JUDGMENT OF THE COURT (Fifth Chamber)

6 April 2000 *

In Joined Cases C-287/95 P and C-288/95 P,

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

appellant,

APPEALS against the judgments of the Court of First Instance of the European Communities (First Chamber, Extended Composition) of 29 June 1995 in Cases T-31/91 and T-32/91 *Solvay* v *Commission* [1995] ECR II-1821 and II-1825, seeking to have those judgments set aside

the other party to the proceedings being:

Solvay SA, established in Brussels, Belgium, represented by L. Simont, Advocate at the Belgian Court of Cassation, by P.-A. Foriers and G. Block, of the Brussels

* Language of the case: French.

Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

THE COURT (Fifth Chamber),

composed of: L. Sevón (Rapporteur), President of the First Chamber, acting for the President of the Fifth Chamber, P.J.G. Kapteyn, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 October 1999,

after hearing the Opinion of the Advocate General at the sitting on 25 November 1999,

gives the following

Judgment

1 By two applications lodged at the Registry of the Court of Justice on 30 August 1995, the Commission of the European Communities brought two appeals pursuant to Article 49 of the EC Statute of the Court of Justice against the judgments of 29 June 1995 in Case T-31/91 *Solvay* v *Commission* [1995] ECR II-1821, hereinafter '*Solvay I*' and in Case T-32/91 *Solvay* v *Commission* [1995] ECR II-1825, hereinafter '*Solvay II*', and together referred to as 'the contested judgments'), by which the Court of First Instance annulled Commission Decision 91/298/EEC of 19 December 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.133-B: Soda Ash — Solvay, CFK) (OJ 1991 L 152, p. 16) and Commission Decision 91/299/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-C: Soda Ash — Solvay) (OJ 1991 L 152, p. 21, hereinafter referred to together as 'the decisions at issue').

2 By order of the President of the Fifth Chamber of the Court of Justice of 18 December 1997, Cases C-287/95 P and C-288/95 P were joined for the purposes of the oral procedure and of judgment.

3 As regards the facts, it is apparent from the contested judgments that at its 1 040th meeting held on 17 and 19 December 1990 the college of Commissioners adopted the decisions at issue. It appears, in essence, from Decision 91/298 that Solvay SA (hereinafter 'Solvay') and another company, Chemische Fabrik Kalk, had been participating since about 1987 in an agreement to share the German soda-ash market, as a result of which the Commission ordered them to pay fines of ECU 3 million and ECU 1 million respectively. In Decision 91/299 the Commission found that Solvay held a dominant position on the continental Western European market for soda-ash and had abused that position, within the

meaning of Article 86 of the EEC Treaty (now Article 82 EC), from about 1983, and consequently imposed on it a fine of ECU 20 million. The decisions at issue had been notified to Solvay by registered letter of 1 March 1991.

4 The Court of First Instance pointed out that the text of the notified decisions had not been previously authenticated by the signatures of the President of the Commission and its Executive Secretary in accordance with the first paragraph of Article 12 of the Commission's Rules of Procedure 63/41/EEC of 9 January 1963 (OJ, English Special Edition, Second Series VII, p. 9), provisionally maintained in force by Article 1 of Commission Decision 67/426/EEC of 6 July 1967 (OJ 1967 147, p. 1), as last amended by Commission Decision 86/61/EEC, Euratom, ECSC of 8 January 1986 (OJ 1986 L 72, p. 34), which were then in force (hereinafter 'the Rules of Procedure').

5 Paragraphs 9 to 14 of *Solvay I* and paragraphs 10 to 17 of *Solvay II* set out the following facts concerning the procedure before the Court of First Instance.

6 On 2 May 1991 Solvay brought an action for annulment of the decisions at issue and for an order that the Commission should pay the costs.

7 After the closure of the written procedure, Solvay lodged a 'supplementary application' on 10 April 1992 in which it put forward a new plea in law to the effect that the decisions at issue should be declared non-existent. Referring to two press articles which had appeared in the *Wall Street Journal* of 28 February 1992 and in the *Financial Times* of 2 March 1992, it submitted *inter alia* that the Commission had publicly stated that for years the practice of the college of Commissioners was not to authenticate acts adopted by it and that no decision in the past 25 years had been authenticated. Those statements by the Commission referred to actions then pending before the Court of First Instance challenging a

Commission Decision finding that there was a cartel in the polyvinylchloride sector (hereinafter 'the PVC decision') and on which the Court of First Instance had given judgment in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315.

