the Commission had attributed to it a market share of less than 10%, and not 15%, from 1980 to 1984.

627 The appellant submits that the average of 10%, or more precisely 9.6%, was obtained on the basis of the figures of 6% and 15% identified by the Commission for the years 1980 to 1982 and 1983 and 1984 respectively, which figures it unwaveringly refused to accept. It argues that, on the basis of its real average market share of approximately 7.2% over the four years in question, and even applying the aggravating factor of the duration of the infringement, namely 110% of that market share, the fine imposed on Enichem should have been less than ECU 2 000 000 rather than the ECU 2 500 000 which it was ordered to pay.

Enichem adds that the Court of First Instance could not claim, without distorting the facts, that the appellant had not seriously challenged the attribution of an average market share of approximately 10% since, at the hearing, it expressly defined its position in that respect, reiterating how mystified it was by the figures used by the Commission.

628 In short, the appellant seeks annulment of the contested judgment inasmuch as the Court of First Instance excluded as unreliable the figures supplied by it concerning its market shares and inasmuch as the Court of First Instance considered the figures produced by the Commission to be undisputed.

Findings of the Court

629 The plea seeks in essence to call in question the Court of First Instance's assessment of the evidence. To that extent, it falls outside the appellate jurisdiction of the Court of Justice unless that evidence has been distorted (see paragraph 285 of this judgment), which the appellant alleges as a preliminary objection.

630 In paragraph 616 of the contested judgment, which is the subject of Enichem's first complaint, the Court of First Instance did indeed exclude the figures put forward by the appellant concerning its market share on the ground that they could not be regarded as reliable.

631 The assessment of those figures related to the consideration by the Court of First Instance, in paragraphs 584 to 617 of the contested judgment, of the existence of a quota system and was linked with the analysis of the Atochem table previously referred to in paragraph 398 of this judgment.

632 The assessment was intended, in particular, to establish, in paragraph 614 et seq. of the contested judgment, whether the market shares of the undertakings in question for 1984 corresponded to the target shares shown in the Atochem table.

633 As regards Enichem, the Court of First Instance, in paragraph 615 of the contested judgment, gave the following reasons for the conclusion which it went on to draw concerning the unreliability of the figures put forward by that undertaking:

'Enichem maintains that its share of sales amounted to 12.3% in 1984, which is clearly below that shown in the Atochem table. That objection cannot be accepted. Enichem was invited to state on what basis it had determined its market share for 1984, but was not able to offer any explanations concerning the factors on which it relied. The Court notes, moreover, that, in the annexes to its application (Volume III, Annex 2), Enichem produced a table recapitulating its sales, year by year, for the period from 1979 to 1986, from which it may be deduced that the market shares were calculated in an identical manner for each of those years. At the request of the Court of First Instance as a measure of organisation of the procedure, the applicant tried to explain how it had calculated its market share for the years 1979 to 1982. In the result, the applicant merely stated its sales figures for each of those years without any evidence in support. Moreover, those sales figures related not to sales of European producers in western Europe but to figures for European consumption, which were necessarily higher since they included imports. That substantially reduced the market share claimed by the applicant.'

634 It is clear from those reasons that the Court of First Instance carried out an extensive examination of the information provided by Enichem itself and requested it to give detailed explanations but that it either received no explanation or obtained explanations which were not supported by any evidence.

635 Those reasons show that, contrary to what Enichem maintains in its appeal, the Court of First Instance was right to find fault with the fact that the sales figures put forward by Enichem had been linked, not to the sales of western European producers, but to European consumption figures, which included imports. The Court of First Instance's assessment, as set out in paragraph 614 of the contested judgment, was aimed at verifying whether the target shares shown in the Atochem table corresponded to the relative market shares of 'the producers between themselves', that is to say, their shares in the market subject to the quota system and, thus, the cartel.

636 Accordingly, the Court of First Instance did not distort the evidence in the case-file by concluding that the figures at issue were unreliable and by excluding them.

637 As regards the appellant's second complaint, which seeks a declaration that the Court of First Instance was not entitled to regard the figures produced by the Commission as undisputed, it should be stated, first of all, that the contested judgment clearly restated Enichem's objections:

> '1189 Finally, Enichem comments that the Commission attributed to it an average market share of 15% between 1980 and 1984, significantly higher than the actual average and even higher than the market share it had in 1984 (12.3%).
>
> ...

