# JUDGMENT OF THE COURT (Sixth Chamber)

8 July 1999 *

In Case C-5/93 P,

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

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 4 November 1992 in Case T-8/89 REV *DSM* v *Commission* [1992] ECR II-2399, seeking to have that judgment set aside,

the other party to the proceedings being:

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

defendant at first instance,

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

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

Advocate General: G. Cosmas,

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

having regard to the Report for the Hearing,

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

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

gives the following

## Judgment

1 By application lodged at the Registry of the Court of Justice on 7 January 1993, DSM NV ('DSM') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the order of the Court of First Instance of 4 November 1992 in Case T-8/89 REV *DSM* v *Commission* [1992] ECR II-2399 ('the contested order') in which that Court dismissed as inadmissible DSM's application for revision of the judgment delivered by the Court of First Instance on 17 December 1991 in Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833.

## Facts and procedure before the Court of First Instance

2 The facts giving rise to this appeal, as set out in the judgment in *DSM* v *Commission*, cited above, and in the contested order are as follows.

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

4 According to the Commission's findings, which were confirmed on this point by the Court of First Instance, before 1977 the market for polypropylene was supplied by 10 producers, four of which (Montedison SpA ('Monte'), Hoechst AG, Imperial Chemical Industries plc and Shell International Chemical Company Ltd), together accounted for 64% of the market. Following the expiry of the controlling patents held by Monte, new producers appeared on the market in 1977, bringing about a substantial increase in real production capacity which was not, however, matched by a corresponding increase in demand. This led to rates of utilisation of production capacity of between 60% in 1977 and 90% in 1983. Each of the EEC producers operating at that time supplied the product in most, if not all, Member States.

5 DSM was one of the new producers which appeared on the market in 1977, with a market share on the West European market of between 3.1 and 4.8%.

6 Following simultaneous investigations at the premises of several undertakings in the sector, the Commission addressed requests for information to a number of polypropylene producers under Article 11 of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). It appears from paragraph 6 of *DSM* v *Commission*, cited above, that the evidence obtained led the

Commission to form the view that between 1977 and 1983 the producers concerned had, in contravention of Article 85 of the EC Treaty (now Article 81 EC), regularly set target prices by way of a series of price initiatives and developed a system of annual volume control to share out the available market between them according to agreed percentage or tonnage targets. This led the Commission to commence the procedure provided for by Article 3(1) of Regulation No 17 and to send a written statement of objections to several undertakings, including DSM.

7 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that DSM had infringed Article 85(1) of the Treaty by participating, with other undertakings, and in DSM's case from some time between 1977 and 1979 until at least November 1983, in an agreement and concerted practice originating in mid-1977 by which the producers supplying polypropylene in the territory of the EEC:

— contacted each other and met regularly (from the beginning of 1981, twice each month) in a series of secret meetings so as to discuss and determine their commercial policies;

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

— agreed various measures designed to facilitate the implementation of such target prices, including (principally) temporary restrictions on output, the exchange of detailed information on their deliveries, the holding of local meetings and from late 1982 a system of 'account management' designed to implement price rises to individual customers;

— introduced simultaneous price increases implementing the said targets;

— shared the market by allocating to each producer an annual sales target or 'quota' (1979, 1980 and for at least part of 1983) or in default of a definitive agreement covering the whole year by requiring producers to limit their sales in each month by reference to some previous period (1981, 1982) (Article 1 of the Polypropylene Decision).

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

9 DSM was fined ECU 2 750 000, or NLG 6 657 640 (Article 3 of the Polypropylene Decision).

10 On 31 July 1986, DSM lodged an action for annulment of that decision before the Court of Justice which, by order of 15 November 1989, referred the case to the Court of First Instance, pursuant to Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1).

11 Before the Court of First Instance, DSM claimed that the Polypropylene Decision should be annulled or declared void, in its entirety or partially, that the fine

imposed on it should be annulled or reduced, that the Court of First Instance should order all steps and measures that it considered appropriate, and that the Commission should be ordered to pay the costs.

