OPINION OF ADVOCATE GENERAL MISCHO

delivered on 25 October 2001 [1]

I — Introduction

A — *Background to the dispute*

1. Following investigations conducted in the polypropylene sector on 13 and 14 October 1983 pursuant to Article 14 of Council Regulation No 17 of 6 February 1962, first regulation implementing Articles 85 and 86 of the Treaty, [2] the Commission of the European Communities commenced an inquiry on polyvinylchloride (hereinafter 'PVC'). It subsequently undertook various investigations at the premises of the undertakings concerned and sent them requests for information.

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

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

4. At the end of the proceeding, the Commission adopted Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.865, PVC) [4] (hereinafter 'the PVC I decision'). By that decision, the Commission penalised the following PVC producers for infringement of Article 85(1) of the

1 — Original language: French.

2 — OJ, English Special Edition, 1959-1962, p. 87.

3 — OJ, English Special Edition, 1963-1964, p. 47.

4 — OJ 1989 L 74, p. 1.

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

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

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

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

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

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

10. The Commission thereupon adopted a fresh decision, on 27 July 1994, in relation to the producers who had been the subject of the PVC I decision, with the exception, however, of Solvay and Norsk Hydro AS (Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 — PVC) (OJ 1994 L 239, p. 14, hereinafter 'the PVC II decision')). That decision imposed on the undertakings to which it was addressed fines of the same amounts as those imposed by the PVC I decision.

11. The PVC II decision contains the following provisions:

'*Article 1*

BASF AG, DSM NV, Elf Atochem SA, Enichem SpA, Hoechst AG, Hüls AG, Imperial Chemical Industries plc, Limburgse Vinyl Maatschappij NV, Mon-

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

6 — Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315.

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

tedison SpA, Société Artésienne de Vinyle SA, Shell International Chemical [Company] Ltd and Wacker-Chemie GmbH infringed Article 85 of the EC Treaty (together with Hydro Norsk... and Solvay...) by participating for the periods identified in this Decision in an agreement and/or concerted practice originating in about August 1980 by which the producers supplying PVC in the Community took part in regular meetings in order to fix target prices and target quotas, plan concerted initiatives to raise price levels and monitor the operation of the said collusive arrangements.

Article 2

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

Article 3

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

(i) BASF AG: a fine of ECU 1 500 000;

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

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

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

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

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

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

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

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

(x) Société Artésienne de Vinyle SA: a fine of ECU 400 000;

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

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

B — *Procedure before the Court of First Instance*

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

13. Each sought the annulment of the PVC II decision in whole or in part and, in the alternative, the annulment or reduction of the fine. Montedison SpA also pleaded that the Commission should be ordered to pay

damages on account of costs incurred in putting together a guarantee and any other expenses arising from the PVC II decision.

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

14. By judgment of 20 April 1999 in *Limburgse Vinyl Maatschappij and Others* v *Commission*[8] (hereinafter 'the contested judgment'), the Court of First Instance:

— joined the cases for the purposes of the judgment;

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

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

— dismissed the remainder of the action;

— ruled on the costs.

D — *Procedure before the Court of Justice*

15. By application lodged at the Court Registry on 3 July 1999, Degussa AG, formerly Degussa-Hüls AG (hereinafter 'Degussa'), brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice.

16. It claimed that the Court should:

— annul the contested judgment in so far as it dismisses Degussa's action and orders it to pay the costs;

— annul Articles 1, 2 and 3 of the PVC II decision in so far as they refer to Degussa;

8 — Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931.

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

17. The Commission contends that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.

II — Assessment

18. The appellant puts forward four pleas, which should be examined in turn.

Infringement of the principle that decisions must be adopted within a reasonable time

19. Degussa maintains, first of all, that the general principle of reasonable promptitude was infringed as a result of the overall duration of the administrative and judicial proceedings. It points out that, according to the case-law of the European Court of Human Rights relating to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the reasonableness of the duration of proceedings must be assessed according to the whole of the proceedings, administrative and judicial, and not only according to its different stages (see the judgment of the European Court of Human Rights in *König* [1978], Series A No 27, paragraph 98 et seq.). In the appellant's submission, this case-law is applicable in connection with the general principle of Community law of reasonable promptitude in proceedings.

20. The appellant points out that, in this case, the Commission began its investigations in October 1983, but that the contested judgment was not delivered until April 1999. It adds that, in view of the likely duration of the appeal, a period of about 20 years will probably have elapsed before the proceedings finally end, thereby exceeding the absolute limit of a bearable delay in proceedings, owing to the delay of the Commission and the Community judicature. The proceedings have already lasted markedly longer than the 11 years considered by the European Court of Human Rights in its judgment in *Garyfallou AEBE* v *Greece* [1997], (*Report of Judgments and Decisions,* 1997-V, p. 1821, paragraph 40.

21. I do not agree with that assessment.

22. Unlike the appellant, I think it is impossible merely to add together the duration of the administrative proceedings and the duration of the court proceedings in order to determine the duration of the proceedings for the purposes of the principle of reasonable promptitude.

