OPINION OF ADVOCATE GENERAL MISCHO

delivered on 25 October 2001 [1]

I — Introduction

A — *Background to the dispute*

1. 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, [2] the Commission of the European Communities commenced an inquiry on polyvinylchloride (hereinafter 'PVC'). It subsequently undertook various investigations at the premises of the undertakings concerned and sent them requests for information.

2. 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. [3] All the undertakings concerned submitted observations in June 1988. Except for Shell International Chemical Company Ltd, which had not requested a hearing, they were heard in September 1988.

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

4. 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), [4] (hereinafter 'the PVC I decision'). By that decision, the Commission penalised the following PVC producers for infringement of Article 85(1) of the EC

1 — Original language: French.
2 — OJ, English Special Edition 1959-1962, p. 87.
3 — OJ, English Special Edition 1963-1964, p. 47.
4 — OJ 1989 L 74, p. 1.

Treaty (now Article 81(1) EC): Atochem SA, BASF AG, DSM NV, Enichem SpA, Hoechst AG (hereinafter 'Hoechst'), Hüls AG, Imperial Chemical Industries plc (hereinafter 'ICI'), Limburgse Vinyl Maatschappij NV, Montedison SpA, Norsk Hydro AS, Société Artésienne de Vinyle SA, Shell International Chemical Company Ltd, Solvay et Cie (hereinafter 'Solvay') and Wacker-Chemie GmbH.

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

6. The Court of First Instance declared Norsk Hydro's application inadmissible by order of 19 June 1990. [5]

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

8. By judgment of 27 February 1992 in *BASF and Others* v *Commission*, [6] the Court of First Instance declared the PVC I decision non-existent.

9. On appeal by the Commission, the Court of Justice, by judgment of 15 June 1994 in *Commission* v *BASF and Others*, [7] set aside the judgment of the Court of First Instance and annulled the PVC I decision.

10. The Commission thereupon adopted a fresh decision, on 27 July 1994, in relation to the producers who had been the subject of the PVC I decision, with the exception, however, of Solvay and Norsk Hydro AS [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'). That decision imposed on the undertakings to which it was addressed fines of the same amounts as those imposed by the PVC I decision.

11. 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, Lim-

5 — Case T-106/89 (not published in the European Court Reports).

6 — 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.

7 — Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555.

burgse Vinyl Maatschappij NV, Montedison SpA, Société Artésienne de Vinyle SA, Shell International Chemical [Company] Ltd and Wacker Chemie GmbH infringed Article 85 of the EC Treaty (together with Norsk Hydro... and Solvay...) 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 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 business secrecy by which the participants are directly or indirectly informed of the output, deliveries, stock levels, selling prices, costs or investment plans of other individual producers, or by which they might be able to monitor adherence to any express or tacit agreement or to any concerted practice covering 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 Artésienne de Vinyle 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.'

B — *Procedure before the Court of First Instance*

12. By various applications lodged at the Registry of the Court of First Instance between 5 and 14 October 1994, Limburgse Vinyl Maatschappij NV, Elf Atochem SA (hereinafter 'Elf Atochem'), BASF AG, Shell International Chemical Company Ltd, DSM NV and DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst, Société Artésienne de Vinyle SA, Montedison SpA, ICI, Hüls AG and Enichem Spa brought actions before the Court of First Instance.

13. Each sought the annulment of the PVC II decision in whole or in part and, in the alternative, the annulment or reduction of the fine. Montedison Spa also pleaded that

the Commission should be ordered to pay damages on account of costs incurred in putting together a guarantee and any other expenses arising from the PVC II decision.

C — *The judgment of the Court of First Instance*

14. By judgment of 20 April 1999 in *Limburgse Vinyl Maatschappij and Others* v *Commission*[8] (hereinafter '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 SA had participated in the infringement complained of after the first half of 1981;

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

— dismissed the remainder of the action;

— ruled on the costs.

D — *Procedure before the Court of Justice*

15. By application lodged at the Court Registry on 5 July 1999, Wacker-Chemie GmbH (hereinafter 'Wacker-Chemie') and Hoechst appealed pursuant to Article 49 of the EC Statute of the Court of Justice.