12 The Commission claimed that the application should be dismissed and DSM ordered to pay the costs.

13 In its judgment in *DSM* v *Commission*, cited above, the Court of First Instance dismissed the application and ordered DSM to pay the costs.

14 Following delivery by the Court of First Instance of its judgment in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315 ('the *PVC* judgment'), DSM, by letter of 5 May 1992, submitted a request to the Commission for repayment, as an undue amount, of the fine which it had paid and of the costs and interests related to the bank guarantee which it had to provide for the purposes of the proceedings in Case T-8/89 or for an explanation, before 19 May 1992, in the event that the Commission considered that the fine had not been unduly paid. The Commission did not reply to that request.

15 By application lodged at the Registry of the Court of First Instance on 26 May 1992, DSM applied, under Article 41 of the EC Statute of the Court of Justice and Article 125 of the Rules of Procedure of the Court of First Instance for revision of the judgment in *DSM* v *Commission*, cited above.

16 DSM claimed that the Court of First Instance should declare that the application for revision was introduced in good time; that it should order measures of inquiry, more particularly those referred to in Article 64(3)(c) and (d) of the Rules of Procedure; that it should revise its judgment in *DSM* v *Commission*, cited above, by declaring non-existent, or at least void, the Polypropylene Decision;

that it should annul, or at least reduce, the fine imposed on it; that it should order the Commission to repay immediately the fine paid to it pursuant to a non-existent, or at least void, instrument, including interest and costs, as set out in the letter which it had addressed to the Commission on 5 May 1992; and that it should order the Commission to pay the costs of the proceedings, including the costs of the proceedings which led to the judgment in *DSM* v *Commission,* cited above. It is clear from paragraph 6 of the contested order that, according to DSM, there was reason to doubt the existence of the Polypropylene Decision on the ground that it could be affected by the same defects as those found in the *PVC* judgment.

17 The Commission contended, principally, that the Court of First Instance should declare the claims inadmissible, or, in the alternative, declare the claims unfounded, and in any event order DSM to pay the costs of the proceedings.

## The contested order

18 In paragraph 14 of the contested order, the Court of First Instance, having recalled the wording of the first paragraph of Article 41 of the EC Statute of the Court of Justice, made applicable to the procedure before the Court of First Instance by the first paragraph of Article 46 of that Statute, stated that it was clear from that provision that revision is not an appeal procedure but an exceptional review procedure that allows an applicant to call in question the authority of *res judicata* attaching to a judgment bringing the proceedings to an end on the basis of the findings of fact relied on by the Court. Revision presupposes the discovery of elements of a factual nature which existed prior to the judgment and which were unknown at that time to the court which delivered it as well as to the party applying for revision and which, had the Court been able to take them into consideration, could have led it to a different determination of the proceedings

19 In paragraph 15, the Court of First Instance stated that the question which it had to determine was whether the applicant for revision had proved that it was not aware of the facts alleged in its application for revision — namely that the College of Members of the Commission did not deliberate on the text of the

Polypropylene Decision notified to it, in particular the Dutch version, and the other defects found in the *PVC* judgment — until after the judgment in *DSM* v *Commission*, cited above, had been delivered. In that connection the 'new fact' on which DSM relied in support of its application was formed by a combination of different facts and evidence, which all occurred at different times. The Court of First Instance stated, in paragraph 16, that it therefore had to examine whether, from those facts and evidence, DSM was aware of the facts on which it relied before the judgment in *DSM* v *Commission*, cited above, was delivered.

20 The Court of First Instance noted, in paragraph 17, as regards the alleged amendments and actual additions to the text of the Polypropylene Decision notified to DSM, that the typographical differences pointed out by DSM appeared in the text of the Polypropylene Decision notified to it on 30 May 1986, so that it was aware of them then. According to the Court of First Instance, the same applied with regard to the discontinuous page numbering in the Polypropylene Decision, the fact that the front page of the notified decision was marked 'Draft Decision of 23 May 1986' and the length of time that elapsed between the date on which the decision was adopted and the date of its notification.

