OPINION OF ADVOCATE GENERAL COSMAS

delivered on 15 July 1997 *

In this case the Court of Justice is called upon to deliver judgment on the appeal of Chemie Linz GmbH (hereinafter 'Chemie Linz') 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 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 Chemie Linz, with a market share fluctuating somewhere between 3.2 and 3.9%. 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

* Original language: Greek.

1 — Case T-15/89 *Chemie Linz* v *Commission* [1992] ECR II-1275.

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

3 — OJ, English Special Edition 1959-1962, p. 87.

course of those investigations the Commission concluded that, between 1977 and 1983, certain polypropylene producers, including Chemie Linz, 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)... Chemische Werke Linz... have infringed Article 85(1) of the EEC Treaty, by participating:... — in the case of Hercules, Linz, Saga and Solvay, 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:

...

(ix) Chemische Werke Linz, a fine of 1 000 000 ECU, or 1 471 590 000 Italian Lira (...)'

4. Fourteen of the fifteen 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 lodged at the Registry of the Court of First Instance on 28 February 1992, when the written and oral procedure had, as stated above, been completed, but nevertheless before judgment had been delivered, Chemie Linz 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 Chemie Linz, that the contested decision was vitiated by serious procedural defects in 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, after hearing the views of the Advocate General once again, on the question arising, rejected the request for the oral procedure to be reopened, and rejected the application in its entirety.

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.

6. Chemie Linz seeks on appeal the setting aside of that decision, and a declaration that it is non-existent or null and void or, in the alternative, referral of 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 of 14 April 1992 the appellant stated that it was abandoning the grounds of its appeal relating to non-existence of the Polypropylene decision, but was maintaining the grounds relating to invalidity of that decision.

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

DSM NV intervened in the appeal in support of Chemie Linz.

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 submits that nowhere in its appeal does the appellant plead any error in law by the Court of First instance but rather raises, for the first time at the appellate stage, a series of facts, arguments and pleas and thus, in its submissions, is changing the subject-matter of the dispute before the Court of First Instance in contravention of the provisions of Article 113(2) and Article 116(2) of the Rules of Procedure of the Court of Justice. For its part the appellant maintains that the above submissions are ill-founded and cannot lead to the rejection of the appeal as inadmissible in its entirety.

8. 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 lacks admissibility. [5] Viewed in that light, the Commission's objection of inadmissibility is ineffectual inasmuch as, amongst the grounds of appeal raised by Chemie Linz, at least one is admissible. That is the ground of appeal going to presumed errors of law alleged to have been committed by the Court of First Instance in rejecting the request for reopening of the procedure after closure of the oral procedure. Consequently, even if the Commission's contentions were fully upheld (a matter to be examined below, together with the appellant's counter-arguments, in the context of the individual discussion of each ground of appeal), that could not result in the dismissal of the appeal as inadmissible in its entirety.

III — Admissibility of the intervention

9. As regards the content and admissibility of the intervention by DSM the same considerations apply in principle as those set forth in the relevant paragraphs of my Opinion in *Hüls*, [6] a case analogous as to its subject-matter, to which I refer.

It follows from that analysis that the intervention by DSM in the present case could theoretically be adjudged to be admissible in part, inasmuch as the intervener supports the appellant in requesting the Court to set aside the judgment of the lower court and declare the Polypropylene decision non-existent. The other claims made by the intervener and the arguments which it relies on in order to support other pleas by the appellant do not call in any event for an examination as to whether they are well founded since they are inadmissible.

10. 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

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-1611; Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003; and in Case C-148/96 P(R) *Goldstein* v *Commission* [1996] ECR I-3883: see also Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667).

6 — Paragraphs 10 to 15 of my Opinion delivered on the same date in Case C-199/92 P.

thus become inadmissible on account of there being no legal interest.

IV — The judgment appealed against

11. The Court of First Instance rejected the pleas submitted in the applicant's pleading of 28 February 1992 on the basis of the following reasoning contained in paragraph 395 of the judgment appealed against:

'It must be stated first of all that the judgment of 27 February 1992 in the *PVC* cases does not in itself justify the reopening of the oral procedure in the present case. Furthermore, in the present case the applicant did not once argue, even by allusion, in the oral procedure that the Decision was non-existent because of defects held in that judgment to have existed. The question to be examined, therefore, is whether the applicant has adequately explained why it did not plead the existence of those alleged defects earlier, since they must in any event have existed before the action was brought. Even though the Community Court, in an action for annulment under the second paragraph of Article 173 of the EEC Treaty, must of its own motion consider the issue of the existence of the contested measure, that does not mean that in every action brought under the second paragraph of Article 173 of the EEC Treaty the possibility that the contested measure is non-existent 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 Community Court must review that issue of its own motion. In the present case, the arguments put forward by the applicant do not provide a sufficient basis to suggest that the Decision is non-existent. The applicant argues that it follows from the statements made by the Commission's agents at the hearing in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 that an original duly signed by the Commission is also lacking in this case. That allegation, if true, would not in itself entail the non-existence of the Decision. The applicant has not put forward anything to explain 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* cases, where the Commission's term of office was about to run out in January 1989. It is not sufficient in that regard simply to reserve the right to make further pleas. In those circumstances there is nothing to suggest that the principle of the inalterability of the adopted measure was infringed after the adoption of the contested Decision and that the Decision has therefore lost, to the applicant's benefit, the presumption of legality arising from its appearance. The mere fact that there is no duly certified original does not in itself entail the non-existence of the contested measure. There is therefore no reason to reopen the oral procedure in order to carry out further measures of inquiry. Since the applicant's arguments could not justify an application for revision, its suggestion that the oral procedure be reopened should not be upheld.'

V — Grounds of appeal

A — *Arguments of the parties*

(a) Appellant's submissions

12. The appellant's submissions are two-fold. First, in its submission, the Court of First Instance infringed Community law, inasmuch as it was wrong to reject the request for reopening of the oral procedure and for further measures of inquiry. Secondly, it submits that the judgment appealed against should be set aside because the Commission's Polypropylene decision whose lawfulness constituted the subject-matter of the dispute before the Court of First Instance must itself be annulled.

13. The first ground of appeal is identical in terms to that of the appellants in *Hüls* and *ICI*. The arguments in that connection are set out *in extenso* in my Opinion in those cases to the relevant sections of which I refer. [7] For the sake of completeness the following matters should also be adverted to: the appellant considers that the Court of First Instance erred in rejecting its request for reopening of the oral procedure. The appellant maintains that its request ought to have been acceded to because, in its pleading of 28 February 1992, it raised facts material to the resolution of the dispute which it was not in a position to know of prior to closure of the oral procedure. Chemie Linz considers the disclosures made by the representatives of the Commission at the hearing before the Court of First Instance in the *PVC* cases [8] to be facts of that kind. Those facts were not raised out of time before the Court of First Instance, since Community procedural law lays down no express time-limit for the raising thereof, nor may the three-month period mentioned in Article 125 of the Rules of Procedure of the Court of First Instance, which refers solely to an application for revision, be applied by analogy.

14. Moreover, according to the appellant, the Court of First Instance did not comply with its obligation to marshall the evidentiary material necessary for the correct solution of the dispute pending before it. That obligation flows, the appellant submits, from Article 64 of the Rules of Procedure of the Court of First Instance in conjunction with Article 164 of the Treaty. The Court of First Instance was, in its submission, not justified in declining to grant the request made by Chemie Linz in its pleading of 28 February 1992 on the ground that it did not adduce 'sufficient evidence' of the flaws alleged to be contained in the contested decision. The matters of fact on which the appellant's request

7 — See paragraphs 40 to 42 of my Opinion in Case C-199/92 P *Hüls* v *Commission* and paragraphs 9 to 18 of my Opinion in Case C-200/92 P *ICI* v *Commission* delivered on the same date.

8 — See footnote 4 above.

was based were sufficient, owing to the similarity of the case, to allow it to be granted, by analogy with the parallel *PVC* and *Soda ash* cases. [9]

15. In sum, the appellant maintains that, whenever it subsequently becomes apparent that the contested decision is vitiated by a defect which renders it a nullity, the Court of First Instance is required to reopen the procedure and to conduct further measures of inquiry until the matter is fully elucidated. It further emphasises that it was not represented at the hearing in the *PVC* case on 10 December 1991. Consequently, it first became aware of the relevant statements by the Commission representatives only after delivery of the judgment of the Court of First Instance in that case, namely on 27 February 1992. Furthermore, the Court of First Instance made no finding in the judgment appealed against that the appellant's pleading of 28 February 1992 had been filed out of time. Accordingly, the Court of Justice was not entitled, Chemie Linz maintains, to review in the appeal proceedings whether or not the request for reopening the oral procedure contained therein was made within the time-limits.

16. The second ground of appeal is based on the following consideration: the Court may set aside a judgment at first instance on appeal where it adjudges that the Commission Decision proceeded against should be annulled. According to Chemie Linz, examination by the appellate jurisdiction of the legality of the act challenged at first instance is a point of law and thus falls within the terms of appellate review. Furthermore, the defects vitiating the Commission's Polypropylene decision as a matter of public policy are to be reviewed *ex officio* both at first instance and on appeal.

17. The appellant further maintains that it is entitled to adduce certain factual matters for the first time at the appeal stage in support of its submissions. Accordingly, it relies on the observations of the Commission in the *LdPE* cases [10] of which it learnt on 10 April 1992 and, secondly, on the appeal brought on 29 April 1992 by the Commission against the *PVC* judgments of the Court of First Instance. [11] The appellant draws certain conclusions from those documents as to the manner of conduct of the Commission, in general, which, in its view, reinforce the suspicions that the polypropylene decision was adopted in breach of essential formal requirements. In particular the Commission appears to consider that the obligation to authenticate its decisions imposed by Article 12 of its rules of procedure constitutes a rule of an internal nature which does not confer rights on individuals and which has become obsolete. According to the appellant, the Commission also arrogates to itself the right to make amendments to acts adopted by it even after their adoption and to take its decisions in certain of the official language versions, delegating to one of its members

9 — Judgments in Case T-32/91 *Solvay* v *Commission* [1995] ECR II-1825 and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, and Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901.

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

11 — See footnote 4 above.

authority to draw up those decisions in the other languages.

18. Chemie Linz considers that the Commission followed that same procedure in adopting the polypropylene decision. At least that is the inference to be drawn, in the appellant's submission, from both the matters set out above and a detailed reading of the decision notified to it [12] and from the delay in notification. [13] For the avoidance of doubt the appellant further requests the Court to order the Commission to produce the original of the polypropylene decision in order for it to be determined whether it is vitiated by the same formal defects which led to the annulment of the Commission's PVC decision whose content was analogous. [14] In any event, Chemie Linz maintains that the following matters are apparent from both its pleading of 28 February 1992 and the evidence which it adduced for the first time in the appeal proceedings: first, on adoption of the polypropylene decision the Commission had the text of the decision available to it in only three of the five official language versions; secondly, the procedure laid down in Article 12 of the Commission's internal rules of procedure was not followed; thirdly, the content of the decision was amended after its adoption. Finally, Chemie Linz stresses that the defects in question must entail the nullity of the decision at issue. In adopting that decision the Commission did not follow the procedural rules provided for by Community law in order to ensure the lawful exercise of its competences. Consequently, the Commission is wrong to assert that failure to observe essential procedural requirements in accordance with Article 12 of its internal rules of procedure does not render it open to annulment, and that an alteration in the content of the decision after its adoption renders it null and void only if the alteration is substantial and does not accord with the will of the author of the act. That view of the matter expressed by the Commission runs directly counter to developments in the Court's case-law, as illustrated by the *PVC* [15] and '*Laying hens*' [16] judgments.

(b) Respondent's contentions

19. In the present case, in replying to the appellant's submissions, the Commission avails itself of precisely the same arguments as it used to answer the corresponding grounds of appeal put forward in the connected *Hüls* and *Hoechst* cases. Those arguments are extensively canvassed in my Opinion in those cases to which, for the avoidance of repetition, I refer. [17]

12 — The appellant highlights places in the decision notified which appear in different typesetting from the rest of the text and considers it likely that the original of the decision underwent changes after its adoption.

13 — According to the appellant the fact that the decision was notified to it more than one month after its adoption is sufficient to make it likely that its content underwent changes.

14 — See footnote 4 above.

15 — Judgment in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, see below paragraph 20 et seq.

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

17 — See my Opinions already cited of the same date in Case C-199/92 P *Hüls* (paragraphs 29 and 43 to 45) and Case C-227/92 P *Hoechst* (paragraphs 26 to 28 and 36 to 38).

B — *Examination of the grounds of appeal*

(a) The second ground of appeal

20. I shall begin my analysis with an appraisal of the second ground of appeal. As the respondent correctly observes that ground gives rise to major doubts as to its admissibility.

At the outset it should be emphasised that, inasmuch as the appellant relies on evidence for the first time at the appeal stage, that evidence lies outside the purview of appellate review. Appellate review was introduced into Community procedural law solely for the appraisal of the correctness in law of the judgment of the court trying the case on its merits on the basis of the matters of fact and law before the Court of First Instance on which it reached its decision. It is therefore inconceivable for there to be an error in the judgment appealed against which is due to a failure to appraise facts unknown to the court trying the case on its merits either because they were not contained in the case-file or came to light after delivery of the judgment appealed against. Community procedural law has provided a means, that of an application for revision, whereby a party may bring to the attention of the court which adjudicated on a matter a fact 'of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision.' [18] Consequently, it was open to the appellant to avail itself of the possibility of an application for revision if it wished to rely on both the Commission's observations in the *LdPE* cases, which became known to it on 10 April 1992, and the Commission's appeal in the *PVC* cases lodged on 29 April 1992. [19] Those matters cannot be examined in the present proceedings and the submissions in that behalf are therefore inadmissible.

21. But the ground of appeal not directed against the judgment appealed against but against the Commission's contested decision must also be rejected as inadmissible in its entirety because it goes to the appraisal of matters not apparent from the judgment appealed against and it is not maintained that corresponding factual submissions were made, in admissible form, at first instance.

22. Nor can the fact that the formal defects in the decision at issue, in respect of which submissions are made by the appellant, are amongst the issues to be reviewed by the Community judicature of its own motion remedy the inadmissibility of the ground of appeal under examination. It is not contended on behalf of the appellant that the Court of First Instance erred in law because it did not of its own motion review those

18 — Article 41 of the EEC Statute of the Court of Justice applicable by analogy to proceedings before the Court of First Instance.

19 — See paragraph 17 above.

supposed defects, which would have been an argument on a point of law. [20] Rather it is contended that, irrespective of the existence of legal defects in the judgment appealed against, the appellate jurisdiction is entitled or obliged of its own motion to review whether the Commission decision, against which proceedings were brought at first instance, was adopted in breach of essential procedural requirements. That line of argument is directly contrary to Article 51 of the EEC Statute of the Court of Justice and cannot, accordingly, be upheld.

In conclusion, the second ground of appeal raised by Chemie Linz must be rejected.

(b) The first ground of appeal

23. In the first ground of appeal it is submitted that, by declining to reopen the oral procedure and order supplementary measures of inquiry, the Court of First Instance infringed a series of procedural rules. An extensive analysis of that ground of appeal is contained in my Opinion in *Hüls* to which I also refer. [21]

24. At the outset it is worth emphasising that Chemie Linz rightly focused its criticism on the flawed reasoning followed by the Court of First Instance at paragraph 395 of the judgment appealed against. [22] Indeed the Court of First Instance misdirected itself in adjudicating on the applicant company's request for reopening of the oral procedure. For one, it did not correctly apply the rules on the burden of proof in forming the view that Chemie Linz had not produced 'concrete proof' in support of its submissions in regard to formal defects in the polypropylene decision. That company did not, nor could it, have access to the relevant evidentiary material to support the well-foundedness of its submissions; that material was at the exclusive disposal of the Commission. In such cases the party making the submission is under an obligation to give some 'indication' to show that the

20 — Nevertheless, the ground of appeal going to the use by the Court of First Instance of the powers available to it to review of its own motion observance of essential formal requirements by the contested decision must, even in those terms, be rejected as unfounded. On that point I refer to the analysis at paragraphs 30 to 31 and 77 to 79 of my Opinion in *Hüls*.

21 — Paragraphs 39 to 79.

22 — It is otiose at this juncture to examine the appellant's submissions going to non-existence of the decision at issue. As I have already stated, Chemie Linz abandoned those submissions in its reply. Moreover, the holding at first instance that the supposed formal defects in the polypropylene decision, even were they found to subsist, do not render the act non-existent is correct as to its conclusion. As the Court of Justice subsequently held, in the *PVC* judgments, those defects can entail annulment of the act thus vitiated but not a finding that that act is non-existent. On that point I refer to the analysis of the Court's *PVC* judgment, as set out at paragraphs 20 to 24 of my Opinion in *Hüls*.
For the sake of completeness, none the less, I consider it appropriate to point out that the reasoning of the judgment appealed against is wrong in point of law. A non-existent act does not enjoy the presumption of legality. A legal finding as to the existence of an act logically precedes a finding as to whether a presumption of legality has arisen, inasmuch as the existence of an act is a necessary precondition of any presumption of legality. The view of the matter taken by the Court of First Instance, namely that, in order to demonstrate the non-existence of an act, evidence must be adduced capable of rebutting 'the presumption of legality enjoyed by the act', is devoid of logic and thus wrong at law (see paragraph 36 of my Opinion in *Hüls*).
Furthermore, in my view, the proper exercise of judicial review requires an examination as to whether the supposed formal defects alleged to be contained in the polypropylene decision constitute an infringement of an essential procedural requirement, irrespective of their legal classification by the parties. Where a party purports to adduce evidence of the non-existence of the act in question, the Court of First Instance is not bound by the legal classification given to that evidence by the party. It is the task of the court, in seeking the true interpretation of the pleadings before it for judgment, to examine whether the contested act is in fact vitiated by the defects alleged by the applicant, regardless of whether the applicant uses them to found a claim of non-existence or nullity of the contested decision.

material unknown to it is relevant to its defence and to adduce at least prima facie evidence of the suspicions aroused by that material. [23] Where those preconditions are satisfied, the Community judicature cannot reject a request for reopening of the oral procedure on the ground that there is no 'sufficient' or 'concrete' evidence as to whether the applicant's submissions are well founded.

25. Nevertheless, the view taken by the Court of First Instance on the request by Chemie Linz for reopening of the procedure and for supplementary measures of inquiry is correct. Allow me to explain. As I have already stated, the matters of law and fact relied on by the appellant in its pleading were submitted for the first time after closure of the oral procedure. Community procedural law indeed gives parties the right exceptionally to make fresh submissions after the oral stage of the proceedings, provided that those matters were not known to them earlier, so as to allow them to invoke them at the appropriate time. The possibility thereby afforded is however wholly exceptional and must be strictly interpreted. In the present case, Chemie Linz ought to have been given pause for thought by virtue of the very fact that there were omitted from the court pleadings those elements which might have shown with certainty, first, whether the procedure under Article 12 of the Commission's internal rules of procedure had been observed on adoption of the polypropylene decision, secondly, whether the Commissioners had before them, at the time when the decision was adopted, a draft of the decision in all the official language versions and, thirdly, whether the text of the decision notified to the company was precisely the same as to content as that on which the College of Commissioners reached their decision. Consequently, inasmuch as the appellant, already at the stage of the written procedure, did not make any submissions, albeit inchoate, in that regard, at the same time requesting the Court of First Instance to order the Commission to produce the relevant documents, it is precluded from making them after the closure of the oral procedure [24] and from seeking reopening of that procedure. Thus, the Court of First Instance rightly could not accede to the requests formulated in the pleading of 28 February 1992. [25]

23 — See paragraphs 54 to 56 of my Opinion in *Hüls*.

24 — See paragraph 57 et seq. of my Opinion in *Hüls*.

25 — The appellant maintains that, inasmuch as the Court of First Instance agreed to examine the pleading as to substance, it cannot by way of exception be adjudged whether that pleading was out of time or not. It submits in that connection that that appraisal by the Court of First Instance touches the facts of the dispute and is not a point of law within the meaning of Article 51 of the EEC Statute of the Court of Justice. That argument is, in my view, incorrect. On the one hand, the Court of First Instance gave no ruling on whether the pleading was within the time-limits. Instead it expressly states in paragraph 395 that '(...) The question to be examined, therefore, is whether the applicant has adequately explained why it did not plead the existence of those alleged defects earlier, since they must in any event have existed before the action was brought. (...)' On the other hand, the question whether actually unknown facts of relevance to the judgment were submitted, which would have justified reopening the oral procedure is a question of law reviewable on appeal (on the definition of a point of law, see paragraphs 8 and 9 of my Opinion in *Hüls* and paragraph 38 of my Opinion in Case C-5/93 P *DSM* v *Commission*).

26. Thus, the Court of First Instance correctly rejected the requests by the appellant for reopening of the oral procedure and for supplementary measures of inquiry. Accordingly, the first ground of appeal must be rejected.

VI — Conclusion

27. In light of all the foregoing I suggest that the Court should:

(1) Dismiss in its entirety the appeal by Chemie Linz GmbH;

(2) Dismiss the claims of the intervener;

(3) Order the intervener to pay its costs;

(4) Order the appellant to pay the remainder of the costs.