16. They claim that the Court should:

— set aside paragraphs 4 and 5 of the contested judgment in so far as they relate to the appellants;

— annul the PVC II decision in so far as it relates to the appellants;

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

8 — Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, 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.

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

— order the Commission to pay the costs, or, if the case is referred back to the Court of First Instance, reserve costs to be awarded by that Court.

17. The Commission contends that the Court should:

— dismiss the appeal;

— order the appellants to pay the costs.

II — Assessment

18. The appellants set out grounds of appeal relating to the infringement of Articles 10(1) and 32(1) of the Rules of Procedure of the Court of First Instance, to the grounds of the judgment relating to the four German undertakings, to the irregularity of the preparatory administrative procedure and to the infringement of Article 85(1) of the Treaty and Article 15(2) of Regulation No 17.

Plea alleging infringement of Articles 10(1) and 32(1) of the Rules of Procedure of the Court of First Instance

19. The appellants raise the point that the contested judgment was delivered by the Third Chamber (Extended Composition) comprising only three members, whereas five members had sat on the bench during the oral procedure.

20. They complain that the Court of First Instance thus departed from the normal composition of a Chamber (Extended Composition), under Article 32(1) of the Rules of Procedure, owing to the expiry of the term of office of one of the members of that chamber on 17 September 1998, following the oral procedure.

21. They argue that that composition of the chamber constitutes an infringement of Articles 10(1) and 32(1) of the Rules of Procedure, justifying annulment of the contested judgment.

22. The appellants point out in that regard that Article 32(1) of the Rules of Procedure governs only the situation in which, by reason of a Judge being absent or prevented from attending, there is an even number of Judges. The expiry of a Judge's term of

office does not constitute absence or prevention within the meaning of that provision, which relates only to temporary situations and which the Court of First Instance therefore incorrectly applied.

23. I consider, unlike the appellants, that that assessment, which, furthermore, contradicts the settled case-law of the Court of First Instance, [9] is not supported by the wording of Article 32(1) of the Rules of Procedure of the Court of First Instance.

24. It is not apparent from the provision that the term 'absence or prevention' contained therein must be construed as excluding prevention which is other than temporary.

25. The party bases its interpretation on the first paragraph of Article 9 of the Rules of Procedure of the Court of First Instance, which relates to the Presidency of the Court and which applies expressly, besides cases of absence and prevention, to that of vacancy. It must be inferred that, within the meaning of the Rules of Procedure, the first two concepts do not include the third, which is therefore covered by a provision only if it is expressly stated.

26. Even if it were possible to infer from an article devoted to the Presidency of the Court of First Instance a key to the interpretation of the provisions governing the operation of the Court, it must be stated, in any event, that the Court did not seek to apply Article 32(1) to a vacancy but to the expiry of a term of office. These two situations are different since the end of a term of office leads, as a rule, to the appointment of a person called upon to succeed the member whose term of office is ending, and not to a vacancy.

27. It follows that the matter of whether Article 32(1) is applicable to a vacancy is irrelevant in the present case.

28. Nor can the appellants invoke the objective of Article 32(1) in support of their argument.

29. That provision seeks to prevent an even number of judges of the Court of First Instance from sitting. In that situation, it does not matter whether a prevention is final or temporary. Even an absence or prevention which is brief but occurs, for example, at the time of the hearing, may render it necessary to make sure that an even number of judges is not sitting.

9 — The Commission cites, in that regard, Case T-26/90 *Finsider* v *Commission* [1992] ECR II-1789, paragraph 37 (taking up a post as a Judge of the Court of Justice); Case T-195/95 *Guérin automobiles* v *Commission* [1997] ECR II-679, paragraph 10 (death); Case T-232/95 *Cecom* v *Council* [1998] ECR II-2679, paragraph 13 (appointment as Advocate General at the Court of Justice); and Case T-134/94 *NMH Stahlwerke* v *Commission* [1999] ECR II-239, paragraph 38 (expiry of term of office).

30. I therefore see no reason to consider that the term 'prevention' within the meaning of Article 32(1) of the Rules of Procedure of the Court of First Instance does not include the prevention which occurs when a Judge comes to the end of his term of office.

31. This plea should therefore be rejected.

Allegations concerning the grounds of the judgment relating to the four German undertakings

32. By this plea, which refers to paragraphs 609 to 612 of the contested judgment, the appellants criticise the Court for carrying out an incomplete examination of the evidence, for giving contradictory and incomplete grounds for its decision and for distorting the clear sense of the evidence.

33. They allege, first of all, that, in paragraph 611 of the contested judgment, the Court rejected Hoechst's sales figures drawn up by a highly reputable approved firm of accountants and certified by two chartered accountants, on the ground that those figures could not be regarded as sufficiently reliable to call into question those supplied by the appellant itself in response to a request for information.

34. The appellants consider that, in view of the presumption that the results of audits certified by chartered accountants are generally correct and exhaustive, it was for the Court of First Instance, if it was unable to accept their findings, to take evidence concerning the data it considered to be inaccurate and open to dispute. Then, if doubts remained, it should have given a ruling in favour of the undertaking against which proceedings had been brought.

35. However, it is not disputed that the Court, in the course of measures of organisation to facilitate the taking of evidence, requested information on the matter from both the Commission and Hoechst. Therefore, as the Commission states, the Court had full knowledge of the relevant documents when it made the contested findings.

36. It cannot therefore be criticised, in the present case, for not taking the steps necessary to determine the facts. The fact that the conclusion it reached does not meet with the appellants' approval is irrelevant in that regard.

37. The appellants' plea alleging incomplete examination of the evidence must therefore be regarded as unfounded.

38. Wacker-Chemie and Hoechst also claim that the grounds relating to the matters in question are contradictory and incomplete. Therefore, they may be challenged before the Court of Justice, and an objection of inadmissibility cannot be raised against the appellants on the basis that it is a plea of fact and not of law. [10]

39. In the appellants' submission, the Court had not given the parties the opportunity to rectify, by means of a reliable certificate drawn up by chartered accountants, incorrect information provided in error. Furthermore, it had not taken into account documents contained in the file of the proceedings which revealed that the figures originally supplied by Hoechst agreed with those certified by the chartered accountants. Finally, the Court had failed to have regard to the causal connection by not taking into account the fact that Hoechst had corrected its own sales figures further to an alteration, by the Commission, of the basis of its requests for information and its treatment of the evidence.

40. The appellants cite, in particular, paragraph 610 of the contested judgment, in which the Court of First Instance stated as follows:

'The Commission referred to the result of that calculation and the conclusions it drew from it in the statement of objections. At the hearing before the Commission, however, Hoechst denied the figures which it had itself initially provided and produced new ones. The Commission was, however, able to establish that the latter lacked all credibility. It thus stated in the Decision (point 14; footnote 1) that "[n]ew figures produced by Hoechst at the oral hearing (but without any supporting documentation)... are clearly unreliable and would have had to involve Hoechst loading its plant at over 105% while the others achieved only 70% occupation rates". In fact, Hoechst acknowledged that those new figures were wrong and supplied the Commission with a third set of figures by letter of 21 October 1988.'

41. The Court added, in paragraph 611:

'By comparison with the figures originally provided, those new figures contain a negligible amendment concerning Hoecht's sales in Europe, which, moreover, merely confirm the accuracy of the figures in the Atochem table, whilst adding, as "sales to

10 — Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587 and the case-law cited therein.

consumers" within the meaning of the Fides declarations, Hoechst's own consumption for its plant at Kalle. The Court considers, however, that bearing in mind the circumstances in which those figures were produced, they cannot be regarded as sufficiently reliable to call into question those supplied by the applicant itself in response to a request for information'.

42. It is unquestionably clear from the above that the appellants' criticism related, in actual fact, to the Court's appraisal of the various points of information provided by Hoechst concerning its sales levels. The only subject-matter of the arguments set out above which the appellants dispute is the evidential value to be attributed to the third set of figures communicated to the Commission by letter of 21 October 1988 as opposed to the two sets supplied previously.