8 The Commission submitted written observations on that supplementary application.

9 After the Court of Justice had ruled on the appeal against that judgment (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555), the Court of First Instance adopted measures of organisation of procedure and in particular requested the Commission to produce, *inter alia*, the texts of the decisions at issue as authenticated at the time, in the languages in which they were authentic, by the signatures of the President and the Secretary-General and annexed to the minutes.

10 The Commission stated in reply that it considered that as long as the Court of First Instance had not ruled on the admissibility of the plea alleging failure to authenticate the decisions at issue the correct course was to postpone consideration of the substance of that plea.

11 By order of 25 October 1994 the Court of First Instance, applying Article 65 of its Rules of Procedure, ordered the Commission to produce the abovementioned texts.

12 Following that order, the Commission produced on 11 November 1994 *inter alia* the text of the decisions at issue in French, the covering page of which bore an undated form of authentication signed by the President and the Executive Secretary of the Commission.

13 In *Solvay I* Solvay pleaded, as a new plea, only defective authentication. In *Solvay II*, however, it put forward a second limb of the plea, alleging amendment of the text of the decision, after the action had been brought, by the insertion of point 63 into Decision 91/299.

14 In the contested judgments the Court of First Instance held that the new plea was admissible. In paragraphs 31 of *Solvay I* and 37 of *Solvay II* it held that the statements made by representatives of the Commission were a matter of fact which could be relied on by Solvay. Even though those statements had been made solely in the context of *BASF and Others* v *Commission*, cited above, they covered all proceedings under Articles 85 of the EEC Treaty (now Article 81 EC) and 86 of the Treaty which had taken place up to the end of 1991, including the proceedings at issue in the cases before the Court of First Instance.

15 In paragraphs 34 of *Solvay I* and 41 of *Solvay II* it held that Article 48(2) of the Rules of Procedure lays down neither a time-limit nor any particular formality for the submission of a new plea in law.

16 Moreover, in paragraphs 35 of *Solvay I* and 41 of *Solvay II* it held that, even if Article 48(2) were to be interpreted as meaning that a new plea in law is admissible only if submitted as expeditiously as possible, that requirement would have been satisfied in the cases before it, as the supplementary application had been lodged within a reasonable period after the appearance of the articles alleged to constitute a new fact.

17 As regards the second limb of the plea in *Solvay II*, alleging amendment of the text of the decision in that a point 63 was inserted into Decision 91/299, the Court of First Instance found that when that point was sent to the applicant by

the Commission on 11 June 1991 Solvay could then have realised that the notified text of the decision was incomplete. It held in paragraph 45 of *Solvay II* that although that limb of the plea had been raised only in the supplementary application, it should, nevertheless, having regard to the fact that no time-limit is laid down in Article 48(2) of its Rules of Procedure, also be declared admissible.

18 As regards the merits of the action, the Court of First Instance first recalled the wording of Article 12 of the Commission's Rules of Procedure in the version in force at the material time:

'Acts adopted by the Commission... shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary.

The texts of such acts shall be annexed to the minutes in which their adoption is recorded.

The President shall, as may be required, notify acts adopted by the Commission to those to whom they are addressed.'

19 In paragraphs 38 of *Solvay I* and 49 of *Solvay II*, the Court of First Instance stated that the very scheme of those rules implies a sequence of events whereby, first, acts are adopted by the college of Commissioners and then authenticated before being notified, as appropriate, to the persons concerned and, possibly, published. It concluded that authentication of an act must necessarily precede its notification.

20 It took the view, in paragraphs 39 of *Solvay I* and 50 of *Solvay II*, that that sequence, which followed from a literal and schematic interpretation of the provision in question, was confirmed by the purpose of that provision. It pointed out that in its judgment in Case C-137/92 P *Commission* v *BASF and Others*, cited above, the Court of Justice had held, in paragraph 73, that that provision was the consequence of the Commission's obligation to take the steps necessary to enable the complete text of acts adopted by the college of Commissioners to be identified with certainty and, in paragraph 75, that authentication was therefore intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners became fixed in the languages which were binding, in order that, in the event of a dispute, it could be verified that the texts notified or published corresponded precisely to the text adopted, and so with the intention of the author.

