OPINION OF ADVOCATE GENERAL MISCHO

delivered on 25 October 2001 [1]

I — Introduction

A — *Background to the dispute*

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

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

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

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

1 — Original language: French.
2 — OJ, English Special Edition 1959-1962, p. 87.
3 — OJ, English Special Edition 1963-1964, p. 47.
4 — OJ 1989 L 74, p. 1.

for infringement of Article 85(1) of the EC Treaty (now Article 81(1) EC): Atochem SA, BASF AG, DSM NV, Enichem SpA, Hoechst AG (hereinafter 'Hoechst'), Hüls AG, Imperial Chemical Industries plc (hereinafter 'ICI'), Limburgse Vinyl Maatschappij NV, Montedison SpA, Norsk Hydro AS, Société Artésienne de Vinyle SA, Shell International Chemical Company Ltd, Solvay et Cie (hereinafter 'Solvay') and Wacker-Chemie GmbH.

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

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

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

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

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

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

11. The PVC II decision contains the following provisions:

'*Article 1*

BASF AG, DSM NV, Elf Atochem SA, Enichem SpA, Hoechst AG, Hüls AG, Imperial Chemical Industries plc, Lim-

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

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

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

burgse 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.'

B — *Procedure before the Court of First Instance*

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

13. Each sought the annulment of the PVC II decision in whole or in part and, in the alternative, the annulment or reduction of

the fine. Montedison Spa also pleaded that the Commission should be ordered to pay damages on account of costs incurred in putting together a guarantee and any other expenses arising from the PVC II decision.

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

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

— joined the cases for the purposes of the judgment;

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

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

— dismissed the remainder of the action;

— ruled on the costs.

D — *Procedure before the Court of Justice*

15. By application lodged at the Court Registry on 1 July 1999, Montedison SpA (hereinafter 'Montedison') appealed pursuant to Article 49 of the EC Statute of the Court of Justice.

16. It claims that the Court should:

— set aside the contested judgment;

— annul the PVC II decision;

— refer the case back to the Court of First Instance;

— reduce the amount of the fine to a minimal sum;

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

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

17. The Commission contends that the Court should:

— dismiss the appeal;

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

II — Assessment

18. The appellant puts forward *nine* pleas in support of its appeal.

A — *Failure to respond to a plea*

19. Montedison complains that the Court of First Instance did not examine the first plea raised on pages 2 to 15 of its application, alleging infringement of Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17 read in conjunction with Article 87(2)(d) of the EC Treaty (now, after amendment, Article 83(2)(d) EC).

20. The appellant points out that Article 172 of the Treaty and Article 17 of Regulation No 17 give the Community judicature unlimited jurisdiction to review decisions, that is, an unlimited power to evaluate the evidence. It submits that, since Article 17 of Regulation No 17 confers in particular on the Community judicature the power to cancel, reduce or increase the fine, the Commission does not retain that power after its decision has been challenged. The point is that the power to evaluate the evidence is definitively transferred to the Community judicature. According to Montedison, if the Commission is not sure that its decision does not contain a formal defect, it should submit an alternative claim on the merits, before the Court hearing the case, that the other party should be fined an equal or higher amount since that Court can rule only on the forms of order sought by the parties and the Commission no longer has the power to adopt a decision.

21. In effect, the appellant disputes whether the Commission is able — during the proceedings pending before the Court of First Instance or after delivery of a judgment by that Court — to repeat its decision, if necessary *ad infinitum* in the event of subsequent appeals. In support of

that assessment, it invokes the judgment in *Alpha Steel* v *Commission*.[9]

22. This plea is subdivided into two separate complaints. First, the appellant criticises the Court of First Instance for not responding to one of its arguments. Secondly, it asks the Court of Justice to examine that argument itself.

23. As regards the first complaint, it should be noted that the Court of First Instance, as the Commission points out, analysed the issue on the merits which form the substance of Montedison's complaint, namely the Commission's right to adopt a new decision.

24. In particular, by establishing in paragraphs 77 et seq. and paragraph 95 et seq. that the matter should be analysed in terms of the consequences of the annulling judgment, consequences which depended on the grounds of annulment, the Court, implicitly but necessarily, rejected the appellant's argument that the mere fact that the case was brought before the Community judicature had the consequence of depriving the Commission of any decision-making power.

25. It therefore appears that, contrary to what Montedison maintains, the Court of First Instance did deal with the appellant's argument.

26. Furthermore, I think that the Court was right not to accept it.

27. I should point out, first of all, that the appellant's observations concerning the injustice which would result if the Commission were permitted to adopt a new decision during the proceedings, evading the pleas raised by the undertaking before the Court, are irrelevant. That is not the position in the present case.