23. Such an approach would give rise to a series of paradoxical consequences.

24. Thus, in a complex case in which, by definition, the Commission needs considerable time to establish the matters of law and of fact necessary to provide grounds for its decision, the Community judicature would have only a negligible length of time in which to assess the same complex case; otherwise the aggregate period would be too long!

25. There is reason to doubt whether such a view is conducive to greater protection for the rights of undertakings.

26. As the Commission points out, this argument is also inconsistent with the guarantee of judicial independence since it implies that the administration might, merely by exploiting the time factor, make it necessary for the court to carry out a speedy examination of the case, lest the undertaking automatically win.

27. Furthermore, judicial protection would then become, for undertakings, a kind of gamble which they would win in almost every possible situation. Indeed, by bringing an action for annulment against the Commission's decision, they would unleash a process in which only a judgment of the Court of Justice rejecting all their pleas could prevent them from prevailing by alleging an infringement of the principle of reasonable promptitude, assuming, of course, that the judgment was delivered sufficiently promptly.

28. In all other situations — annulment of the decision, whether or not followed by the adoption of a fresh decision, or even annulment of the judgment at first instance with reference back to the Court of First Instance — the undertakings concerned would merely need to continue, for as long as necessary, to bring actions while keeping an eye, if I may say so, on the calendar so as to be able, when the time came, to bring an end to the proceedings by playing the trump card of the reasonable time requirement.

29. I would add that, in my opinion, that view fails to take account of the difference between procedure before the Commission and procedure before the Community judicature.

30. What is at issue before the Commission is a set of facts which are attributed to the undertaking and whose correctness and legal significance are, as a rule, the subject of debate. That debate may or may not be followed by the adoption of a decision by the Commission, a decision whose very principle and content fall to a certain extent within the discretion of the Commission, which is responsible for implementing Community competition policy.

31. On the other hand, the Court of First Instance considers a particular legal measure, a Commission decision against which a series of specific complaints are made. The same is true, *mutatis mutandis*, of the Court of Justice in an appeal. The action must be brought within a given time and the Court is under a duty to decide the case.

32. The fact that, both before the Commission and before the Court of First Instance, undertakings have the right for their situation to be settled within a reasonable time does not mean that the two procedures may be regarded as being equivalent in the light of that principle and therefore accumulable.

33. Furthermore, an examination of the case-law of the European Court of Human Rights cited by the appellant does not lead to a different conclusion.

34. Thus, in *König*, the European Court of Human Rights held, in fact, that the starting point of the reasonable period was before the administrative proceedings. However, that case, unlike the present one, concerned administrative proceedings which followed the adoption of the measure containing the complaint and which had to be brought before an action could be initiated before the courts.

35. The European Court of Human Rights therefore, in essence, considered the whole of the period following the adoption of the contested measure. It in no way follows that periods prior to that adoption should be added to it.

36. As for the judgment in *Garyfallou AEBE* v *Greece*, cited above, it should be noted that it did not concern the aggregation of an administrative proceeding and a legal proceeding, but of proceedings brought before various courts.

37. It is apparent from the above that the applicant is wrong to criticise the Court of First Instance for not making such an aggregation.

38. Degussa claims, secondly, that the principle of reasonable promptitude was infringed by reason of the sheer duration of the administrative proceedings.

39. It argues that the Court of First Instance wrongly distinguished between two stages, the first covering the period from the beginning of the investigations to the communication of the statement of objections, and the second, from the notification of the statement of objections to the adoption of the PVC II decision, except the period during which the Community judicature considered the legality of the PVC I decision and the validity of the judgment delivered by the Court of First Instance in the action brought against it. By stating, in paragraph 132 of the contested judgment, that undertakings have a specific interest in that second stage of the procedure being conducted with particular diligence by the Commission, it limited the scope of the general principle of reasonable promptitude to that stage. On the other hand, it had applied to the first stage a very wide criterion which led it to accept that its duration of 52 months was reasonable. Consequently, it infringed the legitimate interest of the undertakings concerned in learning as quickly as possible, at the end of the investigations, whether and to what extent it was actually alleged that they had infringed competition law, in order to be able to take steps to defend themselves.

40. Like the Court of First Instance, I consider that, in order to determine the time to be taken into consideration, a distinction must be drawn between the inquiry stage, in the strict sense, and the adversarial stage of the proceedings.

41. At the former stage, no complaint has yet been made against the operators. The Commission may indeed ask them for information but they do not have to defend themselves against any accusation. There is therefore no uncertainty in respect of the substance of a charge against them or, consequently, any material or non-material damage.

42. Furthermore, before the statement of objections, the only measures taken by the Commission are measures of inquiry. These, as provided for under Regulation No 17, cannot be regarded as an allegation that a criminal offence has been committed.

43. Indeed, the very nature of those measures and their place in the chronology of the taking of the decision show that, at the time they are adopted, the Commission is not yet in a position to formulate complaints against anybody, but is still seeking facts which will result in the possible adoption of a statement of objections, which will not necessarily be addressed to the undertakings which have been the subject of measures of inquiry.

44. In other words, the mere fact that an undertaking is the subject of measures of inquiry adopted by the Commission does not mean that it is an accused. Indeed, the very fact that such measures are taken indicates that the Commission is seeking evidence which will enable it to decide whether there are grounds for bringing proceedings against an undertaking and, if so, the identity of that undertaking. It is therefore not possible, by definition, to accuse anybody.

45. Therefore, the appellant's arguments to the effect that undertakings need to know where they stand so as to be able to conduct their defence cannot matter at this stage.

46. It will be seen in that respect that, at this stage in the proceedings, Regulation No 17 imposes on undertakings the obligation to cooperate with the Commission. The Community legislature therefore also considered that, at this stage, the undertaking is not in the position of an accused.

47. It should also be noted that the application of the principle of reasonable promptitude to this stage of the proceedings would have the adverse effect of encouraging undertakings to be as dilatory as possible in fulfilling that obligation because they would know that every delaying tactic on their part would increase their chances of obtaining the annulment of a possible decision for failure by the Commission to observe that principle.

48. As for the Commission, it might be required to inquire into cases within time-limits which would not allow it properly to substantiate its final decision.

49. On the other hand, an undertaking which receives a statement of objections is clearly the subject of a specific allegation. Furthermore, the issue of a statement of objections means that the Commission intends to adopt a decision against the undertaking, the position of which is thereby changed for the purposes of applying the principle of reasonable promptitude.

50. It is apparent from the above that the Court of First Instance was right to consider that a distinction needs to be made between two stages in the administrative proceedings.

51. Thirdly, Degussa considers that the Court of First Instance erred in law when assessing whether the length of the first stage was reasonable, in paragraphs 127 to 129 of the contested judgment, by referring to the volume of the file and the complexity of the facts to be elucidated by the Commission owing to the type of conduct in question and its range across the geographical market concerned, covering the whole area of activity in the common market of the principal PVC producers. In the appellant's submission, those circumstances did not justify the length of the procedure, being not at all unusual in proceedings under Article 85 of the Treaty. In other comparable cases, relating to the girder and cartonboard production sectors, the periods had been considerably shorter, approximately 16 and 20 months respectively. Furthermore, the Commission had been inactive for a long time during the first stage. It had the responsibility, after all, of organising itself in such a way as to have enough staff to deal quickly with complex matters.

52. I consider, however, that the question whether the proceedings were excessively protracted in the light of the problems raised is a matter to be assessed by the Court of First Instance. It is a question of fact, to be settled according to the circumstances of the specific case. It is therefore not possible, within the context of the appeal, to call in question the assessment of the Court of First Instance in that regard.

53. In any event, it is clear from the arguments stated above that the principle of reasonable promptitude does not apply before a formal accusation is made, that is to say, in the first stage of the administrative procedure.

54. Fourthly, Degussa claims that the Court of First Instance made a further error of law when assessing whether the length of the second stage was reasonable

by holding, in paragraph 133 of the contested judgment, that it had lasted only 10 months when, in fact, it had lasted almost six years and four months.

55. It criticises the Court for having deducted the duration of the legal proceedings which culminated in the judgment in *Commission* v *BASF and Others*. Such an approach would have been justified only if each of the procedures, administrative and legal, had been a factor in fulfilling the objective of legal certainty and clarity. For that purpose, the Community courts should have assessed the whole substantive legality of the Commission's decision — which did not happen in the present case, since neither the substantive pleas nor the subsidiary pleas relating to the fines imposed had been examined — without it being foreseeable at that stage that the Commission would subsequently adopt a new decision on the basis of the former one. That situation was thus attributable solely to the Commission.

56. Degussa concludes that the Court should therefore have found that the total period was more than six years, including the length of the legal proceedings, and held that, clearly, it was unreasonably long.

57. It should be pointed out, first of all, that, as we have seen above, it is not possible merely to add together the duration of the administrative proceedings and the duration of the legal proceedings.

58. The appellant considers, however, that that would have been the case only if the proceedings before the Community judicature had related, as the administrative proceedings, to the substance of the case and not only the procedural defects.

59. However, I cannot see the justification for such a distinction. Indeed, the difference, from the point of view of reasonable promptitude, between the two procedures is not affected by the content of the arguments exchanged before the court which, in any event, all relate to the same issue, namely, the validity of the contested decision.

60. Fifthly, the appellant argues that the four-and-a-half-year duration of the legal proceedings which culminated in the contested judgment in itself constitutes an infringement by the Court of First Instance of the principle of reasonable promptitude.

61. It points out that, after the applications had been lodged, the Court decided, in April 1995, to suspend the written pro-

cedure and to limit the oral procedure to an examination of the procedural pleas and that, by order of 14 July 1995, it then ordered the resumption of the written procedure, which ended on 20 February 1996. The appellant adds that a new oral procedure was held from 9 to 12 February 1998 and that the contested judgment was finally delivered on 20 April 1999. It submits that there was no justification at all for dividing the legal proceedings into two separate stages, each comprising a written procedure and an oral procedure.