21 At paragraph 18 of the order, the Court of First Instance held:

'Furthermore, the effect of the amendments and additions pointed out by the applicant for revision was sufficiently clarified at the hearing of 10 December 1991 in the *PVC* cases in which the agents of the Commission stated that the procedure adopted in those cases corresponded to regular practice. The applicant for revision was at that hearing and was represented there by the same lawyer as in the procedure which led to the judgment of 17 December 1991. Consequently, before the judgment was delivered, it could have lodged an application for the re-opening of the oral procedure, relying on the facts (which it had put forward in its application for revision). It is true that the applicant for revision still did not have, unlike the applicants in Cases T-9/89 to T-15/89 (see the judgments of 10 March 1992 in Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraphs 382 to 385; Case T-10/89 *Hoechst* v *Commission* [1992] ECR II-629, paragraphs 372 to 375; Case T-11/89 *Shell* v *Commission*, paragraphs 372 to 374; Case T-12/89

*Solvay* v *Commission* [1992] ECR II-907, paragraphs 345 to 347; Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraphs 399 to 401; Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraphs 389 to 391; and Case T-15/89 *Linz* v *Commission* [1992] ECR II-1275, paragraphs 393 to 395), the legal evaluation of the *PVC* decision which the Court (of First Instance) rendered in its judgment of 27 February 1992. That circumstances does not, however, alter the fact that the applicant for revision was aware of the facts in question before the judgment was delivered (see the judgment of the Court of Justice in Case C-403/85 REV *Ferrandi* v *Commission* [1991] ECR I-1215, paragraph 13).'

22 In paragraph 19, the Court of First Instance concluded that the various amendments and additions mentioned by DSM and their significance were sufficiently obvious for it to gain knowledge, upon reading the text of the Polypropylene Decision, or at any rate at the hearing held in the *PVC* cases on 10 December 1991, of the facts mentioned in the application for revision. Consequently, those facts could in no event constitute facts unknown to DSM before delivery of the judgment in *DSM* v *Commission*, cited above, within the meaning of the first paragraph of Article 41 of the EC Statute of the Court of Justice and, consequently, they were not capable of giving rise to revision of that judgment.

23 The Court of First Instance added, in paragraph 20, that the *PVC* judgment as such as well as the letter sent by the DSM to the Commission on 5 May 1992 and the fact that it remained unanswered were not material since neither of those events brought to DSM's attention facts which were previously unknown to it.

24 The Court of First Instance therefore held, in paragraph 21:

'It follows from all the foregoing that the facts put forward by the applicant for revision in its application cannot constitute, either on their own or in combination with one another, a new fact within the meaning of Article 41 of the Statute of the Court and, consequently, that the application for revision must be dismissed as inadmissible.'

## The appeal

25 In its appeal, DSM claims that the Court of Justice should:

— declare that its appeal was brought in good time;

— annul the contested order;

— annul the *DSM* v *Commission* judgment, cited above;

— declare non-existent or at least annul the Polypropylene Decision addressed to it and annul or at least reduce the fine imposed on it by the Commission;

— order the Commission to repay without delay the fine paid on 19 February 1992 on the basis of that non-existent, or at least void, decision and the judgment in *DSM* v *Commission*, cited above, together with interest and costs, as detailed in DSM's letter to the Commission;

— in the alternative, annul the contested order and refer the case back to the Court of First Instance for a hearing, in the light of the judgment of the Court of Justice, of DSM's application for revision, in particular by ordering measures of inquiry as requested by DSM or as the Court of Justice considers appropriate, or at any rate take such measures as the Court of Justice, or the

Court of First Instance if the Court of Justice so decides, considers appropriate;

— order the Commission to pay the costs of these proceedings, including the costs incurred or to be incurred in these proceedings, as well as the costs of the proceedings which led to the *DSM* v *Commission* judgment, cited above.