1199 As regards Enichem, the applicant maintains that its average market share was of the order of 2.7% in 1980 and 1981, 5.5% in 1982, 12.8% in 1983 and 12.3% in 1984, so that its average market share for the whole of the period was slightly more than 7%.'

638 Next, it must be observed that the Court of First Instance rejected those objections for the following reasons:

'1200 However, as the Court has already held (paragraph 615 above), the figures produced by the applicant are not sufficiently certain.

1201 Secondly, contrary to what the applicant maintains, the Commission did not attribute to it an average market share of 15% from 1980 to 1984. It is expressly stated in the table produced by the Commission that that market share concerns the year 1984. Moreover, a footnote states that that share is the result of the acquisition of Montedison's PVC business in March 1983, which, as is not denied, substantially increased the applicant's market share. Indeed, if the Commission had proceeded on the basis of an average market share of 15% over the whole of the period, the fine imposed on the applicant would have been higher than those imposed on Elf Atochem and Solvay, which were in the same position as the applicant in terms of both the duration of the infringement and their role in it, but whose market shares as established by the Commission were below 15%. However, it is apparent, on the contrary, that the fine imposed on Enichem is substantially below that imposed on those two undertakings.

1202 Thirdly, the market share indicated in the individual particulars annexed to the statement of objections, namely 12%, does not contradict the share

indicated in the table produced by the Commission; the first concerns the year 1983 as a whole, whereas the second concerns only the market share after the acquisition of Montedison's PVC business.

1203 Finally, it appears that the applicant has been ordered to pay a fine representing 10.6% of the total fine. In those circumstances, taking account of the methods of calculation used by the Commission, it appears that the applicant has been attributed an average market share in western Europe of less than 10%.

1204 In the absence of any serious challenge by the applicant, there is therefore no reason to reduce the fine imposed on it.'

639 It is therefore apparent that, by relying on 'the absence of any serious challenge by the applicant' to justify its refusal to grant the application for a reduction of the fine, the Court of First Instance by no means held that there had been no challenge to the figures at issue. By that statement, the Court of First Instance clearly indicated that it had come to the conclusion that Enichem's challenges, which it had in fact restated and considered, were unfounded.

640 The second complaint, as formulated by the appellant, must therefore be rejected.

641 Even if it could be understood as also including an allegation of distortion of the evidence considered in paragraphs 1200 to 1203 of the contested judgment, it would nevertheless remain unfounded.

642 As regards the Court of First Instance's decision, in paragraph 1200 of the contested judgment, to exclude the figures produced by Enichem by reference to the reasons given in paragraph 615 of that judgment, it has already been held that the corresponding assessment was not vitiated by distortion (see paragraph 636 of this judgment).

643 As to the remainder, the very wording of the reasons given in paragraphs 1201 to 1203 of the contested judgment and the documentary evidence considered show that the Court of First Instance's finding, challenged in the appeal, that the Commission proceeded on the basis of a market share of less than 10%, and not 15%, for the period from 1980 to 1984 is not vitiated by distortion either. Indeed, it shows that, contrary to what Enichem maintains, if the Commission had actually proceeded on the basis of a market share of 15%, the fine imposed on the appellant would not have been less than ECU 2 000 000 but in fact greater than those imposed on Elf Atochem and Solvay, which were penalised more severely.

644 It follows that this plea must be rejected in its entirety.

11. The plea raised by ICI alleging failure by the Court of First Instance to annul or reduce the fine as a result of infringement of the principle that action must be taken within a reasonable time

645 ICI complains that the Court of First Instance rejected its claims for annulment or reduction of the fines on the ground of breach of the principle of reasonable promptitude. That rejection was based on the finding by the Court of First Instance that the duration of the procedure conducted by the Commission was not unreasonable. ICI argues that, if it were to be accepted that the length of the Commission procedure was indeed unreasonable, the Court of First Instance also

erred in failing to take that into account in its assessment of the fine imposed on ICI. Independently of that argument, ICI submits that the fine imposed upon it should be substantially reduced on account of the excessive and unreasonable length of the procedure as a whole.

646 That plea must be rejected in the light of the findings in paragraph 235 of this judgment concerning the plea alleging infringement of the principle that action must be taken within a reasonable time.

VI — The consequences of the partial annulments of the contested judgment

647 The first paragraph of Article 54 of the EC Statute of the Court of Justice provides that, if the appeal is well founded, the Court is to set aside the decision of the Court of First Instance. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

648 In the present case, the state of the proceedings is such as to permit the delivery of final judgment on the pleas raised by Montedison alleging, first, infringement of its rights of access to the Commission's file and, second, a definitive transfer to the Community judicature of the power to impose penalties following the Commission decision.