62. What should be made of this line of argument?

63. I refer to the judgment in *Baustahlgewebe* v *Commission*,[9] in which the Court of Justice held that the reasonableness of the duration of the proceedings must be appraised in the light of the circumstances specific to each case. Furthermore, in that case the proceedings were longer than in the present case, taking five years and six months before the Court of First Instance alone.

64. The Court of Justice underlined the importance to be attached to the complexity of the case and to the constraints inherent in proceedings before the Community judicature, associated in particular with the use of languages.

65. In addition, the Court identified two specific periods, of 32 months and 22 months, which it considered significant from the point of view of the principle of reasonable promptitude, on account of their unjustified length.

66. In the present case, the appellant does not invoke any similar period. It is true that it criticises the Court of First Instance for wasting time by organising an oral procedure to deal specifically with the procedural pleas. However, it must be stated that that possible waste of time is on an altogether different scale from the periods mentioned in *Baustahlgewebe* v *Commission*, since the Court decided, in April 1995, to suspend the written procedure and to organise the oral procedure which took place in June 1995; the written procedure was resumed in July 1995.

67. On the other hand, as is apparent from the above description, the Court was not inactive during that period since, on the contrary, it tried to further the progress of

9 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 45.

the proceedings in the way which may have seemed most effective at the time.

68. Therefore, this argument put forward by the appellant is also unfounded.

69. Finally, Degussa criticises the Court of First Instance for holding, in paragraph 122 of the contested judgment, that infringement of the general principle of reasonable promptitude does not on its own affect the validity of the decision and that annulment is justified only in so far as an excessive delay in the proceedings has also infringed the rights of the defence.

70. The appellant considers that, when the reasonable period expires, the Commission loses the right to adopt a decision. It would be inconceivable if undertakings, in addition to experiencing disadvantages owing to the excessive length of the proceedings, were able to assert their rights only in an action for damages which would make the total duration of the proceedings even longer and which, in many cases, would not be successful, since the damage suffered would be non-material or undemonstrable. The only legal consequence which would ensure the exercise of the fundamental right in question would therefore be the nullity of the adopted decision. The same considerations, it argues, apply *mutatis mutandis* to the reasonable length of proceedings before the Court of First Instance.

71. As regards the administrative procedure, an excessive duration would inevitably infringe the right of the undertakings concerned to a fair hearing, because their opportunity to gather all the evidence of use for their defence would be hindered. Moreover, that infringement could not be regularised during the proceedings before the Court of First Instance (*Solvay* v *Commission*). [10]

72. In the alternative, Degussa requests a reduction of the fine imposed, pursuant to the judgment in *Baustahlgewebe* v *Commission*. [11]

73. However, it is apparent from the above that, in this case, there has been no infringement of the principle of reasonable promptitude. It is therefore not necessary to consider whether the Court of First Instance erred in law as regards the consequences of such an infringement, or to determine whether it is appropriate, pursuant to the judgment in *Baustahlgewebe* v *Commission*, to reduce the fine imposed on the appellant.

10 — Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 98.

11 — Cited above, paragraph 47 et seq.

74. It is only in the alternative, therefore, that I point out that this argument is unfounded.

75. It is not disputed that the rationale of the principle of reasonable promptitude is to protect operators who are the subject of infringement proceedings under Regulation No 17. Therefore, application of that principle must give rise to consequences concerning the degree to which the said operators have been affected by the excessive length of the proceedings.

76. It follows that if that did not affect the undertakings' exercise of their rights of defence and did not, therefore, have an influence on the outcome of the proceedings, the application of the principle must result in lesser consequences than in the converse situation.

77. In particular, I cannot see why a Commission decision, the content of which would have been the same even if its adoption procedure had not been excessively long, should be annulled even so.

78. That would be not only to display an excessive regard for formalities, but such a consequence would also be out of proportion to the operators' rights, since the prejudice they suffer does not stem from the content of the measure but arises only from the moment it is finally adopted.

79. In such circumstances, compensation may reconcile the rights of the undertakings and the general interest which would be jeopardised if the infringement committed were not penalised.

80. On the other hand, if it is established that the rights of the defence have been infringed, it is undeniable that the decision must be annulled in its entirety.

81. However, the appellant seeks to show that the excessive duration of proceedings affects *per se* the opportunity for the undertakings to defend themselves because, as time goes by, it is more and more difficult for them to adduce the necessary evidence.

82. It may be wondered whether the Commission did not come up against the same problem.

83. In any event, such difficulties should be proved *in concreto* by the appellant and cannot be presumed. The appellant's argument is tantamount to creating an irrebuttable presumption that the lapse of time had an effect on the undertakings' opportunity to defend themselves.

84. The decision reached by the Court of First Instance in respect of the effect of the duration of the proceedings on the validity of the Commission's decision is, moreover, in accordance *mutatis mutandis* with that of the Court of Justice in respect of the setting-aside of a judgment of the Court of First Instance. In fact, it unquestionably held, in paragraph 49 of the judgment in *Baustahlgewebe* v *Commission*, that, 'in the absence of any indication that the length of the proceedings affected their outcome in any way' there is no need to annul the contested judgment.

85. That approach, moreover, is only the application to the present case of the general principle that a defect leads to nullity only if it is sufficiently serious. That is apparent from settled case-law [12] relating to annulment for infringement of an essential procedural requirement and also inspired Article 51 of the Statute of the Court of Justice, which makes the possibility of relying, as a ground of appeal, on procedural irregularities subject to the condition that they affected the appellant's interests.

86. It follows from the above that the plea alleging infringement of the principle of reasonable promptitude is unfounded in all respects and should therefore be rejected.

Lack of a proper preparatory administrative procedure

87. The appellant maintains that the Court of First Instance erred in law by not establishing that there had been an infringement of procedural rights and rights of the defence owing to the lack of a proper preparatory procedure. It divides its plea into two limbs.

The first limb, alleging invalidity of the measures taken preparatory to the PVC I decision

88. Degussa criticises the Court of First Instance for having concluded, in paragraphs 189 and 193 of the contested judgment, that the validity of the preparatory measures taken prior to the adoption

12 — Case 30/78 *Distillers* v *Commission* [1980] ECR 2229, paragraph 26; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125; and Case 259/85 *France* v *Commission* [1987] ECR 4393.

of the PVC I decision had not been called into question by the judgment in *Commission* v *BASF and Others*. No such conclusion could be inferred from the grounds of that judgment. In Degussa's submission, the Court was wrong to refer to the judgment in *Spain* v *Commission*, [13] from which it is clear that, in the event of annulment, a procedure may be resumed at the very point up to which it may be considered to be in order. In *Commission* v *BASF and Others*, the Court of Justice had indeed annulled the PVC I decision by reason of a formal defect which occurred during the final stage of its adoption, but it had not given a ruling on the proper conduct of the procedure followed, which the appellants alleged to contain a series of defects.

89. According to Degussa, in the light of the judgment in *Spain* v *Commission*, only preparatory measures which are valid in accordance with the grounds of the judgment in *Commission* v *BASF and Others* or which have not been called into question may be retained. Since the Court of Justice did not examine the pleas going beyond those alleging an infringement of essential procedural requirements, it had not expressly annulled the procedural measures taken preparatory to the adoption of the PVC I decision, but nor had it held that they were valid. Only in the latter case could it have been accepted that the preparatory measures retained their validity.

90. Degussa considers, furthermore, that the Court of First Instance was wrong to hold, in paragraphs 191 and 192 of the contested judgment, that its assessment was unaffected by its judgment in *Cimenteries CBR and Others* v *Commission*. [14]

91. The question of the effects of the annulment of a decision on the validity of the preparatory acts depends, as the Court of First Instance rightly held, on the grounds of annulment, and the appellant does not dispute this.

92. That statement, which, moreover, only reflects the application to this case of the general principle of *res judicata*, is confirmed by the case-law cited by the Court of First Instance and the case-law cited by the appellant itself.

93. The Court of First Instance was therefore right to hold that it was necessary to determine, in the light of the operative part and of the grounds of the judgment of the Court of Justice in respect of the PVC I decision, the effect of the annulment of that decision on the preparatory acts.

94. That annulment arose from the mere fact that the Commission had infringed the procedural rules governing only the

13 — Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993, paragraph 31.

14 — Joined Cases T-10/92, T-11/92 T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 47.

detailed procedure for the definitive adoption of the decision. Therefore, the nullity could not extend to the procedural stages which predated the occurrence of that irregularity and to which those rules were not intended to apply.

95. The situation is therefore similar to that considered in the judgment in *Spain* v *Commission*, cited above, in which the Court of Justice held that the procedure for replacing the annulled measure could be resumed at the very point at which the illegality occurred.

96. However, the appellant reaches a conclusion which is diametrically opposed. It considers that, since the Court of Justice did not expressly confirm the validity of the preparatory measures, although their validity was contested, it could be inferred that they were invalidated by the Court's judgment.

97. This reasoning is based on a misinterpretation of the case-law of the Court of Justice. [15] As the Commission points out, only the operative part of the annulling judgment and the grounds which constitute its essential basis are binding on the institution which adopted the measure.

98. Those contain all the factors which the institution must take into account in order to implement the Court's judgment. It inevitably follows that a plea which the Court has passed over in silence cannot be regarded as upheld by the Court.

99. Moreover, having regard to the principle of economy of pleas, the Court had no need to examine the other pleas, since it had already declared the nullity of the contested decision on the basis of one of them.

100. The appellant's argument is also incompatible with the presumption of validity attaching to the acts of the institutions. According to that, such a measure must be regarded as valid until its invalidity is expressly established by the Court of Justice, which is the exact opposite of the argument expounded by the appellant.

101. The appellant relies, in particular, on the judgment of the Court of First Instance

15 — See Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris and Others and Greece* v *Commission* [1988] ECR 2181, paragraphs 26 and 27.

in *Cimenteries CBR and Others* v *Commission*, in which the Court held that, as a consequence of the annulment of the Commission's decision, the whole procedure was unlawful.

