OPINION OF ADVOCATE GENERAL COSMAS

delivered on 15 July 1997 *

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In this case the Court of Justice is called upon to deliver judgment on the appeal of Hoechst AG (hereinafter 'Hoechst') brought pursuant to Article 49 of the EEC Statute of the Court of Justice against the judgment of the Court of First Instance of 10 March 1992.[1] The judgment under appeal dismissed the action brought by the appellant company pursuant to Article 173 of the EEC Treaty (hereinafter 'the

* Original language: Greek.

1 — Case T-10/89 *Hoechst AG* v *Commission* [1992] ECR II-629.

Treaty') against the Commission's decision of 23 April 1986 (hereinafter the 'Polypropylene' decision). [2] That decision concerned the application of Article 85 of the Treaty in the polypropylene production sector.

I — Facts and course of the procedure before the Court of First Instance

1. As regards the facts of the dispute and the course of the procedure before the Court of First Instance, the judgment under appeal relates as follows: Before 1977 the west European polypropylene market was supplied almost exclusively by ten producers, one of which was Hoechst, with a market share fluctuating somewhere between 10.5 and 12.6.%. After 1977 and following the expiry of the controlling patents held by Montedison, seven new producers appeared with substantial production capacity. This was not accompanied by a corresponding increase in demand, with the consequence that demand did not match supply, at least until 1982. More generally, for the greater part of 1977-1983, the polypropylene market was characterised by low profits or even significant losses.

2. On 13 and 14 October 1983 Commission officials, acting under the powers conferred by Article 14(3) of Council Regulation No 17 of 6 February 1962 [3] (hereinafter 'Regulation No 17'), carried out simultaneous investigations in a number of undertakings operating in the polypropylene production sector. Following those investigations, the Commission addressed requests for information, under Article 11 of Regulation No 17, to the above companies, and also to other related undertakings. From the evidence obtained during the course of those investigations the Commission concluded that between 1977 and 1983 certain polypropylene producers, including Hoechst, had been acting in contravention of Article 85 of the Treaty. On 30 April 1984 the Commission decided to open the proceedings provided for by Article 3(1) of Regulation No 17 and sent a written statement of objections to the undertakings in contravention.

3. At the end of that procedure, the Commission adopted the abovementioned decision of 23 April 1986, which has the following operative part:

'Article 1

(The Companies)... Hoechst AG... have infringed Article 85(1) of the EEC Treaty, by participating:

2 — IV/31.149 — Polypropylene, OJ 1986 L 230, p. 1.

3 — First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87.)

...

— in the case of Hoechst, ICI, Montepolimeri and Shell from about mid-1977 until at least November 1983

...

in an agreement and concerted practice originating in mid-1977 by which the producers supplying polypropylene in the territory of the EEC:

(a) contacted each other and met regularly (from the beginning of 1981, twice each month) in a series of secret meetings so as to discuss and determine their commercial policies;

(b) set "target" (or minimum) prices from time to time for the sale of the product in each Member State of the EEC;

(c) agreed various measures designed to facilitate the implementation of such target prices, including (principally) temporary restrictions on output, the exchange of detailed information on their deliveries, the holding of local meetings and from late 1982 a system of "account management" designed to implement price rises to individual customers;

(d) introduced simultaneous price increases implementing the said targets;

(e) shared the market by allocating to each producer an annual sales target or "quota" (1979, 1980 and for at least part of 1983) or in default of a definitive agreement covering the whole year by requiring producers to limit their sales in each month by reference to some previous period (1981, 1982).

...

Article 3

The following fines are hereby imposed on the undertakings named herein in

respect of the infringement found in Article 1:

...

(vi) Hoechst AG, a fine of 9 000 ECU, or 19 304 010 German marks (...)'.

4. Fourteen of the 15 companies which were the addressees of the decision, including the appellant, brought an action for its annulment. At the hearing which took place from 10 to 15 December 1990, the parties presented oral argument and answered questions from the Court.

5. By separate document dated 2 March 1992 and, when the written and oral procedure had, as stated above, been completed, but nevertheless before judgment had been delivered, Hoechst asked the Court of First Instance to reopen the oral procedure. In support of that request it relied on certain factual evidence of which, it maintained, it had only become aware after the conclusion of the oral procedure and, in particular, after the hearing and delivery of the judgment of the Court of First Instance in the related cases *BASF and Others* v *Commission* (hereinafter 'the *PVC* cases'). [4] From that evidence it can be concluded, according to Hoechst, that the contested decision was vitiated by serious procedural defects, for the examination of which a further review of the evidence is required.

By its abovementioned decision of 10 March 1992, the Court of First Instance, having again heard the views of the Advocate General, rejected the request for the oral procedure to be reopened, and rejected the application in its entirety.