21 Having found that the contested decisions had been authenticated after they had been notified, the Court of First Instance held, at paragraphs 40 of *Solvay I* and 51 of *Solvay II*, that there was an infringement of an essential procedural requirement within the meaning of Article 173 of the EC Treaty (now, after amendment, Article 230 EC).

22 It explained, in paragraphs 41 of *Solvay I* and 52 of *Solvay II*, that it is the mere failure to observe the essential procedural requirement in question which constitutes that infringement. It is therefore unconnected with the question whether there are discrepancies between the texts adopted, notified and published and, if so, whether or not those discrepancies are material.

23 In paragraphs 42 of *Solvay I* and 53 of *Solvay II* it added that, after an originating application had been lodged, it was not possible for an institution to cure a material defect vitiating the contested decision simply by taking the step of retroactive regularisation.

24 As regards the second limb of the plea in *Solvay II*, based on the absence of point 63 in Decision 91/299 in the notified version, the Court of First Instance

held in paragraphs 47 and 48 that the college of Commissioners had in fact adopted that point at its 1 040th meeting. However, its omission from the notified version could not lead to annulment of the decision; it was merely the case that point 63 which had not been notified could not be relied upon. It therefore held that that limb of the plea was unfounded.

25 By the contested judgments the Court of First Instance annulled the decisions at issue in so far as they concerned Solvay and ordered the Commission to pay the costs.

26 In its appeals, the Commission requests the Court of Justice to set aside the contested judgments and to dismiss the ground of annulment of the decisions at issue based upon lack of proper authentication, to refer the case back to the Court of First Instance for a decision on the other grounds of annulment and to order Solvay to pay the costs.

27 Solvay contends that the appeals should be dismissed and the Commission ordered to pay the costs.

28 The Commission puts forward two pleas in support of its appeals.

29 The first plea alleges errors of law and lack of reasoning as regards the admissibility of Solvay's new plea, the organisation of the procedure and the rules of proof and evidence.

30 In the first limb of that plea the Commission claims that the Court of First Instance erred in law by holding, in paragraphs 31 of *Solvay I* and 37 of *Solvay II*, that the statements by the Commission to which reference was made could amount in themselves to a new fact for the purposes of Article 48(2) of the Rules of Procedure.

31 In the second limb of that plea, the Commission claims that the Court of First Instance erred in law by holding, in paragraphs 34 and 35 of *Solvay I* and 40, 41 and 45 of *Solvay II*, that there was no time-limit for raising a new plea under Article 48(2) of its Rules of Procedure.

32 In the third limb of the first plea the Commission submits that, in ordering the Commission to produce the texts of the decisions at issue as authenticated at the time, the Court of First Instance erred in law in its interpretation of its Rules of Procedure and the rules of proof and evidence; moreover the Court also committed an error of reasoning in that it failed to explain, either in the order of 25 October 1994, cited above, or in the contested judgments, why it had concluded that it should order the Commission to produce those texts.

33 The second plea in the appeal alleges errors of law and lack of reasoning concerning the purpose of authentication and the consequences of a failure to authenticate the decisions at the time of their adoption.

34 In the first limb of the second plea the Commission submits that the Court of First Instance erred in law in holding, in particular at paragraphs 41 of *Solvay I* and 52 of *Solvay II*, that authentication is a formal requirement which must be observed whether or not there is any evidence to cast doubt on the authenticity of the text as notified.

35 In the second limb of the plea the Commission submits that the Court of First Instance erred in law in holding, at paragraphs 38 to 40 and 42 of *Solvay I* and 49 to 51 and 53 of *Solvay II*, that authentication must take place before the act is notified to the addressee, failing which it is void, and that the authentication carried out in this case was defective.

36 In the third limb of the second plea the Commission submits that in failing to consider whether the alleged defect was such as to affect the interests of the addressee of those decisions the Court of First Instance erred in law and, as a subsidiary point, failed in its obligation to give reasons.

The second plea

37 The Court will first examine the second plea, dealing with its first and third limbs together.

38 According to the Commission, the contested judgments are vitiated by an error of law in that the Court of First Instance took the view that there is infringement of an essential procedural requirement as soon as there is a failure to observe the procedural requirement in question, whether or not there are other defects affecting the notified text or the interests of the party seeking annulment of the decision are affected.

39 The Commission submits that it follows from *Commission* v *BASF and Others*, cited above, that lack of authentication is a procedural irregularity only when it is combined with one or more other defects affecting the notified text. The requirement of authentication cannot be separated from the need to be able to identify with certainty the full text of acts adopted by the college of Commissioners. In the present case, in the absence of evidence creating uncertainty as to the precise content of the texts adopted, the question whether the decisions at issue had been identified is of no interest whatever.