26 The Commission contends that the Court should:

— principally, declare the appeal, or at least the fifth point of DSM's claims, inadmissible;

— in the alternative, dismiss the appeal;

— in any event, order DSM to pay the costs of the proceedings.

27 In support of its appeal DSM puts forward the following pleas in law: first, infringement of Community law through misinterpretation of Article 41 of the EC Statute of the Court of Justice; second, breach of the duty to state reasons, in that examination of the facts within the meaning of Article 41 of the EC Statute of the Court of Justice was limited to the facts mentioned in paragraphs 6 and 15 of the contested order; third, breach of the duty to state reasons, in that the Court of First Instance described as 'new facts' the amendments and additions made to the text of the notified Polypropylene Decision compared with that adopted by the Commission; fourth, breach of the duty to state reasons, in that the Court of First Instance assumed that it was 'known' to DSM, owing to what was stated at the hearing in the *PVC* cases, that amendments and additions were subsequently made to the text of the Polypropylene Decision; fifth, breach of the duty to state

reasons, in that the Court of First Instance described the amendments and additions mentioned by DSM as 'sufficiently manifest' as well as legally relevant 'facts'; sixth, breach of the duty to state reasons, in that the Court of First Instance considered that the *PVC* judgment as such as well as the letter sent by DSM to the Commission and the fact that it remained unanswered were not material; seventh, breach of the duty to state reasons, in that the Court of First Instance did not examine the substance of the application for revision; eighth, breach of the principle of equal treatment, in that the Court of First Instance, in contrast to the attitude it had taken in the *PVC* cases, did not examine the substance of the application for revision; ninth, breach of the principle of equal treatment, in that the Court of First Instance placed the undertakings concerned in the polypropylene proceedings in different positions, depending on the date of the judgment in question; lastly, infringement of Community law, in that the Court of First Instance did not consider any plea alleging the non-existence of an act of a Community institution to be a matter of public policy.

28 By decision of the President of the Court of Justice of 28 July 1993, in the absence of any objection from the parties, proceedings were stayed until 15 September 1994 to enable the appropriate conclusions to be drawn from the judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555.

## Admissibility

29 The Commission considers, principally, that the appeal is inadmissible. First, the issue of whether a fact or a new fact has come to light constitutes a question of fact, so that the appeal is not raising points of law as prescribed by Article 51 of the EC Statute of the Court of Justice. Secondly, if an application for revision must be held inadmissible in the absence of any new fact, *a fortiori* the same conclusion applies if DSM states that it has not even been able to discover a fact.

30 On the first point, it must be observed at the outset that, if the Commission's argument were accepted, the consequence would be to preclude the possibility of lodging an appeal against decisions in which the Court of First Instance dismissed applications for revision as inadmissible. Such a result would manifestly run counter to the first paragraph of Article 49 of the EC Statute of the Court of Justice, pursuant to which an appeal may be brought before the Court of Justice against final decisions of the Court of first Instance.

31 Secondly, and in any event, the interpretation of the phrase 'fact which is of such a nature as to be a decisive factor, and which, when the judgment was given was unknown to the Court and to the party claiming the revision' in the first paragraph of Article 41 of the EC Statute of the Court of Justice is a point of law, which may be examined in appeal proceedings.

32 Lastly, and subject to individual examination of the various pleas in law relied on by DSM, some of those pleas are also likely to relate to other points of law concerning breach of procedure before the Court of First Instance or infringement of Community law, as referred to in the first paragraph of Article 51 of the EC Statute of the Court of Justice, which may be the subject of an appeal in accordance with that provision.

33 It follows that the plea of inadmissibility raised by the Commission must be dismissed, inasmuch as it relates to the appeal as a whole.

34 In the alternative, the Commission contends that, in any event, DSM's request that the Court of Justice order the Commission to repay the fine is inadmissible, since neither the Court of Justice nor the Court of First Instance may make such an order under Article 173 of the EC Treaty (now, after amendment, Article 230 EC).

