JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
20 April 1999 *

In 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 NV, a company incorporated under Belgian law, established in Brussels, represented by Inne G.F. Cath, an advocate with right of audience before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), with an address for service in Luxembourg at the Chambers of Lambert Dupong, 4-6 Rue de la Boucherie,

Elf Atochem SA, a company incorporated under French law, established in Paris, represented by Xavier de Roux, Charles-Henri Léger and Jacques-Philippe Gunther, all of the Paris Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

BASF AG, a company incorporated under German law, established in Ludwigshafen, Germany, represented by Ferdinand Hermanns, of the Düsseldorf Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch and Marc Wolters, 11 Rue Goethe,

Shell International Chemical Company Ltd, a company incorporated under English law, established in London, represented by Kenneth B. Parker QC, instructed by John W. Osborne, Solicitor, with an address for service in Luxembourg at the Chambers of Jean Hoss, 2 Place Winston Churchill,

DSM NV and **DSM Kunststoffen BV,** companies incorporated under Netherlands law, established in Heerlen, Netherlands, represented by Inne G.F. Cath, an

* Languages of the case: German, English, French, Italian, Dutch.

advocate with a right of audience before the Hoge Raad der Nederlanden, with an address for service in Luxembourg at the Chambers of Lambert Dupong, 4-6 Rue de la Boucherie,

Wacker-Chemie GmbH, a company incorporated under German law, established in Munich, Germany,

Hoechst AG, a company incorporated under German law, established in Frankfurt-am-Main, Germany,

both represented by Hans Hellmann and Hans-Joachim Hellmann, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Jacques Loesch and Marc Wolters, 11 Rue Goethe,

Société Artésienne de Vinyle, a company incorporated under French law, established in Paris, represented by Bernard van de Walle de Ghelcke, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 7 Val Sainte-Croix,

Montedison SpA, a company incorporated under Italian law, established in Milan, Italy, represented by Giuseppe Celona and Giorgio Aghina, of the Milan Bar, and Piero Angelo Maria Ferrari, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Georges Margue, 20 Rue Philippe II,

Imperial Chemical Industries plc, a company incorporated under English law, established in London, represented by David Vaughan QC and David Anderson, Barrister, instructed by Victor White and Richard Coles, Solicitors, with an address for service in Luxembourg at the Chambers of Lambert Dupong, 4-6 Rue de la Boucherie,

Hüls AG, a company incorporated under German law, established in Marl, Germany, represented initially by Hansjürgen Herrmann, Rechtsanwalt, Cologne, and subsequently by Frank Montag, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

Enichem SpA, a company incorporated under Italian law, established in Milan, represented by Mario Siragusa, of the Rome Bar, and Francesca Maria Moretti, of the Bologna Bar, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss and Prussen, 2 Place Winston Churchill,

applicants,

Commission of the European Communities, represented initially by Berend Jan Drijber, Julian Currall and Marc van der Woude, both of its Legal Service, acting as Agents, assisted by Éric Morgan de Rivery, of the Paris Bar, Alexander Böhlke, Rechtsanwalt, Frankfurt-am-Main, David Lloyd Jones, Barrister, Renzo Maria Morresi, of the Bologna Bar, and Nicholas Forwood QC, and subsequently by Julian Currall, also assisted by Marc van der Woude, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of 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),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: V. Tiili, President, K. Lenaerts and A. Potocki, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing from 9 to 12 February 1998,

gives the following

Judgment

Facts

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, OJ, English Special Edition 1959-1962, p. 87), the Commission of the European Communities commenced an inquiry on polyvinylchloride ('PVC'). It undertook subsequently various investigations at the premises of the undertakings concerned and sent them several requests for information.

2 On 24 March 1988 it instituted on its own initiative a proceeding under Article 3(1) of Regulation No 17 against 14 PVC producers. On 5 April 1988 it sent each of those undertakings a statement of objections as provided for in Article 2(1) of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47). 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 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) (OJ 1989 L 74, p. 1). By that decision (hereinafter 'the original decision' or 'the 1988 decision'), the Commission penalised the following PVC producers for infringement of Article 85(1) of the Treaty: Atochem SA, BASF AG, DSM NV, Enichem SpA, Hoechst AG, Hüls AG, Imperial Chemical Industries plc, Limburgse Vinyl Maatschappij NV, Montedison SpA, Norsk Hydro AS, Société Artésienne de Vinyle, Shell International Chemical Company Ltd, Solvay et Cie and Wacker-Chemie GmbH.

5 All those undertakings except Solvay et Cie ('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 (Case T-106/89 *Norsk Hydro* v *Commission*, not published in the ECR).

7 The cases, registered under case numbers 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, were joined for the purposes of the oral procedure and the judgment.

8 By judgment of 27 February 1992 (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), the Court of First Instance declared the 1988 decision non-existent.

9 On appeal by the Commission, the Court of Justice, by judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555 ('the judgment of 15 June 1994'), set aside the judgment of the Court of First Instance and annulled the 1988 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 original decision, with the

exception, however, of Solvay and Norsk Hydro AS ('Norsk Hydro'), Commission Decision 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; 'the Decision').

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

Article 2

The undertakings named in Article 1 which are still involved in the PVC sector in the Community (apart from Norsk Hydro and Solvay which are already the subject of a valid termination order) shall forthwith bring the said infringement to an end (if they have not already done so) and shall henceforth refrain in relation to their PVC operations from any agreement or concerted practice which may have the same or similar object or effect, including any exchange of information of the kind normally covered by business secrecy by which the participants are

directly or indirectly informed of the output, deliveries, stock levels, selling prices, costs or investment plans of other individual producers, or by which they might be able to monitor adherence to any express or tacit agreement or to any concerted practice covering price or market-sharing inside the Community. Any scheme for the exchange of general information to which the producers subscribe concerning the PVC sector shall be so conducted as to exclude any information from which the behaviour of individual producers can be identified, and in particular the undertakings shall refrain from exchanging between themselves any additional information of competitive significance not covered by such a system.

Article 3

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

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

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

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

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

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

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

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

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

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

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

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

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

Procedure

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

('SAV'), Montedison SpA ('Montedison'), Imperial Chemical Industries plc ('ICI'), Hüls AG ('Hüls'), and Enichem SpA ('Enichem') brought the present actions.

13 Pursuant to Article 64 of the Rules of Procedure, a meeting between the members of the Third Chamber (Extended Composition) and the parties took place on 6 April 1995, at which the parties agreed that the written procedure should be suspended and that the oral procedure should be limited to examination of procedural submissions. They also agreed that 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 should be joined.

14 Upon hearing the Report of the Judge Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure, limited to examination of procedural submissions, without any preparatory inquiries or measures of organisation of procedure.

15 By order of the President of the Third Chamber (Extended Composition) of 25 April 1995 (not published in the ECR), 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 were joined for the purposes of the oral procedure on account of the connection between them, pursuant to Article 50 of the Rules of Procedure.

16 The oral procedure took place on 13 and 14 June 1995.

17 By order of 14 July 1995 (not published in the ECR), the President of the Third Chamber (Extended Composition) ordered that the written procedure should be resumed and that the cases be disjoined.

18 The written procedure closed on 20 February 1996.

19 In the context of measures of organisation of procedure, the Court of First Instance (Third Chamber, Extended Composition) informed the parties by letter of 7 May 1997 of its decision to allow each of the parties access to the Commission's file on the matter which gave rise to the Decision, save for internal Commission documents and documents containing business secrets or other confidential information.

20 Having consulted the file in June and July 1997, all the applicants except for those in Cases T-315/94 and T-316/94 lodged observations at the Registry of the Court of First Instance in July and September 1997. The Commission lodged its observations in reply in December 1997.

21 By order of 22 January 1998, having heard the parties, the President of the Third Chamber (Extended Composition) of the Court of First Instance rejoined the present cases for the purposes of the oral procedure.

22 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure and adopted measures of organisation of procedure by asking the parties to reply to certain written questions and to produce certain documents. The parties complied with those requests.

23 The parties presented oral argument and replied to the questions of the Court of First Instance at the hearing held between 9 and 12 February 1998.

24 On that occasion, they stated that they had no objection to the cases being joined for the purposes of the judgment.

25 At the hearing the Court of First Instance was composed of V. Tiili, President, C.P. Briët, K. Lenaerts, A. Potocki and J.D. Cooke. Following the expiry of the term of office of Judge Briët on 17 September 1998, this judgment was deliberated by the three judges by whom it is signed, in accordance with Article 32(1) of the Rules of Procedure.

Forms of order sought

26 Each applicant claims that the Court should:

— annul the Decision in whole or in part;

— in the alternative, annul or reduce the fine imposed upon it;

— order the Commission to pay the costs.

27 In Cases T-315/94, T-316/94 and T-329/94, Wacker, Hoechst and Hüls also claim that the Court should:

— order that the report of the hearing officer be placed on the file and communicated to the applicant;

— order the transcript of the hearing, including the annexes, to be communicated to the applicant.

28 In addition, in Cases T-315/94 and T-329/94, Wacker and Hüls claim that the Court should:

— order the Commission to place before the Court of First Instance the opinion given by the Legal Service on the procedural questions connected with the Decision and have that opinion communicated to them.

29 In Cases T-315/94 and T-316/94, Wacker and Hoechst claim that the Court should:

— take into consideration the procedural file produced in Case T-92/89.

30 In Case T-325/94, Montedison also claims that the Court should:

— order the Commission to pay damages with interest on the basis of the costs connected with the lodging of the security and for all other costs connected with the Decision;

— place on the file in the present case the documents produced in Case T-104/89;

— hear as witnesses the managing director and the responsible manager of Montedison as of 1 November 1982.

31 The Commission claims in each of the cases that the Court should:

— dismiss the actions;

— order the applicants to pay the costs.

Admissibility of the pleas under Articles 44(1), 46(1) and 48(2) of the Rules of Procedure

32 In relation to several of the applicants' pleas in law, the Commission has raised objections of inadmissibility based on either Article 44(1)(c) or Article 48(2) of the Rules of Procedure. One of the applicants has also raised a plea of inadmissibility based on Article 46(1) of the Rules of Procedure. Each of these categories of objection will be examined separately.

I — *The objections of inadmissibility based on Article 44(1)(c) of the Rules of Procedure*

Arguments of the parties

33 The Commission states that in the reply Montedison makes a general reference to all the procedural pleas put forward by the parties in their joint submissions at the hearing on 13 and 14 June 1995. The texts of those submissions were not attached to its pleading because, it was alleged, the Court of First Instance was familiar with them.

34 The Commission also states that at the reply stage, and by way of introduction to the part of its pleading concerning procedural matters, Enichem lists all the procedural pleas put forward by the parties in their joint submissions at the hearing on 13 and 14 June 1995 and declares that it adopts them as its own. For that purpose, Enichem has annexed to its reply the record of the submissions of all the applicants' lawyers.

35 Such references, the Commission submits, do not comply with Article 44(1)(c) of the Rules of Procedure of the Court of First Instance (order of 29 November 1993 in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraphs 21 to 23). The Court of First Instance cannot substitute itself for the applicant in attempting to seek and identify in the documents referred to the grounds on which it may consider the claims made in the application to be justified.

36 The Commission also submits that the pleas listed by Shell in the body of its reply and elaborated in the annexes thereto should be declared inadmissible and excluded from the oral procedure (Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 29, Case C-43/90 *Commission* v *Germany* [1992] ECR I-1909, paragraph 8, Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, paragraph 46, and order of 28 April 1993 in Case T-85/92 *de Hoe* v *Commission* [1993] ECR II-523).

37 The Commission argues that any pleading must indicate clearly the matters of fact and of law applicable to the particular case and, apart from the application, must correspond to the preceding pleading. By referring to documents contained in an annex, submitted by other lawyers in other cases, the applicant compels the Court of First Instance to attempt itself to identify the matters on which the applicant intends to rely in support of its application. Moreover, the documents annexed are merely notes prepared by certain lawyers for the hearing on 13 and 14 June 1995 and do not necessarily correspond to what was actually pleaded, the transcript of the hearing being unavailable; the applicant is relying on only certain parts of the notes on the oral submissions of one of the lawyers, and some of those notes themselves refer to the arguments submitted by other parties in their oral and written pleadings.

38 Finally, the Commission observes that at the end of the oral procedure, which was the sole purpose for which the cases had been joined, the President of the Third Chamber, Extended Composition, of the Court of First Instance ordered the disjoinder of the cases.

Findings of the Court

39 Under Article 44(1)(c) of the Rules of Procedure, all applications must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to give a ruling, if appropriate, without recourse to other information. In order to ensure legal certainty and the sound administration of justice, for an action to be admissible the essential facts and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible. Although specific points in the text of the application can be supported and completed by references to specific passages in the documents attached, a general reference to other documents cannot compensate for the lack of essential information in the application itself, even if those documents are attached to the application (see the order in *Koelman*, cited above, paragraph 21). Moreover, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental purpose (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34).

40 That interpretation of Article 44(1)(c) of the Rules of Procedure also applies to the conditions for admissibility of a reply, which according to Article 47(1) of the Rules of Procedure is intended to supplement the application.

41 In this case, the Court notes that in their replies Shell, Montedison and Enichem make a general reference to the pleas and arguments put forward jointly by a number of applicants at the hearing before the Court of First Instance on 13 and 14 June 1995. That general reference to documents, even if annexed to the reply, cannot replace a statement of facts, pleas and arguments in the text of the reply itself.

42 The Court also notes that Enichem supplements its reply on specific points by references to documents annexed thereto. However, the references are to the annexed document generally and thus do not enable the Court of First Instance to identify precisely the arguments which it might regard as supplementing the pleas in the application.

43 In those circumstances, to the extent that reference is made therein to the joint submissions, the replies of Shell, Montedison and Enichem do not satisfy the requirements of Article 44(1)(c) of the Rules of Procedure and cannot therefore be considered.

II — *The objection of inadmissibility based on Article 46(1) of the Rules of Procedure*

Arguments of the parties

44 Hüls argues that it is inadmissible under Article 46(1)(b) of the Rules of Procedure for the Commission to refer to the Report for the Hearing in Case T-86/89 *Hüls* v *Commission* in order to reply to certain pleas put forward in the application (Joined Cases 19/63 and 65/63 *Prakash* v *Commission* [1965] ECR 533, at p. 546; Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 2; *Commission* v *Germany*, cited above, paragraphs 7 and 8; Case T-82/89 *Marcato* v *Commission* [1990] ECR II-735, paragraph 22; *ICI*, paragraph 47).

45 The Commission considers that the manner of citation used in the defence does not constitute a general reference within the meaning of the case-law relied on by the applicant. The latter has in fact misunderstood the function of an annex, which is to allow a formal reference without unnecessary repetition. Moreover,

the Commission considers that reference to another action involving the same parties in relation to the same set of circumstances is admissible (*ICI*, paragraph 47).

Findings of the Court

46 Under Article 46(1)(b) of the Rules of Procedure the defence must contain the arguments of fact and law relied on. The arguments relied on by the defendant must be set out sufficiently clearly and precisely, even if briefly, in the text of the defence itself in order to enable the applicant to prepare its reply and the Court to give a ruling, if appropriate, without recourse to other information.

47 In this case, under the heading 'Pleas on the substance', the Commission confines itself to stating in the defence that '[it] considers itself obliged to introduce into these proceedings the line of argument already developed [at the time of the actions challenging the 1988 decision]. Rather than reproducing the defence word for word, it considers that at the current stage of the proceedings it is useful to refer to the statement it made in Case T-86/89, as summarised in the Report for the Hearing'. The Commission then lists the corresponding headings of the Report for the Hearing, refers to pages therein and makes observations intended to supplement the pleas to which it refers.

48 The Court finds that the arguments of fact and law relied on by the defendant under the heading 'Pleas on the substance' are set out merely in the form of headings and therefore cannot be regarded as satisfying the conditions as to clarity and precision required for the purposes of admissibility. Accordingly those matters of fact and law must be declared inadmissible.

III — *The objections of inadmissibility based on Article 48(2) of the Rules of Procedure*

Arguments of the parties

49 The Commission argues that any plea which is introduced for the first time at the reply stage, and which cannot be regarded as being based on matters of law or of fact which came to light in the course of the procedure, is a new plea which must be declared inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance (Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraph 82; Case T-16/91 *Rendo* v *Commission* [1992] ECR II-2417, paragraph 131; Case T-29/92 *SPO* v *Commission* [1995] ECR II-289, paragraph 409).

50 In this case, it argues, several pleas raised by LVM, BASF, DSM and ICI are inadmissible by virtue of that rule.

51 The Commission maintains that the order of the President of the Third Chamber (Extended Composition) of the Court of First Instance of 14 July 1995 on the resumption of the written procedure and the disjoinder of the cases cannot be interpreted as authorising a party to raise all the procedural pleas, including those formulated in their application only by other applicants.

52 Moreover, most of the annexes to Hüls's reply should be disregarded because they are not drafted in the language of the case, contrary to Article 35(3) of the Rules of Procedure.

Findings of the Court

53 Under Article 48(2) of the Rules of Procedure no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

54 BASF has raised for the first time in its reply pleas based on infringement of the *non bis in idem* principle, infringement of the Agreement on the European Economic Area ('the EEA Agreement'), infringement of the Commission's Rules of Procedure applicable at the time, limitation, infringement of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('the ECHR') and also a plea alleging infringement of the duty to hear the applicant before the decision to depart from the procedure laid down by Regulation No 17 and Regulation No 99/63.

55 ICI raises in its reply a plea alleging infringement of the Commission's Rules of Procedure, inasmuch as the Commission's Legal Service was not consulted before the Decision was adopted. It maintains that that failure to consult the Legal Service, which was revealed in the Report for the Hearing drawn up in Case T-307/94 before the hearing of June 1995, constitutes a new fact which came to light in the course of the procedure. That plea cannot be accepted. Suffice it to say that the Report for the Hearing does not state that the Legal Service was not consulted at all but that 'there is no opinion of the Legal Service as to whether a fresh decision regarding the PVC producers could be adopted on the basis of the administrative procedure which preceded the adoption of the decision of 21 December 1988' ['Die Kommission behauptet, es gebe kein Gutachten des Juristischen Dienstes zu der Frage, ob eine neue Entscheidung gegenüber den PVC-Herstellern auf der Grundlage des Verwaltungsverfahrens erlassen werden könne, das vor dem Erlaß der Entscheidung vom 21 Dezember 1988 durchgeführt worden sei']. There is thus no basis for holding that that extract from the Report for the Hearing in Case T-307/94 constitutes a new fact indicating that the adoption of the Decision was not preceded by an opinion of the Legal Service.

56 Moreover, in so far as ICI's argument is to be understood as maintaining, in the context of the same plea and by reference to the text of one of the joint submissions annexed to its reply, that the Commission's Rules of Procedure in force at the time the Decision was adopted were illegal, the Court finds that that plea of illegality is raised for the first time in the reply, although there was nothing to prevent the applicant from raising it in the application initiating proceedings.

57 Hüls cites in, and annexes to, its reply the notes recording the submissions on the subjects raised jointly at the hearing on 13 and 14 June 1995. The subjects dealt with in those notes, in so far as they are set out in the form of an argument elaborated in the reply, concern pleas which were raised by the applicant in the application initiating proceedings, save for the plea alleging lack of participation by the Surveillance Authority of the European Free Trade Association ('EFTA'), which was thus raised for the first time in the reply.

58 The Court also finds that the record of joint submissions annexed to Hüls's reply are not drafted in the language of the case chosen by the applicant and that the latter has not supplied translations of extracts from those lengthy documents, contrary to Article 35(3) of the Rules of Procedure. Nevertheless, in the very particular circumstances of this case and bearing in mind the opportunity granted by the Court of First Instance of using any one of the languages of the case in pleading certain common subjects at the hearing on 13 and 14 June 1995, the Court considers, notwithstanding the disjoinder of the cases after that hearing, that not to accept those annexes in a language which is not the language of the case chosen by the applicant would be unduly formalistic. The annexes to Hüls's reply will therefore be accepted as they stand.

59 LVM and DSM argue in their replies, in support of a plea alleging infringement of the principle of proportionality already set out in their application, that the Commission failed to comply with the duty to state reasons under Article 190 of

the EC Treaty. The Court finds that, in view of the terms of that claim in the context of the plea in question, that allegation is in no way independent of the plea in respect of which it is relied on. It cannot therefore be regarded as a separate plea raised for the first time in the reply.

60 Finally, it should be remembered that under Article 113 of the Rules of Procedure the Court of First Instance may of its own motion consider whether there is any absolute bar to proceeding with an action.

61 In that respect, the Court observes that Elf Atochem argued for the first time in its reply that the Commission had disregarded the duty of cooperation with the EFTA Surveillance Authority.

62 As regards SAV, that company relies in its application initiating proceedings upon a plea alleging 'infringement of the principles of sound administration and the rights of the defence for failing to initiate the proceeding within a reasonable period'. In the reply it adds, under the plea headed 'Infringement of the principles of sound administration of justice and the rights of the defence', that the Commission did not take account of the hearing which took place in September 1988 because it had no time to examine the minutes of the hearing before adopting the 1988 decision. The latter argument must be regarded as an entirely separate plea since it does not in any way refer to the initiation of the proceeding within a reasonable period. That plea, which is not linked to any of those set out in the application, must therefore be regarded as having been raised for the first time at the reply stage.

63 No new fact came to light in the course of the procedure to justify the late submission of pleas by Elf Atochem and SAV, so that they could have raised those pleas in the applications initiating proceedings. Therefore, in accordance with Article 48(2), they cannot raise them at the reply stage.

64 In the light of the above, the pleas raised by Elf Atochem, BASF, SAV, ICI and Hüls, set out for the first time at the reply stage and which are not based on matters of law or of fact coming to light in the course of the procedure, must be declared inadmissible.

The claims for annulment of the Decision

I — *The pleas alleging defects of form and procedure*

65 The various pleas by the applicants alleging defects of form and procedure fall into four main categories. First, they challenge the Commission's appreciation of the scope of the judgment of 15 June 1994 annulling the 1988 decision and the consequences it drew therefrom (A). They then maintain that there were irregularities in the adoption and authentication of the Decision (B). They also argue that the procedure prior to the adoption of the 1988 decision is vitiated by irregularities (C). Finally, they argue that insufficient reasons were stated for the Decision in relation to certain questions falling within the three preceding categories (D).

A — *The effects of the judgment of 15 June 1994 annulling the 1988 decision*

66 The applicants' pleas and arguments centre on three separate points. First, some of the applicants maintain that the judgment of 15 June 1994 prevented the Commission from adopting a new decision. Secondly, a number of applicants argue that by annulling the 1988 decision the judgment of 15 June 1994 had the retroactive effect of nullifying the preparatory acts which led to that decision being adopted in relation to all the undertakings to which it was addressed.

Thirdly, some applicants consider that, although the Commission could adopt a new decision in order to comply with the judgment of 15 June 1994, it should have observed certain procedural requirements.

1. The power of the Commission to adopt a new decision after the judgment of 15 June 1994

67 The applicants' arguments may be grouped into three categories. In the first, it is maintained that following the judgment of 15 June 1994 the Commission could not adopt a new decision in 'the PVC case'. The second concerns pleas based on the passage of time, according to which the Commission could no longer exercise its power to adopt the Decision. Finally, the third category concerns pleas based on the Commission's alleged abuse of its discretion.

68 Each of those categories will be examined separately.

(a) The pleas alleging that it was not possible for the Commission to adopt the Decision

69 In support of their claims that the Commission could not adopt the Decision, the applicants rely on two pleas.

70 The first plea alleges infringement of the principle of *res judicata*. The second alleges infringement of the principle *non bis in idem*.

Infringement of the principle of *res judicata*

— Arguments of the parties

71 LVM, DSM, ICI and Enichem argue that the Commission could not adopt the Decision without infringing the principle of *res judicata* as regards the judgment of 15 June 1994.

72 LVM and DSM argue that the distinction between formal and substantive defects affecting the annulled decision has no legal foundation either in legislation or in case-law. Neither Article 174 of the Treaty nor the judgment in 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, paragraph 78) drew such a distinction. Being silent in that respect, the judgment of 15 June 1994 should be interpreted as signifying that the matter was finally determined (Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 37; Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 5; Opinion of Advocate General Reischl in the latter case, pp. 3139, 3151 and 3152). In the applicants' submission, that impression is confirmed by the fact that, having set aside the judgment of the Court of First Instance and given that the state of the proceedings so permitted, the Court of Justice dealt with the case itself.

73 For its part, Enichem maintains that, by its judgment of 15 June 1994, the Court of Justice intended to conclude the proceedings in respect of the PVC producers definitively by using its powers under the second sentence of the first paragraph of Article 54 of the EC Statute of the Court of Justice. Although it examined only some of the pleas, the Court thus ruled on the dispute as a whole, so that all aspects of the dispute are covered by the principle of *res judicata*.

74 The Commission's approach would lead in practice to according a higher status to substantive pleas than to procedural ones, which would thus be regarded as

merely ancillary. Any procedural irregularity could thus be easily corrected. As a consequence, reliance on procedural defects before the Community judicature would be ineffective and the efforts made in this case before the Court of First Instance, and subsequently the Court of Justice, would have been in vain.

75 In the Commission's view, the principle of *res judicata* covers only matters on which the Court of Justice has already given a ruling. In this case, the only ground for the annulment of the 1988 decision which was upheld in the Court's judgment of 15 June 1994 consisted in the absence of due authentication, with the result, the Commission submits, that only the Court's assessment of the formal defects has acquired the force of *res judicata*. The other procedural pleas and the substantive pleas were thus not examined by the Court.

76 The Commission adds that, after the annulment of the 1988 decision, there was no rule which could have permitted the Court of Justice to refer the matter back to the Court of First Instance.

— Findings of the Court

77 The principle of *res judicata* extends only to the matters of fact and law actually or necessarily settled by a judicial decision (Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 14; order of 28 November 1996 in Case C-277/95 P *Lenz* v *Commission* [1996] ECR I-6109, paragraph 50).

78 In this case, the Court of Justice found in its judgment of 15 June 1994 that the Court of First Instance had erred in law by declaring Decision 89/190 non-existent and held that the judgment under appeal before it must be set aside (paragraphs 53 and 54). In those circumstances, in accordance with the second

sentence of the first paragraph of Article 54 of the EEC Statute of the Court of Justice, the Court decided to give final judgment in the matter, given that the state of the proceedings so permitted (paragraph 55).

79 As a consequence, the Court summarised the applicants' pleas in their actions before the Court of First Instance for the annulment of the 1988 decision in the following terms: 'The pre-litigation procedure was defective in a number of ways; the contested decision was not reasoned or was insufficiently reasoned; the rights of the defence were not observed; the evidential basis adopted by the Commission was questionable; the contested decision was contrary to Article 85 of the Treaty and to general principles of Community law; the decision was in breach of limitation rules; it was vitiated by misuse of power; and the fines imposed were unlawful' (paragraph 56).

80 The Court then found that 'in support, in particular, of the plea that the contested decision was not reasoned or was insufficiently reasoned', a number of applicants argued 'in substance, that the reasons for the decision which had been notified to them probably differed on several points, some vital, from the decision adopted by the Commissioners at their meeting on 21 December 1988' (paragraph 57). The Court also indicated that: 'From the Commission's arguments in its defence some applicants also concluded that the decision had not been adopted in two of the languages which were binding, namely Dutch and Italian, since only drafts in English, French and German had been submitted to the college of Commissioners' (paragraph 58). It then went on to state: 'In the final stage of their argument, the applicant companies contended that Article 12 of the Commission's Rules of Procedure had not been observed' (paragraph 59). Finally, it turned to examine 'the substance of the plea' (paragraph 61).

81 Having held that the Commission had infringed the first paragraph of Article 12 of its Rules of Procedure by failing to carry out the authentication of the 1988 decision in accordance with that article, the Court concluded: 'The decision must therefore be annulled for infringement of essential procedural requirements without it being necessary to examine the other pleas raised by the applicants' (paragraph 78).

82 It follows that the judgment of 15 June 1994 did not actually or necessarily settle either the other procedural pleas of the applicants before the Court of First Instance or the substantive pleas, or, finally, the pleas in the alternative regarding the amount of the fines.

83 Moreover, according to the first paragraph of Article 54 of the Statute of the Court of Justice 'if the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment'.

84 The second sentence of that provision does not mean that where the Court itself gives final judgment in the dispute by accepting one or more pleas raised by the applicants it automatically settles all the points of fact and law raised by the latter in the context of the case. To follow Enichem's argument would amount to denying that *res judicata* has legal force only in relation to those points of fact and law which were actually or necessarily determined.

85 In the light of the above, the plea must be rejected.

Infringement of the *non bis in idem* principle

— Arguments of the parties

86 LVM, DSM, Montedison and ICI contend that the Commission infringed the *non bis in idem* principle by adopting a new decision after the Court had annulled the 1988 decision.

87 LVM, DSM and ICI point out that the Community judicature is under a duty to ensure compliance with general principles of law, including the *non bis in idem* principle (Joined Cases 18/65 and 35/65 *Gutmann* v *Commission* [1966] ECR 103 (*Gutmann I*); Joined Cases 18/65 and 35/65 *Gutmann* v *Commission* [1967] ECR 61 (*Gutmann II*)), which is also set out in Protocol No 7 to the ECHR and in Article 14(7) of the International Covenant on Civil and Political Rights signed in New York on 16 March 1966.

88 In the submission of LVM and DSM, both aspects of that principle were infringed by the Commission: in the first place, it imposed a penalty twice in respect of the same offence; secondly, it initiated proceedings for infringement twice — even if, in the second case, they were was limited to the adoption and notification of the Decision — in respect of the same set of facts (*Gutmann I and II*, cited above; Opinion of Advocate General Mayras in Case 7/72 *Boehringer Mannheim* v *Commission* [1972] ECR 1281 (*Boehringer II*), at p. 1294).

89 In establishing whether there has been an infringement of the *non bis in idem* principle, the sole determining factor is whether the facts alleged are identical (*Boehringer II*, paragraph 6), as in this case they are. The fact that the original decision was annulled (thereby eliminating the legal effects of the infringement proceedings but not the fact that they were brought, an infringement found and a fine imposed) and the principle of *res judicata* are not relevant in this respect.

90 ICI maintains that the judgment of 15 June 1994 is binding and final, which means that it has acquired the force of *res judicata* (Article 65 of the Rules of Procedure of the Court of Justice), the Court not having referred the case back to the Court of First Instance. Since the whole of the 1988 decision was annulled, not merely one of its elements, and the judgment of the Court thus constituted a final acquittal, the Commission's adoption of the same decision, based on the same matters of fact and of law, is contrary to the principle of *non bis in idem*. Finally, ICI observes that in its judgment of 15 June 1994 the Court did not require the Commission to adopt a new decision (see, *a contrario*, Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 22).

91 The Commission begins by pointing out that the argument of LVM, DSM and ICI under this plea contradicts their statement that, on account of its annulment *ex tunc*, the 1988 decision never existed.

92 It then observes that the relevance of the *non bis in idem* principle has been recognised by the Court of Justice in Community competition law (*Boehringer II*), so that the applicants' reliance on the ECHR and the International Covenant on Civil and Political Rights is otiose.

93 The applicants' argument is unfounded in any event, since following the annulment of the 1988 decision by the Court of Justice the Decision must be regarded as the first decision penalising PVC companies for breach of Article 85 of the Treaty. The companies did not have two fines imposed on them, either in law or in fact.

94 The Commission adds that the *non bis in idem* rule applies only to the imposition of penalties, and is therefore not to be confused with the principle of *res judicata*.

— Findings of the Court

95 The applicants allege that by adopting the Decision the Commission infringed the general legal principle of *non bis in idem*, which prohibits, first, the imposition of two penalties for the same offence and, secondly, the initiation of proceedings for infringement twice in respect of the same set of facts.

96 In the particular context of the present plea the Court considers that the Commission cannot bring proceedings against an undertaking under Regulation No 17 and Regulation No 99/63 for infringement of Community competition rules, or penalise it by the imposition of a fine, for anti-competitive conduct which the Court of First Instance or the Court of Justice has already found to be either proven or unproven by the Commission in relation to that undertaking.

97 In this case the first point to note is that the Court of Justice annulled the 1988 decision by the judgment of 15 June 1994. Consequently, the Commission's adoption of the Decision after that annulment did not result in the applicants' incurring a penalty twice in respect of the same offence.

98 Secondly, when the Court of Justice annulled the 1988 decision in its judgment of 15 June 1994 it did not rule on any of the substantive pleas raised by the applicants (see paragraph 82 above). Consequently, by adopting the Decision the Commission was merely remedying the formal defect found by the Court. It follows that the Commission did not take action against the applicants twice in relation to the same set of facts.

99 The plea must therefore be rejected.

(b) The pleas based on the passage of time

100 In support of their claims that the Decision should be annulled, a number of applicants raise various pleas based on the passage of time. First, the Commission is alleged to have infringed the principle that it should take a decision within a reasonable time. Secondly, it is alleged to have committed an abuse of rights. Finally, the applicants argue that it has disregarded the principles concerning the right to a fair hearing. Because it makes a common answer to those pleas, the Commission's argument will be set out in full after the arguments of the applicants.

Arguments of the parties

— The plea alleging infringement of the principle that the Commission should take a decision within a reasonable time

101 LVM, DSM and ICI argue that undertakings concerned by proceedings under Article 85 of the Treaty have a right to have their case decided by the Commission within a reasonable time. They maintain that that right is established in Community law (see, in particular, Case 223/85 *RSV* v *Commission* [1987] ECR 4617, paragraph 14) and is independent of the limitation rules set out in 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).

102 Moreover, Article 6(1) of the ECHR requires that the merits of any accusation in a criminal matter be determined within a reasonable time in order to avoid leaving the defendant for too long uncertain as to his legal position.

103 LVM and DSM maintain that the date from which the reasonable period starts to run is that of any action for the purpose of preliminary investigation within the meaning of Article 2 of Regulation No 2988/74 (judgments of the European Court of Human Rights of 15 July 1982 in *Eckle* v *Germany*, Series A, No 51, paragraph 73; of 10 December 1982 in *Foti* v *Italy*, Series A, No 56, paragraph 52; and of 10 December 1982 in *Corigliano* v *Italy*, Series A, No 57, paragraph 34). The end of the period, they submit, corresponds to the date of adoption of the original decision.

104 In this case, the applicants argue, the period started to run in December 1983, the date of the Commission's investigation, and ended in December 1988, thus covering a period of five years, within which the Commission remained inactive from April 1984 until January 1987.

105 Under the ECHR, a reasonable period cannot exceed two years, save in special circumstances (judgment of the European Court of Human Rights of 28 June 1978 in *König* v *Germany*, Series A, No 27, paragraphs 98 and 99). The mere fact that a matter falls within the area of competition law does not constitute special circumstances.

106 The applicants submit, moreover, that disregard of the duty to act within a reasonable time in adopting the 1988 decision, and *a fortiori* the Decision, gave them a legitimate expectation that the investigation would not be followed up.

107 ICI considers that the delay in question falls into two parts: as regards the period of investigation, the Commission took no action between 5 June 1984, the date on which ICI responded to a decision under Article 11(5) of Regulation No 17, and January 1987, when the Commission made investigations at the premises of other PVC producers. It maintains that that period was unreasonable (*RSV* v *Commission*, cited above; Joined Cases T-163/94 and T-165/94 *NTN and Koyo Seiko* v *Council* [1995] ECR II-1381; Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651).

108 As for the delay caused by the litigation, that is to say approximately five years, ICI maintains that the Commission was responsible for that in view of the procedural infringements which it was found to have committed.

109 LVM, DSM and ICI conclude that, having exceeded the reasonable period, the Commission had no further power to adopt the 1988 decision and, *a fortiori*, the Decision. The latter should therefore be annulled for lack of power of the Commission (Case 344/85 *Ferriere San Carlo* v *Commission* [1987] ECR 4435; *RSV* v *Commission*, cited above).

— Abuse of rights

110 Wacker and Hoechst maintain that, apart from the applicability of limitation rules, the lengthy period between 1983 and 1987, in which the Commission remained inactive, and between the beginning of the alleged infringement and the date on which the Decision was adopted, a period of 14 years, constitute an abuse of rights. That delay is solely attributable to the Commission.

— The plea alleging infringement of the principles governing the right to a fair hearing

111 Hüls and Enichem argue that the Commission has infringed the principles governing the right to a fair hearing.

112 In Enichem's submission, the right to a fair hearing has been infringed owing to the length of time which elapsed between the first investigations and the date on which the Decision was adopted. As a result, the parties were placed in a most difficult and unpleasant situtation owing to the impossibility of reconstituting the facts with certainty.

113 Hüls maintains that the practice followed by the Commission is not compatible with the rules governing the right to a fair hearing.

114 First, although it knew of the alleged infringement by 1983 at the latest, the Commission did not carry out an investigation at Hüls's premises until September 1987. Such delay in initiating the procedure adversely affected Hüls's opportunities of defending itself and led *de facto* to a reversal of the burden of proof to its detriment. That applies even more strongly as regards 1994. Moreover, the

accumulated delay should be reflected in the level of the fine (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223).

115 Secondly, it maintains that the principle of laches is a fundamental element of the relevant Community law (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 49; Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 30; see also Article 6 of the ECHR and the decision of the European Commission of Human Rights of 9 February 1990 in *Melchers & Co.* v *Germany*, App. 13258/87). Regulation No 2988/74 cannot, in Hüls's submission, have exhausted the issue; in the event of conflict, the principle of laches, as a general principle of Community law, must necessarily take precedence over the regulation; it means that the Commission could not adopt in 1994 a decision based on facts dating back nearly fifteen years.

116 The Commission states at the outset that it does not dispute the existence in Community law of a general principle, based on the requirements of legal certainty and sound administration, requiring an administrative authority to exercise its powers within certain time-limits (Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769, (*Boehringer I*), paragraph 6.

117 However, it considers that Regulation No 2988/74 meets that objective of legal certainty by enabling the Commission and economic operators to know in advance the time-limits within which the Commission may act for the purpose of finding an infringement of Community competition rules.

118 The regulation precludes any reference to the separate legal tests of undue delay, an unreasonable period, abuse of rights, denial of a fair hearing, or laches. Moreover, such tests would lead only to confusion and legal uncertainty, since

they are not established in written rules drawn up in advance (*Boehringer I*, paragraph 47) and are based on a vague and subjective concept.

119 In reply to the arguments of LVM and DSM, the Commission submits that the regulation makes the application of Article 6 of the ECHR to the legal position of those undertakings equally irrelevant. Even if the ECHR were relevant, the case-law cited by those applicants is not, the Commission submits, since it concerns the concept of a reasonable period in the context of criminal cases involving natural persons and not cases concerning economic law applied to legal persons. In the latter context, where the facts are complex, the two-year period suggested by LVM and DSM would be clearly inadequate, as the duration of proceedings in that area before the Court of First Instance or the Court of Justice demonstrates. Finally, and still assuming the reference to Article 6 of the ECHR to be relevant, the reasonable period cannot, in the Commission's submission, start to run until after notification of the statement of objections; measures of inquiry, such as investigations and requests for information, are merely intended to elucidate the facts and do not constitute charges. In this case, the 1988 decision was adopted a few months after notification of the statement of objections. Therefore, contrary to the argument of LVM and DSM, the Commission cannot be accused of passivity giving rise to a legitimate expectation as to the outcome of the administrative procedure.

Findings of the Court

120 The Community judicature has consistently held that fundamental rights form an integral part of the general principles of Community law whose observance it ensures (see, in particular, Opinion 2/94 [1996] ECR I-1759, paragraph 33; Case C-299/95 *Kremzow* v *Austria* [1997] ECR I-2629, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance rely on the constitutional traditions common to the Member States and the guidelines supplied by international treaties and conventions on the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (Case 222/84 *Johnston* v *Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18;

Kremzow, paragraph 14). Moreover, Article F.2 of the Treaty on European Union states that '[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

121 It is therefore necessary to examine whether in the light of those considerations the Commission has infringed the general principle of Community law that decisions following administrative proceedings relating to competition policy must be adopted within a reasonable time (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 56).

122 Infringement of that principle, if established, would justify the annulment of the Decision however only in so far as it also constituted an infringement of the rights of defence of the undertakings concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure and can therefore be regarded only as a cause of damage capable of being relied on before the Community judicature in the context of an action based on Article 178 and the second paragraph of Article 215 of the Treaty.

123 In this case, the administrative procedure before the Commission lasted for a total of some 62 months. The period during which the Community judicature examined the legality of the 1988 decision and the validity of the judgment of the Court of First Instance cannot be taken into account in determining the duration of the procedure before the Commission.

124 In order to determine whether the administrative procedure before the Commission was reasonable, a distinction must be made between the procedural stage opening with the November 1983 investigations in the PVC sector, based on Article 14 of Regulation No 17, and the procedural stage which started on the date of receipt of notification of the statement of objections by the undertakings concerned. Whether the time taken for each of those two stages was reasonable will be assessed separately.

125 The first period of 52 months elapsed between the first investigations carried out in November 1983 and the initiation of the procedure by the Commission in March 1988 on the basis of Article 9(3) of Regulation No 17, pursuant to Article 3 of that regulation.

126 Whether the time taken for a procedural stage is reasonable must be assessed in relation to the individual circumstances of each case, and in particular its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity.

127 In the light of all the information on the file, the Court considers that in the particular cases submitted to it for review the length of that inquiry procedure was reasonable.

128 The facts which had to be elucidated by the Commission were highly complex 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.

129 Another factor contributing to the difficulty in establishing the facts was the confused mass of documents collected by the Commission. The documents obtained from its investigations at the premises of various petrochemical product manufacturers during the period concerned and the replies of the latter to the questions put by the Commission under Article 11 of Regulation No 17 constituted a particularly bulky file. Moreover, amongst the myriad documents obtained during the administrative procedure, the Commission had to distinguish between those belonging to the PVC file and those belonging to the file

investigated in parallel in the neighbouring PEBD sector, itself the subject, like other thermoplastic products at the same period, of an investigation and a procedure for determining infringements imputed to undertakings amongst which many are also parties to this case. It should also be noted that the file of the case which led to the Decision contained, on a first administrative numbering, a series of documents comprising 1072 pages, and, on another numbering, more than 5000 pages, excluding internal Commission documents.

130 Finally, the complexity of the facts to be elucidated arose from the difficulty of establishing proof of the participation of undertakings in the alleged concerted practice and from the number of undertakings involved. On that point, the Decision states that 'seventeen undertakings took part in the infringement during the period covered...' (point 2, second subparagraph, of the Decision) and that fourteen undertakings had been addressees of the original decision.

131 The second period elapsed between notification of the statement of objections and the adoption of the Decision on 27 July 1994.

132 Whether the time taken for that procedural stage was reasonable must also be assessed in the light of the criteria stated above (paragraph 126), and in particular in the light of what was at stake for the undertakings involved. That criterion is of particular importance in deciding whether this stage of the procedure for establishing an infringement of the competition rules was reasonable. First, the notification of the statement of objections in a procedure for establishing an infringement presupposes the initiation of the procedure under Article 3 of Regulation No 17. By initiating that procedure, the Commission evidences its intention to proceed to a decision finding an infringement (see, to that effect, Case 48/72 *Brasserie de Haecht* v *Wilkin Janssen* [1973] ECR 77, paragraph 16). Secondly, it is only on receipt of the statement of objections that an undertaking may take cognisance of the subject-matter of the procedure which is initiated against it and of the conduct of which it is accused by the Commission. Undertakings thus have a specific interest in that second stage of the procedure

being conducted with particular diligence by the Commission, without, however, affecting their defence rights.

133 In this case, that second procedural stage before the Commission lasted 10 months. That is not sufficient to justify a complaint of undue delay. The objections were notified to the undertakings concerned at the beginning of April 1988. The undertakings replied to the statement of objections in June 1988. Apart from Shell, which did not so request, the undertakings to which the statement of objections was addressed were heard between 5 and 8 September 1988 and on 19 September 1988. The Advisory Committee on Restrictive Practices and Dominant Positions delivered its opinion on the preliminary draft Commission decision on 1 December 1988, and the Commission adopted its original decision 20 days later. The Decision itself was adopted 42 days after delivery of the judgment of 15 June 1994.

134 The Court therefore considers that the original decision, and, after the latter's annulment by the Court of Justice, the Decision, were adopted within a reasonable time after notification of the statement of objections.

135 In the light of the above considerations, the Court finds that in the administrative procedure prior to the adoption of the Decision the Commission acted consistently with the principle that it must act within a reasonable time. The defence rights of the undertakings concerned were not therefore infringed by lapse of time.

136 The pleas based on lapse of time must therefore be rejected.

(c) The pleas based on the Commission's alleged abuse of its discretionary power

Arguments of the parties

137 Enichem argues that by regarding itself as bound to adopt a new decision after the annulment of the original decision by the Court of Justice the Commission exceeded its powers, which were purely discretionary in that area (*Transocean Marine Paint*; Joined Cases 97/86, 193/86, 99/86, and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181; Case C-294/90 *British Aerospace and Rover* v *Commission* [1992] ECR I-493). Neither Article 176 of the Treaty nor Regulation No 2988/74 could thus constitute the legal basis for an obligation to readopt the annulled decision.

138 LVM and DSM consider that, whilst the Commission has a discretionary power to investigate and prosecute infringements of the competition rules, that power must be exercised within the limits of Community law and, in particular, the principle of proportionality. The latter is to be assessed in relation to the aim pursued at the time the measure was adopted and in relation to the means used to achieve that aim.

139 In the first place, the aim of the Decision was not to safeguard competition in the PVC sector, but, as the absence of any preliminary procedure demonstrates, to nullify the effects of the judgment of 15 June 1994 which had censured the Commission's conduct. The need for and appropriateness of the Decision, the adoption of which was not required by the judgment, has thus not been demonstrated. The aim actually pursued does not justify the imposition of a fine, or at any rate such a substantial fine.

140 Secondly, even if the Decision was intended to safeguard competition, it would still be unlawful on the ground that in the absence of a preliminary investigation it constitutes a disproportionate means of attaining that aim.

141 It is thus for the Commission to prove that its intervention was necessary and in proportion to its aim. The Decision made no reference to that issue, contrary to Article 190 of the Treaty.

142 Montedison argues that the Decision is vitiated by a misuse of powers, since its adoption was merely the result of a punitive determination and the obstinacy of Commission officials.

143 In reply to Enichem's complaint, the Commission submits that it has a discretion to refrain from acting (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223), but an undertaking cannot complain that it has used its powers (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraphs 64 and 65).

144 In this case, it would have been illogical for the Commission, which had exercised its discretionary power in adopting the 1988 decision, to refrain from using its prerogatives when the defects censured by the judgment of 15 June 1994 arose in the final phase of the adoption of the decision (*Asteris*, paragraph 28). Moreover, the imposition of a fine is itself a factor capable of justifying the adoption of a decision, even if the parties have already brought the infringement to an end. Article 176 of the Treaty is not at issue in this case.

145 In reply to the plea raised by LVM and DSM, the Commission submits that in adopting the Decision it demonstrated its concern to apply the competion rules in

compliance with the judgment of 15 June 1994 and Regulation No 2988/74. Since the fines imposed were identical with those contained in the 1988 decision, it cannot be accused of having infringed the principle of proportionality.

146 As regards the statement of reasons for the Decision, in particular, the Commission considers that, having regard to the task imposed upon it by Article 155 of the Treaty, it is not required to justify its intervention.

147 Finally, the Commission argues that Montedison has not adduced objective, precise and consistent factors capable of establishing the existence of a misuse of powers (*Automec*, paragraph 105; Case T-465/93 *Consorzio Gruppo di Azione Locale 'Murgia Messapica'* v *Commission* [1994] ECR II-361, paragraph 66).

Findings of the Court

148 The extent of the Commission's obligations in the field of competition law must be considered in the light of Article 89(1) of the Treaty, which constitutes the specific expression in this area of the general supervisory role conferred on the Commission by Article 155 of the Treaty.

149 The supervisory role conferred upon the Commission in competition matters includes the duty to investigate and penalise individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 105).

150 Moreover, Article 85 of the Treaty is an expression of the general aim assigned by Article 3(g) to the Community's activities, namely the establishment of a system ensuring that competition in the internal market is not distorted (to that effect, see Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38).

151 In the light of that general aim and of the task assigned to the Commission, the Court considers that although, after the judgment of 15 June 1994 annulling the 1988 decision, the Commission was not required to adopt the Decision in order to confirm the existence of the anti-competitive conduct complained of, it was not prevented from doing so either, since, in the exercise of the discretion conferred upon it, it neither disregarded the principle of *res judicata* (paragraphs 77 to 85 above) nor prosecuted or penalised the undertakings concerned for anti-competitive conduct which the Court of First Instance, or the Court of Justice, had already held to have been proven or not by the Commission (paragraphs 95 to 99 above).

152 It follows that it was for the Commission to assess, as part of the task conferred upon it by the Treaty, whether it was necessary to adopt the Decision.

153 Concerning the arguments relied on by LVM and DSM (paragraphs 138 and 139 above) in support of their plea alleging infringement of the principle of proportionality, the Court considers that they must be understood as meaning that the Commission misused its powers in adopting the Decision, as Montedison expressly maintains.

154 In that regard, it is sufficient to recall that a decision is vitiated by misuse of powers only if it appears, on the strength of objective, relevant and consistent evidence, to have been adopted with the exclusive or at least the main purpose of achieving an end other than that stated or evading a procedure specifically

prescribed by the Treaty for dealing with the circumstances of the case (Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 69; Case C-285/94 *Italy* v *Commission* [1997] ECR I-3519, paragraph 52).

155 As LVM, DSM and Montedison have adduced no such evidence, that complaint cannot be upheld.

156 As for the argument of LVM and DSM that in the absence of a preliminary inquiry the Decision was a disproportionate means of attaining the aim of protecting competition, the Court will examine that question when assessing the legality of the procedure by which the Decision was adopted (paragraph 269 below).

157 Finally, concerning the Decision's alleged lack of reasoning in relation to the need for and proportionality of the Commission's intervention, it is sufficient to point out that the first recital in the preamble to the Decision refers to 'the Treaty establishing the European Community', which implicitly but necessarily constitutes a formal reference to the task assigned to the Commission.

158 In the light of the above, the pleas alleging misuse of the Commission's discretionary power must be rejected.

2. The scope of the judgment of 15 June 1994

(a) The effect *erga omnes* of the judgment of 15 June 1994

Arguments of the parties

159 Elf Atochem, BASF and SAV maintain that the annulment of the 1988 decision pronounced by the Court of Justice in the judgment of 15 June 1994 produced an effect *erga omnes* and therefore constitutes a new legal situation in relation to all the parties (Case 3/54 *Assider* v *High Authority* [1955] ECR 63), including those who did not bring an action in good time.