40 The Commission considers, moreover, that the Court of First Instance erred in law in failing to address the question whether Solvay's interests could have been

affected by the lack of authentication at the time. It cites as an example *Commission* v *BASF and Others*, cited above, in which the Court of Justice examined whether the irregularities vitiating the procedure for adopting the decision could have affected the content of the PVC decision and, therefore, the rights of its addressees.

41 In reply Solvay states that, according to *Commission* v *BASF and Others*, authentication of acts constitutes an essential procedural requirement within the meaning of Article 173 of the Treaty, breach of which gives rise to an action for annulment. It refers to the case-law of the Court of Justice on essential procedural requirements, from which it is clear that an essential procedural requirement is so important that the Community judicature may, and indeed must, examine of its own motion whether it has been complied with; an infringement of an essential procedural requirement cannot be remedied; and failure to observe an essential procedural requirement results in the nullity of the act irrespective of the actual consequences of the infringement.

42 It should be remembered that, since the intellectual component and the formal component form an inseparable whole, reducing the act to writing is the necessary expression of the intention of the adopting authority (*Commission* v *BASF and Others*, paragraph 70).

43 In the first paragraph of Article 12 of the Commission's Rules of Procedure in force at the material time, the Commission set out measures enabling the full text of acts adopted by the college of Commissioners to be identified with certainty.

44 The Court of Justice has already held that the authentication of acts provided for in the first paragraph of Article 12 is intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes definitive in the languages which are binding (*Commission* v *BASF and Others*, paragraph 75).

45 It follows that such authentication constitutes an essential procedural requirement within the meaning of Article 173 of the Treaty, breach of which gives rise to an action for annulment (*Commission* v *BASF and Others*, paragraph 76).

46 Contrary to the Commission's submissions, it is the mere failure to authenticate an act which constitutes the infringement of an essential procedural requirement and it is not necessary also to establish that the act is vitiated by some other defect or that the lack of authentication resulted in harm to the person relying on it.

47 The judgment in *Commission* v *BASF and Others* cannot be interpreted in the manner suggested by the Commission.

48 In paragraph 75 of that judgment the Court of Justice explained that the authentication of acts was intended to guarantee legal certainty.

49 The principle of legal certainty, which is part of the Community legal order, requires that any act of the administration that has legal effects must be definitive, in particular as regards its author and content.

50 Checking compliance with the requirement of authentication and, thus, of the definitive nature of the act is a preliminary to any other review, such as that of the competence of the author of the act, of compliance with the principle of collegiality or of the duty to provide reasons for the act.

51 Likewise, it is only after any necessary review of the definitive nature of the act adopted by its author that it will be possible to ascertain whether the notified or

published text corresponds fully to the text that was adopted by the author of the act.

52 Although, in the majority of cases in which the production of an authenticated act has been ordered, one of the parties was also challenging the act on another ground, it cannot be concluded that a challenge of that kind is a necessary precondition for an order to produce an authenticated act. Nor, *a fortiori*, is it necessary to establish by reference to other factors that there is *prima facie* another defect in the act.

53 It is for the Community court to decide in accordance with the provisions of the Rules of Procedure in regard to measures of inquiry whether it is necessary for such an act to be produced, in the light of the circumstances of the case.

54 As regards the Court of First Instance, it follows from Article 49 read in conjunction with Article 65(b) of its Rules of Procedure that a request for production of documents is a measure of inquiry which the Court may order at any stage of the proceedings.

55 If the Community court finds, on examining the act produced to it, that the act has not been properly authenticated, it must of its own motion raise the issue of infringement of an essential procedural requirement through failure to carry out proper authentication and, in consequence, annul the act vitiated by that defect.

56 It is of little importance that the lack of authentication has not caused any harm to a party to the dispute. Authentication of acts is an essential procedural

requirement within the meaning of Article 173 of the Treaty that is crucial for legal certainty; infringement of that requirement results in annulment of the defective act without there being any need to establish the existence of such harm.

57 It follows that in annulling the decisions at issue on the ground that they infringed an essential procedural requirement within the meaning of Article 173 of the Treaty, in that the acts adopted by the Commission were not properly authenticated, the Court of First Instance did not commit an error of law and gave adequate reasons for its judgments.