35 In that connection, it must be pointed out that DSM's request presupposes that the Court will uphold its appeal, annul the contested order, examine the admissibility of the application for revision of the judgment in *DSM* v *Commission*, cited above, hold it admissible, proceed to examine the substance of that application, grant it and go on to examine the application for annulment made at first instance. In that context, pursuant to Article 17 of Regulation No 17, the Court has unlimited jurisdiction within the meaning of Article 172 of the EC Treaty (now Article 229 EC).

36 It is settled case-law that, when exercising judicial review of legality under Article 173 of the Treaty, the Community judicature has no jurisdiction to issue directions (see, in particular, the order in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 24). The same applies when the Community judicature has unlimited jurisdiction in accordance with Article 172 of the Treaty.

37 The appeal is therefore inadmissible in so far as it seeks an order from the Court directing the Commission to repay the fine paid by DSM.

**Substance**

*First and second pleas in law: breach of Community law through misinterpretation of Article 41 of the EC Statute of the Court of Justice and breach of the duty to state reasons, in that examination of the facts within the meaning of Article 41 of the EC Statute of the Court of Justice was limited to the facts mentioned in paragraphs 6 and 15 of the contested order*

38 By its first plea, DSM maintains that paragraphs 14 and 15 of the contested order are based on a misinterpretation of Article 41 of the EC Statute of the Court of Justice, which is also applicable to the procedure for revision before the Court of First Instance pursuant to Article 46 of that Statute.

39 This plea has three limbs. First, the condition that facts giving entitlement to revision must have existed prior to the judgment, mentioned in paragraph 14 of the contested order, is not laid down in Article 41 of the EC Statute of the Court of Justice, which sets out solely the condition that, when the judgment was given, the fact relied on must have been unknown to the Court and to the party claiming revision. Secondly, the Court of First Instance wrongly restricted its examination to the 'unknown fact requirement', without examining the precondition of discovery of a new fact. Thirdly, it has not been established whether the facts, in the sense of Article 41, have already been discovered, in other words that they are available to the Court and to the appellant in the form of documentation and information. DSM points out in this connection that the request which it made to the Commission on 5 May 1992 was specifically aimed at obtaining that documentation and that its request, in the procedure for revision, that the Court of First Instance order measures of inquiry was made in that same context. In failing to examine that matter, the Court of First Instance misinterpreted Article 41 of the EC Statute of the Court of Justice.

40 By its second plea, DSM claims that the Court of First Instance infringed Community law, and in particular the duty to state reasons, by restricting its examination to the 'facts' mentioned in paragraphs 6 and 15 of the contested order, relating to the failure on the part of the College of Members of the Commission to deliberate on the text of the Polypropylene Decision as notified, in particular the Dutch version, and to the other defects found in the *PVC* judgment, and by disregarding the fact that the application for revision included various new 'facts' which the measures of inquiry sought would determine.

41 With regard to the first limb of the first plea, it need merely be pointed out that although, in paragraph 14 of the contested order, the Court of First Instance mentioned the condition that the facts giving rise to entitlement to revision must have existed prior to the judgment, it did not draw any consequences from that point and did not rely on that condition when dismissing DSM's application for revision. That complaint is therefore of no consequence and need not be examined by the Court.

42 As for the second limb of the first plea, it is clear from the actual wording of Article 41 of the EC Statute of the Court of Justice that, in order for an application for revision to be admissible, the fact relied on must have been

unknown to the party claiming revision when the judgment was given. The Court of First Instance was therefore perfectly correct in holding that since that condition was not satisfied there was no need to ascertain whether the facts relied on were new.

43 Lastly, with regard to the third limb of the first plea and the second plea, which it is appropriate to examine together, it must be borne in mind that, pursuant to the first paragraph of Article 41 of the EC Statute of the Court of Justice, an application for revision must be based on the discovery of a new fact or facts. Under the second paragraph of Article 41, it is only if the Court finds that a new fact exists, recognises that it is of such a character as to lay the case open for revision and declares the application admissible on that ground that it can examine the substance of the case.