A — *The plea raised by Montedison alleging infringement of its right of access to the Commission's file*

649 In its observations submitted to the Court of First Instance on 28 July 1997, Montedison argued that, after being given access to the Commission's file

pursuant to the measure of organisation of procedure adopted by the Court of First Instance by letter of 7 May 1997, it became aware of four documents illustrating aspects of the Italian PVC market which were in no way compatible with a cartel.

650 In its view, if those documents had been available to it for the purposes of preparing its defence with a view to the hearing of the undertakings during the administrative procedure and thereafter for the purposes of the actions against the PVC I and PVC II decisions, it would have been able to rely on them to show that the allegation was unfounded.

651 In that regard, it is apparent from paragraphs 369 to 377 of this judgment that that plea, although not raised at the stage of its initial application to the Court of First Instance, is admissible under Article 48(2) of the Rules of Procedure of the Court of First Instance, inasmuch as it is based on matters of law or fact which came to light in the course of the procedure.

652 It is therefore necessary to consider objectively the documents in question in the light of the matters on which the Commission based the PVC II decision, in order to determine whether those documents contained information relevant to Montedison's defence (*Hercules Chemicals*, cited above, paragraphs 75, 78, 80 and 81).

653 Montedison states that the documents in question related to reports on the preparatory meetings of the executive board of Solvay to its Italian associate Solvic SpA.

654 It does not expressly comment on the first document, which was attached as Annex 1 to its observations of 28 July 1997.

655 That document, dated 6 March 1981, is entitled 'Visit of the Executive Board on 13 March 1981'. It consists of a copy of one single page of the report in question, on which the appellant underlined the following sentence, contained in a paragraph concerning prices in Italy: 'The general situation is very complicated and changing and no meaningful forecast is possible at the moment'.

656 By way of that document, Montedison seeks to show that it could have argued that, in Italy, there was a situation which was incompatible with the accusation that price initiatives had been implemented.

657 However, although the underlined sentence indicates in general terms that the situation was problematic, it does not disprove the actual existence of price initiatives.

658 Moreover, the preceding three sentences, which also deal with the difficulties encountered, refer to:

— a 'tariff... of [ITL] 825-840/kg since January 1981';

— a 'relatively good situation in Italy [at the end of January], despite everything' in which 'an average price of the order of [ITL] 760/kg was obtained';

— 'decisions to achieve the tariff price at least for 1 March'.

659 The second document relied upon by Montedison, which was attached as Annex 2 to its observations, is dated 22 March 1983 and entitled 'Visit of the Executive Board on 28 and 29 March 1983'.

660 Montedison submits that it indicates a very worrying general reduction in prices on the Italian market in 1982.

661 By way of that document, it likewise seeks to show that it could have disputed the accusation of the implementation of price initiatives.

662 However, whilst the document does indeed describe a 'drastic fall' in the first four months of 1982, a second 'fall' in July and August of the same year and 'a very worrying reduction' from the end of January 1983, it also refers to:

— an 'attempted increase between May and June [1982]';

— a 'considerable rise from September [1982]' resulting from 'a more rigorous policy pursued by some producers (in particular Solvic) with the aim of ending a very worrying situation' and which 'produced satisfactory results'.

663 Moreover, it contains the following final comment: 'We are now once again on the verge of attempting a price increase'.

664 It is therefore apparent that the two documents of 6 March 1981 and 22 March 1983 do not have the significance attributed to them by the appellant, and that they even contain information which could have supported the Commission's accusation.

665 The document attached to Montedison's observations as Annex 4 is dated 11 April 1983 and is entitled 'Preparatory Policy Meeting on Guidelines... Milan, 13 April 1983'.

666 The appellant considers that it confirms the pursuit of an aggressive pricing policy by the company Enoxy (a joint venture between ENI and Occidental Petroleum which lasted until the end of 1982). It adds that no particular mention is made therein of its own pricing practice.

667 As is apparent from its observations of 28 July 1997, it considers that the document in question could also have substantiated its denials concerning the implementation of price initiatives.

668 That document indeed states that, by means of an 'aggressive price policy', Enoxy 'got back to the 1980 position of Anic + Sir + Rumianca'.

669 However, Montedison's claims concerning that document, like those concerning the documents previously considered, are all based on the underlying assertion that the implementation of price initiatives was incompatible with the fierce competition on the Italian market.