58 Consequently, the first and third limbs of the second plea must be rejected.

59 In the second limb of the second plea the Commission submits that the Court of First Instance erred in law and in its reasoning in holding, at paragraphs 38 to 40 and 42 of *Solvay I* and 49 to 51 and 53 of *Solvay II*, that authentication must take place before the act is notified to the addressee, failing which it is void.

60 The Commission maintains that the adoption of a decision is wholly complete when the draft decision is approved by the college of Commissioners. The view of the Court of First Instance fails to have regard to the case-law of the Court of Justice, according to which possible defects arising after the adoption of a decision cannot affect its validity.

61 It also submits that immediate notification is required for a number of acts because of their urgency and in order to ensure their effectiveness, it being impossible to wait until the minutes of the Commission meeting have been approved and authenticated.

62 The Commission also considers that it is inconsistent to deny any value to authentication after an action has been brought but to take the view, nevertheless, that *ex post facto* authentication proved that point 63 of Decision 91/299 had been adopted by the college of Commissioners.

63 Solvay contends that it is clear from the procedure laid down in Article 12 of the Commission's Rules of Procedure that authentication must precede notification and publication of the act. That principle can also be inferred from paragraph 75 of *Commission* v *BASF and Others*, cited above, according to which authentication enables it to be verified that the texts notified or published correspond to the authenticated text.

64 On that point, it is enough that Article 12 of the Commission's Rules of Procedure provides that acts adopted by the Commission are to be authenticated by the signatures of the President and Executive Secretary and that they are to be notified, as may be required, by the President.

65 The Court of First Instance was therefore entitled to find, at paragraphs 38 and 39 of *Solvay I* and 49 and 50 of *Solvay II*, that it followed from a literal and schematic interpretation of that provision that authentication of an act must necessarily precede its notification, as is confirmed by the purpose of the rule on authentication.

66 In order to guarantee legal certainty, it is important to ensure that the texts adopted by the Commission are authenticated within a short period after the President and the Executive Secretary, who are responsible for authentication, have satisfied themselves that the text which they are authenticating corresponds to the text which has been adopted.

67 At the very least it is indispensable for authentication to precede notification because otherwise there would always be a risk that the notified text would not be identical to the text adopted by the Commission.

68 The Court of First Instance was therefore entitled to find that there is an infringement of an essential procedural requirement within the meaning of Article 173 of the Treaty where authentication of a decision occurs on a date after the notification of the act and even after the bringing of an action for annulment of that act.

69 As regards point 63 of Decision 91/299, the Court notes that in paragraph 47 of *Solvay II* the Court of First Instance accepted *ex post facto* authentication as evidence that point 63 of that decision had indeed been adopted by the college at its 1 040th meeting.

70 To accept that the carrying out of a formality proves a fact does not however necessarily imply a finding that the formality was properly carried out. On the contrary, it is apparent from paragraph 47 that the Court of First Instance expressed reservations on that point in stating: 'Even though that authentication has not been effected in accordance with the Commission's Rules of Procedure (see paragraphs 50 to 53 below)...'.

71 In paragraph 47 of *Solvay II*, the Court of First Instance could therefore accept, without contradiction, that *ex post facto* authentication proved the adoption of point 63 of Decision 91/299, but nevertheless find, in paragraph 51 et seq. of the same judgment, that the authentication was not in accordance with the Rules of Procedure, so that there was an infringement of essential procedural requirements within the meaning of Article 173 of the Treaty.

72 Consequently, the second limb of the second plea is unfounded and must be rejected.

The first plea

73 This plea alleges errors of law and lack of reasoning as regards the admissibility of Solvay's new plea, the organisation of the procedure and the rules of proof and evidence.

74 In view of what has been said above both as to the right of the Court of First Instance under Articles 49 and 65(b) of its Rules of Procedure to order the production of documents at any stage of the proceedings and as to its duty to raise of its own motion the issue of infringement of an essential procedural requirement, such as failure properly to authenticate an act, it is unnecessary to deal any further with the first plea raised by the Commission, which must be rejected as manifestly unfounded.

75 It follows from all the foregoing considerations that the pleas submitted by the Commission are unfounded and the appeals must therefore be dismissed.

Costs

76 Under 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 the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the appeals;**

2. **Orders the Commission of the European Communities to pay the costs.**

Sevón Kapteyn Jann

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 6 April 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber