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 Commis-

1 — Original language: French.
2 — OJ, English Special Edition 1959-1962, p. 87.
3 — OJ, English Special Edition 1963-64, p. 47.
4 — OJ 1989 L 74, p. 1.

sion penalised the following PVC producers for infringement of Article 85(1) of the 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 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 Hydro Norsk... and Solvay...) by participating for the periods identified in this Decision in an agreement and/or concerted practice originating in about August 1980 by which the producers supplying PVC in the Community took part in regular meetings in order to fix target prices and target quotas, plan concerted initiatives to raise price levels and monitor the operation of the said collusive arrangements.

Article 2

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

Article 3

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

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

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

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

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

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

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

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

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

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

(x) Société artésienne de vinyle SA: a fine of ECU 400 000;

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

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

B — *Procedure before the Court of First Instance*

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

13. Each sought the annulment of the PVC II decision in whole or in part and, in the alternative, the annulment or reduction of the fine. Montedison Spa also pleaded that the Commission should be ordered to pay damages on account of costs incurred in putting together a guarantee and any other expenses arising from the PVC II decision.

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

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

— joined the cases for the purposes of the judgment;

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

— reduced the fines imposed on Elf Atochem SA, 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.

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 [1999] ECR II-931.

D — *Procedure before the Court of Justice*

15. By application lodged at the Court Registry on 29 June 1999, LVM 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 wholly or in part and terminate the proceedings or, in the alternative, refer the case back to the Court of First Instance in order that the proceedings may be resumed;

— annul the PVC II decision wholly or in part;

— annul or reduce the fine imposed on the appellant;

— 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. LVM puts forward the following pleas in support of its appeal:

— infringement of the doctrine of *res judicata;*

— infringement of the principle *non bis in idem*;

— infringement of the principle that decisions must be adopted within a reasonable time;

— invalidity of the procedural measures taken prior to the adoption of the PVC I decision;

— irregularity of the adoption procedure for the decision of 27 July 1994;

— inadequate statement of reasons;

— infringement of the right not to give evidence against oneself;

— infringement of the right of access to the Commission's file;

— limitation.

19. LVM points out that its grounds of appeal are identical, in scope and content, to those of the appellants DSM NV and DSM Kunststoffen in Case C-244/99 P, except that they advanced two additional pleas.

20. I consider I may therefore refer to my Opinion delivered today in Case C-244/99 P. It is apparent from the reasons stated therein that all of the pleas put forward by the appellant should be rejected.

Conclusion

21. I propose that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.