43. It has consistently been held that the appraisal of evidence by the Court of First Instance constitutes a question of fact which is not subject to review by the Court of Justice hearing an appeal, save where the clear sense of the evidence has been distorted by the Court of First Instance. [11]

11 — See, in particular, Joined Cases C-280/99 P, C-281/99 P and C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 78.

44. The appellants claim that such is the case in this instance. They rely, in that regard, on the same arguments as those set out above.

45. I consider that the Commission therefore correctly describes that claim as a 'reformulation' of the previous plea. While purporting to allege distortion, the appellants merely reiterate their disagreement with the factual assessment made by the Court of First Instance in paragraphs 610 and 611 of the contested judgment, and therefore come up against the inadmissibility of pleas relating to appraisals of evidence by the Court.

46. Even if this plea were admissible, it is, in any event, unfounded. I consider, in fact, that, in view of the circumstances and, in particular, the existence of three sets of different figures supplied during the proceedings by the undertaking concerned itself, since the change in methodology apparently imposed by the Commission cannot explain all those differences, the Court of First Instance was entitled to reject the last of those sets, without committing distortion.

47. Wholly in the alternative, I would also point out that, in any event, this plea is not such as to lead to the annulment of the contested judgment.

48. It should be noted that, contrary to the argument put forward by the appellants, it concerns only a secondary aspect of the findings of fact, since the examination carried out by the Court of other documents submitted by the Commission had already led it to hold that the existence of a quota mechanism between PVC producers [12] was conclusively proved. In relation to those producers, verification of the sales tonnages of the four German producers for the first quarter of 1984, which appear in the document entitled 'Atochem', is only a secondary factor.

49. It is apparent from reading the contested judgment that, in fact, irrespective of that matter, the Court of First Instance had already considered the existence of the quota mechanism sufficiently proved by the evidence contained in documents such as 'Sharing the pain', [13] 'Alcudia', [14] 'DSM', [15] the Montedison note [16] and the documents listed in paragraph 614 of the contested judgment, without the appellants claiming distortion in that regard.

50. This plea should therefore be rejected.

12 — See paragraph 607 of the contested judgment.
13 — See paragraph 588 of the contested judgment.
14 — Paragraph 589 of the contested judgment.
15 — Paragraph 594 of the contested judgment.
16 — Paragraph 599 of the contested judgment.

Plea alleging irregularity of the preparatory administrative procedure

51. Wacker-Chemie and Hoechst complain of the fact that, in paragraphs 183 to 193 and 246 to 270 of the contested judgment, the Court of First Instance held that, by adopting the PVC II decision with an identical content to that of the PVC I decision without giving a fresh hearing to the undertakings concerned and without consulting the Advisory Committee again, the Commission did not infringe Articles 19(1) and 10(3) of Regulation No 17.

52. In the appellants' submission, those provisions — the first applicable 'before [the adoption of] decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16' of the Regulation, and the second, 'prior to the taking of any decision following upon a procedure under paragraph 1' — should have been regarded, from their own wording, as requiring a new hearing and a fresh consultation of the Advisory Committee.

53. The appellants do not dispute that those preparatory measures were carried out before the adoption of the PVC I decision nor do they claim that the annulment of that decision affected their validity.

54. However, they take the view that, since a period of six years elapsed between the

time they were carried out and the adoption of the decision, it should have been held that the hearing of the undertakings and the consultation of the Advisory Committee no longer complied with the requirements of the Regulation.

55. They maintain that evidence obtained during a procedure adopted with the aim of taking action against infringements must be subject to recent review. This requirement applies to the finding of the infringement, the direction to terminate it, and the fixing of the amount of the fine, that is to say, in the present case, to Articles 1, 2 and 3 of the PVC II decision.

56. Thus, in the first place, Article 1 unjustifiably and disproportionately increases the scope of the infringement found. Whereas the finding established in the PVC I decision applied up to the date of its adoption, that is, until 21 December 1988, the PVC II decision applied for five and a half extra years, without any prior statement of objections accusing the undertakings concerned of continuing the infringement from 1989 to 1994. There had therefore undoubtedly been an infringement of the provisions concerning hearings, even according to the Court's assessment making the need to carry out new preparatory procedures conditional on the raising of new objections.

57. Secondly, the direction to terminate the infringement presupposes that the infringement is still continuing when the decision is adopted or, at least, that there is a risk that it will recur. In the absence of evidence on these matters, the lapse of time meant that there was no longer any legal basis for the PVC II decision.

58. Thirdly, also in connection with the direction to terminate the infringement, neither the grounds of the contested judgment nor Article 2 of the PVC II decision specify the undertakings concerned. Before the adoption of the PVC II decision, the appellants and other addressees of the decision had finally ceased their activity on the PVC market and had not therefore been required to terminate the infringement. The PVC II decision is therefore not sufficiently clear and specific in its content.

59. Finally, fourthly, the fixing of the amount of the fine also required a decision to have been taken recently. The Commission should have taken account of the factual situation at the time of the adoption of the second decision. Furthermore, it ought to have taken into consideration the turnover for the preceding financial year, in accordance with Article 15(2) of Regulation No 17, which meant determining the turnover for the last financial year prior to the adoption of the decision.

60. That line of argument is not persuasive.

61. As regards the first point, the appellants' argument is manifestly unfounded. No statement in the decision requires the infringement to have lasted until the date of adoption of the decision.

62. The decision determines only the duration of the infringement taken into account for the purposes of fixing the amount of the fine, a duration which has no connection with the date of adoption of the decision and is in no sense affected by it. On the other hand, the decision does not contain any finding relating to the date the infringement ceased, and moreover, according to an undisputed statement of the Court of First Instance, [17] it was not required to do so.

63. As for the second point, in respect of which it should also be pointed out that it indicates no essential link with the lapse of time since it could have been invoked against the PVC I decision, it should be noted that, since it is not alleged that the infringement continued, the direction is ineffective against the addressees. It cannot therefore constitute an act adversely affecting them.

64. As regards the third point, I need only point out, as did the Court of First Instance in paragraph 1247 of its judgment, that the requirement to terminate the infringement is expressly addressed to undertakings 'which are still involved in the PVC sector'. The appellants' argument on this point is therefore manifestly devoid of all foundation.

65. As regards the fourth point, it should be borne in mind that, under Article 15(2) of Regulation No 17, the fines which the Commission may impose on undertakings may not exceed '10% of the turnover in the preceding business year of each of the undertakings participating in the infringement'.

66. That reference to the turnover for the previous financial year is therefore relevant only in the context of determining a maximum level for the fine. In the present case, it is not claimed that the Commission, by not amending, in the PVC II decision, the amount of the fine imposed under the PVC I decision, had exceeded that threshold.

67. The argument based on the fixing of the level of the fine is therefore irrelevant.

17 — Paragraph 1125 of the contested judgment.

68. It follows from the above that this plea should be rejected, without the need even to consider whether, as the Commission maintains, it is inadmissible, for it only repeats in identical terms the arguments put forward at first instance and rejected by the Court.

71. This plea therefore has no independent content in relation to those complaints which, as we have seen above, should be rejected.

72. The appellants also contest the Court's appraisal, in paragraphs 662 to 673 of the contested judgment, of certain pieces of evidence, namely, two planning documents.

Plea alleging infringement of Article 85(1) of the Treaty and Article 15(2) of Regulation No 17

73. I share the Commission's view, that the appellants merely criticise the Court's appraisal of the evidence, although, in the absence of distortion — which is not alleged in the present case — such an appraisal does not constitute a point of law open, as such, to review by the Court of Justice. [18]

69. Wacker-Chemie and Hoechst claim that the Court wrongly held that Article 85(1) of the Treaty was applicable.

74. It follows that this plea too should be rejected.

70. In that regard, they dispute the grounds contained in paragraphs 609 to 612 of the contested judgment, relating to participation of the German parties to the proceedings in a cartel on quotas. They refer, in that regard, to their complaints alleging an incomplete examination of the facts, a contradictory and incomplete statement of reasons and a distortion of the evidence.

18 — Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42.

III — Conclusion

75. In the light of the foregoing considerations, I propose that the Court should:

— dismiss the appeal;

— order the appellants to pay the costs.