28. I should add that the appellant's argument reflects a misunderstanding of the notion of unlimited jurisdiction, which, in fact, refers to the extent of the powers of the Community judicature hearing an application for annulment. It indicates that the Court is entitled to substitute its assessment for that of the Commission and therefore to replace the Commission's decision with another.

29. However, it does not inevitably follow that, if the Community judicature has not exercised that power, like the Court of Justice in its 1994 judgment, the Commission is divested of it. There is no essential

9 — Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749.

link between the Court's ability to substitute its assessment for that of the Commission and the Commission's inability to adopt a decision if the Court has not exercised that power.

30. The appellant's reasoning is also contradicted by Article 176 of the Treaty, which states that the institution whose act has been annulled must give due effect to the annulment.

31. If the Court of Justice does not fix new fines to accompany the annulment, it cannot automatically be considered, because the Court has unlimited jurisdiction, that it has held that a fine should not be imposed under any circumstances.

32. Indeed, the scope of the Court's ruling depends only on the operative part of the judgment and the grounds which constitute its essential basis.

33. Furthermore, the concept of unlimited jurisdiction, as is apparent from the wording both of Article 172 of the Treaty and of Article 17 of Regulation No 17, refers expressly to the imposition of sanctions. It cannot therefore be invoked when, as in the present case, the annulment of the contested measure is unrelated to that matter.

34. Therefore, by using the concept of unlimited jurisdiction to dispute the existence of a power to adopt the decision, which is a prerequisite for determining the appropriate level of a possible fine, the appellant affords that concept a scope which it does not have.

35. The judgment in *Alpha Steel* v *Commission* does not invalidate that conclusion. That case related to a situation in which, contrary to the circumstances of this case, the Commission adopted a new decision while the legal proceedings against the previous one were still continuing. Furthermore, that judgment, in any event, confirmed that the Commission was entitled to adopt a new decision.

36. It follows from the above that this plea should be rejected.

B — *Inadequate statement of reasons concerning the second head of claim, the infringement of Articles 18 and 19 of Regulation No 17 and Articles 1 and 11 of Regulation No 99/63*

37. Montedison points out that, before the Court of First Instance, it disputed whether

there had been an administrative procedure leading to the adoption of the PVC II decision. That plea had been understood by the Court to allege an infringement of the rights of the defence whereas, in fact, it has a much wider scope.

38. In the heading of its plea, the appellant alleges a failure to state reasons. However, it is apparent from its arguments, which are summarised above, that, in actual fact, it is claiming that the Court of First Instance misunderstood its plea.

39. The fact remains, as the Commission states, that the appellant does not cite any paragraph or part of the judgment which is particularly relevant. It therefore does not specify in any respect from which statements in the judgment it infers the error committed by the Court of First Instance.

40. The Court has consistently held that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside. [10]

41. This plea must therefore be rejected as inadmissible.

42. Accordingly, I make the following observations only in the alternative.

43. The fact that the Court of First Instance interprets the appellant's plea in one way rather than another cannot be considered as a failure to state reasons. It may be that the statement is marred by an error of law but the fact that a statement of reasons may be incorrect still does not mean that it is non-existent.

44. In that regard, the heading of the plea also contains a reference to an infringement of Articles 18 and 19 of Regulation No 17 and Articles 1 and 11 of Regulation No 99/63.

45. In that context, the appellant submits, in essence, that the Commission was required to state its reasons for opting to take a new decision, even though it had the same content as the PVC I decision. According to the appellant, it should have explained the Community's continued interest in pursuing the accused in respect of events dating from 10 years previously and allowed the undertakings to express their views on that new point.

46. That obligation to state reasons is the corollary of its discretionary power.

10 — Order of 17 September 1996 in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 36 to 38.

47. However, the Court has consistently held that the scope of the institution's obligation to state reasons depends on the nature of the measure in question. In particular, if the institution has a discretion whether to adopt it, it cannot be required to state specific reasons in that regard. [11]

48. It is not disputed that, in the present case, the decision whether or not to adopt a new measure lay within the discretion enjoyed by the Commission in implementing Community competition policy.

49. Of course, it is important to distinguish, in that context, between the obligation to state reasons for the act of adopting the measure, which is the subject-matter of the plea raised by the appellant, and the obligation to state reasons for the content of the decision, which the appellant does not claim has been infringed and which means that the decision must state, in sufficient detail, the nature of the infringement its addressee is alleged to have committed, the reasons why the Commission believes that the infringement has occurred and the obligations it intends to impose on the addressee.

50. The Commission was not, therefore, required to give reasons for choosing to adopt a new decision or, *a fortiori*, to hear the undertakings on the matter.

51. It follows from the above that this plea should be rejected.

C — *Failure to consider the economic context*

52. Montedison complains that the Court of First Instance did not carry out the examination of the economic context which must be undertaken prior to any decision in respect of competition, particularly if the decision imposes a fine. [12]

53. The Court merely summarised, in a few lines in paragraph 736 of the contested judgment, the appellant's argument attributing the practices complained of to the oil crisis which, in a few years, had caused more than half the PVC producers to withdraw from the sector. Against that background, it was perfectly reasonable, and also essential, for there to be contacts between the PVC producers. They were simply intended to minimise the losses.

54. The Court of First Instance was therefore wrong to hold, in paragraph 740 of the contested judgment, that, whilst such a

11 — Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291.

12 — Case 23/67 *Brasserie de Haecht* [1967] ECR 407.

crisis in the market situation might justify an exemption under Article 85(3) of the Treaty, at no time had application been made for an exemption. Indeed, the situation did not require any exemption, since a cartel cannot be constituted by a set of actions which each undertaking is required to have for both legal and economic reasons.

55. Contrary to what the heading of this plea might lead us to believe, the appellant is not criticising the Court for not taking into account the economic context in which the alleged acts occurred. It is really complaining that it did not draw the inferences which the appellant considers should have been drawn from it.

56. The appellant's argument is manifestly unfounded.

57. It is not apparent, either from the wording of Article 85(1) of the Treaty or from the case-law, and even less from the preamble to the EC Treaty, cited by Montedison, that the existence of a market crisis is capable of removing the anticompetitive nature of price cartels.

58. The fact that the producers may have considered cartels desirable in order to reduce losses, or even essential to ensure their survival, does not change that unavoidable finding in any way.

59. I therefore endorse the position taken by the Court of First Instance which, in paragraphs 740 and 741 of the contested judgment, states as follows:

'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.

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, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at page 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.'

60. The Court of First Instance also provides us with an answer to the appellant's argument that the Commission should have shown the effect of the cartel on market prices.

61. That argument contradicts both the settled case-law, to which the Court referred, and the very wording of Article 85(1) of the Treaty, from which it is apparent that an agreement contravenes the Treaty if its object *or* its effect is anticompetitive. It is therefore sufficient, to constitute infringement of Article 85, if the agreement, quite apart from its possible effects, had an anticompetitive object.

62. It is pointless for the appellant to invoke at this point the Court's decisions in the '*Cartonboard*' cases, which show that the Commission has to prove that the level of the transaction prices would have been lower had there not been collusion. [13]

63. The Court made that statement in the context of a case in which the Commission had claimed that the cartel had had an effect on prices. Therefore, it was up to the Commission to prove it. On the other hand, it cannot in any sense be inferred that only agreements which have an anticompetitive effect constitute an infringement of the Treaty, while those whose aim is to restrict competition but which, for one reason or another, have not had that effect, therefore escape the prohibition contained in Article 85(1) of the Treaty.

64. Montedison's claim that the consequence of the Court's interpretation is to favour producers of finished PVC goods over producers of the raw material is no more persuasive. Indeed, as the Commission points out, there is no question in Community law of a preference being shown to one or the other category of undertakings since anticompetitive agreements are forbidden at all levels.

65. Moreover, it is indisputable that, if Community law prohibits cartels between

13 — Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 324.

producers, it is to protect consumers at all levels, be it the final consumer or the intermediate producer, who is himself a consumer of the raw material.

66. Montedison also complains that the Commission inferred from the evidence adduced that the undertakings which had participated in meetings had taken part in an infringement of Article 85(1) of the Treaty, without having established that 'unlawful activities were being conducted alongside other, lawful, activities'.

67. Since that argument is designed to criticise the Court of First Instance for not annulling the decision on that basis, it must be stated that the Court considered that it was apparent from the body of evidence supplied by the Commission and cited in the decision that those meetings had an anticompetitive object, [14] which necessarily means that unlawful activities were being pursued.

68. It is not the responsibility of the Court of Justice, hearing the case on appeal, to call in question the assessment of the evidence made by the Court of First Instance, except in the case of distortion, [15] to which the appellant refers in general terms.

69. However, it is not apparent from any document in the case that the statements made in the contested judgment concerning evidence of the anticompetitive object of the meetings, in paragraphs 679 to 686, constitute distortion.

70. The same objection must be made, *mutatis mutandis*, to the appellant's complaint that the Court of First Instance wrongly found that the fixing of European target prices had necessarily had an impact on competition in the PVC market and that the buyers' room for negotiation had therefore been reduced.

71. Finally, Montedison claims that 'the equation which forms the basis of the Court's judgment: meetings between producers = price initiatives = exchange of strategic information = allocation of market shares, is unlawful'. It cites, in that regard, paragraph 119 of the judgment in *Buchmann* v *Commission*. [16]

14 — Paragraphs 679 to 686 of the contested judgment.

15 — See, as an example of settled case-law, Case C-315/99 P *Ismeri Europa* [2001] ECR I-5281, paragraph 48.

16 — Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813.

72. However, it must be pointed out that, in the present case, contrary to the line of reasoning it had put forward in that judgment, the Commission did not infer only from an undertaking's participation in meetings concerning prices that it had participated in a cartel to allocate market shares.

73. Indeed, in the decision and in the PVC II judgment, evidence of participation in the various aspects of the infringement is based on many direct factors, particularly documentary evidence which was, furthermore, analysed in detail by the Court of First Instance in paragraphs 535 to 687 of the contested judgment.

74. It is apparent from the above that this plea should be rejected.

D — *Limitation*

75. Montedison complains that, in paragraphs 1089 et seq. of the contested judgment, the Court of First Instance misapplied the provisions of Regulation (EEC) No 2988/74 of the Council 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. [17]

76. In particular, the Court had wrongly held that the limitation period had been suspended during the legal proceedings brought against the PVC I decision, pointing out that Article 3 of Regulation No 2988/74, whereby the limitation period in proceedings is suspended for as long as the 'decision of the Commission' is the subject of proceedings pending before the Community judicature, has meaning only where a decision finding an infringement and imposing a fine is annulled.

77. In essence, the appellant's argument consists of two statements. In the first place, it maintains that the action against the decision imposing a fine cannot have the effect of suspending the limitation period.

78. If that were the case, it would give rise to the consequence, described as 'monstrous' by the appellant, that the Commission could repeat measures *ad infinitum*, in spite of formal defects.

79. The Commission points out — rightly, in my view — that there is no objective

17 — OJ 1974 L 319, p. 1.

justification for that fear since a measure may be repeated only if it has been annulled solely on procedural grounds and after resumption of the procedure at the point immediately after the step which was found to contain a formal defect.

80. We should also bear in mind that, under Article 3 of Regulation No 2988/74, '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'. This wording seems sufficiently clear as to leave no room for doubt.

81. The appellant suggests that that provision is applicable only if the Commission's decision which is the subject of proceedings was a measure of inquiry. However, it would be paradoxical for that provision to be applicable to decisions relating to a measure of inquiry and not to the decision finding the infringement and imposing a fine.

82. That is particularly so because, according to the appellant's argument, no provision in the regulation is applicable to the annulment of the decision, since the first recital in the preamble to the regulation mentions the need to create a comprehensive set of rules.

83. Admittedly, the appellant tries to avoid that consequence by stating that Article 6 of the regulation is applicable in this case. Merely reading that provision reveals immediately that the effort is futile.

84. It is undoubtedly clear from the wording of that provision that it applies to the limitation period in respect of the enforcement of a decision. This question can, by definition, be raised only when the decision at issue has not — as in this case — been annulled.

85. It follows that Article 6 of the regulation is clearly inapplicable to the present case.

86. The Court of First Instance was therefore right in applying Article 3 of the regulation.

87. Secondly, the appellant claims that, even assuming the Court's reasoning to be correct, the new measure interrupting the limitation period would still have to be adopted less than five years after the previous one. That could not be the contested decision which, under Article 174 of the Treaty, was 'null and void' and had therefore lost all power to interrupt the limitation period, but the statement of

objections. In any event, both the PVC I decision and the statement of objections took effect more than five years before the PVC II decision.

88. Let us note, at the outset, that the appellant's second claim contains an obvious contradiction. The appellant claims that the statement is made even assuming the Court's reasoning to be correct. However, the statement itself is correct only if it is considered that the application against the PVC I decision did not suspend the limitation period during which the Commission was entitled to bring proceedings and therefore that the Court's argument in that regard is incorrect.

89. Against that background it is sufficient to refer to the verification carried out by the Court of First Instance in paragraph 1101 of its judgment, which shows that if, in accordance with the Court's argument, which I support, it is considered that the limitation period is suspended during the legal proceedings, the Commission's power to impose fines was not time-barred on 27 July 1994, the date on which the PVC II decision was adopted.

90. The appellant's second claim is therefore only the consequence of the first and not an additional argument.

91. I believe I have shown that the appellant's first claim is misconceived. It necessarily follows that the second is unfounded.

92. Finally, the appellant disputes the relevance of the measures found by the Court of First Instance to have interrupted the limitation period. It criticises the Court for having held that the investigations carried out by the Commission in respect of ICI, Shell International Chemical Company Ltd and DSM on 21, 22 and 23 November 1983 interrupted the limitation period in respect of the appellant. It maintains that those investigations cannot have had that effect since it had sold its PVC branch 10 months earlier.

93. That assessment is incorrect. By definition, the limitation period in proceedings exists in respect of an undertaking which is the subject of those proceedings, that is to say, an undertaking alleged to be liable for the infringement for which the action is brought.

