JUDGMENT OF THE COURT (Sixth Chamber)

8 July 1999 *

In Case C-227/92 P,

Hoechst AG, whose registered office is in Frankfurt am Main, Germany, represented by H. Hellmann, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 8 Rue Zithe,

appellant,

supported by

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,

intervener in the appeal,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 10 March 1992 in Case T-10/89 *Hoechst* v *Commission* [1992] ECR II-629, seeking to have that judgment set aside,

* Language of the case: German.

the other party to the proceedings being:

Commission of the European Communities, represented by G. zur Hausen, Legal Adviser, 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,

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, at which Hoechst AG was represented by O. Lieberknecht and M. Klusmann, Rechtsanwälte, Düsseldorf, DSM NV by I.G.F. Cath and the Commission by G. zur Hausen,

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 18 May 1992, Hoechst AG ('Hoechst') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 10 March 1992 in Case T-10/89 *Hoechst* v *Commission* [1992] ECR II-629 ('the contested judgment').

Facts and procedure before the Court of First Instance

2 The facts giving rise to this appeal, as set out in the contested judgment, are as follows.

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

4 According to the Commission's findings, which were confirmed on this point by the Court of First Instance, before 1977 the market for polypropylene was supplied by 10 producers, four of which (Montedison SpA ('Monte'), Hoechst, Imperial Chemical Industries plc and Shell International Chemical Company Ltd, 'the big four') 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 Hoechst was one of the big four producers which supplied the market in 1977, with a market share on the West European market of between 10.5 and 12.6%.

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 the contested judgment 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 Hoechst.

7 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that Hoechst had infringed Article 85(1) of the Treaty by participating, with other undertakings, and in Hoechst's case from mid-1977

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 Hoechst was fined ECU 9 000 000, or DEM 19 304 010 (Article 3 of the Polypropylene Decision).

10 On 2 August 1986, Hoechst 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, Hoechst sought annulment of the Polypropylene Decision in so far as it concerned Hoechst, in the alternative, a reduction of the fine imposed and in any event an order that the Commission pay the costs.

12 The Commission contended that the application should be dismissed and the applicant ordered to pay the costs.

13 By a separate document lodged at the Registry of the Court of First Instance on 2 March 1992, Hoechst asked the Court of First Instance to postpone delivery of its judgment, to reopen the oral procedure and to order measures of organisation

of procedure and inquiry pursuant to Articles 62, 64, 65 and 66 of its Rules of Procedure as a result of the statements made by the Commission at the hearing before it 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 of the Court of First Instance').

The contested judgment

14 In dealing with the request to reopen the oral procedure, referred to in paragraph 372, having again heard the views of the Advocate General, the Court of First Instance considered, at paragraph 373, that it was not necessary to order the reopening of the oral procedure in accordance with Article 62 of the Rules of Procedure or to order measures of inquiry as requested by Hoechst.

15 At paragraph 374 of the grounds of the judgment the Court of First Instance held as follows:

'It must be stated first of all that the... judgment [in *PVC*] does not in itself justify the reopening of the oral procedure in this case. Furthermore, unlike the arguments which it put forward in Joined Cases T-79 etc./89 (see the judgment of the Court of First Instance, at paragraph 14), in this case the applicant did not, until the end of the oral procedure, argue even by allusion that the Decision was non-existent because of the alleged defects. It must therefore be asked whether the applicant has adequately explained why in this case, unlike Joined Cases T-79 etc./89, it did not raise those alleged defects earlier, since they must in any event have existed prior to the commencement of proceedings. Even though the Community courts, in an action for annulment under the second paragraph of Article 173 of the EEC Treaty, must of their own motion consider the issue of the existence of the contested measure, that does not mean that in every action brought under the second paragraph of Article 173 of the Treaty the possible

non-existence of the contested measure must automatically be investigated. It is only in so far as the parties put forward sufficient evidence to suggest that the contested measure is non-existent that the Community court must review that issue of its own motion. In this case the arguments put forward by the applicant do not provide a sufficient basis to suggest that the Decision is non-existent. In point III of its written pleading of 2 March 1992 the applicant simply asserted that there were "reasonable grounds" to presume that the Commission had infringed certain procedural rules. The alleged infringement of the language rules laid down in the Rules of Procedure of the Commission cannot, however, entail the non-existence of the contested measure, but only its annulment, if the argument is raised at the proper time. Moreover, the applicant has not explained why the Commission would have made subsequent alterations to the Decision in 1986, that is to say in a normal situation entirely unlike the special circumstances of the *PVC* case, where the Commission's term of office was about to run out in January 1989. The general presumption put forward by the applicant in this respect does not constitute a sufficient ground to justify the order by the Court of measures of inquiry after the reopening of the oral procedure.'

16 Lastly, paragraph 375 reads as follows:

'In point II of its written pleading, however, the applicant specifically alleged that originals of the contested Decision duly certified by the signatures of the President and the Executive Secretary of the Commission do not exist in all the authentic languages. That alleged defect, if true, would not in itself entail the non-existence of the contested Decision. In this case, unlike the *PVC* cases, cited above, the applicant has not put forward any concrete evidence to suggest that any infringement of the principle of the inalterability of the adopted measure took place after the adoption of the contested Decision and that the Decision thus lost the presumption of legality attendant upon its appearance, to the benefit of the applicant. In such a case, the mere fact that there is no duly certified original does not in itself entail the non-existence of the contested measure. In this respect too, therefore, there was no reason to reopen the oral procedure in order to carry out further measures of inquiry. Inasmuch as the applicant's arguments could not justify an application for revision, its suggestion that the oral procedure be reopened should not be upheld.'

17 The Court of First Instance dismissed the application and ordered Hoechst to pay the costs.

The appeal

18 In its appeal Hoechst requests the Court of Justice to:

— annul the contested judgment in so far as it concerns Hoechst and to give final judgment in the case by deciding:

— that the Polypropylene Decision is devoid of effect because it was not notified;

— in the alternative, that that decision is null and void;

— order the Commission to pay the costs;

— in the further alternative, annul the contested judgment, in so far as it concerns Hoechst and refer the case back to the Court of First Instance for judgment.

19 Hoechst also asks the Court to order the Commission to produce the texts of the Polypropylene Decision which it adopted at its meeting of 23 April 1986 in the

languages in which it was adopted, signed by the Member of the Commission, Mr Sutherland, and to include the relevant minutes and annexes thereto.

20 By order of the Court of Justice of 30 September 1992, DSM NV ('DSM') was given leave to intervene by the Court in support of the forms of order sought by Hoechst. DSM requests the Court to:

— annul the contested judgment;

— declare the Polypropylene Decision non-existent or annul it;

— declare the Polypropylene Decision non-existent or annul it as regards all addressees of that decision, or at least as regards DSM, irrespective of whether or not those addressees appealed against the judgment concerning them, or whether or not their appeals were rejected;

— in the alternative, refer the case back to the Court of First Instance on the issue whether the Polypropylene Decision is non-existent or should be annulled;

— in any event, order the Commission to pay the costs of the proceedings, both in relation to the proceedings before the Court of Justice and to those before the Court of First Instance, including the costs incurred by DSM in its intervention.

21 The Commission contends that the Court should:

— dismiss the appeal as inadmissible or, in the alternative, as unfounded;

— order Hoechst to pay the costs of this case;

— reject the intervention as a whole as inadmissible;

— alternatively, reject as inadmissible the forms of order sought in the intervention to the effect that the Court should declare the Polypropylene Decision non-existent or annul it as regards all its addressees, or at least as regards DSM, irrespective of whether those addressees appealed against the judgment of the Court of First Instance concerning them, or whether their appeals were rejected, and reject the remainder of the intervention as unfounded;

— in the further alternative, reject the intervention as unfounded;

— in any event, order DSM to pay the costs arising out of the intervention.

22 In support of its appeal Hoechst puts forward pleas alleging breach of procedure and infringement of Community law, based on the fact that the Court of First Instance declined either to find defects in the procedure by which the

Polypropylene Decision was adopted or to reopen the oral procedure and order measures of organisation of procedure and inquiry.

23 At the Commission's request and with Hoechst's agreement, by decision of the President of the Court of Justice of 27 July 1992 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 ('the *PVC* judgment of the Court of Justice'), which was delivered on the appeal against the *PVC* judgment of the Court of First Instance.

Admissibility of the intervention

24 The Commission considers that DSM's intervention must be declared inadmissible. DSM explained that, as an intervener, it had an interest in having the contested judgment concerning Hoechst set aside. According to the Commission, annulment cannot benefit all addressees of a decision, but only those who bring an action for its annulment. That is precisely one of the distinctions between annulment and non-existence. Failure to observe that distinction would mean that time-limits for bringing an action would cease to be mandatory in actions for annulment. DSM cannot therefore seek the benefit of an annulment because it failed to appeal against the judgment of the Court of First Instance which concerned it (judgment of 17 December 1991 in Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833). By its intervention DSM is simply seeking to circumvent a time-bar.

25 The order of 30 September 1992, cited above, granting DSM leave to intervene was made at a time when the Court of Justice had not yet decided the issue of annulment or non-existence in its *PVC* judgment. According to the Commission, following that judgment, the allegations of procedural defects, even if well

founded, could lead only to annulment of the Polypropylene Decision and not to a finding of non-existence. Accordingly, DSM has ceased to have any interest in intervention.

26 The Commission also objects in particular to the admissibility of DSM's submission that the judgment of the Court of Justice should include provisions declaring non-existent or annulling the Polypropylene Decision as regards all its addressees, or at least as regards DSM, irrespective of whether or not those addressees appealed against the judgment of the Court of First Instance concerning them or whether or not their appeals were rejected. That submission is inadmissible, since DSM is seeking to introduce an issue which concerns it alone, whereas an intervener can only take the case as he finds it. Under the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, an intervener may only support the form of order sought by another party, without introducing his own. In the Commission's view, that point in DSM's submissions confirms that it is seeking to use the intervention in order to get round the expiry of the time-limit for appealing against the judgment of the Court of First Instance in *DSM* v *Commission* concerning it.

27 As regards the objection of inadmissibility raised against the intervention as a whole, the Court observes first of all that the order of 30 September 1992 by which it gave DSM leave to intervene in support of the form of order sought by Hoechst does not preclude a fresh examination of the admissibility of its intervention (see, to that effect, Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333).

28 Under the second paragraph of Article 37 of the EC Statute of the Court of Justice, the right to intervene in cases before the Court is open to any person establishing an interest in the result of the case. Under the fourth paragraph of Article 37, an application to intervene is to be limited to supporting the form of order sought by one of the parties.

29 The forms of order sought by Hoechst in its appeal includes, in particular, the annulment of the contested judgment on the ground that the Court of First Instance failed to find the Polypropylene Decision non-existent. It is clear from paragraph 49 of the *PVC* judgment of the Court of Justice that, by way of exception to the principle that acts of the Community institutions are presumed to be lawful, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent.

30 Contrary to the Commission's contention, DSM's interest did not die on delivery of the judgment by which the Court of Justice annulled the *PVC* judgment of the Court of First Instance and held that the defects found by the latter were not such as to warrant treating the decision challenged in the *PVC* cases as non-existent. The *PVC* judgment did not concern the non-existence of the Polypropylene Decision and therefore did not bring DSM's interest in obtaining a finding of such non-existence to an end.

31 It is true that in its reply, in view of the *PVC* judgment of the Court of Justice, Hoechst withdrew all its pleas in law and claims to the effect that the Polypropylene Decision was non-existent.

32 However, in so far as Hoechst continues to seek the annulment of the contested judgment, claiming that the Polypropylene Decision was adopted in an irregular manner and that the Court of First Instance ought to have carried out the necessary investigation to establish the procedural defects involved, DSM is still entitled to make those submissions in its intervention, on the ground that those defects should have led the Court of First Instance to find that decision non-existent.

33 It is clear from settled case-law (see, in particular, Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 36) that the fourth paragraph of Article 37 of the EC Statute of the Court of Justice does not prevent an intervener from using arguments different from those used by the party it is supporting, provided the intervener seeks to support that party's submissions.

34 In this case, the arguments put forward by DSM concerning the non-existence of the Polypropylene Decision are principally designed to show that, in rejecting Hoechst's request that the Court of First Instance reopen the oral procedure and order measures of inquiry, that Court failed to examine whether that decision was non-existent and therefore infringed Community law. So, while some of DSM's arguments differ from those of Hoechst, they relate to the pleas in law relied upon by the latter in the appeal, are aimed at supporting the claim that the contested judgment should be set aside and must therefore be examined.

35 As regards the Commission's objection to DSM's submission that this Court should declare the Polypropylene Decision non-existent or annul it as regards all its addressees, or at least as regards DSM, that claim specifically concerns DSM and is not identical to the form of order sought by Hoechst. It does not therefore satisfy the conditions laid down in the fourth paragraph of Article 37 of the EC Statute of the Court so that it must be held inadmissible.

Admissibility of the appeal

36 The Commission contends that the appeal is inadmissible in its entirety. In its view, Hoechst has never complained that the Court of First Instance committed an error of law, but rather is putting forward for the first time a large number of facts and arguments which were not mentioned in the Court of First Instance, some of which — such as the Commission's appeal in the *PVC* cases and the proceedings before the Court of First Instance in the '*Low-density polyethylene* ("*LdPE*")' cases (Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 and T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729) — arose in the meantime. Hoechst maintains for the first time that the Polypropylene Decision was not adopted in the Dutch and Italian versions and puts forward purported evidence to show that alterations were made after the texts had been adopted by the Commission. The same applies to its observations relating to the question of which texts of the decision were signed by the competent Member of the Commission.

37 The Commission points out that the subject-matter of the proceedings may not be changed in the appeal and any new plea in law is accordingly inadmissible. Since the function of the appeal procedure is to review, on points of law, the judgment delivered at first instance, it must relate to the state of the dispute at the time when the Court of First Instance delivered its judgment (Case C-18/91 P *V* v *Parliament* [1992] ECR I-3997).

38 In that regard, it should be borne in mind, first, 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 of rules of law, to the exclusion of any appraisal of the facts. The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice (see, *inter alia*, Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraphs 10 and 42).

39 Secondly, under Article 113(2) of the Rules of Procedure of the Court of Justice, the subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal.

40 It follows that, in so far as they concern the assessment made by the Court of First Instance of the facts submitted to it in the context of the request that the oral procedure be reopened, the appellant's complaints may not be examined in an appeal. Pleas in law introduced for the first time in such an appeal are also inadmissible.

41 However, it is incumbent on the Court of Justice to examine whether the Court of First Instance committed an error of law in failing to find that the Polypropylene Decision was vitiated by defects or in refusing to reopen the oral procedure and order measures of organisation of procedure and inquiry as requested by Hoechst.

42 It follows that the appeal is not inadmissible in its entirety but that the admissibility of each complaint and claim made by Hoechst must be examined in turn in the context of an appeal.

Pleas in law relied upon in support of the appeal: breach of procedure and infringement of Community law

43 In support of its appeal, Hoechst, referring to paragraphs 372 to 375 of the grounds of the contested judgment, argues that, inasmuch as it failed to annul the Polypropylene Decision for breach of essential procedural requirements and to find that that decision was devoid of any effect because it was not notified, and inasmuch as it rejected Hoechst's request that the oral procedure be reopened and the necessary measures of organisation and inquiry ordered, the Court of First Instance committed an infringement of Community law and breach of procedure adversely affecting Hoechst's interests, within the meaning of the first paragraph of Article 51 of the EC Statute of the Court of Justice.

Failure to find defects affecting the Polypropylene Decision

44 In the first limb of its plea of infringement of Community law, Hoechst complains that the Court of First Instance failed to find that the Polypropylene Decision was devoid of all effect or had to be annulled by reason of defects affecting the procedure by which it was adopted and notified.

45 According to Hoechst, it follows from the *PVC* judgment of the Court of Justice that, although that Court does not accept that the alleged defects in the Polypropylene Decision are of a particularly grave nature entailing its non-existence, it must regard them as infringements of essential procedural requirements by reason of which the Polypropylene Decision must be declared void pursuant to the first paragraph of Article 174 of the EC Treaty (now the first paragraph of Article 231 EC).

46 In its reply, however, Hoechst alleges a defect the legal consequences of which would go beyond mere annulment, irrespective of the presence of a particularly grave and manifest defect, namely the lack of notification, in breach of Article 191(3) of the EC Treaty (now Article 254(3) EC).

47 The decision adopted by the Commission on 23 April 1986 was at no time notified to its addressees or published in the *Official Journal of the European Communities*. The text notified is not identical to the version adopted and not until three or four weeks after the Commission's decision was it finalised by the latter's services. There are therefore grounds for believing that that text differs from the decision adopted by the Commission by reason of alterations going beyond the mere corrections of spelling and grammar allowed by the Court of Justice in Case 131/86 *United Kingdom* v *Council* [1988] ECR 905.

48 It is now admitted that, in principle, Commission decisions do not reach their addressees in the version in which they were adopted. On the contrary, the adoption by the College of Members of the Commission is followed by a second phase in which the text is recast for the purposes of notifying the act. Hoechst observes that the second phase includes in particular revision of the text by lawyer linguists and finalising of the document by the General Secretariat, taking account of the alterations that have been made.

49 According to Hoechst, there are also specific reasons for believing that, in this case, the texts of the Polypropylene Decision in English, German and French adopted by the Commission were altered after the deliberation. In the German version notified, for example, additions have been made in different characters or with smaller spaces between the letters and lines, as well as omissions which suggest that there were subsequent alterations.

50 Since there is serious evidence to corroborate the hypothesis of subsequent alterations and the scope and nature of those alterations can be determined only by comparing the versions adopted and notified, Hoechst asks the Court of Justice to order the Commission to produce the texts of the Polypropylene Decision in the languages in which it was adopted and to include the extract from the minutes relating to it as well as the annexes thereto.

51 The certified copy of the Polypropylene Decision notified on 27 May 1986 to Hoechst carries a typed reference to Commissioner Sutherland's signature and the date 23 April 1986. Hoechst asks whether the texts of the Polypropylene Decision were actually signed by that Commissioner and, if so, which version of the decision Mr Sutherland may have signed — the version adopted by the Commission but not notified, as the indication of the date would suggest, or the version notified but not adopted. In any event, it is impossible for the Commissioner to have signed the version notified on 23 April 1986, because that version was not available on that date. Consequently, Hoechst asks the Court of Justice to order the Commission to produce the texts of the decision signed by Mr Sutherland in the various languages of procedure.

52 Pursuant to Article 191(3) of the Treaty, Commission decisions take effect only upon notification. Accordingly, if there is a failure to notify, as in this case, the act cannot produce any effect.

53 Moreover, Hoechst considers that the Court of First Instance committed an error of law when it did not take into consideration the defects of the Polypropylene Decision alleged by Hoechst, which constitute breaches of essential procedural requirements, namely, first, the absence of originals of the Polypropylene Decision which could provide proof of its authentication and proper adoption by way of the signatures required for that purpose; secondly, the fact that the College of Members of the Commission did not adopt the decision itself in two of the authentic languages, Italian and Dutch; thirdly, the fact that the statement of reasons was altered after its adoption.

54 Hoechst also offers evidence should those facts be disputed, namely drafts of the decision which were submitted to the Commission for decision, the evidence of the Agents of that institution at the hearing in the *PVC* cases before the Court of First Instance, and the Commission's appeal in those cases, all going to show that the Commission replied at the hearing on 22 November 1991 in the *PVC* cases that Article 12 of its Rules of Procedure had long since 'fallen into desuetude'.

55 DSM states that new developments have taken place in other cases before the Court of First Instance. They confirm that it is incumbent on the Commission to prove that it has followed its own essential procedural requirements and that, to clarify the issue, the Court of First Instance must, of its own motion or at the request of a party, order measures of inquiry in order to examine the relevant documentary evidence. In Cases T-30/91 *Solvay* v *Commission* [1995] ECR II-1755 and T-36/91 *ICI* v *Commission* [1995] ECR II-1847 ('the *Soda-Ash* cases'), the Commission contended that the Supplement to the Reply lodged by Imperial Chemical Industries plc ('ICI') in those cases after the *PVC* judgment of the Court of First Instance contained no evidence that the Commission had infringed its Rules of Procedure, and that the request for measures of inquiry lodged by ICI amounted to a new plea in law. The Court of First Instance nevertheless put questions to the Commission and ICI as to the conclusions to be drawn from the *PVC* judgment of the Court of Justice and also asked the Commission, by reference to paragraph 32 of the *PVC* judgment of the Court of Justice, whether it was able to produce extracts from the minutes and the authenticated texts of the contested decisions. Following other developments in the procedure, the Commission finally admitted that the documents produced as authenticated were only authenticated after the Court of First Instance had ordered their production.

56 According to DSM, in the *LdPE* cases, the Court of First Instance also ordered the Commission to produce a certified copy of the original version of the contested decision. The Commission admitted that authentication had not taken place at the meeting at which the College of Members of the Commission adopted that decision. DSM observes that the procedure for authenticating acts

of the Commission must therefore have been introduced after March 1992. It follows that the same defect of lack of authentication must affect the Polypropylene Decision.

57 DSM adds that the Court of First Instance adopted a similar approach to that taken in the *Polypropylene* cases in Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, at paragraphs 24 to 27, and Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957, at paragraphs 28 to 31, when it rejected the applicants' pleas on the ground that they had failed to produce the slightest evidence which might rebut the presumption of validity of the decision that they were contesting. In Case T-43/92 *Dunlop Slazenger International* v *Commission* [1994] ECR II-441, the applicant's argument was rejected on the ground that the decision had been adopted and notified in accordance with the Commission's Rules of Procedure. In none of those cases did the Court of First Instance reject the applicants' plea of irregularity in the adoption of the challenged act on the ground that the Commission's Rules of Procedure had not been complied with.

58 The only exceptions are to be found in the orders in Case T-4/89 Rev. *BASF* v *Commission* [1992] ECR II-1591 and Case T-8/89 Rev. *DSM* v *Commission* [1992] ECR II-2399; however, even in those cases the applicants did not rely on the *PVC* judgment of the Court of First Instance as a new fact, but on other facts. In Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, the Court rejected the plea that the Commission had infringed its own Rules of Procedure, because it had not been properly raised before the Court of First Instance. In the polypropylene proceedings, however, the same plea had been raised before the Court of First Instance and was rejected on the ground that there was not sufficient evidence.

59 DSM considers that the Commission's defence in this case is based on procedural arguments that are irrelevant, given the content of the contested judgment, which in essence turns on the burden of proof. According to DSM, if, in the *Polypropylene* cases, the Commission has not itself produced evidence as to the regularity of the procedures followed, that is because it is not in a position to show that it complied with its own Rules of Procedure.

60 According to the Commission, Hoechst introduced a new plea in law in its reply when it maintained that the Polypropylene Decision had not produced any effects because it was not notified. That plea and the claim for a declaration that the Polypropylene Decision is null and void are inadmissible.

61 As regards DSM's arguments, the Commission states that these are fundamentally flawed, since they fail to take account of the differences between the *PVC* cases and this case, and misunderstand the *PVC* judgment of the Court of Justice.

62 Moreover, the Commission maintains its view that the applicants in the *Soda-Ash* cases had not produced sufficient evidence to justify the order by the Court of First Instance that the Commission produce documents. At all events, in those cases and the *LdPE* cases, also cited by DSM, the Court of First Instance reached its decision in the light of the particular circumstances of the case before it. In the Polypropylene proceedings, supposed deficiencies in the Polypropylene Decision could have been pointed out in 1986, but no one did so.

63 If, in its judgments in *Fiatagri and New Holland Ford* v *Commission* and *John Deere* v *Commission*, cited above, the Court of First Instance rejected the applicants' allegations, which were raised timeously, on the ground that there was no evidence to support them, the same solution should *a fortiori* be reached in this case, where the arguments relating to procedural irregularities in the Polypropylene Decision were produced late and without evidence.

64 The objection raised by the Commission to the admissibility of the complaint concerning lack of notification of the Polypropylene Decision cannot be upheld.

65 In its appeal Hoechst had claimed that the Polypropylene Decision was non-existent. At the reply stage, at the same time as it withdrew its pleas and claims concerning non-existence, it claimed that the consequence of one of the defects previously relied on in that context, namely lack of notification, was that the Polypropylene Decision had produced no effect. In so doing, Hoechst reduced the scope of the pleas raised in the appeal and therefore did not introduce a new plea in law.

66 As for the claim for a declaration that the Polypropylene Decision is null and void, the admissibility of which is also contested by the Commission, it need merely be pointed out that, pursuant to Article 174 of the Treaty, if the action is well founded, the Court of Justice is to declare the act concerned to be void. Under Article 113 of the Rules of Procedure of the Court of Justice, an appeal may seek the same form of order, in whole or in part, as that sought at first instance. It follows that the forms of order sought by Hoechst are an integral part of any action for annulment and may be properly submitted in an appeal against a judgment of the Court of First Instance dismissing an action for annulment.

67 As for the complaints put forward by Hoechst, it follows from paragraphs 38 to 42 above that, in the context of an appeal, the Court must confine itself to examining whether, in failing to find defects affecting the Polypropylene Decision, the Court of First Instance committed errors of law.

68 With regard, first, to Hoechst's complaints alleging lack of notification of the Polypropylene Decision, it must be stated immediately that non-notification could have no consequence other than a finding of the non-existence or annulment of the act in question.

69 It is clear from paragraphs 48 and 49 of the *PVC* judgment of the Court of Justice that acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

70 However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say that they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

71 It follows that, contrary to Hoechst's submissions, Community law does not accept an intermediate situation between a finding that an act is non-existent and its annulment.

72 That conclusion is not open to the objection that, pursuant to Article 191(3) of the Treaty, decisions take effect upon notification and that, in the absence of notification, the decision is devoid of any effect. As regards notification of an act, like any other essential procedural requirement, either the irregularity is so grave and manifest that it entails the non-existence of the contested act, or it constitutes a breach of essential procedural requirements that may lead to its annulment.

73 It follows that the Court of First Instance did not commit an error of law when it failed to find that the Polypropylene Decision was devoid of any effect.

74 Secondly, with regard to the refusal by the Court of First Instance to find defects relating to the adoption and notification of the Polypropylene Decision such as to lead to its annulment, it need merely be held that this plea was raised for the first time in the request that the oral procedure be reopened and measures of organisation of procedure and inquiry be taken. Consequently, the question whether the Court of First Instance was obliged to examine it overlaps with the question whether that Court should have acceded to the request, which is the subject-matter of the plea alleging breach of procedure.

75 Thirdly, in the light of Hoechst's submissions relating to the alleged defects of the Polypropylene Decision and DSM's argument that it follows that that decision was legally non-existent, it is appropriate also to examine whether, in interpreting the conditions capable of rendering an act non-existent, the Court of First Instance infringed Community law.

76 In that connection, according to paragraph 50 of the *PVC* judgment of the Court of Justice, from the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations.

77 As was the case in the *PVC* actions, whether considered in isolation or even together, the irregularities alleged by Hoechst, which relate to the procedure for the adoption of the Polypropylene Decision, do not appear to be of such obvious gravity that the decision must be treated as legally non-existent.

78 The Court of First Instance did not therefore infringe Community law as regards the conditions capable of rendering an act non-existent.

79 Finally, inasmuch as the appellant asks the Court of Justice to order measures of inquiry or offers evidence in order to establish the conditions under which the Commission adopted the Polypropylene Decision, suffice it to point out that such measures cannot be considered in an appeal, which is limited to points of law.

80 On the one hand, measures of inquiry would necessarily lead the Court to decide questions of fact and would change the subject-matter of the proceedings commenced before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

81 On the other hand, the appeal relates only to the contested judgment and it is only if that judgment were set aside that the Court of Justice could, in accordance with the first paragraph of Article 54 of the EC Statute of the Court of Justice, deliver judgment itself in the case. As long as the contested judgment is not set aside, the Court is not therefore required to examine possible defects in the Polypropylene Decision.

82 It follows from the foregoing that the first limb of the plea alleging infringement of Community law must be dismissed.

Failure to reopen the oral procedure and to order measures of organisation of procedure and inquiry

83 In the second limb of its plea of infringement of Community law and in its plea alleging breach of procedure, Hoechst complains that the Court of First Instance failed to reopen the oral procedure and order measures of organisation of procedure and inquiry.

84 In so far as the infringement of Community law alleged by Hoechst concerns the refusal by the Court of First Instance to reopen the oral procedure and order measures of organisation of procedure and inquiry, it overlaps with the plea alleging breach of procedure. Those pleas must therefore be examined together.

85 It is appropriate, therefore, to examine, first, whether, in refusing to reopen the oral procedure and order measures of organisation of procedure and inquiry, the Court of First Instance committed errors of law.

86 According to Hoechst, the exercise by the Court of First Instance of its discretion with regard to reopening the oral procedure is circumscribed by limits depending on the purpose of the reopening requested by one of the parties and must be reviewed in an appeal. Where measures of inquiry are involved that are intended to clarify new facts and an oral procedure is necessary in that context, only the legal principles concerning the taking of evidence are relevant. If those principles required measures of inquiry to be taken, the margin of discretion available when the decision on reopening the procedure is taken is reduced to nothing.

87 Hoechst's request of 2 March 1992 showed the need for measures of inquiry, not only with a view to a possible finding that the Polypropylene Decision was non-existent, but also in order to ascertain whether that decision was vitiated by an infringement of essential procedural requirements.

88 Hoechst points also to the fact that the Court of First Instance did not dismiss as out of time the presentation of new facts and the related offer of evidence, but examined the question on its merits, although it limited its assessment to the plea of non-existence. The Court of First Instance nevertheless disregarded the fact that Hoechst had simultaneously pleaded infringement of essential procedural requirements and that it was therefore necessary to clarify, under that legal aspect, the facts presented.

89 Even if the three-month time-limit laid down for revision of judgments by Article 125 of the Rules of Procedure of the Court of First Instance should be applied by analogy — which would be generally precluded under statutory time-bar systems —, that analogy would operate in favour of Hoechst since the time-limit was complied with. It was only with the statements made on 10 December 1991 in the course of the *PVC* proceedings before the Court of First Instance that Hoechst acquired knowledge for the first time of the facts from which it appeared

that the defects in the administrative act that had appeared in that procedure affected all Commission decisions.

90 The Commission contends that Article 62 of the Rules of Procedure of the Court of First Instance does not require that Court to reopen the oral procedure as the appellant claims, but allows it to do so. The Court of First Instance convincingly explained its reasons for not reopening the oral procedure or ordering measures of inquiry, because there was no need to ascertain of its own motion facts of importance for the decision or to clarify important factual evidence, adduced within the period prescribed, on which the parties disagreed.

91 On the one hand, verification of the Court's own motion would have been necessary only if the parties had put forward sufficient evidence to suggest that the Polypropylene Decision was non-existent. The Court of First Instance rightly held that infringement of the language rules, subsequent alterations, or the absence of the required signatures did not entail non-existence of that decision, as was confirmed by the Court of Justice in its *PVC* judgment. Since the *PVC* judgment of the Court of Justice, it is also established that failure to authenticate a decision, in accordance with Article 12 of the Commission's Rules of Procedure, may lead to annulment of the contested decision but not to its being non-existent. However, Hoechst did not raise in a sufficiently precise manner and within the appropriate time-limit any plea founded on breach of that provision and the Court of First Instance did not therefore have to examine, even from the point of view of annulment of the Polypropylene Decision, the question of the existence of a duly-signed original.

92 Hoechst's request of 2 March 1992 did not expressly mention infringement of essential procedural requirements but referred principally to non-existence and, only in two places and very broadly, to the illegality of the Polypropylene Decision. Even if that plea were construed as a plea of nullity, it was not sufficiently precise and reasoned and was out of time.

93 On the other hand, the Court of First Instance examined Hoechst's request of 2 March 1992, but considered that the applicant had not adduced relevant

factual evidence within the prescribed period. The Court of First Instance rightly questioned whether the plea concerning the alleged defects of the Polypropylene Decision had been made timeously in the course of the proceedings in view of the rule set out in Article 48(2) of the Rules of Procedure of the Court of First Instance, according to which no new plea in law may be introduced after the written procedure has been completed unless it is based on matters of law or of fact which come to light in the course of the procedure.

94 The *PVC* judgment of the Court of First Instance cannot be regarded as a ground which came to light during the proceedings, since the case-law concerning the procedure for revision provided for in Article 41(1) of the EC Statute of the Court of Justice applies equally to Article 48(2) of the Rules of Procedure of the Court of First Instance. According to that case-law (order of the Court of First Instance in *BASF* v *Commission*, cited above, paragraph 12, and judgment in Case C-403/85 REV *Ferrandi* v *Commission* [1991] ECR I-1215), a judgment delivered in different proceedings cannot warrant revision of a judgment.

95 With regard to the explanations given by the Commission's Agents at the hearing in the *PVC* cases, in November 1991, Hoechst was represented at that hearing and could have availed itself of those statements much earlier in the *Polypropylene* case. Consequently, the plea of nullity was not put forward by Hoechst timeously, but rather three months later. The Commission points out that, in the analogous case of revision of a judgment, in accordance with Article 125 of the Rules of Procedure of the Court of First Instance, the period allowed is three months from the date on which the fact relied on by the applicant came to his knowledge.

96 As regards the irregularities alleged by Hoechst with regard to the language rules, the Court of First Instance rightly held that that was a general presumption and Hoechst had not produced evidence sufficient to entail the non-existence of the Polypropylene Decision.

97 The Court of First Instance did, however, acknowledge that Hoechst had specifically alleged that there was no original of the decision. However, even that allegation should not have led the Court of First Instance to order measures of inquiry, either from the point of view of non-existence to which the contested judgment refers, or from the point of view of the possible nullity of that decision. The Court of First Instance held that Hoechst had not put forward any concrete evidence to suggest that any infringement of the principle of the inalterability of the adopted measure had taken place. Moreover, that plea was put forward belatedly, in breach of the provisions of Article 48(2) of the Rules of Procedure of the Court of First Instance. Contrary to Hoechst's assertion, the Court of First Instance did not accept that its arguments had been presented timeously. On the contrary, it expressed doubts on the point, although it left the matter in abeyance, because it examined by way of review of its own motion the question of the non-existence of the Polypropylene Decision.

98 On the question of the alleged breach, by the Court of First Instance, of its duty to clarify the facts, relied on by Hoechst in a very broad way, the Commission points out that Article 64(3)(d) of the Rules of Procedure of the Court of First Instance does not determine the conditions under which measures of organisation of procedure may be requested. For the same reasons as led it to reject the request that the oral procedure be reopened, the Court of First Instance was right not to order the measures of organisation of procedure requested by Hoechst. The purpose of such measures, as described in Article 64(1) of the Rules of Procedure of the Court of First Instance, is to ensure that cases are prepared for hearing and procedures carried out, not to remedy the applicant's negligence in submitting its pleas in law.

99 Turning first to measures of organisation of procedure, the Court must point out that, under Article 21 of the EC Statute of the Court of Justice, it may require the parties to produce all documents and to supply all information which it considers desirable. Article 64(1) of the Rules of Procedure of the Court of First Instance provides that measures of organisation of procedure are to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions.

100 Under Article 64(2)(a) and (b) of the Rules of Procedure of the Court of First Instance, measures of organisation of procedure are, in particular, to have as their purpose to ensure efficient conduct of the written and oral procedure and to facilitate the taking of evidence and to determine the points on which the parties must present further argument or which call for measures of inquiry. Under Article 64(3)(d) and (4), those measures may consist of asking for documents or any papers relating to the case to be produced and their adoption may be proposed by the parties at any stage of the procedure.

101 As the Court of Justice held in its judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 93, a party is entitled to ask the Court of First Instance, as a measure of organisation of procedure, to order the opposite party to produce documents which are in its possession.

102 However, it follows from both the purpose and subject-matter of measures of organisation of procedure, as set out in Article 64(1) and (2) of the Rules of Procedure of the Court of First Instance, that they form part of the various stages of the procedure before the Court of First Instance, the conduct of which they are intended to facilitate.

103 It follows that, after the hearing has taken place, a party may ask for measures of organisation of procedure only if the Court of First Instance decides to reopen the oral procedure. Accordingly, the Court of First Instance would only have to take a decision on such a request if it had upheld the request to reopen the oral procedure, so that there is no need to examine separately the complaints made by Hoechst in this regard.

104 As regards the request for measures of inquiry, the case-law of the Court (see, in particular, Case 77/70 *Prelle* v *Commission* [1971] ECR 561, paragraph 7, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 53) makes it clear that, if made after the oral procedure is closed, such a request can be admitted only if it

relates to facts which may have a decisive influence on the outcome of the case and which the party concerned could not put forward before the close of the oral procedure.

105 The same applies with regard to the request that the oral procedure be reopened. It is true that, under Article 62 of its Rules of Procedure, the Court of First Instance has discretion in this area. However, the Court of First Instance is not obliged to accede to such a request unless the party concerned relies on facts which may have a decisive influence and which it could not put forward before the close of the oral procedure.

106 In this case, the request to the Court of First Instance for the oral procedure to be reopened and measures of inquiry ordered was based on the *PVC* judgment of the Court of First Instance and on statements made by the Commission's Agents at the hearing in the *PVC* cases, or at a press conference which took place after that judgment was delivered.

107 First, indications of a general nature relating to an alleged practice of the Commission concerning the language rules or subsequent alterations to a decision that emerged from a judgment delivered in other cases or from statements made on the occasion of other proceedings could not, as such, be regarded as decisive for the purposes of the determination of the case then before the Court of First Instance.

108 As regards the defect relating to the absence of originals of the Polypropylene Decision authenticated by the signatures of the President of the Commission and the Secretary General in all the authentic languages, it is true that the Court found that this defect had been specifically pleaded by Hoechst in its request of 2 March 1992. However, Hoechst failed to produce decisive facts, specific to the Polypropylene Decision, such as would justify reopening the oral procedure.

109 Secondly, even when submitting its application, Hoechst was in a position to provide the Court of First Instance with at least minimum evidence of the expediency of measures of organisation of procedure or inquiry for the purposes of the proceedings in order to prove that the Polypropylene Decision had been adopted in breach of the language rules applicable or altered after its adoption by the College of Members of the Commission, or that the originals were lacking, as certain applicants in the *PVC* cases did (see, to that effect, *Baustahlgewebe* v *Commission*, cited above, paragraphs 93 and 94).

110 In that connection, it should be noted that, contrary to Hoechst's assertion, the Court of First Instance did not hold in the contested judgment that the facts relied on in its request of 2 March 1992 had been submitted timeously.

111 Furthermore, the Court of First Instance was not obliged to order that the oral procedure be reopened on the ground of an alleged duty to raise of its own motion issues concerning the regularity of the procedure by which the Polypropylene Decision was adopted. Any such obligation to raise matters of public policy could exist only on the basis of the factual evidence adduced before the Court.

112 It must therefore be concluded that the Court of First Instance did not commit any error of law in refusing to reopen the oral procedure and to order measures of organisation of procedure and inquiry.

113 It follows from the foregoing that the second limb of the plea of infringement of Community law and the plea alleging breach of procedure must also be rejected.

114 The appeal must therefore be dismissed in its entirety.

Costs

115 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 Hoechst's pleas have failed, it must be ordered to pay the costs. DSM must bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders Hoechst AG to pay the costs;

3. **Orders DSM NV to pay its own 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