6. Hoechst lodged an appeal against that decision, requesting the Court to set it aside and, either declare the Commission's decision non-existent, or in the alternative annul the said decision, or in the further alternative refer the case back to the Court of First Instance. At the same time it sought an order that the respondent should pay the costs. In its reply the appellant abandoned the pleas going to non-existence of the Polypropylene decision, whilst persisting with its pleas going to nullity, as set forth in its originating application.

The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

4 — 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.

DSM NV intervened in the appeal in support of Hoechst.

II — Admissibility of the appeal

7. In its response the Commission at the outset requests the Court to reject the appeal as inadmissible in its entirety. In that connection it contends that at no point in its appeal does Hoechst rely on an error of law by the Court of First Instance. Conversely, the appellant is raising for the first time at the appeal stage a whole series of facts, arguments and pleas. Those belated pleas go to the non-existence of the Commission's Polypropylene decision or other serious procedural flaws affecting the procedure by which that decision was adopted. In the Commission's view, by raising those pleas, the appellant is altering the subject-matter of the dispute, in breach of Articles 113(2) and 116(2) of the Rules of Procedure of the Court.

8. For its part, the appellant points out that, in raising before the Court procedural defects in the contested decision, it was merely seeking to prove that the Court of First Instance misdirected itself in its interpretation of Community law. Accordingly, in the appellant's view, it is not possible for the appeal to be held inadmissible on the basis of the abovementioned criticisms made by the Commission.

9. As a preliminary matter it should be recalled that, under Article 51 of the EEC Statute of the Court of Justice, an appeal 'shall be limited to points of law. It shall lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance.' Moreover, the provisions of Articles 113(2) and 116(2) of the Rules of Procedure of the Court of Justice preclude the appellant from changing the subject-matter of the proceedings before the Court of First Instance in its appeal; nor may it be changed in the response. At any stage of the proceedings and under Article 119 of the Rules of Procedure, where an appeal is clearly inadmissible, the Court may by reasoned order dismiss the appeal.

For an appeal to be inadmissible in its entirety it must contain no admissible ground of appeal. Thus, it is necessary to examine all the grounds of appeal put forward and to determine that each one of them is inadmissible. [5]

5 — The notice of appeal must be examined exhaustively and comprehensively as to admissibility. As may be inferred from decisions of the Court, for an appeal to be ruled inadmissible, an examination of all the grounds put forward is necessary and a finding that each one of them is inadmissible, prior to the appeal being adjudged inadmissible in its entirety (see orders of the Court in Case C-19/95 P *San Marco Impex Italiana* v *Commission* [1996] ECR I-4435; Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-611; Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003; and in Case C-148/96 P *Goldstein* v *Commission* [1996] ECR I-3883: see also Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667).

10. It is in that light, too, that the objection of inadmissibility raised by the Commission must be examined. Indeed, at first sight, the vague terms in which the grounds of appeal are couched do raise a certain number of questions concerning their admissibility: in fact, the alleged breach of the law by the Court of First Instance is not readily discernible. None the less, as to the first ground of appeal raised by Hoechst, that refers to errors of law made, in the appellant's submission, when the Court of First Instance dismissed the request for the procedure to be reopened after closure of the oral procedure. Since that plea is purely legal in nature and is based on matters which were before the Court of First Instance and on which it gave its decision, it may be regarded as an autonomous ground of appeal which has been validly raised.

11. Consequently, even on the supposition that the Court must uphold the Commission's assertions (which I shall examine subsequently, together with the appellant's counter-arguments in the context of the individual discussion of each ground of appeal), it cannot be contended that the appeal should be dismissed in its entirety on the ground that it is inadmissible.

III — Admissibility of the intervention

12. With regard to the content and admissibility of the intervention by DSM, the considerations set forth in the relevant paragraphs of my Opinion in *Hüls* v *Commission*, [6] a case whose subject-matter is analogous, apply to the present case and I refer to them.

It follows that the intervention by DSM in the present case could theoretically be adjudged admissible in part, to the extent to which it supports the appellant's request that the Court of First Instance, following annulment of the judgment at first instance, declare the Polypropylene decision non-existent. The other claims by the intervener and the arguments which it relies on in support of other claims by the appellant cannot in any event be examined on their merits, because they are inadmissible.

However, in the present case the appellant in its reply abandoned its pleas going to non-existence of the Polypropylene decision: indeed, it has reduced its claims inasmuch as it is henceforth seeking no longer a declaration that the contested decision is non-existent but its annulment. Accordingly, the intervention by DSM has thus become inadmissible, on account of there being no legitimate interest.

6 — Paragraphs 10 to 15 of my Opinion, also delivered today, in *Hüls* v *Commission* (Case C-199/92 P).

IV — Grounds of appeal

13. Hoechst considers that the Commission's Polypropylene decision, which it challenged in proceedings before the Court of First Instance, is vitiated by substantial formal defects which render it null and void. [7] On the basis of this principle, Hoechst argues that the Court of First Instance cannot have it both ways: either there was adequate evidence of those defects which the Court of First Instance ought to have taken into consideration in annulling the Polypropylene decision or of which the Court could have taken cognisance for the first time in the context of these proceedings, or at the very least there were clear presumptions in favour of the existence of procedural defects vitiating the contested decision, in which case the refusal by the Court of First Instance to examine those presumptions more closely, in spite of the request to that effect, was in breach of the Rules of Procedure. More precisely, the appellant attributes to the matters on which it relies a twofold function: first, they constitute in its view complete proof of the existence of substantial procedural defects which ought to have led the Court of First Instance to declare the Polypropylene decision null and void; secondly, it considers that those matters afforded sufficient evidence to compel the Court of First Instance to grant its application for the reopening of the oral procedure and the adoption of fresh measures of organisation of procedure. The line of defence followed by the Commission follows this twofold view of the matter.

7 — As I have already stated (see paragraph 6 above), in its reply the appellant abandoned its pleas going to the non-existence of the polypropylene decision.

A — *Relevant provisions of the Court's PVC judgment*

14. I refer to paragraphs 19 to 23 of my Opinion in *Hüls* v *Commission.*

B — *The judgment appealed against*

15. The Court of First Instance dismissed the claims made by the applicant in its pleading of 2 March 1992, [8] on the following grounds, set out at paragraphs 374 and 375 of the judgment appealed against:

'It must be stated first of all that the abovementioned judgment does not in itself justify the reopening of the oral procedure in this case. Furthermore, unlike the arguments which it put forward in Joined Cases T-79 etc./89 (see the judgment of the Court, at paragraph 14), in this case the applicant did not, until the end of the oral procedure, argue even by allusion that the Decision was non-existent because of the alleged defects. It must therefore be asked whether the applicant has adequately explained why in this case, unlike Joined Cases T-79 etc./89, it did not raise those alleged defects earlier, since they must in any event have existed prior to the commencement of proceedings. Even though the Community Courts, in an action for annulment under

8 — See paragraph 5 above.

the second paragraph of Article 173 of the EEC Treaty, must of their own motion consider the issue of the existence of the contested measure, that does not mean that in every action under the second paragraph of Article 173 of the Treaty the possible non-existence of the contested measure must automatically be investigated. It is only in so far as the parties put forward sufficient evidence to suggest that the contested measure is non-existent that the court must review that issue of its own motion. In this case the arguments put forward by the applicant do not provide a sufficient basis to suggest that the Decision is non-existent. In point III of its written pleading of 2 March 1992 the applicant simply asserted that there were "reasonable grounds" to presume that the Commission had infringed certain procedural rules. The alleged infringement of the language rules laid down in the Rules of Procedure of the Commission cannot, however, entail the non-existence of the contested measure, but only its annulment, if the argument is raised at the proper time. Moreover, the applicant has not explained why the Commission would have made subsequent alterations to the Decision in 1986, that is to say in a normal situation entirely unlike the special circumstances of the *PVC* case, where the Commission's term of office was about to run out in January 1989. The general presumption put forward by the applicant in this respect does not constitute a sufficient ground to justify the order by the Court of measures of inquiry after then reopening of the oral procedure.

In point II of its written pleading, however, the applicant specifically alleged that originals of the contested Decision duly certified by the signatures of the President and the Executive Secretary of the Commission do not exist in all the authentic languages. That alleged defect, if true, would not in itself entail the non-existence of the contested Decision. In this case, unlike the *PVC* cases, cited above, the applicant has not put forward any concrete evidence to suggest that any infringement of the principle of the inalterability of the adopted measure took place after the adoption of the contested Decision and that the Decision thus lost the presumption of legality attendant upon its appearance, to the benefit of the applicant. In such a case, the mere fact that there is no duly certified original does not in itself entail the non-existence of the contested measure. In this respect too, therefore, there was no reason to reopen the oral procedure in order to carry out further measures of inquiry. Inasmuch as the applicant's arguments could not justify an application for revision, its suggestion that the oral procedure be reopened should not be upheld.'

C — *Examination of grounds of annulment*

(1) *Limits of the powers of the appellate jurisdiction*

16. I consider it useful as a preliminary step to reply to two issues raised by Hoechst

concerning the wider problem of the limits of the powers of the appellate jurisdiction.

(a) Adoption of measures of inquiry by the appellate jurisdiction

17. The appellant requests the Court, if it deems fit, to order additional measures of inquiry in connection with the existence of formal defects in the Polypropylene decision. More specifically, Hoechst considers that the action brought by it before the Court of First Instance was inadmissible on the ground that it was directed against a legally non-existent act. It also points out that, under a general principle of the law of procedure, which also applies within the Community legal order, the courts are required to review, if necessary of their own motion, the admissibility of the actions availed of. In Hoechst's view, that obligation is also incumbent on the appellate jurisdiction. In order to discharge that obligation, the appellate jurisdiction has the power to order measures of inquiry into the admissibility of the action, without exceeding the limits of its powers, as laid down in the first paragraph of Article 51 of the EEC Statute of the Court of Justice.

18. It is no longer necessary, it seems to me, to reply to the appellant's submissions in this regard since they are based on its reasoning in more general terms that the decision contested at first instance was legally non-existent. The abandonment by the appellant of its claim for a declaration that the decision is non-existent also entails abandonment of the submissions on inadmissibility made by it before the Court of First Instance. None the less, it should be stressed that, in any event, the Court does not have jurisdiction at the appeal stage to order measures of inquiry. On that question I would refer to the analysis set out at paragraphs 26 and 27 of my Opinion in *Hüls* v *Commission*, cited above.

(b) The new matters of fact raised at the appeal level

19. In the appellant's submission, adoption of the judgment appealed against was followed by the discovery of a whole series of facts of decisive significance for the resolution of the dispute, which were unknown to the Court of First Instance and to the parties. It is for that reason and in order to secure legal protection that the appellant is raising those matters of fact for the first time on appeal before the Court.

20. However, to raise matters of fact for the first time at the appeal stage is contrary to the principles governing review by the appellate jurisdiction and to the provisions of the first paragraph of Article 51 of the EEC Statute of the Court of Justice. An appeal can only be on a point of law. Consequently, the appellant cannot prop-

erly be heard to say that the Court of First Instance misdirected itself in law on the ground that, in the course of its appraisal of the law, it failed to have regard to matters of fact which it did not know, and could not have known, about, since those matters were not raised before it, or occurred after delivery of the judgment. For those reasons, the arguments at issue whereby the appellant is endeavouring to demonstrate the relevance of the procedural flaws in the contested decision are not admissible.

(2) *The existence of substantial procedural defects vitiating the contested decision*

(a) Arguments of the parties

21. The appellant considers that the Court of First Instance misdirected itself by not having regard to the substantial procedural defects vitiating the Polypropylene decision at issue, in breach of the second and fourth paragraphs of Article 173 of the Treaty. Hoechst argues that it raised these irregularities before the Court of First Instance in its pleading of 2 March 1992.

22. First, the appellant maintains that there is no original of the contested decision authenticated in the form provided for in Article 12(1) of the Commission's Rules of Procedure. It stresses the importance of authentication of acts adopted collectively by the Community institutions as a warrant of observance of the principle of legality. Hoechst states, however, that it is not inferring the absence of the original from a mere reading of the case-file since normal practice is for the original to be annexed to the minutes of the Commission's meetings and filed in its archives. In the appellant's submission, the absence of authentication constitutes a latent defect which does not rebut the presumption of legality of the act vitiated by that defect. Hoechst, therefore, considers that it had justifiable reasons for not formulating this ground of annulment at first instance timeously.

23. The appellant further points out that, in addition to the lack of authentication, the Commission failed to adopt the decision in all the mandatory language versions provided for, although it was under an obligation to do so. As regards, in particular, the adoption of the Dutch and Italian versions, the Commission, according to the appellant, delegated authority to one of its members. In Hoechst's view, that delegation of authority is without legal foundation because it is not covered by Article 27 of the Commission's Rules of Procedure which limits delegations of authority solely to preparatory and executory acts. In Hoechst's view, the adoption of a definitive decision in certain of the mandatory languages is not legally permissible. It follows that the fact that, when the Polypropylene decision was adopted, the Italian and Dutch versions had not been drawn up, amounts to a substantial procedural defect which, the appellant maintains, ought to have led to the annulment of that decision.

24. The appellant also argues that the contested decision was never notified to it, in breach of Article 191(3) of the Treaty and Article 12(3) of the Commission's Rules of Procedure. Accordingly, as far as it is concerned, that decision never produced any legal effect. More specifically, it points out that the text sent to it by the Commission and the text subsequently published in the *Official Journal* include alterations and amendments as opposed to the text collectively adopted by the Commission. As far as the appellant is concerned, these modifications are more than mere spelling or grammatical corrections allowed under the Court's case-law. [9] In the appellant's view, the Commission made *ex post facto* changes to its decision. That is borne out by both the explanations given by the Commission's representatives at the hearing in the *PVC* cases [10] and by the view of the matter taken by the Court of First Instance in that case, and in the recent LdPe judgment. [11] Hoechst also submits that certain alterations which, in its view, were flagrant were made to the content of the act in the version notified to it in German. In that connection it refers to certain passages of the text which would appear to have been added after the initial adoption of the decision and are printed in a different typeface and with smaller spacing. It also maintains that, at certain places in the decision notified, passages have visibly been deleted by comparison with the initial text. The decision notified, which is presented as a certified copy of the original decision, bears the typed signature of Commissioner Sutherland. Yet it is not possible to determine unambiguously the text signed by the Commissioner: the original text unlawfully amended or the text finally notified drawn up without there having been a complete original. For, in the appellant's submissions, both the indications coming from the text notified and the matters ventilated in the *PVC* cases allow the certain inference to be drawn that, in line with settled practice, every Commission decision, after it has been adopted, is recast by the Commission's Legal Service before being notified to the recipients.

25. Hoechst infers from all these acts and omissions by the Commission that the contested decision was adopted, *inter alia*, in breach of the rules on statements of reasons for decisions, inasmuch as the grounds of the decision were amended and supplemented after its adoption. In Hoechst's view, the mandatory rules laid down in Article 190 of the Treaty were not observed and the infringement of this essential requirement ought to have led the Court of First Instance to annul the Polypropylene decision.

26. The Commission retorts with the contention that none of the errors of law relied on by the appellant may be inferred from the text of the judgment of the Court of First Instance and that therefore the appellant's arguments must be dismissed in their entirety

9 — Judgment in Case 131/86 *United Kingdom* v *Council* [1988] ECR 905.

10 — See footnote 4 above.

11 — Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 and T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729.

27. With regard to the absence of an authenticated original, the Commission agrees with the reasoning of the Court of First Instance (paragraph 375 of the judgment appealed against), according to which the irregular absence of the original is not sufficient in itself to render the act unlawful. In the Commission's view, it is also necessary for the party raising this plea to provide sufficient evidence in support of the suggestion that the act was unlawfully amended after its adoption. It will only be if sufficient evidence to this effect is adduced that the presumption of legality of the act will be rebutted and that the failure of authentication will have legal consequences. [12] According to the defendant, the same reasoning was followed in the *PVC* judgments of the Court of First Instance [13] and of the Court. [14] In any event, the Commission points out that the plea based on infringement of an essential procedural requirement constituted by non-observance of Article 12 of the Commission's Rules of Procedure was raised outside the time -limits, after closure of the oral procedure, and that it was proper for the Court of First Instance not to uphold it.

28. As to the delegation of authority, which in the appellant's view was unlawful, to one of the Commissioners to draw up the text of the decision in Italian and Dutch *ex post facto*, the Commission observes that this is not proven by the matters relied on by Hoechst. Nor, in the Commission's view, has it been established that the content of the contested decision was altered *ex post facto*; accordingly, the text notified to Hoechst did not differ from the one initially adopted. As regards more specifically what the appellant described as flagrant alterations to the German text, the Commission observes that, apart from the fact that they are not proven, submissions are made on them for the first time at the appeal stage and may therefore not be taken into consideration.

(b) My reply to the abovementioned arguments

29. The appellant is relying on a whole series of substantial procedural defects which are said to vitiate the Polypropylene decision. Whether or not raised by the parties, such defects must be examined by the Community judicature of its own motion, in accordance with the Court's current case-law.

(i) Extent of the powers of the appellate jurisdiction and issues reviewed of the Court's own motion

12 — As regards the requirement that such formal defects be proven in greater detail, the respondent refers to the judgment of the Court cited above and to the judgments of the Court of First Instance in Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441; Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905 and Case T-35/92 *Deere* v *Commission* [1994] ECR II-957.

13 — See footnote 9 above.

14 — Judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555.

30. I would refer on this point to my analysis at paragraphs 26, 27 and 30 of my Opinion in *Hüls* v *Commission*. It follows from this analysis that, even on points of law reviewable of the Court's own motion, review by the appellate jurisdiction is limited, on the one hand, to examining whether the lower court correctly classified its findings of fact under the appropriate legal rule and, where such a request was made in the appeal, to verify whether relevant factual submissions were properly made before the lower court and that court failed to examine them. Accordingly, the appellant's other factual and legal arguments, whereby it seeks an order for further measures of inquiry in order to ascertain the existence of formal defects in the Commission's Polypropylene decision and in which, in particular, it endeavours to supplement its pleading of 2 March 1992, cannot be examined in these appeal proceedings.

(ii) The existence of proven formal defects in the contested decision

31. I would observe that an examination of the judgment appealed against does not reveal that the Court of First Instance erred in law in discerning and appraising the matters from which it might be inferred that the Polypropylene decision was vitiated by substantial procedural defects. It cannot be inferred from the judgment appealed against that the Court of First Instance had before it evidence of such a nature and significance or, *a fortiori*, that it misappraised such evidence. Moreover, the appellant maintains that it made submissions at first instance, chiefly in its pleading of 2 March 1992, concerning the relevant procedural defects of the decision at issue, which the Court of First Instance erroneously declined to appraise.

32. To the extent to which Hoechst submits that there was a failure to examine a substantive plea and distortion of written evidence, the appeal plea in that regard is admissible. As to whether it is well founded, the following observations should be made: in none of its pleadings in the proceedings at first instance [15] does the appellant formulate in clear terms a claim for annulment of the contested decision on the ground of substantial defects, nor is reliance placed on matters from which such irregularities may be clearly inferred. With particular regard to the pleading of 2 March 1992, it should be observed that it is merely making suppositions as to the existence of defects rendering the decision non-existent and seeking reopening of the oral procedure and not the submission of a plea of annulment. Yet even if that pleading were to be interpreted as containing, irrespective of the submissions going to non-existence, factual evidence which the lower

15 — The appellant is maintaining indirectly that, where a defect appears in the body of the contested decision contained in the file on the basis of which the Court of First Instance adopted its judgment, submissions may be made in regard to it for the first time in the appeal proceedings. However, the contested decision is not a procedural document in the proceedings at first instance and cannot therefore form the basis for the submission of grounds of appeal (see in that regard the matters referred to at footnote 36 of my Opinion in *Hüls*).

court ought to have appraised in order to determine whether the decision in issue was or was not vitiated by substantial procedural defects, [16] again the judgment of the Court of First Instance is in overall terms correct.

33. First of all, the question arises as to whether the Court of First Instance ought to have considered the abovementioned pleading on account of its late submission. [17] I will not at this stage enter into such a detailed account of the arguments on this question. Even if, regardless of the pleading being out of time, the Court of First Instance did have regard to it — though not required to do so —, that pleading contained no conclusive evidence of the existence of substantial procedural defects in the contested decision. Thus, Hoechst was unable to adduce sufficient evidence of the flaws which it alleges are inherent in the Polypropylene decision. [18]

It follows that this ground of appeal must be dismissed.

16 — The decisive matter raised by the appellant at first instance concerns not the existence or otherwise of the contested decision but the likely existence of the formal defects of the absence of the requisite signatures, the *ex post facto* alteration of the content of the decision and the infringement of the linguistic regime. In fact, for the courts what legal classification the parties attribute to the facts on which they rely is not important; what is important are those same facts. That is particularly so where those facts may be found not to render the decision non-existent but to constitute an infringement of essential formal requirements in connection with the act adopted, a matter to be reviewed of the Court's own motion.

17 — This pleading was lodged after closure of the oral procedure and, if interpreted in the manner contended for on behalf of the appellant, would be raising new grounds of annulment of the Polypropylene decision which were not put forward, even in outline form, during the written procedure and are based on matters of fact coming to light for the first time in connection with that pleading. Under Article 48(2) of the Rules of Procedure of the Court of First Instance 'no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or fact which come to light in the course of the procedure.' Irrespective of the question whether that derogation applies also in cases where the oral procedure has been closed, it does not seem to me that the matters raised by Hoechst in its pleading display the abovementioned characteristics such as to justify late submission of pleas. The appellant argues that it could only have become aware of the existence of substantial procedural defects after the disclosures made by the Commission representatives in the *PVC* cases. In that sense those disclosures are matters of fact 'which come to light in the course of the procedure.' This reasoning is not in my view correct because knowledge of these procedural defects, even if only in outline, predates the disclosures made at the hearing before the Court of First Instance in the *PVC* cases. Consequently, those defects ought to have been raised, even if only in summary form, at the time of the originating application or, in any event, before closure of the oral procedure. For an examination of the grounds on which I consider that the pleas and claims set out in the pleading were submitted out of time and ought not to have been considered by the Court of First Instance, I would refer to the analysis at paragraphs 57 to 79 of my Opinion in *Hüls* v *Commission*.

(3) *Possible existence of substantial procedural defects vitiating the contested decision*

34. According to the applicant's arguments, even if the matters before the Court

18 — Moreover, of the procedural defects relied on, the non-existence of an authenticated original of the Commission's decision, under Article 12 of its Rules of Procedure, is the most decisive. This defect subsumes within it the other irregularities relied on by the appellant (see in this regard paragraph 33 of my Opinion in *Hüls* v *Commission*). However, the Court of First Instance did not find concrete evidence of those defects in any of the documents before it, nor did the appellant adduce any such evidence. Thus, since the infringement of the formal requirements laid down in Article 12 of the Commission's Rules of Procedure was not sufficiently demonstrated in law it was not possible to infer with any certainty, first, that the decision notified was altered after its adoption by the Commission, that the Commission did not adopt the decision in all the languages provided for by the Rules of Procedure and, finally, that there was any substantial procedural defect in regard to the rules concerning the reasoning and notification of Commission decisions. The pleading of 2 March 1992 merely mentions suspicions of possible irregularities by the Commission on adoption of the Polypropylene decision. Yet mere suspicions cannot in any event suffice in order to bring about annulment of the contested decision.

of First Instance for appraisal do not allow the inference that the framers of the contested decision committed substantial irregularities, it remains to examine whether that same evidence justified reopening the oral procedure with a view to ordering fresh measures of organisation of procedure.

(a) Arguments of the parties

35. The appellant maintains that, in its pleading of 2 March 1992, it requested the Court of First Instance, on the one hand, to reopen the oral procedure under Articles 62 and 64 of its Rules of Procedure and, on the other, to adopt measures of organisation of procedure under Articles 65 and 66 of those Rules. It also considers that, contrary to the Commission's assertions, the Court of First Instance does not enjoy unlimited discretionary power in responding to such applications and that that response must be examined in the context of the review conducted by the appellate jurisdiction. In order to appraise the legality of the judgment at first instance, it is essential, in Hoechst's view, to appraise the objective pursued by the application for reopening of the procedure. Where that application seeks the adoption of measures of inquiry with a view to making new findings of such a nature as to have a decisive effect, in which case those matters will have to be ventilated in fresh pleadings and hearings, the possibility open to the Court of First Instance is transformed, in Hoechst's view, into an obligation to reopen the oral procedure and to adopt measures of inquiry under the rules governing the burden of proof. Those rules render mandatory the investigation of evidence crucial to the outcome of the case. In Hoechst's view, the need for there to be an examination in greater detail of the existence of substantial procedural defects vitiating the contested decision raised by it is dictated by a whole series of procedural and substantive rules of Community law. Thus the refusal by the Court of First Instance is, as far as the appellant is concerned, contrary to both Article 62 and Articles 65 and 66 of the Rules of Procedure of the Court of First Instance. That Court was bound, on the basis of the application made by the appellant but also of its own motion, to investigate, in light of the considerations set out in the pleading of 2 March 1992, all the matters which may have enabled it to establish whether or not the Polypropylene decision was adopted lawfully.

36. The appellant also maintains that the Court of First Instance did not reject the pleas in its pleading on the ground that they were formulated out of time but rather examined them in detail. None the less, in Hoechst's submission, although it was under an obligation to do so, the Court of First Instance neglected to examine them not only in regard to non-existence but also in regard to infringement of essential formal requirements. In any event, again in Hoechst's submission, the Commission cannot be heard to say that the pleading was submitted out of time. In fact, for the Commission to make that allegation is tantamount to its challenging the accuracy in law of the judgment appealed against, although it did not appeal and, therefore, that allegation is inadmissible. The argument that what is in the pleading of 2 March 1992 ought to have been produced within a period of three months from the date when the applicant gained knowl-

edge of it, by analogy with Article 125 of the Rules of Procedure concerning applications for revision, is refuted by the appellant's reply to the effect that procedural time-limits cannot be applied by analogy. In any event, since the appellant gained knowledge of the matters on which it has raised pleas only thanks to the disclosures made by the Commission's representatives at the hearing in the *PVC* cases, which took place on 10 December 1992, the date of 2 March 1992, on which the pleading was lodged, is within that three-month period.

37. For its part, the Commission points out as a preliminary matter that the appellant is wrong to maintain that the Court of First Instance was obliged to order reopening of the procedure because to do so was not indispensable in the present case. The request for reopening of the oral procedure by the appellant was not, it is the Commission's contention, based on matters of significance in achieving a resolution of the dispute and was, moreover, made out of time. In the Commission's view, the Court of First Instance was right to reject the pleas based on infringement of the rules on languages applicable to the decision or on the non-existence of a duly authenticated original of the contested decision. In fact, as the Court went on to hold, in its *PVC* judgment, [19] even on the supposition that they do exist, those irregularities do not entail the non-existence of the act which they affect. As regards the matters presented by the appellant as new facts, the Commission points out that, as such facts are connected with the *PVC* judgment of the Court of First Instance, they cannot be relied on in support of an application for reopening of the oral procedure in other proceedings. [20] If the new facts are considered to be constituted by the disclosures made at the hearing by the representatives of the Commission on which the *PVC* judgment of the Court of First Instance was based, their submission by Hoechst in its request of 2 March 1992 was out of time. The relevant request ought to have been made within three months of the date when those new facts came to the applicant's knowledge by analogy with the provisions laid down in the case of an application for revision under Article 125 of the Rules of Procedure of the Court. The Commission states that, as early as the afternoon of 22 November 1991, one of its officials had acknowledged in the context of the procedure leading to the hearing in the *PVC* cases that the procedure laid down in Article 12 of the Commission's Rules of Procedure had fallen into disuse. From that day on, then, according to the contentions on behalf of the respondent, Hoechst knew of the facts on which it relied in its request for the reopening of the oral procedure. The Commission adds that the appellant is wrong to take the view that the Court of First Instance indirectly acknowledged that the pleading had been submitted within the time- limits. On the contrary, in the Commission's view, it expressed doubts in its judgment as regards the submission at the correct time of the pleas raised in the pleading.

38. The Commission further contends that the Court of First Instance rightly held that

19 — See paragraph 14 above.

20 — The Commission refers to the order of 26 March 1992 in Case T-4/89 Rev. *BASF* v *Commission* [1992] ECR II-1591, and to the judgment in Case C-403/85 Rev. *Ferrandi* v *Commission* [1991] ECR I-1215.

Hoechst had not submitted with the request in question the requisite sufficient evidence for its application for the reopening of the procedure to be acceded to. The position taken by the Court of First Instance continues to be correct even if the request of 2 March 1992 is interpreted as meaning that it is alleging formal invalidity and not that the Polypropylene decision in question is non-existent. Moreover, it points out that the appellant, not the Commission, bore the burden of proof as regards the existence of the relevant procedural defects. The contrary interpretation, which is advocated by the appellant, runs counter to the presumption of legality of acts of Community institutions in accordance with case-law. [21] Further, Hoechst could not merely rely on a probable failure to observe the procedure laid down in Article 12 of the Commission's Rules of Procedure. It had to bring forward concrete evidence to show that the polypropylene decision had undergone alterations as to its content after its adoption. That interpretation which was followed by the Court of First Instance in the judgment under appeal is supported, again in the Commission's view, by the judgment in *Lestelle* v *Commission* [22] and the Court's *PVC* judgment. [23] In any event, the possible formal invalidity of the Polypropylene decision ought, in accordance with Article 48(2) of the Rules of Procedure of the Court, to have been submitted in the originating application and not in any event after the conclusion of the oral procedure. In the alternative, it is contended on behalf of the respondent that it was in the absolute discretion of the Court of First Instance to decide whether reopening of the procedure was necessary or not. [24]

39. As far as the interpretation of the provisions of Article 64(3)(d) of the Rules of Procedure is concerned, the Commission observes that there are no predetermined conditions which may be inferred either from those provisions or from any other procedural rule which, when met, oblige the Community judicature to accede to a request for the adoption of measures of organisation of procedure. Consequently, it is not correct to assert that the Court of First Instance is required to engage in the task of information collection also to cover facts raised belatedly or in a general and uncertain manner by the parties. Conversely, the respondent relies on the provisions of Article 173 of the Treaty, the first paragraph of Article 19 of the EEC Statute of the Court of Justice and Article 44(1)(c) and (e) and Article 48(1) and (2) of the Rules of Procedure of the Court of First Instance from which it derives the principle of the obligation on the part of the applicant party to present his applications within the time-limits, together with evidence in support. Measures of organisation of procedure are not intended to remedy omissions of the parties as regards the presentation of their arguments within the time-limits and in accordance with legal requirements. In any event, owing precisely to its exceptional nature, any application for the adoption of measures of organisation of procedure must be made within a reasonable time frame; otherwise there is a risk that the sound administration of justice will be compromised. Thus, in the Commission's view, the application made by Hoechst is out of time.

21 — The Commission refers to the judgments in *Dunlop Slazenger* v *Commission*, *Fiatagri and New Holland Ford* v *Commission* and *John Deere* v *Commission* (cited above at footnote 12).

22 — Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755.

23 — Loc. cit., paragraph 14.

24 — The Commission cites in support the judgment in Case T-33/91 *Williams* v *Court of Auditors* [1992] ECR II-2499, paragraph 31.

(b) My reply on the above issues

40. In light of the foregoing, the question arises whether the Court of First Instance was legally entitled to reject the application to reopen the procedure, a question directly linked with the likely existence of substantial procedural defects in the Commission's Polypropylene decision. In this connection I would refer to the analysis at paragraphs 47 to 79 of my Opinion in *Hüls* v *Commission* from which it is apparent that the solution which the Court of First Instance opted for was correct, albeit on different grounds; accordingly, the pleas in support of the contrary viewpoint must be rejected.

Conclusion

41. In light of all the foregoing I propose that the Court should:

(1) Dismiss in its entirety the appeal brought by Hoechst AG;

(2) Dismiss the intervention;

(3) Order the intervener to pay its costs;

(4) Order the appellant to pay the remaining costs.