44 It follows that, if and as long as no new fact has been found, the revision procedure cannot be used to prompt the court hearing the application to order new measures of inquiry. Moreover, in the present case, DSM could have requested during the main proceedings the measures of inquiry that it requested in the revision procedure. It must therefore be held that the Court of First Instance properly applied Article 41 of the EC Statute of the Court of Justice when it refused to order measures of inquiry for discovering facts the existence of which had not been established by DSM in its application, and that it rightly confined its examination to the facts that DSM had set out in its application for revision.

45 The first and second pleas in law must therefore be dismissed.

*The third plea in law: breach of the duty to state reasons, in that the Court of First Instance described as 'new facts' the amendments and additions made to the text of the notified Polypropylene Decision compared with that adopted by the Commission*

46 DSM states that in its application for revision it gave a detailed account of possible amendments to the text of the Polypropylene Decision, based on differences in the typeface used in the notified copy. It did not maintain that those purported amendments and additions constituted a fact which ought to be described as particularly serious and manifest within the meaning of the *PVC* judgment, since the existence of that new fact could only be revealed if the authentic text was to hand, having been made available by the Commission. In the absence of such an opportunity to ascertain the facts, the statement by the Court of First Instance to the effect that the typographical differences in question were known to DSM once the decision had been notified is irrelevant. The same applies to the other points to which DSM drew attention, such as the discontinuous page numbering and the words 'Draft Commission Decision of 23 May 1986' on the cover page as well as the time that is supposed to have elapsed between the adoption of the Polypropylene Decision and its notification. These are also suppositions rather than established facts; they could only become established facts if the Commission produced the documentation requested. It follows that the assessment by the Court of First Instance in that connection is factually inaccurate, since facts were involved of which, as yet, neither the Court of First Instance nor DSM have knowledge.

47 Inasmuch as that plea refers to the examination by the Court of First Instance of the typographical differences in the text of the Polypropylene Decision notified on 30 May 1986, it need merely be pointed out that those facts were relied on by DSM in its application and that it was therefore incumbent on the Court of First Instance to reach a finding on them, which it did.

48 In so far as it is alleged that the Court of First Instance examined no facts other than those established in the application for revision, this plea overlaps with the third limb of the first plea and the second plea, and must be dismissed for the same reasons.

49 The third plea in law must therefore be dismissed.

*Fourth plea in law: breach of the duty to state reasons, in that the Court of First Instance assumed that it was known to DSM, owing to what was stated at the hearing in the* PVC *cases, that amendments and additions were subsequently made to the text of the Polypropylene Decision*

50 In the first limb of this plea, DSM claims that the statement by the Commission's Agent at the hearing in the *PVC* cases, according to which Article 12 of the Rules of Procedure of that institution was not applied, concerned another case and did not supply an answer to the question whether amendments might have been made to the Polypropylene Decision. The assessment of the Court of First Instance, at paragraph 18 of the contested order, to the effect that DSM was aware of the facts on which it was relying before judgment was delivered, in the context of the *PVC* hearings, is therefore legally irrelevant and factually inaccurate.

51 In the second limb, DSM maintains that it was not required to request that the oral procedure be reopened since, pursuant to Article 62 of its Rules of Procedure, the Court of First Instance may, of its own motion, order such reopening. According to DSM, the Court of First Instance was, in this case, even obliged to carry out such an examination. Furthermore, a request for the oral procedure to be reopened would have had no practical effect, since on 10 December 1991, the date of the hearing in the *PVC* cases, the judgment, which was to be delivered on 17 December 1991, would undeniably have already been in its final form.

52 As regards the first limb of the fourth plea, it should be borne in mind that, pursuant to Article 168A of the EC Treaty (now Article 225 EC) and the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal may rely only on grounds relating to the infringement, by the Court of First Instance, of rules of law, to the exclusion of any appraisal of the facts. As the Commission rightly pointed out, by this limb DSM is criticising a finding of fact made by the Court of First Instance, so that it is inadmissible in an appeal.