102. However, that statement must be placed in the context of the judgment in question. The nullity of the decision was the consequence of the invalidity of the preparatory procedure, namely access to the file, and not, as in this case, the lack of authentication of the final text of the decision. It therefore necessarily followed that, when implementing the judgment annulling the decision, the Commission was required to take into account the causes of the annulment and to remedy them, if necessary by repeating the procedural measures whose nullity had caused the invalidity of the final decision.

103. It follows from the above that the appellant's arguments and, consequently, the first limb of its plea should be rejected.

The second limb, regarding the obligation to open a new administrative procedure

104. Degussa argues that, irrespective of their validity, the measures adopted preparatory to the PVC I decision were not sufficient to allow the Commission to adopt the PVC II decision. In the appellant's submission, the Commission should have opened an additional procedure including a hearing of the appellant, and the intervention of the Advisory Committee and of the Hearing Officer.

105. Firstly, it disputes the argument of the Court of First Instance that, since there were no new objections, a fresh hearing was not required. It considers, in fact, that it is apparent from Regulation No 17 that any decision concerning the finding of an infringement must be preceded by a hearing.

106. However, it must be remembered that, as shown above, the hearing held prior to the adoption of the PVC I decision was unaffected by the annulment of the decision. The undertakings concerned were therefore heard and were able to put their case as to the complaints made against them by the Commission.

107. Therefore, the question is this: was the Commission nevertheless under an obligation to give the undertakings concerned a second hearing?

108. It must be stated that no such obligation arises under Regulation No 17 or

Regulation No 99/63. In fact, the clear inference of those provisions is that the Commission must give the undertakings mentioned in the statement of objections the opportunity of being heard on the matters to which the Commission has taken objection.

109. It is also provided that the Commission is to deal, in its decisions, only with those objections in respect of which the undertakings have been afforded the opportunity of stating their views.

110. It follows that, if the Commission's decision does not contain new objections in relation to those which formed the subject-matter of the hearing of the undertakings, the regulations do not require another hearing to be held.

111. The parallel which the appellant seeks to draw with the withdrawal, renewal or amendment of a decision is not persuasive. In all those situations, amendments are made to the content or scope of an existing measure. Those circumstances could not, by definition, be covered by the same preliminary procedure as that which preceded the adoption of the measure. On the contrary, as we shall see, in the present case there have been no significant changes in the circumstances which were covered by the preliminary procedure.

112. However, Degussa claims, secondly, that, even if the PVC II decision does not contain, in the strict sense of the term, any new objections, it is set against a factual and legal background which is sufficiently different from that of the adoption of the PVC I decision to render it necessary to regard these altered circumstances as new objections.

113. In that regard, it stresses the development of the case-law, the legal consequences of the lapse of time and the changes which have affected the factual situation and, accordingly, the level of the fines.

114. It has been stated above that the relevant regulations require only that undertakings be given the opportunity to express their views regarding the objections made against them. They do not, on the other hand, imply that they should be heard regarding every new circumstance.

115. Undertakings should therefore have been able to put forward their arguments with regard to the acts they are alleged to have committed. On the other hand, the regulations do not require that the undertakings should be consulted on all the other aspects of the Commission's action, for example, on the level of fines.

116. That applies all the more in the present case, in which, as the Commission rightly points out, the PVC II decision relates only to acts carried out between 1980 and 1984, in respect of which the undertakings were fully able to express their views.

117. As the Court of First Instance held in paragraph 1235 of the contested judgment, the Commission's sole purpose, in adopting the PVC II decision, was to adopt a decision identical in substance to that of 1988, by merely rectifying the formal defect which had led to its annulment by the Court of Justice.

118. The fact that there have been factual and legal developments since 1988 has no relevance to the requirements of the regulations, which were satisfied by the hearing concerning the objections contained in the contested decision.

119. The possibility that, as a consequence of the lapse of time, there may have been developments in the case-law does not affect the above conclusions. Indeed, such developments may occur at any time in the proceedings, and the Commission cannot be required to arrange a new hearing on every occasion. It is even more the case that such developments do not mean that the Commission is required to amend the decision which it is in the course of taking.

120. It follows from the above that the Commission was not under a duty to give the undertakings a second hearing.

121. The appellant puts forwards a similar argument, *mutatis mutandis*, in so far as concerns consultation of the Advisory Committee. It maintains that the matter should have been referred to the Advisory Committee pursuant to Article 10(3) of Regulation No 17, which requires that it be consulted prior to any decision.

122. According to the appellant, the 1988 consultation could not in any sense replace a new hearing before the adoption of the 1994 decision, owing to the complete change in the factual and legal circumstances between those two dates. The Advisory Committee should have been consulted, in particular, on the very principle of adopting the PVC II decision without a preliminary procedure, following the annulment of the PVC I decision, since such a situation was without precedent.

123. This argument, like the argument concerning the hearing of undertakings, is not convincing.

124. Let us remember that measures taken preparatory to the PVC I decision were not affected by the annulment of the decision. Therefore, the Advisory Committee was properly consulted before the adoption of the PVC II decision. Was it necessary to consult it for a second time?

125. It is clear from Article 10(5) of Regulation No 17 that the Advisory Committee is to deliver an opinion on a preliminary draft decision. However, the appellant does not claim that the text of the PVC II decision makes substantial modifications to that on which the Advisory Committee had already been consulted.

126. In the absence of such modifications, the regulation did not require, in my view, that the Advisory Committee should be consulted again on a text which was substantially the same as that on which it had already given its opinion.

127. The changes in circumstances invoked by the appellant do not seem to me to justify a different solution.

128. I should make it clear that the only specific point raised by the appellant in that connection, namely the principle itself of adopting a new decision in such circumstances, is not as unprecedented as it suggests since the Commission had already stated, in the *Fourth Report on Competition Policy*,[16] that Article 3 of the regulation concerning limitation periods[17] should allow it to adopt a new decision imposing a fine in the event of annulment of such a decision on the ground of procedural defect.

129. Nor do the developments in the case-law seem to me — for the reasons explained above in relation to the obligation to give the undertakings a hearing — such as to give rise to an obligation to consult the Advisory Committee again.

130. Finally, the appellant invokes the need to call for the further intervention of the Hearing Officer. It considers that the Court of First Instance did not respond to the plea which it put forward to that effect.

131. It is necessary to refer, in that connection, to paragraph 253 of the contested judgment, according to which 'since the Commission was not required to hold a

16 — Paragraph 49.

17 — Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

new hearing of the undertakings concerned, it could not be in breach of its decision of 23 November 1990 on the hearings in proceedings relating to Articles 85 and 86 of the EEC Treaty and Articles 65 and 66 of the ECSC Treaty'.

132. The appellant's argument is therefore unfounded.

Infringement of the rights of the defence resulting from inadequate access to the file

133. Degussa points out that, during the proceedings before the Court of First Instance, the appellants obtained, under measures of organisation of procedure, disclosure of the documents which had not been sent to them by the Commission in the course of the administrative procedure. It states that, in paragraph 1019 of the contested judgment, the Court found that there had been an infringement of the appellant's right of access to the file. The appellant complains that the Court, after considering the appellants' observations on the documents finally disclosed, dismissed its application for annulment of the PVC II decision on the ground that inadequate access to the file had not resulted in infringement of the rights of the defence.

134. The appellant maintains that that conclusion is incorrect, because it is based on an assessment criterion which is itself incorrect, the Court's disputed method consisting — according to paragraph 1039 of the contested judgment — in examining whether documents not disclosed to the applicants at the time of the administrative procedure might, had they been communicated, have affected the Commission's conclusions. It considers that the Court is not able to make such an assessment.

135. The examination which the Court carried out also failed to have regard to the right of access to the file. That right is infringed if the Commission has excluded from the proceedings documents which were in its possession and which might have been of use for the appellant's defence. It is irrelevant whether those documents were actually considered to be of use for the defence in an inspection carried out *a posteriori* by the Court. It is also wholly irrelevant whether the Commission took into account the circumstances arising from those documents.

136. The appellant maintains that there is therefore always an infringement of the rights of undertakings as defendants if the Commission has not communicated, during the administrative procedure, documents which may have been of use for their defence.

137. The appellant therefore criticises not only the way in which the Court of First

Instance examined the effect of the undisclosed documents but also the principle behind that examination.

138. On that point, it should be noted that the case-law of the Court of Justice [18] indisputably shows that, if the undertaking fails to establish that the documents in question contained evidence of use for its defence and, consequently, that the fact that it was unable to take cognisance of their content before the decision was adopted infringed its defence rights, there is no need to annul the Commission's decision.

139. The Court of First Instance, which, furthermore, cited its own case-law [19] in support of its finding, was therefore right to hold that a mere irregularity in the access to the file did not justify the annulment of the decision, and that annulment was necessary only if it was established that non-disclosure could have had a negative effect on the appellant's defence rights.

140. It was therefore perfectly reasonable for the Court to check that that condition was fulfilled in this case. It is hard to see how it could have applied its case-law any other way, if it were not to deprive that condition of all substance.

18 — Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 80.

19 — *Solvay* v *Commission*, cited above, and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847.

141. As regards whether, by so doing, the Court of First Instance followed an incorrect assessment criterion, the following should be pointed out.

142. We have seen that the appellant refers to paragraph 1039 of the contested judgment, in which the Court states that the purpose of the measure of organisation of procedure decided upon by the Court was 'to examine whether documents not disclosed to the applicants at the time of the administrative procedure might, had they been communicated, have affected the Commission's conclusions'.

143. However, it must be pointed out that, to analyse the documents, it also used the terms 'affected the applicants' defence' (paragraph 1035 of the contested judgment), 'in what way their defence rights have been affected' (paragraph 1036), 'affected the undertakings' defence' (paragraph 1041), and 'contain anything relevant to the applicants' defence' (paragraph 1073).

144. Furthermore, in paragraph 1074 of the contested judgment, the Court of First Instance states that none of the applicants 'establishes that the course of the procedure and the decision might have been influenced, to the applicants' detriment, by failure to disclose documents of which they ought to have had knowledge'. The

expression 'course of the procedure' itself refers, implicitly, to the undertakings' opportunities to defend themselves during the procedure.

145. Furthermore, reading the explanations given by the Court in respect of that examination unquestionably shows that it examined whether the documents in question would have been of any use at all to the appellant. It did not therefore confine its appraisal to whether the failure to disclose the disputed documents had had an impact on the content of the final decision.

146. In fact, its account had the effect, fundamentally, of showing that the documents concerned, far from providing the appellant with an argument, were either unlikely to be relied upon by the appellant, because of their nature or subject-matter, or, because of their content, liable to confirm the Commission's conclusions, or in any event not to contradict them in the slightest.

147. I therefore consider that the Court complied, in its method of analysis, with the aforementioned case-law of the Court of Justice.

148. The specific example cited by the appellant to show that such is not the case is not convincing.

149. The appellant argues that the undisclosed documents mentioning the existence of 'keen competition' between PVC producers could have been used by the undertakings to show, at least, the failure to implement the prohibited agreement, a consideration which the Commission would be likely to take into account when fixing the amount of the fine. The non-disclosure of those documents had therefore affected the undertakings' ability to defend themselves, even though it was not established that the content of the decision would have been different if the document had been communicated to the appellant at the appropriate time.

150. The Commission contends that the assessment of the evidential value of documents by the Court of First Instance is a point of fact which is not open to challenge on an appeal.

151. The problem raised in the present case is slightly different. The appellant is not objecting directly to an assessment of fact made by the Court of First Instance, but is seeking to establish, in the light of that example, that the Court followed an incorrect criterion for making that assessment and that that error led to specific consequences, namely that the Court wrongly held that non-disclosure of those documents did not lead to infringement of the rights of the defence.

152. The appellant takes the view that the Court considered whether the Commis-

sion's decision would have had a different content if those documents had been disclosed and does not call into question the results of its assessment in that regard. It submits, however, that the Court should have carried out a different examination, namely to determine whether the undertakings would have been able to rely on the documents. It would then have reached a different outcome, which would illustrate the specific consequences of the Court's choice of an incorrect criterion.

153. The fact remains, however, that, in this case, the Court did not merely consider whether the Commission's decision would have had a different content if the documents had been disclosed. It expressly stated, in paragraph 1063 of the contested judgment, that the undertakings had been able to argue the circumstances mentioned in those documents, and that they had indeed done so.

154. The Court mentions, in that regard, that the undertakings had a plentiful documentary basis on which to do so, after the documents were sent by the Commission to the parties in May 1988. It is therefore pointless for the appellant to claim that the fact that the undertakings did not have all the documents referring to competition between the producers prevented them from making a sound decision as to which documents would be of use for their defence.

155. Likewise, the example cited by the appellant does not show that the Court followed an incorrect criterion or, *a fortiori*, that it would have arrived at a different result if it had applied a correct one.

156. It is apparent from the above that this plea is unfounded.

Infringement of Article 190 of the EC Treaty (now Article 253 EC)

157. Degussa criticises the Court of First Instance for having rejected its plea alleging that the Commission had not provided details of the method used to calculate the fine. The Court had thus failed to comply with the obligation to state reasons and had infringed Article 190 of the Treaty.

158. In the appellant's submission, that provision requires that the reasons for a decision should be stated therein. The Court therefore wrongly held that particulars of the calculation of the fine do not form part of the statement of reasons which must be provided in the decision and that it is sufficient if they are communicated during the court proceedings.

159. This argument is unfounded both on account of the circumstances of the present case and in principle.

160. The Commission rightly points out that, in paragraph 1183 of the contested judgment, the Court of First Instance found as a matter of fact that the appellant already knew the detailed method of calculating the fine imposed since, in the course of the actions challenging the PVC I decision, it had obtained information in that respect from a table produced by the Commission at the Court's request and annexed to the application lodged against the PVC II decision.

161. According to settled case-law, [20] the requirements which the statement of reasons of a decision must fulfil depends on the context, which, in this case, includes the appellant's prior knowledge gained in consequence of the PVC I procedure.

162. Since the similarity between the two decisions in that respect is not disputed, the Court's finding that, in the circumstances, the PVC II decision was sufficiently reasoned cannot be disputed.

163. Furthermore, and in any event, the Court of Justice held, [21] in a context similar to the one in this case, that the requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity and duration of the infringement. Only if those factors are not stated is the decision vitiated by failure to state reasons.

164. However, in the present case, the Court of First Instance stated, [22] without being contradicted by the appellant, that, in paragraph 52 of the contested decision, the Commission explained its reasoning in relation to the gravity of the infringement and, in paragraph 54, considered the duration of the infringement.

165. The Court was therefore right, for that reason too, to reject the plea alleging insufficient statement of reasons for the PVC II decision.

166. Consequently, this plea should also be rejected.

20 — See, for example, Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17.

21 — Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 43.

22 — Paragraphs 1175 to 1178 of the contested judgment.

III — Conclusion

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

— dismiss the appeal;

— order the appellant to pay the costs.