160 SAV argues in that respect that it is discriminated against by comparison with Solvay and Norsk Hydro, which are not addressees of the Decision and in relation to which the 1988 decision no longer has any effect owing to the judgment of 15 June 1994.

161 Similarly, LVM and DSM maintain that the Commission has infringed the principle of non-discrimination, since Article 1 of the Decision found an infringement by all PVC producers, thus placing them in a comparable situation, whereas Articles 2 to 4 of the Decision, fixing penalties, expressly excluded Norsk Hydro and Solvay.

162 The Commission cannot attempt to justify its position by arguing that the 1988 decision remains valid in relation to those two undertakings, since, in accordance with Article 174 of the Treaty, an annulled measure must be regarded as 'non-existent' and the parties restored to the previous position (Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 60). The annulment also

takes effect *erga omnes*; thus Article 174 of the Treaty does not in any way limit the effect of the annulment to undertakings which validly brought an action challenging the measure. Moreover, if under Article 189 of the EC Treaty a decision is binding on all addressees, nullity cannot but apply to all.

163 Furthermore, if the Commission's arguments were to be accepted the discrimination complained of would also be present as regards implementation; whereas the Decision was capable of being implemented against its addressees, the 1988 decision could no longer be implemented against Solvay and Norsk Hydro. Although those undertakings were in a position comparable to that of the others, they escaped any penalty.

164 The Commission maintains that the 1988 decision was a bundle of individual decisions. As Solvay did not bring an action to challenge that decision, and Norsk Hydro did not bring its action in good time, the 1988 decision became final in relation to them (Case 20/65 *Collotti* v *Court of Justice* [1965] ECR 847; Case 52/64 *Pfloeschner* v *Commission* [1965] ECR 981; Case 161/87 *Muysers and Tülp* v *Court of Auditors* [1988] ECR 3037, paragraphs 9 and 10).

165 In its submission, the question of the effect *erga omnes* of judgments annulling measures, which concerns the annulment of legislative measures affecting the legal order in general, does not arise in this case; the effect of a judgment annulling an individual decision can only be relative.

166 Finally, the Commission argues that the plea by LVM and DSM alleging infringement of the principle of non-discrimination is inadmissible because the position of Solvay and Norsk Hydro cannot affect the interests of those two

applicants. The Commission also considers the plea unfounded because Solvay and Norsk Hydro remain subject to the 1988 decision.

Findings of the Court

167 Although the 1988 decision was drafted and published in the form of a single decision, it must be treated as a series of individual decisions making against each of the undertakings to which it was addressed a finding of infringement of the provisions of Article 85 of the Treaty under which it was charged and imposing a fine. Had the Commission so wished, it could have formally adopted a number of separate individual decisions confirming the infringements of Article 85 of the Treaty which it had found.

168 Under Article 189 of the Treaty, each of those individual decisions forming part of the 1988 decision is binding in its entirety on the undertaking to which it is addressed. Therefore, where an addressee did not bring an action under Article 173 for annulment of the 1988 decision in so far as that decision relates to it, the decision continues to be valid and binding on it (see, to that effect, Case C-188/92 *TWD Textilwerke Deggendorf* v *Germany* [1994] ECR I-833, paragraph 13).

169 Accordingly, if an addressee decides to bring an action for annulment the Community judicature has before it only the elements of the decision which relate to that addressee. The unchallenged elements of the decision relating to other addressees, on the other hand, do not form part of the subject-matter of the dispute which the Court is called on to resolve.

170 In an action for annulment the Court can give judgment only on the subject-matter of the dispute referred to it by the parties. Consequently, the 1988 decision

can be annulled only as regards the addressees who have been successful in their actions before the Community judicature.

171 Point 2 of the operative part of the judgment of 15 June 1994 therefore entails the annulment of the 1988 decision only in so far as it concerns the addressees who were successful in their actions before the Court of Justice.

172 The case-law relied on by the applicants in support of their argument that the judgment took effect *erga omnes* is irrelevant here because the judgment in *Assider* concerns the effect of a judgment annulling a general decision under the ECSC Treaty and not, as in this case, a series of individual decisions.

173 Consequently, the Commission did not discriminate against the applicants in any way by not mentioning Solvay and Norsk Hydro in the operative part of the Decision. For the Commission to be accused of discrimination, it must be shown to have treated like cases differently, thereby placing some operators at a disadvantage compared to others, without such differentiation being justified by the existence of substantial objective differences (Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 8). In this case, it is sufficient to note that, contrary to what the applicants claim, their situation is not comparable to that of Norsk Hydro and Solvay because the 1988 decision was not annulled in relation to those two undertakings. Moreover, the Commission indicated in reply to a question from the Court that Norsk Hydro and Solvay had paid the fines imposed upon them, so that the applicants cannot claim to be in a less favourable position than those undertakings.

174 In those circumstances, the annulment of the 1988 decision by the Court of Justice did not take effect *erga omnes*, as argued by the applicants, and the plea

alleging infringement of the principle of non-discrimination must be dismissed as unfounded.

(b) The alleged invalidity of the procedural measures prior to the adoption of the Decision

Arguments of the parties

175 Elf Atochem and BASF maintain that the annulment of the 1988 decision by the Court of Justice in its judgment of 15 June 1994 took effect *ex tunc*, with the result that the Decision, which was distinct from the 1988 decision, could not in any event be adopted without conducting a fresh administrative procedure.

176 Wacker, Hoechst and Hüls consider that the annulment by the Court of Justice of the 1988 decision, bringing the administrative procedure to an end, automatically invalidated the whole adversarial administrative procedure, after the notification of the statement of objections (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 48 to 52; Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 30; 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; *SIV* v *Commission*, cited above, paragraph 83). In their submission, the

adversarial procedure before the Commission and the final decision formed a single administrative procedure. The Decision was therefore unlawful on account of the Commission's failure to initiate a fresh administrative procedure before adopting the Decision. In support of that argument, Wacker and Hoechst argue that steps taken in an administrative procedure under Article 3(1) of Regulation No 17 are only preparatory acts, the lawfulness of which may be assessed only in the context of review of the final decision (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9 et seq.; order of 18 June 1986 in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 13 et seq.).

177 Wacker, Hoechst and Hüls submit that in order to adopt a new decision after the annulment the Commission should have opened a fresh adversarial administrative procedure (*Cimenteries CBR*) and complied with all the essential procedural requirements.

178 Wacker and Hoechst also emphasise that there is nothing in the operative part or the grounds of the judgment of 15 June 1994 to suggest that the Court intended to run counter to those principles and preserve the administrative procedure which had been followed in adopting the 1988 decision, up to the defect found (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraphs 106 to 109). Finally, those applicants maintain that the Commission does not have the right to rectify infringements of essential procedural requirements (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraphs 7 to 11; Opinion of Advocate General Warner in Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229 at p. 2267, p. 2297 et seq.).

179 Enichem maintains that the annulment of the 1988 decision nullified the procedural measures prior to that decision, to which they were merely accessory. Those measures had no independent significance and were not in themselves

capable of forming the subject-matter of an action for annulment (*IBM* and *Cimenteries CBR*).

180 Finally, Montedison argues that an undertaking which has been fined is entitled to a prior procedure. It is therefore incorrect to maintain that the procedural stages prior to the defective one remain valid for the adoption of a new measure, especially when the administrative procedure is designed to protect the right to an adversarial hearing and the defence rights of the party concerned. The various phases of the procedure were necessary stages which the Commission had to go through before being able to impose a fine (*IBM*, paragraph 17).

181 The Commission observes that in order to comply with a judgment annulling a measure the institution concerned is required to have regard not only to the operative part of the judgment but also to the grounds which led to it and constitute the essential basis of it (*Asteris*, paragraph 27). In this case, the only ground for annulling the 1988 decision was the infringement of the first paragraph of Article 12 of the Rules of Procedure of the Commission at the time, concerning the authentication of measures (judgment of 15 June 1994, paragraphs 76 to 78). Therefore, the prior administrative procedure was neither affected nor called into question by the judgment of the Court of Justice.

182 In accordance with Article 176 of the Treaty, implementing a judgment entails the restoration of the situation as it existed prior to the occurrence of the events censured by the Court (Joined Cases T-17/90, T-28/91 and T-17/92 *Camara Alloisio* v *Commission* [1993] ECR II-841, paragraph 79). The Commission was thus entitled to issue a new decision in compliance with the procedural requirements which had been infringed (Case C-331/88 *R* v *Minister for Agriculture Fisheries and Food,* ex parte *Fedesa* [1990] ECR I-4023, paragraph 34; Opinion of Advocate General Mischo in *Fedesa*, [1990] ECR I-4042, paragraph 57; *Cimenteries CBR*, paragraph 47).

Findings of the Court

183 Paragraph 2 of the operative part of the judgment of 15 June 1994 reads as follows:

'[The Court] annuls Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV-31.865, PVC).'

184 In order to determine the scope of the judgment annulling the 1988 decision, it is necessary to refer to the grounds of that judgment. It is they which, first, identify the exact provision regarded as unlawful and, secondly, show the exact reasons for the illegality found in the operative part (*Asteris*, paragraph 27; Case T-26/90 *Finsider* v *Commission* [1992] ECR II-1789, paragraph 53; Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993, paragraph 31).

185 In that regard, the grounds for the judgment of 15 June 1994 indicate that the 1988 decision was annulled for lack of authentication within the meaning of the first paragraph of Article 12 of the Rules of Procedure of the Commission in force at the time.

186 In its judgment, after declaring that the Commission had an obligation *inter alia* to take the steps necessary to enable the complete text of acts adopted by the college of Commissioners to be identified with certainty (paragraph 73), the Court noted that the first paragraph of Article 12 of the Rules of Procedure in force at the relevant time provided that: 'Acts adopted by the Commission, at a meeting or by written procedure, shall be authenticated in the language or

languages in which they are binding by the signatures of the President and the Executive Secretary' (paragraph 74).

187 The Court then held that: 'Far from being ... a mere formality for archival purposes, the authentication of acts provided for in the first paragraph of Article 12 of its Rules of Procedure is intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes fixed in the languages which are binding. Thus, in the event of a dispute, it can be verified that the texts notified or published correspond precisely to the text adopted by the college and so with the intention of the author' (paragraph 75). Therefore, '[a]uthentication of acts referred to in the first paragraph of Article 12 of the Commission's Rules of Procedure... constitutes an essential procedural requirement within the meaning of Article 173 of the EEC Treaty, breach of which gives rise to an action for annulment' (paragraph 76).

188 Having noted that the Commission did not deny having failed to authenticate the contested decision in the way provided for by the Rules of Procedure, the Court concluded that the 1988 decision had to be annulled 'for infringement of essential procedural requirements without it being necessary to examine the other pleas raised by the applicants' (paragraph 78).

189 That summary shows that the Court of Justice annulled the 1988 decision on account of a procedural defect affecting only the manner in which it was finally adopted by the Commission. Since the procedural defect occurred at the final stage of the adoption of the 1988 decision, the annulment did not affect the validity of the measures preparatory to that decision, before the stage at which the defect was found (see to that effect *Fedesa*, paragraph 34, and *Spain* v *Commission*, paragraph 32).

190 That conclusion is not affected by the argument put forward by some of the applicants to the effect that the annulment of the 1988 decision necessarily

nullified the procedural acts prior to that decision because they were inextricably linked to the final decision. The fact that measures of a purely preparatory character may not themselves be the subject of an action for annulment (*IBM*, paragraph 12) is explained by the absence of a final position on the part of the Commission. It does not therefore entail the consequence that the validity of those measures is called into question where the final decision is annulled by reason of a procedural defect which occurred, as in this case, at a subsequent stage of those measures.

191 Nor is it affected by the argument based on the judgment in *Cimenteries CBR*. In the cases which gave rise to that judgment, the Court of First Instance ruled inadmissible the actions by the applicants against, *inter alia*, the Commission's decision refusing them access to all the documents on its file, for lack of a measure open to challenge. In its findings, the Court indicated that if, for the sake of argument, it 'were to recognise, in proceedings against a decision bringing the procedure to a close, that a right of full access to the file existed and had been infringed, and were therefore to annul the Commission's final decision for infringement of the rights of the defence, the entire procedure would be vitiated by illegality' (paragraph 47).

192 That reference to 'the entire procedure' cannot be interpreted separately from the following sentence in the grounds of the judgment, according to which the Commission might resume the procedure, 'giving the undertakings and associations of undertakings concerned a further opportunity to give their views on the objections made against them in the light of all the new information to which they should have been granted access' (paragraph 47). It follows from the very wording of that assessment that the Court of First Instance did not consider that the validity of the statement of objections could be called into question.

193 In the light of the foregoing, it is clear that the validity of the preparatory measures taken prior to the adoption of the 1988 decision has not been called into question by the annulment of that decision by the Court of Justice. Therefore, the claims based on the invalidity of those measures must be dismissed as unfounded.

3. The detailed procedure for adopting the Decision, after the annulment of the 1988 decision

Summary of the applicants' arguments

194 The applicants argue essentially that even if the defect occurred at the final stage of the adoption of the decision of 1988, the Commission could only remedy the defect if it complied with certain procedural guarantees before adopting the Decision.

195 The applicants argue that the Decision is new in relation to the 1988 decision since the latter was annulled. That was sufficient to require the opening of a new administrative procedure before adopting the Decision. Some applicants argue that such an administrative procedure should have been resumed in its entirety, whilst others consider that certain steps in that procedure should have been completed. More generally, they argue that the Commission infringed the applicants' right to be heard.

— The procedural stages provided for by secondary legislation

196 LVM, Elf Atochem, BASF, Shell, DSM, SAV, Montedison, ICI and Hüls argue that they have been unable to present their point of view in accordance with the provisions of Regulation No 17 and Regulation No 99/63, which express the fundamental Community law principle of the rights of the defence, applicable even in the absence of specific legislation (*Transocean Marine Paint*; *British Aerospace and Rover*; *Hoffmann-La Roche*, paragraph 9; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 81; *Musique Diffusion Française*, paragraphs 9 and 10; Case 322/81 *Michelin* v

Commission [1983] ECR 3461, paragraph 7; Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 46; Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 69). SAV argues that the 1988 decision is deemed never to have existed, so that the Commission should have resumed the whole administrative procedure, as moreover it had committed itself to doing in the *Fourth Report on Competition Policy* (paragraph 49). SAV and ICI also argue that the Commission's contention that only material alterations in the content of the annulled decision at the time of its rectification might justify a new procedure is based exclusively on the case-law of the Court of Justice concerning the balance between the institutions, which is not at issue in this case (*Fedesa*, cited above).

197 ICI rejects the Commission's argument that it was entitled merely to remedy the defect found by the Court without hearing the parties, since the 1988 decision and the Decision itself were taken in factual and legal circumstances which differed in several respects as regards the participants, the economic situation of the industry and changes in the case-law that had occurred in the years preceding the Decision.

198 SAV and Montedison argue in this context that, since the annulled measure was adopted in the exercise of a discretionary power and annulled on account of a formal defect, the institution may not re-adopt it without complying with the formal requirements and the rights of the defence, even in the absence of a specific provision (*Transocean Marine Paint*, paragraph 16).

199 LVM, Elf Atochem, BASF, Shell, DSM, Wacker, Hoechst, SAV, ICI, Hüls and Enichem argue, more specifically, that by failing to conduct a prior administrative procedure the Commission infringed the obligations which it had assumed in relation to the role of the hearing officer. Elf Atochem, Shell, SAV, ICI and Enichem rely on the Commission 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 (*Twentieth Report on Competition Policy*, p. 350). BASF and Hüls argue that the Commission infringed Articles 5, 6 and 7 of the Commission decision of 8 September 1982 on the mandate of the hearing officer (*Thirteenth Report on Competition Policy*, p. 291).

200 ICI claims that the Decision would have been substantially different if the hearing officer had been able to intervene, since ICI could then have pleaded, *inter alia*, limitation, delay in adopting of the Decision, the refusal of its request for access to the Commission's file, the issue of self-incrimination, the scope of Article 20 of Regulation No 17 and the concept of concerted practice.

201 In Hüls's submission, the intervention of the hearing officer in 1988 cannot be regarded as having permitted the latter to exercise his functions in 1994; there must be proximity in time between the intervention of the hearing officer and the adoption of the corresponding decision. The company finds the Commission's attitude in this case all the more surprising in that the role of the hearing officer has been extended (*Twenty-third Report on Competition Policy*, paragraph 203 et seq.; Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (OJ 1994 L 330, p. 67).

202 Enichem adds that the judgment of the Court of First Instance in Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, on which the Commission relies, does not support the conclusion that hearing by the hearing officer is not an obligatory stage in any proceeding. In this case, had he been heard, the hearing officer would have been able to submit observations on the appropriateness of readopting a decision, on paragraphs 55 to 59 of the grounds for the Decision, which were new in relation to the grounds of the initial decision (Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 40) and which fall within the exclusive competence of the college of Commissioners, on the amount of the fine, which Enichem submits is discriminatory and erroneously fixed by reference to the 1987 rather than the 1993 turnover figures, on the assessment of limitation, which, contrary to what the Commission maintains, is a plea going to the substance of the case, on the rules concerning access to the file, on the effect *erga omnes* of the judgment of the Court of Justice, on the application of the principle of *res judicata*, according to which the Commission did not have the power to adopt the Decision, concerning the same facts, in breach of the *non bis in idem* principle, and on changes in the PVC market, from which Enichem withdrew in 1986, transferring its activities to a joint undertaking constituted as to 50% with ICI, in which Enichem now holds only a minority share. The Decision could thus have been substantially affected by the failure to involve the hearing officer.

Because of the choice made by the Commission, Enichem found itself obliged to bring an action in order to submit such observations.

203 LVM, Elf Atochem, BASF, DSM, Wacker, Hoechst, SAV, ICI, Hüls and Enichem consider that the Commission infringed the obligation to consult the Advisory Committee on Restrictive Practices and Dominant Positions (the 'Advisory Committee') before adopting the Decision, such consultation being required by Article 10(3) of Regulation No 17. They maintain that the Advisory Committee must be consulted before the adoption of any decision finding a breach of the competition rules referred to in Article 10(1) of Regulation No 17 and any decision imposing a fine, in accordance with Article 15(3) of the same regulation. Since the Decision was new in relation to the initial decision, the consultation of the Advisory Committee which took place in 1988 was either inoperative or insufficient. The Decision should therefore be annulled for infringement of essential procedural requirements (Opinion of Advocate General Gand in *ACF Chemiefarma*, p. 707, at pp. 709 to 711; Opinion of Advocate General Warner in *Distillers Company*, p. 2267, at p. 2293; Opinion of Advocate General Slynn in Joined Cases 228/82 and 229/82 *Ford* v *Commission* [1984] ECR 1129, at pp. 1147 and 1173. Some applicants also cite the case-law on the infringement of an obligation to consult: Case 2/54 *Italy* v *High Authority* [1954-1956] ECR 37; *Roquette Frères*; Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593; Joined Cases C-13/92, C-14/92, C-15/92 and C-16/92 *Driessen* v *Minister van Verkeer en Waterstaat* [1993] ECR I-4751; Case C-388/92 *Parliament* v *Council* [1994] ECR I-2067). The applicants maintain, by contrast, that Case 71/74 *Frubo* v *Commission* [1975] ECR 563, relied upon by the Commission, is irrelevant, since the general consultation of the Member States in the context of Regulation No 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129) where the Commission is in no doubt cannot be compared to the consultation of the Advisory Committee laid down in detail in Regulation No 17.

204 Consultation of the Advisory Committee was particularly necessary in this case for two reasons. First, BASF, Wacker, Hoechst, SAV, Hüls and Enichem argue that the Decision is the first to have been adopted following the annulment by the Community judicature of a previous decision concerning the same undertakings.

In that case, SAV and ICI argue, by reason of the role conferred upon it, the Advisory Committee, which must be closely associated with the concerted development of competition policy (*Thirteenth Report on Competition Policy*, paragraph 79), should have been consulted as to the appropriateness of taking a new decision where the previous one had been annulled, that being obvious from the point of view of competition policy, there being no precedent in the case-law. The fact that the adoption of a new decision after the annulment of a previous one falls within the Commission's discretion made it all the more necessary for the Advisory Committee to be consulted as to the appropriateness of such action. It was, moreover, along those lines that the Commission has acted in the past (Commission Decision 75/649/EEC of 23 October 1975 relating to a proceeding under Article 85 of the EEC Treaty, IV/223 — Transocean Marine Paint Association, OJ 1975 L 286, p. 24).

205 Secondly, BASF, Wacker, Hoechst, ICI, Hüls and Enichem argue that the Advisory Committee should also have been consulted by reason of the amendments to the text of the Decision compared with that of the original decision and, some of the applicants argue, by reason of the length of the procedure, the particular circumstances which led to the annulment of the initial decision, the errors of the Commission revealed at the preliminary inquiry stage before the Court of First Instance, the actions brought against that decision and changes in the market for the product in question since 1988. ICI argues in this context that the change in the composition of the Advisory Committee also justified fresh consultation of that body. In the same context, BASF argues that the purpose of consulting the Advisory Committee is also to ensure that the impugned undertakings have the right to a fair procedure and the right to be heard, as demonstrated by Articles 1, 7(1) and 8(2) of Regulation No 99/63.

206 BASF, Wacker, Hoechst and ICI consider that such consultation might have led the Commission to adopt a different decision, especially as regards the amount of the fines, or to decide not to adopt the Decision. BASF argues that by removing two sentences from paragraph 37 of the recitals in the preamble to the initial decision, concerning the harmful effects of the agreement, the Commission removed an aspect from consideration which must necessarily have had an impact on the decision to impose a fine and its amount.

207 BASF and ICI further consider that if the Advisory Committee has to be consulted before the renewal of an exemption the same should apply where the Commission adopts a decision replacing an annulled decision.

208 More specifically, LVM and DSM argue that by not consulting the Advisory Committee before adopting the Decision the Commission prevented Member States from participating in the definition of Community competition policy, and that compulsory consultation of the Advisory Committee served to support efforts to achieve institutional equilibrium in that area. The infringement of such an obligation should therefore entail the annulment of the Decision for infringement of essential procedural requirements, or even for lack of powers, if that obligation is to be understood as requiring the agreement of the competent authorities of the Member States.

209 SAV argues that the case-law on the balance between the institutions, which refers to the obligation to consult the Parliament on a proposal for a directive that has undergone successive amendments (particularly *Parliament* v *Council*, cited above), cannot be transposed by analogy to the case of failure to consult the Advisory Committee on a new decision adversely affecting its addressee.

210 Finally, SAV and ICI consider that the Commission infringed Article 190 of the Treaty inasmuch as the citations in the preamble to the Decision refer only to the consultation of the Advisory Committee which took place before the adoption of the 1988 decision.

211 Also more specifically, SAV argues that the Commission disregarded its obligation to cooperate with the EFTA Surveillance Authority. In particular, Articles 53, 56 and 58 of the European Economic Area Agreement, which was signed at Oporto on 2 May 1992 and entered into force on 1 January 1994, and Protocols 21 and 23 thereto, obliged the Commission to cooperate with the EFTA Surveillance Authority in relation to the determination of competition policy and the adoption of individual decisions in that area. By failing to consult the Advisory Committee,

the Commission deprived the EFTA Surveillance Authority of the possibility of expressing its point of view. The obligation to cooperate with that Authority arose from the very fact of adopting a decision, irrespective of the question whether that decision was identical with a previous annulled decision. Moreover, since this was a case concerning competition policy, the Surveillance Authority should have been called upon to cooperate with the Commission.

— The applicants' alleged right to be heard

212 The applicants claim that the Commission infringed in a number of respects the right of undertakings to make their views known.

213 First, LVM and DSM maintain that the mere intention to adopt a new measure adversely affecting its addressees was sufficient to entail an obligation to hear the parties on the subject of that intention (Joined Cases C-48/90 and C-66/90 *Netherlands* v *Commission* [1992] ECR I-565, paragraph 44). ICI maintains that it should in any event have been heard as to whether it was desirable or judicious to adopt a new decision in the particular circumstances.

214 Secondly, SAV, Hüls and Enichem argue that the prior decision to depart from the normal procedure for adopting a decision justified a hearing of the parties on that prior decision.

215 SAV considers that, in not resuming the whole of the administrative procedure in order to adopt the Decision, the Commission made a choice. In its submission, the public authorities are obliged to respect the right of the addressee of a measure to be informed of the conditions in which the Commission intends to adopt a decision, even in the absence of a specific legislative provision (Case C-49/88 *Al-Jubail Fertiliser and Saudi Arabian Fertiliser* v *Council* [1991] ECR I-3187, paragraph 16; *Netherlands* v *Commission*, cited above). The Commission

should therefore have heard the undertakings on the subject of the procedural choice envisaged.

216 Hüls considers that it should have been placed in a position to submit its observations as to the legality of the procedure which the Commission intended to follow after the judgment of 15 June 1994, especially on the question whether a new decision could be adopted without a new hearing.

217 BASF, Wacker, Hoechst and Hüls maintain that the Commission was in doubt as to the steps to be taken in adopting the Decision and therefore asked the Legal Service for a note on the point. BASF, Hüls and Wacker request the Court to order the Commission to produce that note for the Court's file, the former also requesting that, if only an oral opinion was given, the staff member who gave it should be heard.

218 Thirdly, LVM, BASF, Shell, DSM, SAV, ICI and Enichem maintain that the adoption of a new decision entailed an obligation on the Commission to hear the undertakings concerned before a measure adversely affecting them was adopted (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 27; Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 28; Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 12; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 29; *Netherlands* v *Commission*, cited above, paragraph 44). The undertakings would thus have been able to submit their observations, especially concerning changes in the case-law on the concept of concerted practices and the detailed rules for proving their existence. They would also have been able to make submissions on changes in the case-law concerning conditions for access to the Commission's file, on the interpretation of the limitation rules, on the Commission's delay in announcing its decision, on the discrimination in relation to Norsk Hydro and Solvay and on the principle of *non bis in idem*.

219 Wacker, Hoechst and ICI argue in that regard that the Commission cannot seek to limit the right to be heard to the accusations made against an undertaking. An

undertaking must be able to make its observations known each time the Commission puts forward fresh points of view not hitherto notified, whether relating to fact or law.

220 LVM and DSM also consider that the right which undertakings have to bring the dispute before the Court of First Instance does not absolve the Commission from hearing them before adopting a decision (Case T-36/91 *ICI* v *Commission*, cited above, paragraph 108), and that the infringement of the fundamental right cannot be remedied in that way without undermining the balance between the institutions.

221 In SAV's submission, the former procedure could be resumed at the stage at which it was vitiated only to the extent that it had been brought up to date, thereby obliging the Commission to take account at the stage at which the measure was re-established of factual and legal changes in the meantime (Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437; *British Aerospace and Rover*, cited above, and the Opinion of Advocate General Van Gerven in that case, paragraphs 10 and 12). SAV emphasises that it should have been heard so that it could plead changes in the case-law (paragraph 218 above), which formed part of the specific purpose of the administrative procedure. Moreover, the mere fact that SAV might rely on that case-law in the present action does not, it submits, affect the Commission's obligation to hear it on that subject previously, which might have led to a different decision.

222 Fourthly, LVM, Elf Atochem, BASF, Shell, DSM, Wacker, Hoechst, SAV, ICI, Hüls and Enichem argue that the undertakings should have been heard on the ground that, compared with the original decision, the wording of the Decision differs on essential points (Case 51/69 *Bayer* v *Commission* [1972] ECR 745, paragraph 11; Case 55/69 *Cassella* v *Commission* [1972] ECR 887, paragraph 11) such as the assessment of the rules on limitation, the removal of two sentences concerning the effects of the agreement (paragraph 37 of the recitals in the preamble to the Decision), the addition of a section relating to the procedure since 1988, and the omission of Solvay and Norsk Hydro. Shell considers, moreover, that for the Commission to maintain the 'cease and desist' order (Article 2 of the Decision)

must mean that it had in its possession information in respect of the period 1988 to 1994 in regard to which Shell was not heard.

223 Fifthly, BASF maintains that, as the previous administrative procedure had been closed by the 1988 decision, a fresh hearing of the undertakings was necessary.

224 Sixthly, BASF, Wacker, Hoechst, ICI and Hüls claim that they should have been heard because six years had elapsed between the hearing and the adoption of the Decision. Along the same lines, Shell argues that too much time elapsed between the alleged infringement and the adoption of the Decision; the question therefore arose whether the proceedings had now become oppressive and unfairly prejudicial to the applicant. BASF, Wacker, Hoechst and Hüls argue that the procedure for finding an infringement leading to the imposition of fines has a dissuasive purpose (*Musique Diffusion Française*, paragraph 106) and is quasi-criminal in character. Guarantees identical to those provided for in criminal procedure should therefore be given. Amongst those guarantees, in their submission, is the obligation to ensure reasonable proximity in time between the date of the hearing and the date of the decision (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 167). In this case, the interval of six years between those two dates, which was not imputable to the undertakings since the 1988 decision was vitiated by serious defects, could not be described as reasonable. BASF adds that, bearing in mind the changes in the PVC market, the change in its own position and the substantive changes made to the text of the Decision, a fresh hearing of the undertakings was necessary before the Decision could be adopted, having regard to all the legal and factual circumstances at the date of adoption.

225 Finally, ICI maintains that it cannot be regarded as having been able to defend its interests in an effective manner as six years had elapsed between the presentation of its written and oral observations and the adoption of the Decision; the right to make an effective presentation of observations presupposes that an undertaking be heard in the legal and factual context existing immediately prior to the adoption of a decision.

Arguments of the Commission

226 In reply to the pleas and arguments of the applicants, the Commission states that as far as the applicants are concerned the 1988 decision was annulled by the judgment of the Court of Justice of 15 June 1994 for lack of authentication of the 1988 decision, in breach of the first paragraph of Article 12 of the Rules of Procedure of the Commission in force at the time (judgment of 15 June 1994, paragraphs 76 to 78).

227 The validity of the procedure carried out until the stage at which the defect occurred was thus not affected. The Commission was therefore entitled, in order to comply with the judgment of the Court of Justice, simply to adopt a duly authenticated decision, in the absence of any new procedural rule for applying Article 85 of the Treaty issued after the date of the annulled decision or of any new factual circumstances, since the facts complained of were long since past. That was, moreover, in accordance with the specific purpose of the prior administrative procedure (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 52). To require otherwise would be unduly formalistic (*Frubo*, paragraph 11).

228 The Commission adds that the differences in wording between the 1988 decision and the Decision are not substantive (*ACF Chemiepharma*, paragraph 178; Case 817/79 *Buyl* v *Commission* [1982] ECR 245, paragraph 23; *Fedesa*, cited above; Case C-65/90 *Parliament* v *Council*, cited above; Case C-388/92 *Parliament* v *Council*, cited above), so that the case-law relied on by some of the applicants (especially *Transocean Marine Paint* and *British Aerospace and Rovery*) is irrelevant.

229 In reality, the purely editorial changes to the text did not justify the opening of a hearing since those additions did not constitute measures adversely affecting the applicants. Although two sentences in paragraph 37 of the recitals in the German version of the 1988 decision no longer appeared at the same place in the Decision, that was due simply to reasons of harmonisation with other language versions

which were equally authentic. In any event, since the adjustments to the text did not constitute a measure adversely affecting the applicants, there was no need to hear them on the subject.

230 Since the defect which led to the annulment of the 1988 decision was clearly limited to the final stage of its adoption, and the Decision was not materially different in any way from its predecessor, all the stages preceding the adoption of the 1988 decision remained valid.

231 In those circumstances, and in the absence of any new measure adversely affecting the applicants, the Commission considers that it was not required to send a new statement of objections, or give the undertakings the opportunity to submit their oral or written observations, or to refer the matter to the hearing officer, that being indissociable from the two previous procedural steps.

232 Nor, the Commission submits, was it required to consult the Advisory Committee. Given the annulment of the 1988 decision, the consultation of the Advisory Committee which took place on 30 November 1988 should be regarded, in the absence of any new measures adversely affecting the applicants, as the consultation prior to the adoption of the Decision. The spirit and purpose of Article 10(3) of Regulation No 17 were therefore complied with. The Commission also argues that reference to the right to involve the Advisory Committee in the context of the renewal of an exemption decision is not relevant in this case. It submits that such renewal concerns another temporal frame of reference, so that the assessments are based on different parameters.

233 In the BASF and ICI cases, the Commission states that its position concerning the Advisory Committee does not exclude minor adjustments of the text, such as those concerning limitation and the removal of two sentences in the German-language version of the Decision. As regards the case of *Transocean Marine Paint*, to which SAV refers, the Commission submits that that case shows that a

fresh opinion is necessary only where a substantive matter was not originally referred to the Advisory Committee. That was, however, not the case here.

234 The Commission further maintains that it is not bound by the opinion of the Advisory Committee, as is shown by the second sentence of Article 10(6) of Regulation No 17.

235 In the case concerning SAV, the Commission argues that, in any event, the Advisory Committee was informed of SAV's arguments in response to the objections (*Michelin*, paragraph 7; *Hüls*, paragraph 86) and that the latter did not change since 1988. It adds that no consultation of the Advisory Committee was required as to the appropriateness of adopting a new decision.

236 Lastly, the Commission observes that Article 1 of Regulation No 99/63 does not require consultation of the Advisory Committee until after the parties have been heard. No fresh hearing of the parties having been necessary, there was by the same token no need to hold a fresh consultation of the Advisory Committee either (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 54).

237 The Commission adds that it is the sole judge as to the appropriateness of adopting, or re-adopting, a decision (*Parker Pen*, paragraph 65), so that it did not have to hear the parties on any alleged procedural choice. Nor was there any decision of its own in which the Commission had decided to use a procedure other than that prescribed.

238 Finally, the Commission observes that the alleged changes in the case-law, as regards both the concept of a concerted practice and the question of access to the

file, are irrelevant since there is no relation to the substance of the objections relating to the reference period. Those alleged changes did not therefore lead to any alteration in the objections maintained against the applicants. Even if they might be relied upon by applicants in order to obtain the annulment of the prior administrative procedure, they could not lead to the annulment of the Decision for failure to reopen the procedure.

239 In any event, procedural questions, on which the case-law is claimed to have changed, do not normally form part of the statement of objections and were not examined by the Commission in its decision (Case 48/69 *ICI* and *Michelin*, both cited above). In that regard, the matters relating to access to the file appearing in the Decision did not constitute part of the essential reasoning supporting the operative part.

240 In the case of Elf Atochem, the Commission maintains that the applicant's argument that it should have been heard as to the application of the principles of *non bis in idem* and proportionality is meaningless, since neither of those principles is in issue in the present case. It also maintains that the applicant's argument based on changes in the PVC market between 1988 and 1994 is irrelevant because those changes, if proven to have occurred, have no bearing on the assessment of the facts, which took place between 1980 and 1984. Similarly, in Case T-313/94, the Commission states that there is nothing in the Decision to indicate that matters relating to the period between 1988 and 1994 were used in support of Article 2 of the operative part.

241 In the BASF, Wacker and Hoechst cases, the Commission argues in reply to the plea concerning the length of the interval between the hearing and the Decision that the administrative procedure in competition matters is not of a criminal law nature and contains no principle that only those matters dealt with in oral proceedings may be used as a basis for the final decision (*Mündlichkeitsgrundsatz*). There was therefore nothing to prevent Members of the Commission from being informed of the outcome of the hearing by such persons as the Commission had appointed to conduct it, in accordance with Article 9(1) of Regulation No 99/63, without needing to attend that hearing personally (*Boehringer I*,

paragraph 23). The Commission also points out that the hearing officer is under a duty to draw up minutes of the hearing, to be read and approved by the undertaking in question.

242 The mere passage of time between the infringement and the Decision, between the 1988 decision and the Decision, and between the hearing and the Decision did not confer a right to a hearing, the Community legislature having intended that the limitation period should be suspended for the duration of the proceedings before the Community judicature (Article 3 of Regulation No 2988/74). Shell, which also pleads the passage of time between the infringement and the Decision, did not suffer any damage in that respect.

243 Moreover, the Decision was not taken as a surprise. On the contrary, the Commission made its intentions known by a press release published on the same day as the judgment of the Court of Justice.

244 Finally, the Commission denies having infringed the provisions of the EEA Agreement, which is inapplicable *ratione temporis* because the facts leading to the Decision occurred before the entry of that Agreement into force on 1 January 1994.

245 In the BASF, Wacker and Hüls cases, the Commission states that there is no written opinion of the Legal Service on the question whether a new decision might be adopted in respect of PVC producers on the basis of the administrative procedure prior to the adoption of the 1988 decision. In any event, any such opinion would be purely internal in character and not accessible to third parties (*Hüls*, paragraph 86).

Findings of the Court

246 In all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with, even if the proceedings in question are administrative proceedings (*Hoffman-La Roche*, paragraph 9).

247 Applying that principle, Article 19(1) of Regulation No 17 and Article 4 of Regulation No 99/63 require the Commission to adopt in its final decision only those objections on which the undertakings and associations of undertakings concerned have had the opportunity to put their case.

248 The right of the undertakings and associations of undertakings concerned to put their case on the matters to which the Commission has taken objection, at both the written and oral stages of the administrative procedure, is an essential part of the rights of the defence (*Hoechst*, paragraph 52). Such a hearing is necessary in order to enable those parties 'to submit their comments on the whole of the objections raised against them which the Commission proposes to deal with in its decisions' (third recital in the preamble to Regulation No 99/63).

249 Observance of the rights of the defence thus requires that each undertaking or association of undertakings concerned be given the opportunity to be heard as to the objections raised against each of them which the Commission proposes to deal with in the final decision finding infringement of the competition rules.

250 In this case, it has already been held that the annulment of the 1988 decision did not affect the validity of the measures preparatory to that decision, taken prior to the stage at which the defect occurred (paragraph 189 above). The validity of the

statement of objections sent to each of the applicants at the beginning of April 1988 was thus unaffected by the judgment of 15 June 1994. Similarly, and for the same reasons, the validity of the oral stage of the administrative procedure, which took place before the Commission in September 1988, was not affected.

251 Consequently, a new hearing of the undertakings concerned was required before the Decision only to the extent that the latter contained objections which were new in relation to those set out in the original decision annulled by the Court of Justice.

252 Since the applicants do not deny that the text of the Decision does not contain any new objection compared with the text of the 1988 decision, the Commission was right to adopt the Decision without holding a new hearing of the undertakings concerned. In that regard, the fact that the Decision was adopted in factual and legal circumstances different from those which existed at the time the original decision was adopted does not in any sense mean that the Decision contains new objections.

253 Since the Commission was not required to hold a 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. That decision was not applicable at the time to the oral stage of the administrative procedure which preceded the adoption of the Decision.

254 As regards the Advisory Committee, the powers, composition and consultation procedure of which are governed by Article 10(3) to (6) of Regulation No 17, the Court notes that it delivered its opinion on the Commission's draft decision on 1 December 1988.

255 The applicants' claim that, in the circumstances of this case, the Commission should have carried out a fresh consultation of the Advisory Committee before adopting the Decision cannot be accepted.

256 According to Article 1 of Regulation No 99/63, 'before consulting the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission shall hold a hearing pursuant to Article 19(1) of Regulation No 17'. That provision confirms that the hearing of the undertakings concerned and the consultation of the Advisory Committee are necessary in the same situations (*Hoechst*, paragraph 54).

257 As the Court has already held (paragraph 252 above), a fresh hearing of the undertakings concerned was not necessary, in the circumstances of the case, before the adoption of the Decision. In view of the fact that, compared with the 1988 decision, on a draft of which the Advisory Committee had been consulted in accordance with Article 10(5) of Regulation No 17, the Decision contains only editorial amendments not affecting the objections, fresh consultation of the Advisory Committee was not required.

258 Finally, it should be observed in this context that the Decision expressly refers in the introductory part to consultation of the Advisory Committee. The complaint of SAV and ICI alleging insufficient reasoning of the Decision in that respect must therefore be rejected.

259 As regards the complaint alleging failure to comply with the duty to cooperate with the EFTA Surveillance Authority, suffice it to say that as no fresh hearing of the undertakings concerned and no fresh consultation of the Advisory Committee were required prior to the adoption of the Decision, the relevant provisions of the EEA Agreement and Protocols 21 and 23 were not applicable to the administrative procedure in progress. Those provisions entered into force on 1 January 1994, at which date the procedural stages requiring cooperation

between the Commission and the EFTA Surveillance Authority, namely the hearing of the undertakings and the consultation of the Advisory Committee, had already taken place.

260 The applicants also rely on the case-law to the effect that respect for the rights of the defence, in all proceedings which are initiated against a person and which are liable to culminate in a measure adversely affecting that person, is a fundamental principle of Community law which must be guaranteed even in the absence of specific rules (see, for example, *Netherlands* v *Commission*, cited above, paragraph 44).

261 However, it does not follow from that case-law that the Commission was obliged to hear the applicants again before adopting the measure adversely affecting them.

262 It should not be forgotten that the administrative procedure for finding infringement of Article 85 of the Treaty is governed by Regulations Nos 17 and 99/63. That specific legislation contains provisions (paragraph 247 above) which expressly and effectively guarantee respect for the rights of the defence.

263 In any event, according to that case-law, the principle of respect for the rights of the defence requires that an exact and complete statement of the objections which the Commission intends to raise against the addressee of the decision should be sent to that person before the decision is finally adopted.

264 Therefore, contrary to what the applicants maintain, it does not follow from that case-law that respect for the rights of the defence imposes upon the Commission, when initiating a procedure for infringement of Community competition rules against several undertakings, any obligation other than to ensure that each

undertaking may, during that proceeding, effectively put its case as to the accuracy and relevance of the facts and circumstances alleged, and on the documents relied on by the Commission in support of its allegation that there has been a breach of Community law.

265 Similarly, the judgment in *Transocean Marine Paint* relied on by the applicants in support of their argument that a fresh hearing is necessary is irrelevant here, since it concerns a special case, namely the need to respect an undertaking's rights of defence where the Commission intends to grant an exemption under Article 85(3) of the Treaty subject to certain conditions.

266 The Commission was not therefore bound, before adopting the Decision, to allow the undertakings in question a hearing concerning its intention to adopt a new measure adversely affecting them, the procedural choice made, their various observations on certain factual and legal matters and the differences between the text of the Decision and that of the original decision which was annulled. It must be emphasised that it is not alleged that those circumstances constitute fresh complaints.

267 Nor is the absence of any obligation on the Commission to undertake a fresh hearing of the undertakings concerned affected by the fact that six years elapsed between the oral stage of the administrative procedure and the adoption of the Decision. The undertakings had the opportunity in September 1988 to state orally their views on the objections, which remained unchanged from that date and in the Decision.

268 Finally, even if the Commission's Legal Service did issue an opinion as to whether a new decision could be adopted in relation to PVC producers on the basis of the administrative procedure prior to the adoption of the 1988 decision, respect for the rights of the defence does not require that the undertakings involved in a proceeding under Article 85(1) of the Treaty be given the opportunity to

comment on such an opinion, which is a purely internal Commission document. It should be noted that the Commission is not obliged to follow the opinion given by the Legal Service, so that the latter does not constitute a decisive factor which the Community judicature must take into account in its review (see to that effect *Hüls*, paragraph 86).

269 Similarly the Court must reject the argument by LVM and DSM (paragraph 140 above), that the Decision is unlawful because, in the absence of a preliminary inquiry, it constitutes a disproportionate means of attaining the aim of protecting competition. It is sufficient to note in that respect that the Commission was not obliged to hear the undertakings again before adopting the Decision. The disproportionality alleged by the applicants thus rests on a false premiss.

270 In view of all of the foregoing, the applicants' complaints must be dismissed in their entirety.

B — *The irregularities in the adoption and authentication of the Decision*

271 Some of the applicants maintain that there were irregularities in the Commission's adoption and authentication of the Decision.

272 At the hearing, Wacker and Hoechst withdrew a plea alleging lack of authentication of the Decision, and the Registrar took official note of that withdrawal. The Court considers that that withdrawal also entails withdrawal of the plea alleging lack of conformity between the copies of the Decision notified to Wacker and Hoechst and the original, the latter plea being closely linked to the former.

273 The applicants' claims consist of several pleas in law.

1. Illegality of the Commission's Rules of Procedure of 17 February 1993

Arguments of the parties

274 LVM and DSM refer to the fact that the Decision was adopted under the Commission's Rules of Procedure of 17 February 1993 (OJ 1993 L 230, p. 16; 'the Rules of Procedure'). Article 16 of those rules provides that instruments adopted by the Commission, annexed to the minutes of the meeting at which they were adopted, are to be authenticated by the signatures of the President and the Secretary-General on the first page of the minutes.

275 LVM and DSM submit that a party may rely on the infringement of such internal rules as an essential procedural requirement (*BASF*, paragraph 75). The provisions on authentication do not, in fact, comply with the principles set out in the latter judgment (paragraphs 75 and 78) and in the judgment of 15 June 1994 (paragraphs 75, 76 and 78), whereby the requirement of authentication by the signatures, on the instrument itself, of the President and the Secretary-General of the Commission expresses a fundamental requirement of Community law, inspired by considerations of legal certainty. Therefore, there was no authentic instrument in the Dutch language which was duly authenticated.

276 Enichem argues that the Commission infringed both the principles set out in the judgment of 15 June 1994 and its Rules of Procedure when it adopted the Decision. It submits that Articles 2 and 16 of those rules, concerning the authorisation to adopt measures and the authentication of measures adopted under that procedure, are incompatible with the principle of collective responsibility.

277 Moreover, the rules for authenticating instruments laid down by Article 16 of the Rules of Procedure do not guarantee the legal certainty required by the Court, since they provide for the authentication of the minutes rather than the adopted measure.

278 The Commission replies to the pleas of LVM and DSM that the plea of illegality raised against the Rules of Procedure is inadmissible. The Rules of Procedure of an institution do not constitute a measure of general application, binding in its entirety and directly applicable in all Member States for the purposes of applying Article 184 of the Treaty. In any event, LVM and DSM are confusing the principle of collective responsibility referred to in Article 163 of the Treaty and the authentication of decisions. It is thus wrong to claim that Article 12 of the Rules of Procedure, in the version in force when the 1988 decision was adopted, was the only means of complying with the principle of collective responsibility (judgment of 15 June 1994, paragraphs 72 to 77).

279 The Commission considers that Enichem has failed to establish either in what way the Rules of Procedure do not comply with the judgment of the Court or in what way that alleged non-compliance concerns matters relating to the adoption of the Decision (Case T-35/92 *Deere* v *Commission* [1994] ECR II-957).

Findings of the Court

280 As a preliminary observation, the Court considers that the applicants' arguments should be understood as pleading that a number of provisions of the Commission's Rules of Procedure in force at the time the Decision was adopted were unlawful. In accordance with Article 184 of the Treaty, the applicants are indirectly challenging the validity of certain provisions of the Rules of Procedure by invoking one of the grounds for review mentioned in Article 173 of the Treaty, namely infringement of the Treaty or of any rule of law relating to its application.

281 The plea that provisions in the Rules of Procedure were unlawful falls into two parts. In the first part, LVM, DSM and Enichem argue that the first paragraph of Article 16 of the Rules of Procedure, concerning the detailed rules for authenticating measures, infringes the principle of legal certainty referred to by the Court of Justice in the judgment of 15 June 1994. In the second part, Enichem argues that Article 2(c) and the second paragraph of Article 16 of the Rules of Procedure, concerning the delegation procedure, infringe the principle of collective responsibility.

— The admissibility of the plea of illegality

282 The Court considers it necessary to examine of its own motion the admissibility of the plea of illegality as a whole, without confining itself to the objection raised by the Commission.

283 Article 184 of the Treaty provides that '[n]otwithstanding the expiry of the period laid down in the fifth paragraph of Article 173, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the [European Central Bank] is at issue, plead the grounds specified in the second paragraph of Article 173 in order to invoke before the Court of Justice the inapplicability of that regulation'.

284 The first point to note is that under the case-law of the Court of Justice (*Simmenthal*, paragraphs 39 to 41), Article 184 of the Treaty expresses a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision under challenge, if that party was not entitled under Article 173 of the Treaty to bring a direct action challenging those acts and by which it was thus affected without having been in a position to seek to have them declared void.

285 Article 184 of the Treaty must be given a wide interpretation in order to ensure effective review of the legality of the acts of the institutions. To that effect the Court of Justice has already held in *Simmenthal* (paragraph 40) that the scope of that article must extend to acts of the institutions which, although not in the form of a regulation, produce similar effects.

286 The Court takes the view that the scope of Article 184 of the Treaty must extend to internal rules of an institution which, although they do not constitute the legal basis of the contested decision and do not produce effects similar to those of a regulation within the meaning of that article, determine the essential procedural requirements for adopting that decision and thus ensure legal certainty for those to whom it is addressed. Any addressee of a decision must be able indirectly to challenge the legality of the measure determining the formal validity of that decision, notwithstanding that the measure in question does not constitute the legal basis of the latter, if it was not in a position to apply for the annulment of that measure before receiving notification of the contested decision.

287 Consequently, those of the Commission's Rules of Procedure which are designed to ensure the protection of individuals may be the subject-matter of a plea of illegality.

288 Secondly, it should be remembered that the plea of illegality must be limited to what is necessary for the resolution of the dispute.

289 Article 184 of the Treaty is not intended to enable a party to contest the applicability of any measure of general application in support of any action whatsoever. The general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (Case 21/64 *Macchiorlati Dalmas e Figli* v *High Authority*

[1965] ECR 175, at 187 and 188; Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389, at 409; Joined Cases T-6/92 and T-52/92 *Reinarz* v *Commission* [1993] ECR II-1047, paragraph 57).

290 In this case, the second part of the plea of illegality seeks to establish that the Commission's internal rules on delegation infringe the principle of collective responsibility. However, Enichem does not even argue that the Decision was adopted under delegated powers, or put forward any evidence to suggest that that was the case. Since Enichem has not established the existence of a direct legal connection between the Decision and the provisions in the Rules of Procedure which it claims are illegal, the second part of the plea must be dismissed as inadmissible.

291 As to the first part of the plea of illegality, it should be noted that the Decision was authenticated under the provisions of the first paragraph of Article 16 of the Rules of Procedure. There is therefore a direct legal connection between the Decision and that article of the Rules of Procedure, which the applicants claim is unlawful.

292 That article sets out the detailed rules for authenticating the measure adversely affecting the applicants. The authentication of acts in accordance with the detailed provisions of the Rules of Procedure is intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes fixed in the languages which are binding (judgment of 15 June 1994, paragraph 75). It follows that that provision is intended to ensure the protection of the addressees of the measure and may thus form the subject-matter of a plea of illegality.

293 Consequently, the first part of the plea of illegality raised by LVM, DSM and Enichem against the first paragraph of Article 16 of the Rules of Procedure is admissible. It is therefore necessary to examine whether that plea is well founded as regards the alleged failure to comply with the requirement of legal certainty.

— The illegality of the first paragraph of Article 16 of the Rules of Procedure for failure to comply with the requirement of legal certainty

294 According to the applicants, the Decision is illegal because the detailed rules laid down by the first paragraph of Article 16 of the Rules of Procedure concerning the authentication of measures are incompatible with the requirement of legal certainty referred to by the Court of Justice in the judgment of 15 June 1994.

295 The first paragraph of Article 16 of the Rules of Procedure in force at the time the Decision was adopted provides:

'Instruments adopted by the Commission in the course of a meeting or by written procedure shall be annexed, in the authentic language or languages, to the minutes of the meeting at which they were adopted or at which note was taken of their adoption. They shall be authenticated by the signatures of the President and the Secretary-General on the first page of the minutes.'

296 In the judgment of 15 June 1994 the Court of Justice held that under Article 162(2) of the Treaty the Commission was under an obligation *inter alia* to take the steps necessary to enable the complete text of acts adopted by the college of Commissioners to be identified with certainty (paragraphs 72 and 73).

297 In that respect, the Court of Justice held that the authentication of measures provided for in the first paragraph of Article 12 of the Rules of Procedure in force at the time of the adoption of the 1988 decision, which provided that '[a]cts adopted by the Commission, at a meeting or by written procedure, shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary' was intended to guarantee legal certainty by ensuring that the text adopted by the college became fixed in the languages which were binding. It added: 'Thus, in the event of a

dispute, it can be verified that the texts notified or published correspond precisely to the text adopted by the college and so with the intention of the author' (paragraph 75).

298 In the light of those grounds of the judgment of 15 June 1994, it is necessary to determine whether the rules laid down in the first paragraph of Article 16 of the Rules of Procedure (paragraph 295 above) are such as to enable the complete text of acts adopted by the college to be identified with certainty.

299 It should be made clear at the outset that, contrary to what the applicants maintain, the Court of Justice did not make any determination in the judgment of 15 June 1994 as to whether the authentication provided for under the first paragraph of Article 12 of the Rules of Procedure in force at the time of the adoption of the 1988 decision constituted the only method of authentication which would meet the requirement of legal certainty. Although the Court indicated the purpose of the authentication of measures (paragraph 75 of the judgment), it did not state that the detailed rules on authentication in the first paragraph of Article 12 of the Rules of Procedure then in force were the only ones capable of achieving that aim.

300 Moreover, it was undisputed between the parties before the Court of Justice that the Commission had infringed the provisions on authentication laid down by the Commission's Rules of Procedure, with the result that the Court could find the original decision unlawful on the ground of infringement of essential procedural requirements without having to rule on the legality of authentication in the terms laid down by the first paragraph of Article 12 of the old Rules of Procedure.

301 Finally, the applicants consider that the signature on the minutes does not comply with the requirement of legal certainty because in the absence of any instrument carrying the signature of the President and the Secretary-General it is not possible to verify that texts notified or published correspond perfectly with the text adopted by the college of Commissioners. They conclude that all that has been authenticated is the first page of the minutes.

302 That argument cannot be accepted. The Court considers that the rules laid down in the first paragraph of Article 16 of the Rules of Procedure constitute a sufficient guarantee for determining, in case of dispute, whether texts notified or published correspond perfectly with the text adopted by the college and thus with the intention of their author. Since that text is annexed to the minutes, and the first page of the minutes is signed by the President and the Secretary-General, there is a link between those minutes and the documents which they cover which allows certainty as to the exact content and form of the college's decision.

303 In the absence of a finding by the Community judicature that an authority has not complied with its usual practice, the latter must be presumed to have acted in accordance with the applicable legislation.

304 Therefore, the authentication provided for in accordance with the rules in the first paragraph of Article 16 of the Rules of Procedure must be regarded as lawful. The plea must therefore be dismissed.

2. Infringement of the principle of collegiality and of the Commission's Rules of Procedure

Arguments of the parties

305 LVM and DSM argue that the Commission infringed its Rules of Procedure when adopting the Decision. In their replies, they state that the copy of the Decision marked 'certified copy' notified to them was signed by the Member of the Commission in charge of competition matters, thus implying that the Decision was adopted not by the college of Commissioners but only by the Member concerned, in breach of the principle of collegiality. They submit that that is

sufficient to undermine the presumption that the Decision is valid (Case T-37/91 *ICI* v *Commission*, cited above; Case T-31/91 *Solvay* v *Commission* [1995] ECR II-1821). LVM and DSM request the Court to order the Commission to produce further information in that respect.

306 Elf Atochem states that the Decision was adopted barely a month after the judgment of the Court of Justice, and that, according to statements by a Commission spokesman to the press, it was adopted without discussion in the college. It maintains that those factors are sufficient to call the validity of the Decision into question for infringement of the principle of collegiality.

307 The Commission considers that an infringement of the internal rules for adopting a decision may be relied on only where the applicant is able to demonstrate, by specific evidence, that there is reason to doubt the validity of the adoption of the decision. In the absence of such evidence, it maintains, the Commission measure must be deemed to have been validly adopted (*Deere*, paragraph 31). In this case, the applicants have not adduced any specific evidence.

Findings of the Court

308 The fact that the copy of the Decision addressed to LVM and DSM bears the name of the Member of the Commission responsible for competition matters and the words 'certified copy' ('*voor gelijkluidend afschrift*' in Dutch) does not constitute evidence that the Decision was adopted in breach of the principle of collegiality. The text of the Decision indicates that it is a 'decision of the Commission'. Moreover, that same text indicates that it is 'the Commission of the European Communities' which, having considered the facts and the legal assessment, issued the Decision.

309 Thus, these applicants do not advance any evidence or specific fact such as to displace the presumption of validity which applies to Community acts (*Dunlop Slazenger*, paragraph 24).

310 In the absence of such evidence, the Court of First Instance cannot order the measures of inquiry requested.

311 Moreover, the fact that the Decision was issued shortly after the judgment of 15 June 1994 and the fact, if it were established, that it was adopted without discussion in the college of Commissioners do not in any way imply that the principle of collegiality has been infringed.

312 It follows that the pleas must be rejected.

3. The composition of the file submitted to the college of Commissioners for deliberation

313 ICI maintains that as a result of the defects affecting the administrative procedure the college of Commissioners was unable to take cognisance of all the relevant documents in the case, and in particular a fresh report of the hearing officer and a fresh report of the outcome of the consultation of the Advisory Committee, before adopting the Decision. The college, whose composition had largely changed since 1988, was thus not informed of ICI's pleas in defence.

314 The Commission considers that that plea is devoid of legal foundation.

315 It should be remembered that, after the annulment of the 1988 decision by the Court of Justice on 15 June 1994, the Commission did not commit any error in law by not carrying out a fresh hearing of the undertakings concerned or a fresh consultation of the Advisory Committee before adopting the Decision (paragraphs 246 to 258 above).

316 Since the applicant's argument is based on a false premiss, the plea is without legal foundation and must therefore be rejected.

4. Infringement of the principle that decisions must be made and deliberated by the same body, and of the principle of immediacy

Arguments of the parties

317 Hüls argues that by virtue of the principle that decisions must be made and deliberated by the same body, a decision may be adopted only by persons who participated in the procedure or had the opportunity to form a direct opinion on the matter. In this case, most of the Members of the Commission at the date the Decision was adopted, in particular the Member with responsibility for competition matters, and the Director-General of the Commission's Directorate-General for Competition (DG IV) were no longer those in office at the time of the inquiry into the matter in 1988.

318 The applicant maintains that in competition matters the Commission should not be regarded as an administration as such, that is to say as an institution

independent of its Members. Reference may be made in that respect to Articles 1 and 12 of the Rules of Procedure, which stipulate that the Commission is to act collectively, and to Article 6 of the rules concerning the hearing officer.

319 BASF, Wacker and Hoechst argue that the Commission has infringed the principle of immediacy. BASF observes that when the Decision was adopted most of the Members of the Commission and the Director-General of DG IV were no longer the same as those in office in 1988. The Decision was thus adopted by persons who were not fully informed in the matter and had no opportunity to become so informed after delivery of the judgment of 15 June 1994. The applicants state that their plea does not demand that Members of the Commission be personally present at hearings, but that they be precisely informed of what is said at them through implementation of the Rules of Procedure and, in particular, consultation of the hearing officer.

320 Finally, Wacker and Hoechst maintain that the persons who drew up the decision should have participated in the hearings, or at the very least have been able to obtain within a short time the impression which they produced on other participants. That was not so in this case, most of the Members of the Commission at the date of the hearing being no longer in office when the Decision was adopted.

321 The Commission argues that the principle that the deciding body be identical with the deliberating body and the principle of immediacy do not exist. Community procedural law on competition rests on authorities invested with a function and not on persons exercising the functions in question (*ACF Chemiefarma*, paragraphs 71 and 72). There is no provision requiring that the various stages of a competition proceeding should take place during a single mandate of Members of the Commission.

Findings of the Court

322 The applicants claim infringement of a general principle requiring continuity in the composition of an administrative body handling a procedure which may lead to a fine.

323 There is no such general principle (*ACF Chemiefarma*, paragraph 72).

324 The plea is therefore unfounded and must be dismissed.

C — *The alleged defects in the administrative procedure*

325 The applicants raise a number of alternative pleas alleging irregularities during the administrative procedure prior to the adoption of the Decision. The Court notes in that context that at the hearing Wacker and Hoechst withdrew their plea of infringement of Article 3 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59) and that the Registrar took official note of that withdrawal.

326 A distinction can be made between those pleas according to whether they relate to defects in the notification of the statement of objections or defects relating to the hearing. The plea alleging infringement of the right of access to the Commission's file will be examined after the part of this judgment concerning the substance.

1. The pleas alleging defects in the notification of the statement of objections

(a) Formal defects in the notification of the statement of objections

Arguments of the parties

327 Wacker and Hoechst maintain that the Decision is based on improper notification of the statement of objections. Firstly, they maintain, it was notified only by a Commission official, in breach of Article 2 of Regulation No 99/63. Secondly, the statement of objections, consisting of a bulky document which it was impossible to identify as complete, infringed the provisions of the same Article 2, whereby the Commission is to notify its objections in writing. The objections ought therefore to have been notified in a single written document. Thirdly, the statement of objections should have been signed by its author.

328 The Commission considers that the plea is clearly unfounded.

Findings of the Court

329 As regards the alleged delegation to a Commission official of the notification of the statement of objections, the documents before the Court show that the statement of objections addressed to the applicants was accompanied by a letter signed by the Deputy Director-General of DG IV on behalf of the Director-General.

330 In signing that letter the Deputy Director-General was acting not under a delegation of powers but simply under a proxy received by the Director-General from the Commissioner responsible (Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 5). Such delegation constitutes the normal method by which the Commission exercises its powers (*VBVB and VBBB*, paragraph 14).

331 As the applicants have not supplied any evidence to suggest that the Community administration has failed to observe the rules applicable in the matter (*VBVB and VBBB*, paragraph 14), the complaint must be dismissed.

332 The complaints alleging failure to comply with the formal rules concerning the statement of objections must likewise be dismissed.

333 Under Article 2(1) of Regulation No 99/63, '[t]he Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them'. That provision does not require that the statement of objections bear a handwritten signature on the document itself, or that it should consist of a formally single instrument.

334 In the light of the above, the plea must be dismissed.

(b) Infringement of Article 3 of Council Regulation No 1

Arguments of the parties

335 BASF, Hüls and Enichem argue that the Commission infringed Article 3 of Regulation No 1. The statement of objections included annexes which were indispensable to a proper understanding of the objections and which were not written in the language of the Member State having jurisdiction with regard to those applicants. That also applied to the documents sent by the Commission on 3 May 1988. Enichem adds that the Commission also infringed Article 4 of Regulation No 99/63.

336 The Commission considers that the applicants' arguments are contrary to the wording and spirit of Article 3 of Regulation No 1. It also maintains that the abundance of the applicants' reactions demonstrates that in fact they have had no particular difficulty in understanding all the evidence.

Findings of the Court

337 The annexes to the statement of objections not emanating from the Commission should be regarded not as 'documents' within the meaning of Article 3 of Council Regulation No 1 but as supporting evidence on which the Commission relies. They are therefore to be brought to the attention of the addressee as they are (see, in particular, Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 21). The Commission has thus committed no infringement of Article 3 of Council Regulation No 1.

338 As to the infringement of Article 4 of Regulation No 99/63 alleged by Enichem, the body of the statement of objections which was notified to that applicant in Italian contains relevant extracts from the annexes. That method of presentation was thus sufficient to enable it to determine precisely the facts and legal reasoning on which the Commission relied (*Tréfilunion*, paragraph 21) and therefore properly to defend its rights.

339 The plea must therefore be dismissed.

(c) Insufficient time to prepare the reply to the statement of objections

Arguments of the parties

340 Wacker and Hoechst maintain that the Commission did not put them in a position to take cognisance of the file and subsequently make their point of view known effectively (Case 121/76 *Moli* v *Commission* [1977] ECR 1971, paragraph 20). By refusing, despite the circumstances of the case, to extend the period granted to the undertaking to submit its observations in reply to the statement of objections, the Commission infringed both the rights of the defence and Article 11 of Regulation No 99/63.

341 BASF argues that it did not have sufficient time to examine the documents which were notified to it by letter of 3 May 1988.

342 The Commission replies to Wacker and Hoechst that the provisions of Article 11 of Regulation No 99/63 were complied with. The applicant thus had two months to reply in writing to the statement of objections and five months to prepare for the hearing of September 1988. Those periods were pefectly adequate, especially when compared with the periods laid down in the fifth paragraph of Article 173 of the Treaty (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 270 to 273). The fact that some of the annexes to the statement of objections were not in the applicant's language does not affect that conclusion, since the applicant and its lawyer could not have had any difficulty in understanding them.

343 In reply to BASF, the Commission states that having regard to the wording of the Commission's letter of 3 May 1988 the applicant could not claim not to have understood until after the adoption of the Decision that the documents annexed thereto were relevant to its defence; that was a matter for it to determine. The letter having been addressed on 3 May 1988, and the replies given on 10 June 1988, the period allowed the applicant was sufficient; moreover, the applicant submitted numerous comments without asking for any extension of the period. The provisions of Article 11(1) of Regulation No 99/63 were therefore complied with.

Findings of the Court

344 Article 2(4) of Regulation No 99/63 provides: 'The Commission shall when giving notice of objections fix a time limit up to which the undertakings and associations of undertakings may inform the Commission of their views.' For that purpose, Article 11(1) of the same regulation provides: '... the Commission shall have regard both to the time required for preparation of comments and to the urgency of the case. The time limit shall be not less than two weeks; it may be extended.'

345 In this case, the statement of objections was sent to the undertakings concerned on 5 April 1988. They were to state their views on the objections by 16 May 1988.

346 By letter of 3 May 1988, the Commission sent a series of further documents to the addressees of the statement of objections, stating that, although the documents were not cited in the statement of objections, '[they] may be relevant in assessing the matter as a whole'.

347 Wacker and Hoechst requested an extension of the period until 15 July 1988. By letter of 18 May 1988, the Commission decided to grant them an extension until 10 June 1988, to take account in particular of the delivery of the further documents on 3 May 1988.

348 To BASF's application for an extension of 5 May 1988, which reached the Commission on 17 May 1988, the Commission replied by letter of 24 May 1988 fixing the deadline for the reply to the statement of objections as 10 June 1988.

349 The Court considers that in the circumstances of the present case the period of approximately two months thus granted to the applicants was sufficient to allow them to prepare their reply to the statement of objections (to that effect, see *United Brands*, paragraphs 272 and 273).

350 The plea must therefore be dismissed.

2. The pleas alleging defects relating to the hearing

(a) Insufficient time to prepare for the hearing

351 Wacker and Hoechst argue that the hearing officer did not have sufficient time to prepare the hearing.

352 The Commission maintains that there is no evidence for that statement.

353 Assuming that the applicants had the capacity to raise such a plea, they have not indicated why the period allowed to the hearing officer to prepare for the hearing was insufficient, or even how, if their claim were founded, that fact could have vitiated the administrative procedure.

354 The plea must therefore be dismissed as unfounded.

(b) Infringement of Article 3 of Regulation No 1

Arguments of the parties

355 BASF, Wacker, Hoechst and Enichem argue that the Commission has infringed Article 3 of Regulation No 1. The minutes of the hearing reproduced the statements of the various parties in the languages which they used, and not solely

in the language of the Member State having jurisdiction over the applicants. In BASF's submission, those statements are also essential since, *ex hypothesi*, the objection made against each of the undertakings is that they implemented an agreement between them.

356 The Commission considers that plea to be unfounded.

Findings of the Court

357 Article 9(4) of Regulation No 99/63 provides that 'the essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him'.

358 In this case, it is undisputed that the applicants were in a position effectively to take cognisance of the essential content of their own statements recorded in the minutes.

359 Furthermore, the applicants, who do not deny that it was possible for them to follow what was said during the hearing owing to the simultaneous interpretation provided, do not allege that the lack of a translation of the parts written in a language other than that of the Member State having jurisdiction over them resulted in the minutes' containing substantial inaccuracies or omissions in their regard which could have had harmful consequences capable of vitiating the administrative procedure (*ACF Chemiefarma*, paragraph 52; *Parker Pen*, paragraph 74).

360 The plea must therefore be rejected.

(c) Minutes of the hearing not complete

Arguments of the parties

361 BASF maintains that the minutes of the hearing were incomplete. They did not contain decisive parts of the statements of other undertakings. Thus, contrary to what was stated therein, the minutes did not have attached to them the arguments made on behalf of all the undertakings concerned, the argument of the applicant and that of the other undertakings. Since the accusations were of collusion, however, it was essential to take cognisance of and to examine the defences submitted by the other parties. BASF adds that the Commission cannot rely on Article 9(4) of Regulation No 99/63, since that concerns only the checking of the accuracy of the contents of the minutes by the party heard, not the right to take cognisance of the statements of other parties.

362 Wacker and Hoechst submit an identical plea based on the absence of any mention in the minutes of statements common to various undertakings.

363 The Commission considers that the minutes of the hearing, as notified to BASF, complies with Article 9(4) of Regulation No 99/63 inasmuch as it enables the latter to approve its own statements. There would be no sense in submitting to the applicant for approval the text of statements made by the other undertakings and their lawyers at the hearing.

364 BASF, Wacker and Hoechst were aware of those statements in any event, since they attended the hearing.

Findings of the Court

365 During the oral phase of the administrative procedure before the Commission which took place from 5 to 8 September 1988 and on 19 September 1988, those concerned had the opportunity to argue jointly their views on certain subjects.

366 In the minutes of the hearing, communicated to each of the participants, the submissions made in common were set out in summary form.

367 They also show that the full text of the various submissions on behalf of those concerned was to be contained in annexes forming part of the minutes. However, it is clear that those annexes were not attached to the document.

368 That does not constitute a defect in the administrative procedure sufficient to taint the resulting Decision with illegality, however. The purpose of Article 9(4) of Regulation No 99/63 (cited above at paragraph 357) is to assure the persons heard that the minutes contain a true record of the substance of what they have said (Case 48/69 *ICI*, paragraph 29). In so far as the common submissions concerned the applicants, they were able to know the essential content of those statements because they were recorded in the minutes of the hearing. Moreover, they do not argue that the reproduction of those statements in summary form contains inaccuracies. Finally, given that those arguments were submitted on

behalf of the applicants, they cannot successfully claim that they were not sufficiently aware of them.

369 Nor does the failure to communicate the text of the argument of BASF and others who submitted observations in the annex to the minutes constitute a defect in the administrative procedure sufficient to taint the Decision with illegality, since the minutes themselves report the essential statements.

370 In any event, BASF, Wacker and Hoechst participated at the hearing and were able on that occasion to take note of the subjects which were actually argued in common and of the observations submitted individually by other persons.

371 The plea must therefore be dismissed.

(d) Failure to produce the opinion of the hearing officer

Arguments of the parties

372 Wacker and Hoechst argue that they should have had the opportunity to take note of the opinion of the hearing officer and to comment upon it. The Commission thus unlawfully failed to produce the opinion of the hearing officer.

373 BASF and Hüls argue that the Decision is illegal for failure to take account of the hearing officer's report. The report drawn up by the hearing officer at the time of the 1988 decision might contain assessments of fact and law supporting criticisms made by the undertakings. They therefore ask the Court of First Instance to request the Commission to produce the report of the hearing officer.

374 The Commission rejects the request for communication of the report of the hearing officer on the ground that it is an internal document to which third parties have no access.

Findings of the Court

375 The Court observes that the rights of the defence do not require that undertakings involved in a proceeding under Article 85(1) of the Treaty be able to comment on the report of the hearing officer, which is a purely internal Commission document. As has been held, since that report is purely advice for the Commission, which is no way bound to follow it, it does not have any decisive aspect which the Community judicature must take into account in exercising its review (order of 11 December 1986 in Case 212/86 R *ICI* v *Commission*, not published in the ECR, paragraphs 5 to 8). Observance of the rights of the defence is sufficiently assured where the various authorities which contribute to the final decision are correctly informed of the arguments of the undertakings in reply to the objections communicated to them by the Commission and the evidence submitted by the Commission in support thereof (*Michelin*, paragraph 7).

376 In that regard, it is important to note that it is not the purpose of the hearing officer's report to supplement or correct the arguments of the undertakings, or to formulate new objections or to supply new evidence against them (see, in

particular, Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 54; *Hüls*, paragraph 87).

377 The undertakings are therefore not entitled, in order to ensure that their rights of defence are observed, to require communication of the report of the hearing officer in order to be able to comment on it (*Petrofina*, paragraph 55; *Hüls*, paragraph 88).

378 The plea must therefore be rejected.

D — *The alleged infringement of Article 190 of the Treaty*

Arguments of the parties

379 Some of the applicants maintain that the duty to state reasons under Article 190 of the Treaty has been infringed in several respects.

380 Thus, Wacker and Hoechst maintain that insufficient reasons were stated for the Decision on the three following essential points: existence of all the factors constituting the infringement, classification as an agreement or concerted practice and participation of those applicants.

381 Montedison argues that the Decision does not reveal the considerations which led the Commission to decide to confirm the fines already imposed in respect of facts which allegedly took place 10 to 15 years previously (Case C-27/89 *Scarpe* [1990] ECR I-1701, paragraph 27; Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraph 222). In this case, it maintains, there is no legitimate interest (see *a contrario* Case 7/82 *GVL* v *Commission* [1983] ECR 483; *Automec*, paragraph 85) to justify prosecuting an undertaking which withdrew from the market more than 10 years ago.

382 ICI argues that the Decision contains no reasoning justifying the Commission's delay in taking it, the decision not to serve a fresh statement of objections and to hear the parties, the use of documents discovered in the course of a separate investigation and evidence obtained in breach of the right not to give evidence against oneself, the refusal to grant access to the file in accordance with the case-law, the imposition of a fine based on an error of fact and the conclusion that the 1988 decision remained valid against Solvay and Norsk Hydro.

383 Hüls argues that the text of the Decision itself is incomprehensible without the documents to which it refers, none of which are annexed to the Decision. Moreover, in its legal assessement, the Commission did not refer either to specific and definite evidence, or to the facts set out at the beginning of the Decision. Finally, it argues that the Decision is not correctly reasoned, especially taking into account the duration of the procedure (*Sytraval and Brink's France*, paragraph 77 in conjunction with paragraph 56).

384 Enichem argues that the Commission has failed to explain why it is again penalising the undertakings in question after such a long period of time. Neither Regulation No 2988/74, which might at most support the powers of the Commission but not explain its approach in the matter, nor the fact that the Commission had already decided to impose the fines in 1988, which does not imply that it was required to do so again after the judgment of 15 June 1994, is sufficient in that regard.

385 The Commission considers that plea unfounded. It maintains that the Decision complies with the requirements of Article 190 of the Treaty.

Findings of the Court

386 It is settled case-law that the purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, in particular, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51).

387 In this case, it must first be emphasised that the first recital in the preamble to the Decision refers to 'the Treaty establishing the European Community', which, impliedly but necessarily, constitutes a formal reference to the task assigned to the Commission (paragraphs 148 and 149 above). That reference alone constitutes sufficient reasoning for the Commission's interest in finding an infringement and penalising the undertakings for it. Since the Commission has a discretionary power in implementing the prerogatives conferred upon it by the Treaty in the area of competition law, it is not required to explain further the grounds which led it to choose that course. Therefore, the allegations of Montedison and Enichem must be rejected.

388 As regards the insufficiency of reasoning alleged by Wacker, Hoechst and Hüls, the Court finds that although Article 190 of the Treaty requires the Commission to state the elements of fact and law which constitute the legal basis of the decision and the considerations which led it to adopt the decision, it is not required to discuss all the issues of fact and law which have been raised by every party during the administrative proceedings (see, in particular, *Van Landewyck*, paragraph 66). In that respect, the Court finds that paragraphs 7 to 27 of the recitals constitute a clear statement of the main documents regarded by the

Commission as evidence of infringement. Similarly, paragraphs 28 to 39 of the recitals constitute sufficient reasoning for the legal consequences which it drew from the facts.

389 The fact that the Commission gives no explanation for its delay in taking the Decision, the procedural choice not to serve a fresh statement of objections or to hear the parties, the use of documents discovered in the course of a separate investigation and evidence obtained in breach of the right not to give evidence against oneself, the refusal to grant access to the file in accordance with the case-law and the imposition of a fine based on an error of fact cannot constitute insufficient reasoning for the decision. Those arguments raised by ICI are essentially concerned only with challenging the validity of the Commission's assessment concerning those various questions. Such arguments, which fall within the scope of an examination of whether the decision was justified, are irrelevant in the present context.

390 Finally, as regards ICI's argument that insufficient reasons were given concerning the validity of the 1988 decision in respect of Norsk Hydro and Solvay, it is sufficient to note that the Decision contains express reasoning on this point. Paragraph 59 of the recitals in the preamble to the Decision states that '[s]ince Solvay did not make an application to the Court of Justice for the annulment of the decision, and Norsk Hydro's application was declared inadmissible, Decision 89/190/EEC remains valid as against them'.

391 In the light of the foregoing, this plea must be dismissed.

II — *The pleas on the substance*

392 The applicants have essentially three lines of argument. First, they make a series of pleas in law on the matter of evidence (A). Secondly, they dispute the existence,

both in fact and in law, of an infringment of Article 85(1) of the Treaty (B). Thirdly, each of them submits arguments to show that, in any event, it did not participate in the alleged infringement of which it is accused (C).

A — *The evidence*

393 There are two aspects to the applicants' pleas. They begin by challenging the admissibility of some of the evidence brought against them, and go on to dispute the probative value of the elements held by the Commission to prove the case against them.

1. The admissibility of the evidence

394 The applicants argue that evidence held against them is inadmissible, and make six pleas in law to that effect: first, infringement of the principle of the inviolability of the home; secondly, infringement of the principles of the right to silence and the right not to incriminate oneself; thirdly, infringement of Article 20 of Regulation No 17; fourthly, they dispute that refusal to reply to requests for information or to produce documents may be held to constitute evidence against them; fifthly, they argue that certain documents were never communicated to them, or, sixthly, were communicated to them only belatedly.

395 As the applicants point out, the common feature of these pleas is that, if they are well founded, the documents in question must be removed from the proceedings and the lawfulness of the decision assessed without them (*AEG*, paragraphs 24 to 30; order of the President of the Court of Justice in Case 46/87 R *Hoechst* v *Commission* [1987] ECR 1549, paragraph 34).

(a) Infringement of the principle of inviolability of the home

Arguments of the parties

396 LVM and DSM argue as a preliminary point that the Court of First Instance has jurisdiction to review the compliance of an investigation carried out under Article 14 of Regulation No 17 with Article 8 of the ECHR. In the first place, that provision is directly applicable in Community law. Secondly, an investigation on the business premises of a natural or legal person, pursuant to Article 14(3) of Regulation No 17, constitutes a search falling within the scope of Article 8 of the ECHR.

397 Again as a preliminary point, the applicants consider that even if they did not bring an action challenging the decisions to investigate they retain an interest in having their legality reviewed, inasmuch as the Decision is based on evidence obtained improperly. Moreover, the investigation carried out on the premises of DSM on 6 December 1983 was based on an authorisation under Article 14(2) of Regulation No 17 which could not form the subject-matter of an action for annulment on the basis of Article 173 of the Treaty.

398 In the first part of this plea, the applicants argue that in the course of its investigations the Commission infringed the principle of inviolability of the home within the meaning of Article 8 of the ECHR as interpreted in the case-law of the European Court of Human Rights (*Niemietz* v *Germany*, judgment of 16 December 1992, Series A, No 251-B), whose review is more extensive than that performed in the context of Community law (*Hoechst*, cited above; Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137).

399 Firstly, the formal acts relating to the investigations were adopted without prior judicial authorisation. Secondly, the decisions or authorisations for investigation

were formulated in general terms, without limitation, and thus did not permit the subject-matter of the investigation to be identified, as shown by the decision of 4 November 1987 to investigate at LVM and the authorisation of 29 November 1983 on the basis of which DSM's premises were the subject of an investigation on 6 December 1983. Thirdly, the applicants argue that only necessary investigations may be carried out (Article 14(1) of Regulation No 17 and Article 8 of the ECHR). That requirement of necessity must be assessed in the light of the description of the assumptions which the Commission intended to verify, a description precisely lacking in the present case.

400 The applicants conclude that all the formal acts relating to the investigations adopted by the Commission in the present case are vitiated by illegality.

401 Enichem, for its part, argues that 'the following decision to investigate is illegal because its subject-matter was formulated in ... general terms', and thus infringed Article 14 of Regulation No 17.

402 In the second part of the plea, LVM and DSM challenge the way in which the Commission's investigations were conducted; the nature and volume of the documents actually examined at the time indicates that they encroached on business confidentiality.

403 The Commission begins by arguing that the ECHR does not apply to Community competition procedures. In addition, it maintains that the plea is not admissible on account of the applicants' failure to bring an action challenging the Commission's decision ordering the disputed investigation.

404 As to the merits of the plea, the Commission considers that the relevance of the case-law of the Court of Justice (*Hoechst* and *Dow Benelux*, cited above) is not

affected by Article 8 of the ECHR as interpreted by the European Court of Human Rights.

Findings of the Court

405 In this case, the Commission carried out investigations under Article 14(2) of Regulation No 17 at the premises of the following undertakings: Shell and ICI on the basis of an authorisation of 16 November 1983; DSM on the basis of an authorisation of 29 November 1983; EVC, a joint undertaking of ICI and Enichem, on the basis of an authorisation of 17 July 1987; and Hüls on the basis of an authorisation of 17 September 1987.

406 In addition, the Commission adopted decisions to investigate under Article 14(3) of Regulation No 17 on 15 January 1987, addressed to Alcudia, Atochem, BASF, Hoechst and Solvay, and on 4 November 1987, addressed to Wacker and LVM.

407 The Court will first examine the admissibility of the plea, which is disputed by the Commission, and then its merits.

(i) The admissibility of the plea

408 The decisions to investigate are in themselves measures which may be the subject-matter of an action for annulment on the basis of Article 173 of the Treaty. Thus, Article 14(3) of Regulation No 17 expressly provides that the decision to investigate must indicate 'the right to have the decision reviewed by the Court of Justice'.

409 It is settled case-law that a decision adopted by a Community institution which has not been challenged by its addressee within the time-limit laid down by Article 173 of the Treaty becomes definitive as against him. Such a rule is based in particular on the consideration that the periods within which legal proceedings must be brought are intended to ensure legal certainty by preventing Community measures which produce legal effects from being called in question indefinitely (see, in particular, Case C-178/95 *Wiljo* v *Belgian State* [1997] ECR I-585, paragraph 19).

410 LVM is therefore time-barred from arguing that the investigation decision that was addressed to it, and which it did not challenge within the time-limits, was illegal, and the plea is therefore inadmissible.

411 On the other hand, LVM and DSM may, in so far as documents obtained by the Commission are used against them, challenge the legality of investigation decisions addressed to other undertakings whose actions to challenge the legality of those decisions directly, if brought, may or may not have been admissible.

412 Similarly, in the context of an action for the annulment of the final decision, the applicants may challenge the legality of the authorisations to investigate, which are not measures that may be challenged by an action under Article 173 of the Treaty.

413 Finally, the case-law of the Court of Justice shows that an undertaking may not challenge the legality of the manner in which investigation procedures are carried out in the context of an action for the annulment of the measure on the basis of which the Commission carries out that investigation. Judicial review of the conditions in which an investigation was conducted falls within the scope of an action which may, in an appropriate case, be brought for the annulment of the final decision adopted by the Commission pursuant to Article 85(1) of the Treaty

(*Dow Benelux*, paragraph 49; Opinion of Advocate General Mischo in that case, point 127 *in fine*; order in Case T-9/97 *Elf Atochem* v *Commission* [1997] ECR II-909, paragraph 25).

414 The applicants may also therefore challenge the manner in which investigation procedures of the Commission were conducted.

415 In those circumstances, the inadmissibility pleaded by the Commission must be limited to the plea by LVM inasmuch as it is directed against the investigation decision addressed to that company.

416 However, in the case of the plea as set out by Enichem, the Court finds that neither the applicant's written submissions nor the oral procedure enable it to identify the investigation decision whose validity the applicant is challenging. The plea must, therefore, in so far as it is raised by Enichem, be declared inadmissible as the Court is unable to discern its meaning and scope.

(ii) The merits of the plea

417 For the reasons set out above (paragraph 120), the plea must be understood as alleging infringement of the general principle of Community law ensuring protection against intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, which are disproportionate or arbitrary (*Hoechst*, paragraph 19; *Dow Benelux*, paragraph 30; Joined Cases 97/87, 98/87 and 99/87 *Dow Chemical Ibérica* v *Commission* [1989] ECR 3165, paragraph 16).

418 This plea is divided into two parts, the first concerning the validity of the formal acts relating to the investigations, the other the validity of their implementation.

— The first part of the plea, concerning the validity of the formal acts relating to the investigations

419 In the first place, it is not disputed that the decisions to investigate sent by the Commission to certain undertakings in 1987 are identical, or similar, to that which it sent to Hoechst on 15 January 1987. That latter undertaking brought an action seeking the annulment of that decision, which was dismissed by the Court of Justice (*Hoechst*, cited above). In so far as the pleas and arguments put forward today by LVM and DSM are identical or similar to those put forward at that time by *Hoechst*, the Court sees no reason to depart from the case-law of the Court of Justice.

420 That case-law is, moreover, based on the existence of a general principle of Community law, as referred to above, which applies to legal persons. The fact that the case-law of the European Court of Human Rights concerning the applicability of Article 8 of the ECHR to legal persons has evolved since the judgments in *Hoechst*, *Dow Benelux* and *Dow Chemical Ibérica* therefore has no direct impact on the merits of the solutions adopted in those cases.

421 Secondly, it is apparent from Article 14(2) of Regulation No 17 that investigations carried out on a simple authorisation are based on the voluntary cooperation of the undertakings (*Hoechst*, paragraph 31; *Dow Benelux*, paragraph 42; *Dow Chemical Ibérica*, paragraph 28). That finding is not altered by the fact that a penalty is provided for in the first part of the sentence in Article 15(1)(c) of Regulation No 17. Such a penalty only applies if, having agreed to cooperate in the investigation, the undertaking fails to produce the books or other business documents requested in full.

422 Since the undertaking did in fact cooperate in an investigation carried out on authorisation, the plea alleging undue interference by the public authority is unfounded, in the absence of any evidence that the Commission went beyond the cooperation offered by the undertaking.

423 That part of the plea must therefore be dismissed.

— The second part of the plea, concerning the implementation of those acts

424 Under this heading, the applicants put forward a single argument, to the effect that the number of documents copied and taken away by the Commission represented an infringement of business confidentiality.

425 However, the allegedly excessive volume of documents which the Commission copied, which is, moreover, not otherwise defined by the applicants, cannot in itself constitute a defect in the conduct of the investigation, particularly when the Commission was carrying out an inquiry into an alleged agreement between all the European producers in a given sector. Moreover, under Article 20(2) of Regulation No 17, officials and other servants of the Commission are under an obligation not to disclose information acquired by them as a result of the application of the regulation and which, by their nature, are covered by business privilege.

426 It has therefore not been established that the investigations carried out by the Commission were irregular.

427 In the light of the foregoing, this plea must be dismissed in its entirety.

(b) Infringement of the 'right to silence' and the privilege against self-incrimination

Arguments of the parties

428 The plea may be divided into two parts.

429 In the first part of this plea, LVM, DSM and ICI recall that under Article 14(3) of the International Covenant on Civil and Political Rights and Article 6 of the ECHR, as interpreted by the European Court of Human Rights, any accused person, including an undertaking, has the right, *ab initio*, to remain silent (*Funke* v *France* (ECHR), judgment of 25 February 1993, Series A, No 256-A; (1993) 16 EHRR, 297, paragraph 44; Opinion of the European Commission on Human Rights of 10 May 1994, *Saunders* v *United Kingdom*, paragraphs 69, 71 and 76; *contra* the previous judgment of the Court of Justice in *Orkem*, paragraphs 30 to 35 and 37 to 41, the assessment in which, being some way behind that in *Funke* v *France*, no longer has any meaning in the applicants' submission). The applicants argue that the Commission cannot ignore the case-law of the European Court of Human Rights (Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; *Orkem*, paragraph 30).

430 The applicants conclude that any information obtained by the Commission on the basis of Article 11 of Regulation No 17 should be removed from the

proceedings. In their submission, that applies both to the decisions to require information under Article 11(5) of Regulation No 17 and to requests for information under Article 11(1) of the regulation; since the penalties laid down by Article 15(1)(b) of the regulation apply in both cases, the applicants argue that this is a case of information obtained under duress within the meaning of the case-law of the European Court of Human Rights.

431 The applicants maintain that the rights of the injured undertakings cannot be ignored on the ground that such a conclusion is likely to call into question the legality of Article 11 of Regulation No 17 taken as a whole; it was thus for the Commission to establish proof of infringement by some other means compatible with Articles 6 and 8 of the ECHR.

432 Therefore, none of the replies given by the undertakings to the requests for information addressed to them by the Commission may be used to constitute evidence.

433 In the second part of this plea, LVM, Elf Atochem, DSM, ICI and Enichem invoke the privilege against self-incrimination.

434 In those circumstances, LVM, Elf Atochem, DSM and ICI argue, the replies given to the questions which were declared unlawful in the judgments of the Court of Justice in *Orkem*, and in Case 27/88 *Solvay* v *Commission* [1989] ECR 3355 should be removed from the proceedings.

435 Elf Atochem challenges on that basis the decision under Article 11(5) of Regulation No 17 of which it was the addressee. By contrast, LVM, DSM and ICI challenge the legality of all the requests for information, to whatever undertaking they were addressed and whatever their legal basis.

436 Enichem maintains that, by obliging the undertakings to submit to investigations, even though it had not the slightest evidence of the practices sought, the Commission led the undertakings to incriminate themselves.

437 The Commission repeats that the ECHR does not apply to Community competition procedures. The plea is, moreover, inadmissible on account of the applicants' failure to bring an action challenging the decisions to require information.

438 In any event, the Commission observes that the undertakings have not provided any answer in this case to any of the questions held to be contrary to Community law by the Court of Justice (*Orkem* and Case 27/88 *Solvay*).

Findings of the Court

439 In the context of its enquiry in this affair, the Commission sent most of the applicants requests for information under Article 11 of Regulation No 17. Some of them were requests for information under Article 11(1) of the regulation, whilst others were decisions based on Article 11(5).

440 The Court will first examine the admissibility of the plea, which is disputed by the Commission, and then its merits.

— The admissibility of the plea

441 For the reasons set out above in relation to decisions to investigate, and which apply likewise to decisions requiring information, the applicants are time-barred from pleading the illegality of the decisions requiring information which were addressed to them and which they did not challenge within the time-limit of two months from their notification.

442 The plea is therefore inadmissible in so far as it seeks to have the decisions requiring information which were addressed to them declared illegal.

— The merits of the plea

443 The aim of the powers given to the Commission by Regulation No 17 is to enable it to carry out its duty under the Treaty of ensuring that the rules on competition are applied in the common market.

444 In the course of the preliminary inquiry procedure, Regulation No 17 does not give an undertaking under investigation any right to refuse to comply with an investigative measure on the ground that evidence that it had infringed the rules on competition might thereby be obtained. On the contrary, it places the undertaking under a duty of active cooperation, which means that it must be prepared to make any information relating to the object of the inquiry available to the Commission (*Orkem*, paragraph 27; Case T-34/93 *Société Générale* v *Commission* [1995] ECR II-545, paragraph 72).

445 In the absence of any right to silence expressly granted by Regulation No 17, it is necessary to consider whether certain limitations on the Commission's powers of investigation are nevertheless implied by the need to safeguard the rights of the defence, which the Court has held to be a fundamental principle of the Community legal order (*Orkem*, paragraph 32).

446 In that connection, whilst it is true that the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings (*Orkem*, paragraph 33; *Société Générale*, paragraph 73).

447 However, in order to ensure the effectiveness of Article 11(2) and (5) of Regulation No 17, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct (*Orkem*, paragraph 34; Case 27/88 *Solvay*; *Société Générale*, paragraph 74).

448 The recognition of an absolute right of silence, as argued for by the applicants, would go beyond what is necessary to preserve the defence rights of undertakings and would constitute an unjustified hindrance to the Commission in the accomplishment of its task under Article 89 of the Treaty of ensuring compliance with the competition rules in the common market. The Court would point out, in particular, that both in their replies to the requests for information and in the administrative procedure which follows where, in appropriate cases, the Commission decides to open that procedure, undertakings have every opportunity to put their point of view, especially concerning the documents which they may have been led to produce or replies which they may have given to the Commission's questions.

449 The Commission may not, however, by a decision to request information, undermine the undertaking's defence rights. Thus it may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (*Orkem*, paragraphs 34 *in fine* and 35; Case 27/88 *Solvay*; *Société Générale*, paragraph 74).

450 It is within the limits thus restated that the applicants' arguments must be assessed.

451 In this case it is, to start with, undisputed that the questions contained in the decisions requiring information and which are challenged by the applicants in this part of the plea are identical to those annulled by the Court of Justice in *Orkem* and Case 27/88 *Solvay*. These questions are therefore likewise unlawful.

452 However, as the Commission has emphasised, the file shows that the undertakings either refused to answer those questions or denied the facts on which they were being thus questioned.

453 In those circumstances, the illegality of the questions does not affect the legality of the Decision.

454 In fact, the applicants have not identified any answer given specifically to those questions, or indicated the use made of those answers by the Commission in the Decision.

455 Secondly, an undertaking is not under an obligation to reply to a request for information under Article 11(1) of Regulation No 17, as opposed to decisions requiring information.

456 In those circumstances, the undertakings are free to reply or not to the questions put to them under that provision. That conclusion is not affected by the fact that a penalty is stipulated in the first part of the sentence of Article 15(1)(b) of Regulation No 17. Such a penalty applies only where, having agreed to reply, the undertaking provides inaccurate information.

457 Therefore, by making requests for information under Article 11(1) of Regulation No 17, the Commission cannot be regarded as compelling an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.

458 Thirdly, as regards the specific argument by Enichem, compliance by the Commission with the prohibition against compelling undertakings to provide answers which might involve an admission of the existence of an infringement may be assessed only by reference to the nature and content of the questions which are put, and not in relation to the evidence which the Commission previously held. Moreover, in *Hoechst*, which concerned a decision to investigate similar to those addressed to the other PVC producers, the Court of Justice concluded that that decision contained the essential indications prescribed by Article 14(3) of Regulation No 17. In particular, it emphasised that the decision at issue referred in particular to information suggesting the existence and application of agreements or concerted practices between certain PVC producers capable of constituting an infringement of Article 85 of the Treaty (*Hoechst*, paragraph 42). In those circumstances, Enichem's argument cannot be accepted.

459 Therefore, the plea must be dismissed in its entirety.

(c) Infringement of Article 20(1) of Regulation No 17

Arguments of the parties

460 LVM, DSM, ICI, Hüls and Enichem note that under Article 20(1) of Regulation No 17 information acquired under statutory powers may be used only for the purpose for which it was requested (*Dow Benelux*, paragraphs 17 and 18, and, on related questions, Case C-67/91 *Dirección General de Defensa de la Competencia* v *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraphs 35 to 39 and 42 to 54, and Case C-60/92 *Otto* v *Postbank* [1993] ECR I-5683, paragraph 20).

461 Therefore, although the Commission may use information gathered in the context of an inquiry as evidence in assessing whether it is appropriate to open another inquiry (*Dow Benelux*, paragraph 19), it cannot use that information as proof of that new infringement (*Asociación Española de Banca Privada*, paragraph 42), for which other means of proof must be found.

462 In the investigation which led to the adoption of Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding pursuant to Article 85 of the Treaty (IV/31.149 — Polypropylene (OJ 1986 L 230, p. 1)) the Commission obtained documents, some of which were subsequently unlawfully used as evidence in the present case. More specifically, the documents were so-called 'planning documents', the document entitled 'sharing of the burden', attached to Annex 3 and Annex 6 of the statement of objections respectively, and a note from

ICI of 15 April 1981 annexed to the Commission's letter of 27 July 1988. LVM and DSM maintain that documents of the latter are also at issue.

463 The applicants conclude that by using those documents as evidence in this case the Commission infringed Article 20(1) of Regulation No 17.

464 Enichem argues that in so doing the Commission also infringed Article 14(2) and (3) of Regulation No 17, since in the course of its inquiry into the polypropylene market it gathered documents that were outside the scope of its authorisation.

465 The Commission argues essentially that the documents in question were included in the file on the present case on the basis of authorisations relating to PVC. There was nothing therefore to prevent their use in this case.

Findings of the Court

466 Before considering the merits of this plea, it is necessary to clarify the facts.

— The facts

467 It is common ground, first, that the documents in question were originally obtained by the Commission in the context of the inquiry into the polypropylene

sector, and, secondly, that they were used by the Commission as evidence in the contested decision.

468 The file also shows that the Commission requested a fresh copy of the documents in question in the context of authorisations concerning, mainly, PVC.

469 Thus, as regards the planning documents, the Commission again took copies at the time of a subsequent investigation, on the strength of an authorisation which primarily concerned PVC.

470 As regards Annex 6 to the statement of objections and ICI's note of 15 April 1981, the Commission identified them and requested them a second time at the time of the investigation of 23 November 1983, on the basis of an authorisation primarily concerning PVC, as is confirmed by a letter from ICI to the Commission of 16 March 1984. ICI cannot validly claim that, in that letter, it nevertheless opposed the incorporation of those documents into the PVC file; on the contrary, that letter explicitly shows that its author voluntarily provided fresh copies of those documents for that purpose.

471 As regards DSM's documents, only DSM and LVM have referred to them. However, neither the written material nor the questions at the hearing have allowed the documents in question to be identified. In any event, the replies of those two applicants show, first, that those documents were first obtained by the Commission in the context of the polypropylene matter, and, secondly, that the Commission requested and obtained them once again in December 1983, at the time of an investigation on DSM's premises on the strength of an authorisation primarily concerning PVC.

— The merits of the plea

472 There is no dispute that, having regard to Articles 14 and 20(1) of Regulation No 17, information obtained during investigations must not be used for purposes other than those indicated in the authorisation or decision under which the investigation is carried out. That requirement is intended to protect both professional secrecy and the defence rights of undertakings. Those rights would be seriously prejudiced if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof (*Dow Benelux*, paragraph 18).

473 On the other hand, it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty (*Dow Benelux*, paragraph 19).

474 It has been established, moreover (see paragraphs 467 to 471 above), that the Commission did not merely introduce into this case of its own motion documents which it had obtained in another case, but requested those documents again in the context of authorisations to investigate which primarily concerned PVC.

475 Having regard to those factors, the plea appears to be limited to the question whether the Commission, having obtained documents in one matter and used them as evidence to open another proceeding, is entitled, on the basis of authorisations or decisions concerning that second proceeding, to request fresh copies of those documents and then use them as evidence in the second matter.

476 Since the Commission obtained those documents anew on the specific basis of authorisations or decisions directed primarily at PVC, in accordance with Article 14 of Regulation No 17, and used them for the purpose indicated in those authorisations or decisions, it observed the rights of defence afforded to undertakings under that provision.

477 The fact that the Commission once obtains documents in a given matter does not confer such absolute protection that those documents cannot be requested under statutory powers in another matter and used as evidence. Were it otherwise, as the Commission has emphasised, undertakings would have an incentive, when a first matter is investigated, to give all the documents providing evidence of another infringement, thereby forearming themselves against any prosecution in that respect. Such a solution would go beyond what is required to safeguard professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the competition rules in the common market.

478 In the light of all those considerations the plea must be dismissed.

(d) Inadmissibility as evidence of the refusal to reply to requests for information or to produce documents

Arguments of the parties

479 Elf Atochem and BASF deny that the Commission may use as evidence of infringement or their participation in it the fact that they did not reply to requests for information or did not produce documents, particularly in view of the fact that there were objective reasons justifying the refusals.

480 The Commission maintains that there is nothing in the decision to support such an allegation.

Findings of the Court

481 In examining this plea, it is necessary to distinguish between proof of the infringement and proof of the participation of undertakings in it.

— Proof of the infringement

482 Whilst it is true that the Commission refers, directly or indirectly, to the refusal of the undertakings to reply to certain questions (Decision, point 6, in fine; point 8, in fine; point 9, third paragraph; point 14, first paragraph; point 16, first paragraph; point 18, first paragraph; point 20, third and fourth paragraphs; point 26, third and fifth paragraphs; point 37, second paragraph), it did not at any point in the Decision use that fact as proof of infringement.

483 In fact it confined itself in those points to indicating that, having been unable to obtain the information requested from the undertakings, it had to rely on other evidence in order to prove the infringement and, in particular, make a more marked use of deductions in the light of the information it did possess.

484 This part of the plea is therefore unfounded.

— Proof of participation in the infringement

485 Since the only question at issue is that of the undertakings' participation in the alleged agreement, an applicant may not challenge the evidence used to establish other undertakings' participation in the infringement. Examination of the plea is therefore limited to determining whether, against each of the applicants ICI and Elf Atochem, the Commission has used, as proof of their participation, their refusal or inability to reply to requests for information.

486 Although the applicants were not able to identify the extracts from the Decision showing that their refusal to reply to requests for information from the Commission was held to constitute proof of their participation in the alleged infringement, it is stated at the end of the first paragraph of point 26 of the Decision that 'the Commission has also considered the role played by each producer and the evidence of the participation of each in the cartel. Full particulars were supplied to each producer in the course of the administrative procedure.'

487 Those particulars include the documents entitled 'Individual Particulars', which were annexed to the statement of objections.

488 In the case of Elf Atochem, under the heading 'Main proofs of participation in the infringement', that document indicates: '[The undertaking] refuses to provide any information under Article 11 of Regulation No 17 concerning its participation [in the] meetings.'

489 The refusal to reply to requests for information, or the impossibility of replying to them, cannot in itself constitute proof of an undertaking's participation in an agreement.

490 In order to assess Elf Atochem's participation in the agreement, it is therefore necessary to leave that circumstance found by the Commission out of account.

491 No similar mention appears in the 'Individual Particulars' concerning ICI. Therefore, in the absence of any indication that the Commission used that undertaking's refusal or inability to reply to requests for information as proof of participation in the agreement, the plea, in so far as it is made by ICI, must be dismissed as unfounded.

(e) Failure to communicate documents

Arguments of the parties

492 Wacker and Hoechst argue first that the extracts from the trade press, although referred to in the list of annexes to the statement of objections, were not annexed thereto and could not therefore be used against them. Secondly, they argue that ICI's note of 15 April 1981, relied upon by the Commission, was neither mentioned in nor annexed to the statement of objections. At the reply stage, they maintain that that note was never sent to them.

493 Hüls maintains that ICI's note of 15 April 1981 cannot be regarded as admissible evidence because it was not annexed to the statement of objections.

494 It further argues that Annex 15 to the statement of objections, concerning sales by the four German producers during the first quarter of 1984 and during the whole of that year should be removed from the proceedings, since it was drawn

up on the basis of factors which were not disclosed (*AEG*, paragraph 30).

495 The Commission maintains that the extracts from the trade press were annexed to the statement of objections. Moreover, even if ICI's note of 15 April 1981 was not annexed to the statement of objections, it was sent to the parties on 28 July 1988. No consequences can therefore be drawn concerning the legality of the Decision. Finally, in so far as the plea by Wacker and Hoechst is based on failure to communicate that document, the Commission maintains that the plea is inadmissible under Article 48(2) of the Rules of Procedure.

Findings of the Court

496 First, it appears that the extracts from the trade press did form part of the statement of objections (special annex entitled 'Known Price Initiatives'). Furthermore, even if Wacker and Hoechst did not receive them, they were by their nature public documents. In those circumstances failure to communicate those documents, even if it were established, cannot affect the legality of the Decision.

497 Secondly, there is no provision which prevents the Commission from sending the parties after the statement of objections fresh documents which it considers support its argument, subject to giving the undertakings the necessary time to submit their views on the subject (*AEG*, paragraph 29). Therefore, the fact that a document was neither mentioned in the statement of objections nor annexed thereto cannot itself affect the legality of the Decision. Nor do the applicants maintain, moreover, that after the Commission had sent them a copy of that document by letter of 27 July 1988, indicating its relevance with regard to the alleged quota mechanism, they were not in a position effectively to put forward their views in that respect. In fact, they had the opportunity to submit observations both orally and in writing.

498 Thirdly, in so far as the plea is based on the fact that that document was never sent to Wacker and Hoechst, it is a new plea raised at the reply stage. In the absence of indications that it is based on matters of fact and law that arose during the proceedings, it must be declared inadmissible under Article 48(2) of the Rules of Procedure.

499 Fourthly, Annex 15 to the statement of objections does not constitute proof in its own right, but sets out, albeit in summary form, the calculations which the Commission made in support of its conclusions from Annex 10. Those conclusions were fully set out in the statement of objections, and the applicant was able to make its observations in respect of them at the appropriate time. Therefore, even if Annex 15 were inadmissible for failure to contain sufficient information, it would in any event be for the Court of First Instance to check the merits of the conclusions drawn by the Commission at point 14 of its Decision from Annex 10 to the statement of objections.

500 The plea must therefore be dismissed.

(f) Late communication of documents

Arguments of the parties

501 BASF maintains that Annex 3 to the statement of objections, which constitutes a decisive incriminating document, was not communicated to the company in its entirety until the hearing on 6 September 1988. Despite the request made at that hearing, the applicant did not therefore have the opportunity to give its views on the subject, contrary to Articles 3, 4 and 7 of Regulation No 99/63.

502 The Commission maintains that this plea does not concern Annex 3 itself, but the illegible handwritten annotations that were made thereto. It considers that the applicant had sufficient knowledge of those annotations.

Findings of the Court

503 It is not disputed that the documents constituting Annex 3 to the statement of objections were annexed to that communication, as sent to the applicant on 5 April 1988. The plea is therefore limited to the allegedly late communication of the transcript of the handwritten comments which were made, illegibly, to the four pages comprising that annex.

504 It is also undisputed that the applicant did not receive a full transcript of the handwritten notes until 6 September 1988, at the hearing.

505 However, the only handwritten annotation on which the Commission sought to rely in the Decision had been expressly mentioned in the annex to the statement of objections concerning the known price initiatives. It follows that the applicant had every opportunity to put forward its observations in that respect.

506 The plea must therefore be dismissed.

507 In the light of all those considerations the pleas concerning inadmissibility of the proof relied on by the Commission against the applicants must be dismissed, subject to paragraph 490 above.

2. The adducing of evidence

508 The applicants' arguments in this respect comprise two pleas, or series of pleas. First, they challenge the probative value of certain types of document used against them by the Commission. Secondly, they accuse the Commission of infringing the principles concerning the adducing of evidence.

(a) The plea that certain types of evidence used by the Commission lacked probative value

Arguments of the parties

509 LVM and DSM argue that, in accordance with the principles of criminal procedure in the Netherlands and the right to a fair hearing under Article 6 of the ECHR (judgment of the European Court of Human Rights of 20 November 1989 in *Kostovski* v *Netherlands*, Series A, No 166, paragraphs 39 and 44 and, indirectly, Case T-4/89 *BASF* v *Commission* [1991] ECR II-1523, paragraphs 64 to 72, and Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraphs 69 to 73), the proof of incriminating facts may not be exclusively based on statements of the accused, or on the statements of other accused undertakings, which must in principle be regarded as suspect, so that they must not be used otherwise than against those who made them, or, finally on 'unofficial' statements in writing, the trustworthiness and authenticity of which are uncertain by nature.

510 In this case, therefore, in so far as the Decision is based exclusively on such documents, without the support of evidence admissible in law, the applicants argue that it should be annulled.

511 The Commission objects that the provisions of Netherlands criminal law and the unacceptably broad interpretation of the *Kostovski* judgment, cited above, are not relevant to the application of Community competition rules. They would deprive Articles 11 and 14 of Regulation No 17 of all practical effect.

Findings of the Court

512 In the first place, there is no general principle of Community law which prohibits the Commission from using information and documents such as those referred to by the applicants. Secondly, if the applicants' argument were to be accepted, the Commission's burden of proving conduct contrary to Articles 85 and 86 of the Treaty would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the Treaty.

513 In particular, the applicants are mistaken in relying, in support of their argument, on the judgments in T-4/89 *BASF* and *Enichem Anic*, cited above. What the grounds of those judgments as cited by the applicants actually show is that, far from regarding the statements of undertakings as devoid of probative value in principle, the Court of First Instance concluded that, in the cases before it, the documents relied on did not have the meaning and scope attributed to them by the Commission.

514 In those circumstances, the pleas relied upon by the applicants cover the same ground as the question whether the Commission's factual findings are supported by the evidence which it has produced.

(b) Infringement of the rules on adducing evidence

Arguments of the parties

515 LVM, Elf Atochem, BASF, DSM, Wacker, Hoechst and ICI maintain, in the context of specific pleas, that the Commission has infringed the principle of the presumption of innocence and the burden of proof to which it is subject.

516 They argue that the presumption of innocence guaranteed by Article 6 of the ECHR constitutes a general principle of Community law and applies in all respects when implementing Articles 85 and 86 of the Treaty (*ACF Chemiefarma*, paragraph 153; Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215; Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 301; Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679; T-4/89 *BASF*, paragraphs 70 and 71; *Enichem Anic*, paragraph 70).

517 Therefore, whatever practical difficulties the Commission might encounter in adducing evidence, the burden of proving an alleged infringement rests with it, as the counterpart to the wide powers of inquiry which are granted to it (*Hoechst* and *Dow Benelux*, cited above).

518 For that purpose, the Commission cannot restrict itself to assertions, suppositions or inferences. It must refer to serious, precise and consistent evidence (see for example *Europemballage and Continental Can*, paragraphs 31 to 37, *United Brands*, paragraphs 264 to 267, and *Suiker Unie*, paragraph 166; Opinion of Advocate General Sir Gordon Slynn in *Musique Diffusion Française*, at p. 1914,

and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307); moreover, there must be a direct causal link between the facts and the conclusions that are drawn from them, which must be reasonably and objectively free of doubt (Case 56/65 *Société Technique Minière (LTM)* v *Maschinenbau Ulm* [1966] ECR 235, at pp. 248 and 249).

519 Conversely, the undertakings accused of an infringement of Article 85 of the Treaty must be given the benefit of the doubt. In addition, they do not necessarily have to go so far as to show that the Commission's assertions are wrong, but merely have to show that they are unsafe or insufficiently proven (Opinion of Advocate General Sir Gordon Slynn in *Musique Diffusion Française*, at p. 1931). Otherwise, the undertakings would be faced with an unlawful reversal of the burden of proof; they would be required to adduce negative proof of their non-participation and the agreement and thus be faced with the '*probatio diabolica*'.

520 In this case, the Commission infringed those principles and rules.

521 In the submission of LVM and DSM, far from relying on established facts, the Commission contented itself with what it refers to as indirect evidence, but which are in reality merely assertions, suppositions and inferences (for example, points 9, 16, 20 and 23 of the Decision).

522 In this case, Elf Atochem submits, the Commission, which recognised the weakness of its evidence (points 31 and 38 of the Decision), proved neither the accuracy of the data on which its analysis was based nor the merit of its assessments. In reality, it postulated the existence and, on the strength of meetings between certain producers as to the subject-matter of which it admits that it had no information, the implementation of an overall plan based on proposals of 1980 discovered at ICI. However, it was not able to prove either the participation

of each producer in what it called 'joint initiatives' or a single will on the part of the undertakings it accuses of committing an infringement together.

523 BASF argues that the Commission's method of adducing evidence constitutes a vicious circle. First, it presumed that the items of evidence produced had a certain content and then it used those same items to prove that they had the preconceived content attributed to them. In BASF's submission, that led to an unacceptable reversal of the burden of proof. It was equally unacceptable to maintain that the absence of incriminating documents, concerning meetings between producers for example, might serve to create a presumption of guilt. The absence of documents was, moreover, inevitable, bearing in mind the number of years which had elapsed between the first investigation and the statement of objections.

524 Wacker and Hoechst maintain that, through wrongful use of circumstantial evidence, the Commission infringed the rules on adducing evidence. Its reasoning consisted in deducing the existence of the underlying agreement on the basis of the existence of the implementing measures, and vice versa, but without ever demonstrating the existence of one or the other.

525 In SAV's submission, while the Commission acknowledged that it lacked essential material in proving the participation of certain undertakings, including the applicant, in the agreement, that evidence was deduced, in respect of each participant, from its adherence to 'the agreement considered as a whole'. In reality, the Commission merely deduced the participation of all the undertakings from the fact that some of them participated (point 25 of the Decision). In fact, the three items of evidence purportedly establishing SAV's individual participation have no probative value.

526 ICI argues that the evidence in this case is insufficient to justify the Commission's factual allegations. That applies, for example, to the object of the meetings and

the commitments allegedly made by producers on those occasions (point 9, third and fourth paragraphs, of the Decision), to the implementation of any scheme relating to 'volume' and prices, to the conclusion that the prices resulted from concertation, or to any causal link between the planning documents and the Commission's subsequent findings of fact (points 24, second paragraph, and 30, second paragraph, of the Decision).

527 In any event, those factual allegations did not warrant the legal conclusions drawn from them by the Commission as regards either the existence of an agreement or concerted practice or the effect on trade between Member States (*United Brands*, paragraphs 248 to 267; Opinion of Advocate General Sir Gordon Slynn in *Musique Diffusion Française*, pp. 1930 and 1931).

528 Hüls maintains that, without explanation, the Commission described in its Decision as a certainty that which, in its letter of 24 November 1987 asking the applicant for information, consisted as yet of mere probabilities. In reality, since the request for information, the Commission had had the preconceived idea that the applicant had infringed Article 85 of the Treaty.

529 The Commission replies essentially that it has not disregarded the burden of proof to which it is subject. It considers that it had sufficient evidence to find an infringement (point 23 of the Decision). Any inaccuracy in that assertion is a matter going to the substance of the case. The Commission notes in particular that the use of indirect evidence is permissible (see, in particular, Case 48/69 *ICI*, paragraphs 64 to 68, *CRAM*, paragraphs 16 to 20, and *Ahlström Osakeyhtiö*, paragraph 71). That was in any case indispensable bearing in mind the growing awareness in European business circles of the scope of competition law. Moreover, items of evidence should be regarded not in isolation but in their entirety (Case 48/69 *ICI*, paragraph 68, and *Ahlström Osakeyhtiö*, paragraph 163), and individual items of evidence cannot be divorced from their context (*SIV*, paragraphs 91 to 94).

Findings of the Court

530 Examination of the present plea forms part and parcel of the plea, raised by the same applicants in particular, alleging obvious errors by the Commission in assessing the facts when establishing both the existence of the infringement and the participation of the undertakings in it.

531 Analysis of this plea must therefore be postponed, in order to examine it together with other substantive pleas.

B — *The denial of the existence of an infringement of Article 85(1) of the Treaty*

532 All the applicants challenge the Commission's assessment of the facts. Only SAV claims to be denying only its participation in the alleged agreement, arguing that it was unaware of it. However, in order to demonstrate that it did not take part in the agreement, it also disputes, at least in part, the facts found by the Commission. Those objections are therefore examined under this heading.

533 The applicants also criticise the Commission's legal assessment of the facts.

534 The Court will examine the factual and legal objections in turn.

1. Facts

Brief recapitulation of the Decision

535 In the first part of the Decision, headed 'The Facts', the Commission began, in an initial introductory subsection, by identifying the undertakings concerned by the Decision and supplying certain information concerning, *inter alia*, the product in question, the PVC market and the overcapacity in that sector.

536 In a second subsection, it went on to describe the infringement, examining in turn the five following aspects: the origin of the agreement (point 7 of the Decision), the meetings between producers (points 8 and 9), the system of quotas (points 10 to 14), the monitoring of sales in national markets (points 15 and 16) and the target prices and price initiatives (points 17 to 22).

537 As to the origin of the agreement, the Commission effectively relies on two documents found at ICI's premises, attached as Appendix 3 to the statement of objections (hereinafter jointly referred to as the 'planning documents'). The first of those documents, headed 'Checklist', and the second, headed 'Response to Proposals', amount, in the Commission's submission, to a blueprint for a cartel.

538 In respect of the meetings between producers, the Commission referred in particular to the replies of certain producers to requests for information sent out by the Commission during the preliminary administrative procedure.

539 As regards quota mechanisms, the Commission described the alleged facts on the basis of various documents. It thus referred to three documents, forming Appendices 6, 7 and 9 to the statement of objections, which, in its submission,

show that the PVC producers established between themselves a compensation mechanism designed to reinforce a scheme of quotas. The first document, entitled 'Sharing the pain', is a handwritten document found on ICI's premises, the second a document emanating from ICI but found on the premises of an external producer ('the Alcudia document') and the third an internal document of DSM ('the DSM document') found on its premises. The Commission also relied on two other documents, namely a note of 15 April 1981 found on ICI's premises and transcribing the message from the managing director of Montedison's petrochemical division ('the note of 15 April 1981') (sent by the Commission to the applicants by letter of 27 July 1988) and a table found on Atochem's premises ('the Atochem table') (Appendix 10 to the statement of objections).

540 For the sales monitoring mechanisms, whereby the 'home' producers in certain major national markets had informed each other of the tonnages they had sold in those markets, the Commission relied primarily on a series of tables found at Solvay's premises ('the Solvay tables') attached as Appendices 20 to 40 of the statement of objections. It also referred to Solvay's replies of 25 February 1988 and Shell's replies of 3 December 1987, to requests for information. Those replies were attached to the statement of objections, as Appendices 41 and 42 respectively.

541 As regards the price initiatives, the Commission relied on internal documents of several PVC producers, attached as Appendices P1 to P70 of the statement of objections, and on extracts from the trade press concerning the period from 1980 to 1984, annexed without numbering to the statement of objections.

542 Finally, in a third subsection, the Commission made certain observations with particular reference to the evidence for the existence of the cartel (points 23 and 24 of the Decision). It states: 'It is inherent in the nature of the infringement with which the present case is concerned that any decision will to a large extent have to be based upon circumstantial evidence: the existence of the facts constituting the infringement of Article 85 may in part at least have to be proved by logical deduction from other proven facts' (point 23). Having listed the main items of

evidence which it considered it held, the Commission emphasised that 'the various items of direct and circumstantial evidence in the present case must be considered together.... Taken in this light, each element of proof reinforces the others with respect to the facts in issue and leads to the conclusion that a market-sharing and price-fixing cartel was being operated in PVC' (point 24 of the Decision).

Arguments of the applicants

543 The applicants maintain that the Commission has not succeeded in establishing the facts whose existence it alleges.

— The origin of the cartel

544 In the applicants' submission, the planning documents have no probative value.

545 First, BASF, DSM, Wacker, Hoechst, Hüls and Enichem argue that it has not been established that those documents concerned PVC; the Commission's sole aim in attaching Appendices 1 and 2 to the statement of objections was to give the impression that the planning documents contained in the next appendix related to that sector.

546 Secondly, BASF and Enichem argue that it has not been established that those documents concerned markets other than the British market.

547 Thirdly, BASF, DSM, Wacker, Hoechst, SAV, Hüls and Enichem argue that the Response to Proposals does not constitute a response to the Checklist. The first document was later than the second, and the subjects referred to in the Response to Proposals bore no relation to those referred to in the Checklist. Neither document did so much as refer to the other, and the fact that they were found attached to each other does nothing to alter the lack of correlation between their subject-matter.

548 Fourthly, BASF, DSM, Wacker, Hoechst, SAV, Hüls and Enichem argue that since the planning documents were drafted by, and addressed to, unknown persons, there is nothing to prove that they were not simply expressions of the opinion of various persons within ICI, or that they were sent to or brought to the knowledge of other undertakings.

549 Fifthly, the applicants maintain that there is no evidence of any link between those documents and the later restrictive practices which the Commission claims to have established.

550 Finally, in the submission of BASF and DSM, even though the Checklist refers, without any further detail, to a meeting on 18 September 1980, the Commission has not established that that meeting took place, or that it was not simply an internal ICI meeting, or that its purpose was to examine the Checklist, or even that it had any results.

— The meetings between producers

551 BASF notes that neither the date nor the place of the meetings has been stated.

552 With the exception of Shell, the applicants argue that the Commission has not established that those meetings had an anti-competitive aim. In deducing from the replies by the undertakings to the requests for information that the meetings had an unlawful aim, the Commission misconstrued those replies; what they actually showed was that the discussions between producers concerned trends in the PVC market in general. That explanation was perfectly plausible, given the crisis in the sector and the number of documents confirming the competitive nature of the market. In BASF's submission, the absence of minutes for those meetings does not warrant the Commission's conclusion that they were unlawful.

553 LVM, BASF, DSM and Enichem maintain that there is nothing to link the meetings between producers with the alleged overall plan. Hüls argues that the alleged anti-competitive aim of the meetings cannot be established on the basis of the planning documents in any event, since they have no probative value.

— The quota and compensation mechanisms

554 The applicants deny that the documents cited by the Commission have probative value.

555 They repeat their argument that the planning documents cannot be relied on by the Commission (see above, paragraph 544 et seq.).

556 Secondly, BASF, Wacker, Hoechst and Hüls maintain that as 'Sharing the pain' and the 'Alcudia' document do not concern PVC and were drafted by persons outside that sector, the opinions of those persons, being based on fragmentary information and rumours, could not constitute proof of infringement.

557 Neither of the documents established that a compensation mechanism actually existed and was put into operation. Moreover, the Alcudia document was marked 'draft'. In addition, ICI had stated in its reply of 9 October 1987 to a request for information that such a system had never been put into operation.

558 Thirdly, the DSM document likewise lacked probative value.

559 DSM, BASF and Hüls maintain that it was merely an internal market study, comparing global statistics under the Fides system with DSM's own sales. In DSM's submission, the word 'compensation' in that document referred only to compensation for earlier inaccurate information from Fides. A compensation mechanism as understood by the Commission would be pointless in any case because demand for PVC had risen by 12% in the first half of 1982 by comparison with the first half of 1981.

560 Wacker and Hoechst argue that the DSM document has been extracted from a larger document, and should not therefore be read in isolation.

561 Finally, BASF argues that the Commission has not established a single case of compensation between producers; implementation of such a mechanism, the detailed rules for the functioning of which have not been established, has not therefore been proved. Deliveries of minimal quantities from producer to producer, in order to deal with bottlenecks, cannot be classed as compensations.

562 Fourthly, the applicants maintain that the Atochem table has no probative value.

563 Elf Atochem states that although that document was discovered on the premises of Atochem it comes in fact from outside that undertaking and was found in the office of a person without operational responsibility, amongst files of general studies unrelated to PVC.

564 BASF adds that since that document was presumed to be dated 1984, it was drawn up after the event, which would make no sense in a quota system. Wacker and Hoechst maintain that the origin of the figures given in that document is unknown; they might in any case derive from public information.

565 BASF, Wacker, Hoechst and Hüls maintain that the Commission merely speculated that the abbreviation '%T' on the Atochem table was a reference to a target; in fact, the figures for German producers corresponded exactly to the proportion represented by their production capacity, so that '%T' could mean percentage of total capacity.

566 LVM, BASF, DSM and Enichem observe, moreover, that the actual sale tonnages do not correspond to the tonnages expressed in the Atochem table, thus supporting the idea that the figures are only individual estimates. In reality, the Commission had actual sales figures for only three of the thirteen undertakings, and only six of the eleven figures relating to those three undertakings corresponded to actual sales figures.

567 As regards the German producers, in particular, BASF, Wacker, Hoechst and Hüls argue that their sales were aggregated, making it impossible to identify the individual producers and their sales, a finding incompatible with the existence of a quota mechanism. Moreover, comparison of those alleged targets with Hoechst's actual sales figures, as drawn up and certified by a firm of accountants in October 1988, showed significant differences, of the the order of 5%.

568 Fifthly, BASF disputes the relevance of the documents on which the Commission relies to support its analysis of the Atochem table.

569 Thus, Appendices 13 to 16, concerning statistics on actual sales volumes, simply showed that the declarations made by the producers to the Fides system were accurate. Appendices 17 and 19 were merely internal documents, referring to sales objectives fixed by the undertakings themselves; Appendix 18 contra-indicated the existence of a quota system, since it contained a prediction by ICI of a decline in its market share for the months to come.

570 Sixthly, Wacker, Hoechst and Hüls argue that ICI's note of 15 April 1981 is equally devoid of probative value. Not only does it not concern PVC but its meaning remains obscure.

— The monitoring of sales in national markets

571 In the first place, Hüls maintains that the Solvay tables are by their nature lacking in probative value. They were drawn up only subsequently, on the basis of information of unknown origin, for the purpose of establishing market studies. They could amount, at most, to mere hypotheses as to the future direction of turnover figures, which never materialised the following year, and estimates, as the rounded figures show. Being drafted in French, and not in English, they could only be internal Solvay documents.

572 Secondly, LVM observes that the Solvay tables would only have probative value if they were accurate, whereas, in fact, they differed significantly from actual sales. The Commission took account of provisional data supplied to Fides, and not of definitive Fides figures, which alone reflected actual sales. Bearing in mind

loading and delivery dates, differences might exist. In relation to the German producers, moreover, Wacker and Hoechst point out that the Solvay tables do not contain any itemised data, but only overall figures.

573 Thirdly, Hüls maintains that the overall figure for PVC sales on the German market (Appendix 20 to the statement of objections), even if it accords with statements by Fides, should not, in accordance with the rules of the Fides system, include deliveries to Dynamite Nobel AG; such an error shows that the figures appearing in Appendix 20 do not reflect the Fides system.

574 Fourthly, LVM, BASF, DSM, Montedison and Enichem accuse the Commission of asserting without proof that precise sales figures could not have been obtained without a volontary exchange between the producers. On the contrary, Solvay had explained that it alone had drawn up, for internal purposes, the statistical documents on which the Commission bases its accusation. Using examples, DSM challenges the Commission's conclusion that a precise assessment of the market shares of each producer could not be obtained without an exchange of information between them. In fact, merely on the basis of easily accessible information, each undertaking could have made precise estimates of its competitors' sales without any unlawful exchange of information. BASF emphasises that the very concept of an exchange implies a reciprocity between undertakings, which is precisely not what is being alleged. In Enichem's submission, even if a note referring to the table in Appendix 34 (and to that alone) mentions data exchanged with colleagues, it is not stated who those colleagues are; given the aggressive policy of the applicant, it can only refer to work colleagues within Solvay, and not to the applicant. In any event, these were exchanges of past data, and not forecasts.

575 Finally, BASF and Shell maintain that the Commission misconstrued Shell's reply to a request for information. In the first place, Shell indicated that no precise information had been given to Solvay; any such communication concerned western European sales and could not therefore be the source for the data in the Solvay documents, which contained a country by country breakdown. Secondly,

any such information was given only occasionally between January 1982 and October 1983, whereas the Solvay documents covered the period from 1980 to 1984. Those facts confirm, in the applicants' submission, that the information in the Solvay documents was obtained only from officially published statistics and contacts with customers.

— The price initiatives

576 BASF, Wacker, Hoechst and Montedison reiterate their argument that the planning documents have no probative value (paragraph 544 et seq.).

577 In the submission of LVM and DSM, the existence of target prices was inconceivable in the PVC market, where prices were negotiated in each individual case.

578 LVM, DSM, Wacker and Hoechst argue that Appendices P1 to P70 to the statement of objections have no probative value because they concern internal reports of undertakings drawn up subsequently.

579 In any event, according to LVM, BASF, DSM, Wacker, Hoechst, Montedison, Hüls and Enichem, those appendices do not support the conclusion that the initiatives to which objection is made were concerted; in reality, they were simply the result of independent decisions of the undertakings, which were merely adapting intelligently to market conditions.

580 Finally, the applicants maintain that Appendices P1 to P70 and the documents sent to them by the Commission on 3 May 1988 revealed, on the contrary, a competitive market in which, in particular, prices changed rapidly and frequently and certain producers took an aggressive line.

581 In their submission, extracts from the trade press could constitute neither evidence nor even an indication of infringement. They were therefore not sufficient to support the Commission's argument.

Findings of the Court

582 In establishing the origin of the cartel, the Commission relied on the wording of the planning documents, the information given by ICI concerning those documents in response to a request for information, and the close correlation between the practices envisaged in those documents and the practices witnessed on the market.

583 In those circumstances, the Court's first task is to examine the various market practices which the Commission considers it has proved and compare them with the practices envisaged in the planning documents.

— The quota system

584 The first planning document, the Checklist, announces in section 3 'Proposals for a new framework of meetings'. That section, after listing in the form of initials or acronyms the names of certain prospective participants at such meetings, includes

a subsection on 'Proposals on how these meetings will operate' which in turn refers to: 'producers' percentage shares, and variations permitted about these' and 'arrangements for loading new capacity'.

585 The second planning document, the Response to Proposals, refers in section 2 to the proposal that 'In future, tonnage quotas should be on a *company* and not on a *national* basis' together with the following commentary: 'Strongly supported, but, to be realistic and workable, a future quota system must include an agreed formula for the loading of new capacity and of plants that have been restarted after being closed temporarily'. In section 3, the same document contains the following proposal: 'The market share of producers should be based on their achieved 1979 position, with correction of any flagrant anomalies in that year', with the following commentary: 'Fully supported'. Finally, section 4 makes the following proposal: 'A flexibility of plus or minus 5% should be applied to the market shares established under 3 above, so that the actual market positions of producers can in time evolve to reflect the real potential of each', together with the following commentary: 'A lot of doubt about this, mainly based on the fact that, if producers' market shares are to be defined, it would be dangerous to build in a licence to exceed the agreed share'.

586 In order to establish the existence of a quota mechanism, the Commission refers in its Decision to various documents of which it was able to obtain copies during its investigations.

587 It has thus relied on three documents in particular, which it claims establish the existence of a compensation mechanism operated between PVC producers in 1981, and which testify to the existence of quota mechanisms of which it was only the corollary.

588 The document 'Sharing the pain', found on ICI's premises, relates mainly to a system for sharing the burden of reductions in sales of a thermoplastic product other than PVC. However, it contains the following observations: 'Experience with similar schemes on PVC and LDPE does not augur well, but certain lessons can be learned.' After the heading: 'Target quantity', the author of the document continues: 'What would performance be monitored against? PVC [producers] were able to work on agreed market shares for 1981.' Finally, the document states: 'The PVC scheme only allowed for adjustment if a company's or a group of companies' sales fell below 95% of "target". This allows companies to creep up in market share at no penalty.'

589 The Alcudia document, which emanated from ICI but found with a Spanish producer, outlines a draft scheme for a compensation mechanism between those LDPE producers who had sold less than a given share and those who had sold more. The document states: 'The scheme is very similar to a scheme recently introduced by PVC producers and put into operation for half of May sales and June sales.' The document then describes the essential features of that scheme, being similar to that applied in the case of PVC. Thus, producers were to agree on their target sales at a given percentage of the total sales. As soon as the provisional Fides totals became known, tonnage targets were to be calculated for each participating producer and compared with actual sales, and variances to be established; compensations were then to be made between those who had oversold their quota and those who had not attained it. For ease of operation, it was also proposed that: 'producers [be] "grouped" in the hope that arrangements within a group can be made to nullify the variances'. An alternative scheme was also mooted, whereby only variances in excess of 5% would be taken into account. At the end of the document, the author compares the proposed scheme for LDPE with the 'PVC arrangement' and comments *inter alia*: 'Can the scheme be operated with 2/3 producers outside? PVC have only one outside.'

590 The Court considers that the wording of those documents constitutes evidence which supports the conclusions which the Commission drew from them.

591 Whilst it is true that both documents concern another thermoplastic product, the fact remains that the extracts cited by the Commission in its decision relate expressly to PVC.

592 Moreover, the wording of those documents shows that the compensation mechanism in question was in fact put into operation by all but one of the PVC producers. The Alcudia document, in particular, constitutes a draft only in so far as it concerns the other thermoplastic product in question, namely LDPE.

593 Finally, the objection of the applicants that those documents were not reliable because their author was not from the PVC sector cannot be accepted. Both those documents contain precise indications, especially as to dates, percentages and the number of participants in the PVC system, which lead to the conclusion that the authors had an exact knowledge of the mechanism which they were referring to, and from which they intended to draw lessons in the light of 'experience gained'.

594 The Commission also refers to the DSM document, dated 12 August 1982.

595 As the Commission notes in the penultimate and final paragraphs of point 11 of the Decision, the author of the document points to a significant increase (some 12%) in PVC sales in western Europe in the first half of 1982 by comparison with the first half of 1981, whereas growth in demand in that geographical area had been significantly less; the author also notes significantly different trends between one geographical market and another. The author then rejects a number of explanations, based on the normal development of the market (reduction of imports from non-member countries into western Europe, storage and increase in the level of activity), which were initially put forward (see also, in that respect, Appendix P22 to the statement of objections, which is a DSM document of 12 July 1982), and continues: 'Maybe an explanation could be found in a false

declaration of sales in the first half of 1981 (compensation!). This item will be investigated.'

596 That document thus shows that the movement of the market in the first half of 1982 compared with the first half of 1981 could not be explained in terms of normal market factors, but rather by false sales declarations for the first half of 1981. Those false declarations themselves find their *raison d'être* in compensation mechanisms between producers. As the Commission found, that document, which must be read in the light, *inter alia*, of the two previously examined and which reveal the existence of a compensation mechanism during the first half of 1981, establishes that certain producers had doubtless declared sales figures for that half-year which were lower than the reality, in order to avoid being subject to that mechanism.

597 That document also permits the conclusion that owing to the conduct of certain producers the mechanism did not function as well as it might. That fits in, moreover, with the document 'Sharing the pain', in which it was stated that 'Experience with similar schemes on PVC and LDPE does not augur well'.

598 In that context, the alternative interpretation of the term 'compensation' proposed by DSM, which is moreover unclear, lacks all credibility. It cannot be accepted that in order to correct errors in their statements to the Fides system for one year producers declared sales the following year including those omitted the previous year.

599 In order to establish the existence of a quota mechanism, the Commission also refers to a note discovered at ICI and dated 15 April 1981. It is the text of a message sent by the managing director of Montedison's petrochemical division to ICI, and contains the follwing extract: 'ICI on PVC for instance might have by the end of 1981 new capacity in Germany and have been asking for a 30 kilotonne

increase in quota since January 1981'. As the Commission noted, ICI was at that time intending to open a new plant in Germany, while closing an old plant elsewhere.

600 That note, even if primarily concerned with another thermoplastic product, relates in the extract referred to above specifically to PVC.

601 The applicants have been unable, moreover, to offer any interpretation of the term 'quota' contained in that note other than that adopted by the Commission. Nor should it be forgotten that the note in question is the transcription of a message from a director of a rival company, so that the term 'quota' cannot be regarded as referring merely to internal objectives of ICI.

602 Finally, the Commission considered that the volume control scheme thus established continued until at least until April 1984. It relied in that respect on the Atochem table, headed 'PVC — first quarter'.

603 The table comprises nine columns:

— the first lists all European PVC producers active on the market at that time;

— the second, third and fourth columns comprise, in respect of each European producer, save for four German producers whose sales appear to be grouped together, an indication of sales effected in January, February and March respectively. For the first two months, the table contains the note 'FIN', and

for March the note 'Q'. It is undisputed that those indications correspond to the 'final' and 'quick' statistics sent to the Fides information exchange; that is moreover what is shown by Atochem's reply of 5 May 1987, attached as Appendix 11 to the statement of objections, to a request for information from the Commission. As the Decision states (point 12, third paragraph), Fides is an industry-wide statistical service run by a Zurich-based accounting firm under which subscribing producers supply individual data, first in quick form and then in final form, to a central office which collates the information and produces global and anonymised statistics for the whole western European market;

— the fifth column shows total sales for the first quarter;

— the sixth shows the sales percentage of European producers in relation to the total sales of all of them during the first quarter;

— the seventh is headed '%T';

— the eighth shows sales for April, with the note 'Q';

— the final column shows the share of the producers in relation to total sales by European producers during the first four months of the year.

604 The Commission concluded that the symbol '%T' was obviously a reference to a target percentage. It also draws the conclusion from that document that the

producers referred to exchanged their sales figures outside the official Fides system in order to monitor the functioning of a quota system. Finally, the Commission examined to what extent the producers had attained the target allocated to them.

605 A preliminary point to note is that the Court considers that the exact identity of the author of the document is not decisive. All that is relevant is whether the conclusions which the Commission drew from the Atochem table are well founded.

606 Nor is it disputed that the table refers to the first months of 1984, as Atochem's reply of 5 May 1987 to a request for information shows. In the light of the fact that the table gives only 'quick' and not final statistics for March and April 1984 it may be attributed to May 1984.

607 First, the Court confirms the Commission's interpretation of the symbol '%T'. It does not accept that the symbol refers only to purely internal targets of the undertakings; that fails to explain why the author of the document had at his disposal all the internal targets of the various producers. Moreover, the interpretation of the symbol cannot be divorced from the context of this case, and in particular from the other documents which evidence the existence of a quota mechanism between PVC producers. The table shows, in addition, that the document does not contain any indication of market shares in relation to total sales in western Europe, since imports are not taken into account, but does indicate the respective market shares of the producers in relation to the market constituted by themselves as a whole, thereby confirming that the aim was to monitor market shares in the context of the collusive mechanism. Finally, the applicants have not offered any plausible alternative explanation of the symbol '%T' in the context of this case.

608 Secondly, the Commission was at pains to establish whether the sales tonnages indicated in the table for the various producers tallied with the various undertakings' declarations to Fides. In that regard, the Commission has stated that it was not able to obtain copies of those declarations from all the producers, and was not therefore able to carry out a systematic monitoring of sales figures appearing in the table. The Commission did, however, obtain the sales figures of some undertakings. Those figures show that 10 of the sales figures which it was able to verify are identical with the declarations by undertakings to Fides. In addition, five further sales figures, concerning Solvay and LVM, show an amount close to that indicated in the table.

609 Finally, the Commission attempted to calculate the sales of the four German producers for the first quarter of 1984. For that purpose, it used figures declared to Fides in respect of three of them (BASF, Wacker and Hüls), of which it had obtained copies, and the sales figures declared by Hoechst itself in its reply of 27 November 1987 to a request from the Commission for information. It thus arrived at a total of 198 353 tonnes, which it compared with the total of 198 226 tonnes resulting from the Atochem table. The difference between those two totals is in fact negligible, and supports the Commission's argument that such a result could not be obtained without an exchange of data between the producers.

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

611 By comparison with the figures originally provided, those new figures contain a negligible amendment concerning Hoecht's sales in Europe, which, moreover, merely confirm the accuracy of the figures in the Atochem table, whilst adding, as 'sales to consumers' within the meaning of the Fides declarations, Hoechst's own consumption for its plant at Kalle. The Court considers, however, that bearing in mind the circumstances in which those figures were produced, they cannot be regarded as sufficiently reliable to call into question those supplied by the applicant itself in response to a request for information.

612 The German producers argue, however, that their sales are aggregated, and not stated individually; it was therefore sufficient for three of the four German producers to have participated in that exchange of information for the share of the fourth to be deduced, by mere subtraction, from the overall official figures issued by the Fides. They maintain that the Atochem table did not therefore have probative value in relation to any of the four producers in question. That argument cannot be accepted. The tables issued by Fides show in aggregated form sales originating in Germany, and not merely those of the four German producers; for the first quarter of 1984, those statistics show a sales total significantly higher than the mere total sales of BASF, Wacker, Hoechst and Hüls. In those circumstances, the Court considers that knowledge of sales figures from three of them does not make it possible to ascertain, by mere subtraction, a sales total of the four German producers as accurate as that appearing in the Atochem table.

613 Moreover, the sales figures stated in the Atochem table are precise, save for those indicated for ICI and Shell, which are obviously rounded; in the case of ICI, a footnote to the table states: 'calculated on Fides numbers'. Those findings support the Commission's conclusion that, in respect of the other producers, the figures are not mere estimates calculated on the basis of official figures, but information supplied by the producers themselves. It should be remembered in that respect that, whilst producers individually send to Fides their own declarations of sales figures, that is done on a confidential basis; the producers receive only aggregated data in return, and not the individual data declared by other producers.

614 Thirdly, the Commission endeavoured to verify whether the relative shares of the producers between themselves for 1984 corresponded to the target share appearing in the Atochem table. It was thus able to determine, in the light of the information which it was able to obtain, that Solvay's market share in 1984 was identical with the target share stated in the Atochem table. It was, moreover, able to determine that the market share of the four German producers for 1984, namely 24%, was close to the target share indicated in that table, namely 23.9%. Finally, ICI's market share for 1984 amounted to 11.1%, compared with its target share in the Atochem table of 11%. It is also significant, as the Commission points out, that two internal ICI documents of 18 September 1984 and 16 October 1984, produced as Appendices 17 and 18 to the statement of objections, refer precisely to an ICI 'target' of 11%.

615 Enichem maintains that its share of sales amounted to 12.3% in 1984, which is clearly below that shown in the Atochem table. That objection cannot be accepted. Enichem was invited to state on what basis it had determined its market share for 1984, but was not able to offer any explanations concerning the factors on which it relied. The Court notes, moreover, that, in the annexes to its application (Volume III, Annex 2), Enichem produced a table recapitulating its sales, year by year, for the period from 1979 to 1986, from which it may be deduced that the market shares were calculated in an identical manner for each of those years. At the request of the Court of First Instance as a measure of organisation of the procedure, the applicant tried to explain how it had calculated its market share for the years 1979 to 1982. In the result, the applicant merely stated its sales figures for each of those years without any evidence in support. Moreover, those sales figures related not to sales of European producers in western Europe but to figures for European consumption, which were necessarily higher since they included imports. That substantially reduced the market share claimed by the applicant.

616 The Court therefore finds the figures put forward by Enichem totally unreliable.

617 The factual findings in the Commission's Decision must therefore be confirmed.

— The monitoring of sales in national markets

618 Amongst the proposals as to how the new series of meetings was to operate, the Checklist contains the following extract: 'Monthly data on sales of each producer by country'.

619 In order to establish the existence of a mechanism whereby domestic producers of certain large national markets informed each other of the tonnages which they sold on each of those markets, the Commission referred primarily to the Solvay tables.

620 Those tables are presented in a uniform manner.

621 The tables concerning the German market (Appendices 20 to 23 to the statement of objections) comprise several columns. The first contains the following headings: 'Consumption N.M.' (i.e. 'Consumption on the national market'), 'Imports from third countries', 'Sales by national producers'; the latter heading is followed by the names of the main national producers. The following columns are headed 'Hypothetical' for a given year, followed by a column headed 'Actual' for the same year. Each of those columns is divided into two, one side being expressed in tonnage and the other in percentage terms; opposite each heading in the first column, figures appear. It is worth noting that the sales of each of the German producers are indicated; thus the argument by Wacker and Hoechst that the sales figures for German producers are aggregated and not stated individually is not borne out.

622 The other tables, concerning the French (Appendices 24 to 28 to the statement of objections), Benelux (Appendices 29 to 32) and Italian (Appendices 33 to 40) markets also contain several columns. The first contains the names of national producers, a heading entitled 'Total of national producers', a heading entitled 'Imports', sometimes distinguishing between imports 'from other Fides countries' and those from 'non-member (non-Fides) countries', and a heading entitled 'Total market'. The next two columns refer to two successive years; each of those columns is subdivided into two, one side being expressed in tonnes and the other in percentages; opposite each of the headings in the first column figures appear. In certain cases, an extra column appears, showing in percentage terms the change from one year to another. In addition, in certain cases, a column headed 'Forecasts', referring to the current year, is added.

623 As is shown by the Decision, and as the Commission confirmed in reply to a question from the Court, this head of claim concerns only the German, Italian and French markets.

624 It should be noted at the outset that the Solvay tables do not refer merely to 'hypothetical' results but also to 'actual' results. Since the exchange of information is based on 'actual' results, the information in question can only be information as to the past; the argument that it was only a question of future estimates is therefore not borne out. Moreover, since the Solvay tables may be dated to the beginning of the month of March following the year in respect of which sales figures by producer and by country were exchanged, those figures cannot be regarded as being sufficiently old to lose all confidentiality.

625 In addition, whilst it is true that the tables contain figures in kilotonnes, sometimes accompanied by a decimal, that does not justify the conclusion that these were merely estimates by Solvay alone. In fact, the sales figures for Solvay, the undertaking from which the tables came, are themselves only stated in kilotonnes.

626 The Commission endeavoured to verify that the sales shown in the tables corresponded to the sales made by the producers mentioned therein. However, it was unable to verify all the figures in the tables as most of the producers said they were unable to provide their sales statistics.

627 That verification led to the finding that, on the German market, the sales figures for Hüls, BASF and ICI which the Commission was able to obtain were, for several years, identical with or close to those shown in the Solvay tables (point 16, second paragraph, of the Decision). It should be noted in that regard that BASF stated in its application that those documents 'give a very faithful picture of the state of the main competitors' sales'. Hüls has nevertheless remarked that the Solvay tables for Germany in respect of 1980 show overall sales of 736.7 kilotonnes; in relation to Wacker and Hoechst, as a footnote to Appendix 20 to the statement of objections shows, that amount included 'special work for [Dynamite Nobel AG]', which is not included in the Fides statistics. However, that objection does not explain precisely how Solvay was aware of the sales figures corresponding to that 'special work' and confirms, on the contrary, the Commission's conclusion that the producers communicated their sales figures to each other outside the Fides system.

628 Concerning the French market, the Commission found that the sales figures for Shell, LVM and Atochem appearing in the Solvay tables for certain years were very close to the actual sales figures which it had been able to obtain (point 16, third paragraph, of the Decision).

629 The Commission was unable to obtain any actual sales figures for the Italian market. The applicants named in those tables have not disputed the accuracy of the figures stated there. Moreover, as the Commission has pointed out, the first table concerning the Italian market carries the following commentary: 'The division of the national market between the different producers for 1980 has been indicated on the basis of the exchange of data with our colleagues.' Elsewhere, the tables attached as Appendices 37 and 39 to the statement of objections, which refer to 1983 sales, include, in the margin beside the name of the smallest

producer on the Italian market, the note 'estimates'. Finally, Solvay, in its reply of 25 February 1988 to a request for information, stated: 'Because of the particular features of the Italian situation, we cannot exclude the possibility that certain sales figures may have been communicated between competitors.' In that context, the explanation of the term 'colleagues' proposed by Enichem cannot be accepted.

630 Nevertheless, the applicants maintain that those figures are not necessarily the result of an exchange between producers. In that respect, they do not claim that the figures in the Solvay tables were themselves public, but that they could be calculated in the light of information obtained on the market or information that was already public. They base that argument on the explanations given by Solvay concerning the preparation of those tables, which, in that company's submission, could have been carried out without contacts with competitors.

631 The Court notes in that respect that Shell stated in its reply of 3 December 1987 to a request for information: 'Occasionally, in the period January 1982 to October 1983, Solvay would telephone to seek confirmation of its estimation of Shell companies' sales tonnage'. The letter states, however, that no precise information was given.

632 Concerning the French market, Solvay stated that overall market volume might be accurately determined by reference, *inter alia*, to Fides statistics. By subtracting the volume of its own sales, Solvay obtained the total sales of its competitors in the French market. As to the determination of sales for each producer, Solvay stated as follows: 'If the client belongs to a group producing PVC but nevertheless derives part of its supplies from other producers, it is estimated on a global basis that the parent company supplies its subsidiary as to 80%, the remainder being shared between competitors; if we know that one of the PVC consumers obtains its supplies primarily from one producer, the French personnel [of Solvay] responsible estimate on a global basis that that producer supplies 50% of that customer's needs; finally, if the customer is supplied by various producers outside the cases referred to above, the division is made

between the various suppliers on a linear basis in relation to their number (for example: if there are four suppliers for a given client, the French personnel responsible attribute 25% of that customer's supplies to each of them).' In that way, Solvay determines the share of each producer with its own customers. Finally, 'in order to determine the total quantities actually sold by competitors across the whole of the market, the French personnel [of Solvay] apply the market shares thus calculated to the total figure for PVC consumption... and thus obtain the approximate total sales of [Solvay's] competitors'.

633 It is obvious that that calculation method alleged by Solvay, and on which the other applicants rely, is based on global estimates and leaves significant room for approximations and unknown factors. The means of calculation claimed cannot, in the Court's view, allow the precise and exact determination of the sales of each of the producers, as they appear in the Solvay tables.

634 Similarly, in relation to the German market, Solvay stated that the sales share of each of its competitors was determined with the help of 'conversations with customers', public information (official statistics and specialised press) and the 'extensive market knowledge of [its] German personnel'. Here also, the Court cannot accept that that method has allowed Solvay, without any exchange with competitors, to arrive at results as precise as those in the Solvay tables. In that respect, moreover, the applicants' responses to a question of the Court show that the number of each producer's customers sometimes amounted to several hundred.

635 Finally, the examples given by DSM to demonstrate that the sales figures may easily be calculated in the light of public information are irrelevant. Those examples concern the assessment of the overall market and of the applicant's own market share, which is in no way at issue in the Decision.

636 In those circumstances, the objections of the applicants based on facts must be dismissed.

— The target prices and price initiatives

637 As already stated (paragraph 584 above), the Checklist contains in section 3 proposals as to how the new series of meetings envisaged was to operate. After listing the names of 10 PVC producers in the form of initials or acronyms, the document contains the following extracts: 'how to achieve greater price transparency', 'delta for importers (2% maximum?)', 'higher prices UK and Italy (levelling up?)' and 'abatement of tourism'. It also contains a heading 'Price proposals', which includes the following: 'The period of stability (we can accept 02 1980 status, but only for limited period)' and 'Price levels October to December 1980 and dates of implementation'. Finally, under the heading relating to the meeting to be held on 18 September 1980, the following statement appears: 'commitment to be sought on October/December price moves'.

638 The Response to Proposals contains two points relating to price. The first proposal, to the effect that '[t]here should be a common price level for Western Europe', is followed by the response: 'Proposal supported, but doubts voiced about the practicability of abandoning the traditional importers' discount.' The sixth proposal states that '[a] price increase should not be attempted before the end of the 3-month period of stabilisation', during which suppliers were to have contact only with customers that they had supplied during the previous three months (point 5 of the Response to Proposals); it is accompanied by the following response: '... because of the losses currently being incurred, the possibility of a price increase on 1 October should not be discounted, though the difficulties in the face of this were recognised, e.g. of obtaining unanimous support for this and of having to apply it at a time when demand in Western Europe was likely to be falling.'

639 In its Decision, the Commission identified 15 price initiatives (see Table 1 annexed to the Decision), the first of which came into being on 1 November 1980.

640 In this action, LVM and DSM are the only applicants to deny the very existence of the price initiatives found by the Commission, on the ground that such price initiatives were inconceivable in the PVC sector. Suffice it to say in that respect that Appendices P1 to P70 to the statement of objections refer systematically to target prices and price initiatives. Apart from the question whether these were individual or concerted actions, that finding is sufficient to rebut the argument of those applicants.

641 The existence of the price initiatives must therefore be regarded as established. It is then necessary to see whether, as the Commission maintains, those initiatives were the result of collusion between PVC producers.

642 It should be noted at the outset that even if, in the cases of some applicants, Appendices P1 to P70 are internal documents drawn up after the dates of the price initiatives identified by the Commission, that fact by itself does not vitiate the conclusion that the initiatives were the result of collusion. On the contrary, it is necessary to examine the contents of the documents in question.

643 The applicants do not deny that the documents produced by the Commission show that increases were planned on identical dates to take the PVC price to a uniform level which, as a rule, was much higher than that prevailing on the market in the days preceding those increases. In fact, in respect of each of the initiatives identified by the Commission that emerges from the very wording of Appendices P1 to P70. Moreover, the excerpts from the trade press annexed by the Commission to the statement of objections confirm those increases on the dates identified by the Commission.

644 The Court also considers, after a careful examination of Appendices P1 to P70, that those initiatives cannot be regarded as having been taken separately by individual companies. In the light of both the wording of the appendices and a comparison between them, the Court is satisfied that those documents do constitute cogent proof of collusion between producers concerning the price at European level.

645 Thus, for example, Appendix P1, which is a document from ICI, after referring to the fact that '[d]emand in the West European market for PVC in October increased considerably in anticipation of the November 1st price rise', states: 'The price increase announced for November 1st is intended to bring all West European suspension prices [for PVC] to a level of minimum DM 1.50.' That document can be compared with Appendices P2 and P3 from Wacker, which show an identical increase on the same date, and P4, from Solvay, which contains the following extract concerning November 1980: '[S]ome importers are offering discounts against UK producers, contrary to what was planned.' Moreover, Appendix 5, from DSM, also refers to the price initiative of 1 November.

646 Similarly, the second price initiative planned for 1 January 1981 to take the PVC price to DM 1.75 is referred to in Appendices P2 and P8 from Wacker, P4 from Solvay, P6 and P7, obtained from ICI, and P9 from DSM. In particular, Appendix P4, after the extract cited in the paragraph above, states: 'The outlook for December is poor, in spite of another increase announced for 1st January 1981.' Appendix P6 contains the following passage: '[A] further price move has been announced... to DM 1.75 [per kilogramme] across all Western European markets from 1 January 1981.'

647 The initiative planned for 1 January 1982, intended to take PVC prices to DM 1.60, is established by two documents from ICI, joined as Appendices P19 and P22 to the statement of objections, and two documents obtained from DSM, joined as Appendices P20 and P21. Appendix P22 contains the following commentary: 'The industry initiative... is to raise prices to DM 1.60 per kilogramme/£380 per tonne, but it does not look promising — BP and Shell are

refusing to cooperate.' Appendix P21 states: 'The outlook for January is not optimistic. In spite of the announced price increase, we now see a decrease [in] prices versus the December level. What is more, the UK suppliers did not even inform the UK customers about the increase [in] prices.' It should be noted in that regard that whereas it is possible for an undertaking to be informed, through its customers for example, that a competitor has or has not announced a price increase, it is not possible for it be informed that a producer has not announced a price increase that it should have announced. That can be explained only by the fact that the expected increase had previously been agreed between producers.

648 The initiative announced for 1 May 1982 to take prices to DM 1.35 is confirmed by Appendices P23 and P26 from ICI, P24 from DSM and P25 issued by Wacker. In particular, the author of Appendix P23, examining price levels on the European market, and especially the French and German markets, in April 1982, adds: 'The slide in prices was halted by the month end, due to the announcement of a general increase in European prices to DM 1.35/kg on 1 May.' Appendix P24, concerning May 1982, stated that '[d]ue to the announced price increase' DSM's prices had risen, but that '[t]his is far behind the planned increase to the levels of DM 1.35/DM 1.40. This is mainly due to the failures in the German and Benelux markets and because of the non-cooperation of the UK and Scandinavian suppliers in the price increase. In France and Italy the increase was more successful.'

649 The initiative of 1 September 1982 to take prices to DM 1.50/kg is established, in particular, by Appendices P29, P39 and P41 from DSM, P30 and P34 from ICI, and P31 and P33 from Wacker. In Appendix P29, dated 12 August 1982, one finds the following concerning prices for August: 'Some pressure is felt in Germany and Bellux, which is kind of a surprise as a major price increase is planned [for] 1st September.' Under the heading 'Prices September', the document continues: 'A major price increase [to] a level of [approximately] DM 1.50/kg is planned. So far, we have noticed that all major producers are announcing this price increases (*sic*) and only very few deviations have been found.' Appendix P32 contains the following commentary: 'In the Western European market, very intensive efforts are being made to consolidate prices on

1 September.' Appendix P33 contains the following observation: 'The price increase of 1 September taking PVC to a minimum of DM 1.50/kg has been generally successful, although we are still finding cases in October where our competitors are supplying at DM 1.35 and DM 1.40/kg.' In Appendix P34, the author of the document, surveying the situation of the Western European market in general, notes an increase in demand in October 1982 in relation to the previous month, and adds: '[H]owever, this was to a large extent due to the endeavours to bring up prices [on] 1 September, which consequently had led to stocking up before then.' Appendix P41 contains the following commentary, concerning the initiative of 1 September: 'The success of the price increase is now very much depending on the discipline of the German producers.'

650 Reference can also be made to the price increases on 1 April 1983 and 1 May 1983, designed to take PVC prices to DM 1.60, with a minimum of DM 1.50, and DM 1.75, with a minimum of DM 1.65, respectively. In its reply of 3 December 1987 to a request for information (Appendix 42 to the statement of objections), Shell stated that at a meeting in Paris on 2 or 3 March 1983 between Western European PVC producers 'some proposals were made by other producers relating to price increases and volume restraint', although it added that no agreement was reached. ICI has confirmed that that meeting was held (Appendix 4 to the statement of objections). Appendix 43, from ICI, includes the following passage: 'Inform all customers starting Monday, 7 March [1983] that prices will be raised to DM 1.60 with rebates for category 1 and category 2 of respectively 10 and 5 pfennig.' As the remainder of the text of that telex shows, that increase was to take effect from 1 April 1983. The author of Appendix P49 from Shell dated 13 March 1983, after referring to a decline of prices in March to a level of DM 1.20/kg, states: 'A major initiative is planned to stop this erosion, with minimum targets established for March/April of DM 1.50 and DM 1.65/kg respectively.' A telex from ICI of 6 April 1983, joined to the statement of objections as Appendix P45, comments: 'Evidence from the market clearly suggests that the industry at large is now following the price initiative of 1 April 1983.' A document from Wacker of 25 April 1983 (Appendix P46) refers to 'efforts to increase PVC prices in April to DM 1.50/kg and in May to DM 1.65/kg'. A DSM internal report of 24 June 1983 (Appendix 48), after referring to a decline in prices in Western Europe during the first quarter of 1983, states: 'Since

April 1st, an attempt has been made to raise prices across Western Europe. The planned increase [to] a level of DM 1.50 [on] April 1st and DM 1.65 [on] May 1st has failed.'

651 In an ICI memorandum of 31 January 1983, annexed as Appendix 44 to the statement of objections, it was stated that: 'In Europe the "Target prices" are fairly well known through the industry and as such are "Posted levels"'. The author added: 'It is widely acknowledged that these Posted levels will not be achieved in a slack market..., but the announcement does have a psychological effect on the buyer. An analogy is the car purchase where the "List Price" is set at such a level so that the purchaser is satisfied when he obtains his 10-15% discount, he has struck a good deal, but the car producer/garage has still an adequate margin.' In those circumstances, the author suggested that 'the PVC industry announce widely Target prices which are well above likely attainable, e.g. DM 1.65/kg in March' (emphasis removed).

652 It may also be noted that the trade press itself referred on a number of occasions to collusion between PVC producers. Thus, in *European Chemical News* of 1 June 1981 one reads: 'Europe's major plastics producers are making a concerted effort to impose significant price increases for [PVC] in an attempt to reach early 1981 target levels.' On 4 April 1983, the same publication stated: 'West Europe's [PVC] producers are making a determined attempt to increase prices from the beginning of April. They are understood to have met in Paris in the middle of March to discuss the price rises.'

653 In the light of a meticulous examination of the numerous documents relating to PVC prices produced by the Commission as appendices to the statement of objections, of which those described in paragraphs 645 to 650 above are only examples, the Court considers that it has been established, on the evidence adduced by the Commission, that the 'price increases', 'price initiatives' or 'target prices' to which those documents refer did not constitute mere individual

decisions taken by each of the producers independently, but were the result of collusion between them.

654 It is to be noted immediately, however, that many of the Appendices P1 to P70 refer to the failure or limited success of certain price initiatives, as the Commission found in point 22 of that Decision.

655 Those failures or limited successes may be explained by the various factors highlighted by the Commission in point 22 and which are expressly mentioned in some of the Appendices P1 to P70. In some cases, for example, customers bought heavily at the old price in advance of an announced price increase. That is what emerges in particular from Appendices P8, P12, P21, P23, P30 and P39.

656 Moreover, it appears on reading Appendices P1 to P70 that, at least on certain occasions, the producers sought to find a balance between maintaining sales volume and relationships with individual customers on the one hand, and increasing prices on the other.

657 Thus, special discounts or rebates were sometimes offered to major customers (see, for example, Appendix P17), or temporary agreements were made with customers to ensure supplies to them at prices prior to the proposed increase (in particular Appendix P21). Several documents obtained by the Commission show that, on certain occasions, producers evinced their intention to support a proposed price initiative whilst ensuring that that would not be to the detriment of sales volumes. Thus an ICI telex sent to various branches in Europe on 18 December 1981 concerning the price initiative for January 1982 reads: '[T]here remains some doubt whether these levels will be achieved, so please keep a careful eye on individual customer situations throughout Europe... it is very important that we strike the right balance between increasing prices and maintaining customer share in this difficult period.' A note by Wacker of

9 August 1982 (Appendix P31) contains the following observation: 'Wacker's strategy for the forthcoming months is to follow in the wake of our competitors' efforts to raise prices, whilst not tolerating any fresh diminutions in quantities. In other words, if the market does not accept that increase, we shall exercise the necessary price flexibility at the required moment.' Similarly, an undated note by DSM (Appendix P41) contains the following commentary concerning the forthcoming initiative of 1 January 1983: 'DSM will support the attempt to increase the prices, though not as a leader. The price increase will be supported within the scope of a defence of our market shares.'

658 Conversely, a number of documents show the intention of producers to support a price initiative strongly, or actual support for such an initiative, despite the risks for sales volumes. Thus, for example, in the case of DSM, Appendix P13 states that 'we supported the price increase strongly' and Appendix P41 contains the following extract: 'The September price increase and the decision of DSM to support this increase very strongly have resulted in a loss in volume, but far better prices.' Concerning ICI, reference may be made in particular to Appendix P16, dated 14 July 1981, concerning the price initiative of 1 June and referring to ICI's firm stance on prices, to Appendix P30 of 20 October 1982, which states that 'ICI maintained a particularly hard line', and to Appendix P34, concerning the September 1982 initiative, which states: 'Again we supported the price increase in full.' Reference may also be made, in the case of Wacker, to Appendix P15, concerning the price initiative of 1 September 1981 designed to take the target price to DM 1.80: 'Wacker Chemie has decided, as a general policy and in the interests of urgent price consolidation, not to transact any business below DM 1.80 in September.'

659 As the Commission stated in point 22 of its Decision, some producers were occasionally accused of aggressive market behaviour, which brought disruption or failure to price initiatives which other producers wished to support. Thus, in a note from DSM of 25 February 1981 (Appendix P9), the author states that: 'The announced price increase [on] January 1 to a level of DM 1.75 has certainly not been successful.' The note continues: 'The aggressive attitude of some French and Italian suppliers during the last three months initiated heavy competition at the

large accounts, which resulted in decreasing prices.' Similarly, Appendix P23 from ICI, dated 17 May 1982, refers to ICI's concerns as to its UK market share and states: 'Shell, BP and DSM were seen as particularly aggressive here.' A DSM document of 1 June 1981, sent by the Commission to the undertakings by letter of 3 May 1988, states in relation to the Belgian and Luxembourg markets in April 1981: 'An attempt to increase prices failed after one week. Aggressive foregoing by BASF, Solvay, ICI and SAV resulted in a price level that was no better, no worse than the previous month.' Another DSM document of October 1981 states in relation to the same geographical markets: 'During August, prices came under pressure. A more aggressive behaviour by several suppliers (BASF, SAV, Solvay, Anic and ME) was noticed.' An ICI document of 19 April 1982 states: 'Confirmation of which manufacturers are leading the price downwards is difficult to find, but both Shell and Solvay have been indicated as probable culprits.'

660 In reality, price initiatives could succeed only in a favourable environment and that was beyond the control of the producers. Thus, Appendix P52 shows that ICI viewed several factors as contributing to the likely success of the initiative set for 1 May 1983, including lower stocks, a resumption in demand, rumours of shortages, especially for export, a rise in prices on external markets and the effects of rationalisation of the sector. Other documents show change in the level of demand (for example, Appendices P27, P31, P45, P47) or of imports from non-member countries (for example, Appendices P16 and P31). Conversely, matters such as over-capacity, increased imports, falling prices on the markets of non-member countries, the large number of PVC producers in Western Europe or the opening of new plants by Shell and ICI appear as factors making the price level more fragile (Appendix P21 from DSM concerning 1981).

661 The Court concludes from the above examination that the Commission correctly assessed the facts of this case as regards price initiatives.

— The origin of the cartel

662 In the light of the above examination, there appears to be a close correlation between the projects described in the planning documents and the practices actually found on the PVC market, as from the months immediately following the drawing up of those documents, in terms of both prices and regulation of volume, which constitute the two main aspects of the infringement. In addition, but to a lesser extent, there is a correlation between the projects described in the planning documents and the practices of which complaint is made concerning information exchange between producers.

663 The Court will examine the applicants' arguments concerning the origin of the cartel in the light of the wording of the planning documents, in the light of the information given by ICI concerning them in its reply to a Commission request for information of 30 April 1984, annexed as Appendix 4 to the statement of objections, and in the light of that correlation between the planning documents and the practices actually found in the market in the weeks immediately after they were drafted.

664 In its reply to the request for information, ICI indicated that, bearing in mind the place where the Commission found the documents, it was reasonable to suppose that they concerned PVC. The correlation between the planning documents and the practices actually found in the PVC market confirms that conclusion.

665 Secondly, the exact identity of the author of the planning documents does not appear to be decisive. The only question which matters is whether those documents may be regarded as the blueprint for a cartel, as the Commission maintains. Moreover, the document entitled 'Response to Proposals' does contain the name of its author: Mr Sheaff, the Director of ICI's 'Plastics' Division at the beginning of the 1980s. In its reply to a request for information, ICI indicated that it was reasonable to suppose that Mr Sheaff was also the author of the document entitled 'Checklist'.

666 The Court cannot accept the objection that the planning documents concerned only the British market, or the British and Italian markets. Point 1 of the Response to Proposals concerns a 'common price level for Western Europe'. Point 2 concerns the possibility of a quota system 'on a company and not a national basis', which at the very least excludes the hypothesis that a single geographical market was involved. Moreover, in point 6 of the Response to Proposals, which considers the possibility of a price rise in the final quarter of 1980, reference is made to difficulties resulting, in particular, from a fall in 'demand in Western Europe' as a whole. Even if, in two places, the Checklist does refer more particularly to the British and Italian markets, it contains a point 3 headed 'Proposals for a new framework of meetings', and that point contains proposals formulated in general terms which do not in any way suggest that they are limited to one or two geographical markets; on the contrary, the fact that those proposals are presented just after the list of the main European PVC producers supports the conclusion that the British and/or Italian markets were not the only ones envisaged. Finally, the planning documents refer in particular to two practices, the first relating to price initiatives, of which the first was scheduled for the last quarter of 1980, and the second relating to a quota system accompanied by a compensation mechanism. That analysis shows that an initiative was introduced on 1 November 1980 to 'bring all West European suspension prices for PVC to a minimum level of DM 1.50', and that a compensation mechanism was put into operation from the early months of 1981, in which all European producers except Shell participated. That correlation supports the conclusion that the planning documents did not refer merely to one or two national markets.

667 The applicants' claim that the planning documents themselves were never distributed outside ICI's premises is irrelevant. All that matters is whether the content of those documents reveals the existence of a plan to organise the PVC market outside the operation of free competition.

668 The argument that the two planning documents were unconnected cannot be accepted. In the first place, they were both found at ICI's premises and were physically attached to each other. Secondly, the Checklist comprised a list of

certain topics which, in a general way, concerned mechanisms for monitoring sales volumes and regulating prices. Those topics are themselves considered, with greater precision, in the Response to Proposals. Moreover, some of the more detailed points occur in both documents. That applies to the reference to a three-month stabilisation period, the possibility of a price rise in the final quarter of 1980, the need to find an arrangement to take account of new production capacity, or again the possibility of variances on predetermined market shares, with the same reference to a threshold of 5% and to the reservations expressed in that regard. The Court cannot therefore accept that those two documents are unrelated.

669 The applicants nevertheless argue that, having seen the planning documents, the Commission wrongly concluded that the second document constituted a summary of the PVC producers' response to ICI's proposals (point 7, final paragraph, of the Decision). They argue that the planning documents could be nothing more than expressions of opinion or observations of staff members of ICI, or of ICI and Solvay, the undertaking more particularly referred to in points 5 and 6 of the Checklist. They also argue that the Response to Proposals is an earlier document than the Checklist, thereby negating the Commission's argument.

670 In the Court's view, the mere wording of the planning documents does not support the Commission's conclusion, in the final paragraph of point 7 and the first paragraph of point 10 of its Decision, that the second planning document constituted the response of the other PVC producers to ICI's proposals any more than it supports the conclusion that those documents were mere expressions of the opinions of ICI staff members.

671 Even if the applicants' argument were correct, that would not affect the Commission's approach to the evidence. As the above examination has shown, the Commission has produced numerous documents establishing the existence of the practices described in the Decision. The fact also remains that the planning documents, and especially the Checklist, which emanate from a senior ICI

executive, clearly reveal the existence of a blueprint for a cartel on the part of that undertaking, which at the time those documents were produced was one of the main European PVC producers; moreover, the practices envisaged in those documents were detected in the West European PVC market in the following weeks. It therefore appears that, at the very least, those planning documents constitute the basis on which consultations and discussions between producers took place, and led to the actual implementation of the unlawful measures envisaged.

672 In that regard, even if the documents produced by the Commission in support of its factual findings concerning practices on the PVC market do not indeed make any reference to the planning documents, the Court considers that the close correlation between those practices and the practices described in those documents sufficiently demonstrates the existence of a link between them.

673 The Commission was therefore right to conclude that the planning documents could be regarded as being at the origin of the cartel which materialised in the weeks which followed their production.

— The meetings between producers

674 It should be noted at the outset that the fact that informal meetings took place between producers outside the context of trade associations is not contested by the applicants.

675 Moreover, for the purposes of assessing the facts in relation to Article 85 of the Treaty, it is not essential for the date, and *a fortiori* the place, of the meetings between the producers to be established by the Commission. ICI's reply of 5 June

1984 to a request for information from the Commission (Appendix 4 to the statement of objections) shows that those meetings took place 'fairly regularly, at differing levels of seniority, approximately once a month'. ICI stated that by reason, *inter alia*, of the fact that no documents concerning those meetings could be found, it was not able to give the dates and locations of meetings held since August 1980. On the other hand, it could identify the dates and locations of nine informal meetings between producers during the first ten months of the most recent year, namely 1983. Thus, six meetings were held in Zurich on 15 February, 11 March, 18 April, 10 May, 18 July and 11 August 1983, two in Paris on 2 March and 12 September 1983, and one in Amsterdam on 10 June 1983. ICI also listed the undertakings which are believed to have participated in at least some of those informal meetings, namely, in alphabetical order, Anic, Atochem, BASF, DSM, Enichem, Hoechst, Hüls, ICI, Kemanord, LVM, Montedison, Norsk Hydro, PCUK, SAV, Shell, Solvay and Wacker.

676 In its reply of 3 December 1987 to a request for information (Appendix 42 to the statement of objections), Shell admitted participation in the Paris meeting of 2 March 1983 and the Zurich meeting of 11 August 1983, in respect of which the Commission had obtained proof in the form of diary entries.

677 BASF, in its reply of 8 December 1987 to a request for information from the Commission (Appendix 5 to the statement of objections), also stated that meetings took place between PVC producers between 1980 and October 1983, 'sometimes as often as once a month'. It also listed the undertakings represented regularly or occasionally at those meetings, namely, in alphabetical order, Anic, Atochem, Enichem, Hoechst, Hüls, ICI, LVM, Montedison, Norsk Hydro, Shell, Solvay and Wacker.

678 Finally, in the course of these actions, Montedison has acknowledged the existence of informal meetings between producers, as referred to in the specialist press.

679 Although the applicants do not deny that those informal meetings between producers took place, they object that their subject-matter has not been established.

680 Despite the number of meetings which were held during the period concerned and the investigative measures carried out under Articles 11 and 14 of Regulation No 17, the Commission was not able to obtain any minutes or written record of those meetings. However, contrary to what the applicants maintain, it does not follow from point 9 of the Decision that the Commission concluded, on the strength of that fact alone, that the meetings pursued an anti-competitive aim.

681 In its reply to the requests for information, ICI indicated that those meetings covered a wide range of issues, 'including discussions on price and market volumes'. More particularly, it stated that 'discussions certainly took place at the meetings held between producers during the period concerned regarding price levels and the level of margin necessary to reduce the extent of the massive losses they were incurring. It is ICI's recollection that individual producers expressed their own views on this subject and that these were debated. Often producers held different views on the appropriate price levels.... However, an apparent consensus sometimes emerged of what might represent price levels to which producers might aspire, but no firm price commitments resulted from such discussions. It was ICI's judgment at the time, and remains so, that any such consensus was more apparent than real. Certainly, as far as ICI is aware, each party to such discussions appears to have felt free to take whatever independent action it felt was appropriate to its own individual circumstances.'

682 In its response of 3 December 1987 to a request for information, Shell acknowledged having participated in two meetings listed by ICI. Concerning the first, which was held in Paris on 2 March 1983, it stated: 'The meeting discussed industry difficulties, and some proposals were made by other producers relating to price increases and volume restraint. [The Shell representative] gave no

support to such proposals. [He] cannot recollect that any agreement or consensus was reached.' Concerning the second meeting, held in Zürich on 11 August 1983, Shell stated that: 'Some producers expressed their views as to a price proposal. [The Shell representative] gave no support to any such views. [He] cannot recollect that any agreement or consensus was reached.'

683 The Court notes in this respect that, contrary to what the applicants argue, the Commission has not misconstrued the replies of certain undertakings to the requests for information. It recalled that each of those producers had, despite the purpose of the meetings, maintained that no 'commitments' were entered into there (see point 8, second paragraph, of the Decision concerning ICI and point 9, first paragraph, concerning primarily Shell and Hoechst).

684 It should not be forgotten, moreover, that the planning documents indicated expressly the intention to establish a 'new framework of meetings' between producers, which were to discuss arrangements on prices, volume monitoring and exchange of information. The Commission has also established the existence of producer meetings during the period concerned. Finally, as the earlier analysis has shown, the Commission has established the existence during the period in question of quota mechanisms, price regulation and exchanges of information between producers.

685 From the close coincidence between what was envisaged in the planning documents, on the one hand, and the practices actually implemented on the PVC market, the Commission correctly concluded that the informal meetings between producers were in fact concerned with the topics set out in the planning documents.

686 The Court therefore finds that the Commission correctly established the purpose of the meetings between producers which were held from 1980 to 1984.

687 In those circumstances, the applicants' objections to the part of the Decision headed 'The Facts' must be dismissed.

2. Law

688 The applicants accuse the Commission of committing several errors of law in applying Article 85 of the Treaty. First, it erred in law by classifying the conduct of the undertakings as an agreement 'and/or' a concerted practice (a). Secondly, they argue that it was wrong in this case to describe it as either an agreement or a concerted practice (b). Thirdly, it infringed Article 85 of the Treaty in determining the object or effect of the alleged collusion (c). Finally, it erred in law by holding that it affected trade between Member States (d).

(a) The classification of the conduct as an agreement 'and/or' a concerted practice

Arguments of the applicants

689 LVM, Elf Atochem, DSM, Hüls and Enichem maintain that the Commission infringed Article 85(1) of the Treaty by contenting itself with the statement in the operative part of the Decision that the undertakings had participated in an agreement 'and/or' a concerted practice.

690 The applicants note that the Court of First Instance has recognised the possibility of a joint classification (in particular, Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833, paragraphs 234 and 235).

691 In this case, however, Enichem argues that by adopting an alternative legal classification rather than a cumulative one the Commission went beyond that case-law.

692 LVM, Elf Atochem, DSM and Hüls maintain that the case-law referred to above can apply only in special circumstances. Only if proof of both classifications were established would such a solution be applicable. In this case, the Commission has not established the existence of either an agreement or a concerted practice.

693 LVM, DSM and Enichem argue that the distinction between those two legal classifications entails differences as far as adducing evidence is concerned.

Findings of the Court

694 The Court notes at the outset that the arguments of LVM, Elf Atochem, DSM and Hüls do not seek to challenge the principle itself that conduct may be classified as an agreement 'and/or' a concerted practice, but rather the adoption of such a classification in this case, given that, in their submission, neither an agreement nor a concerted practice has been shown to exist. The reply to this plea therefore depends on the reply to the following plea.

695 It is thus only Enichem which challeges the principle itself that conduct may be classified as an agreement 'and/or' a concerted practice.

696 In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article 85 of the Treaty.

697 The Commission is therefore entitled to classify that type of complex infringement as an agreement 'and/or' concerted practice, inasmuch as the infringement includes elements which are to be classified as an 'agreement' and elements which are to be classifed as a 'concerted practice'.

698 In such a situation, the dual classification must be understood not as requiring simultaneous and cumulative proof that every one of those factual elements reveals the factors constituting an agreement and a concerted practice, but rather as designating a complex whole that includes factual elements of which some have been classified as an agreement and others as a concerted practice within the meaning on Article 85(1) of the Treaty, which does not provide for any specific classification in respect of that type of complex infringement.

699 This plea, as raised by Enichem, must therefore be dismissed.

(b) Whether the conduct in this case could be classified either as an agreement or as a concerted practice

Arguments of the parties

700 The applicants argue that the Commission has not established the existence of either an agreement or a concerted practice.

701 BASF and ICI argue that, for an agreement to exist for the purposes of Article 85(1) of the Treaty, there must be evidence of a commitment to common objectives and of mutual obligation (Case 44/69 *Buchler* v *Commission* [1970] ECR 733, paragraph 25; *Van Landewyck*, paragraph 86). Under Article 85(1), an agreement has to be concluded between at least two parties who, even if not in such a manner as to be binding, have shown an intention to engage in a given line of conduct that is likely to distort competition (Case 28/77 *Tepea* v *Commission* [1978] ECR 1391). It is not therefore sufficient to establish the existence of a consensus between producers.

702 The applicants argue that the facts in this case do not establish that the 'Checklist', which might or might not have been sent to other undertakings, or even brought to their attention, constituted a proposal for collusion. They maintain that there is nothing to show that the proposal allegedly constituted by the 'Checklist' was discussed, drawn up by common agreement and accepted by other producers. Nor, in the light of its very content, could the 'Response to Proposals' constitute the acceptance of the alleged cartel proposals. In any event it has not been established that the opinions expressed in the 'Response to Proposals' emanate from any of the other PVC producers.

703 The applicants further argue that the mere existence of the meetings does not allow it to be established what their purpose was. There was nothing to link them to the alleged overall plan. In fact, they submit, the documents used by the Commission concerning the price initiatives showed that the undertakings pursued independent pricing policies in the light of market trends; none of them proved prior concerted action between producers.

704 In Elf Atochem's submission, the Commission has not established the existence of an agreement with any certainty. The mere existence of meetings was not sufficient to reveal their purpose or the adherence to the alleged agreement of each of the parties taking part. The Commission could not deduce the existence of a 'broad continuing agreement' from circumstances which showed, at most, conduct that was neither general, nor uniform, nor permanent. Thus there was, at most, a series of discrete agreements.

705 The applicants do not challenge the definition of a concerted practice in the third paragraph of point 32 of the Decision (Case 48/69 *ICI*, paragraph 112; *Suiker Unie*, paragraph 174; Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021, paragraphs 12 to 14; *CRAM*, paragraph 20). Nevertheless, Elf Atochem, BASF, ICI and Hüls argue that the concept of a concerted practice involves two elements, the one subjective (concertation) and the other objective (conduct on the market, that is to say a practice). In this case, the Commission did not establish either. In particular, by not carrying out an investigation of the undertakings' market behaviour, the Commission failed to demonstrate even the existence of a concerted practice.

706 LVM and DSM argue that the Commission has sought, in breach of Article 85 of the Treaty, to penalise an attempted infringement. Since the article concerns the object or effect of a practice, there must necessarily be implementing measures. Therefore, an attempt or intention to conclude a prohited agreement, and by nature any form of collusion not resulting in implementing measures in the form of 'practices', falls outside the scope of Article 85 of the Treaty. LVM and DSM thus deny that mere participation in meetings with a prohibited purpose may be classified as a punishable act.

707 Elf Atochem argues that parallel conduct constitutes only imperfect evidence of a concerted practice (*Ahlström Osakeyhtiö*); moreover, the burden of proof cannot be reversed by the mere finding of parallel conduct (Opinion of Advocate General Darmon in *Ahlström Osakeyhtiö*, at p. I-1445). In any event, the applicant maintains that the Commission has not even established parallel conduct in the matter of prices, quotas and compensations.

708 BASF argues that the mere fact that rival undertakings implement a price increase does not signify that they are acting in concert (Case 48/69 *ICI*). In that respect, it emphasises the crucial importance of price for the marketing of PVC, bearing in mind that it is an interchangeable bulk product. The price was thus established at the balancing point between supply and demand. The lowering of prices by a producer, the only way for him to increase his market share, would necessary lead to a general collapse in prices in view of the small number of suppliers. Conversely, a rise in prices would succeed only if market conditions allowed; otherwise, other producers would not follow the rise, and its initiator would either lose market share or be forced to lower his prices again.

709 Wacker and Hoechst claim that the Commission wrongly refrained from examining the actual market behaviour of the undertakings.

710 SAV argues that the Commission infringed its obligation to carry out a detailed and objective examination of the economic context of the alleged cartel (*Société Technique Minière*, *Suiker Unie*, *Ahlström Osakeyhtiö* and *SIV*). In this case, the Commission merely made a few general remarks on the market (points 5 and 6 of the grounds for the decision), but made no attempt to examine its actual functioning.

711 Montedison argues that the Commission has not taken account of the conditions in which prices are determined in the case of products intended for industrial users; in reality, price tables are published regularly, the price applied by the main undertaking in the sector allowing others to adopt a position without thereby forfeiting their autonomy (*Suiker Unie*). Against those obvious considerations, the Commission merely refers to the purpose of the meetings as stated in the planning documents, the participation of nearly all PVC producers at those meetings, and the producers' internal marketing reports (Decision, point 21). There was nothing to show, however, that the 1980 proposal, which was drafted by one undertaking, was accepted and implemented; nor was Montedison even mentioned. Moreover, the mere fact that nearly all producers participated in those meetings reveals nothing as to their content. Finally, the internal marketing reports did not concern Montedison. The company adds that, even if it were established, the fact that list prices rose after the meetings does not show that the rises were the result of concerted action.

712 Enichem argues that the fact that none of the price initiatives ever succeeded suggests that the efforts in question were made by producers individually. Moreover, the documents collected by the Commission (the P appendices to the statement of objections) show the highly competitive nature of the market, which cannot be imputed simply to lack of discipline in a cartel; in the absence of direct proof, the allegation of a cartel should be supported in detail by actual collusive conduct on the part of the presumed participants, which was not the case here.

713 LVM, Elf Atochem, DSM, SAV, ICI, Hüls and Enichem argue that, even if the factual findings of the Commission were established, it would be sufficient for the undertakings impugned to invoke circumstances casting those facts into a different light and thereby permitting an alternative explanation to that adopted by the Commission (*CRAM*, paragraph 16; *Ahlström Osakeyhtiö*, especially at paragraphs 70 and 72).

714 In this case, as regards price initiatives, the Commission rejected without evaluation the explanation put forward by the applicants and based on the

economic theory of 'barometric price leadership'. However, that theory leads to the conclusion that price initiatives are simply the result of the normal operation of the market, without illicit contact between enterprises.

Findings of the Court

715 It is well established in the case-law that for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way (see, *inter alia*, *ACF Chemiefarma*, paragraph 112; *Van Landewyck*, paragraph 86).

716 The applicants' arguments do tend to show, at least in part, that the planning documents cannot be classified as an agreement within the meaning of Article 85(1) of the Treaty. Those arguments are, however, irrelevant.

717 The grounds of the Decision, and particularly points 29 to 31 concerning the nature and structure of the agreement, show that the Commission did not classify the planning documents as an agreement within the meaning of that provision. Moreover, as was emphasised in the part of the Decision headed 'The Facts', the Commission states that it regards those documents as a 'blueprint for a cartel'.

718 Furthermore, the applicants' arguments consist in repeating the factual objections which have already been examined and rejected by the Court.

719 In those circumstances, the applicants cannot successfully argue that the creation at producer meetings and the joint implementation of quota and compensation mechanisms, price initiatives and exchanges of information on actual sales, over a number of years, do not constitute the expression of a joint intention to behave on the market in a certain way.

720 Moreover, although Article 85 distinguishes between 'concerted practices', 'agreements between undertakings' and 'decisions by associations of undertakings', the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition (Case 48/69 *ICI*, paragraph 64). The criteria of coordination and cooperation laid down by the case-law of the Court, far from requiring the elaboration of an actual 'plan', must be understood in the light of the concept inherent in the Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators with the object or effect either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (*Suiker Unie*, paragraphs 173 and 174).

721 The applicants do not challenge that case-law, referred to by the Commission in point 33 of the Decision, but contest its application in this case.

722 Nevertheless, by organising over a period of more than three years, and participating in, meetings whose purpose has been correctly established by the Commission, producers took part in concerted action whereby they knowingly substituted practical cooperation between them for the risks of competition.

723 Each producer thus not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors, but also could not fail to take account, directly or indirectly, of the information obtained during those meetings in determining its future market policy.

724 The applicants nevetheless rely on the judgments in *CRAM* and *Ahlström Osakeyhtiö* to challenge the Commission's conclusions.

725 Those judgments establish that where the Commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and thus allow another explanation of the facts to be substituted for the one adopted by the Commission (*CRAM*, paragraph 16; *Ahlström Osakeyhtiö*, especially at paragraphs 70, 126 and 127).

726 That case-law is not applicable here.

727 As the Commission points out in point 21 of the Decision, the proof of the concerted action between the undertakings is based not on a mere finding of parallel market conduct but on documents which show that the practices were the result of concerted action (see paragraph 582 et seq.)

728 In those circumstances, the burden is on the applicants not merely to submit an alleged alternative explanation for the facts found by the Commission but to challenge the existence of those facts established on the basis of the documents

produced by the Commission. As examination of the facts has shown, that has not been done in this case.

729 The Commission was therefore right to classify the conduct in question, in the alternative, as a concerted practice within the meaning of Article 85(1) of the Treaty.

730 Finally, the Court finds that, as stated in point 31 of the Decision, the practices implemented are the result of collusion which continued over several years, based on the same mechanisms and pursuing the same common purpose. The Commission was therefore right to conclude that those practices were to be regarded as a single permanent collusion rather than a series of discrete agreements.

731 The plea must therefore be dismissed in its entirety.

(c) The finding that the object or effect of the conduct was to restrict competition

Arguments of the parties

732 LVM and DSM argue that restriction of competition requires, as evidence that there has been an infringement, obvious conduct and an effect on the market. In this case, in the absence of proven conduct the Commission should have made efforts to demonstrate an effect on the PVC market. It did not do so, contenting itself with assertions, which were, moreover, merely speculative.

733 LVM, DSM, Hoechst and Wacker maintain that the Commission unlawfully failed to carry out, or have carried out, an economic analysis of the effects of the alleged cartel, whereas it is required to assess the effects on a market and to take account of the economic context (see, in particular, *Société Technique Minière* and *Ahlström Osakeyhtiö*, paragraph 70). Moreover, it rejected without explanation all the economic conclusions of an expert commissioned by the incriminated undertakings showing that the PVC market was characterised by lively competition. Wacker and Hoechst claim that in order to compensate for the insufficient examination by the Commission of the alleged cartel's effects an expert report should be commissioned in order to assess those effects, or that a period should be allowed them to request and obtain such a report. SAV maintains that the Commission contented itself with formulating a few generalities about the market (points 5 and 6 of the Decision), but did not examine its actual functioning at all.

734 ICI argues that when the Commission was appraising the effect of the alleged cartel on prices it failed to take into account the economic evidence which had been submitted. That showed that the PVC market was characterised by lively competition, thus confirming that PVC prices were not subject to any influence other than the free play of competition. The Commission did not put forward any evidence of its own to substantiate its theory, which was based on mere assertion. In reality, whatever took place during the meetings had no effect on prices.

735 BASF maintains that the Commission's examination of the effects of the alleged cartel was inadequate, as is confirmed by the removal of a passage in point 37 of the German version of the Decision compared with the 1988 decision.

736 Montedison recalls that the PVC sector was in crisis following the substantial rise in oil prices in 1979. All undertakings produced at a loss between 1980 and 1986, causing some of them to withdraw from the market. Faced with that situation, they made use of their right to hold meetings and to express their respective opinions freely. The practices complained of were not, therefore, the result of collusion but represented attempts to recover some of the losses, the only rational

conduct in a market in crisis. Moreover, those practices had no effect on competition; the Commission itself found that the price initiatives met with total failure or only partial success.

737 Hüls claims that the alleged price initiatives had no effect, as market prices remained below the alleged target prices.

738 Enichem argues that the Commission has not adduced evidence that the market was affected. The psychological effect alleged by the Commission does not correspond to any precise legal concept. Moreover, prices barely changed between January 1981 and October 1984.

Findings of the Court

739 Examination of the facts shows that the infringement complained of consisted, in particular, in the joint fixing of prices and sales volumes on the PVC market. The aim of such an infringement, which is expressly mentioned by way of example in Article 85(1) of the Treaty, is anti-competitive.

740 The fact that the PVC sector was in crisis at the time of the facts in question does not justify the conclusion that the conditions for applying Article 85(1) of the Treaty were not fulfilled. Whilst such a market situation might in an appropriate case be taken into account with a view to obtaining, exceptionally, an exemption under Article 85(3) of the Treaty, it is clear that the PVC producers did not at any time apply for exemption under Article 4(1) of Regulation No 17. Moreover, as is shown by point 5 of the Decision in particular, the Commission was not

unaware of the crisis in the industry when it made its assessment; it took account of it in determining the amount of the fine.

741 It is well established that for the purpose of applying Article 85(1) of the Treaty there is no need to take account of the actual effects of an agreement once it appears that its aim is to prevent, restrict or distort competition within the common market (see, in particular, *Consten and Grundig* v *Commission* [1966] ECR 299, at p. 342). Therefore, in so far as the applicants' plea is to be understood as requiring that it be shown that competition has actually been affected, even though the anti-competitive aim of the conduct complained of is established, it cannot be accepted.

742 It does appear that two sentences of point 37 of the German version of the 1988 decision, relating to the effects of the agreement, have been removed from the German version of the decision. Since that removal was merely intended to harmonise the various language versions of the Decision, however, the applicants cannot conclude that the Commission's examination of the effects of the infringement was insufficient.

743 Finally, contrary to what some of the applicants maintain, the Commission did not content itself with a speculative analysis of the infringement. It merely confined itself to stating in point 37 of the Decision that it was a matter of pure speculation whether in the long term prices would have been significantly lower in the absence of collusion.

744 Consequently, the Commission correctly concluded that the infringement was not without its effects.

745 For example, fixing European target prices necessarily distorted competition on the PVC market. Buyers saw their scope for price negotiation restricted. Moreover, as has already been pointed out (paragraph 655 above), a number of the Appendices P1 to P70 show that buyers often purchased before the date on which a price initiative was implemented. That confirms the Commission's conclusion that buyers were aware of the fact that the producers' price initiatives would limit their ability to negotiate and would not therefore be without effect.

746 Whilst the producers regarded some price initiatives as failures (see paragraph 654 above), a fact of which the Commission was well aware in taking its Decision, many of the Appendices P1 to P70 refer to the total or partial success of price initiatives. In fact, the producers themselves stated on several occasions that a price initiative had either brought a period of falling prices to an end or led to an increase in market prices. See, for example, Appendix P3 ('the increase on 1 November [1980] has worked, so that a second action has been undertaken'), P5 ('the price increase [on] 1 November [1980] was not completely successful, but prices [have] increased substantially'), P17 ('the June [1981] price increases are gradually being accepted throughout Europe'), P23 ('the slide in prices was halted by the month end [i.e. April 1982], due to the announcement of a general increase in European prices to DM 1.35/kg on 1 May'), or P33 ('the price increase for homopolymerous PVC introduced on 1 September [1982], taking the price to a minimum of 1.50 DM/kg, has been generally successful').

747 The objective findings of the producers themselves at the time of the facts thus show that the price initiatives affected market prices.

748 Moreover, as the Commission pointed out (point 38 of the Decision), the practices in question were decided upon over a period of more than three years. It is thus hardly likely that, at that time, the producers considered them wholly ineffective.

749 It follows that the Commission correctly assessed the effects of the infringement. Therefore, and bearing in mind in particular the objective findings of the producers themselves at the time of the facts, the Commission was not required to carry out a detailed economic analysis of the effects of the cartel on the market. In those circumstances, there is no need to accede to the request of Wacker and Hoechst that such an analysis be carried out.

750 This plea must therefore be dismissed.

(d) The finding that the conduct affected trade between Member States

Arguments of the parties

751 LVM and DSM argue that the Commission has not shown that the practices in question affected trade between Member States. In their submission, the decisive factor in determining whether trade between Member States is affected is not the fact that the agreement 'may' affect trade but the economic effect of the agreement. In their submission, that effect, or the possibility thereof, must be demonstrated (*Société Technique Minière*, at p. 249; Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 22).

752 ICI argues that, when considering whether the effect was 'appreciable', the Commission relied on unsubstantiated assertions. It failed, for example, to take into account the economic evidence submitted by the applicant in reply to the statement of objections. In reality, whatever took place during the producers' meetings had no effect on trade between Member States.

Findings of the Court

753 Article 85(1) of the Treaty requires that agreements and concerted practices be capable of affecting trade between Member States. The Commission has no obligation therefore to demonstrate that it has actually been so affected (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 19 and 20).

754 The case-law also shows that an agreement, concerted practice or decision by an association of undertakings falls outside the prohibition in Article 85 when it has only an insignificant effect on the market, taking into account the weak position of those concerned on the market of the product in question (Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295, paragraph 7).

755 In this case, as the Commission stated in point 39 of its Decision, the conduct complained of extended to all Member States and covered virtually all Community trade in this industrial product. In addition, most of the producers sold their products in more than one Member State. Finally, it is not denied that there was considerable intra-Community trade, given the imbalances in supply and demand in the various national markets.

756 The Commission therefore concluded correctly in point 39 of the Decision that the conduct in question was likely to have an appreciable effect on trade between Member States.

(e) The other pleas in law

Misuse of powers

757 BASF considers that the Commission misused its powers by refusing to carry out the verifications necessary to support its assertions concerning the effects of the cartel on the market, the economic context, the duration of the infringement and the existence of obstacles to the free operation of the market. It thereby misused the discretionary power conferred upon it by Article 15(2) of Regulation No 17.

758 The Commission argues that this plea is merely a repetition of previous pleas and should therefore be dismissed for the same reasons. In any event, it denies using its powers for purposes other than those stated.

759 In the absence of objective, relevant and consistent evidence that the Decision was taken with the sole, or at least the main, purpose of attaining objectives other than those stated, this plea must be dismissed.

Inconsistency between the operative part and the grounds of the Decision

760 Shell argues that there is an inconsistency between Article 1 of the operative part of the Decision and the findings supporting it. The company observes that in the findings it is alleged, first, to have participated only in a concerted practice and not in an agreement between undertakings (point 34); secondly, it is accepted that it in no way participated in drawing up the planning documents (point 48);

thirdly, its alleged participation lasted from January 1982 until October 1983 (points 48 and 54); and, finally, its participation was limited (paragraphs 48 and 53). On each of those points, Shell maintains, the operative part was different.

761 It must be remembered that the operative part of a decision is to be understood in the light of the grounds supporting it.

762 In this case, Article 1 of the operative part, referring not merely to an agreement but also to a concerted practice, excludes the possibility of any contradiction with point 34 of the Decision. Moreover, since that article refers to infringements 'for the periods identified in this Decision', the applicant cannot argue that there is a contradiction with the grounds of the Decision either as regards its non-participation in the blueprint for a cartel in 1980 or as regards the duration of its participation. Finally, there is nothing in the operative part to suggest that the Commission did not take account of the limited role of the applicant, as set out in points 48 and 53 of the grounds for the Decision.

763 The plea must therefore be dismissed.

C — *The applicants' participation in the infringement*

764 The applicants accuse the Commission first of applying the principle of collective responsibility (1). Secondly, they maintain that their participation in the infringement has in any event not been established (2).

1. The alleged attribution of collective responsibility

Arguments of the parties

765 Elf Atochem, BASF, SAV, ICI and Enichem argue that under a universally recognised principle the liability of an undertaking can only be personal.

766 In this case, the Commission disregarded that principle. It stated in point 25 of the Decision that it was necessary to prove not that each participant had taken part in every manifestation of the infringement, but only that it had participated in the cartel 'as a whole'.

767 The Commission observes that it was perfectly aware of the need to prove the individual adherence of the applicants to the cartel, as is demonstrated, in particular, by point 25, second paragraph, point 26, first paragraph, and the end of point 31 of the Decision.

Findings of the Court

768 In the second paragraph of point 25 of the Decision, the Commission stated as follows: 'As regards the practicalities of proof, the Commission considers that besides demonstrating the existence of a cartel by convincing evidence, it is also necessary to prove that each suspected participant adhered to the common scheme. This does not however mean that documentary proof must exist to show that each participant took part in every manifestation of the infringement.... In the present case it has not been possible, given the absence of pricing

documentation, to prove the actual participation of every producer in concerted price initiatives. The Commission has therefore considered in relation to each suspected particpant whether there is sufficient reliable evidence to prove its adherence to the cartel as a whole rather than proof of its participation in every manifestation thereof.'

769 At the end of point 31 of the Decision, the Commission states: 'The essence of the present case is the combination of the producers over a long period towards a common unlawful end, and each participant must not only take responsibility for its own direct role as an individual, but also share responsibility for the operation of the cartel as a whole.'

770 It is thus apparent, especially from the first sentence in the second paragraph of point 25 of the Decision, that the Commission was aware of the need to prove the participation of each undertaking in the cartel.

771 For that purpose, it referred to the concept of the cartel considered 'as a whole'. That does not justify the conclusion, however, that the Commission applied the principle of collective responsibility, in the sense that it deemed certain undertakings to have participated in actions with which they were not concerned simply because the participation of other undertakings in those actions *was* established.

772 The concept of the cartel considered 'as a whole' is indissociable from the nature of the infringement in question. That consisted, as the examination of the facts shows, in the regular organisation over the years of meetings of rival producers, the aim of which was to establish illicit practices intended to organise artificially the functioning of the PVC market.

773 An undertaking may be held responsible for an overall cartel even though it is shown to have participated directly only in one or some of its constituent elements if it is shown that it knew, or must have known, that the collusion in which it participated, especially by means of regular meetings organised over several years, was part of an overall plan intended to distort competition and that the overall plan included all the constituent elements of the cartel.

774 In this case, even if in the absence of documentation the Commission was not able to prove the participation of every undertaking in the implementation of the price initiatives, such implementation being one of the manifestations of the cartel, it nevertheless considered itself able to demonstrate that each undertaking had in any event participated in the producer meetings, the purpose of which was, *inter alia*, to fix prices in common.

775 As is stated in the fourth and fifth paragraphs of point 20 of the Decision: 'The Commission is not... able, in the absence of price documentation from the producers, to show that all of them simultaneously introduced identical price lists or even applied the German mark European targets. What can however be demonstrated is that one of the major objects of the meetings in which they were all involved was to set price targets and coordinate price initiative[s].'

776 The same idea is expressed in the fifth paragraph of point 26: 'The degree of responsibility borne by each participant does not... depend on the documents which, fortuitously or otherwise, are available at that undertaking but rather on its participation in the cartel seen as a whole. Thus, the fact [that] the Commission did not obtain evidence as to the pricing conduct of certain firms does not diminish their involvement, since they are shown to have been full members of a cartel in which price initiatives were planned.'

777 It is thus apparent that, in the Decision, the Commission maintained that it was able to demonstrate that each undertaking had participated, first, in certain manifestations of the cartel and, secondly, in the light of consistent evidence, in meetings between producers in the course of which the latter agreed amongst themselves *inter alia* the prices to be charged in the following days. In that regard, the Commission rightly referred to the fact that the undertaking in question was cited in the planning documents, the plans in which were implemented and found to exist on the PVC market in the weeks which followed their preparation, to the fact that its participation in other manifestations of the cartel was proven, and to the fact that the undertaking had been cited by BASF and ICI as having participated in the meetings between producers.

778 It follows from all those considerations that the Commission did not impute collective responsibility to each undertaking, or responsibility in respect of a manifestation of the cartel in which that undertaking did not become involved, but responsibility for the actions in which each had participated.

2. Individual participation of the applicants in the infringement

779 All the applicants in these cases save ICI deny that their participation in the infringement has been established, either in a specific plea or in the context of other pleas concerning, for example, the establishment of the facts or the rules on the burden of proof.

780 Consequently, it is necessary to examine the situation of each of the applicants in turn, with the exception of ICI. The examination of this question is indissociable from that of the probative value of the documents to which the Commission refers, and of the legal consequences which it drew from them, which have already been examined.

(a) DSM

Arguments of the applicants

781 The applicants begin by denying that they took part in meetings between producers in the course of which prices and market shares were discussed, and maintain that the Commission's evidence in that respect is clearly insufficient. In the first place, the mention of DSM's name on the Checklist, the probative value of which has already been challenged, does not prove either that the meeting envisaged took place or that DSM took part in it. Moreover, the statements of ICI, which were in any event made subject to reservations, concerned facts which occurred in 1983, the year in which DSM left the PVC market. Finally, DSM was not identified by BASF as having taken part in the meetings.

782 Secondly, as to the alleged quota system, the applicants consider that the DSM document, which is the only one used against the company by the Commission and which contains the term 'compensation', has no probative value. Even if the term did have the meaning ascribed to it by the Commission, that does not mean that the applicants took part in such a mechanism.

783 Thirdly, as to monitoring of sales, the applicants deny that the Commission has established the existence of such a mechanism.

784 Finally, concerning target prices and price initiatives, the applicants reiterate that the very existence of concerted price initiatives has not been established.

Findings of the Court

785 DSM has been identified by ICI as a participant in the meetings between producers (see paragraph 675 above), the illicit nature of which has been demonstrated by the Commission (see paragraphs 679 to 686 above). Contrary to what the applicant maintains, ICI's statements concern not only the period after January 1983 but also the informal meetings which took place approximately once a month 'as from August 1980', as BASF has confirmed (see paragraphs 675 and 677 above).

786 In addition, DSM was explicitly mentioned in the planning documents as an anticipated member of the 'new framework of meetings' envisaged by ICI. Bearing in mind the close correlation between the practices envisaged in those documents and those found on the PVC market in the following weeks (see above, paragraph 662 et seq.), the mention of DSM's name may be taken as evidence of its participation in the infringement.

787 A number of the documents which the Commission used to establish the existence of common price initiatives (see paragraphs 637 to 661 above) emanated from DSM. Several of those documents, and in particular Appendices P5, P13, P28 and P41, also state that DSM 'strongly supported' those price initiatives.

788 The Alcudia document, which together with other documents confirms the existence of a mechanism for regulating sales volumes between PVC producers, refers indirectly to DSM as it states that 'PVC have only one [producer] outside [the compensation scheme]' (see paragraph 589 above). In response to a request for information ICI stated that Shell was the producer in question. Moreover, the DSM document, which the Commission rightly held to confirm the existence of a compensation mechanism between producers (see paragraphs 594 to 598 above), is a monthly report on the state of the market drawn up by DSM staff.

789 As regards the monitoring of sales, the applicant is challenging only the existence of such a mechanism. That plea has already been examined and dismissed by the Court (see paragraphs 618 to 636 above).

790 In the light of all those considerations, the Commission was right to conclude that DSM participated in the infringement.

(b) Atochem

Arguments of the applicant

791 The applicant submits that the Commission failed to adduce evidence of Elf Atochem's consent to or participation in the infringement.

792 Concerning the price initiatives, the applicant maintains that no document mentions its name, or the names of its constituent companies. Nothing in the documents on file establishes that Elf Atochem adopted conduct parallel to that of the other PVC producers. On the contrary, many documents demonstrate competitive and independent conduct on its part.

793 Concerning the alleged system of quotas, compensation and market monitoring, the applicant argues that the two documents on the basis of which it is incriminated (the Atochem table and the Solvay tables) have no probative value. The Commission itself acknowledged in point 11 of the Decision that there was very little discipline. In the applicant's submission, the constant variations in Elf Atochem's market share are clearly inconsistent with the existence of a system such as that in which it is alleged to have participated.

794 The Commission has failed to adduce evidence of either Elf Atochem's presence at the meetings between producers or of its participation, active or passive, in any decisions which might have been taken there.

Findings of the Court

795 Atochem has been cited by ICI as a participant at the meetings between producers (see paragraph 675 above), the illicit nature of which has been established by the Commission (see paragraphs 679 to 686 above).

796 The presence of the applicant at those meetings has been confirmed by BASF (see paragraph 677 above).

797 In addition, the planning documents mention, amongst the members identified by ICI as prospective participants in the 'new framework of meetings', the 'new French company', as to which it is not disputed either that that referred to the company Chloé, or that the latter subsequently became Atochem.

798 For the reasons already set out (see paragraph 788 above), the Alcudia document refers indirectly to Atochem.

799 The Atochem table, summarising the sales of the various producers still active in the first half of 1984 and the corresponding targets (see above, paragraph 602 et seq.), was discovered at the headquarters of that company. Even if, as the applicant maintains, that table was not drawn up by its staff, it indicates both a sales target and sales figures for that company.

800 Atochem's argument that 'production trends do not demonstrate the existence of the alleged quotas' (application, page 12) is based on a table which constituted Annex 1 to the applicant's reply to the statement of objections; but that table refers to the years 1986 and 1987, which are not at issue in this case.

801 Finally, amongst the sales figures which appear in the Solvay tables and which the Commission was able to verify, one concerns Atochem and is accurate (see paragraph 628 above).

802 Moreover, even if the Commission was unable to obtain an Atochem price table enabling it to verify that that company had implemented the common price initiatives, Appendices P1 to P70 show that the French producers were involved in that aspect of the cartel. Thus, in addition to documents such as Appendices P1, P6, P15, P19, P22, P26, P29, P32, P45 and P48, which refer to 'general initiatives' intended to raise 'European prices as a whole' or to 'industry initiatives', certain appendices refer more specifically to the French market and support the conclusion that the price initiatives were announced and applied there. That is apparent in particular from Appendices P21, P23, P24, P30, P31 and P38.

803 Although two documents refer to the aggressive attitude of French producers on prices, that does not affect the Commission's conclusions. In the first place, the Commission took account of that point in its examination of the facts, especially in the third paragraph of point 22 of the Decision, which states: 'It is also true that a number of producers who took part in the meetings were named as aggressive or disruptive in certain markets by other producers who considered themselves as strong supporters of price initiatives and were prepared to lose volume in order to force through an increase.' The Commission also referred to that fact in its legal assessment, especially in the first paragraph of point 31 of the Decision, which states: 'In relation to one or other aspect of the arrangements a particular producer or group of producers may from time to time have had reservations or been dissatisfied about some specific point.' Moreover, the occasional aggressive conduct of certain producers is referred to as having

contributed to the failure of certain initiatives, for instance in points 22, 37 and 38 of the Decision. Secondly, the fact that the applicant occasionally refrained from implementing a proposed price increase does not affect the Commission's conclusion; more specifically concerning those undertakings for which it had not been able to obtain price tables, the Commission limited itself to stating that those undertakings had in any event participated in meetings between producers the purpose of which was, in particular, the setting of price objectives (see above, paragraph 774 et seq.), and not the actual implementation of those initiatives (*Atochem*, paragraph 100).

804 Those factors taken together show that the Commission was right to conclude that the applicant participated in the infringement.

(c) BASF

Arguments of the applicant

805 The applicant claims that there is insufficient evidence of its adherence to the cartel taken as a whole. The evidence was limited to the planning documents, participation in regular meetings, and the Atochem and Solvay tables.

806 In the first place, the probative value of the planning documents has already been challenged. In the absence of any evidence that it was aware of those documents and subscribed to them, they could not prove the participation of the applicant in the cartel.

807 Secondly, there is no evidence to support the conclusion that the applicant adhered to agreements in breach of competition law allegedly adopted at the meetings between producers, the mere existence of meetings being insufficient, moreover, to show that that occurred. In any event, the applicant recalls having stated in its reply of 8 December 1987 to a request for information that it had not participated in any meeting after October 1983, assuming that there were any.

808 Thirdly, the mere fact that the applicant's name was mentioned without its knowledge in the Atochem table is not, BASF submits, sufficient to establish its participation in an illicit cartel. That document did not show either that BASF was assigned a quota of its own, or that it adhered to a system of quotas. The Solvay tables do not establish that the applicant took part in exchanges of information with its competitors.

Findings of the Court

809 The applicant has acknowledged that it took part in informal meetings between producers, which the Commission has established were unlawful under Article 85(1) of the Treaty (see above, paragraphs 679 to 686).

810 Its presence at the meetings has been confirmed by ICI (see above, paragraph 675).

811 The applicant was identified in the planning documents as a prospective participant in the 'new framework of meetings'. Even if, as already indicated (see above, paragraphs 670 to 673), those documents constitute at most a 'blueprint for a cartel' and cannot therefore be regarded as proof of the applicant's participation in the infringement, the fact that the applicant is cited in them may be regarded as evidence of such participation.

812 For the reasons already set out (see paragraph 788 above), the Alcudia document refers indirectly to BASF.

813 BASF's name appears in the Atochem table, which includes, albeit in aggregate form, the sales data and percentage of target sales for the four German producers (see paragraph 612 above).

814 BASF is also mentioned in the Solvay tables. Amongst the sales figures mentioned which the Commission was able to verify, two concern the applicant and are accurate (see paragraph 627 above).

815 Moreover, even if the Commission was unable to obtain a BASF price table enabling it to verify that that company had implemented the common price initiatives, Appendices P1 to P70 show that the German producers were involved in that aspect of the cartel. Thus, in addition to documents such as Appendices P1, P6, P15, P19, P22, P26, P29, P32, P45 and P48, which refer to 'general initiatives' intended to raise 'European prices as a whole' or to 'industry initiatives', certain appendices refer more specifically to the German market and support the conclusion that the price initiatives were announced and applied there. That is apparent in particular from Appendices P23, P24, P26, P29, P30, P41 and P58.

816 Those factors taken together show that the Commission was right to conclude that the applicant participated in the infringement.

(d) Shell

Arguments of the applicant

817 In the first part of this plea, the applicant alleges that the Commission failed to take into account the particular structure of the Shell group. Although it was an addressee of the Decision it neither produces nor supplies PVC. It is merely a service company, whose advisory role does not put it in a position to direct Shell's operating companies to implement a cartel, whether on prices or on production quotas. Furthermore, the Commission was not entitled to assume that if the applicant advised group operating companies to seek a particular price on a particular occasion, those companies would actually choose to do so.

818 In the second part of the plea, the applicant states that the proof of its participation in the meetings between producers is founded largely on its admission that one of its representatives attended two of them.

819 However, the first meeting, held in Paris on 2 March 1983, was intended solely to discuss the crisis affecting the European petrochemical industry and the need to restructure the industry, in particular in the light of the first draft report of the Gatti/Grenier working group drawn up following meetings with the Commission. Moreover, a common initiative could not have been decided at that meeting as the trade press had referred to the price increase two weeks earlier. The issue of *European Chemical News* of 21 February 1983 stated: 'Producers are understood to be considering price increases to DM 1.50-1.65/kg, but the timing is unclear'. In any event, the Shell representative gave no support to any alleged initiative, as is confirmed by the fact that less than four weeks after the meeting Shell group companies established a target price of DM 1.35/kg, well below the alleged target price of DM 1.60/kg or the alleged minimum industry price of DM 1.50/kg.

820 The second meeting, which took place in Zurich in August 1983, was to consider the marketing environment for PVC, prevailing market prices, and the need in the industry for higher prices. Shell's representative gave no support to any of the relevant proposals. The company maintains that none of its internal documentation indicates any price target for that period, and that any industry prices referred to in its documentation at that time were clearly derived from independent trade sources.

821 In the third part of this plea, the applicant submits that the only evidence for the quotas is the 1980 planning documents and the Atochem table, which probably referred to 1984. According to the Decision, Shell was not involved in drawing up the 1980 plan and its alleged participation ceased in October 1983. As for the compensation scheme, the Decision expressly acknowledged (in point 26, end of second paragraph) that Shell did not participate in it.

822 In the fourth part of the plea, concerning mechanisms for monitoring sales on national markets, Shell notes that proof of the existence of those mechanisms is based partly on the Solvay tables and partly on telephone conversations between Solvay and Shell, which Shell acknowledged to have taken place in its reply to a request for information.

823 The Solvay tables concerned the large national markets in Germany, Italy, Benelux and France. In this case, only the latter two markets could be relevant, since Shell is not a home producer in Germany or Italy. As regards Benelux, the Commission itself recognised that the figures did not correspond to the specific Fides declarations. As regards France, contrary to the Commission's claims, the figures ascribed to Shell in the Solvay documents were clearly different from those contained in Shell's declaration to Fides.

824 The Commission also misconstrued Shell's reply to the request for information. No precise information was given to Solvay; any such communication concerned only West European sales and could not therefore constitute the source for the Solvay tables, which contained a breakdown by country. Secondly, any such information was given only occasionally between January 1982 and October 1983, whereas the Solvay tables covered the period from 1980 to 1984. Those facts confirmed that the information in the Solvay tables was obtained only from officially published statistics and contacts with customers.

825 In the fifth part of its plea, concerning price initiatives, the applicant alleges that the Decision is inconsistent with regard to the extent of Shell's participation. The Decision states at one and the same time that Shell took part in the price initiatives (point 20), that it was informed of them (point 26) and that it merely knew of them (point 48).

826 Shell maintains that, apart from two isolated instances, it did not attend any meetings of producers.

827 It also maintains that Shell companies established their prices independently. In relation to the four initiatives for which the Commission holds documents emanating from Shell, the company comments that industry initiatives were always announced in the trade press first and that the price targets fixed by Shell did not correspond to the alleged price targets in the industry. The only case of coincidence, on 1 September 1982, was not significant, since Shell did not fix its target price until 9 September 1982 to come into effect on 1 October 1982; besides, as early as November 1982 Shell reduced its target price (DM 1.40/kg instead of DM 1.50/kg).

828 In the sixth part of its plea, Shell argues that a concerted practice was incompatible with its strategy, under which it had brought on stream in 1981 a new PVC plant whose immediate capacity of 100 kt per annum was to be utilised

to the maximum. Shell's two PVC plants were loaded to a level far in excess of the industry average and its market shares were thereby increased substantially. In those circumstances, to accept a quota based on the position achieved in 1979 would make no sense. In reality, no year could serve as an acceptable reference point, since Shell was operating a new plant.

Findings of the Court

829 In the first part of the plea, the applicant argues that, bearing in mind the particular features of the Royal Dutch-Shell group, it is impossible for it to dictate a line of conduct, anti-competitive or otherwise, to the operating companies in the group.

830 In point 46 of the Decision, when examining the particularities of the Royal Dutch-Shell group, the Commission acknowledged that 'the various operating companies in the chemical sector apparently have a large degree of management autonomy' and that the applicant is a 'service company'.

831 It also stated, however, and this has not been challenged, that the applicant assumes overall responsibility 'for the planning and coordination of the activities of the Shell group in thermoplastics'. It thus stands in an advisory position vis-à-vis the operating companies in the group.

832 Moreover, also in point 46 of the Decision, the Commission stated that the applicant 'was in contact with the cartel' and 'attended the meetings in 1983'. A number of appendices to the statement of objections concerning the price initiatives emanated from the applicant (Appendices P35, P36, P49, P50, P51, P53, P54, P55 and P59). Those appendices, amongst other documents, prove the existence of concerted initiatives between producers (see paragraph 637 et seq.) and show that the applicant was, at the very least, precisely informed of the target

prices fixed and the dates scheduled for that purpose. Moreover, the Shell representative at the two meetings in which the applicant admits participating in 1983 was Mr Lane, then Vice-President of Shell.

833 Finally, the Commission observed that '[t]he Court's definition of a concerted practice is particularly apt to cover the involvement of Shell which cooperated with the cartel without being a full member, and was able to adapt its own market behaviour in the light of its contact with the cartel' (Decision, point 34). Consequently, even if the applicant was not in a position to impose prices on the sales subsidiaries, the fact remains that, by being in contact with the cartel and sending the information thus obtained to the subsidiaries, it was the driving force of the Shell group's participation in the concerted practice. It should be noted in that respect that, as their wording shows, those appendices to the statement of objections emanating from the applicant, which indicated both the target prices and their implementation dates, were addressed to all the group's subsidiaries in Europe.

834 In those circumstances, the alleged particular structure of the Royal Dutch-Shell group cannot in itself be an obstacle to finding that the applicant was in a position to participate in a practice contrary to Article 85(1) of the Treaty and, *a fortiori*, to its being an addressee of the Decision.

835 As regards the proof of the applicant's participation in the cartel, it should be recalled that the Commission acknowledged the applicant's lesser role in the infringement, especially in paragraphs 48 and 53 of the Decision. It therefore needs to be examined whether the Commission adduced sufficient evidence to establish that the applicant operated 'on the periphery' of the cartel (point 53 of the Decision).

836 In that respect, both ICI and BASF have identified the applicant as a participant at the informal meetings between producers (see paragraphs 675 and 677 above). Shell admits having participated in two meetings, proof of which was obtained by the Commission in the form of diary entries (see paragraph 676 above). However,

it denies that those meetings had an anti-competitive aim, or that it took part in collusion of any kind on those occasions.

837 Concerning the first meeting, in Paris on 2 March 1983, the Court has found that the Commission has established that it had an anti-competitive aim (see paragraphs 650 and 652 above).

838 The press article relied on by the applicant, taken from the *European Chemical News* of 21 February 1983, does not affect that conclusion. The article itself is ambiguous, and does not justify the conclusion that the initiatives were taken individually. Moreover, it is vague as to the date of the initiatives, whereas the documents dating from a few days after the meeting of 2 March 1983, and found by the Commission at the premises of Shell and other undertakings, show their exact date.

839 Shell maintains, finally, that it did not in any event support a price initiative, arguing that on 31 March 1983 it fixed its target price at DM 1.35/kg, a level below that allegedly fixed by producers acting in concert. The fact remains, however, as is shown by Appendix P49, dated 13 March 1983, that Shell was informed of the price level determined by the producers on 2 March 1983 and of the date for implementing that initiative. Thus, by its participation in the meeting of 2 March 1983, the applicant, far from determining its pricing policy independently in a state of uncertainty as to the conduct of its competitors, must necessarily have taken into account, directly or indirectly, the information it obtained from them at that meeting.

840 With respect to the second meeting, held in Zurich in August 1983, the applicant acknowledged in reply to a request for information from the Commission that during that meeting 'some producers expressed their views as to a price proposal'. Several appendices to the statement of objections, such as Appendices P53, P54, P55, P56, P57, P58 and P60, show that an initiative was in fact envisaged and put into operation for the month of September 1983. Finally, Appendices P53, P54

and P55, emanating from Shell, indicate that the latter took part in that initiative, contrary to what it maintains. It was, moreover, aware of the price initiative before it was made public. The trade press relied on by the applicant in its reply to the statement of objections did not refer to the initiative until the end of September.

841 The Alcudia document, concerning the compensation mechanism, has no probative value in relation to the applicant, as according to ICI's answers to a request for information Shell was the only producer not to participate in it (see paragraph 788 above). As is shown *inter alia* by point 48 of the Decision, that finding contributed to the Commission's conclusion that Shell had acted on the periphery of the cartel.

842 The Atochem table concerns the first quarter of 1984 and may be attributed to May 1984 (see paragraph 606 above), whereas, according to the third paragraph of point 54 of the Decision, Shell had distanced itself from the cartel since October 1983. Indeed, the Atochem table contains only rounded figures for Shell's sales. However, in so far as that table shows a target percentage for the applicant, which can only have been determined before the first quarter of 1984, it shows that Shell was no outsider to the quota mechanism at the end of 1983.

843 With regard to the sales monitoring mechanism (see paragraphs 618 to 636 above), only two of the geographical markets covered by the Solvay tables are relevant to Shell, namely Benelux and France.

844 In reply to a question from the Court, the Commission confirmed that the complaint concerning the monitoring of sales did not apply to the Benelux market, as already indicated in the statement of objections.

845 On the other hand, those tables show precise figures for Shell on the French market for sales in both 1982 and 1983 (see paragraph 628 above). The fact that they are so precise confirms that, at least in the French market, Shell participated in the exchange of information. In its reply to a request for information on 3 December 1987 the applicant stated that 'occasionally, in the period January 1982 to October 1983, Solvay would telephone to seek confirmation of its estimation of Shell companies' sales tonnage'. The applicant also refers to its statement that 'no precise information was given'; however, the precision of the sales figures on the French market belies that assertion.

846 As regards the alleged inconsistency in the Decision as to the degree of Shell's participation in the price initiatives, point 20 of the Decision is concerned only with demonstrating the collective nature of the price initiatives. Point 26 states that the applicant was informed of those intitiatives, and point 48 states that it was informed of them and supported them. The Court would merely remark in that respect that point 48 supplements but does not contradict point 26.

847 As the Court has already said, the documents produced by the Commission establish that the applicant participated in the price initiatives decided at the meetings between producers on 2 March 1983 and 11 August 1983 (see points 836 to 840 above). Similarly, Appendix P59, which is a Shell document dated 28 October 1983, shows that Shell was perfectly well aware of the initiative decided for 1 November 1983, designed to take PVC prices to a level of 1.90 DM/kg. As regards the initiative envisaged for September 1982, it is true that the *European Chemical News* had announced both the price initiative and its amount and date as early as July 1982. However, the very wording of that article militates against the conclusion that the initiatives were taken individually. Thus it states, for example: '[PVC] producers are discussing a price increase for September and October (the "manufacturer's price" column in the table below reflects those planned target prices)'. Indeed, as the Court has already held (see paragraph 649 above), the documents produced by the Commission support the conclusion that the initiative in question was the result of concerted action between producers in the sector. The fact that Shell did not adopt the agreed target price until the beginning of September for implementation in October 1982

does not appear to be crucial in those circumstances. Moreover, Appendices P34 and P39, emanating from ICI and DSM respectively, show that 'the price initiative continued into October'.

848 In the light of all those considerations it is clear that, contrary to the applicant's assertions, it was involved in the collusive mechanisms decided upon by the PVC producers. The Commission has correctly established Shell's participation in the infringement.

849 In those circumstances, the applicant's argument based on its commercial strategy at the beginning of the 1980s cannot succeed. Through its participation in the infringement, the applicant was able to adapt its commercial behaviour by reference to its knowledge of the attitude of the other producers.

(e) LVM

Arguments of the applicant

850 The applicant begins by denying that it participated in producer meetings during which prices and market shares were allegedly discussed, and submits that the Commission's evidence is clearly insufficient. First, the planning documents were established nearly 30 months prior to the formation of LVM, mention of the applicant's parent companies, DSM and SAV, having no probative value whatever as far as LVM was concerned. In addition, the statements by ICI and BASF identifying LVM as a participant at the producer meetings were made subject to reservations. Finally, it is not correct to say that the applicant refused to reply in its letter of 28 January 1988 to the request for information of 23 December 1987

under Article 11 of Regulation No 17; in any event, that does not prove its participation in the meetings.

851 Secondly, as to the alleged quota system, the applicant argues that the only document used against it by the Commission, namely the Atochem table, has no probative value. In the applicant's submission, it contains sales figures that differ significantly from actual sales.

852 Thirdly, as to sales monitoring, the applicant considers that the Solvay tables would have probative value only if they were accurate, which, in its submission, they are not.

853 Finally, concerning target prices and price initiatives, the applicant reiterates that even the existence of concerted price initiatives has not been established. In reality, the applicant merely adapted intelligently to market conditions (see Appendices P13, P21 and P29 to the statement of objections).

Findings of the Court

854 As LVM was not formed until the beginning of 1983, the fact that the earlier documents produced by the Commission in support of its conclusions, such as the planning documents, do not refer to LVM is irrelevant for the purpose of assessing that company's participation in the infringement. For its part, the applicant cannot rely in support of its claims on Appendices P13, P21 and P29 to the statement of objections, which relate to facts prior to its creation and concern DSM.

855 LVM has been identified by ICI as a participant in the informal meetings between producers (see paragraph 675 above), which the Commission has demonstrated to have pursued an objective contrary to Article 85(1) of the Treaty (see paragraphs 679 to 686 above).

856 The presence of the applicant at those meetings has been confirmed by BASF (see paragraph 677 above).

857 Certain documents used by the Commission, rightly, to establish the existence of joint price initiatives, such as Appendices P57, P58 and P64, emanate from that undertaking.

858 The Atochem table includes the name of the applicant and states a percentage of target sales allocated to it; moreover, the sales figures of that company which are shown there are close to actual sales figures (see paragraph 608 above).

859 The Solvay tables contain an express reference to LVM. Amongst the figures mentioned which the Commission was able to verify, two concern that undertaking and correspond, in rounded form expressed in kilotonnes, to its actual sales figures (see paragraphs 625 and 628 above).

860 Those factors taken together show that the Commission was right to conclude that the applicant participated in the infringement.

(f) Wacker

Arguments of the applicant

861 The applicant maintains that the planning documents do not demonstrate that it participated in discussions, negotiations or meetings such as those alleged against it. The information provided by ICI and BASF identifying it as a participant in meetings between producers are neither precise nor reliable.

862 The applicant goes on to deny participating in either a quota system and compensation mechanism or a price cartel. It argues that there is no document to support the Commission's allegations in that respect.

Findings of the Court

863 Wacker has been identified by ICI as a participant in the informal meetings between producers (see paragraph 675 above), which the Commission has demonstrated to have pursued an objective contrary to Article 85(1) of the Treaty (see paragraphs 679 to 686 above).

864 The presence of the applicant at those informal meetings has been confirmed by BASF (see paragraph 677 above).

865 Wacker's name appeared in the planning documents as an anticipated member of the 'new framework of meetings' in the form of the initial 'W'; at the time of the facts, only Wacker had a company name beginning with that initial.

866 Many documents used by the Commission to establish the existence of joint price initiatives (see paragraphs 637 to 661 above), such as Appendices P2, P3, P8, P15, P25, P31, P32, P33, P47, P62 and P65, emanate from that undertaking. They refer widely to price initiatives, actions to increase prices decided upon and intensive efforts in the industry to consolidate prices.

867 For the same reasons as those set out above (see paragraph 788), the Alcudia document refers indirectly to Wacker.

868 The applicant is mentioned in the Atochem table, which contains, albeit in aggregate form, the sales figures and percentage of target sales for the four German producers (see paragraph 612 above).

869 The Solvay tables contain a statement of the applicant's sales figures, and those figures have not been challenged.

870 Those factors taken together show that the Commission was right to conclude that the applicant participated in the infringement.

(g) Hoechst

Arguments of the applicant

871 The applicant maintains that the planning documents do not demonstrate that it participated in discussions, negotiations or meetings such as those alleged against it. The information provided by ICI and BASF identifying it as a participant in meetings between producers are neither precise nor reliable.

872 The applicant goes on to deny participating in either a quota system and compensation mechanism or a price cartel. It argues that there is no document to support the Commission's allegations in that respect.

Findings of the Court

873 Hoechst has been identified by ICI as a participant in the informal meetings between producers (see paragraph 675 above), which the Commission has demonstrated to have pursued an objective contrary to Article 85(1) of the Treaty (see paragraphs 679 to 686 above).

874 The presence of the applicant at those informal meetings has been confirmed by BASF (see paragraph 677 above).

875 For the reasons already set out above (see paragraph 788), the Alcudia document refers indirectly to Hoechst.

876 The applicant is mentioned in the Atochem table, which contains, albeit in aggregate form, the sales figures and percentage of target sales for the four German producers (see paragraph 612 above).

877 The Solvay tables contain a statement of the applicant's sales figures, and those figures have not been challenged.

878 Moreover, even if the Commission was unable to obtain a Hoechst price table enabling it to verify that that company had implemented the common price initiatives, Appendices P1 to P70 show that the German producers were involved in that aspect of the cartel. Thus, in addition to documents such as Appendices P1, P6, P15, P19, P22, P26, P29, P32, P45 and P48, which refer to 'general initiatives' intended to raise 'European prices as a whole' or to 'industry initiatives', certain appendices refer more specifically to the German market and support the conclusion that the price initiatives were announced and applied there. That is apparent in particular from Appendices P23, P24, P26, P29, P30, P41 and P58.

879 Those factors taken together show that the Commission was right to conclude that the applicant participated in the infringement.

(h) SAV

Arguments of the applicant

880 The applicant argues that there is no proof of its participation in the alleged cartel. It states that three documents were relied upon by the Commission, none of which has probative value.

881 It submits, for example, that one of the planning documents, the Checklist, is merely an internal ICI document setting out a unilateral proposal of ICI. The applicant was mentioned in it only as a PVC producer or as an undertaking considered by ICI as a future participant in the group of undertakings referred to in that document, and not as a participant in a cartel. There was nothing to establish that such a proposal had been addressed to other producers, or that they had accepted it. The Response to Proposals could not be a response to the Checklist, because it was established earlier than the Checklist. In any event, the Response to Proposals did not prove that SAV participated, since no name is mentioned in that document.

882 ICI's reply of 5 June 1984 to the Commission's request for information of 30 April 1984 stated precisely the dates and locations of the meetings only for 1983; SAV ceased all direct production and marketing activity in the PVC market with effect from 1 January 1983. Moreover, the reply was vague and subject to reservations; by contrast, the applicant had always denied participation in any meetings, and BASF did not identify the applicant as having participated in them (Decision, point 26, note 10). Finally, if SAV participated in certain meetings, it was not demonstrated that prices or volumes were discussed at those meetings. The Commission had in any case misconstrued the statements of ICI, which has always affirmed that the meetings did not pursue an anti-competitive aim.

883 Regarding the Solvay tables, the applicant argues that the sales figures attributed to it on the French market, far from being accurate, as the Commission maintains, differ by some 8% to 25% from its actual sales. It has therefore not been demonstrated that the applicant participated in any exchange of information whatsoever, constituting an infringement in itself, or, indeed, that it participated in any collusive arrangement of which the exchange of information was the instrument.

884 Finally, the applicant maintains that its participation in the alleged cartel is in any event not plausible. Having arrived on the PVC market only shortly beforehand, in 1977, in the unfavourable context of a market burdened with overcapacity, it had pursued an aggressive policy which was reflected in an increase in tonnages sold and market shares held. The applicant had no interest in fact in participating in a cartel of the type alleged by the Commission. Nor could the latter take refuge in the assertion that the meetings between producers had an anti-competitive aim in any event, precisely because there was no evidence, or no sufficient evidence, to show that SAV participated in those meetings.

Findings of the Court

885 The applicant has been identified by ICI as being a participant in the informal meetings between producers (see paragraph 675 above), which the Commission has demonstrated to have pursued an objective contrary to Article 85(1) of the Treaty (see paragraphs 679 to 686 above). Although ICI gave exact dates and locations of meetings only for 1983, it indicated that informal meetings were held 'as from August 1980', at the rate of approximately one a month (see paragraph 675 above). The Commission was therefore right to regard ICI's response as evidence of the applicant's participation in the infringement.

886 The applicant appears in the planning documents as an anticipated member of the 'new framework of meetings'. As the Decision shows, the planning documents constitute only a 'blueprint for a cartel' and cannot therefore be regarded as proof of the applicant's participation in the infringement. Nevertheless, the fact that the applicant is cited there constitutes an indication of such participation, bearing in mind the close correlation between the practices described there and those found on the market in the following weeks (see paragraphs 662 to 673 above).

887 For the reasons set out above (see paragraph 788 above), the Alcudia document, which together with other documents confirms the existence of compensation mechanisms between PVC producers, refers indirectly to the applicant.

888 Regarding the Solvay tables, SAV has produced a table from its accounts to show that the sales figures concerning it, that is to say those for the French market during the years 1980 to 1982, contain significant differences, of the order of 8% to 25%, in relation to actual sales. It is of course impossible to determine whether the amounts produced by SAV from its accounts have been calculated in the same way as those appearing in the Solvay tables. However, in the absence of serious denials from the Commission, the Court must conclude that those tables cannot be regarded as evidence in respect of the applicant.

889 Although the Commission was unable to obtain a SAV price table enabling it to verify that that company had implemented the common price initiatives, Appendices P1 to P70 show that the French producers were involved in that aspect of the cartel. Thus, in addition to documents such as Appendices P1, P6, P15, P19, P22, P26, P29, P32, P45 and P48, which refer to 'general initiatives' intended to raise 'European prices as a whole' or to 'industry initiatives', certain appendices refer more specifically to the French market and support the conclusion that the price initiatives were announced and applied there. That is apparent in particular from Appendices P21, P23, P24, P30, P31 and P38.

890 Two documents refer to the aggressive attitude of French producers on price, but that is not sufficient to invalidate the Commission's conclusions. First, the Commission took account of those documents both in its examination of the facts and in its legal assessment (see paragraph 801 above). Secondly, the fact that the applicant did not on occasion implement a planned price initiative does not affect the Commission's conclusion; more particularly concerning the undertakings for which the Commission was unable to obtain any price table, it restricted itself to stating that those undertakings had in any event participated in the meetings between producers whose purpose included the fixing of price objectives (see above, paragraph 774 et seq.), and not the actual implementation of those initiatives (*Atochem*, paragraph 100).

891 In the light of all those considerations, the Court finds that the documents produced by the Commission are sufficient to establish that, contrary to what the applicant maintains, it participated in the infringement. However, the Court must still assess whether the observations made above, especially with regard to the Solvay tables, affect the Commission's conclusions as to the duration of the applicant's participation in the infringement.

(i) Montedison

Arguments of the applicant

892 The applicant begins by pointing out that it is not mentioned either in the planning documents or in the Atochem table.

893 Nor, in its submission, does the evidence against it have probative value.

894 First, the fact that it was identified by ICI and BASF as having participated in at least some of the meetings does not reveal anything reprehensible. Moreover, only Montedison, and not Montedipe, was cited by ICI and BASF, whereas Montedison had ceased PVC production on 1 January 1981; that means that its participation had ceased before that date.

895 Secondly, the applicant argues in relation to exchanges of information concerning the Italian market, which was, moreover, public information, that the Commission failed to refer to the footnotes of the document on which it relies, which expressly mentioned the lively competition in that market.

896 Thirdly, as regards participation in a compensation system, the applicant maintains that the Alcudia document has no probative value. Montedison denies that such a mechanism has ever been put into operation; no Italian undertaking had adhered to it individually, as is attested by the fact that the document in question refers only in a general manner to Italian producers. Even if such a mechanism had actually been put into operation, it would only have been one of those rationalisation measures taken under bilateral agreements which the Commission had itself advocated as a replacement for the crisis cartel.

897 Fourthly, the applicant observes that none of the price initiatives identified by the Commission concerned Montedipe, which was then the owner of the undertaking. In any event, the unlawful acts committed consisted only in seeking an ideal price which would have enabled producers to reduce their losses. However, the price actually charged by Montedipe was always significantly below the target price and always diverged from the market price, which clearly proves that the applicant acted entirely independently.

Findings of the Court

898 As the applicant has stated, Montedison is not referred to either in the planning documents or in the Atochem table, which concerns a period after Montedison withdrew from the PVC market. That fact emerges, *inter alia*, from points 7 and 13 of the Decision.

899 Montedison has been identified by ICI as a participant in the informal meetings between producers (see paragraph 675 above), which the Commission has demonstrated to have pursued an objective contrary to Article 85(1) of the Treaty (see paragraphs 679 to 686 above).

900 Its presence at the meetings has been confirmed by BASF (see paragraph 677 above).

901 It is true that ICI and BASF referred to Montedison rather than Montedipe, which took over Montedison's PVC production activity on 1 January 1981. It does not follow, however, that Montedison did not participate in the infringement after that date.

902 Although Montedison transferred production activities to Montedipe in January 1981, it did not abandon all activity in the PVC sector until 1983 (see, in particular, the first paragraph of point 13 of the Decision). Moreover, in reply to a question from the Court, the applicant acknowledged that throughout that period it held the whole of Mondedipe's capital either directly or through companies controlled by Montedison. Finally, ICI's note of 15 April 1981, which helps prove the existence of systems for monitoring sales volumes between producers, is the transcription of a message sent by the director of Montedison's petrochemical division (see paragraphs 599 to 601 above), which proves that, contrary to what it alleges, Montedison was involved in the infringement.

903 For the reasons set out above (see paragraph 788) the Alcudia document, which is one of the documents which serve to establish the operation of compensation mechanisms between PVC producers, refers indirectly to Montedison. The applicant cannot claim that such a mechanism was advocated by the Commission in July 1982, on the occasion of contacts between the Commission and nine European producers concerning the restructuring of the petrochemical sector: not only did the Commission make clear its refusal on that occasion to countenance any price or sales quota agreements between producers, but those contacts took place after the implementation of the compensation mechanism whose existence the Commission has demonstrated in this case.

904 In addition, ICI's note of 15 April 1981 refers to the quota mechanism; that note is the transcription of a message from Mr Diaz, former managing director of Montedison's petrochemical division, to ICI (see paragraphs 599 to 601 above).

905 Concerning the Solvay tables in relation to the Italian market (Appendices 33 to 41 to the statement of objections), the applicant cannot, for the reasons already indicated (paragraphs 629 to 635 above), claim that the sales figures contained therein could have been based on public information. Even if the second footnote to the document comprised by Appendix 34 refers to lively competition, that does not explain how Solvay was aware of the sales figures of each of its competitors. On that point, it should be noted that the first footnote to that document states: 'The sharing of the national market between the various producers for 1980 has been indicated on the basis of the exchange of data with our colleagues' (see paragraph 629 above).

906 As to the price initiatives, which the Commission has shown to have been concerted initiatives adopted in breach of Article 85(1) of the Treaty (see paragraphs 637 to 661 above), the applicant has produced a table in which it compares the target prices alleged by the Commission and the prices actually charged by Montedison (point 10 of the application). It deduces from the differences between them that it cannot have participated in the price initiatives. At no time, however, does the applicant state either the source of the figures which it claims constitute the prices actually charged by it,or the precise date on

which those prices actually charged were determined. The table shows in any event that the prices actually charged by the applicant, assuming them to be accurate, were lower than the target prices, but the Commission has always acknowledged in that respect that the undertakings did not succeed in achieving the target prices. In common with other producers, the applicant has not been accused of implementing price initiatives, since the Commission has not been able to obtain pricing documents from the applicant, but is accused only of participating in informal meetings between producers during which the fixing of target prices was decided upon (see paragraphs 774 to 777 above).

907 Moreover, Appendices P1 to P70 show that Italian producers were involved in that aspect of the cartel. Thus, in addition to documents such as Appendices P1, P6, P15, P19, P22, P26, P29, P32, P45 and P48, which refer to 'general initiatives' intended to raise 'European prices as a whole' or to 'industry initiatives', certain appendices refer more specifically to the Italian market and support the conclusion that the price initiatives were intended to apply in Italy even if the planned increase occasionally failed to materialise, thereby arousing criticism from competitors. That is apparent in particular from Appendices P9, P24, P26 and P28.

908 Those factors taken together show that the Commission was right to conclude that the applicant participated in the infringement.

(j) Hüls

Arguments of the applicant

909 The applicant argues that there is nothing to link it to the planning documents. It has not been proved, for example, that the Checklist, which was drawn up by a

third party, was communicated to the applicant, or that the latter participated in drawing up the Response to Proposals and thus gave its approval to the alleged plans. The abbreviation 'H' on those documents does not necessarily refer to Hüls; in 1984, Hüls and Hoechst were similarly-sized German producers, and in 1980 H was the initial of five PVC producers. The Commission's presumption is thus baseless, especially as before 1985 the applicant was not called Hüls AG but Chemische Werke Hüls AG, generally known under the abbreviation CWH.

910 Secondly, the applicant maintains that in the absence of minutes its participation in unlawful meetings and the regularity of that participation has not been proved. The statements of ICI and BASF do not have probative value, since those two undertakings always denied that the meetings had an unlawful purpose.

911 Thirdly, the applicant's participation in price initiatives has not been demonstrated, in the absence of internal pricing documents of the undertaking. Nor can it be deduced from participation in meetings, precisely because the applicant did not attend unlawful meetings.

912 Fourthly, ICI's note of 15 April 1981 does not establish the applicant's participation in a quota system. Participation in the alleged compensation mechanism established to support that system has not been proved either. Moreover, the Atochem table does not have probative value, since the figures stated there differ significantly from actual sales.

913 Finally, the applicant maintains that the Commission has not proved the applicant's participation in the alleged exchange of information. The Solvay tables have no probative value in that respect.

Findings of the Court

914 Hüls has been identified by ICI as a participant at the informal meetings between producers (see paragraph 675 above), which the Commission has demonstrated to have pursued an anti-competitive aim (see paragraphs 679 to 686 above).

915 The presence of Hüls' representatives at the meetings has been confirmed by BASF (see paragraph 677 above).

916 According to the planning documents, the 'Planning group of 6' was to be composed of 'S', 'ICI', 'W', 'H' and the 'new French company'. After referring to the fact that ICI declined to confirm the identity of the undertakings thus referred to, the Commission stated in its Decision (point 7) that 'from the context and the list of proposed participants it is clear that... "H" in all probability is Hüls, the largest German PVC producer (Hoechst, the only other possibility, was only a minor producer of PVC)'.

917 Hüls denies that 'H' can refer to it because before 1985 its full title was Chemische Werke Hüls AG, and the corresponding initials CWH. That argument cannot be accepted. In the planning documents, proposed members of the 'new framework of meetings' are indicated by simple initials rather than by official and recognised abbreviations. Both the Atochem table and ICI's reply to a request for information, which are dated 1984, refer to Hüls. Similarly, several appendices to the applicant's initial application, dating from the beginning of the 1980s, show commercial notepaper bearing the word Hüls in large letters and the abbreviation 'CWH' in small letters. Thus, even if Hüls was not the applicant's official designation, it was obviously what it was usually called.

918 As the Commission stated in its Decision, it appears that when the planning documents were drawn up Hüls was the largest producer and seller of PVC in

Germany and one of the principal producers in Europe. That finding is confirmed by the applicants' replies to a question from the Court. Moreover, the other four undertakings designated as prospective members of the 'Planning Group' were also the principal PVC producers in Europe in 1980.

919 For the reasons already set out above (see paragraph 788), the Alcudia document, concerning compensation mechanisms, refers indirectly to Hüls.

920 The applicant is referred to in the Atochem table, which contains, albeit in aggregate form, the sales figures and percentage of target sales for the four German producers (see paragraph 612 above).

921 Hüls is also cited in the Solvay tables. Amongst the sales figures contained therein which the Commission has been able to verify, three concern the applicant and are accurate (see paragraph 627 above).

922 Even if the Commission was unable to obtain a Hüls price table enabling it to verify that that undertaking had implemented the common price initiatives, Appendices P1 to P70 show that the German producers were involved in that aspect of the cartel. Thus, in addition to documents such as Appendices P1, P6, P15, P19, P22, P26, P29, P32, P45 and P48, which refer to 'general initiatives' intended to raise 'European prices as a whole' or to 'industry initiatives', certain appendices refer more specifically to the German market and support the conclusion that the price initiatives were announced and applied there. That is apparent in particular from Appendices P23, P24, P26, P29, P30, P41 and P58.

923 Those factors taken together show that the Commission was right to conclude that the applicant participated in the infringement.

(k) Enichem

Arguments of the applicant

924 The applicant argues that it has not been established that it participated in any of the manifestations of the cartel.

925 First, it bore no responsibility for the cartel's origins. It did not participate in drawing up the planning documents, and the mere fact of being cited without its knowledge by other undertakings intending to invite it to participate in meetings cannot give rise to such responsibility. Nor, in its submission, has it been established that the Response to Proposals actually constitutes the response of the persons to whom the Checklist was supposed to be sent.

926 Secondly, concerning the producer meetings, the applicant notes that ICI and BASF have cited the names of Anic or Enichem, whereas from October 1981 until February 1983 there was no operating company corresponding to those names either in whole or in part. In any event, the Commission should also have proved the identity of the participants and the frequency of their participation.

927 Thirdly, Enichem argues that there is no proof of its participation in the price initiatives. The absence of internal company documents on pricing cannot be taken to mean, as the Commission would have it, that those documents were hidden or destroyed on account of their compromising nature; such reasoning, in any event purely speculative, infringes the principle that the burden of proof is on the Commission. Moreover, there was nothing to establish even the applicant's participation in the meetings which, according to the Commission, preceded the price increases. On the contrary, many documents show that Enichem adopted an aggressive pricing policy on the Italian market.

928 Fourthly, concerning quotas, the applicant notes that the only document mentioning Enichem or Anic is the Atochem table. Not only is that document not sufficient on its own to establish the applicant's participation, but it is of no evidential value, given the significant disparity between the sales figures cited in it (always above 14%) and the actual figures (12.3%). In those circumstances, the finding that market shares changed significantly during the period covered by the inquiry demonstrates that there was no agreement on quotas.

929 Fifthly, concerning the monitoring of sales, the only evidence of Enichem's participation was the Solvay tables. In the applicant's submission, those have no probative value.

930 Enichem concludes that, in the absence of any evidence against it, it is of little importance that items of evidence are to be considered as a whole rather than in isolation. In any event, the four documents in which the applicant's name appears (Appendices 3, 10 and 34 and the statements of BASF and ICI) are too isolated to establish the applicant's continuing adhesion to a complex cartel, especially as Enichem's aggressive policy has been demonstrated.

Findings of the Court

931 Anic and Enichem, to which Anic's conduct has been imputed, have been identified by ICI as participating in the meetings (see paragraph 675 above), whose anti-competitive purpose has been established by the Commission (see paragraphs 679 to 686 above).

932 The presence of Anic and Enichem at the meetings has been confirmed by BASF (see paragraph 677 above).

933 Enichem nevertheless argues that, because there was no PVC operating company bearing the name of either Anic or Enichem between October 1981 and February 1983, the replies of ICI and BASF have not established its participation during that period. That argument cannot be accepted. As the Commission has pointed out, the group to which the applicant belongs did not withdraw from the PVC market during that period but transferred all its activities in that sector to a joint venture, all of whose PVC activities derived from the ENI group and were taken over by the latter in February 1983. Moreover, the Solvay tables for 1982 concerning the Italian market show that that joint subsidiary carried on the participation in the infringement. Finally, Anic itself had not disappeared, since it was not until the end of 1982 that it transferred to the joint venture company in question the capital of another company of the ENI group, SIL, itself the owner of PVC production sites in Italy.

934 Anic is one of the undertakings referred to in the planning documents. Bearing in mind the close correlation between the practices described in those documents and those found on the PVC market in the following weeks, those documents, even if they were internal ICI documents as the applicants maintain, constitute evidence of the applicant's participation in the infringement.

935 The Atochem table, which helps demonstrate the existence of a sales quota mechanism, states the name of the applicant, its sales figures for the first quarter of 1984 and a percentage sales target allocated to it. The applicant's challenge of the sales figures concerning it has already been examined and dismissed (see paragraph 615 above).

936 For the reasons already set out above (see paragraph 788), the Alcudia document, concerning compensation mechanisms between producers, refers indirectly to Enichem.

937 The applicant's argument that producers' market shares changed significantly during the period of the inquiry, which would be incompatible with a quota mechanism, is based on a mere reference to the 'real facts' (reply, p. 23) and is not supported by any evidence. In any event, as stated in the Decision itself, the documents establishing the existence of compensation mechanisms between producers also support the conclusion that those mechanisms did not function correctly (see paragraphs 588 and 597 above). Finally, in the particular case of Enichem, the change in market shares does not appear to be a crucial factor, given the numerous restructurings of that group during the period of the infringement, through the acquisition of competitors' businesses in the PVC industry.

938 The Solvay tables state the applicant's name and its sales in the Italian market. The table attached as Appendix 34 to the statement of objections contains the following comment: 'The sharing of the national market between the various producers for 1980 has been indicated on the basis of the exchange of data with our colleagues...'. Since the cartel originated in the planning documents, which are dated August 1980, it was precisely for that year that the exchange could be effective for the first time (see paragraph 629 above).

939 The applicant also argues that the Commission should have specified which undertakings participated in each of the meetings, thereby establishing the frequency with which each participated. However, the frequency of an undertaking's presence at producer meetings does not affect the fact of its participation in the infringement, but the extent of that participation. Moreover, to require the Commission to establish the frequency of each undertaking's participation would make it impossible in practice to penalise a cartel, save in cases where minutes or written records of unlawful meetings, mentioning the participants' names, are found. Where, in their replies to requests for information, ICI and BASF stated that the undertakings named by them had participated more or less frequently in the meetings (see paragraphs 675 and 677 above), the Commission duly took account of that (especially in the third paragraph of point 8 and the third paragraph of point 26 of the Decision). It also took that fact into consideration when determining the level of the fines (point 53 of the Decision), subject to examination of the situation of undertakings identified either as ringleaders or as limited participants. Indeed, if the Commission had been able to obtain proof of the participation of each of the undertakings at all the producer meetings in the course of which, for nearly four years, concerted price initiatives and sales volume mechanisms were fixed, the fines imposed, which do not exceed ECU 3 200 000, would appear low in proportion to the severity of the infringement.

940 Finally, Appendices P1 to P70 indicate that the Italian producers were involved in the price initiatives. Thus, in addition to documents such as Appendices P1, P6, P15, P19, P22, P26, P29, P32, P45 and P48, which refer to 'general initiatives' intended to raise 'European prices as a whole' or to 'industry initiatives', certain appendices refer more specifically to the Italian market and support the conclusion that the price initiatives were intended to apply in Italy, even if the planned increase occasionally failed to materialise, thereby arousing criticism from competitors. That is apparent in particular from Appendices P9, P24, P26, P28 and P58.

941 Those factors taken together show that the Commission was right to conclude that the applicant participated in the infringement.

D — *Attribution of liability for the infringement and identification of the addressees of the Decision*

1. Attribution of liability for the infringement

Arguments of the applicants

942 Elf Atochem challenges the grounds in the Decision relating to Elf Atochem's not being responsible for the activities of PCUK, a company the greater part of whose chemical business was transferred to Atochem on the latter's formation in 1983. The grounds relied on the consideration that Elf Atochem 'is clearly liable for Ato Chimie/Chloe/Orgavyl' (sixth paragraph of point 42 of the Decision), and not on the rule whereby, when an undertaking transferring a business continues to exist as a distinct entity after the transfer, the transferee undertaking does not bear liability for possible anti-competitive actions of the transferor prior to the transfer.

943 DSM notes that on 1 January 1983 the PVC business of DSM NV was transferred to LVM, a joint subsidiary of DSM NV and EMC Belgique SA, and that LVM has been held liable for its own actions. In this case, therefore, it is in relation to the period prior to that date that the question of liability for the infringement arises. By a document of 19 December 1984, DSM Kunststoffen BV, a wholly-owned subsidiary of DSM NV, was created. The rights and obligations previously attaching to the plastics division of DSM NV were transferred to it. Although DSM Kunststoffen was an autonomous subsidiary of DSM NV, it was nevertheless to the latter that liability for the infringement was attributed.

944 By so doing, the Commission misapplied Community law. In DSM's submission, the principle is that where rights and obligations, and also economic activities to which the alleged infringement relates, have been transferred to another

undertaking, the infringement must be attributed to that other undertaking, the successor in law of the first, and therefore the addressee of the decision (*CRAM*, paragraphs 6 to 9; Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraph 30). The decisive factor as far as attribution of liability for an infringement is concerned is the autonomous conduct of the undertaking in the market, and not its legal structure (Case 48/69 *ICI*, paragraph 133; Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraphs 311 and 312). The applicants have always insisted that DSM Kunststoffen acted independently, without being contradicted by the Commission, with whom the burden of proof rested (*AEG*, paragraph 50). For the period running from the beginning of the presumed infringement to the beginning of 1983 the infringement should therefore have been imputed to DSM Kunststoffen.

945 Montedison states that it is only an intermediary between the holding company and the operating company, since it ceased PVC production on 31 December 1980. During the two years which followed, that production activity was carried on by the Montedipe subsidiary, and in 1983 that branch of the undertaking came definitively under the control of Enichem. The Commission has never demonstrated that Montedipe did not operate independently of Montedison.

946 Enichem observes that the Commission proceeded on the basis that, in order to assign liability for an infringement, it was necessary first to identify the undertaking which committed it, then to determine what happened; if the undertaking which committed the infringement merely transferred the PVC branch of its business to a third party but remained in existence as an independent legal person, it would remain liable for the infringement; if, on the other hand, the undertaking committing the infringement were absorbed by another undertaking and thereby ceased to exist, it would be the acquiring company that assumed liability for past infringements. The applicant maintains that that argument is based on a hybrid conception of an 'undertaking', depending on whether a legal or economic criterion is used.

947 Enichem states that both its own PVC business and the PVC sector in Italy generally underwent profound change during and after the period covered by the inquiry.

948 Thus, the company now called Enichem Anic, to which the Decision should have been sent, had a PVC production business until the end of 1981, and again between the beginning of 1983 and the transfer of the business to EVC, a joint subsidiary created in October 1986 by Enichem and ICI. In the interval, the company which operated on the PVC market was Enoxy, a joint subsidiary created by ENI and the American company Occidental.

949 During the whole of that period, however, Enichem, under various names, acted merely as the holding company for the Italian State's share in the various operating companies which succeeded one another in the PVC sector.

950 Finally, the business activities in the PVC sector which were tranferred to EVC in 1986 were carried on, during the period examined by the Commission, by a number of independent undertakings (Anic; Occidental; Montedison, the PVC business of whose subsidiary Montedipe was transferred in March 1983 to Enoxy, which in that same month became a wholly-owned subsidiary of Enichem on the transfer by Occidental of its shares; Sir, whose business was transferred to the ENI group in December 1981 and Rumianca, a subsidiary of Sir, whose chemical activities were also transferred to the ENI group) which all continued to exist as legal persons.

951 However, in the light of paragraph 43 of the Decision, it appears that the Commission attributed to the applicant, Enichem, liability for the infringements committed during the inquiry period, and thus by all the undertakings, including Sir, Rumianca and Enoxy (but with the exception of Montedipe). Sir and Rumianca were part of the Sir Finanziaria group, which still exists and should therefore continue to bear the liability for the participation of its former subsidiaries. Similarly, Occidental, which continues to exist as a legal person, should be jointly and severally liable for the infringement during the period from December 1981 to February 1983, during which it jointly managed Enoxy; instead the Commission attributed no liability to Occidental, in breach of the principle of non-discrimination. In fact Enichem Anic can be regarded as liable only for the infringements committed by Anic until the end of 1981 and by Enoxy

Chimica since February 1983 (*Suiker Unie*, paragraphs 74 to 88; *CRAM*, and *Enichem Anic*, paragraph 228 et seq.).

Findings of the Court

952 It is clear first of all that Elf Atochem does not challenge the conclusion which the Commission reached not to impute to it liability for the actions of PCUK, but merely the reasoning underlying that conclusion. In those circumstances, examination of the plea raised by this applicant could not lead to even a partial annulment of the operative part of the Decision. Therefore, in the absence of any interest of the applicant in bringing an action, the plea must be dismissed.

953 The case-law shows that, where an infringement is found to have been committed, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time, so that it can be made answerable for it. Where, however, between the infringement and the time when the undertaking in question must answer for it, the person responsible for the operation of that undertaking has ceased in law to exist, it is necessary, first, to establish the combination of physical and human elements which contributed to the infringement and then to identify the person who has become responsible for their operation, so as to avoid the result that because of the disappearance of the person responsible for its operation when the infringement was committed the undertaking may evade liability for it.

954 The rules set out by the Commission in the second paragraph of point 41 of the Decision comply with those principles.

955 It is therefore necessary to examine the Commission's application of those principles in the cases of DSM, Montedison and Enichem in turn.

956 DSM's argument relates only to the attribution of the infringement to DSM, and thus to the period before the creation of LVM (see paragraph 943 above).

957 In this case, unlike the situations which were examined in the judgments relied on by the applicant, there is no dispute either that DSM is the undertaking which committed the infringement before the creation of LVM, or that, despite the reorganisation which it carried out by transferring its plastics business to subsidiaries after the facts at issue, DSM exists at law. The Commission was therefore right, applying the principles referred to above, to hold DSM liable in respect of the period at issue.

958 In those circumstances, the transfer of the branch of business activity to subsidiaries has no impact on the determination of the undertaking responsible for the infringement.

959 The plea by DSM must therefore be dismissed.

960 It is well established that the fact that a subsidiary has separate legal personality is not sufficient to exclude the imputation of its conduct to the parent company, especially where the subsidiary does not determine its market conduct independently but in all material respects carries out the instructions given to it by the parent company (Case 48/69 *ICI*, paragraphs 132 and 133).

961 In this case, Montedison has confirmed that it held all the capital of Montedipe and Montepolimeri, with the result that those companies must be regarded as necessarily following a policy laid down by the bodies which, under its constitution, determine the policy of the parent company (*AEG*, paragraph 50).

962 The plea by Montedison must therefore be dismissed.

963 Enichem's plea comprises two claims concerning liability for the infringment. The first relates to liability for the actions of two companies, Sir and Rumianca, committed before their incorporation into the group to which the applicant belongs. The second relates to liability for acts committed by Enoxy between January 1982 and February 1983.

964 In the first place, the applicant claims, the Commission has imputed to it liability for acts of Sir and Rumianca, whose PVC businesses were acquired by the ENI group in December 1981 through the medium of Anic, but, as the former parent company of those two companies still exists, it should have borne responsibility for the infringement. In support of its argument, the applicant refers to point 43 of the Decision, where it is stated that 'Enichem comprises the Italian State-owned chemical sector formerly operating as Anic' and that Enichem must therefore 'take the responsibility for the activity of Anic' and thus for all the companies connected with it.

965 However, it does not appear that the Commission held Enichem responsible for the activities of Sir and Rumianca before their integration into the group including the applicant.

966 First, Sir and Rumianca are not referred to in the Decision. Since no complaint is made against them, no responsibility for unlawful actions by them can have been

imputed to the applicant. Paragraph 43 of the Decision can at most mean that the PVC activities of Sir and Rumianca, particularly for the purposes of calculating market share with a view to determining the amount of the fines, are not imputed to the applicant until after the day on which they were incorporated into Anic. It does not support the conclusion that responsibility for any unlawful practices by Sir and Rumianca before that incorporation was imputed to Enichem.

967 Secondly, the documents before the Court and the applicant's replies to the Court's questions at the hearing show that on 29 December 1981 ENI and Occidental created a joint company, Enoxy, to which all the PVC sector controlled by ENI through the intermediary of Anic was transferred; on its side, Occidental transferred to Enoxy activities other than PVC. In February 1983, ENI took back the share of Occidental in the capital of Enoxy; some days later, ENI transferred all its shares in the Enoxy group to Enichimica SpA (now Enichem SpA).

968 In those circumstances, the applicant accuses the Commission, first, of imputing to it responsibility for the actions of Occidental, the other parent of Enoxy. However, that complaint consists of a mere affirmation, which is not supported by anything in the Decision.

969 The applicant then complains that the Commission did not also hold Occidental responsible for the actions of Enoxy, even though it was one of the two parent companies. However, since the group to which the applicant belongs remained present in the PVC market from January 1982 to October 1983, through a joint company to which it had transferred its business in the PVC sector, the fact that the Commission did not also take action against Occidental does not exclude responsibility on the part of the group to which the applicant belongs (*Ahlström Osakeyhtiö*, paragraph 197).

970 In those circumstances, the plea by Enichem must also be dismissed.

2. Identification of the addressees of the Decision

Arguments of the applicants

971 DSM argues, first, that the Commission committed an error of law in addressing the Decision to DSM NV, rather than to DSM Kunststoffen. Responsibility for the infringement committed before 1983 by DSM NV should be imputed only to DSM Kunststoffen, a wholly-owned subsidiary of DSM NV created by a document of 19 December 1984; it was to that company, therefore, that the Decision should have been addressed.

972 Secondly, the applicants maintain that they have been victims of discrimination. The Commission had accepted an argument similar to theirs on behalf of Shell (Decision, point 46). Conversely, the Commission treated them in the same way as Enichem and Montedison, whereas the facts were not the same (Decision, paragraph 45).

973 Thirdly, the applicants maintain that the Commission failed to comply with the duty to state reasons. Even if it was not obliged to reply to all the factual arguments raised by the undertakings in question (*ACF Chemiefarma*, paragraph 77), it replied nevertheless to similar complaints made by other undertakings (Decision, paragraphs 45 and 46). The statement of reasons in respect of the applicants ought moreover to have been all the more detailed because the applicants had raised that plea during the administrative stage (*AWS Benelux*, paragraph 27).

974 Enichem argues that, for a group of undertakings to be an appropriate addressee of a decision, it must constitute a single unitary organisation of personal, tangible and intangible elements which pursues, on a long-term basis, the objective, *inter alia*, of producing and selling a given product (*Shell*, paragraphs 312 and 313). In

this case, the company maintains, there is no proof establishing its role at the head of that group of companies (end of point 45 of the Decision).

975 In reality, as a holding company, Enichem did not assume any responsibility with regard to activities in the thermoplastics sector, including PVC. The company argues that points 43 and 45 of the Decision are contradictory in that respect, since it cannot be maintained that Enichem is, at one and the same time, responsible in its capacity as the principal holding company of a group and the successor of the operating company of the same group.

976 In reality, Enichem Anic, as it was called as from 27 May 1985, was the only legal person capable of representing continuity between the various group companies which operated under various names in the PVC sector until, in 1986, the business was transferred to EVC, a joint subsidiary created with ICI. Enichem Anic (under its various names) managed the whole cycle of thermoplastics production and direct marketing in Italy, independently of Enichem. Moreover, all the companies involved in the foreign marketing of Enichem Anic's products, including the subsidiaries of Enichem International, which is not a wholly-owned subsidiary of Enichem, acted on the basis of distribution contracts or agencies with Enichem Anic. Thus only Enichem Anic could have been the addressee of the decision.

977 In support of its view, the applicant observes that the decision of 24 November 1987 taken pursuant to Article 11(5) of Regulation No 17 was addressed to Enichem Anic (at that time Enichem Base). Moreover, the investigation of 21 January 1987 was carried out at the premises of that undertaking. If the statement of objections was sent to Enichem, that was only because the Commission believed that that company was the operating company of the group, and not because it was a holding company of the group. Finally, the applicant points out that Decision 86/398 in the polypropylene case was addressed to Anic SpA, that is to say to Enichem Anic, that having been the name of the company since 27 May 1985.

Findings of the Court

978 Although, as the Commission has stated in point 44 of the Decision, an 'undertaking' within the meaning of Article 85(1) of the Treaty is not necessarily the same as a company having legal personality, it is necesssary for the purposes of applying and enforcing decisions to identify an entity possessing legal personality to be the addressee of the measure.

979 Since DSM is the sole perpetrator of the infringement and thus constitutes the only company with legal personality to which the infringement is imputed, the question of identifying the addressee does not arise. The addressee could only be DSM NV, the sole perpetrator of the infringement.

980 Since that conclusion follows from the direct application of the principles set out in point 44 of the Decision, the mention of those principles constitutes a sufficient statement of reasons in the applicant's case.

981 Moreover, in the case of DSM a single undertaking, which continues to exist in law, committed the infringement. Neither Shell nor Enichem nor Montedison is in the same position. Therefore, the allegedly different treatment accorded to those three undertakings by the Commission when determining the addressee of the Decision cannot constitute discrimination against DSM.

982 The pleas and arguments raised by DSM must therefore be dismissed.

983 In point 45 of the Decision, the Commission stated: 'Enichem and Montedison have claimed that the appropriate addressee of any Decision should be the company inside the group which is currently responsible for thermoplastics activities. The Commission notes however that in both cases the marketing

responsibility for PVC was shared by other companies of the group: for instance, while Enichem Anic SpA is responsible for Enichem's sales of PVC in Italy, its international marketing operations are directed by the Zurich-based company Enichem International SA and in each Member State PVC sales are undertaken by the appropriate national subsidiary of Enichem. The Commission considers it appropriate to address this Decision to the main holding company at the head of the Enichem and Montedison groups.'

984 Montedison has confirmed that, during the period of the infringement, it held all the capital of Montedipe and Montepolimeri. That being so, it appears superfluous to enquire whether the applicant was able to exercise a decisive influence on the commercial behaviour of its subsidiaries (*AEG*, paragraph 50).

985 In those circumstances, the Commission was right to address the decision to Montedison.

986 As Enichem has acknowledged, the plea raised by that company 'constitutes not an end in itself, but the essential basis for further arguments concerning the amount of the fine, which was obviously calculated by reference to the turnover of the holding company, which was far higher than that of the operating company' (reply, p. 15). In this case, it appears that, as it was entitled to do (*Boehringer I*, paragraph 55; Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraphs 51 to 53), the Commission initially determined the total fine, which it then divided between the undertakings by reference to the average market share of each and any attenuating or aggravating circumstances which might apply to any of them individually. Therefore, subject to the application of Article 15(2) of Regulation No 17 fixing the maximum fine which the Commission may impose, the turnover of the holding company was not taken into account in determining the amount of the individual fine imposed on the applicant. To that extent, the applicant has no interest in raising this plea.

987 Moreover, as point 45 of the Decision shows, Enichem Anic was only one of the operating companies for PVC within the ENI group. It thus controlled production establishments in Italy and was in charge of marketing in Italy. Other companies in the group, controlled through the intermediary of the Swiss company Enichem International SA, were however responsible for marketing outside that geographical area. It cannot therefore be accepted that a company such as Enichem Anic, representing only a part of the group's PVC business, must of necessity be the sole addressee of the Decision.

988 It is undisputed, moreover, that the applicant is only a holding company, with no operational activity. The applicant has confirmed that 'during the whole of the inquiry period, Enichem SpA [under various names] continued to play the role only of a holding company for the State share in the various successive operating companies in the PVC sector' (application, p. 57).

989 In such a situation, where large numbers of operating companies are active in both production and marketing and are also designed to cover specific geographical areas, for the Commission to address its decision to the group's holding company rather than, as the applicant would have it, to one of its operating companies does not constitute an error in law.

990 It is true that in the polypropylene case the Commission sent the decision to Enichem Anic and not to the applicant. However, that is not sufficient to justify the conclusion that the choice of the applicant as the legal person to whom the Decision is addressed is necessarily wrong. In the first place it has not been established that at the material time the organisation of the ENI group in the polypropylene sector was identical to that in the PVC sector. Secondly, and in any event, the fact that the Commission addressed the decision to a particular company in one case cannot bind it in other cases.

991 The fact that a decision to request information was sent to Enichem Anic and that an investigation procedure took place at that undertaking's headquarters is not decisive as regards the identity of the addressee of the Decision, given that, under Articles 11 and 14 of Regulation No 17, any undertaking may be the subject of a request for information or an investigation procedure.

992 The plea must therefore be rejected.

III — *The pleas concerning access to the file*

A — *The conditions under which the Commission gave access to its file during the administrative procedure*

Arguments of the parties

993 A number of applicants complain that the Commission gave them access to only part of its administrative file.

994 At the reply stage, relying on the judgments of the Court of First Instance in Case T-30/91 *Solvay* [1995] ECR II-1775 and Case T-36/91 *ICI*, those applicants reiterate the assertion made in their application that limited access to the file infringes an essential procedural requirement affecting the rights of the defence. They submit that the mere possibility of the existence of exculpating documents is sufficient for a finding of an infringement of defence rights, which cannot be

regularised by the Court in the context of its review (T-30/91 *Solvay*, paragraph 98; T-36/91 *ICI*, paragraph 108). The Decision ought therefore to be annulled.

995 In its defence in the various cases, the Commission has stated that point 27 of the Decision sets out the reasons why it did not accede to the undertakings' requests during the administrative procedure for full access to the file.

996 Confirming the reasons thus given, it maintains that it gave proper access to its administrative file.

997 The Commission argues that the case-law does not grant an absolute right of access to that file (*VBVB and VBBB*; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359; Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389). To the extent that the applicants' plea constitutes a request for such full access, therefore, the Commission maintains that it is unfounded.

998 The Commission argues that it is required to give access only to the whole of the documents on which it bases its conclusions. In this case, it did not only that but went beyond those requirements by sending the undertakings further documents on 3 May 1988 which, in its view were capable of being used in their defence (last paragraph of point 27 of the Decision, *in fine*).

999 In certain cases, the Commission challenges the principle stated by the Court of First Instance in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711 that it is required to comply with the principles it laid down in the *Twelfth Report on Competition Policy* and therefore to disclose, in addition to

the incriminating documents, the documents in its administrative file, subject to certain reservations.

1000 The applicants have not demonstrated bad faith on the part of its staff.

1001 If there were documents of use to the defence in the file on other undertakings, the undertaking from which they emanated would have relied on them.

1002 Moreover, the applicants were authorised to exchange documents amongst themselves, on the basis of reciprocal waivers of confidentiality, with the reservation that the exchange should not involve sensitive commercial information exchange of which might constitute a restriction of competition (third paragraph of point 27 of the Decision).

1003 The Commission refers also to the confidential nature of the documents comprised in its administrative file. In accordance with both Article 214 of the Treaty and Article 20(2) of Regulation No 17, it was required not to divulge internal commercial documents of each undertaking. Moreover, the Commission supplied a list of documents contained in the file during the administrative procedure.

1004 The Commission considers that the undertakings ought, at the very least, to identify the documents which they consider capable of being useful to their defence.

1005 In the rejoinder, the Commission argues that the judgments in Case T-30/91 *Solvay* and Case T-36/91 *ICI* confirm that there is no absolute right of access to the file. In particular, undertakings have no right of access either to documents

containing business secrets or other confidential information or to internal Commission documents. It those circumstances, it was right not to divulge to the undertakings the commercial documents emanating from each of them.

1006 The Commission maintains that the distinction between incriminating and exculpating documents is crucial. Whilst lack of access to incriminating documents entails only the elimination of those documents as a means of proof (Case T-37/91 *ICI*, paragraph 71), lack of access to exculpating documents entails the illegality of the decision, as the Court cannot remedy an infringement of defence rights which occurred at the administrative stage of the procedure (Case T-30/91 *Solvay*, paragraph 98).

1007 However, in order to determine whether there are exculpating documents among those not divulged, it is not sufficient, the Commission maintains, merely to assert that the possibility exists; there must be some examination of plausibility. In this case, in the absence of the particular circumstances at issue in *ICI* and *Solvay*, where the finding of infringement was based on parallel conduct rather than direct evidence and the undertakings concerned by Article 85 of the Treaty were also accused of abuse of a dominant position, the Commission maintains that there is nothing to show that there may have been exculpatory documents among those not communicated.

1008 The Commission submits, therefore, that mere failure to communicate documents during the administrative procedure is not sufficient to justify the annulment of the Decision.

Findings of the Court

1009 The Court notes at the outset that Montedison has not raised any plea concerning access to the file in its application.

1010 It is common ground that during the administrative procedure the Commission granted access to only part of its administrative file. In addition to the documents emanating from its own staff, each applicant had at its disposal all the documents on which the Commission based its conclusions and a series of other documents, sent by letter of 3 May 1988.

1011 The purpose of providing access to the file in competition cases is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence. Respect for the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings. The proper observance of that general principle requires that the undertaking concerned be afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission (Case T-30/91 *Solvay*, paragraph 59, Case T-36/91 *ICI*, paragraph 69, Case T-37/91 *ICI*, paragraph 49, and the case-law cited therein).

1012 In the adversarial proceedings for which Regulation No 17 provides, it cannot be for the Commission alone to decide which documents are of use for the defence (Case T-30/91 *Solvay*, paragraph 81; Case T-36/91 *ICI*, paragraph 91). Having regard to the general principle of equality of arms, the Commission cannot be

permitted to decide on its own whether or not to use documents against the applicants, where the latter had no access to them and were therefore unable to take the relevant decision whether or not to use them in their defence (Case T-30/91 *Solvay*, paragraph 83; Case T-36/91 *ICI*, paragraph 93).

1013 Such an infringement of the rights of the defence is, moreover, an objective one and does not depend upon whether the Commission's officials acted in good or bad faith (Case T-30/91 *Solvay*, paragraph 84; Case T-36/91 *ICI*, paragraph 94).

1014 In any event, the defence of one undertaking cannot depend upon the goodwill of another undertaking which is supposed to be its competitor and against which the Commission has made similar allegations. Since the Commission is responsible for the proper investigation of a competition case, it may not delegate that task to the undertakings, whose economic and procedural interests often conflict. Consequently, in determining whether the rights of the defence were infringed, it does not matter that the impugned undertakings have been authorised to exchange documents. Such cooperation between undertakings, which cannot be taken for granted, cannot in any case relieve the Commission of its own duty to ensure that during the investigation of an infringement of competition law the defence rights of the undertakings concerned are respected (Case T-30/91 *Solvay*, paragraphs 85 and 86; Case T-36/91 *ICI*, paragraphs 95 and 96).

1015 However, as the Commission has emphasised, access to the file cannot extend to internal documents of the institution, the business secrets of other undertakings and other confidential information (*BPB Industries and British Gypsum*, paragraph 29).

1016 According to a general principle which applies during the course of the administrative procedure and which is expressed in Article 214 of the Treaty and various provisions of Regulation No 17, undertakings have a right to

protection of their business secrets. However, that right must be weighed against safeguarding the rights of the defence (Case T-30/91 *Solvay*, paragraph 88; Case T-36/91 *ICI*, paragraph 98).

1017 In those circumstances, the Commission cannot use a general reference to confidentiality to justify a total refusal to divulge documents on its file. Moreover, in this case it does not seriously maintain that all the information contained in those documents was confidential. The Commission would therefore have been able to prepare (or have prepared) a non-confidential version of the documents in question or, should that prove difficult, to have drawn up a sufficiently precise list of the documents concerned so as to allow the undertaking to determine, in the light of full knowledge of the facts, whether the documents described could be relevant to its defence (Case T-30/91 *Solvay*, paragraphs 89 to 95; Case T-36/91 *ICI*, paragraphs 99 to 105).

1018 In this case, no non-confidential version of the documents in question has been prepared. Moreover, even if the Commission did in fact supply the applicants with a list of the documents in its file, that list was of no use to the applicants because it merely indicated in a general way the undertaking from which the corresponding pages of the administrative file came.

1019 In the light of all those factors, the Court finds that during the administrative procedure in this case the Commission did not give the applicants proper access to the file.

1020 However, that is not sufficient of itself to warrant annulment of the Decision.

1021 An alleged infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case, because it is effectively the objections raised by the Commission which determine the infringement which the undertaking concerned is alleged to have committed. It is therefore necessary to consider whether the applicant's ability to defend itself was affected by the conditions in which it had access to the Commission's administrative file. In that respect, it is sufficient for a finding of infringement of defence rights for it to be established that non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment (Case T-30/91 *Solvay*, paragraphs 60 and 68; Case T-36/91 *ICI*, paragraphs 70 and 78; see also, in the area of State aids, Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 13).

1022 If that were so, the administrative procedure would be defective and the Decision would have to be annulled. Any infringement of the rights of the defence occurring during the administrative procedure cannot be remedied in the proceedings before the Court of First Instance, whose review is restricted to the pleas raised and which cannot therefore be a substitute for a thorough investigation of the case in the course of the administrative procedure. If during the administrative procedure the applicants had been able to rely on documents which might exculpate them, they might have been able to influence the assessment of the college of Commissioners (Case T-30/91 *Solvay*, paragraph 98; Case T-36/91 *ICI*, paragraph 108).

1023 By letter of 7 May 1997, issued by way of measures of organisation of procedure and subject to the assessment of the pleas relied upon by the applicants, the Court of First Instance decided to grant each of them access to the Commission's file, save for internal Commission documents and documents containing business secrets or other confidential information. It invited the parties to inform it of any confidential information which might still be in the file. Finally, the applicants seeking access were invited to submit by 31 July 1997 precise and reasoned observations, as brief as possible, in order to show how, in their view, failure to communicate those documents might have affected their defence. They were to submit a copy of the documents to which they referred.

1024 None of the applicants raised any problem of confidentiality.

1025 To take account of the time needed by the Commission to consult undertakings not involved in order to ensure that documents emanating from them were not covered by confidentiality, and in the light of a request from Counsel for BASF based on compelling personal reasons, the Court extended the period granted to the applicants to submit their observations on the documents which they had consulted to 31 August 1997, and then to 22 September 1997.

1026 As already stated, only Wacker and Hoechst did not respond to the Court's invitation and did not lodge observations at the Court Registry. At the hearing, Counsel for those two applicants indicated that personal constraints had prevented him from consulting the Commission's file and submitting observations. The Court notes, however, that it was not at any time presented with a request for an extension of the period on that ground, and that Wacker and Hoechst did not at any time submit observations. In those circumstances, the Court considers that those two applicants have not shown that the failure to communicate documents during the administrative procedure infringed their defence rights.

1027 The Commission submitted its observations on 12 December 1997.

1028 In addition, as already stated, Montedison did not raise any pleas concerning access to the administrative file. Therefore, there is no need to take account of the observations submitted by that applicant.

1029 Accordingly, it is necessary to examine the observations submitted by the nine other applicants following the measure of organisation of procedure decided upon by the Court.

B — *The observations lodged in the context of the measure of organisation of procedure*

Arguments of the applicants

1030 The nine applicants who validly submitted observations produced a series of documents the failure to disclose which, in their submission, might have affected their defence rights.

1031 A number of applicants argue that the Commission not only did not give them access to the file, but deliberately deleted certain passages of documents which it had communicated. Those passages contained comments which might have supported the applicants' arguments.

1032 Some applicants also argue that, in view of the time which has elapsed, it is no longer possible to examine properly the documents which they might have consulted.

1033 Finally, others comment that the documents to which they refer are already sufficient to show in what way their defence rights might have been affected, but that other documents might also have been produced to support that conclusion.

1034 DSM and LVM also request that the Court order the production of the records of the Commission's investigations at the undertakings' premises.

Findings of the Court

1035 By way of a preliminary observation, it should be noted that the purpose of this review is to determine whether the failure to disclose documents or extracts might have affected the applicants' defence. The fact that passages of documents subsequently revealed were initially deleted by the Commission at the time of the administrative procedure does not alter the scope of the Court's review. Any infringement of the rights of defence falls to be assessed objectively and does not depend on the good or bad faith of Commission officials.

1036 Moreover, the applicants had nearly three months to consult the Commission's file and submit their observations. Since it is for undertakings alleging incomplete access to the administrative file to show in what way their defence rights have been affected, something which they have had sufficient time to do, account can be taken only of the documents which they have produced. It is not enough for the applicants simply to refer to the fact that the list of documents referred to in, and annexed to, their observations is not exhaustive.

1037 Finally, the examination which must be carried out is an objective one, and must be made in the light of the conclusions reached by the Commission in its Decision. The fact that the documents are not recent is therefore no obstacle to determining whether there has been an infringement of the rights of the defence.

1038 In the circumstances of the case, the applicants' observations must be examined simultaneously.

1039 In that context, firstly, the applicants cannot rely on documents or extracts which they already had at the time of the administrative procedure. That applies in particular to the documents annexed to the statement of objections and the Commission's letter of 3 May 1988. The very 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. That reservation does not apply, however, to documents already communicated, where the applicants rely on extracts which have been deleted. It is therefore necessary to exclude Annexes 9, 10, 11, 15, 21 and 23 to the observations of DSM and LVM, Annexes 4 and 6 to the observations of Elf Atochem, Annex 134 to the observations of BASF, Annex 10 to the observations of SAV, Annex 13 to the observations of ICI, Annexes 12, 15 and 26 to the observations of Hüls, and Annexes 9, 26 and 28 to the observations of Enichem.

1040 Secondly, for the purposes of this examination, it is also necessary to exclude the documents and extracts relied on by the applicants where they concern a period prior to the origin of the cartel or after the date of the end of the infringement used by the Commission in calculating the amount of the fine. For that purpose, it is not the date of the document which is important but the relevance of the extract relied upon by the applicants with regard to the period of the infringement. Accordingly, it is necessary to exclude Annexes 8, 16 to 18, and 23 to 29 to the observations of DSM and LVM, Annexes 2 and 3 to the observations of Elf Atochem, Annexes 132 to 138, 141 and 142 to the observations of BASF, Annexes 1, 2, 6 to 9, and 11 to the observations of SAV, Annexes 18, 25, 27 and 34 to the observations of Hüls, and Annexes 1, 11, 15, 26, 32(4), 40, 45, and 54(2) and (3) to the observations of Enichem.

1041 Thirdly, certain documents relied on by the parties do not concern objections made by the Commission. The failure to disclose them cannot therefore have affected the undertakings' defence. That applies to documents concerning the markets of non-member countries (see point 39 of the Decision, footnote 1) or sales of derived products (particularly Annex 7 to the observations of Elf Atochem and Annexes 3 and 4 to the observations of SAV).

1042 Similarly, the applicants mention a number of documents referring to price instructions given orally, that being evidence contradicting the Commission's argument that the very absence of written instructions in respect of several of the producers showed that they had 'something' to hide. However, although the Commission noted the absence of documents concerning prices for certain

undertakings and did not accept the argument that price objectives could not have been fixed in writing, it did not conclude that that absence proved the participation of those undertakings in the price initiatives (Decision, point 20). The documents cited by the applicants in that respect are therefore irrelevant. Moreover, the applicants make only a partial reading of those documents, which expressly state that oral instructions are to be supplemented by sending written tariffs (in particular, Annex 30 to the observations of DSM and LVM and Annex 41 to the observations of Enichem).

1043 It is therefore necessary to examine the other documents produced by the applicants.

1044 In general, certain applicants emphasise the fact that the documents which they produce make no reference to the existence of an agreement or concerted practice between undertakings (Annexes 19 and 31 to the observations of DSM and LVM and Annex 135 to the observations of BASF). However, the fact that documents are silent in that respect cannot be regarded as liable to alter the Commission's conclusions based on documentary evidence. That applies in particular to press releases or letters sent by a producer to its customers announcing a price increase. Such documents cannot be expected to indicate that the increase was being made in concert with other producers.

1045 Similarly, the applicants refer to three internal Shell documents, headed 'business plans', of 12 July 1982, 19 April 1983 and 4 November 1983 and covering the periods 1982 to 1986, 1983 to 1987 and 1984 to 1987 respectively (Annexes 1 to 3 to the observations of DSM and LVM, and Annexes 1 and 2 to the observations of ICI). Apart from the fact that those documents were confidential at the time of the administrative procedure, the fact that they do not mention the existence of an infringement of Article 85 of the Treaty cannot be regarded as capable of calling into question the documentary evidence produced by the Commission. By their nature those documents concern market forecasts. References to anticipated 'competitive pressure' or the 'underlying assumption' of a fully competitive pricing policy cannot affect Commission conclusions based on subsequent documents drawn up at the time of the facts alleged and which establish the existence of price initiatives in 1983 and 1984 in which Shell was one of the participants.

1046 Some applicants refer to the fact that a number of documents illustrate that there was overcapacity on the market, that producers were incurring losses at the relevant time and that a number of them were being restructured (for example, Annex 139 to the observations of BASF and Annex 13 to the observations of Hüls).

1047 However, the Commission took full account of the state of the market and the situation of the undertakings (Decision, points 5 and 36), including that prevailing when the amount of the fine was determined (second paragraph of point 52 of the Decision). Moreover, those circumstances are not sufficient to exclude the application of Article 85 of the Treaty (see paragraph 740 above).

1048 LVM and DSM refer to a handwritten document of 1983, which contained the transcription of handwritten annotations to the planning documents (Annex 6 to their observations). However, they do not explain how those annotations, which had been supplied to the applicants at the hearing before the Commission in September 1988 (see paragraphs 503 to 505 above), are supposed to affect the meaning of the planning documents.

1049 The applicants then refer to documents which allegedly contradict directly the probative value of those produced by the Commission in support of its conclusions.

1050 Thus, a number of documents are alleged to show that the word 'compensation' does not have the meaning attributed to it by the Commission in the Decision (see, in particular, Annex 5 to the observations of Elf Atochem and Annex 11 to the observations of ICI). However, the use of the same word in contexts which are clearly different does not throw doubt on the Commission's conclusions. The existence of a compensation mechanism, as identified by the Commission in the Decision, is expressly shown by the 'sharing the pain' and Alcudia documents (paragraphs 588 to 593 above). That is also apparent both from the wording of the DSM document and from a comparison between that document and the two just referred to (paragraphs 594 to 598 above).

1051 Elf Atochem also refers to a document showing trends in Shell's market share in 1981 which it maintains are incompatible with a compensation system between producers (Annex 1 to the applicant's observations). However, the Decision shows that Shell was the one producer which did not participate in that mechanism and that the Commission held it to have participated in the infringement only as from 1982.

1052 DSM, LVM and Enichem also refer to tables attached to ICI's reply to a request for information (Annex 37 to the observations of DSM and LVM and Annexes 37 to 39 of the observations of Enichem). Although that reply of 5 June 1984 was attached as Appendix 4 to the statement of objections, the tables in question, containing ICI's internal price targets from September 1980 to December 1983, by national market, had been removed. The applicants argue that those tables reveal the existence of price targets other than those identified by the Commission in its Decision, and that this casts doubt on the collusive nature of the price initiatives.

1053 It should not be forgotten, however, that the tables in question were drawn up for the purposes of the infringement procedure. The fact that ICI states that they were its internal price initiatives cannot therefore affect the Commission's conclusions in relation to the documents which it has produced. Apart from the question of the exchange rates used by Enichem to convert the price targets declared by ICI (which were denominated in national currency) into German marks (the currency in which the initiatives are expressed in the tables annexed to the Decision), it should be noted that the applicants disregard the comments and reservations made by ICI itself in the preamble to those tables. Thus ICI indicated, in the first place, that the prices were those charged to 'second-ranking' customers and, secondly, that the absence of any indication of a price initiative for a given month did not mean that there had not been one, but that there was no longer any written record of it. Indeed, it appears that those tables fail to mention price initiatives which are expressly shown by documents emanating from ICI and annexed to the statement of objections. Moreover, the differences pointed out by Enichem are based on the indication by ICI of prices for 'second-ranking' customers, but are contradicted if account is taken of the prices for major customers, as indicated in the appendices to the statement of objections.

1054 Hüls refers to an ICI letter of 7 March 1983, which it alleges calls into question the interpretation given to Appendix P45 to the statement of objections, of 6 April 1983, referring to the two-stage price initiative of 1 April 1983 and 1 May 1983 (Annex 11 to the observations of Hüls). That letter is alleged to show that ICI fixed its prices individually, with particular reference to market demand, running the risk of losing customers.

1055 With regard to that submission, the existence of the joint initiative in question has been established by reference to a number of documents (in particular Appendices 42 and P42 to P53 to the statement of objections), and not merely by reference to document P45. Moreover, the Commission has established that there was a meeting of producers in Paris on 2 March 1983, during which both sales volumes and the price level were discussed. Hüls has also produced a telex from ICI of 4 March 1983 (Annex 10 to the observations of Hüls), which shows that ICI decided upon firm action to raise prices to DM 1.50 per kilogramme as from 1 April. Thus, two days after the Paris meeting, ICI decided upon a price rise the date and level of which correspond to those of the initiative identified by the Commission in the Decision. Finally, another ICI telex of early March 1983 (Annex 19 to the observations of Hüls) refers not only to the price initiative of 1 April 1983, but also to that of 1 May 1983 designed to raise the price to a minimum level of DM 1.65 per kilogramme. That should also be compared with Appendix P43 to the statement of objections, which is undated but, in the light of its content, must have been established before Monday 7 March 1983. That document already showed that price initiatives had been decided upon as from 1 April and 1 May 1983, with mention of the target prices.

1056 In those circumstances, the ICI letter of 7 March 1983 signed by the ICI representative at the producer meetings, far from casting doubt upon the Commission's conclusions, supports them. Even if the author has doubts as to that initiative's chances of success, bearing in mind the failure of the previous initiative of 1 January 1983, also identified by the Commission in its Decision, that does not alter the fact that it was the result of agreement between the producers in Paris five days earlier.

1057 DSM, LVM (Annex 30 to their respective observations) and Hüls (Annex 20 to its observations) similarly rely on an ICI document of 19 April 1983 allegedly

establishing that that undertaking became aware of the price initiative only in the light of information obtained on the market. However, the applicants ignore the fact that as early as the first days of March, that is to say immediately after the producers met in Paris on 2 March 1983, ICI was already informed of the date and level of the initiative of 1 May 1983 (paragraph 1055 above). Moreover, the document of 19 April 1983 itself refers to an earlier letter of 10 March 1983.

1058 Enichem produces a series of documents which it considers cast doubt on the Commission's conclusion that the initiatives were fixed in German marks to be subsequently converted into national currency. That discussion is, however, of no practical consequence. In the first place, Appendices P1 to P70 show that European target prices were in fact agreed in German marks, and the applicant has itself relied on extracts from numerous documents confirming that that was so (for example, Annexes 2 and 36 to its observations). Moreover, it is obvious that, for the purposes of their implementation, those prices were to be converted into national currency. Finally, the Commission has never claimed that the price initiatives had the effect of ensuring that prices actually charged on each national market were identical.

1059 Certain documents are alleged to show that undertakings were informed of other producers' price initiatives by their customers or the trade press (Annexes 31 and 33 to the observations of DSM and LVM, Annex 140 to the observations of BASF, Annexes 9 and 33 to the observations of Hüls, and Annexes 3 to 6 and 10 to 12 of the observations of Enichem). However, those documents do not support the conclusion that the undertakings were informed of the existence of a price initiative only by those means. On the contrary: they are consistent with the idea that the applicants sought to verify with their customers or through the trade press whether their competitors had in fact announced a prices increase and whether they had implemented it on the date anticipated — which is also shown by the documents already communicated in Appendices P1 to P70. Taking account of the fact that those initiatives were often not followed at the required level, that information allowed each undertaking above all to satisfy itself that an initiative was being followed and to adopt its policy with regard to the success or failure, in whole or in part, of an initiative.

1060 The other documents relied on by the applicants are alleged to demonstrate lively competition in the PVC market during the infringement period, that being wholly incompatible with the Commission's conclusions. In particular, the applicants refer to documents which identify 'aggressive' competitors, or which refer to the presence of economic conditions favourable or unfavourable to a price increase, that being alleged to signify that the initiatives were not the result of collusion but decided unilaterally by reference to the state of the market.

1061 Those documents are not intended directly to cast doubt on others supplied by the Commission in support of its conclusions but to demonstrate the existence of lively competition incompatible with those conclusions.

1062 The Decision shows, however, that those circumstances were fully taken into account. Thus the Decision does not claim that prices increased consistently during the infringement period, or even that they remained stable during that period. On the contrary, the tables annexed to the Decision show that prices did not cease to fluctuate, reaching their lowest level during the first three months of 1982. The Commission thus expressly recognised that the price initiatives had met with limited success and were occasionally regarded as failures (Decision, points 22 and 36 to 38). It also indicated some of the reasons for those results: in addition to factors outside producers' control (anticipated purchases by consumers, imports from non-member countries, fall in demand, especially in 1981 and 1982, special discounts...), it found that certain producers sometimes gave preference to their sales volumes to the detriment of their prices (Decision, points 22 and 38) and that, given the characteristics of the market, it would have been futile to attempt concerted price initiatives unless conditions were favourable to an increase (Decision, point 38). Nor did the Commission ignore the existence of 'aggressive' conduct on the part of some undertakings (Decision, point 22). Likewise, it acknowledged that the 'sharing the pain', Alcudia and DSM documents, whilst evidencing the existence of a compensation mechanism between producers, also supported the conclusion that those mechanisms did not function correctly (Decision, point 11). It was in the light of those considerations as a whole that the Commission determined the amount of the fine to be imposed on the applicants.

1063 Moreover, both Appendices P1 to P70 and the documents sent by the Commission to the parties in May 1988 already supplied a plentiful documentary basis enabling the applicants to argue, as indeed they have done, the existence of the circumstances which they allege today.

1064 Finally, it should be noted that, apart from the extracts relied on by the applicants, a number of the documents produced, read as a whole or in conjunction with the documents annexed to the statement of objections, in fact support the conclusions of the Commission.

1065 Thus they indicate that competitors who are denounced as aggressive at a given date are shown to have actually supported the previous or subsequent price initiative. ICI for instance relies on a Shell document of July 1982 in which it is described as a probable aggressive competitor (Annex 4 to its observations), yet Appendix P37 to the statement of objections, emanating from ICI, bears witness to the strong support given by ICI to the price initiative of September 1982. A comparison of Annex 12 to the observations of ICI with Appendices P38 and P40 to the statement of objections shows the same, as do in the case of DSM in particular Appendices P5, P13, P28 and P41 to the statement of objections.

1066 Similarly, in an internal memorandum of Wacker of 7 June 1982 (Annex 7 to the observations of Shell, Annex 5 to the observations of SAV and Annex 14 to the observations of ICI), the author, having emphasised the catastrophic fall in prices, indicates, in a passage relied on by the applicants: 'Major increase in market share [in Germany, for the period from January to May 1982]: Shell and Enoxy; average increase in market share: DSM, SAV, PCUK; losses above the average, besides Wacker: Hoechst, Orgavyl and CWH, and BASF.' However, in the following line the author continues: 'Since May, efforts have been in progress to improve prices of homopolymerous PVC.' Those efforts, allegedly made individually in a competitive market, consisted in fixing, for 1 May 1982, a target price 35% higher than the market price, then, for 1 June 1982, a target price more than 10% higher than the previous target (namely DM 1.35/kg and DM 1.50/kg, corresponding to the target prices identified by the Commission at those dates). That is to be compared with Appendix P25 to the statement of

objections, also emanating from Wacker, in which the author, despite that substantial rise in the competitive context described by the applicants, adds: 'The figure for the quantities sold should be good in May.' Similarly, the author of Appendix P23 to the statement of objections, having referred to the fall in prices in April to a level of DM 1/kg, indicates: 'The slide in prices was halted by the month end, due to the announcement of a general increase in European prices to DM 1.35/kg on 1 May.' Finally, the Court notes that both the Wacker memorandum of 3 March 1982, communicated by the Commission to the parties on 3 May 1988, and Appendix P25 to the statement of objections supported the same argument as that raised by the applicants in the light of Wacker's memorandum of 7 June 1982.

1067 Again, a memorandum from Solvay of 22 March 1983 (Annex 43 to the observations of Enichem), having referred to the worrying situation on prices and the aggressivity of certain producers, contains the following commentary: 'Today we are again on the threshold of an attempt to raise prices.' It should be remembered in that connection that the Commission has identified, in the light of documents emanating from other undertakings, an initiative which took place on 1 April 1983. Moreover, the document in question mentions initiatives of May, June and September 1982, all three of which have been identified by the Commission in its Decision.

1068 A large number of documents produced by the applicants contain explicit references to 'price initiatives', the dates and levels of which correspond exactly to those identified by the Commission in the Decision.

1069 Shell also relies on ICI documents which are alleged to confirm, as Shell has always maintained, that, given its role as a service company, it was not in a position to impose any line of conduct on sales companies of the group in the various Member States (Annexes 2 and 3 to the observations of Shell). However, that fact emerges expressly from the Decision (point 46), even if the Commission nevertheless considered that the applicant should be an addressee of the Decision, particularly in view of the fact that it was the entity which provided contact with the cartel. It should be noted in that respect that in one of those documents

(Annex 3 to the observations of Shell), which is a record of a meeting between ICI and Shell, the latter indicates 'the route into Shell' for ICI to follow in order to arrive at coordination within the group.

1070 No document relating specifically to the meetings between producers and the sales monitoring mechanism has been produced.

1071 Finally, it should be noted that the records of investigations carried out at the premises of undertakings, which some applicants have requested be produced, are internal Commission documents. As such, they are not accessible to the applicants (paragraph 1015 above). The fact that two of those records have nevertheless been disclosed cannot affect that conclusion.

1072 Having regard to the fact that those two records would in any event not have been supplied, and rightly so, at the time of access to the file if it had occurred in 1988, they must be set aside, irrespective of their content. Moreover, those documents, drafted the day after, or within a few days of, the investigation at BASF's premises on 20 and 21 January 1987, from which it emerges that no evidence of a concerted practice could be discovered, are not capable of undermining the probative value of the documents assembled by the Commission in support of its final conclusions.

1073 In another development, without calling for production of the documents, Hüls and Enichem have argued that, apart from internal Commission documents and documents in respect of which confidentiality has not been waived by the undertakings from which they emanate, some pages of the file have not been communicated to the applicants. At issue, for example, is a request for information sent to the company Kemanord at the time of the inquiry procedure; such a request cannot by its nature contain anything relevant to the applicants' defence. Other documents consist of letters or facsimile cover sheets sent to the Commission by undertakings not involved, or vice versa. As the Commission has pointed out, where it has not obtained a waiver of confidentiality by those

undertakings, it is not entitled to disclose those documents. There is, moreover, no evidence to suggest that they could have been in any way relevant in the present examination. Enichem has also referred to the existence of a letter from Wacker which was not communicated. However, the letter from the Commission to the Court Registry of 17 July 1997 shows that that document was and remains at the applicants' disposal.

1074 It follows therefore from the exhaustive examination which the Court has made of the documents referred to by the applicants that none of them 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.

1075 In the light of all those considerations, the applicants' pleas concerning access to the Commission's administrative file must be dismissed.

Fines

1076 All the applicants have sought in the alternative to have the fines set aside or reduced. Their arguments are in five parts. First, they raise pleas in law based on the passage of time and the limitation rules, as contained in Regulation No 2988/74 (I). Secondly, they plead infringement of Article 15(2) of Regulation No 17 (II). Thirdly, they argue that there has been an insufficient statement of reasons (III). Fourthly, they argue that the Commission made certain errors of assessment (IV). Finally, they plead infringement of certain general principles of Community law (V).

I — *Passage of time and limitation*

1077 In support of their claims for the annulment or reduction of the fines, the applicants begin by raising pleas in law identical to those in support of their claims for annulment of the Decision (paragraphs 100 to 119 above), based on the passage of time.

1078 For the same reasons as those set out above (see paragraphs 120 to 136), those pleas must be dismissed.

1079 It is therefore necessary to examine the pleas alleging infringement of Regulation No 2988/74.

Arguments of the applicants

1080 The applicants maintain that the power to impose fines was time-barred under Regulation No 2988/74. In that respect, they rely on the following eight arguments.

1081 First, BASF argues that the various stages of the administrative procedure prior to the adoption of the 1988 decision did not interrupt the limitation period, since their effects were removed by the judgment of 15 June 1994.

1082 Secondly, three applicants argue that in relation to them the facts were already time-barred, at least in part, at the time the 1988 decision was adopted. Thus Montedison and Hüls argue that, since the first measure interrupting the

procedure against them occurred, in respect of one of them, in November 1987 and, in respect of the other, in December 1987, the facts prior to November 1982 and December 1982 respectively are time-barred. In order to show that on 1 November 1982 it was no longer in contact with the cartel, Montedison requests the Court to hear as witnesses the managing director and responsible board member of its subsidiary Montedipe, who were in office on 1 November 1982. DSM argues that, since it left the market in January 1983, the facts have been time-barred since January 1988.

1083 Thirdly, according to BASF and ICI, the 1988 decision is not a measure capable of interrupting the limitation period within the meaning of Article 2(1) of Regulation No 2988/74. They maintain that since it has in any event been annulled it cannot produce any legal effects, including in the matter of limitation.

1084 Fourthly, according to LVM, BASF, DSM, ICI and Hüls, the actions brought against the 1988 decision did not suspend the limitation period. Decisions finding an infringement and imposing a fine are not covered by Article 3 of Regulation No 2988/74.

1085 Fifthly, according to ICI and Hüls, even if the actions challenging a decision finding infringement and imposing a fine are capable of suspending the limitation period, that does not apply to the actions challenging the 1988 decision. The time which had elapsed was solely attributable to the Commission, which was alone responsible for the nullity of the 1988 decision.

1086 Sixthly, according to LVM and DSM, if the action challenging the 1988 decision suspended the limitation period there would be discrimination, as Solvay and Norsk Hydro would be treated differently to the other undertakings. The 1988 decision, annulled *erga omnes* by the Court of Justice, could no longer be implemented with regard to the first two undertakings.

1087 Seventhly, according to LVM, DSM and ICI, the action by Solvay challenging a request for information, which gave rise to the judgment in Case 27/88 *Solvay* v *Commission* [1989] ECR 3355, could not suspend the limitation period in respect of the other undertakings.

1088 Finally, according to LVM, BASF, DSM and ICI, bearing in mind the mandatory limitation period laid down by the second sentence of Article 2(3) of Regulation No 2988/74, the Commission's power to impose fines was in any event time-barred when it adopted the Decision on 27 July 1994.

Findings of the Court

1089 Article 1 of Regulation No 2988/74 provides that the Commission's power to impose fines is subject to a five-year limitation period in respect of breaches of Article 85(1) of the Treaty. The period begins to run on the day on which the infringement is committed, or, in the case of continuing or repeated infringements, on the day on which it ends. It may, however, be interrupted or suspended, pursuant to Article 2 or 3 respectively of Regulation No 2988/74.

1090 As the Court has already held (paragraphs 183 to 193 above), the validity of the preparatory measures which preceded the adoption of the 1988 decision is not affected by the annulment of that decision by the Court of Justice in the judgment of 15 June 1994. Therefore, those measures did interrupt the limitation period within the meaning of Article 2 of Regulation No 2988/74.

1091 In this case, the Decision (point 6) shows that investigations were carried out on 21, 22 and 23 November 1983 at the premises of ICI and Shell, and on 6 December 1983 at the premises of DSM. A written request for information was sent to ICI by decision of 30 April 1984. Investigations were carried out on 20

and 21 January 1987 at the premises of, *inter alia*, Atochem, Enichem and Solvay, then, later in 1987, at those of Hüls, Wacker and LVM. Finally, the statement of objections was notified to the undertakings on 5 April 1988.

1092 The Court finds, in the first place, that each of those measures interrupted the limitation period pursuant to Article 2(1)(a), (b) and (d) of Regulation No 2988/74. Secondly, the limitation period starts to run afresh as from each interruption, in accordance with the first sentence of Article 2(3) of the regulation. Thirdly, that interruption applies for all the undertakings which took part in the infringement, pursuant to Article 2(2) of the regulation.

1093 Therefore, the Commission's power to impose fines in respect of facts which arose at the earliest in August 1980 were not time-barred when it adopted the 1988 decision. Accordingly, there is no need to accede to Montedison's request for the hearing of witnesses.

1094 The applicants go on to deny that the actions challenging the 1988 decision, in which all of them were parties, could suspend the limitation period.

1095 Article 3 of Regulation No 2988/74 provides that 'the limitation period in proceedings shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities'.

1096 The applicants consider that the word 'decision' used in Article 3 denotes the measures listed in Article 2 of the regulation. Since the final decision finding an

infringement and imposing a fine is not included in that list, they argue that the actions challenging the 1988 decision did not suspend the limitation period.

1097 However, not all of the measures listed in Article 2(1) of the regulation are measures which require to be classified as decisions. That applies in particular to written requests for information under Article 11, inspection authorisations pursuant to Article 14 of Regulation No 17, and the statement of objections, none of which is a preparatory measure. It cannot therefore be accepted that the word 'decision' used in Article 3 of the regulation refers to the measures listed in Article 2 thereof.

1098 In fact the specific purpose of Article 3 is to enable the limitation period to be suspended where the Commission is prevented from acting for an objective reason not attributable to it and connected precisely with the fact that an action is pending. A Commission decision imposing a fine cannot be regarded as final for as long as the statutory period for bringing an action against it continues to run or, in appropriate cases, an action is pending; once the action is completed, the Commission may in the event of an annulment be induced to adopt a fresh decision. In that context, it should be noted that Article 2 of the regulation, concerning interruption, and Article 3, concerning suspension, have different aims. Whilst the first is intended to draw the consequences from the adoption by the Commission of investigative measures and proceedings for infringement, the second is intended on the contrary to remedy the situation in which the Commission finds itself prevented from acting.

1099 The applicants cannot validly claim that because the 1988 decision was annulled for breach of essential procedural requirements by the Commission the actions challenging that decision could not suspend the limitation period.

1100 Article 3 of the regulation, whereby the limitation period is suspended for as long as proceedings are pending before the Court, has meaning only where a decision finding an infringement and imposing a fine, which forms the subject-matter of

the action, is annulled. As the Commission points out, any annulment of a measure which it has adopted is necessarily imputable to it, in the sense that it reveals an error on the Commission's part. To argue therefore, as the applicants do, that an action does not have the effect of suspending the limitation period if it leads to recognition of an error attributable to the Commission would deprive Article 3 of the regulation of all meaning. It is the very fact that an action is pending before the Court of First Instance or the Court of Justice which justifies the suspension, and not the conclusions reached by those courts in their judgment.

1101 In those circumstances, it is clear that the limitation period was suspended for as long as the 1988 decision was the subject of proceedings pending before the Court of First Instance and the Court of Justice, to which all the applicants were parties. Even if only the date of the last action lodged before the Court of First Instance, 24 April 1989, were to be taken into account, and no account were taken of the time which elapsed between the delivery of the judgment of the Court of First Instance and the date on which the matter was referred to the Court of Justice, the limitation period would have been suspended for a minimum period of four years, 11 months and 22 days. Therefore, even if, as the applicants maintain, the statement of objections notified on 5 April 1988 were to be the last measure interrupting the limitation period, as envisaged by Article 2(1)(d) of Regulation No 2988/74, the Commission's power to impose fines was not time-barred on 27 July 1994, the date on which the Decision was adopted.

1102 The applicants nevertheless argue that if the actions challenging the 1988 decision suspended the limitation period the result would be discrimination, as Solvay and Norsk Hydro would be treated differently to the other undertakings.

1103 However, that argument rests on the premiss that the annulment of the 1988 decision by the Court of Justice produced an effect *erga omnes*. As has already been held (paragraphs 167 to 174 above), that is not the case.

1104 Moreover, even if the applicants' argument were correct, it would not affect the objective conclusion that the Commission's power to impose fines was not time-barred in relation to them.

1105 The maximum limitation period of ten years provided for by the second sentence of Article 2(3) of Regulation No 2988/74 is extended by the period during which the limitation period was suspended by reason of the actions pending before the Court of First Instance and the Court of Justice (Article 2(3) of the regulation, *in fine*). As already stated, that suspension lasted at least four years, 11 months and 22 days. Therefore, having regard to Article 2(3) of Regulation No 2988/74, the Commission's power to impose fines in respect of facts arising, at the earliest, in August 1980 was not time-barred either on 27 July 1994, the date on which the Decision was adopted.

1106 In the light of all those factors, it is clear that the Commission's power to impose fines was not time-barred when it adopted the Decision. It is not necessary, therefore, to determine whether the adoption of the 1988 decision also interrupted the limitation period or whether the action by Solvay challenging a decision to request information addressed to it suspended the limitation period with regard to the other undertakings; those factors, if well founded, could only support the conclusion that limitation had not taken effect.

II — *Infringement of Article 15(2) of Regulation No 17*

1107 The applicants challenge the Commission's assessment as to the intentional nature and duration of the infringement, and also challenge the turnover taken into account for the purposes of determining the fine. Finally, they accuse the Commission of failing to take certain mitigating circumstances into account.

The intentional nature of the infringement

1108 LVM, DSM, Wacker, Hoechst and Enichem deny that the Commission has established that the infringement was intentional within the meaning of Article 15(2) of Regulation No 17.

1109 In the version in force at the time when the Decision was adopted, that provision provided that 'the Commission may by decision impose on undertakings fines of from 1 000 to 1 000 000 ecus, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently... they infringe Article 85(1)... of the Treaty'.

1110 In this case, there is no dispute that the Commission found the infringement wholly intentional and not merely negligent (point 51, paragraph 2 of the Decision).

1111 For an infringement of the competition rules of the Treaty to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing those rules; it is sufficient that it could not have been unaware that its conduct was aimed at restricting competition (Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 41).

1112 In this case, the intrinsic gravity of the repeated infringement of Article 85(1) of the Treaty, and in particular subparagraphs (a) and (c) thereof, as described and analysed in this judgment, reveals that the applicants did not act imprudently, or even negligently, but intentionally.

1113 The plea must therefore be dismissed.

The duration of the infringement

Arguments of the applicants

1114 The applicants argue that the Decision should be annulled, at least in part, or the fine annulled or reduced, on account of various defects occurring in the determination of the duration of the infringement (*Hoffmann-La Roche*, paragraphs 140 and 141, *Musique Diffusion Française*, paragraphs 129 and 130, *Petrofina*, paragraph 249 et seq., Case T-4/89 *BASF*, paragraphs 64 to 72 and 259 to 262, and *Dunlop Slazenger*).

1115 LVM and DSM accuse the Commission of failing to state sufficiently precisely when the infringement started and came to an end (points 48 and 54 of the Decision respectively).

1116 More specifically, DSM finds that bearing in mind that, according to the Decision, DSM's responsibility ceased on the date on which LVM was constituted, namely 1 January 1983, there is a contradiction in points 42, 48 and 54 of the Decision concerning the date on which the infringement of which it is accused came to an end.

1117 Elf Atochem argues that the Commission has not been able to prove the duration of the alleged infringement. Neither the date of its commencement nor the date of its termination has been precisely established.

1118 BASF maintains there is no proof that it adhered to the cartel from 1980 onwards. Nor, in its submission, has its participation in the infringement until May 1984 been established; that conclusion was based on the Atochem table, the probative value of which has already been challenged. The applicant maintains that, in any event, it did not participate in meetings after October 1983, the date of the Commission's first investigations in the polypropylene sector. At the very least, that should lead to a reduction in the fine.

1119 Wacker and Hoechst argue in their replies that the Decision does not contain a sufficient statement of reasons as to the determination of the duration of the infringement. In breach of the principle of individual responsibility, the length of each addressee's participation, save in the cases of Shell and ICI, was not indicated. In reality, there was nothing in this case to show that each of them had participated in the infringement from August 1980, the presumed commencement of the cartel, until its presumed end in May 1984.

1120 Montedison argues that there is a contradiction in the grounds of the Decision. In the final paragraph of point 43 of the Decision, the Commission recognised that the applicant had left the PVC market in March 1983. However, as points 26 and 51 of the Decision show, the Commission included the period after March 1983 in its assessment.

1121 Hüls considers that the Decision does not set out the reasons for the fine imposed. In particular, the Commission omitted to state the date on which the applicant first participated in the cartel and the date on which it ceased doing so, merely indicating a duration for the cartel which was valid for most of the undertakings. The Commission thereby infringed the duty to state reasons.

1122 In the context of a plea alleging lack of reasoning, Enichem maintains that, in breach of Article 15(2) of Regulation No 17, the Commission has established neither the duration of the alleged infringement nor the duration of the participation of each undertaking in it.

Findings of the Court

1123 The Court will begin by examining the arguments set out above which concern only compliance with the duty to state reasons.

1124 In that respect, save in the case of DSM, which will be examined below (paragraph 1127 et seq.), the Commission stated clearly in points 48 and 54 of the Decision both the duration of the infringement found in respect of each of the applicants and the documents or other factors on which it relied in establishing that duration. Thus both the applicants and the Court are in a position to verify whether the Commission's assessments are well founded.

1125 Moreover, whilst Regulation No 17 requires the Commission to determine the duration of the infringement taken into account for the purposes of fixing the amount of the fine, it does not require it to determine at what later date the infringement actually ceased. Accordingly, the Commission cannot be accused of failing to state reasons as regards the actual date on which the infringement came to an end. Even if the infringement had in fact ceased, that would not entail the annulment of Article 2 of the Decision but would deprive it of effect in so far as it required the undertakings to cease the practices complained of.

1126 In its analysis of the duration of the infringement, the Commission found that Montedison had transferred its business to Enichem in March 1983 (last paragraph of point 43 of the Decision). That finding is not contradicted by the fourth paragraph of point 26 and the third paragraph of point 51 of the Decision, which relate to subsequent periods and concern only those undertakings which were still active in the PVC market and not, obviously, the applicant. The plea alleging a contradiction in the reasoning in that respect must therefore be dismissed.

1127 As regards the date on which DSM's participation in the infringement was taken to have ceased, the Decision refers to the 'beginning of 1983' (point 42, seventh

paragraph), 'April 1983' (point 48, fourth paragraph) and 'mid-1983' (point 54, second paragraph, *in fine*). Whilst it is true that the Commission's position does not emerge clearly, it being noted however that only points 48 and 54 concern an identical question, the fact remains that the date April 1983 is the only one mentioned in the part of the Decision expressly dealing with the 'Duration of the infringement'.

1128 In its written submissions in this case, the Commission has confirmed that it took April 1983 into account because it was inconceivable that DSM's role in the PVC market disappeared overnight on 1 January 1983.

1129 In the exercise of its unlimited jurisdiction, the Court finds first that, by an agreement of 22 February 1983, EMC Belgium (acting for SAV) and DSM transferred their respective PVC production businesses to LVM with effect from 1 January 1983.

1130 It is also apparent from Appendix P41 to the statement of objections, which emanates from DSM, that the latter would 'support the attempt to increase prices... starting January 1st [1983]' and that a further price increase would be made if the first one turned out to be successful. That document supports the Commission's argument that decisions taken by DSM before its withdrawal from the market were still capable of producing effects in the following months. Since the second price initiative identified by the Commission in 1983 is dated 1 April 1983, the Court considers that, for the purposes of determining the fine, the effects of DSM's participation in the cartel should be regarded as having continued until that date.

1131 Therefore, the pleas alleging defects in the statement of reasons for the Decision as regards the duration of the infringment must be rejected.

1132 Some applicants consider, next, that the Commission has failed to adduce proof of the duration of their participation in the infringement.

1133 However, as has been stated, the Decision contains a sufficiently precise indication of the duration of the infringement on the part of each of the undertakings and of the documents on which the Commission relies in that regard. It appears that the applicants' arguments are intended to challenge the probative value of those documents, which has already been examined in detail in the section of this judgment headed 'Facts' (paragraph 535 et seq.).

1134 It should be remembered in this respect that in the planning documents several undertakings, including the 'new French company', BASF and Wacker, were identified as prospective participants in the new framework of meetings. The blueprint for a cartel contained in those documents was implemented in the weeks which followed, in particular by means of a general price initiative as from 1 November 1980, the existence of which could be deduced from the planning documents. Moreover, both ICI and BASF have admitted the existence of meetings between producers, the anti-competitive purpose of which has been determined by the Commission, as from August 1980. In the case of Hoechst, the Commission found, in the third paragraph of point 48 of the Decision, that that undertaking was not cited in the planning documents. However, as from the beginning of 1981, the Solvay tables state that applicant's sales figures for the German market in 1980.

1135 Similarly, the Court has confirmed the probative value of the Atochem table and the latest price initiative identified by the Commission in the period used for the purposes of determining the fine was on 1 April 1984. Apart from ICI and Shell (see the third paragraph of point 54 of the Decision and paragraph 613 above), all the undertakings still active in the PVC sector in the first three months of 1984, including Elf Atochem, Wacker and Hoechst, are identified in the Atochem table.

1136 In the light of those considerations, therefore, the applicants' pleas concerning the duration of the infringement must be dismissed.

1137 In the case of SAV, however, it must be borne in mind that the Solvay tables cannot be regarded as having probative value as against that undertaking (see paragraph 888 above).

1138 Consequently, the latest document permitting the identification of the applicant as a participant in the infringement is the Alcudia document (see paragraph 887 above). In that document, as in others, the compensation mechanism described therein specifically concerns only the first six months of 1981 (see paragraphs 587 to 601 above).

1139 In addition, the Court considers that the price documents referred to above in paragraph 889 cannot be regarded as sufficient evidence of the applicant's participation in the infringement beyond the first six months of 1981. Whilst those documents are capable of constituting additional evidence to support, in the light of other documents, the conclusion that an undertaking has participated in the infringement, they cannot, in respect of a period during which they are not corroborated by any other factors, be regarded as sufficient proof of the participation of an undertaking in the infringement.

1140 Since the Solvay tables have no probative value in relation to SAV, therefore, it has not been demonstrated that the latter took part in the infringement after the first half of 1981.

1141 For the purposes of determining the fine, therefore, the applicant's participation in the infringement must be regarded as established only in respect of the

period from August 1980 to June 1981, and not to April 1983 as stated in the Decision.

1142 Article 1 of the Decision must therefore be annulled in so far as, by reference to the grounds for the Decision, SAV is alleged to have participated in the infringement in question after the first half of 1981.

1143 The fine must therefore be reduced to reflect the duration thus established and the gravity of the infringement in which that undertaking participated. Expressed in euros, pursuant to Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), the fine imposed on SAV must be reduced to EUR 135 000.

The turnover taken into account

Arguments of the applicants

1144 Enichem begins by arguing that turnover for the purposes of Article 15(2) of Regulation No 17 is the turnover for the tax year preceding the Decision, in this case 1993. Whereas the ratio between the fine and that turnover was necessarily different from that which existed between the fine and the turnover for 1987, the Commission nevertheless imposed a fine of identical amount, in absolute value. In that respect, the fact that the fine imposed remains below the maximum of 10% laid down by Article 15 is, the applicant submits, irrelevant.

1145 The company then argues that in view of the fact that it ceased all activity in the PVC sector in 1986 and thus no longer had any PVC-related turnover either in 1987 or in 1993, it is inequitable to use its overall turnover, even if that is possible (*Parker Pen*, paragraph 94), particularly as the turnover taken into account is that of Enichem, to which the Decision was addressed in error, rather than that of the operating company Enichem Anic.

Findings of the Court

1146 The purpose of the reference to turnover in Article 15(2) of Regulation No 17, cited in paragraph 1109 above, is to determine the maximum amount of the fine which may be imposed on an undertaking for infringement of Article 85(1) of the Treaty.

1147 Therefore, the mere change in the ratio between, on the one hand, the fine imposed in the 1988 decision and the turnover for the company's previous accounting year, namely 1987, and, on the other hand, the fine of an identical ecu amount imposed in the Decision and the turnover for the company's preceding accounting year, namely 1993, does not in itself entail an infringement of Article 15(2) of Regulation No 17. That would be so only if, by reason of that change, the fine imposed in 1994 exceeded the maximum fixed by that article. However, it is undisputed that the fine imposed is substantially below that maximum.

1148 In addition, in order to determine the amount of the fine actually imposed on the applicant, the Commission took account *inter alia* of the respective importance in the PVC market of each participant in the infringement (first paragraph of point 53 of the Decision). That importance was assessed by reference to the average market share, and not the turnover, of each of the applicants during the period of the infringement alone.

1149 The applicant's pleas must therefore be dismissed.

The failure to take certain mitigating circumstances into account

Arguments of the applicants

1150 In support of their claims for a reduction in the fine imposed upon them, the applicants plead the following circumstances, which they claim the Commission ignored.

1151 BASF and ICI emphasise the delay in adopting the Decision and the culpable lack of diligence on the part of the Commission, which did not pursue the investigations begun in 1983 until 1987. Had it acted sooner, the infringements would doubtless have ended before May 1984 (*Commercial Solvents*, paragraph 51; *Dunlop Slazenger*, paragraph 167).

1152 Wacker, Hoechst and SAV refer to the crisis in the PVC sector and the substantial losses incurred during the period covered by the Decision.

1153 Wacker and Hoechst refer to their blameless conduct since 1988, the preventive effect already attaching to the initial decision, and their withdrawal from the market since 1993.

1154 Hoechst and SAV emphasise their limited significance on the market at the time of the facts in question and the absence of any perceptible effect of their conduct on the market.

1155 SAV refers to the fact that it is a newcomer on the PVC market and to the absence of any previous infringements of Community competition rules.

1156 ICI pleads lack of proven effect on the market (*Suiker Unie*, paragraph 612 et seq., *inter alia*), its cooperation in replying to the Commission's questions under Article 11 of Regulation No 17, and the action which it took in order to secure future compliance with Community competition law (see *inter alia* Commission Decision 88/86/EEC of 18 December 1987 relating to a proceeding under Article 85 of the Treaty (V/31.017 — Fisher-Price/Quaker Oats Ltd — Toyco) (OJ 1988 L 49, p. 19)).

Findings of the Court

1157 The gravity of infringements must be determined by reference to numerous factors such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (order of 25 March 1996 in Case C-137/95 P *SPO* v *Commission* [1996] ECR I-1611, paragraph 54).

1158 First, the Court of Justice has held that, whilst a serious infringement justifies a heavy fine, account must be taken of the fact that it might have been ended sooner if the Commission had acted more quickly (*Commercial Solvents*, paragraph 51). In this case, the Commission first suspected the existence of an

infringement in October 1983 and no fine was imposed for the period after May 1984. It is therefore necessary to determine whether by reason of its (alleged) lack of diligence during that period the Commission might indirectly have helped to prolong the infringement. It should be remembered, however, that the Commission carried out investigations as early as November 1983 and sent ICI a request for information in December 1983 and a decision to request information in April 1984. In those circumstances, it cannot be accused of a lack of diligence which might have helped to prolong the duration of the infringement taken into account for the purpose of determining the level of the fines. That applies particularly in the case of ICI, as no fine was even imposed for the period after October 1983.

1159 Secondly, the Commission stated in the second paragraph of point 52 of the Decision that it had reduced the fines because over much of the period covered by the Decision the undertakings concerned had reported substantial losses in the PVC sector due to the crisis in the industry at that time. That finding is sufficient to dispose of the applicants' argument based on the crisis in the PVC market and the substantial losses of producers during the relevant period (*DSM*, paragraph 304).

1160 Thirdly, as has already been held (paragraphs 744 to 749 above), the applicants' claim that the infringement has had no effect is wrong, even if the price initiatives were only partially successful, as the Commission itself recognised in the Decision. They cannot therefore claim that the absence of effect was a mitigating circumstance.

1161 Fourthly, ICI's cooperation during the administrative procedure did not go beyond what it was obliged to do under Article 11(4) and (5) of Regulation No 17. Its collaboration cannot therefore constitute a mitigating circumstance

(Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 341). Moreover, ICI's argument on the substance of the case seeks essentially to show that the Commission misinterpreted its replies to the requests for information.

1162 Fifthly, whilst it is doubtless important that ICI took measures to prevent further infringements of Community competition law being committed by its staff in the future, that does nothing to alter the reality of the infringement found in this case. The mere fact that, in certain cases, the Commission took account in earlier decisions of the introduction of an information programme as a mitigating circumstance does not mean that it had an obligation to do so in this case, particularly as the infringement constituted a manifest breach of Article 85(1)(a) and (c) of the Treaty. As the Commission pointed out in the second paragraph of point 51 of the Decision, ICI is also one of the undertakings already fined for collusion in the chemicals industry (Commission Decision 69/243/EEC of 24 July 1969 relating to a proceeding under Article 85 of the Treaty (IV/26.267 — Dyestuffs) (Journal Officiel 1969 L 195, p. 11)).

1163 Sixthly, neither the irreproachable conduct of an undertaking since the 1988 decision nor the absence of prior infringements can be a mitigating factor as regards the existence and gravity of the infringement committed. Such factors constitute a normal circumstance that the Commission does not have to take into account in mitigation (*DSM*, paragraph 317).

1164 Seventhly, the fact that an undertaking withdrew from the PVC market before the Decision was adopted does not alter the existence, the gravity or the duration of the infringement found against it. It does not therefore justify the reduction of a fine.

1165 Eighthly, the fact that an undertaking is a newcomer to a market cannot reduce the gravity of the infringement described above, in which it participated (*Solvay*, paragraph 339).

1166 Ninthly, the mere fact that the 1988 decision was adopted does not have a deterrent effect. Only a fine is both punitive and preventive in character. The decision of 1988 was annulled, however, and with it the fines that were imposed.

1167 Finally, the first paragraph of point 53 of the Decision shows that, in determining the fines to be imposed on individual undertakings, the Commission took account of their respective importance in the PVC market. The applicants cannot therefore rely on their small size on the market in order to obtain a reduction in the fine.

1168 In the light of all those considerations, the applicants cannot accuse the Commission of failing to take account of the alleged mitigating circumstances.

III — *Infringement of the duty to state reasons*

Arguments of the applicants

1169 LVM, Elf Atochem, DSM, Wacker, Hoechst, Hüls and Enichem maintain that the Decision does not contain any specific information explaining the level of the fines imposed on each of them (*ACF Chemiefarma*, paragraph 176; *Suiker Unie*, paragraphs 622 and 623).

1170 The Commission thus failed to specify the objective standards used to assess the liability of the undertakings and their respective importance. Neither the listing in general terms of the criteria used nor the existence of different fines for each of the undertakings was sufficient to make good that omission.

1171 In the applicants' submission, disclosure of such information constitutes not merely a wish on their part, but a right (*Enichem Anic*, paragraph 274; *Tréfilunion*, paragraph 142). To hold otherwise would be to ignore Article 6 of the European Convention on Human Rights, which guarantees every accused person the right to know, precisely and in detail, the grounds for the penalty imposed upon him, including the criteria used to measure the penalty and the 'keys to calculation'.

Findings of the Court

1172 It is settled case-law that the statement of reasons required by Article 190 of the Treaty, which constitutes an essential procedural requirement within the meaning of Article 173 of the Treaty, must be appropriate to the measure at issue and disclose clearly and unequivocally the reasoning followed by the institution which adopted it in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, and in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, *inter alia*, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

1173 Although, in the case of a decision imposing fines on several undertakings for an infringement of Community competition rules, the scope of the duty to state reasons must be assessed *inter alia* in the light of the fact that the gravity of the infringement depends on a large number of factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, no binding

or exhaustive list of the criteria to be applied has been drawn up (*SPO*, paragraph 54). The Commission has a discretion when fixing the amount of each fine, and cannot be required to apply a precise mathematical formula for that purpose (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 69).

1174 The Commission has set out in points 51 to 54 of the Decision the factors it took into account in determining the fine. Points 52 and 53, in particular, show that the method it used in this case comprised two stages, as indicated by the introduction to each of those paragraphs and the list of criteria, first general and then individual, which are mentioned there.

1175 The Commission began by fixing the total amount, as it is entitled to do (*Boehringer I*, paragraph 55; *IAZ*, paragraphs 51 to 53). As point 52 of the Decision shows, in determining the amount of the fines to be imposed the Commission took a number of criteria into account, namely the nature and gravity of the infringement, the importance of the industrial product in question and the value of the sales relating thereto — some ECU 3 000 million annually in western Europe — and the combined size of the undertakings concerned.

1176 It also emphasised that it had taken into account as mitigating circumstances the fact that the undertakings had suffered substantial losses during much of the period covered by the Decision and the fact that most of the undertakings had already had heavy fines imposed upon them for their participation in an infringement in the thermoplastics sector (polypropylene) during much the same period.

1177 In the 1988 decision, including the cases of Solvay and Norsk Hydro, the total amount of the fines thus determined was ECU 23 500 000.

1178 The Commission then apportioned that total between the undertakings penalised. As Points 53 and 54 of the Decision show, in order to determine the amount of the fines to be imposed on the various undertakings, the Commission took into account the level of participation of each of them, the role they played (in so far as this could be established) and their respective importance on the PVC market. For that purpose, it tried to ascertain to what extent some undertakings could be regarded as ringleaders, which it was not able to do, or, conversely, whether some, like Shell, could be regarded as having played only a marginal role in the infringement. It also took account of the duration of the participation of each, as stated in point 54 of the Decision.

1179 Interpreted in the light of the detailed account in the Decision of the factual allegations made against each addressee of the Decision, Points 51 to 54 of the Decision contain a sufficient and relevant indication of the factors taken into account by the Commission in assessing the gravity and duration of the infringement committed by each of the undertakings in question.

1180 It is certainly desirable, in order to enable undertakings to define their position with full knowledge of the facts, for them to be able to determine in detail, in accordance with such system as the Commission might consider appropriate, the method whereby the fine imposed upon them in a decision establishing an infringement of Community competition rules has been calculated, without their being obliged, in order to do so, to bring court proceedings against the decision (*Tréfilunion*, paragraph 142).

1181 However, such calculations do not constitute an additional and subsequent ground for the Decision, but merely translate into figures the criteria set out in the Decision which are capable of being quantified.

1182 Pursuant to Articles 64 and 65 of its Rules of Procedure it is for the Court of First Instance to ask the Commission, if the Court considers it necessary in order to examine the applicants' pleas, for specific explanations of the various criteria applied by the Commission and referred to in the Decision.

1183 Indeed, in the course of the actions challenging the 1988 decision the Court asked the Commission to produce explanations at the hearing concerning the calculation of the fines imposed. For that purpose the Commission produced a table, which was annexed to the applications in the current proceedings.

1184 Consequently, the applicants' pleas that the Decision did not adequately state reasons concerning the criteria taken into account for the purposes of determining the fine must be dismissed.

IV — *Errors of law and obvious errors of assessment*

Arguments of the applicants

1185 LVM and DSM argue that the criteria set out in the Decision for the purpose of determining the amount of the fine which concern the importance of the product in question and the combined position of the undertakings in the market (Decision, point 52) are hard to understand and *a fortiori* to assess. The criterion based on the economic importance of the offender is, in the applicants' submission, inadmissible, as it leads in practice to determining the amount of the fine by reference to the resources of each of the undertakings rather than the gravity of their conduct.

1186 Secondly, the applicants recall that at the hearing before the Court of First Instance in the actions challenging the 1988 decision the Commission produced a table explaining how the fines were calculated. The table showed that the Commission took into account the average market share of each of the undertakings in the PVC sector between 1980 and 1984. The market shares for some applicants were manifestly wrong, however, and the fines should be reduced in proportion.

1187 Thus Elf Atochem argues that in calculating the fine imposed upon it the Commission attributed to it an average market share between 1980 and 1984 of 13%, which was higher than its actual share.

1188 ICI argues that its average market share was 8.1% between 1980 and 1984, and as low as 7.4% if account is taken only of the period between 1980 and 1983, the only period in respect of which the applicant was incriminated. In contrast, the table produced by the Commission attributed to it an average market share of 11%.

1189 Finally, Enichem comments that the Commission attributed to it an average market share of 15% between 1980 and 1984, significantly higher than the actual average and even higher than the market share it had in 1984 (12.3%).

Findings of the Court

1190 Contrary to what LVM and DSM maintain, the Commission is entitled to take into account both the volume and value of the goods which are the subject-matter of the infringement and the size and economic strength of the undertakings concerned (*Boehringer I*, paragraph 55; *IAZ*, paragraph 52).

1191 In reply to a question from the Court during the actions brought to challenge the original decision, the Commission presented at the hearing a table showing the figures relating to the determination of the amount of the fines. That table, which has been produced by the applicants in these proceedings, shows that in apportioning the total fine between the undertakings the criterion of the importance of each of them on the PVC market, which is stated in the Decision (point 53), was translated into figures by reference to the average share between 1980 and 1984 of the West European PVC market as defined by Fides. In fact that market share appears to have been the decisive element, inasmuch as the portion of the total fine allocated to each undertaking corresponded to its market share. To that key rate, the Commission applied adjustments — increases or reductions — identified in the Decision, for example by reference to the duration of the participation or the finding that one of the applicants played a lesser role. Thus, an undertaking which participated fully during the whole of the infringement bore a share of the total fine corresponding to about 110% of its average market share.

1192 It is necessary to examine the applicants' arguments in the light of those factors.

1193 At the request of the Court, Atochem produced figures for its average market share between 1980 and 1984, which was of the order of 10.5%.

1194 ICI produced figures showing that its average market share between 1980 and 1983, the only period during which it was held in the Decision to have participated in the infringement, was 7%.

1195 As the Commission has not seriously challenged those figures, the Court finds that, by attributing to Elf Atochem and ICI market shares of 13% and 11% respectively, the Commission exaggerated those two applicants' market shares and accordingly imposed too high a share of the fine upon them.

1196 The share of the fine imposed on Elf Atochem and ICI must therefore be reduced.

1197 The fine imposed on Elf Atochem must be fixed at a share of the total fine equivalent to its average market share, increased to take account of the fact that the applicant participated in the infringement for the whole of the duration determined by the Commission and taking into account the fact that there are no particular mitigating circumstances in its case. The fine must therefore be reduced to 11% of the total fine, namely, in rounded figures, EUR 2 600 000.

1198 The fine imposed on ICI must be fixed at a share of the total fine equivalent to its average market share, reduced to take account of the fact that the applicant distanced itself from the infringement as from October 1983. The fine must therefore be fixed at 6.6% of the overall fine, namely, in rounded figures, EUR 1 550 000.

1199 As regards Enichem, the applicant maintains that its average market share was of the order of 2.7% in 1980 and 1981, 5.5% in 1982, 12.8% in 1983 and 12.3% in 1984, so that its average market share for the whole of the period was slightly more than 7%.

1200 However, as the Court has already held (paragraph 615 above), the figures produced by the applicant are not sufficiently certain.

1201 Secondly, contrary to what the applicant maintains, the Commission did not attribute to it an average market share of 15% from 1980 to 1984. It is expressly stated in the table produced by the Commission that that market share concerns the year 1984. Moreover, a footnote states that that share is the result of the acquisition of Montedison's PVC business in March 1983, which, as is not denied, substantially increased the applicant's market share. Indeed, if the

Commission had proceeded on the basis of an average market share of 15% over the whole of the period, the fine imposed on the applicant would have been higher than those imposed on Elf Atochem and Solvay, which were in the same position as the applicant in terms of both the duration of the infringement and their role in it, but whose market shares as established by the Commission were below 15%. However, it is apparent, on the contrary, that the fine imposed on Enichem is substantially below that imposed on those two undertakings.

1202 Thirdly, the market share indicated in the individual particulars annexed to the statement of objections, namely 12%, does not contradict the share indicated in the table produced by the Commission; the first concerns the year 1983 as a whole, whereas the second concerns only the market share after the acquisition of Montedison's PVC business.

1203 Finally, it appears that the applicant has been ordered to pay a fine representing 10.6% of the total fine. In those circumstances, taking account of the methods of calculation used by the Commission, it appears that the applicant has been attributed an average market share in western Europe of less than 10%.

1204 In the absence of any serious challenge by the applicant, there is therefore no reason to reduce the fine imposed on it.

1205 In those circumstances, the applicants' pleas must be dismissed, subject to what has been held above in the cases of Elf Atochem and ICI (paragraphs 1193 to 1198).

1206 The Court is aware of the fact that, since the Commission initially determined the total amount, subsequently apportioned between the undertakings, the reduction

in the amount of the fine imposed on some undertakings should lead to a corresponding increase in the fines imposed on other undertakings, in order to arrive at the same total. In the circumstances of this case, however, the Court considers that, in the exercise of its unlimited jurisdiction under Article 172 of the Treaty, there is no need to effect such an increase.

V — *Infringement of general principles of law*

1207 The applicants plead infringement of various general principles, namely the principle that penalties should relate to the specific circumstances of each applicant, the principle of proportionality and, lastly, the principle of equal treatment.

The principle that penalties should relate to the specific circumstances of each applicant

1208 In the submission of Elf Atochem, Wacker, Hoechst, SAV, Hüls and Enichem, by stating that each producer was responsible not only for individual decisions attributed to it but also for the implementation of the cartel as a whole, the Commission applied the principle of collective liability. By so doing, it infringed the principles that penalties should be individualised and personal.

1209 As has been held above (paragraphs 768 to 778), each of the applicants is being penalised only for the actions of which it is individually accused.

1210 The plea must therefore be dismissed.

Infringement of the principle of proportionality

Arguments of the applicants

1211 Shell begins by recalling that points 48 and 53 of the Decision expressly indicate the limited and marginal role played by Shell, and adds that its alleged participation lasted only from January 1982 to October 1983, a total of 21 months. In those circumstances, it maintains, the fine imposed is disproportionate.

1212 Montedison argues that the fine is disproportionate in view of the brief duration of the infringement.

1213 Enichem observes that the fine imposed in the Decision, like that imposed in the original decision, is expressed in ecus. Bearing in mind the significant depreciation of the Italian lira between the dates when those two decisions were adopted, the fine payable by the applicant in Italian lire is in reality substantially higher than that imposed in 1988. If it is accepted that the duration and gravity of infringement have not, in the nature of things, changed in relation to the 1988 decision, and if the fine imposed at that time is presumed to have been proportionate, it follows that the fine borne by Enichem today, expressed in national currency, is disproportionate.

1214 The applicant adds that it had no reason to take steps to protect itself against an exchange risk, since the judgment of the Court of First Instance, and then that of the Court of Justice, absolved it from any obligation to pay a fine. It argues that the only currency of reference is that of the State in which the undertaking has its main office (Joined Cases 41/73, 43/73 and 44/73 *Société Anonyme Générale Sucrière* v *Commission* [1977] ECR 445, paragraphs 12 and 13; factual part of the judgment, p. 455). It also notes that it would have been easy to avoid the

prejudicial effect of the devaluation of that currency, for example by prior conversion of the initial fine into Italian lire.

Findings of the Court

1215 Article 15(2) of Regulation No 17 provides that in order to determine the amount of the fine it is necessary to take into consideration the duration and gravity of the infringement. The proportionality of the fine must therefore be assessed in the light of all of the circumstances of the infringement.

1216 In this case, Montedison has not demonstrated how the fine imposed is disproportionate, having regard to the gravity and duration of the infringement.

1217 Shell's argument is based on considerations which the Commission took into account when determining the amount of the fine, and which led it to impose a proportionately smaller fine than that imposed on the other undertakings (Decision, end of point 53). There is nothing to show that the fine thus fixed was disproportionate.

1218 With regard to Enichem's arguments, Article 3 of the Decision provides that the fines imposed are expressed in ecus, and Article 4 provides that they are payable in ecus.

1219 There is nothing to show that the fine imposed, expressed in ecus, is disproportionate having regard to the gravity and duration of the infringement.

1220 Moreover, the Commission is entitled to express the amount of the fine by means of the ecu, a monetary unit convertible into national currency. The possibility of converting the ecu into national currency distinguishes it from the unit of account initially referred to in Article 15(2) of Regulation No 17, in respect of which the Court of Justice has expressly recognised that, not being a currency in which payment is made, it necessarily implies the fixing of the amount of the fine in national currency (*Société Anonyme Générale Sucrière*, paragraph 15).

1221 There is in any case no dispute that the fine imposed on the applicant in Article 3 of the Decision and expressed in ecus is identical to that fixed in Article 3 of the 1988 decision. Indeed, the Commission's very purpose was to adopt a decision identical in substance to that of 1988, which had been annulled for infringement of essential procedural requirements.

1222 Moreover, as the fines have since the 1988 decision been expressed in ecus and in the absence of a single common currency in which the Commission could have expressed the fines or of fixed exchange rates between the currencies of the Member States, the risks of fluctuating exchange rates remain inevitable. Enichem could have covered itself against such risks for as long as the case was pending before the Court of First Instance, and then on appeal before the Court of Justice. Finally, it should be remembered that, on the same day as the judgment was delivered on 15 June 1994, the Commission stated in a press release that it intended to adopt the decision afresh, which it did a month later.

1223 Finally, it is not disputed that the fine imposed, even expressed in national currency, remains substantially below the maximum laid down in Article 15(2) of Regulation No 17.

1224 In the light of those considerations, the applicants' pleas must be dismissed.

Infringement of the principle of equal treatment

Arguments of the applicants

1225 The applicants allege four types of infringement of the principle of equal treatment.

1226 First, LVM, Shell, DSM, ICI and Enichem all claim to be victims of unequal treatment in relation to certain other applicants.

1227 Secondly, Enichem maintains that the fine imposed upon it is higher than that imposed in other decisions concerning sectors undergoing crises less severe than that in the PVC sector (Commission Decision 84/405/EEC of 6 August 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.350 — Zinc Producer Group) (OJ 1984 L 220, p. 27)).

1228 Thirdly, Enichem challenges the discrimination it claims to have suffered by reason of the change in the ecu/Italian lira exchange rate between the adoption date of the 1988 decision and the adoption date of the Decision. Even if the amounts expressed in ecus are identical in both decisions, the amounts in national currency are different, given the exchange rate fluctuations in the meantime. The applicant, whose fine has substantially increased when converted into national currency, thus claims to have been discriminated against in relation to other addressees of the Decision. It claims that, in reality, it is being penalised for having successfully used the legal remedies available to it to challenge the original decision.

1229 Fourthly, LVM, DSM, ICI and Enichem challenge the discrimination to which they claim to have been subject by comparison with Solvay and Norsk Hydro,

which, in law, escape any pecuniary penalty. In the first place, the Decision does not impose any fines on Solvay and Norsk Hydro. Secondly, those undertakings escape any penalty imposed by the 1988 decision, since that decision was annulled in relation to all the undertakings, as a consequence of the effect *erga omnes* of the judgment of the Court of Justice of 15 June 1994. Moreover, even if the 1988 decision had not been annulled in relation to Solvay and Norsk Hydro, the Commission would not have been able to have enforced it: first, because Article 192 of the Treaty requires the national authority to verify the authenticity of the 1988 decision, which is impossible since that decision was annulled for lack of authentication; secondly, because the limitation period for the enforcement of sanctions has now expired (Article 4 of Regulation No 2988/74).

Findings of the Court

1230 First, as has been noted, the individual fines have been determined by weighing up various factors, in particular the importance of the undertaking in the market, the duration of its participation, or the role which it played, particularly in the case of Shell.

1231 In that regard, the applicants have failed to establish that the Commission treated identical situations differently or different situations identically. In reality, all the alleged cases of discrimination as between the applicants are based on a comparison between their own situation and that of one or more other applicants, whose importance in the market, length of participation or role in the infringement were different.

1232 Secondly, the amount of the fines depends on a variety of criteria which must be assessed on a case-by-case basis with reference to all the circumstances of the case. Moreover, the fact that the Commission imposed fines in the past of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits laid down in Regulation No 17, if that is

necessary to ensure the implementation of Community competition policy (*Musique Diffusion Française*, paragraph 109). It has therefore not been established in this case that the Commission has infringed the principle of equal treatment in the light of its earlier practice.

1233 Thirdly, as regards the discrimination allegedly resulting from the devaluation or depreciation of certain national currencies in relation to others, the fines imposed on the various applicants were expressed in ecus. It is not disputed that, so expressed, the fines imposed on each of the applicants in Article 3 of the Decision are identical to those imposed in the 1988 decision.

1234 Exchange rate risks are inherent in the existence of separate national currencies whose parity is capable of fluctuating at any time. Moreover, Enichem does not claim that the fixing of fines in national currency would remedy the effects of such fluctuations where, as in this case, the undertakings in question are based in different Member States and their fines would be fixed in the national currency of each of those States.

1235 As the Court has already held, the Commission is entitled to express the fines in ecus, which, moreover, enables the undertakings to compare more easily the fines imposed on each of them. Moreover, the Commission's very purpose 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. Finally, bearing in mind that the fines were already expressed in ecus in the 1988 decision, and bearing in mind also the inevitable exchange rate risks, the applicant could have taken steps to protect itself against such risks, as the Court has already observed above (paragraph 1222).

1236 Fourthly, the alleged discrimination suffered by the applicants in comparison with Solvay and Norsk Hydro is based on the premiss that the annulment of the 1988

decision by the Court of Justice had effect *erga omnes*. Suffice it to say that, as the Court has already held (paragraphs 167 to 174 above), that is not the case.

1237 In any event, where an undertaking has acted in breach of Article 85(1) of the Treaty, it cannot escape being penalised altogether on the ground that another trader has not been fined, when that trader's circumstances are not even the subject of proceedings before the Court (*Ahlström Osakeyhtiö*, paragraph 197).

1238 Consequently, all the applicants' pleas alleging infringement of general principles of law must be dismissed.

1239 In the light of the above, all the applicants' pleas in law in support of their claims for the annulment or reduction of the fine must be dismissed, subject to the following reservations.

1240 In accordance with paragraphs 1143, 1197 and 1198 above, the fines imposed on Elf Atochem, SAV and ICI must be reduced to EUR 2 600 000, EUR 135 000, and EUR 1 550 000 respectively.

The other forms of order sought

1241 In addition to the claims already examined and those relating to costs, the applicants have sought certain other forms of order (see paragraphs 27 to 30 above).

1242 Some of those claims have already been examined on account of their close connection with the pleas in law raised in support of the claims for annulment of the Decision or the annulment or reduction of the fine, and which have been dismissed (see paragraphs 268, 365 to 371, 375 to 377 and 1091 above).

1243 As regards the claims that the documents produced at the time of the actions challenging the 1988 decision should be placed on the Court file, they must be dismissed for the same reasons as those set out above (paragraph 39).

1244 Accordingly, it is necessary to examine first the claims for annulment of Article 2 of the Decision (I), and secondly Montedison's claim for compensation in respect of the loss allegedly suffered (II).

I — *Annulment of Article 2 of the Decision*

Arguments of the applicants

1245 At the reply stage, without formally including the claim in the forms of order sought, Hoechst argues that Article 2 of the operative part of the Decision, ordering cessation of the infringement, is unlawful in relation to Hoechst because it fails to take into account the fact that the applicant was no longer in the PVC business when the Decision was adopted.

1246 DSM observes that, under Article 3(1) of Regulation No 17, the Commission may require undertakings to terminate infringements which it finds. In this case, Article 2 of the Decision required, *inter alia*, that all exchanges of confidential information between PVC producers should cease; however, neither Article 1 of

the Decision nor, in fact, the grounds for the Decision supported the conclusion that such an infringement had been found. The Commission thus exceeded its powers under Article 3 of Regulation No 17.

Findings of the Court

1247 It is not necessary to consider the admissibility of the plea by Hoechst in the light of Article 48(2) of the Rules of Procedure; it is sufficient to note that Article 2 is expressly addressed to undertakings 'which are still involved in the PVC sector'. The argument in support of this claim is therefore manifestly devoid of all foundation.

1248 Article 3(1) of Regulation No 17 provides that where the Commission finds an infringement of Article 85 of the Treaty it may by decision require the undertakings concerned to bring it to an end. As point 50 of the Decision states, Article 2 of the Decision was adopted pursuant to that provision. Having noted the content of the latter, the Commission stated: '[I]t is not known whether meetings or at least some communication between firms on prices and volumes have in fact ever ceased. It is therefore necessary to include in any decision a formal requirement that those undertakings still active in the PVC sector terminate the infringement and refrain in the future from any collusive arrangements having a similar object or effect.'

1249 It is well established in the case-law that the application of Article 3(1) of Regulation No 17 may comprise both a prohibition on continuing certain activities, practices or situations which have been found to be unlawful (*Commercial Solvents*, paragraph 45; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 90) and a prohibition

on adopting similar conduct in the future (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 220).

1250 Since Article 3(1) must be applied with reference to the infringement found, the Commission has the power to specify the extent of the obligations of the undertakings concerned in order to terminate it. Such obligations must not, however, exceed what is appropriate and necessary to attain the objective sought, namely restoration of compliance with the rules infringed (*RTE and ITP*, paragraph 93).

1251 In this case, in Article 2 of the Decision, the Commission first requires the undertakings still active in the PVC sector to bring the infringements found in the Decision to an end forthwith.

1252 It then requires the undertakings to refrain in future in relation to their PVC operations from any agreement or concerted practice which may have the same or similar object or effect.

1253 Such instructions fall clearly within the Commission's powers under Article 3(1) of Regulation No 17.

1254 Among those agreements or concerted practices with similar object or effect to the practices censured in the Decision, the Commission included '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'. Since the Commission is entitled to prohibit for the future any agreement or practice with an object identical or similar to that of the conduct found in the

Decision, it rightly included such exchanges of information. In the first place, the Decision contains *inter alia* a charge based specifically on the exchange of sales data; secondly, the meetings between producers relied on the exchange of information concerning prices and sales volumes, as they were aimed at defining jointly the policy to be pursued in that area. Just as the Commission is entitled to prohibit exchanges of information on sales and prices, which are covered by the Decision, it is entitled to prohibit also exchanges which 'indirectly' allow an 'identical or similar' result to be achieved. It would, in particular, be easy to deduce the sales of each undertaking from the exchange of individualised information on output and stock levels. To deny the Commission the power to prohibit such an exchange would allow the undertakings to circumvent easily the injunction upon them not to continue or resume conduct such as that found by the Decision to exist.

1255 As for the prohibition of exchanges of information of the kind normally covered by business secrecy, by which undertakings 'might be able to monitor adherence to any express or tacit agreement or to any concerted practice covering price or market-sharing', it is directly related to the practices found to exist by the Decision, which accuses the undertakings of jointly implementing mechanisms for monitoring sales volumes and price initiatives.

1256 In the words of the first part of the second sentence of Article 2 of the Decision, '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'. In the Decision, the systems for exchanging general information to which the producers subscribe are not called into question, precisely because they do not enable the conduct of individual producers to be identified, but are limited to communicating aggregate data (see point 12, third paragraph, of the Decision). The second sentence of Article 2 is thus aimed simply at preventing producers from circumventing the prohibition against continuing or resuming conduct such as that found to exist by the Decision by replacing their mechanism of regular

meetings with a system for exchanging individualised information, which would lead to the same result. That sentence is thus intended merely to define more closely the concept of an agreement or concerted practice with a similar object or effect set out in the previous sentence.

1257 The second part of the second sentence of Article 2 of the Decision adds nothing to the first. It is in fact merely intended to specify that the prohibition on exchanging individualised data enabling the conduct of each producer to be identified in the context of a system to which producers are subscribers cannot, of course, be circumvented by means of direct exchanges between producers.

1258 Finally, the second sentence of Article 2 of the Decision clearly indicates that, in contrast to the situation considered by the Court of First Instance in the context of the actions challenging Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1), the Commission has not included a prohibition also covering, in certain circumstances, data exchanged in aggregate form.

1259 In the light of all those factors it is clear that the obligations imposed on the undertakings pursuant to Article 2 of the Decision do not exceed what is appropriate and necessary to restore compliance with the rules infringed. In adopting Article 2 of the Decision, therefore, the Commission did not exceed the powers conferred upon it by Article 3(1) of Regulation No 17.

1260 Consequently, the claims for annulment of Article 2 of the Decision must be dismissed.

II — *The claim for compensation in respect of loss allegedly suffered*

1261 Montedison asks the Court to order the Commission to pay it damages in respect of costs connected with furnishing the bank guarantee and any other costs relating to the Decision.

1262 The application does not enable the pleas in law on which the applicant seeks to base its claims in the matter to be identified.

1263 It follows that with regard to that claim the application does not satisfy the minimum requirements for the admissibility of an application laid down in Article 19 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure. Accordingly, these claims must be rejected as inadmissible (*Parker Pen*, paragraphs 99 and 100).

1264 Moreover, if the fault of which the Commission is accused corresponds to the various objections set out by the applicant in support of its claims for annulment, which the Court has dismissed, the Court would in any event have to hold that those claims for compensation in respect of loss suffered were unfounded.

Conclusion

1265 It follows from the whole of the examination which the Court has carried out that Article 1 of the Decision must be annulled in so far as it finds that SAV participated in the infringement after the first half of 1981. The fines imposed on Elf Atochem, SAV and ICI must be reduced to 2 600 000 euros, 135 000 euros and 1 550 000 euros respectively. The remainder of the actions must be dismissed.

Costs

1266 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Where there are several unsuccessful parties the Court of First Instance is to decide how the costs are to be shared.

1267 As LVM, BASF, Shell, DSM, Wacker, Hoechst, Montedison, Hüls and Enichem have been unsuccessful in all their pleadings, they must be ordered to pay the Commission's costs, as the latter has asked for them.

1268 As Elf Atochem and ICI have been unsuccessful in some of their pleadings, those applicants and the Commission must each be ordered to bear their own costs.

1269 As SAV has been unsuccessful in some of its pleadings, but has been successful in a significant part of them, the Court orders that applicant to bear two thirds of its costs and the Commission to bear one third of the applicant's costs in addition to its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. Joins 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 for the purposes of the judgment;

2. Annuls Article 1 of 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) in so far as it holds that Société Artésienne de Vinyle participated in the infringement in question after the first half of 1981;

3. Reduces the fines imposed by Article 3 of that decision on Elf Atochem SA, Société Artésienne de Vinyle and Imperial Chemical Industries plc to EUR 2 600 000, EUR 135 000 and EUR 1 550 000 respectively;

4. Dismisses the remainder of the actions;

5. Orders each applicant to bear both its own costs and those of the Commission in the case which it has brought. However, in Cases T-306/94 and T-328/94, Elf Atochem SA, Imperial Chemical Industries plc and the

Commission are each ordered to bear their own costs. In Case T-318/94, Société Artésienne de Vinyle is ordered to bear two thirds of its own costs and the Commission is ordered to bear one third of the applicant's costs in addition to its own costs.

Tiili Lenaerts Potocki

Delivered in open court in Luxembourg on 20 April 1999.

H. Jung V. Tiili

Registrar President

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