53 In so far as the second limb of this plea complains that the Court of First Instance did not reopen the procedure of its own motion, it does not relate to the contested order but to the judgment in *DSM* v *Commission*, cited above, which is not the subject of this appeal.

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

*Fifth plea in law: breach of the duty to state reasons, in that the Court of First Instance described the amendments and additions mentioned by DSM as 'sufficiently manifest' as well as legally relevant 'facts'*

55 Referring to paragraph 19 of the contested order, DSM considers that the Court of First Instance was in breach of the duty to state reasons, in that it described the amendments and additions mentioned by DSM as 'sufficiently manifest' as well as legally relevant 'facts'. The description 'sufficiently manifest' given to the supposed facts is legally irrelevant and factually inaccurate.

56 In so far as this plea challenges the assessment made by the Court of First Instance as to the 'sufficiently manifest' nature of the amendments and additions mentioned by DSM, it concerns points of law which cannot therefore be examined in an appeal.

57 Inasmuch as it complains that the Court of First Instance considered those amendments and additions to be relevant, it need merely be pointed out that they had been relied on by DSM in its application, so that it was incumbent on the Court of First Instance to examine them.

58 The fifth plea in law must therefore be dismissed.

*Sixth plea in law: breach of the duty to state reasons, in that the Court of First Instance considered that the* PVC *judgment as such as well as the letter sent by DSM to the Commission and the fact that it remained unanswered were not material*

59 DSM maintains that the Court of First Instance was in breach of its duty to state reasons, in that, at paragraph 20 of the contested order, it considered that the *PVC* judgment as such as well as the letter sent by DSM to the Commission and the fact that it remained unanswered were not material. The purpose of the letter sent to the Commission was primarily to obtain the documentation which would have enabled it to acquire knowledge of the facts, which were as yet unknown to DSM, and it was therefore material. Parties are entitled to apply for revision of a judgment if they have reasons for believing that new facts exist that are of such a nature as to be a decisive factor for the outcome of the proceedings.

60 On this point, it must be noted, first, that the assessment in paragraph 20 of the contested order, to the effect that the *PVC* judgment, as well as the letter sent by DSM to the Commission on 5 May 1992 and the fact that it remained unanswered, did not bring to DSM's attention facts which were previously unknown to it, is a finding of fact which the Court of Justice has no jurisdiction to review in an appeal.

61 Secondly, Article 41 of the EC Statute of the Court of Justice makes it clear that an application for revision must be based on the discovery of a fact. Therefore, the Court of First Instance was right in considering that mere suppositions which should have been verified in the context of measures of inquiry were not material in the context of an application for revision.

62 The sixth plea in law must therefore be dismissed.

*Seventh and eighth pleas in law: breach of the duty to state reasons and of the principle of equal treatment, in that the Court of First Instance, in contrast to the attitude it had taken in the* PVC *cases, did not examine the substance of the application for revision*

63 By its seventh plea, DSM claims that the Court of First Instance was in breach of its duty to state reasons and that, contrary to its own case-law on the matter, it did not examine the substance of the application for revision.

64 By its eighth plea, DSM maintains that the Court of First Instance was in breach of the principle of equal treatment, in that, unlike in the *PVC* cases, it did not proceed to examine the substance of the application for revision on the basis of the information supplied by DSM. The measures of inquiry ordered by the Court of First Instance in the *PVC* cases are no different from DSM's request for information.

65 Those pleas, which it is appropriate to examine together, are based on a misconception of the revision procedure. In its second paragraph, Article 41 of the EC Statute of the Court of Justice provides expressly that the revision is to be opened by a judgment of the Court expressly recording the existence of a new fact, recognising that it is of such a character as to lay the case open to revision and declaring the application admissible on this ground. Article 127(2) of the Rules of Procedure of the Court of First Instance provides: 'Without prejudice to its decision on the substance, the Court of First Instance shall..., having regard to the written observations of the parties, give its decision on the admissibility of the application.' Under Article 127(3), only if the Court of First Instance finds the application admissible does it proceed to consider its substance.

