OPINION OF ADVOCATE GENERAL RUIZ-JARABO

delivered on 28 January 1999 *

1. '*I prefer injustice to disorder.*' With these blunt words — the absoluteness of which I hasten to repudiate — Johann-Wolfgang von Goethe [1] took sides in what is probably the most complex dilemma in law as a whole: the tense relationship between the desire for justice and the need for certainty.

2. The appeal on which the Court of Justice must give judgment on this occasion appears deceptively simple. The issue is whether or not the Commission is under an obligation to cancel penalties whose substantive invalidity can easily be inferred from a judgment of the Court of Justice. As soon as the question is looked at in any detail, the difficult conflict between the two values mentioned above — substantive justice and legal certainty — becomes apparent.

According to the respondents' contention, the Commission's obligation to comply with the judgment derives from the broad terms of Article 176 of the Treaty establishing the European Community (hereinafter 'the Treaty'). In the Commission's opinion, upon the expiry of the period of two months laid down in Article 173, any decisions which could have been challenged become unassailable and, therefore, continue to be binding in every respect on the addressees, in accordance with Article 189.

The issue here goes far beyond interpretation of the abovementioned provisions and requires general principles of law to be brought into account. Whilst, on the one hand, the principle of legality requires, among other things, that the legal order purge itself of any measures which are tainted by nullity, on the other hand legal certainty, and, more specifically, the principle that definitive administrative measures are unchallengeable, allows the rectification — at least formally — of such defects, after certain time-limits for instituting proceedings have expired. After briefly analysing the contested judgment and the grounds of appeal, I shall attempt to give a systematic outline of the procedure which — in my opinion — every Community institution should follow in circumstances comparable to those of this case and, finally, I shall apply those criteria to the present case.

* Original language: Spanish.

1 — In the biography of Goethe which introduces the Spanish version of the complete works of that author (Aguilar, Madrid 1963), Rafael Cansinos Assens says that 'Order is sacred for Goethe. Anything is preferable to anarchy' (p. 268). Goethe also rejects even limited popular suffrage, freedom of the press and free expression of thought (p. 269). He is not therefore a good example for a modern democratic society.

I — The facts

3. The seven respondents represent, either in their own right or as successors in title, 10 of the 11 Swedish addressees of the 'Wood pulp' decision (see point 7 et seq. below).

4. During the 1970s, it was the custom of the producers of bleached sulphate wood pulp intended for the manufacture of high-quality paper to conclude long-term supply contracts, for periods of up to five years. Under such contracts, the producer guaranteed his customers the possibility of buying a minimum quantity of pulp each quarter at a price not exceeding the price announced at the beginning of that period. The customer, for his part, was free to buy more or less than the quantity reserved for him and could negotiate discounts on the price announced.

5. The quarterly announcing of prices constituted a settled commercial practice in the European wood pulp market. The system was so organised that the producers notified to their customers and agents weeks, or in some cases days, before the start of each quarter the prices, generally fixed in United States dollars, which they wished to apply during that period. Those prices were usually published in the specialised press.

6. The final prices invoiced to customers ('the transaction prices') could be the same as or lower than the announced prices when buyers were granted discounts or payment facilities of various kinds.

A. *The Wood pulp decision of 19 December 1984*

7. As early as 1977, the Commission stated that it had discovered in the wood pulp industry certain practices and agreements which might be restrictive of competition. Following the administrative procedure, commenced in relation to 57 producers and associations of producers of wood pulp, the Commission sent each of them a statement of objections. On 19 December 1984, the Commission adopted Decision 85/202/EEC[2] relating to a proceeding under Article 85 of the Treaty.

In the decision, the Commission stated that 40 wood pulp producers, together with

2 — Decision relating to a proceeding under Article 85 of the EEC Treaty (IV/29.725 — Wood pulp) (OJ 1985 L 85, p. 1 — authentic in the English version).

three of their professional associations, had concerned on prices in breach of Article 85(1) of the Treaty. Thirty-six of those addressees, including nine established in Sweden, were fined amounts of between ECU 50 000 and ECU 500 000.

8. In Article 1(1) of the decision, the Commission stated that nine of the Swedish addressees, and other Finnish, United States, Canadian and Norwegian producers, had concerted on prices for wood pulp deliveries to the European Economic Community during the whole or part of the period from 1975 to 1981.

9. According to Article 1(2), all the Swedish producers, among others, had infringed Article 85 of the Treaty by concerting on actual transaction prices charged in certain countries of the Community.

10. In Article 1(5), certain producers, including all the respondents in these proceedings, were criticised for having applied to their Community customers, in contracts for the sale of wood pulp, clauses prohibiting the export or resale of the wood pulp purchased by them.

11. Annexed to the decision was an undertaking given to the Commission by a large number of the addressees. In it, the parties concerned undertook to quote and invoice a major part of their sales in the currency of the buyer; not to quote their prices quarterly, but to keep them in force 'until further notice'; to communicate their prices only to the traders specified in the undertaking; to cease certain concertation, and no longer to impose export or resale bans on buyers.

B. *The judgment of the Court of Justice of 27 September 1988*

12. Twenty-eight of the addressees of the decision — none of whom were any of the Swedish addressees — brought an action for annulment before the Court of Justice. [3] By a first judgment of 27 September 1988, [4] the Court disposed of a number of preliminary matters which are not relevant to the present appeal, and assigned the case

3 — Those who did not bring proceedings, in addition to the Swedish undertakings, included ITT Rayonier Inc. and the Norwegian, Portuguese and Spanish addressees. None of the latter four had been penalised. Also, the order of 20 March 1990 recorded the fact that the United States applicant, Mead Corporation, had withdrawn its action.

4 — Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Åhlström Osakeyhtiö and Others* v *Commission* [1988] ECR 5193.

to the Fifth Chamber for consideration of the substance.

C. *The experts' report*

13. In the course of the subsequent procedure the Court of Justice, by order of 25 November 1988, decided to have the question of parallelism of prices investigated by experts. Whilst preparing their report, the experts were asked to say whether the documents relied on by the Commission justified its reaching the conclusion as to parallelism between the announced prices and the transaction prices. The experts' report was submitted on 10 April 1990.

14. By order of 25 October 1990, the Court ordered a further evidential measure. Experts were requested to describe and analyse the characteristics of the market during the period covered by the decision and to say whether, having regard to those characteristics, the natural functioning of the market had resulted in a differential price structure or a uniform price structure. The experts submitted their report on 11 April 1991.

15. It was apparent from the expert evidence that the uniformity of the prices was more likely to have been accounted for by the normal functioning of the market than by concertation.

D. *The judgment of the Court of Justice of 31 March 1993*

16. After the comprehensive Opinion delivered by Advocate General Darmon on 7 July 1992, the judgment on the substance was delivered on 31 March 1993.[5] The following points merit particular attention.

17. As regards the infringement involving general concertation on announced prices, mentioned in Article 1(1) of the decision (see point 8 above), which the Commission inferred from the system of quarterly announcements, the Court of Justice stated that:

'... Concertation is not the only plausible explanation for the parallel conduct. To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trend may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circum-

5 — 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 v Commission* [1993] ECR I-1307.

stances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.' [6]

The Court concluded that, in the absence of firm, precise and consistent evidence, it was appropriate to annul Article 1(1) of the decision.

18. As regards the infringement found in Article 1(2) of the decision, consisting in general concertation on transaction prices (see point 9 above), the Court considered that the statement of objections had not made that allegation clear, for which reason the addressees had not had an opportunity effectively to defend themselves in the administrative procedure. Article 1(2) was therefore annulled.

19. As regards the inclusion of clauses prohibiting exports or resales, for which the Commission criticised certain undertakings — including the parties to these proceedings — in Article 1(5) of the decision (see point 10 above), the Court dismissed the action, considering that that practice — which had been proved — was contrary to Article 85(1) of the Treaty.

20. Having annulled the provisions concerning some of the infringements mentioned in the decision, the Court then annulled or reduced the fines imposed by the Commission.

21. As regards the fines for the only infringement upheld by the Court which is relevant here, namely the inclusion by certain undertakings of a clause prohibiting resales or exports (Article 1(5) of the decision), the Court took account of the following factors:

— that the fines imposed on those undertakings penalised the infringements of participation in general concertation on announced prices and on transaction prices, for which the findings have been annulled in both cases;

— that although the inclusion of the abovementioned clauses constituted a

6 — Paragraph 126, at [1993] I-1613.

serious infringement of the Treaty, the parties concerned had rapidly brought the practice to an end;

— that the parties concerned declared that the inclusion of the disputed clauses in the contracts or general sales conditions was solely the result of negligence on their part.

Having regard to those considerations, the Court reduced the initial amounts of the fines from between ECU 125 000 and ECU 200 000 to ECU 20 000 for each undertaking.

22. The Court of Justice also annulled the provisions of the undertaking annexed to the decision (see point 11 above), [7] in so far as they imposed obligations other than those resulting from the findings of infringements made by the Commission which had not been declared void. In other words, it annulled the provisions by which the signatories undertook to allow and invoice most of their sales in the buyer's currency, not to announce their prices quarterly and to notify their prices only to the addressees indicated in the undertaking.

The fact is that annulment of the undertaking was requested by only some of its signatories, and by a number of undertakings which had not signed it. [8]

E. *The request for re-examination of the Wood pulp decision*

23. After delivery of the judgment of 31 March 1993, the Swedish undertakings, by letter of 24 November 1993, asked the Commission to re-examine their legal situation in the light of the judgment and to refund to them the fines paid, to the extent to which they had been imposed for infringements found in Article 1(1) and (2) of the decision, which had been annulled by the Court of Justice.

24. On 4 February 1994 the Director-General for Competition informed the Swedish undertakings that Commission officials had reached the provisional conclusion that their request was to be denied and granted

7 — Although the Commission alleged that the undertaking was a unilateral measure of the signatories and that, as such, it could not be the subject of an action for annulment, the Court considered that the obligations imposed by it were to be regarded in the same way as orders requiring an infringement brought to an end. By means of the undertaking, the signatories assented to a decision which the Commission was empowered to adopt unilaterally (see paragraphs 180 and 181, at I-1625).

8 — The latter, nevertheless, had an interest in its annulment since, not having agreed to sign the undertaking, those undertakings had received considerably higher fines.

them a period of two months in which to submit observations.

25. On 8 April 1994, the Swedish undertakings sent the Commission further observations and at the same time asked for a final decision to be adopted regarding the legal consequences of the judgment of 31 March 1993. That request was repeated on 24 October and 21 December 1994.

26. Finally, on 4 October 1995, the member of the Commission responsible for competition rejected the undertakings' request. The following passages are included in his communication: [9]

'I do not see any possibility to accept your request. Article 3 of the decision imposed a fine on each of the producers on an individual basis. Consequently, in point 7 of the operative part of its judgment, the Court annulled or reduced the fines imposed on each of the undertakings who were applicants before it. In the absence of an application of annulment on behalf of your clients, the Court did not and indeed could not annul the parts of Article 3 imposing a fine on them. It follows that the obligation of the Commission to comply with the judgment of the Court has been fulfilled in its entirety by the Commission reimbursing the fines paid by the successful applicants. As the judgment does not affect the decision with regard to your clients, the Commission is neither obliged nor indeed entitled to reimburse the fines paid by your clients.

As your clients' payment is based on a decision which still stands with regard to them, and which is binding not only on your clients but also on the Commission, your request for reimbursement cannot be granted.'

F. *The application to the Court of First Instance for annulment of the decision rejecting the request for review*

27. By application lodged at the Registry of the Court of First Instance on 15 December 1995 the Swedish undertakings brought the action which ultimately led to this one. They claimed that the Court should:

— annul the Commission decision of 4 October 1995 refusing partial reimbursement of the fines;

— order the Commission to take all necessary steps to comply with the

9 — Footnote not relevant to English translation.

judgment of the Court of Justice of 31 March 1993 and, in particular, to repay to the applicants the fines paid by each of them;

— order the Commission to pay interest on the sums paid from the date on which the fines were paid to the date of reimbursement;

— order the Commission to pay the costs.

28. The Commission contended that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss it as unfounded;

— in any event, order the applicants to pay the costs.

G. *The judgment of the Court of First Instance of 10 July 1997*

29. In its judgment of 10 July 1997,[10] the Second Chamber, Extended Composition, of the Court of First Instance upheld the applicants' claim for annulment of the decision of 4 October 1995 and at the same time declared the application inadmissible to the extent to which it sought the issue of directions to the Commission. It also ordered the Commission to pay the costs.

The reasoning of the Court of First Instance, as far as is relevant to this case, may be summarised as follows.

30. The Court of First Instance begins by stating that the Wood pulp decision, although drafted and published in the form of a single measure, must be treated as a bundle of individual decisions. It also stated that the Community judicature, in proceedings for annulment, can only give a decision on the subject-matter of the dispute referred to it by the parties. It therefore rejected the applicants' contention that the judgment of 31 March 1993 took effect *erga omnes*.

31. The Court of First Instance then upheld the argument that the first paragraph of Article 176 of the Treaty had been

10 — Case T-227/95 *AssiDomän Kraft Products and Others* v *Commission* [1997] ECR II-1185.

infringed, according to which 'the institution or institutions whose act has been declared void... shall be required to take the necessary measures to comply with the judgment of the Court of Justice'.

32. According to the Court of First Instance, the possibility cannot be excluded a priori that the measures which an institution must adopt under Article 176 in order to comply with a judgment of annulment delivered by the Court of Justice may, in exceptional cases, extend beyond the precise framework of the dispute which gave rise to the annulment, the objective being to eradicate the effects of the illegalities found in the judgment. In that connection, the Court of First Instance referred to the judgment of 26 April 1988 in *Asteris and Others* v *Commission*, [11] and, more particularly, to that of 22 March 1961 in *SNUPAT* v *High Authority*. [12]

33. The Court of First Instance then considered whether that case-law might be relied on in the dispute before it and, specifically, whether the Commission was required to examine its decision with respect to addressees who did not bring an action in due time and, if so, what the scope of that obligation should be.

34. In answering the first question, the Court of First Instance observed that the concerted practice in breach of Article 85(1) of the Treaty of which the Swedish undertakings were accused was based on the same findings of fact and the same economic and legal analyses as those taken into account in the judgment of annulment favourable to those undertakings which brought an action. In those circumstances, it would be contrary to the principle of legality for the Commission not to have to review its initial decision.

35. As regards the scope of the review which the Commission should carry out, the Court of First Instance reached the initial conclusion that there was nothing in Community law to prevent the Commission from repaying the fines and added that, 'if Article 176 were not to be deprived of all its practical effect', the Commission would also be required 'in accordance with the principles of legality and of good administration' to repay those fines, 'as they would have no legal basis'. [13]

II — The appeal. Grounds of appeal

36. By a document lodged at the Registry of the Court of Justice on 4 September 1997 the Commission brought the present appeal, which is based on three grounds, namely:

— misinterpretation of Article 176 of the Treaty;

11 — Joined Cases 97/86, 193/86, 99/86 and 215/86 [1988] ECR 2181.

12 — Joined Cases 42/59 and 49/59 [1961] ECR 53.

13 — Paragraph 92, at II-1218.

— infringement of Articles 173 and 189 of the Treaty;

— contradictory reasoning.

37. In its first submission, the Commission contends that its only obligation in relation to the judgment of 31 March 1993 was to refund, in the manner described in that judgment, the amounts of the fines paid by the undertakings named in the judgment of the Court of Justice, which can be no other than those which were parties to the proceedings. The Commission distinguishes the cases cited by the Court of First Instance and concludes that they are not relevant.

The respondents insist that the rules laid down in *Asteris* and *SNUPAT* are properly applicable, in particular the statements of principle which they contain. From those statements the respondents infer that it is possible, once a measure has been declared void by the Court of Justice, for a Community institution to be required, in the context of Article 176, to revoke other measures which were not contested but were vitiated by the same defect.

38. As regards the alleged infringement of Articles 173 and 189 of the Treaty, the Commission states that decisions not contested within the prescribed time-limit by their addressees are final as regards those persons.

The respondents contend that, under Article 155 of the Treaty, the Commission's first obligation is to see that the Community legal order is respected, which necessarily implies eliminating from it any measures which have been declared substantively void by the Court of Justice. In addition, the position advocated by the Commission would be conducive to legal uncertainty and inconsistent application of Community law. If that approach were followed, only the Swedish respondents, and not those who brought proceedings for annulment in due time, would continue — for example — to be bound by the undertaking given to the Commission (see point 11 above), which was annulled by the March 1993 judgment (see point 22 above). Furthermore, in the course of any national proceedings based on Article 85 only the latter could invoke in their defence the partial nullity of the Wood pulp decision.

39. In its third submission, the Commission considers that the reasoning followed by the Court of First Instance in its judgment is contradictory. It observes that the Court of First Instance first states that, in so far as an addressee has not brought an action against the aspects of a decision which affect it, that decision continues to be valid and binding on it,[14] and then goes on to say that, as a result of the March 1993

14 — Paragraph 58, at II-1209.

judgment, the Commission is required to repay the fines paid by the Swedish addressees 'as they would have no legal basis'. [15]

According to the respondents, the Commission's plea to that effect is based on an incorrect interpretation of the contested judgment. The lack of a legal basis for the Wood pulp decision as far as the Swedish undertakings are concerned is, in the view of those undertakings, a direct consequence not of the judgment of annulment but rather of the review, in the light thereof, which the Commission is required to undertake pursuant to Article 176.

III — Analysis of the grounds of appeal

40. As I stated in the introduction, this case clearly reflects the dialectical tension between two ideals central to every system of laws: justice and legal certainty. [16] Let me say that, as a matter of principle and so far as is relevant here, Community law, with its inherently fragmentary approach, incorporates them partially in the first paragraph of Article 176 and the fifth paragraph of Article 173 of the Treaty respectively.

41. According to the first-mentioned provision, the institution from which the annulled act emanates is required to take the necessary measures to comply with the judgment of the Court of Justice.

42. According to the last-mentioned provision, an action may be brought to secure the annulment of a decision within two months after notification to the applicant or, in the absence thereof, of the day on which it came to the knowledge of the applicant. For the rest, decisions are, until they are withdrawn by the institution itself or annulled by the Court of Justice, binding in their entirety upon those to whom they are addressed (fourth paragraph of Article 189).

43. In so far as any attempt to define in a precise context the scope of the requirement of legality (the first ground of appeal) in relation to that of legal certainty (second ground) will necessarily affect the relative scope of the other, it is appropriate to analyse the first two grounds as one. Moreover, in order to determine whether or not there is any contradiction between the two principles in the reasoning of the contested judgment (subject-matter of the third ground of appeal) it is necessary to abide strictly by the terms in which they are expressed. I consider therefore that it is

15 — Paragraph 92, at II-1218.

16 — In the sphere of political sociology, Machiavelli, in *Il Principe*, wonders whether, for a person exercising power, it is better to be feared than loved, a dilemma which corresponds to what in the legal field may represent the tension between the values of justice and certainty. His conclusion is well known: 'as it is difficult to be both at the same time, the safest course is to be feared rather than loved'.

appropriate to treat as one the three grounds of appeal relied on by the Commission.

IV. Brief interpretation of the contested judgment

44. The appraisal made by the Court of First Instance (paragraphs 55 to 100), having regard to the grounds of annulment, can be divided into three logical parts: in the first (paragraphs 55 to 63) the Wood pulp decision is characterised — for the purposes of Article 173 — as a set of individual decisions, the assertion that a judgment annulling a collective decision is effective *erga omnes* is rejected and the binding nature of a decision as regards those who have not brought an action against it within the prescribed period is upheld. I fully agree with that analysis and make it my own, although I consider it useful to clarify it to some extent regarding the question of the effect *erga omnes* of a judgment of annulment (see point 54 below).

45. The second part of the appraisal by the Court of First Instance (paragraphs 64 to 95) contains two successive arguments as to what should be the scope of the obligations attaching to an institution under Article 176. First (paragraphs 64 to 72), the judgment states that, in accordance with that provision and having regard to the principle of legality, an institution may be obliged to examine, after lodgment of an application within a reasonable period, whether measures should be adopted regarding addressees other than those who brought the action for annulment. I agree with the result of that reasoning, although I demur as regards its legal basis and the modalities of the review. The legal basis of the obligation to re-examine final administrative measures adopted by Community institutions is — in my view — the need to give place, having regard to the general rule that such measures are not challengeable, to superior considerations of equity. The obligation to carry out a review has as its basis an indication [17] of the irregularity of a final measure, and that indication may be, but is not confined to, the existence of a judgment annulling an identical measure.

After extrapolating, so as to apply to the Swedish undertakings, the considerations taken into account by the Court of Justice in partially annulling the Wood pulp decision as regards the undertakings which brought an action at that time (paragraphs 73 to 84), the Court of First Instance reaches the conclusion (paragraph 85) that the Commission, after receiving the application submitted by the Swedish undertakings, was under an obligation to re-examine in the light of the judgment of 31 March 1993 the legality of the Wood pulp decision in relation to the Swedish addressees. I agree both with the idea of extrapolating and with the conclusion reached.

46. As to what should have been the result of that review, the Court of First Instance begins by referring to the case-law con-

17 — The judgment in *Asteris* (paragraph 28), cited in paragraph 32 above, prefers the expression 'finding of illegality'.

cerning the revocation of measures creating individual rights and then — absolutely correctly, in my opinion — applying it a fortiori to measures imposing burdens (paragraphs 88 to 91). Having established the irregularity affecting the infringements attributed to the Swedish addressees and declared that a Community institution is authorised to revoke measures imposing burdens, the Court of First Instance goes on to say:

'In that case, if Article 176 were not to be deprived of all its practical effect, the Commission would also be required, in accordance with the principles of legality and good administration, to repay [the] fines, as they would have no legal basis.' [18]

I again disagree regarding the legal foundation of the obligation — this time the requirement of revocation — which attaches to a Community institution in relation to vitiated measures which are final: compliance with time-limits for bringing actions is also a requirement of the principles of legality and good administration. However, the point on which I disagree with the contested judgment is the apparent automatism which it displays in requiring withdrawal of the measure as soon as the competent institution establishes the substantive reality of the defect.

In my opinion, between mere determination of the substantive illegality of a final measure, appraised in the light of an annulling judgment, for example, and its withdrawal, there must be a balancing exercise: the interests and conduct involved must be weighed up in the light of equitable considerations. Those considerations will determine the degree of latitude available to the institution in each case. If those interests are not weighed, what would probably be deprived of all its practical effect would be the mandatory time-limit of two months laid down in Article 173.

47. In the third part of the Court of First Instance's appraisal (paragraphs 96 to 100) the Court declared inadmissible the undertakings' claim that part of the fines paid by them should be refunded. The reason given is that 'the Community judicature... is not entitled to issue directions to the Community institutions'. [19]

That conclusion — I believe — is difficult to reconcile with the Court of First Instance's interpretation as described so far.

It is indeed true that decisions of the Community judicature are essentially declaratory. However, the claim for refund of the fine could have been interpreted as a request for annulment of the Wood pulp decision in terms similar to those used by the Court of Justice in its judgment of 31 March 1993. Whilst it is true that the Community order provides for a division of powers between the judicial and admini-

18 — Paragraph 92, final sentence, at II-1218.

19 — Paragraph 97, at II-1219 to 1220.

strative authorities, it is no less true that that division will be meaningful only if the administrative authority enjoys a degree of latitude — however small — in carrying out its assessment. However, the inference to be drawn from paragraph 92 of the contested judgment seems to be that no such latitude is available in the present case.

V — The solution which I propose

48. The foregoing comments give a glimpse of the main outlines of the solution which I shall propose. First, I am of the view that the proper solution to this dispute calls for the legal context chosen by the Court of First Instance to be abandoned. Any obligation which the Commission may be under to refund the fines to the Swedish undertakings should not be regarded as an emanation *ultra partes* of a judgment of annulment but rather as the recognition by the legal order of an intolerable injustice. That recognition is based therefore not on Article 176 but on equitable considerations known to the laws of all the Member States, which are capable of overriding the general principle that administrative measures cannot be attacked outside the time-limit for instituting proceedings. That general rule does not therefore run counter to the right of the Administration (in this case the Community institutions) to undertake at any time a fresh examination of those measures which impose a burden or charge. That right becomes an obligation when factors emerge which prompt reasonable doubts as to the legality of the measure. Different from that obligation of review [20] is the power to withdraw such measures which is vested in the Community institutions. In the exercise of that right the institution in question enjoys a discretion to appraise, as a matter of equity, the various circumstances present in each case, although it is true that, in certain cases, that discretion may become so insignificant that an obligation to withdraw the measure must be envisaged. In any event, those rights are subject to review by the court.

49. It is of course appropriate to take a more restrictive approach and always take the option, after the period for bringing proceedings has elapsed, of upholding formal or procedural legality. The advocates of that view also consider that an administrative measure which has become unchallengeable through inertia on the part of its addressee has been *assented to*. That view must be rejected. First, it raises to the highest level something which is nothing more than a technical device safeguarding the law; second, it reflects an approach specific to private law, circumventing the

20 — As will have been noted, I am eschewing the term 'revision' so as not to cause confusion with the cases to which Article 41 of the EC Statute of the Court of Justice relates.

essential link between the Administration and the public interest and legality.

50. It is also appropriate to recognise only the discretion of the Administration to withdraw final measures vitiated by a defect, but not a corresponding right to demand such withdrawal. To my mind, the latter approach would leave the way open to the amendment of final measures for reasons of expediency but it is not appropriate to situations marked by a serious or obvious irregularity in which complete legal protection is required – protection which involves conferring on the person concerned, in particular circumstances, a real subjective right to have the basis of a vitiated measure re-examined when it is not open to challenge by ordinary means.

51. In setting out my views, I shall take account only of the subject-matter of these proceedings, namely the dispute concerning the withdrawal, vis-à-vis the Swedish undertakings, of the penalty for the infringement mentioned in Article 1(1) of the Wood pulp decision. A separate issue is the extent to which, in relation to the same undertakings, the undertaking annexed to the decision should be regarded as binding after its partial annulment by the judgment of 31 March 1993 (see point 22 above). Suffice it to note that, in response to questions put to it by this Court, the Commission conceded that it did not regard the clauses of the annulled undertaking as valid. It is of only academic importance to verify whether those clauses are no longer binding on the Swedish undertakings as a result of the particular wording of point 6 of the operative part of that judgment [21] or because they no longer have any economic rationale, [22] as the Commission contends, or else as a consequence of the obligation which Article 176 imposes on the institution from which the annulled measure emanates, as contended by the respondents. In any event, that question falls outside the scope of these proceedings.

A. *Preliminary issues*

52. The solution I suggest presupposes, first, that a Community institution has issued a measure of an individual nature, that it has become final and that its addressees have sought its withdrawal after expiry of the period for bringing proceedings on the basis of what I have called an indication of a possible irregularity. Clearly, such circumstances are present in this case. I must add that, because of its content and legal effects, the Wood pulp decision belongs to the category of acts known as 'measures imposing burdens'. In fact, the operative part of that decision imposes, essentially, obligations to refrain

21 — Which, unlike the part dealing with penalties, annuls certain provisions of the undertaking without referring to any party.

22 — Being binding on only some of the undertakings producing wood pulp.

from certain action and pecuniary penalties.

53. Before the Court of First Instance, the Swedish undertakings argued — in support of their challenge — that the Wood pulp decision constituted a single act of which the annulment by the Court of Justice accrued to the benefit of all its addressees, not just those who took part in the proceedings for annulment.

That claim was rejected by the Court of First Instance, which considered that the Wood Pulp decision, although drafted and published in the form of a single decision, was to be seen as a bundle of individual decisions making a finding or findings of infringement against each of the undertakings to which it was addressed and, where appropriate, imposing a fine.[23] I fully support that interpretation: the Wood Pulp decision is a divisible collective measure.

54. Having made that clarification, the Court of First Instance rejected the applicants' view that the Court of Justice's *Wood pulp* judgment was effective *erga omnes*. Referring to the judgment of 9 March 1994 in *TWD Textilwerke Deggendorf*,[24] the Court of First Instance pointed out that, where an addressee does not bring an action for annulment under Article 173 against the aspects of the decision affecting it, that decision continues to be valid and binding on it. In other words, it is not that the declaration that a decision is void has no effect *erga omnes* but rather that, since the decision is a divisible collective measure, that effect is limited in each case to the subject-matter of the dispute brought before the Community Court, which can be nothing other than the parts of the collective decision which relate to the addressee concerned.

I shall now examine in detail each of the elements of my proposal, referring, where appropriate, to precedents in the case-law of the Court of Justice and to the solutions adopted in the laws of the various Member States.

B. *The general rule: final acts are not open to challenge*

55. The law, being a servant of social organisation, does not seek – in contrast to morality – to attain an ideal of absolute perfection. It merely defines the substance of typical legal relationships and formalises the judicial remedies, relying on occasion upon equitable considerations to achieve justice in a given case. However, I believe it can be safely said that the ultimate aim of every legal system is not justice but order: the law abhors disorder. It has therefore equipped itself with arms to fight the main causes of disorder: instability of legal situations. In the context relevant to these proceedings, the relevant arm is the concept of the unassailability of decisions that have

23 — Paragraph 56, at II-1209.

24 — Case C-188/92 [1994] ECR I-833, paragraph 13.

become final, also known as the principle of *res judicata*.[25] On expiry of the period laid down by the legislature for actions to be commenced, a vitiated measure can no longer be challenged and any defect to which it may be subject becomes a part of the established order. This principle is so important that I feel I can say in general terms that it must mark the starting point of this analysis. The general rule must therefore be that final measures are not open to challenge.

56. Nevertheless, however necessary certainty as to the temporal effectiveness of measures may be, there are occasions when it must give way to considerations which the legal order itself treats as deserving of greater protection. The Court of First Instance gave the impression in its judgment that, by virtue of Article 176, such considerations may include requirements of legality.[26]

57. In reality, however, legality and certainty, more than principles or mechanisms, constitute values which shape a State governed by the rule of law. In that sense, certainty, far from being counterposed to legality, is one of its manifestations: the requirements of certainty are also those of legality. Thus, for example, institutions such as usucapion or limitation of actions, the immediate aim of which is certainty in legal relations, contribute, to the same extent as actions for recovery, the system of remedies or the principle of *res judicata*, to attainment of the objectives of legality which are inherent in every legal order. No system of law can allow the validity of the legal situations which arise within it to be questioned indefinitely.[27] That basic statement is reflected, as far as the present case is concerned, in the existence of peremptory time-limits for legal proceedings to be brought against certain acts of the institutions. Article 173 of the Treaty provides, *inter alia*, that any natural or legal person may institute proceedings against a decision addressed to him within a period of two months of its notification. The extreme brevity of this period may be open to criticism, particularly where the acts which it is wished to attack involve facts or appraisals of great complexity or where they have an essential impact on the subjective rights of the addressee.[28] However, as this question falls outside the scope of this dispute I shall not go into it.

58. The rule is therefore clear: two months after its notification, any decision which has not been contested becomes unchallengeable by its addressee. That general rule is not merely a matter of good

25 — Although, as indicated by the words used, this expression in fact relates to judicial decisions. The Germans have coined the term *Bestandskraft* (in contrast to *Rechtskraft*) to describe the finality of measures of the Administration.

26 — Together with considerations of good administration (paragraph 92 of the contested judgment, at II-1218).

27 — In that regard, the Spanish Constitutional Court has gone so far as to say that the lack of any limitation period 'might be detrimental to the Constitution, *implying as it would an excessive sacrifice of legal certainty in favour of justice*' (judgment 147/86 of 25 November 1986; Consejo General del Poder Judicial: *Cuestiones de Inconstitucionalidad*, Volume I, p. 681; emphasis added).

28 — See, for example, E. García de Enterría and T.-R. Fernández, *Curso de Derecho Administrativo*, Madrid, 1995, Volume I, p. 613.

procedure; it reflects the legitimate concern of the legal order to apply certain time-limits to the bringing of actions against measures of the Administration. Not a trivial concern, since, apart from the important objectives of legal certainty already referred to, it serves no less important aspects of administrative efficiency. [29]

59. As compared with the clarity of the fifth paragraph of Article 173, Article 176 merely obliges the institution from which the measure annulled by the Court of Justice emanated to 'take the necessary measures to comply' with its judgment.

60. Since it is a general rule and is expressed in dazzlingly clear terms, the two-month time-limit laid down by Article 173 must be observed in any action against measures of the institutions based on grounds of lack of competence, infringement of essential procedural requirements, breach of the Treaty or of any legal provision for the implementation thereof, or misuse of powers.

61. The Court of Justice has had many an opportunity to express its views, straightforwardly, on the effects of failure to institute proceedings against a decision within the time-limit. From the time of its judgment of 17 November 1965 in *Collotti* v *Court of Justice*, [30] until the most recent one, of 30 January 1997 in *Wiljo*, [31] the Court of Justice has held 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'. [32] That dictum — in the words of the Court of Justice itself — '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'. [33]

62. As far as the laws of the Member States are concerned, it must be observed that nowhere — with the possible exception of Denmark — are effects *ultra partes* of the scope of those recognised by the Court of First Instance attributed to a judgment of annulment. Quite the contrary: a clear majority [34] of European systems uphold the principle of the unassailability of administrative measures once the relevant (and relatively short) periods have elapsed. [35]

63. In its judgment, the Court of First Instance appears in principle to adopt the

29 — The 'principle of good administration' to which the Court of First Instance refers to justify the need for withdrawal (paragraph 92, at II-1218) must be understood as meaning orderly administration (*ordnungsmäßige Verwaltung*).

30 — Case 20/65 [1965] ECR 847.

31 — Case C-178/95 [1997] ECR I-585.

32 — Paragraph 19, at I-603.

33 — Ibid.

34 — With the possible exception of Danish, Scots, Finnish, Swedish and (with certain nuances) Irish law.

35 — Thus, for example, even in a system of law as attached to fairness as the English one, the general time-limit for proceedings for judicial review is three months (Order 53, Rule 4(1), of the *Rules of the Supreme Court*).

general rule that final measures are unchallengeable when it declares that the Wood pulp decision is binding on the addressees who did not bring proceedings, referring in paragraph 58 [36] to the settled case-law of the Court of Justice on the subject (*TWD Textilwerke Deggendorf*). [37] However, that important rule is eclipsed in the Court's further reasoning, where it only recognises that, to ensure legality, there may be an obligation — which it infers from Article 176 — to examine the effect *ultra partes* of an annulling judgment, pursuant to a request made *within a reasonable period.* [38]

process of European integration [39] has been based, the Community institutions may be called on to review measures adopted by them which have become final. I repeat that that obligation cannot have as its legal basis — at least not exclusively — the claim that, by implication, a judgment of the Court of Justice annulling a measure takes effect *ultra partes*. That option not only displays significant shortcomings from the point of view of the way in which the law is applied (why should a fresh examination not be undertaken where the irregularity becomes apparent in a context other than that of legal proceedings?) — also, above all, it does not allow the interpretation *contra tabulas* of Article 173 which implies permitting the (limited and indirect) challengeability of acts of institutions which have become final. Only by recourse to superior considerations of equity, based on the requirements of the legality of administrative action, can this exception to the general rule be justified.

C. *The entitlement and the obligation to re-examine measures imposing burdens. Indications of irregularity*

64. However important it may be, the unchallengeability of final administrative measures is not an end in itself and cannot aspire in any event to prevail in any situation deserving of protection. The corollary of that statement is that, in the context of the obligations attaching to them, not so much — in my view — by virtue of Article 176 of the Treaty but because they should safeguard the rule of law in the Community on which the

65. In the absence of express rules indicating under what conditions it is appropriate to re-examine and, if appropriate, withdraw Community decisions, [40] my analysis will be inspired by a number of guidelines found in the case-law of the Court of Justice and by what appear to be majority legal trends in the Member States.

36 — At II-1209.

37 — Cited in point 54 above.

38 — Paragraph 72, at II-1213.

39 — Opinion 1/91 of 14 December 1991 on the planned setting up of the European Economic Area [1991] ECR I-6079, paragraph 21.

40 — As the Court of First Instance rightly points out (paragraph 89 of the contested judgment, at II-1217), Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87) neither regulates nor precludes reexamination for the benefit of an individual of an illegal decision adopted under Articles 3 and 15 of that regulation.

D. *The possibility of re-examining acts imposing burdens*

66. The possibility of re-examining and if need be withdrawing — *ex proprio motu* or at the request of a party — an administrative measure of an individual nature, such as a decision, has been gradually establishing itself in Community law from the outset. If such measures confer subjective rights on their addressees, they can only be withdrawn when they are contrary to law and only if the withdrawal occurs within a reasonable period. [41] It is obvious that the latter requirement, intended to safeguard legitimate expectations as to the legality and stability of the tainted measure, has no *raison d'être* in relation to measures which impose a burden. [42]

67. In the case of acts which impose a burden on their addressees, the Community institution is, therefore, entitled at any time to re-examine them and if need be withdraw them, on its own initiative or at the request of an interested party, provided that it complies in all cases with the general principles governing administrative action, amongst which the prohibition of arbitrary acts is pre-eminent.

41 — Judgment in Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly* [1957-58] ECR 39, particularly at pp. 55 and 56. See also, amongst the more recent cases, Case C-90/95 P *De Compte* v *Parliament* [1997] ECR I-1999, in which it is stated (paragraph 35), that 'while it must be acknowledged that any Community institution which finds that a measure which it has adopted is tainted with illegality has the right to withdraw it within a reasonable period, with retroactive effect, that right may be restricted by the need to fulfil the legitimate expectations of a beneficiary of the measure, who has been led to rely on the lawfulness thereof'.

42 — In various national systems (German, Netherlands, Italian), an administrative penalty may not be withdrawn by the same authority as imposed it. This precaution is a matter of orderly administration, and is not relevant here.

E. *The obligation to re-examine acts imposing burdens*

68. In certain circumstances, the mere entitlement of a Community institution to re-examine an unchallengeable individual measure becomes an obligation and, as such, can be the subject of legal proceedings. That obligation will be imposed by the requirement of legality where there is any serious indication of irregularity, existing from the outset or becoming apparent subsequently, which may affect the measure in question.

69. Such indications, when relied on in proceedings, become grounds for review. Known to almost all legal systems, such grounds are traditionally divided into two kinds:

— pleas calling for amendment, in favour of the interested party, of the factual or legal basis of the final measure being challenged;

— pleas by which it is sought to rely on new evidence or have existing evidence reappraised, prompting a decision more favourable to the person concerned.

Alongside those two traditional categories, which display the common feature of relying upon a new factor, as compared with the circumstances which obtained when the act was adopted, at least two others must be recognised, in which the defect prompting the challenge may have been inherent in the measure since the time of its adoption. Although the way in which they are dealt with in the legal systems of the various Member States is less uniform, [43] the following defects affecting final measures may be regarded as grounds of review:

— outright nullity;

— manifest infringement of the law. [44]

As I shall explain in due course (see point 84), the distinction between those two kinds of nullity is not always straightforward and is of dubious utility. More than the possible types, what is important is whether there is a — serious — legal infringement and, if there is, it is necessary to see that justice is done rather than raising obstacles by imposing a purely formal requirement, such as that of characterising the infringement by giving it a specific name, particularly if an error in the characterisation might lead to the measure surviving despite not meeting the basic requirements of fairness. [45]

70. In this first task of appraisal in order to determine what constitutes an indication of irregularity, the institution enjoys a degree of latitude. However, it is clear that a judgment of the Court of Justice declaring a measure void will constitute an indication that another measure is irregular provided that it is shown that, as far as the defect leading to its annulment is concerned, the two measures are similar or identical — in other words, provided that the factual basis is essentially the same as that of the measure considered to be identical and the *ratio juris* of the annulling judgment can be extrapolated so as to apply to it. To that end, it will be necessary to have regard not only to the operative part of the judgment but also to the grounds leading up to it, which constitute its essential basis, in that they are necessary to establish the precise meaning of what was determined by the operative part. [46] That does not mean — and this is an important detail — that an annulling judgment will necessarily become applicable to an identical measure in annulment proceedings. A person entitled to rely, for his own benefit, on a judgment annulling a measure identical to the one of which he seeks review is entitled not to the

43 — Whilst in some systems there are special proceedings to establish nullity, in others the concept exists of revision *ex proprio motu* which, despite its name, may be sought by the interested party, who, moreover enjoys certain rights in the course of the proceedings (to be heard, for there to be an objective and rational appraisal and for reasons to be given for the decision).

44 — In Spanish law, the infringement must affect a provision ranking as a formal statute.

45 — In that regard, see the explanatory memorandum to the Spanish Law on Contentious-Administrative Jurisdiction, of 27 December 1956.

46 — See, to that effect, the judgment in *Asteris*, cited in point 32 above, paragraph 27.

withdrawal of that act but to a review — in the sense of re-examination — by the institution concerned of the justification for it, in accordance with the procedures with which I will deal below. [47]

71. There is no doubt that — as correctly observed by the Court of First Instance — the judgment of 11 March 1993 annulled the first paragraph of Article 1 of the Wood pulp decision, on the basis of considerations which are generally applicable to analysis of the wood pulp market carried out by the Commission at an earlier stage, which are not based on an examination of individual conduct or practices engaged in by each of the addressees.

In fact, the Commission inferred that there was an infringement involving general concertation on announced prices mainly from the system of quarterly announcements (see points 5 and 8 above). However, the Court of Justice considered that the available evidence did not prove that the existence of concertation and prices was the only plausible explanation for the indications of parallel conduct in the market.

72. Paraphrasing paragraph 82 of the contested judgment, I consider that those findings — relating generally to the validity of the Commission's economic and legal assessment of the parallel conduct observed on the market — may give rise to *serious doubts as to the legality of the wood pulp decision* in so far as it states that the Swedish addressees — the respondents in this case — also infringed Article 85(1) of the Treaty by concerting on prices for bleached sulphate wood pulp for deliveries to the Community during the periods specified.

73. It can therefore be seen from the judgment of 11 March 1993 that there were serious indications of substantive irregularity regarding the infringements attributed to the Swedish addressees in Article 1(1) of the Wood pulp decision. [48] In those circumstances, the Commission not only was entitled generally to re-examine at any time a measure imposing a burden but, having regard to superior requirements of equity, was obliged to undertake, at least, a fresh appraisal of

47 — In the comparative law of the Member States, a judicial decision annulling a measure is not, as a general rule, a ground for the annulment of an identical measure but that does not mean that it has no effect at all. It may thus lead to re-examination of the justification for the measure. In German law, for example, paragraph 51 of the Law on Administrative Procedure (*Verwaltungsverfahrensgesetz*) does not provide an unambiguous answer, giving way to interpretation by the courts.

48 — The Court of First Instance did not consider it necessary to examine also the impact which the dicta of the Court of Justice in its judgment of 31 March 1993 might have on the infringement imputed to the Swedish undertakings in Article 1(2) of the decision. That issue, for which there is an indubitable factual basis (the content of the statement of objections), was not raised by the parties in these appeal proceedings, and therefore in my opinion falls outside their scope.

the justification for the measure in the light of those indications.

74. Since they affect the subjective rights of individuals, I consider that all decisions as to whether or not to review a final measure must contain a proper statement of reasons, under Article 190 of the Treaty. [49]

F. *The time-limit for requesting review*

75. The Court of First Instance considered that any application for review should be submitted *within a reasonable period.* [50]

76. Pending the adoption in the Community context of complete rules governing administrative procedure — the basic requirement of legal certainty — any determination of a time-limit for seeking review of a measure which is in itself not open to challenge is, in practice, hazardous.

In applications for review, the laws of various Member States set a period of between three and five years from the time at which the measure became final and of only a few months, coinciding in certain cases with the period granted for bringing ordinary proceedings, reckoned from the discovery of the indication of irregularity relied on for the purpose of obtaining a review.

It would therefore be appropriate, in line with the provisions of Article 173 concerning proceedings for annulment, to require an application for review to be made within a period of two months after the person concerned became aware, or could have become aware, of the indication of irregularity relied upon. Another possibility would be to follow the prudent approach of the Court of First Instance and decide case by case in accordance with the criterion of reasonableness.

If the first of the above options were followed, it would be legitimate to ask whether the application made by the Swedish undertakings on 24 November 1993 was lodged beyond the time-limit reckoned from the date of the judgment of 31 March of the same year.

In any event, I do not think that the Court of Justice will have to resolve this question in relation to the present proceedings.

49 — This is generally the case in Italian law (see, among others, the decisions of the Consiglio di Stato of 16 February 1979, Sixth Chamber, No 81, and of 20 April 1994, Fifth Chamber, No 345) and in Netherlands law (see H. Henneken, 'Commentary on the judgment of the Centrale Raad van Beroep of 3 July 1997', *Administratiefrechtelijke Beslissingen* 1997, p. 419).

50 — Paragraph 72, at II-1213.

G. The possibility of withdrawing a final measure imposing a burden

77. As I stated above (see point 46), my main difficulty with the contested judgment lies in the unmitigated automatism with which it appears to deduce from the ascertainment of the substantive irregularity of the penalties contained in an administrative measure, which in principle has become final, that they must be withdrawn since they 'would have no legal basis'. That interpretation, which purports to have been carried out 'in accordance with the principles of legality and of good administration' in order to ensure that Article 176 is not 'deprived of all its practical effect', [51] is open to criticism from various points of view, beginning with the very principles which are invoked in its favour.

In the first place, the principle of legality also requires observance of the time-limits laid down for bringing proceedings, because legality applies both to substance and to formal or procedural aspects. Moreover — as I have explained — in the event of a conflict between these two *levels* of legality, the general rule is rather that legal situations which have been consolidated by the expiry of time-limits for pursuing a remedy are not open to challenge.

Secondly, as regards reliance on the general principle of good administration, a judgment of the French Conseil d'État comes to mind in which, quite rightly, it was stated that 'the requirements of good administration also apply to citizens'. [52] A person who has not availed himself of the ordinary remedies open to him cannot require the Administration to display more than ordinary zeal in the defence of his rights. Moreover, the unchallengeability of final administrative measures is often justified by reference to, *inter alia*, the efficacy of administrative action. [53] And, indeed, good administration is also efficient administration.

Finally, as far as Article 176 is concerned, it must be acknowledged that its own effectiveness is exhausted when the institution in question adopts the measures required by the precise context of the dispute which gave rise to the judgment of annulment. [54] If the Court of First Instance's interpretation were accepted, every institution would be under an obligation to review any of its measures in the light of a judgment of annulment subject to the sole and unusual requirement that a request had been submitted 'within a reasonable period' — and why not on its own initiative? — and would have to amend those measures if any of them were found to contain the defects giving rise to illegality noted in the judgment. Thus, Article 173 of the Treaty and the time-limit of two months for bringing proceedings against Community measures would be deprived not only of their effectiveness but also of any potentiality.

51 — Paragraph 92, at II-1218.

52 — C.E., 28 January 1986, Thys, 26116, J.T., 1989, p. 307, in which it is also stated that 'peut être considéré comme une forme de fraude, le fait de s'abstenir sciemment... de faire valoir ses droits... pour se plaindre en suite... de la méconnaissance de ses droits'.

53 — Principle of administrative economy (Verwaltungsökonomie).

54 — See paragraph 69 of the contested judgment, at II-1212.

78. I also consider that the Court of First Instance's interpretation is not in conformity with the scant case-law of the Court of Justice regarding Article 176 and is contrary to legal practice in almost all the Member States.

79. Neither the judgment in *Asteris*[55] nor that in *SNUPAT*[56] supports the reasoning contained in paragraph 92 of the contested judgment, that is to say the view that the institution concerned is under an obligation to annul a final measure upon ascertaining that the measure was tainted with illegality.

The central point of *Asteris* is the question of the temporal effect of the declaration that a legislative provision of a general nature is void. It deals, ultimately, with a specific manifestation of the classic problem of the prospective effect of declarations of nullity of legislative measures, accepted by the Court of Justice since its famous judgment in *Defrenne II*.[57] When provisions of a general nature are involved, the interests at stake are not comparable with those which arise in relation to decisions of an individual nature. The logic of the *Asteris* judgment — which, in any event, includes no reasoning whatsoever similar to that in paragraph 92 of the contested judgment — cannot therefore be transposed to the present case.[58]

In the *SNUPAT* judgment, whose scope is also limited by its very specific facts, there is likewise no reflection of the view stated by the Court of First Instance in paragraph 92 of its judgment that measures must be automatically withdrawn: on the contrary, reference is made to the need to weigh public and private interests.[59]

80. Among the laws of the Member States, only the Danish system would allow a solution like that advocated by the Court of First Instance, and that would, essentially, result from the relaxed approach to or, even, non-existence of mandatory time-limits for bringing court proceedings against administrative measures. Almost all the other systems, with differences of detail, incorporate the concept of unchallengeability of final administrative mea-

55 — Cited in point 32 above.

56 — Cited ibid.

57 — Case 43/75 [1976] ECR 455.

58 — And if it were, it would necessarily lead to a result contrary to that in the contested judgment, since the benefit of the nullity of a general provision is available only in cases which were already pending when the nullity was declared (see paragraphs 74 and 75 of *Defrenne II*, at p. 482).

59 — Pages 86 to 88.

sures. When that general rule is subjected to corrective action, by legislation or case-law, to give effect to certain superior requirements of substantive law, a weighing of the various conflicting interests has always been carried out first. [60]

81. The same solution must be adopted in this case. Thus, in the case of a pecuniary penalty like the one at issue here, the institution will have to weigh both the nature and seriousness of the defect, its effects and the possibility of remedying it, and also the severity of the penalty and its impact on the assets of the individual or the viability of the undertaking. In addition, since the measure is final, account must be taken of factors such as the time which has elapsed since it became final and the degree of obviousness of the illegality, and also the extent of any recourse by the addressee to the remedies available at the material time, particularly as regards the level of specialised assistance which he can be assumed to have had. [61] Only if, in view of some particular circumstance, or a combination of circumstances, retention of the measure must be regarded as intolerable, the institution must proceed to withdraw it. This, and no other, must be the threshold at which, exceptionally, the general rule that measures are unchallengeable may be broken. The logical consequence is that if, because the legal situation created by it is considered intolerable, a measure is withdrawn as regards certain applicants, it will be necessary also to withdraw it as regards any other addressee of the same or an identical measure, since the intolerability of the measure cannot be dependent upon the addressee's action regarding proceedings. [62]

To bring to a satisfactory conclusion the exercise described above, which essentially calls for an equitable assessment, the Community institution must in general enjoy a considerable degree of latitude. Nevertheless, there are several cases in which that latitude is more restricted or where, no latitude whatsoever being available, the conduct of the institution may be regarded as being subject to specific rules. I shall now enumerate the most frequent cases, but not without first pointing out that such cases must be exceptional and, in addition, must be strictly interpreted for fear of undermining the general rule that final measures are unchallengeable.

60 — Virtually all the Member States recognise, under different names and with different characteristics, the concept of discretional review by the administration of final measures which are subject to a defect. As I pointed out earlier, that power confers on individuals the right to be heard, to have the administration use its discretion rationally and objectively, and to be given a reasoned decision. Thus, for example, in Germany, on expiry of the period for bringing proceedings against a measure imposing a burden, the right to secure the annulment of a vitiated measure vested in the individual to whom it is addressed becomes an enforceable right to secure a rational and objective appraisal (*fehlerfreies Ermessen*) of the justification for review and possible withdrawal of the measure (order of the Federal Constitutional Court of 17 December 1969, *Entscheidungen des Bundesverfassungsgerichts*, vol. 27, p. 297 et seq.).

61 — In so far as, from the time at which there is a real possibility under the law of challenging a measure adverse to him, he ceases to be a mere addressee of an administrative decision and becomes — even potentially — a party to an administrative or contentious administrative procedure (see E. Forsthoff, *Lehrbuch des Verwaltungsrechts*, 1973, vol. 1, end of p. 257).

62 — In this case, that would necessarily, if the claims of the Swedish undertakings were upheld, prompt the withdrawal *ex proprio motu* of the decision as regards the addressee Mead Corporation, which withdrew from the proceedings in the first action (see footnote 3 above).

— *Measures which are* ipso jure *void*

82. The general rule that final measures are unchallengeable cannot be relied upon as against measures which are *ipso jure* void. Some writers consider that nullity *ipso jure*, or absolute nullity, constitutes the most extreme category of invalidity, characterised by the fact that it cannot be rectified, is not subject to a time-bar and may be relied on *erga omnes*. Classic examples of this particular kind of nullity are total and absolute failure to follow the prescribed legal procedure or the adoption of a measure by a body which is manifestly not empowered to do so.

83. Without embarking upon dogmatic or terminological disquisitions,[63] I must say that this category has been received into the case-law of the Court of Justice through the concept of *non-existent acts*. 'If a measure is deemed to be non -existent — said the Court of Justice — the finding may be made, even after the period for instituting proceedings has expired, that the measure has not produced any legal effects. For reasons of legal certainty which are evident, that classification must consequently be restricted under Community law, as under the national legal systems which provide for it, to measures which exhibit particularly serious and manifest defects',[64] being limited to 'quite extreme situations'.[65]

The case-law of the Court of Justice has been very restrictive in declaring Community measures non-existent,[66] taking into consideration, when doing so, not only the seriousness of the illegality, but also the appearance or obviousness of the irregularity.[67]

84. A Community institution, on reaching the conclusion that one of its measures is *ipso jure* void or when it has been declared void by the Court, must withdraw it on its own initiative or at the request of a party, even though it has become final, without prejudice to any liability which it may have incurred.

Despite the eminently formal nature of the irregularities which must be examined under this heading, the fact is that, on many occasions, there may be room for some appraisal on an equitable basis, since,

63 — See my Opinion in Joined Cases C-10/97 to C-22/97 *IN.CO.GE. '90 and Others* [1998] ECR I-6307.

64 — Case 15/85 *Consorzio Cooperative d'Abbruzzo* v *Commission* [1987] ECR 1005, paragraph 10; Case 226/87 *Commission* v *Greece* [1988] ECR 3611, paragraph 16; and Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 10.

65 — Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 50.

66 — And this has prevented a more detailed conceptual analysis by academic authors. In that connection, see M.C. Bergerès, 'La théorie de l'inexistence en droit communautaire', *Revue trimestrielle de droit européen*, 1989, p. 393.

67 — See A. Kalogeropoulos, 'Éléments de l'application de la théorie de l'inexistence des actes juridiques en droit communautaire', *État-Loi-Administration, Mélanges en l'honneur d'Epaminondas P. Spiliotopoulos*, Ed. Ant. N. Sakkoulas, Athens, 1998, p. 181 et seq., in particular pp. 199 and 200.

having regard to the specific circumstances of each case, particular defects may be classified as nothing more than essential procedural requirements or may lead to the absolute nullity of the measure. [68]

85. A separate category, but one that attracts similar penalties, deserves mention here: measures adopted in breach of new legislation concerning penalties.

— Sets of measures producing discriminatory results

86. Another category of measures regarding the withdrawal of which Community institutions enjoy a limited discretion comprises those which, if maintained, give rise to unacceptable discrimination. Although the law may, for the sake of legal certainty, allow, after the expiry of certain periods, substantively 'anti-juridical' situations to become unchallengeable, such unchallengeability must, in certain circumstances, fall away in the face of the general prohibition of discrimination. It is obvious that the alleged inequality cannot be reduced to that existing between the annulled measure and any other measure, of identical content, which has become final through not being attacked. In such circumstances there is no discrimination, since different situations are given different treatment: in the first, the measure is annulled because the available remedies have been used; in the other, there is no annulment because those remedies were not invoked. The discrimination which is relevant here must, to constitute such, have some origin outside the control of the party invoking it.

87. If an institution, within the bounds of the latitude which it must be granted for the exercise of its discretionary powers, decides to withdraw a measure similar to another which has been declared void, it will be obliged to act in the same way regarding any other identical measure, or else will be guilty of discrimination.

88. A particular manifestation of the prohibition of discrimination is, in my opinion, the obligation to withdraw certain measures which have become final in order to comply with basic requirements of distributive justice. That situation arose in *SNUPAT*, cited several times above.

89. The background to that decision is provided by Decision No 2/57 of the High

68 — To illustrate this, a comparison may be drawn between the judgment of the Court of First Instance in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315, in which certain defects led to a declaration that the measure concerned was non-existent, and the judgment of the Court of Justice of 15 June 1994, the appeal cited in footnote 65, in which the same defects merely entailed a declaration that the measure was void.

Authority of the ECSC, which had laid down a subsidy regime for the importation of ferrous scrap. That regime was financed out of contributions which Community steel undertakings were obliged to make into a common fund of amounts determined by reference to their consumption of scrap. To calculate such consumption — and, therefore, the respective contributions — scrap from their own resources could be excluded.

A substantial proportion of the scrap which *SNUPAT* needed for its operations came from its parent company, for which reason it sought an 'own resources' exemption. The High Authority rejected SNUPAT's application but at the same time acceded to requests from two other steel undertakings, Breda and Hoogovens, which obtained supplies from another undertaking with which they formed an economic unit. SNUPAT brought proceedings before the Court of Justice against the decision of the High Authority withholding an exemption. By judgment of 17 July 1959, the Court of Justice dismissed the application, considering that the exemption would constitute a discriminatory advantage as against the other undertakings. SNUPAT then asked the High Authority, pursuant to the judgment and in discharge of its obligations under Article 34(1) of the Treaty establishing the European Coal and Steel Community (having similar scope to that of Article 176 of the EC Treaty), to revoke retroactively the exemptions granted to Breda and Hoogovens. That withdrawal would have had the effect of increasing the contribution to the common fund from those two undertakings, and correspondingly decreasing the charges borne by SNUPAT in that regard. Faced with a further refusal by the High Authority, SNUPAT brought further proceedings before the Court of Justice, leading to the judgment of 22 March 1961, in which SNUPAT's claim was upheld. In its reasoning, the Court of Justice paid particular attention to the special characteristics of the equalisation machinery to which the proceedings related, which created a situation of solidarity between all the undertakings using ferrous scrap.

90. Whilst the applicant in the SNUPAT case was entitled to the withdrawal of final measures illegally granting competing undertakings certain advantages which it had been refused, that was because, being granted under an equalisation system, those advantages proportionally increased the financial burden borne by the applicant, thereby leading to unacceptable discrimination which could not be attributed to the procedural conduct of the applicant. That is how I think the following passage from that judgment should be construed:

'In these circumstances, the abovementioned judgment showed the exemptions in a new light, since this should have led, after a fresh examination of their legal basis, to a decision concerning their legality. The said judgment must therefore have led the High Authority to re-examine its previous position and to consider whether the disputed exemptions could be retained

in view of the principles established by the abovementioned judgment, since it was required as from that time *to conform to those principles at the risk of tolerating discrimination interfering with normal competition* as provided for by the fundamental rules of the Treaty.' [69]

— *Particularly severe penalties*

91. Where the identical measure has imposed a particularly severe penalty, the institution may be obliged to withdraw it at any time.

The term 'particularly serious penalties' must be understood, in this context, as meaning those, principally fines, which may cause irreparable damage to the assets of an individual or frustrate the viability of an undertaking, as well, of course, as those which directly or indirectly involve deprivation of liberty.

69 — At p. 79. Emphasis added.

VI — Application of the proposed solution to the present case

92. I can at this stage apply all the foregoing considerations to the present case. Although it might be concluded here — a conclusion which coincides with the contested judgment — that the decision on the re-examination and possible withdrawal of the final measure is, primarily, a matter for the institution which adopted it, I believe that the Court of Justice, having all the information before it, must give final judgment on the claims of the parties, [70] even if only for the basic reason of keeping proceedings to a minimum. [71]

93. It is thus clear that, by virtue of the judgment of 11 March 1993 and the pro-

70 — This authority stems from Article 54 of the EC Statute of the Court of Justice which states: '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.' One of the cases in which the opportunity offered by that provision may be taken is that of error *in iudicando*, provided that the account of the facts is complete and sufficient to give final judgment and no evidential measures are necessary. This course appears to have been taken in the case-law of the Court of Justice, although the Court has never stated for what reason it considers that the state of the proceedings enables it to give judgment itself, confining itself to laconic statements such as 'this is the case' (Case C-345/90 P *Parliament* v *Hanning* [1992] ECR I-949, particularly at I-989; and *Commission* v *BASF and Others*, cited in footnote 65, at I-2648.
In short, it will be appropriate for the Court of Justice to give judgment on the substance where it is clear from the documents before it that the case is ready for judgment (see J. Héron, *Droit judiciaire privé*, Montchrétien, Paris, 1991, p. 517; J. Vincent and S. Guinchard: *Procédure civile*, Dalloz, Paris, 1994, p. 922), in view of the fact that the Community legislature has created it as a modern court of cassation, enjoying full freedom to give final judgment where it considers that it is necessary to do so (see J. Nieva Fenoll, *El recurso de casación ante el Tribunal de Justicia de las Comunidades Europeas*, Bosch, Barcelona, 1998, p. 430).
In the present case there is no doubt that the question brought before the Court of Justice in this appeal is of a strictly legal nature, as has been shown throughout this Opinion.

71 — It should be borne in mind that the Wood pulp decision was adopted in 1984.

cess of extrapolation described earlier, important indications of substantive irregularity have been disclosed in relation to the infringements attributed to the Swedish addressees in the Wood pulp decision. For that reason, the Commission is obliged, at least, to re-examine the legal foundation of the findings relating to those infringements.

94. Therefore, the Commission errs in law where, in a letter signed by its member responsible for competition, dated 4 October 1995 (see point 26 above), it replied to the Swedish addressees to the effect that the Commission *was not even entitled* to refund the fines claimed.

95. The result of such an examination should have been either partial withdrawal or maintenance of the contested decision in so far as it was addressed to the Swedish undertakings. In my view, none of the circumstances making it advisable to restrict the degree of latitude ordinarily enjoyed by Community institutions, as described above, is present. I would point out that those circumstances, having to be strictly interpreted, are never presumed.

In the first place, there is no reason to assume that the defect declared in the judgment of 11 March 1993 regarding the infringement mentioned in Article 1(1) of the Wood pulp decision can be regarded as particularly serious or, otherwise, capable of entailing absolute nullity of the measure. There was, rather, a defect in the appraisal of the evidence on which the Commission relied in adopting the contested decisions which, not being classifiable as a gross error, should not entail nullity *ipso jure* of the tainted measure.

Nor does it appear that the penalties at issue in these proceedings are particularly severe as far as the viability of the addressees is concerned, nor, finally, does it appear that maintenance of the measure might produce intolerable discriminatory effects of the kind described above.

96. The absence of those particular circumstances does not relieve the institution from which the measure emanated of the duty to reappraise the justification for it. To that end, the interests at stake must be taken into account, the various factors being weighed against each other. If on balance it seems that it would be intolerable to maintain the measure, it must be withdrawn.

97. In response to questions from the Court of Justice, the Swedish undertakings have mentioned no consideration whatsoever such as to identify any interest deserving of protection, other than the legitimate right enjoyed by them to seek partial

reimbursement of the fines. They refer only to the legal foundations on which the contested judgment purported to be based. The Commission, for its part, resisting withdrawal, refers to the considerations of legal certainty embodied in Article 173 and to the general prohibition of discrimination — discrimination which would arise if the penalty were withdrawn and the fines were refunded, primarily between the Swedish undertakings, which did not bring proceedings at an earlier stage, and the undertakings which did do so, thereby accepting the risk inherent in bringing proceedings; but also between the Swedish undertakings and all those persons penalised who did not bring proceedings in time and did not enjoy the advantage, as in this instance, of a judgment of annulment being given in relation to their case.

98. After making a detailed analysis of the circumstances of this case and of the Swedish undertakings' observations, I can find no reason for departing from the general rule that measures not contested in due time should be unchallengeable. If the Wood pulp decision became final regarding those addressees — who must be presumed to have had an adequate level of learned assistance — that was solely because of a conscious decision taken by them regarding recourse to proceedings. If the Court of Justice, in accordance with Article 176 or the requirements of legality, were to consider that threshold sufficient to justify withdrawal of a measure which had been final for 14 years, it would be dealing a mortal blow to Article 173 and the procedural order stemming from it. For my part, I consider that since there is no superior consideration of equity whatsoever, nor has there been claimed to be, the balancing of the various interests which I propose can produce no result other than that pursued by the general rule, which is to preserve the finality of the contested penalty. Accordingly, it is proper — in my view — for the Court of Justice to uphold the Commission's application and, giving judgment on the substance, since the state of the proceedings so permits, to dismiss the respondents' contention that the Wood pulp decision of 19 December 1984 should be withdrawn.

VII — Costs

99. Since the appeal is well founded and final judgment may be given by this Court, the respondents should, pursuant to Article 122 of the Rules of Procedure of the Court of Justice, be ordered to pay the costs.

VIII — Conclusion

100. I propose that the Court of Justice, upholding the grounds of appeal:

(1) set aside the judgment of the Court of First Instance of 10 July 1997 in Case T-227/95 *AssiDomän Kraft Products and Others* v *Commission*;

(2) give judgment on the substance and dismiss the appeal by AssiDomän and Others against the Commission decision of 31 March 1993;

(3) order the respondents to pay the costs.