670 It is apparent from the PVC II decision that, in its assessment, the Commission took into account the fact that various decisions of the undertakings against which a procedure had been initiated had in fact been thwarted by the competitive conduct of some of them and the general context of fierce competition.

671 It found neither that the prices had increased steadily during the period of the infringement nor that they had remained stable throughout that period. On the contrary, the tables annexed to the PVC II decision show that the prices fluctuated continuously, reaching their lowest level in the first quarter of 1982.

672 In points 22 and 36 to 38 of the account of the facts contained in the PVC II decision, the Commission:

— referred to the 'aggressive' conduct of certain undertakings;

— expressly acknowledged that the price initiatives had been only partially successful and, in some cases, had even been considered failures;

— stated some of the reasons for those results.

673 It therefore determined the amount of the fine imposed on the appellants in the light of all of those considerations.

674 In particular, with respect to the three abovementioned documents, it must be stated, in the light of the fourth paragraph of point 20 of the account of the facts contained in the PVC II decision, that Montedison, like other producers, did not consider that it was open to attack for having introduced price initiatives, since the Commission had been unable to obtain from it documents as to its pricing practices. On the other hand, the fifth paragraph of point 20 and the final paragraph of point 26 of the account of the facts contained in that decision clearly show that a procedure was initiated against it only because of its participation in the informal meetings of the producers at which it was decided to fix target prices.

675 It follows from the above that Montedison cannot validly maintain that the documents of 6 March 1981, 22 March 1983 and 11 April 1983 contained information which it could use in its defence.

676 The document attached to Montedison's observations as Annex 3 is dated 23 March 1983 and is entitled 'Visit of the Executive Board on 28 and 29 March 1983'.

677 The appellant claims, first, that that document indicates the tendency of Italian consumers to approach more than one supplier for their purchases of PVC, thus illustrating 'customer tourism'.

678 The appellant's arguments must be understood as relating to its dispute as to the subject-matter of the discussions held at the regular meetings of the undertakings concerned.

679 In the fifth paragraph of point 7 of the account of the facts contained in the PVC II decision, the Commission found, on the basis of one of the planning documents, namely the Checklist, that the purpose of those meetings was to discuss matters such as, *inter alia*, 'measures designed to ensure [the price initiatives] were successful including the discouraging of "customer tourism" (buyers changing to a new supplier offering the lowest price)'. In the third paragraph of point 39 of that account, it considered that the '[a]rrangements 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 trade relationships'.

680 In that connection, Montedison highlights a passage in the document of 23 March 1983, in which:

— it is stated that, 'in several cases', customers who had previously had the choice of several national suppliers 'will find it difficult to accept being tied to one single supplier';

— it is added that 'from the end of 1982, we have been contacted by traditional MTE and Enoxy customers seeking information on our ability to supply them regularly'.

681 However, the first statement, as meant by the author thereof, indicates an intention to ensure that an existing customer remains tied to its traditional Italian supplier rather than also dealing with other suppliers. The second statement presents the enquiries made with regard to supplies as a nascent threat to the achievement of that aim. Yet in normal competitive circumstances, such enquiries would normally be regarded by the undertaking approached as an opportunity to increase its market share and not as a risk.

682 The reference to difficulties encountered or envisaged, which were outside the control of the suppliers concerned, therefore confirms rather than contradicts the intention to take steps to prevent those suppliers from having to compete for their customers.

683 Montedison cannot therefore validly claim that, in that respect, the document relied on contained information which it could have used in its defence.

684 Second, the appellant submits that the document of 23 March 1983 contains an analysis of the business structure of the Montedison group which is based on estimates rather than on definite information. It therefore claims to show that there was no exchange of information between the producers as regards the Italian market.

685 It is sufficient, however, to state that:

— the extract produced, while referring to a 'Table 6' by way of illustration of the sharing of sales between the various producers, is not accompanied by a copy of that table, so that it cannot be established whether the figures on which the analysis is based are estimates;

— the only sentence in the document which is cited by Montedison in its observations ('We estimate that about 15 units... have been assigned to the sale of PVC in Italy...') does not support its denials of exchanges of data specific to the sales realised.

686 Consequently, the appellant is likewise precluded from maintaining that, in that respect also, the document of 23 March 1983 contained information which it could have used in its defence.

687 It follows from the above that the plea raised by Montedison alleging infringement of its right of access to the Commission's file must be rejected.

688 The action brought by this appellant must therefore be dismissed to the extent that it is based on that plea.

B — *The plea raised by Montedison alleging a definitive transfer to the Community judicature of the power to impose penalties following the Commission's decision*

689 In its application, Montedison submits in essence that, pursuant to Article 172 of the Treaty and Article 17 of Regulation No 17, in conjunction with Article 87(2)(d) of the Treaty, which confer on the Community judicature unlimited jurisdiction in respect of measures of the Commission imposing fines in competition matters, the Commission is irrevocably deprived of its power to impose such fines once its decision is the subject of judicial proceedings.

690 It maintains that the Commission is specifically obliged, in the alternative, to request the Community judicature to exercise its unlimited jurisdiction and to rule on the merits where the applicant's complaints regarding infringement of essential procedural requirements by the Commission are upheld. Should it fail to do so, it is prohibited, after delivery of the judgment annulling the decision, from imposing another penalty in respect of the same set of facts.

691 The appellant denies that it is open to the Commission, in the course of proceedings before the Court of First Instance or following delivery of a judgment, to repeat its decision, ad infinitum, as the case may be, in the event of a subsequent action. In support of that submission, it relies on Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749.

692 In that regard, it is sufficient to point out that the provisions relied on by Montedison are concerned only with the scope of the review carried out by the Community judicature in respect of Commission decisions on competition matters. More than a simple review of legality, which merely permits dismissal of the action for annulment or annulment of the contested measure, the unlimited jurisdiction conferred on the Community judicature authorises it to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine.

693 However, the mere bringing of an action does not entail the definitive transfer to the Community judicature of the power to impose penalties. The Commission finally loses its power once the court has actually exercised its unlimited jurisdiction. On the other hand, where the Community judicature simply annuls a decision on the ground of illegality without itself ruling on the substance of the infringement or on the penalty, the institution which adopted the annulled measure may reopen the procedure at the stage at which the illegality was found to have occurred and exercise again its power to impose penalties.

694 Acceptance of Montedison's line of argument would run counter to the economy and purpose of judicial review of legality. Since the Community judicature is clearly not competent to substitute itself for the Commission in reopening an administrative procedure which has been entirely or partially annulled, the remedying of the illegality established would be completely ineffective if the Commission had no power to impose penalties at the end of the procedure regularised by it.

695 In the present case, the Court's judgment of 15 June 1994 did not entail the exercise of unlimited jurisdiction but rather a mere review of legality. It therefore did not deprive the Commission of its power to impose penalties.

696 The judgment in *Alpha Steel*, cited above, on which the appellant relies, is not relevant to the situation in the present proceedings. In that case, the Commission, during the judicial proceedings, withdrew the decision at issue and replaced it with a second decision. In any event, the judgment in that case confirmed the right of the Commission to adopt a fresh decision.

697 It follows that this plea must be rejected.

698 Consequently, the action brought by this appellant must itself be dismissed to the extent that it is based on that plea.

Costs

699 Under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where an appeal is well founded and the Court gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) of those Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the appellants have been unsuccessful in their procedural grounds for appeal or as a result of the Court's findings on their substantive appeals, they must be ordered to pay the costs of the present proceedings. The costs of the proceedings before the Court of First Instance leading to the contested judgment are to be borne in accordance with point 5 of the operative part of that judgment.

On those grounds,

THE COURT

hereby:

1. **Joins Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P for the purposes of the judgment.**

2. Partially annuls the judgment of the Court of First Instance of 20 April 1999 in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* to the extent that it:

— dismissed the new plea raised by Montedison SpA alleging infringement of its right of access to the Commission's file;

— failed to respond to the plea raised by Montedison SpA alleging a definitive transfer to the Community judicature of the power to impose penalties following the Commission's decision.

3. Dismisses the remainder of the appeals.

4. Dismisses the action brought by Montedison SpA to the extent that it is based on, first, the plea alleging infringement of its right of access to the Commission's file and, second, the plea alleging a definitive transfer to the Community judicature of the power to impose penalties following the Commission's decision.

5. **Orders the appellants to pay the costs of the present proceedings. The costs of the proceedings before the Court of First Instance leading to the judgment in Limburgse Vinyl Maatschappij v Commission, cited above, are to be borne in accordance with point 5 of the operative part of that judgment.**

Rodríguez Iglesias	Puissochet	Gulmann
Edward	La Pergola	Jann
Macken	Colneric	von Bahr

Delivered in open court in Luxembourg on 15 October 2002.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President