94. It is common ground that an undertaking may perfectly well be liable for infringements committed previously by one of its branches with which it no longer has links when the proceedings relating to those infringements are brought.

95. The mere fact that Montedison sold its PVC branch before certain investigations were made in connection with the PVC infringement proceedings therefore in no way implies that it cannot be the subject of proceedings relating to the activities of that branch and, on that basis, be affected by the interruptive effect of those investigations on the limitation period.

96. Montedison also argues, in that regard, that the interruption of the limitation period requires the existence of a record of notification or written authority to carry out an investigation. However, the existence of those documents, prior to the statement of objections, was not established.

97. Reference should be made in that regard to Article 2 of Regulation No 2988/74 which defines measures interrupting the limitation period as 'any action taken by the Commission, or by any Member State, acting at the request of the Commission, for the purpose of the preliminary investigation or proceedings in respect of an infringement'.

98. It follows that, contrary to the appellant's claims, that provision requires neither a certified record nor a written authority to carry out an investigation for the limitation period to be interrupted.

99. Therefore, this argument should also be rejected and, consequently, the whole of this plea.

E — *Infringement of the right to a fair hearing, Articles 48(2) and 64 of the Rules of Procedure of the Court of First Instance, and breach of the principle that liability is personal, on account of the way in which the oral procedure was organised*

100. Montedison maintains that the invitation to present a joint oral defence at the hearing, issued persistently by the Court of First Instance, was not compatible with the right to a fair hearing enshrined by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and that Article 54 et seq. of the Rules of Procedure do not provide for a collective joint defence.

101. In order to conduct such a defence it might be necessary to exclude from the defence certain arguments, evidence and contentions which are not common to all the appellant undertakings. To impose it would also be tantamount to presuming that the guilt of those undertakings had been established.

102. The Commission, after pointing out that it was associated with the legal pro-

ceedings, observes, however, that it found no trace of what Montedison is claiming. According to the Commission, the Court neither imposed nor requested 'in a pressing manner' anything on or from the appellant. It merely made the very sensible suggestion that, in order to avoid repetition, parties wishing to present identical arguments should do so jointly, and the appellants willingly agreed.

103. It must be pointed out that the appellant adduces no evidence of possible constraint. The Court cannot be criticised for simply issuing an invitation to the appellants. Since it is Montedison which invokes the existence of constraint or, in any event, of a 'pressing invitation', it is for Montedison to adduce evidence of its claim.

104. Since it does not adduce the slightest evidence to support its claims, this complaint should be rejected.

105. Montedison also maintains that, in the present case, the result of conducting a joint defence would have had the consequence of the Court totally overlooking two of its main arguments, as is evident from the first and second grounds of appeal.

106. It emerges from the examination of those grounds which I have made above that the complaint that the Court would have ignored the appellant's arguments is, in my view, unfounded.

107. This argument should therefore be rejected.

108. Montedison adds that the Court did not trouble to assess the evidence referred to in its application, although it is apparent from that evidence that none of the documents obtained by the Commission listed that undertaking among the participants in the infringements discovered.

109. That criticism flagrantly contradicts the statements made in the contested judgment, from which it appears, on the contrary, as the Commission rightly points out, that the Court examined in detail the evidence put forward by the appellant.

110. Accordingly, it drew attention, at several points in its judgment, to the appellant's argument relating to the lack of probative value of the evidence submitted by the Commission [18] and to the fact that the appellant was not mentioned in

18 — See, in particular, paragraphs 574, 576 and 579.

some of the documents the Commission supplied. [19] It also made a detailed study of the documents in the case concerning the appellant's participation in the infringement. [20]

111. Therefore, I cannot agree with the appellant's view that the Court did not trouble to examine its arguments. On the contrary, it is difficult to avoid the impression that the actual subject of the appellant's complaint is not the Court's failure to carry out an examination but rather the conclusion it reached.

112. It must be pointed out in that regard that the assessment of the evidence made by the Court of First Instance relates to questions of fact which the Court of Justice hearing the case on appeal cannot review, save in the case of distortion, which the appellant does not allege.

113. Moreover, such distortion is still less apparent from the statements of the Court of First Instance mentioned above since the Court refers in them to a body of evidence which is undisputed by the appellant, such as the fact that it was mentioned both by ICI and BASF, or a note addressed by the managing director of Montedison's petrochemical division to ICI, or developments in the Italian market, from which evidence it was able to infer the appellant's participation in the infringement.

19 — See, on that point, paragraphs 711 and 892 et seq. of the contested judgment.

20 — Paragraphs 898 to 908 of the contested judgment.

114. The appellant's claim that, in the end, the Court found only one piece of evidence against it and examined only one of its arguments concerning the evidence favourable to it is therefore incorrect.

115. The same is true of Montedison's claim that, in the course of that examination, the Court committed an error.

116. The appellant, by juxtaposing various passages from the contested judgment, seeks, in fact, to show that the Court gave an irrelevant response to its argument.

117. It submits, in that regard, that, by stating that ICI and BASF had referred by name to Montedison and not to Montedipe, it sought to show that its participation in the infringement must have ceased on 1 January 1981, the date on which Montedipe had taken over PVC production from Montedison.

118. According to the appellant, the Court replied to that argument in paragraphs 984 and 985 of its judgment by holding the parent company Montedison liable for the actions of its subsidiary Montedipe, which is a completely different matter from the

question of evidence of its participation in the infringement, raised in its plea.

119. However, the appellant omits to mention paragraphs 901 and 902 of the contested judgment in which the Court expressly examined the question of evidence relating to the statements made by ICI and BASF and to the change in Montedison's PVC activities.

120. The Court of First Instance stated as follows:

'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.

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.'

121. The Court therefore, unquestionably, examined the appellant's argument correctly.

122. As regards the argument concerning Articles 64 et seq. of the Rules of Procedure of the Court of First Instance, it must be stated that those provisions in no sense exclude the possibility that the Court of First Instance may suggest that the parties avoid repetition by submitting identical arguments jointly. Indeed, that may be considered a measure intended 'to ensure efficient conduct of the written and oral procedure' within the meaning of Article 64(1) of the Rules of Procedure of the Court of First Instance.

F — *Infringement of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of Article 48 of the Rules of Procedure of the Court of First Instance*

123. Montedison points out that, in paragraphs 903 and 904 of the contested judg-

ment, the Court accepted the existence of a quota or compensation system, on the basis of a document which refers only indirectly to Montedison, and that it dwelt on the fact that ICI had requested an increase in the quotas.

124. The appellant complains that the Court did not take into consideration the explanation it provided on pages 46 and 47 of its application initiating proceedings.

125. Let us note in passing that the question of evidence of the quotas, which is examined on pages 44 and 45 of the said application and not pages 46 and 47, is treated in considerably less detail in the application than in the appeal. That said, the reference in the application is sufficient to justify the conclusion that this is not a new plea.

126. In any event, it must be stated, as the Commission points out, that, in paragraph 896 of the contested judgment, the Court gives a very detailed description of the points raised by Montedison in its application. Its reply is given in paragraphs 903 and 904 of the judgment.

127. Therefore, I cannot agree with the appellant when it claims that the Court did not take its arguments into consideration.

128. Similarly, the appellant accuses the Court of failing to state the reasons why it did not take account of 23 documents mentioned on pages 24 to 31 of the application. Yet those pages do not contain such a reference. The appellant explains, however, that those documents would have shown that there was fierce competition, which is inconsistent with a price and market shares cartel.

129. It must also be stated, at this point too, that the Court examined in detail the question whether the available evidence justified the Commission's conclusions as regards the existence of quota systems [21] and price initiatives. [22] In that context, it specifically examined, in paragraph 659 of its judgment, the issue of the effect of the evidence establishing the existence of keen competition between the producers. It also pointed out, in paragraph 1062 of its judgment, that the Commission had taken due account of the difficulty in implementing the cartel and particularly of the existence of the 'aggressive' behaviour of some producers.

130. The Court then considered that matter and also, implicity but necessarily, responded to the appellant's reliance on the

21 — Paragraphs 584 to 617 of the contested judgment.
22 — Paragraphs 637 to 661 of the contested judgment.

documents relating to it. The appellant, which, furthermore, does not adduce any specific evidence at this point to contradict the Court's assessment, cannot therefore allege a failure to examine the evidence in that regard.

131. The Court of First Instance cannot, subject to its obligation to observe general principles and the Rules of Procedure relating to the burden of proof and the adducing of evidence and not to distort the true sense of the evidence, be required to give express reasons for its assessment of the value of each piece of evidence presented to it, in particular where it considers that that evidence is unimportant or irrelevant to the outcome of the dispute. [23]

132. Furthermore, in paragraphs 1009 and 1028 of the contested judgment, the Court had refused to allow the appellant to put in evidence four new documents in its favour, with which it had become acquainted during a measure of organisation of procedure relating to access to the Commission's file. According to Montedison, the Court was wrong to hold that, since the appellant had not raised pleas relating to access to the administrative file, it was not appropriate to take account of observations made by it in response to that measure of organisation of procedure.

133. Montedison maintains that the four documents in question illustrate the disastrous fall in prices in Italy, the aggressiveness of the competition and the fact that foreign undertakings were not informed of the state of the Italian market.

134. The appellant alleges, in that regard, infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance relating to the prohibition against the introduction of new pleas. The appellant itself states, however, that it was not a question, in the present case, of putting forward a new plea but of substantiating a plea already raised. There cannot therefore be an infringement of Article 48(2), since that provision applies only to the introduction of new pleas.

135. Nor is it possible to infer *a fortiori* from that provision, as the appellant infers — on the pretext that it was a question of substantiating an existing plea and not putting forward a new one — a right to make any observations which the appellant considers appropriate. Indeed, such observations can be made only in compliance with the other provisions of the Rules of Procedure, such as Article 48(1).

23 — Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549.

136. However, Montedison also states that the rejection of those documents constitutes an infringement of the right to a fair hearing under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

137. In my view, although it is not necessary to take a view on the applicability of that provision, as such, to the present case, it is important to point out that that right does not imply, however, that the Court is required to accept all the evidence relied on. In fact, the sound administration of justice means that the Court has a right to impose limits on the evidence offered in support, such as that mentioned in Article 48(1) of the Rules of Procedure of the Court of First Instance. Similarly, there must come a time when the Court is entitled to think that it is sufficiently informed or that the evidence submitted is irrelevant to the dispute before it.

138. That said, the situation was different in the present case, since the appellant's observations, annexed to the appeal, which the Court of First Instance refused to take into account, were not presented as further evidence but were lodged in connection with a measure or organisation of procedure before the Court of First Instance, to enable the Court to assess the undertakings' pleas concerning access to the file. In deciding to adopt that measure, the Court also expressly reserved assessment of the applicants' pleas. [24]

139. Against that background, it was reasonable for the Court not to take account of those observations, since Montedison had not formulated any plea relating to access to the file, in support of which the said observations could have been made.

140. It is also important to point out that those observations, far from being formally submitted as further evidence within the meaning of Article 48(1) of the Rules of Procedure of the Court of First Instance, could very well be construed as putting forward — after the lodging of the application and therefore out of time — a plea relating to access to the file.

141. In any event, it should be pointed out that, of the four documents concerned, two were examined by the Court anyway because they were mentioned by another party. Furthermore, the matters which the appellant claimed the documents contained, namely the developments in the Italian market, were considered in detail by the Court, particularly in its examination of the Solvay document. [25]

24 — Paragraph 1023 of the contested judgment.

25 — See paragraphs 629 to 635 and 905 of the contested judgment.

142. The appellant has not therefore established in what respect the Court's rejection of its documents had the slightest impact on the Court's decision.

143. Since a breach of procedure could not, in any event, lead to annulment unless it were proved that it had harmful consequences for the appellant,[26] quod non, this argument should be rejected.

144. Finally, the appellant points out that the Court of First Instance, in paragraph 906 of the contested judgment, disregarded a table which it produced, in which it compared the target prices alleged by the Commission with the prices actually charged by Montedison, in order to show that it could not have participated in price initiatives. It criticises the Court for reaching that decision on the ground that the appellant had not stated either the source of the figures which it claimed constituted the prices actually charged by it, or the precise date on which those prices had been determined.

145. The appellant argues that the source could only be the mandatory accounting documents showing all Montedipe's sales and that they were the average selling prices for the periods in question.

146. That argument is clearly inadmissible. It is not for the Court of Justice, hearing a case on appeal, to review the assessment of the evidence carried out by the Court of First Instance, save in the event of distortion, which is not alleged in the present case.

147. Furthermore, the argument is wholly irrelevant since it is apparent both from the PVC II decision and from the contested judgment[27] that the Commission does not allege that the price initiatives were successful and that the producers had actually achieved the target prices.

148. Therefore, the fact that the appellant relies on a document which, whatever the evidential value accorded to it, would not, in any event, contradict the Commission's argument, cannot call into question the content of the decision or of the judgment.

149. It follows from all the above that this plea should be rejected.

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

27 — See, in particular, paragraph 906 of the judgment.

G — *Infringement of Articles 10(1) and 32(1) of the Rules of Procedure of the Court of First Instance*

150. Montedison states that one of the judges of the enlarged chamber hearing the case, who had left his post seven months before the judgment was delivered, had been wrongly held to be 'absent' or 'prevented from attending' within the meaning of Article 32(1) of the Rules of Procedure and was not replaced at the appropriate time.

151. However, I fail to see in what respect the Court of First Instance —which, moreover, acted in accordance with its settled case-law[28] — was wrong to hold that the expiry of a term of office constituted absence or prevention from attending within the meaning of that provision.

152. It is not apparent from the wording of that provision that it does not apply in circumstances such as those of this case.

153. An analysis of the objective of Article 32(1) confirms that conclusion.

154. That provision seeks to prevent an even number of judges of the Court of First Instance from sitting. In that situation, it does not matter whether a prevention is final or temporary. Even an absence or prevention which is brief but occurs, for example, at the time of the hearing, may render it necessary to make sure that an even number of judges is not sitting.

155. I therefore see no reason to consider that the term 'prevention' within the meaning of Article 32(1) of the Rules of Procedure of the Court of First Instance does not include the prevention which occurs when a judge comes to the end of his term of office.

156. This plea should therefore be rejected.

H — *Infringement of Article 15(2) of Regulation No 17*

157. The appellant, recalling the principles applicable to the fixing of fines, essentially criticises the Court of First Instance for

28 — The Commission cites, in that regard, Case T-26/90 *Finsider* v *Commission* [1992] ECR II-1789, paragraph 37 (taking up office as a judge in the Court of Justice); Case T-195/95 *Guérin Automobiles* v *Commission* [1997] ECR II-679, paragraph 10 (death); Case T-232/95 *Cecom* v *Council* [1998] ECR II-2679, paragraph 13 (appointment as an Advocate General of the Court of Justice), and Case T-134/94 *NMH Stahlwerke* v *Commission* [1999] ECR II-239, paragraph 38 (expiry of term of office).

allowing a disproportionate and discriminatory fine to be imposed upon it.

158. It considers that the Court was wrong in holding, in paragraph 1216 of the contested judgment, that Montedison had not demonstrated how the fine imposed was discriminatory. It challenges the evidential requirement thus imposed on it, when, throughout the proceedings, it had maintained that, at worst, it could be charged with participating in a few meetings which, moreover, had a lawful object, during a period of between one and three years, instead of the six years taken into consideration by the Commission.

159. The discriminatory nature of the fine stems, in the appellant's submission, from the fact that, on the one hand, Montedison had been treated in the same way as the other undertakings concerned which, however, had been active in the sector during the whole of the period in dispute, and, on the other, it had not been granted a reduction in the fine, unlike three other undertakings.

160. The appellant's argument is based on a false premiss. In fact, it considers as established the fact that its participation in the infringement was on an altogether different scale from that stated in the decision and draws the reasonable conclusion that its fine should have been reduced.

161. However, the fact of the matter, as we have already seen, is that its arguments concerning both the gravity and duration of its participation in the infringement were rejected by the Court, which therefore had no reason to alter the amount of the fine.

162. The situation is similar as regards discrimination. The amount of the fine was determined in the same way as for the other undertakings, that is to say, by taking into account in particular the established duration of the undertaking's participation in the cartel.

163. If some producers obtained a reduction in fine, it is because the Court found, after examining the evidence, that the duration of their participation had not been as long, or their market share as large, as implied by the Commission's decision. In the case of Montedison, the examination of the evidence did not lead to such conclusions or reveal other reasons for reducing the fine and, therefore, inevitably, did not warrant a reduction.

164. This plea should therefore be rejected.

I — *Failure to examine evidence of the damage suffered by the appellant and infringement of the principle of the Commission's liability for wrongful conduct*

165. Montedison complains that, in paragraph 1263 of the contested judgment, the Court rejected as inadmissible its claim that the Commission should be ordered to pay damages on the ground that, in that regard, the application did not satisfy the minimum requirements laid down by the Rules of Procedure. However, during the four years of proceedings, the appellant had not ceased to criticise the Commission's unlawful conduct, to the various aspects of which it draws attention.

166. Its claim was therefore not only admissible but also well founded. The appellant refers to the judgment in *Baustahlgewebe* v *Commission*,[29] in which the Court of Justice, in a situation in which the legal proceedings had been excessively long, reduced the amount of the fine for reasons of procedural economy, thus, according to Montedison, counterbalancing that amount and that of the damage suffered, which was attributed to the Commission's action.

167. It must be stated, however, that the appellant does not expand that line of argument at the appeal stage. On the other hand, its application before the Court of First Instance contains no reference to it, since it merely 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 contested decision'.

168. The fact that the application contains numerous criticisms of the Commission but does not make any claim for compensation, cannot be regarded as sufficient. It is, in fact, almost inevitable that an action for the annulment of a Commission decision will contain criticisms of the institution. The Court of First Instance cannot be required to infer from that the existence and basis of a claim for compensation.

169. In the absence of any plea expressly forming the basis of that claim, the Court was fully entitled to regard it as inadmissible under Article 44(1)(c) of its Rules of Procedure, which provides that the appli-

29 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 48.

cation shall contain 'a summary of the pleas in law on which the application is based'.

170. I should add that the Court was also right in stating that, even if the wrongful conduct imputed to the Commission corresponds to the complaints made by the appellant, the overall rejection of those complaints necessarily means that there is no basis for the claim for compensation.

171. I cannot see any basis for that claim other than the criticisms formulated by the appellant in its application. Treatment of the claim was therefore inevitably linked to treatment of the criticisms, and these were rejected by the Court.

172. It is apparent from the above that this plea should be rejected.

Conclusion

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

— dismiss the appeal;

— order the appellant to pay the costs.