66 That splitting of the procedure into two phases, the first concerning admissibility and the second the substance, can be explained by the strictness of the conditions governing revision, which may itself be understood in consideration of the fact that revision defeats the force of *res judicata* (see Case 116/78 Rev *Bellintani and Others* v *Commission* [1980] ECR 23, paragraph 3).

67 The Court of First Instance cannot therefore be criticised for having ruled only on the admissibility of the application and no argument can be drawn from the manner in which it proceeded in the *PVC* cases.

68 The seventh and eighth pleas in law must in consequence be dismissed.

*Ninth plea in law: breach of the principle of equal treatment, in that the Court of First Instance placed the undertakings concerned in the polypropylene proceedings in different positions, depending on the date of the judgment in question*

69 DSM claims that the Court of First Instance was in breach of the principle of equal treatment, in that it placed the undertakings concerned in the polypropylene proceedings in different positions, depending on the date of the judgment in question. In three cases, the judgment was delivered on 24 October 1991, in four cases on 17 December 1991, and in seven cases on 10 March 1992. The latter undertakings were thus able to introduce an appeal on the basis of grounds drawn from the *PVC* judgment. Since the cases in question had been joined, that difference in treatment acquires even more significance from the fact that the parties were unable to exert any influence on the dates on which the Court of First Instance delivered judgment. Article 18 of the contested order recognised the difference in position, but attached no consequences to it, on the ground that DSM was already aware of the facts in question before the judgment was delivered. DSM considers that that assessment is not only legally immaterial and factually inaccurate, but that it also does not properly justify the difference in treatment.

70 In that connection it must be held, first, that the complaint that the Court of First Instance did not deliver its judgments in related cases on the same day concerns the main proceedings which were concluded by the judgment in *DSM* v *Commission*, cited above, and not the revision procedure that gave rise to the contested order, which is the subject of this appeal.

71 Secondly, in so far as it seeks to cast doubt on the finding of the Court of First Instance to the effect that DSM was already aware of the facts relied on in the application for revision before the judgment which it sought to have revised was delivered, that plea concerns questions of fact and is not therefore admissible in an appeal.

72 The ninth plea in law must therefore be dismissed.

*Tenth plea in law: infringement of Community law, in that the Court of First Instance did not consider any plea alleging the non-existence of an act of a Community institution to be a matter of public policy*

73 According to DSM, the Court of First Instance infringed Community law in not considering that any plea alleging the non-existence of an act of a Community institution is a matter of public policy, in not considering that such a plea may be relied upon by the parties without any time-limit and in not considering that it must be raised by the Community judicature of its own motion. In the *PVC* judgment, the Court of First Instance held that a plea alleging an act of the institutions to be non-existent is a matter of public policy, may be relied upon by the parties during the proceedings without any time-limit and must be raised by the Community judicature of its own motion. The applicant is therefore entitled to raise the plea at any stage of the procedure and therefore also after the judgment is delivered, without any time-bar, and the Court of First Instance is obliged to examine its merits. Inasmuch as measures of inquiry are necessary for that purpose, the Court of First Instance is obliged to order them.

74 As far as this plea is concerned, the Court finds it sufficient to hold, without its being necessary to examine either the interpretation of the concept of non-existence applied in the *PVC* judgment or the conditions under which an act may found to be non-existent in annulment proceedings, that, in the contested order, the Court of First Instance had only to reach a decision on the admissibility of the application for revision of the judgment in *DSM* v *Commission*, cited above, and in that context did not have to deal with the Polypropylene Decision.

75 That 10th plea in law must accordingly be dismissed.

76 In those circumstances, since none of the pleas in law relied upon by DSM has been upheld, the appeal must be dismissed in its entirety.

## Costs

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

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders DSM NV to pay the costs.**

Kapteyn Hirsch Mancini

Murray Ragnemalm

Delivered in open court in Luxembourg on 8 July 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber