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 Shell International Chemical Company Ltd (hereinafter 'Shell') 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 (and also one of 'the big four') was Shell, with a market share fluctuating between approximately 10.7 and 11.7%. 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 characterized 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 and from the requests for information, the Commission concluded that, between 1977 and 1983, certain polypropylene producers, including Shell, had been acting in contra-

* Original language: Greek.

1 — Case T-11/89 *Shell* v *Commission* [1992] ECR II-757.

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

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

vention 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)... Shell International Chemical Co. Ltd... have infringed Article 85(1) of the EEC Treaty, by participating:... 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:

...

(xiii) Shell International Chemical Co. Ltd, a fine of 9 000 000 ECU, or £ 5 803 173... .'

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

5. By letter lodged at the Registry of the Court of First Instance on 6 March 1992, when the written and oral procedure had, as stated above, been completed, but nevertheless before judgment had been delivered, Shell 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] According to Shell, it can be concluded from that evidence that the contested decision was vitiated by serious procedural defects and was therefore non-existent; there were also significant grounds to suggest that the decision in question was vitiated by other substantial procedural defects. For those reasons, Shell requested the Court of First Instance to reopen the oral procedure and order measures of inquiry.

By its abovementioned decision of 10 March 1992, the Court of First

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. The hearing in those cases was completed on 10 December 1991.

Instance, after hearing the views of the Advocate General once again, rejected those requests. At the same time it partially upheld the application and reduced the fines imposed.

6. Shell lodged an appeal against that decision, requesting the Court to:

1. set aside the decision under appeal, particularly in so far as the Court of First Instance refused to reopen the oral procedure and to order measures of enquiry; and

— either declare the Commission's decision non-existent, or annul the said decision for lack of competence or infringement of essential procedural requirements;

— or remit the case to the Court of First Instance.

2. order any further measures of enquiry which the Court deems appropriate for a decision in the case.

3. order the Commission to pay the costs.

The Commission asks the Court to dismiss the appeal and to order the appellant to pay the costs.

DSM NV intervened in the appeal in support of Shell.

II — Admissibility of the intervention

7. As regards the admissibility of DSM's intervention in this case, I would make exactly the same points as I did in my Opinion in the related Case C-199/92 P *Hüls* v *Commission.* [5]

III — Examination of the grounds of appeal

A — *Arguments of the parties*

8. According to the appellant, the judgment under appeal, in so far as the arguments put forward in its request of 6 March 1992 were examined and rejected, is wrong in

5 — See points 10 to 16 of my Opinion of today's date in Case C-199/92 P.

law. Shell considers that it had put forward compelling evidence which no court could properly have ignored. That evidence referred to the lack of authentication of the Polypropylene decision pursuant to Article 12 of the Commission's Rules of Procedure, from which it followed that the contested decision was legally non-existent. Consequently it was not necessary to produce further evidence that the text of that decision had been amended at a date subsequent to its adoption. At all events, however, Shell relies on the text of the Polypropylene decision notified to it, which it has produced for the Court, as evidence of those alterations. It further points out that it could not produce more complete evidence precisely because the Court of First Instance refused to order the necessary measures of organization of procedure in order to obtain such evidence. The appellant concludes that the Court of First Instance should have ordered the reopening of the oral procedure and found the contested decision to be non-existent, ultimately dismissing the main application as inadmissible. Since it failed so to act, the judgment should be set aside on the following grounds:

(1) the Court of First Instance lacked competence to make the final orders 1-4 in the decision under appeal;

(2) it committed a breach of procedure by rejecting without proper reasoning its request of 6 March 1992;

(3) it committed an infringement of Community law by rejecting that request and by refusing to declare the Polypropylene decision non-existent.

9. In the alternative, the appellant maintains that in its request it had produced evidence suggesting that the contested decision was probably vitiated by substantial procedural defects. By refusing to take the relevant presumptive evidence into account and order measures of enquiry, the Court of First Instance infringed the rules of Community law (both substantive and procedural).

10. Lastly, the appellant submits that the Court of Justice may, of its own motion, declare the contested decision non-existent, taking any appropriate measures of organization for that purpose. According to Shell, the Court has a duty to do so in order to protect the public interest.

11. The arguments put forward by the Commission to counter the appellant's claims are identical to those relied on in its response in the related case *ICI* v *Commission*. A detailed presentation of the Commission's arguments is given in my Opinion in that case to which I would refer the Court in order to avoid repetition. [6]

6 — See point 19 et seq. of my Opinion of today's date in Case C-200/92 P.

B — *My reply to the above arguments*

(a) Limits of appellate review and powers of the Court hearing the appeal

12. The claim in the appeal to the effect that the Court of Justice may, or should, order any appropriate measures of organization in order to marshall evidence relating to the non-existence of the contested decision is inadmissible before the Court of Justice since it exceeds the limits of appellate review. On that point I would refer to the relevant points in my Opinion in the related case *Hüls* v *Commission.* [7]

Shell's reference to evidence which is not contained in the judgment under appeal is inadmissible and it does not claim that corresponding arguments of facts were put forward, admissibly, before the Court hearing the substance of the case. [8]

(b) Competence of the Court of First Instance

13. This ground of appeal is inadmissible since it was put forward only vaguely. The appellant does not put forward at any point in its appeal the factual and legal arguments on which it bases its view that the Court of First Instance lacked competence to make the final orders in the decision under appeal.

(c) Failure by the Court of First Instance to declare the Polypropylene decision non-existent

14. The reasoning in the judgment under appeal to the effect that the defects put forward in the request of 6 March 1992 were not sufficient to warrant the Polypropylene decision being deemed non-existent is correct. In fact, in accordance with the view taken by the Court of Justice in the *PVC* cases, [9] which I consider should be followed in the present case, failure to comply with the procedure laid down in Article 12 of the Commission's Rules of Procedure, if ultimately proved, does not render non-existent the decision thereby affected, but constitutes a ground for annulment.

15. Even if, to some extent, the mistaken legal characterization by the applicant of the procedural defects on which the latter relied in its request before the Court of First Instance was partly applicable, [10] the judgment of the Court of First Instance cannot

7 — See points 26 and 27.

8 — See points 19 and 20 of my Opinion of today's date in Case C-227/92 P *Hoechst* v *Commission.*

9 — Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555. See also point 20 et seq. of my Opinion of today's date in Case C-199/92 P *Hüls* v *Commission.*

10 — The relevant evidence put forward by the applicant before the Court of First Instance does not consist in the probability that the contested decision was non-existent but in the likelihood of procedural defects, viz. the failure to authenticate the validity of the decision, subsequent alteration of its content and infringement of the language rules. In other words the legal characterization which the parties ascribe to the facts is not important for the Court, but rather the facts themselves on which they rely. In particular, where those facts, if shown, may not render the decision non-existent but nevertheless constitute infringement of an essential procedural requirement in the adoption of the decision at issue, they must be examined of the Court's own motion, which implies their invalidity.

be set aside. That is because it does not appear from the judgment under appeal that that Court, responsible for deciding the substantive issues, found there to be evidence showing such defects. Consequently the appellant's arguments to that effect, together with the intervention as a whole, are unfounded. (On this point I would refer to the analysis contained in point 31 et seq. of my Opinion in *Hoechst* v *Commission.*)

(d) Possibility of the existence of substantial procedural defects in the contested decision

16. The appellant maintains that, on the evidence it produced with its letter of 6 March 1992, there were sufficient indications to suggest that the Polypropylene decision was adopted in infringement of an essential procedural requirement; consequently the Court of First Instance erred, since it refused to reopen the oral procedure and to order further measures of enquiry relating to the existence or otherwise of those procedural defects.

17. I would point out, first of all, that the issue raised by the appellant is legal in nature and is consequently admissible at the stage of the appeal, contrary to the Commission's contention. More precisely, the question whether the correct interpretation and application of the rules on the burden of proof, in conjunction with the provisions of Articles 48, 62 and 64 of the Rules of Procedure of the Court of First Instance, required the latter to order the reopening of the oral procedure on the sole basis of the evidence relied upon in the letter of 6 March 1992 by Shell, is a question of law concerning application to the facts of the applicable rules of law, and hence can be reviewed on appeal. [11]

18. Furthermore, I consider that the grounds on which the Court of First Instance rejected the appellant's request that the oral procedure be reopened are wrong in law. [12] However the solution reached at first instance is correct, regardless of the content of the particular reasoning in the contested decision. Shell's request did not fulfil the conditions required by law in order to be upheld by the Court of First Instance, nor was that Court under any obligation under the rules relating to judicial review of the Court's own motion [13] to reopen the oral procedure. Consequently those grounds of appeal must be dismissed.

11 — See point 9 of my Opinion in *Hüls* v *Commission.*

12 — Inasmuch as the grounds of the judgment under appeal are exactly the same as those set out in paragraph 401 of the judgment in Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, I consider it useful, to avoid repetition, to refer on the question of the legality of the reasoning in question, to point 26 of my Opinion in Case C-200/92 P *ICI* v *Commission.*

13 — See the analysis contained in points 57 to 79 of my Opinion in *Hüls* v *Commission* to which I would refer on this matter.

IV — Conclusion

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

(1) Dismiss the appeal of Shell International Chemical Company Ltd in its entirety;

(2) Dismiss the intervention;

(3) Order the intervener to bear its own costs;

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