OPINION OF ADVOCATE GENERAL COSMAS

delivered on 15 July 1997 *

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* Original language: Greek.

In this case the Court of Justice is called upon to deliver judgment on the appeal of Hüls Aktiengesellschaft (hereinafter 'Hüls') 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

1 — Case T-9/89 *Huls* v *Commission* [1992] ECR II-499.

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

the application of Article 85 of the Treaty in the polypropylene production sector. [3]

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 Hüls, with a market share fluctuating somewhere between 4.5 and 6.5%. 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 and/or 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, [4] (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 Hüls, 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 — The principal focus of interest in the present case, and in the other appeal proceedings (ten in all) pending before the Court and concerning the same Polypropylene Decision adopted by the Commission, is the issue of the legality of the procedure followed in the adoption of the decision at issue and the extent to which that decision reveals substantial procedural flaws which, moreover, ought to have been detected and inquired into during the proceedings before the Court of First Instance. It is worth noting that the relevant pleas raised by the appellant companies in all these cases show significant similarities, though they are not identical, just as the factual circumstances of those cases are not always the same. The point of law which arises, however, calls in a certain number of places for the discussion of the same issue, particularly in the case of the six undertakings, including the appellant, upon whose actions the Court of First Instance adjudicated in six judgments delivered on 10 March 1992. Those undertakings had requested the Court of First Instance, in the period between 27 February 1992, the date of delivery of the *PVC* judgment of the Court of First Instance, and 10 March 1992, to resume the oral procedure in order to determine, in the light of the matters arising out of the contemporaneous and analogous *PVC* cases, the extent to which all the essential formal and procedural requirements had been observed on the adoption of the contested '*Polypropylene*' judgment. The Court of First Instance rejected all the requests made in that connection. For systematic reasons it is appropriate for Cases C-199/92 P (*Hüls*), C-49/92 P (*Enichem*), and C-235/92 P (*Montecatini*) to be examined first. In those cases most of the issues arising in that group of cases are dealt with and, for the avoidance of repetition, reference will be made thereto, as far as possible.

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

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 Hüls (now Hüls AG)... have infringed Article 85 (1) of the EEC Treaty, by participating:... — in the case of BASF, DSM and Hüls, 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:

...

(vii) Hüls AG, a fine of 2 750 000 ECU, or 5 898 447,50 German marks (...)'

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 4 March 1992, when the written and oral procedure had, as stated above, been completed, but nevertheless before judgment had been delivered, Hüls 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 on 27 February 1992 in the related cases *BASF and Others* v *Commission* (hereinafter 'the "*PVC*" cases'). [5] That evidence showed, according to Hüls, that the contested decision was vitiated by serious procedural defects for the examination of which fresh measures of inquiry into the evidence is required. [6]

In 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.

6. Hüls lodged an appeal against that decision, requesting the Court to set it

5 — 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 — The appellant submits in its separate pleading that, in view of the explanations offered by the Commission in the *PVC* cases, it is evident that the same procedural flaw, which is to be examined *ex officio*, is encountered in the present case. Consequently, it is necessary, even at this stage of the proceedings, for measures of inquiry to be ordered, in particular in order to require the Commission to produce a copy of the original of the Polypropylene decision legally ratified by the signatures of the President of the Commission and the executive Secretary, together with a series of other documents, in order to determine, first, whether the Polypropylene decision was decided in the languages provided for by relevant Community rules and, secondly, whether any amendments were made to the original decision subsequent to its adoption.

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.

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 Hüls.

II — Admissibility of the appeal

7. In its response the Commission, at the outset, requests the Court to reject the appeal as inadmissible. In that connection it makes certain submissions on inadmissibility which refer to the second category of grounds already raised by the appellant, namely those grounds which refer to a breach of rules of substantive Community competition law. 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, 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 parties from changing the subject-matter of the proceedings before the Court of First Instance in the appeal or 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. [7]

9. Viewed in that light, the Commission's objection of inadmissibility is ineffectual, inasmuch as it raises objections only to the second series of grounds of appeal relied on by Hüls concerning possible infringements of substantive Community competition law, and not to the other grounds of appeal, that is to say the first series of grounds contained in the notice of appeal. The latter grounds of appeal allege procedural flaws before the Court of First Instance. 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.

7 — 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 judgments 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 *Goldstein* v *Commission* [1996] ECR I-3885: see also Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667).

III — Admissibility of the intervention

10. In its intervention DSM concentrates on the formal legality of the contested Polypropylene decision and maintains as follows: first, the onus, it says, was on the Commission to prove that the applicable procedural rules were followed on the adoption of the Polypropylene decision. Secondly, the Court of First Instance was under a duty, either of its own motion or following a relevant request by the applicant in the proceedings before it, to determine whether, and, if so, to what extent, the contested decision is in fact vitiated by formal defects. The intervener reinforces its submissions by invoking the factual circumstances of and the solution adopted in the '*Soda Ash*' [8] and '*LdPE*' [9] cases by the Court of First Instance. Finally, it requests the Court to allow the appeal, to quash the judgment of the Court of First Instance appealed against and to declare the Polypropylene decision to be non-existent or invalid. According to DSM, allowing the appeal and holding the Polypropylene decision to be non-existent or invalid would not benefit only the appellant but also the intervener itself. On that ground, it maintains that it has a legal interest in making this intervention.

The substance of the abovementioned submissions will be examined below, following

8 — Cases T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, T-31/91 *Solvay* v *Commission* [1995] ECR II-1821, T-32/91 *Solvay* v *Commission* [1995] ECR II-1825, T-36/91 *ICI* v *Commission* [1995] ECR II-1847, and T-37/91 *ICI* v *Commission* [1995] ECR II-1901.

9 — 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.

consideration of whether the intervention is admissible.

11. In its observations on the intervention lodged with the Court on 20 June 1995, the Commission raises a plea of inadmissibility against the intervention on the following ground: In the *PVC* judgments of the Court [10] it was held that certain formal defects in acts of the Commission analogous or corresponding to those invoked by the intervener can result only in the annulment of the act in question and not in a finding that it is non-existent. Consequently, inasmuch as the invalidity of an individual act produces results only in favour of the parties seeking annulment, a decision by the Court in favour of annulment would not avail the intervener. That decision would not produce results *erga omnes*, but would concern a part only of the Polypropylene decision, namely that imposing certain measures and sanctions on the appellant, Hüls. For its part, then, DSM, *qua* third party, is said by the Commission to have no legal interest in intervening in these proceedings.

The Commission further points out that by its intervention DSM is seeking to make good its omission to exercise its right of appeal against the judgment of the Court of First Instance of 17 December 1991, [11] dismissing its action for annulment of the aforementioned Commission decision to the extent to which it concerned DSM. Thus the intervener is seeking to evade the negative consequences flowing from the expiry of the time-limit for bringing the appeal, thus indirectly circumventing the mandatory nature of that time-limit.

Finally, the Commission regards as inadmissible the claim contained in the intervention requesting the Court to declare the Polypropylene decision non-existent or invalid as regards all the polypropylene producers to whom it is addressed. That claim, however, is not contained in the appellant's pleading. Consequently, reliance thereon by the intervener goes beyond that which it may seek in the context of the present proceedings, precisely because it is contrary to the ancillary nature of the intervention.

12. It must at the outset be clarified that examination of the admissibility of the intervention does not run counter to the earlier decision of the Court, as formulated in its order of 30 September 1992. By that order DSM was granted leave to make this intervention. When that order was made the issue of admissibility was examined prima facie, in the light of the decision whether or not to authorize the party

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

11 — Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833.

seeking leave to intervene to participate in the written and oral stages of these proceedings. The view formed in that order on the admissibility of the intervention was, I consider, provisional and gave rise to no question of *res judicata* which would preclude examination of that issue at the present stage. That is corroborated by both the literal and purposive interpretation of the applicable procedural provisions, [12] and by the Court's case-law. [13]

13. Intervention before the Court is provided for in the second paragraph of Article 37 of the EEC Statute of the Court of Justice in favour of persons (apart from Member States and institutions of the Community, which are covered by the first paragraph of Article 37) who have an interest in the result of the case. That legal interest must be direct and present. The intervention may be concerned solely to support the pleas of the party in support of whom the intervention is made.

14. The question concerning the criteria of admissibility of an intervention made for the first time at the appeal stage has not hitherto greatly occupied the Court. However, certain orders of the Court (even though, as has been observed, those orders do not have the binding force of a judgment) afford useful and clear pointers. Thus, the fact that the intervener was itself entitled to apply for relief or bring proceedings does not suffice in itself to deprive it of its right to intervene. [14] The Court does not appear to countenance such an absolute consequence being visited on an omission, owing to expiry of the time-limit or other procedural impediment, to bring an independent action or apply for other relief. On the contrary, the fact that the intervener could have brought an independent action, thus acquiring the status of a

12 — Article 93 of the Rules of Procedure of the Court, both before and after the 1993 amendment, provides that:
'(...)
2. The President shall decide on the application by order or shall refer the application to the Court.
(...)
3. If the President allows the intervention, the intervener shall receive a copy of every document served on the parties (...)'
It is apparent from the above provisions that the aim of that particular procedure is to examine, at a preliminary stage, whether a third party should be allowed to participate in the proceedings pending and not to form a definitive view on whether the arguments and grounds relied on by that person are admissible in their entirety.

13 — See Opinion of Advocate General Reischl in Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333 in relation to the question of the admissibility of the Parliament's intervention in that case which was finally adopted by the Court: 'In my opinion these reservations cannot be dismissed simply by reference to the said order granting the Parliament leave to intervene. Such an order opens access to the proceedings only provisionally; the admissibility of the intervention is decided if necessary in the judgment as is clear from the previous case-law. In this respect I refer to the judgment in Case 9/61 *Government of the Kingdom of the Netherlands* v *High Authority of the ECSC* [1962] ECR 213.'

14 — See order in Case C-76/93 P *Scaramuzza* v *Commission* [1993] ECR I-5716 and I-5721 (two cases). In this case the Court took into account the fact that the person seeking leave to intervene had not herself brought an action, although she could have done, but did not rule her application for leave to intervene inadmissible on that ground but on the ground that she was unable to point to the emergence of any direct legal interest if the claims of the party in whose favour she sought to intervene were successful.

party, is regarded as a factor which renders likely the existence of a legal interest in intervention. [15]

15. The question arises, then, as to the manner in which it is to be judged whether a person, who did not bring independent proceedings against, or apply for other relief from, a specific act, has a legal interest in intervening in pending proceedings in which another person, having the status of a party, is challenging the same act. [16] The existence of a direct and present legal interest is assessed on the basis of the form of order sought by the party in whose support the intervention is made. [17] Although it is easier to prove the existence of a legal interest where the annulment of a regulatory act is sought — precisely because that annulment takes effect *erga omnes* — that is not true of a case, such as the present proceedings, where the dispute turns on the legality of an individual act. In the latter case, only a finding that the act is non-existent, owing to the existence of latent defects or the non-existence of the body of the act, produces results *erga omnes*. [18] If the individual decision is annulled on grounds of formal or substantive legality, that annulment enures only for the benefit of the successful party. [19] Consequently, the intervener does not derive from that annulment any direct legal interest which might subsist in the annulment or at least in the rendering ineffective of that individual decision in respect of the part concerning it. Whatever indirect justification is likely to be inferred as regards the intervener from the fact that defects have been shown to exist which vitiate the legality of the act in question, is not sufficient to justify its participation in the pending proceedings. [20]

16. On the basis of the foregoing I shall now examine — in whole and in part — the admissibility of the intervention by DSM in the present case. The two relevant legal preconditions are these: first, proof of a direct and present legal interest on the part of the intervener in the outcome of the dispute; secondly, no independent form of order may be sought by the intervener, that is to say going beyond that which is sought

15 — That is apparent from the formulation of the recent order of the Court in Case C-245/95 P *Commission* v *NTN Corporation and Others* [1996] ECR I-553, in particular paragraphs 8 and 9. The fact that the person seeking leave to intervene did not bring independent proceedings merely entails the negative consequence for that person of being limited to supporting the form of order sought by the party in whose favour it is intervening. See also order in Case T-35/91 *Eurosport Consortium* v *Commission* [1991] ECR II-1359.

16 — It is worth noting that when an individual act, that is to say an act which contains no general abstract rules of law, governs the legal situation of more than one person it constitutes in actual fact a series of several individual acts embodied in a single act. That observation is also true of the Polypropylene decision. That decision embodies fifteen administrative fines, the same number as the undertakings on which they were imposed. That fact is of particular relevance to the manner in which the legal interest of the intervener is to be assessed. Essentially, the intervener is seeking to participate in proceedings whose subject-matter is not the individual decision concerning it but another individual decision which is embodied in the same decision as the one that concerns it.

17 — See the abovementioned orders in Case C-245/95 P (footnote 15) and C-76/93 P (footnote 14).

18 — Precisely because there is found to be no act embodying both the individual decision which concerns the party in whose favour the intervention is made and the individual decision concerning the intervener. On that ground, if the principal party proves the non-existence of the embodying act, that is of direct benefit to the intervener as well.

19 — Thus, also in the case of the aggregation in the same document of several individual decisions, as in the present case, annulment as regards one of the interested parties brings about no direct, positive result in favour of the others. That is true even if the annulment is based on a formal defect in the decision which is necessarily present in the other aggregated individual decisions. That position, fully warranted by the rationale of the power to quash, need not occasion surprise; besides, it is accepted by the courts of cassation of the Member States.

20 — That was the position adopted in the *Scaramuzza* order (paragraph 7 et seq.), cited at footnote 15.

by the party in whose favour the intervention is made. [21] In the present case the form of order sought in lawful manner by the appellant in whose favour the intervention is made may be divided into three categories.

In any event the appellant seeks the setting aside of the judgment at first instance with reference back, if appropriate, to the Court of First Instance for a fresh judgment. That claim by itself cannot give rise to any direct legal interest in favour of the intervener, inasmuch as the annulment of the judgment at first instance, in so far as it affects Hüls, has no influence at all on the legal situation of DSM. Even where, in addition to the annulment of the judgment at first instance, an order referring the case back to the Court of First Instance is sought, the likely benefit for the intervener — which in the best case would be the probability that the Court of First Instance, in adjudicating upon the matter afresh, would form the view that the Polypropylene decision was non-existent — consists merely in a hypothetical, indirect and future legal interest which is not sufficient for the admissibility of the intervention to be upheld.

Conversely, if the appellant seeks, in addition to the annulment of the first-instance judgment, an adjudication by the Court on the merits of the case resulting in a finding that the Polypropylene decision is non-existent or invalid owing to substantial defects in the body of the act, or to its non-existence, were that claim to be upheld, it would enure to the benefit of the intervener, since, as has been seen, a finding of non-existence has effect *erga omnes*. From that point of view, DSM has a direct and present legal interest in intervening in these appeal proceedings.

Again, where the appellant seeks, in addition to the annulment of the first-instance judgment, an adjudication by the Court on the merits of the case and a declaration that the Polypropylene decision is invalid, on grounds connected with its formal or substantive legality, annulment of that act does not operate *erga omnes* but only in favour of the appellant. Consequently, the intervener cannot rely on a legal interest stemming from annulment of the Polypropylene decision.

Moreover, the appellant is not seeking, nor could it seek, to extend the results of the annulment of the abovementioned act to all

21 — See on that point judgment in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 11 and 12.

the polypropylene producers to which it is addressed. [22] On that ground, the claim in that connection put forward by the intervener is inadmissible.

17. It follows from the foregoing that the intervention by DSM is admissible only in part, as regards that part in which the intervener backs the appellant's request that the Court should, in addition to setting aside the first-instance judgment, declare the Polypropylene decision to be non-existent in accordance with the exposition set out above. [23] Neither the other claims made by the intervener nor the arguments relied on by it in support of the appellant's other claims need be examined on their merits since they are inadmissible.

22 — It is not possible to construe to that effect the appellant's claim that the contested act should be annulled and 'declared invalid in its entirety.' The appellant may seek annulment of an act only in so far as it concerns him. Apart from the case of a finding that an act is non-existent, the Community judicature cannot correspondingly accept the general nullity of an act containing several individual decisions.

23 — The Commission's objection of inadmissibility, to the extent to which it is based on the view formed by the Court in the *PVC* cases (see above footnote 11 and paragraph 20 below) in connection with whether certain substantial formal defects in a decision render it non-existent or merely invalid, is unfounded because it disregards the limits of the adjudication in the Court judgment in question. The fact that in the *PVC* cases the Court did not find in favour of non-existence does not preclude, notwithstanding the similarities of the two cases, a finding of non-existence in the present case.

IV — Grounds of appeal

A — *Pleas concerning formal defects in the Commission Decision*

18. Hüls considers that the Commission's Polypropylene decision, which it challenged in proceedings before the Court of First Instance, is vitiated by substantial procedural defects which render it non-existent or invalid. Those defects, or at least clear and sufficient indications of their existence, were raised by it in its pleading prior to delivery of the first-instance judgment. According to the appellant, the Court of First Instance infringed a series of legal and procedural rules by declining to inquire into those matters further, even though it was requested to do so in the pleading of 4 March 1992. That refusal was also based on erroneous reasoning: the Court of First Instance misinterpreted the concepts of a non-existent act and of the presumption of legality.

In the following part I shall first examine the ground of appeal involving the interpretation of those concepts before going on to deal with the issue of the alleged breaches of procedural rules.

(1) *Relevant provisions and the Court's* PVC *judgment*

(a) Applicable provisions

19. In accordance with the first subparagraph of 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 proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.'

In accordance with Articles 60 and 61(2) of those rules:

'Where an Advocate General has not been designated in a case, the President shall declare the oral procedure closed at the end of the hearing (...).

After the delivery, orally or in writing, of the Opinion of the Advocate General the President shall declare the oral procedure closed.'

Article 62 provides that:

'The Court of First Instance may, after hearing the Advocate General, order the reopening of the oral procedure.'

The first subparagraph of Article 64(4) of those rules provides as follows:

'Each party may, at any stage of the procedure, propose the adoption or modification of measures of organization of procedure. In that case, the other parties shall be heard before those measures are prescribed.'

It is of particular relevance to cite the provisions governing the exercise of the right of appeal.

Article 41 of the EEC Statute of the Court, which is also applied in proceedings before the Court of First instance, states as follows:

'An application for the revision of a judgment may be made to the Court only on discovery of a fact which is 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.'

Article 125 of the Rules of Procedure of the Court of First Instance further provides:

'Without prejudice to the period of ten years prescribed in the third paragraph of Article 38 of the ECSC Statute, the third paragraph of Article 41 of the EEC Statute and the third paragraph of Article 42 of the Euratom Statute, an application for revision of a judgment shall be made within three months of the date on which the facts on which the application is based came to the applicant's knowledge.'

(b) The Court's *PVC* judgment

20. That judgment [24] is of particular importance in the solution of the issues arising in the present case. In the context of the appeal against the *PVC* judgment of the Court of First Instance of 27 February 1992 the case turned on the legal consequences of the non-existence of an authenticated original of a Commission act signed by the President and the Executive Secretary, in accordance with the provisions of Article 12 of the Commission's Rules of Procedure. [25]

21. As a first step the Court held that that procedural defect did not render the act non-existent. That holding was based on the following considerations. [26] Acts of the Community institutions are presumed to be lawful. By way of exception to that principle, acts tainted by an irregularity 'whose gravity is so obvious that it cannot be tolerated by the Community legal order' do not have legal effect and consequently do not enjoy the presumption of legality and must be regarded as 'legally non-existent'. However, a finding that an act is legally non-existent must, for reasons of legal certainty, be reserved for 'quite extreme situations'. As regards, then, the formal defects under consideration, the Court held as follows: 'In any event, whether considered in isolation or even together, the irregularities of competence and form found by the Court of First Instance, which relate to the procedure for the adoption of the Commission's decision, do not appear to be of such obvious gravity that the decision must be treated as legally non-existent.'

22. After setting aside the judgment of the Court of First Instance as to non-existence, the Court proceeded to give final judgment in the matter and therefore examined whether those same formal irregularities constituted any other ground on which the act might be annulled. [27] In that connection it took into consideration three important elements. The first was the fundamental nature of the principle of collegiate responsibility governing the functioning of the Commission. [28] Observance of that princi-

24 — See above, footnote 10.

25 — In the *PVC* cases the non-existence of an authenticated original and, with it, an infringement of Article 12 of the Commission's Rules of Procedure, were established judicially and not doubted by the Commission. Consequently, unlike the facts in the '*Polypropylene*' case, the Court merely had to determine the legal consequences flowing from an already established infringement of Article 12 of the Commission's Rules of Procedure.

26 — Paragraphs 48 to 54.

27 — Paragraphs 61 to 78 of the judgment.

28 — The Court cites its judgment in Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585.

ple must undoubtedly be of concern to legal subjects, in particular when, in Commission decisions finding infringements of Article 85 of the Treaty, directions are issued to the undertakings involved and pecuniary sanctions imposed on them. The second was the obligation of the Commission to provide a statement of the reasons on which its decisions are based, in accordance with Article 190 of the Treaty; it follows from that obligation that 'since the operative part of, and the statement of reasons for, a decision constitute an indivisible whole, it is for the college of Commissioners alone to adopt both the operative part and the statement of reasons, in accordance with the principle of collegiate responsibility.' The third concerned the rule under which specifically decisions finding infringements of Article 85 of the Treaty cannot be the subject of a delegation of authority to the Commissioner responsible for competition policy.

23. It follows from the foregoing that 'the Commission has an obligation, *inter alia*, to take the steps necessary to enable the complete text of acts adopted by the college of Commissioners to be identified with certainty.' It was in pursuance of that obligation that the rule contained in Article 12 of the Commission's Rules of Procedure was enacted. Accordingly, 'far from being, as the Commission claims, a mere formality for archival purposes, the authentification of acts referred to in the first paragraph of Article 12 of its Rules of Procedure is intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes fixed in the languages which are binding. Thus, in the event of a dispute, it can be verified that the texts notified or published correspond precisely to the text adopted by the college and so with the intention of the author. Authentification of acts (...) therefore constitutes an essential procedural requirement within the meaning of Article 173 of the EEC Treaty breach of which gives rise to an action for annulment.'

24. It follows from the foregoing judgment of the Court that the non-existence of an authenticated original, as described above, of itself constitutes an infringement of an essential procedural requirement and not a ground for declaring the act non-existent. [29]

(2) *The judgment appealed against*

25. The Court of First Instance rejected the pleas submitted in the applicant's pleading

29 — It would be possible to counter the case-law set out above by saying that that solution does not confront with the necessary rigour such a serious breach of the law by the Commission as is constituted by its infringement of Article 12 of its own Rules of Procedure. Especially the jurist acquainted with the rules in force in the domestic laws of certain Member States may be occasioned surprise by the failure to declare an unsigned substantive act non-existent. It should not, however, be overlooked that the Court, in arriving at that view of the matter, took account of the special features of the 'administrative' functioning of the Community institutions and adjudged, again in my personal view, that to characterize the infringement at issue as an infringement of an 'essential procedural requirement' entailing annulment of the act was the best means of protecting both the proper functioning of the Community institutions and the legal interests of the parties concerned. For that reason and notwithstanding the doubts set out above as to the extent to which the sanction against the Commission's infringements in the *PVC* cases was sufficiently severe, I consider that the same judicial solution may be accepted in the cases under consideration.

of 4 March 1992 [30] on the basis of the following reasoning contained in paragraphs 384 and 385 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, unlike the argument which it put forward in the *PVC* cases (see paragraph 13 of the judgment), 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 the alleged defects. The question to be examined, therefore, is whether the applicant has adequately explained why in the present case, unlike in Joined Cases T-79/89 *et al*, 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 brought 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. In point 1(2) of its document, the applicant pleads an alleged infringement of the rules on languages laid down in the Commission's Rules of Procedure. Such an infringement cannot, however, entail the non-existence of the contested measure but only its annulment, provided that the argument is received at the proper time. The applicant also contends, in point 1(3) of its document, that in view of the circumstances of the *PVC* case there must be a presumption of fact that the Commission also made subsequent amendments to its polypropylene decisions without having the authority to do so. The applicant has not, however, 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. Mere reference to "unawareness of irregularity" is not sufficient in this regard. The general presumption put forward by the applicant in this respect does not constitute a sufficient ground for ordering measures of inquiry after the reopening of the oral procedure.

Finally, the argument put forward by the applicant in point 1(d) of its document must be interpreted as asserting, on the

30 — See paragraph 5 above.

basis of the statements made by the Commission's representatives in Joined Cases T-79/89 *et al*, that an original of the contested Decision, authenticated by the signatures of the President of the Commission and the Executive Secretary, is lacking. That allegation, if true, would not in itself entail the non-existence of the Decision. In the present case, unlike in 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, to the benefit of the applicant, the presumption of legality arising from its apparent existence. In such a case, the mere fact that there is no duly authenticated original does not in itself entail the non-existence of the contested measure. Therefore, in this respect too, there was 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.'

(3) *Examination of the grounds of appeal*

(a) Limits of the powers of the appellate jurisdiction

26. I consider it useful as a preliminary step to reply to an issue raised by Hüls concerning the limits of the powers of the appellate jurisdiction.

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. Those defects are set forth in the notice of appeal. According to the appellant, the discretionary power to carry out additional measures of inquiry, even at the appeal stage, is consonant with the obligation incumbent on the Community judicature to examine fully and of its own motion the existence of irregularities in the administrative and judicial procedures conducted up to that time.

27. On the question whether the Court may order measures of inquiry at the appeal stage in connection with determining the existence of formal defects in the contested Commission decision, the following matters should be emphasized: it follows from the nature of appellate review, as that concept is understood in the judicial systems of the Member States and is described in the relevant provisions of the EEC Statute of the Court of Justice and the Rules of Procedure of the Court, that that review is limited to determining the legality of the judgment of the court trying the substantive issues, that is to say it focuses on the legal validity of the latter's judicial reasoning, on the basis of the facts as found by that court. Conversely, the appeal court

has no warrant to appraise evidence, except where a plea is raised alleging distortion of the clear sense of the factual evidence. [31] Thus, the carrying out of further measures of inquiry is inconceivable at the appeal stage. [32]

In the light of the foregoing, the appellant's request for supplementary measures of inquiry to be carried out in connection with the possible irregularities in the Commission's contested Polypropylene decision must be rejected.

(b) Misinterpretation by the Court of First Instance of the concepts of non-existent act and presumption of legality

— Arguments of the parties

28. The appellant maintains that the contested judgment should be quashed because the Court of First Instance is misinterpreting and misapplying the legal concepts of 'non-existent' act and 'presumption of legality'.

In particular, according to Hüls, the Court of First Instance erred in holding that an act not duly signed is not by operation of the law non-existent but is covered by the presumption of legality. In doing so it infringed the general criteria for the non-existence of acts, as laid down in the case-law. [33] Also it is misinterpreting the concept of the presumption of legality and the theory of the *de facto* existence of the administrative act in order to support its viewpoint. According to the appellant, both latent and patent defects, such as those vitiating the Commission's Polypropylene decision, cannot be covered by the theory

31 — As laid down in Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981 (paragraph 49): 'The Court of First Instance thus has exclusive jurisdiction to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it.'

32 — The prohibition on the conduct of measures of inquiry applies both at the stage prior to a decision by the appeal court on whether an appeal is well founded and in the event that the appeal is upheld and the question arises as to whether the case should be referred back to the court trying the substantive issues for a fresh judgment. Prior to annulment the prohibition is based on the fact that no defect could be found in the judicial reasoning of the court trying the substantive issues on a matter of fact of which that court was not aware. After an appeal has been upheld, Article 54 of the EEC Statute of the Court provides that the Court may itself give final judgment in the matter, 'where the state of the proceedings so permits'. In the event that supplementary measures of inquiry were required, that would mean that the state of the proceedings does not 'permit' final judgment to be given.

33 — Judgment in Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *ECSC* [1957] ECR 157. According to the appellant, that judgment is in line with widely accepted notions known to the national laws of the Member States and defines a non-existent act as one which is vitiated by particularly serious and manifest defects. The appellant infers from the Court's case-law that the absence of a signature on the act is such a serious and manifest defect. In that connection it refers to the Opinion of Advocate General Trabucchi in Joined Cases 15/33 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73 *Schots-Kortner and Others* v *Council, Commission and Parliament* [1974] ECR 177, and to the Opinion of Advocate General Mischo in Case 15/85 *Consorzio Cooperative d'Arbruzzo* v *Commission* [1987] ECR 1005. The omission of the requisite signatures from the Polypropylene decision is, according to Hüls, manifestly obvious. Accordingly, the appellant maintains that, from its submissions contained in its pleading of 4 March 1992, there may be presumed to have been another particularly serious and manifest defect, namely the alteration to the content of the Polypropylene decision subsequent to its adoption. Inasmuch, then, as the Court of First Instance did not form the view that the abovementioned defects had rendered the act in question non-existent *ab initio*, it contravened Community law in the manner in which it interprets the concept of a 'non-existent' act.

of the *de facto* administrative act. Besides, Hüls maintains, it would in that case be logically consistent to proceed directly to use the presumption of legality as the criterion for determining whether an act is in existence.

Hüls maintains that its assertions are not undermined by the Court's *PVC* judgment; instead of non-existence, the contested act was voidable for infringement of an essential formal requirement.

29. In countering the above allegations the Commission refers to the solution adopted by the Court in the *PVC* cases. According to the Commission, following the *PVC* judgment the question no longer arises as to the non-existence of acts vitiated by the irregularities described by the appellant. Moreover, the Commission contends, the Court of First Instance rightly declined to set aside the Polypropylene decision because there was insufficient evidence of the existence of the defects and irregularities relied on by Hüls. [34]

— Reply to the above pleas

(i) Extent of appellate review of issues which are to be reviewed of the Court's own motion

30. It is worthwhile at this juncture to determine the extent to which the nature of a ground of annulment as a matter to be reviewed of its own motion by the Court trying the substantive issues (Court of First Instance) is of relevance to the manner in which the judgment at first instance concerning that ground will be reviewed on appeal. [35] The fact that a ground of annulment belongs to the category of those which are to be considered of the Court's own motion does not automatically mean that that ground may be put forward and examined for the first time at the appeal stage, or that appellate review will also be extended to issues not raised and argued at first instance. Appeal proceedings cannot be altered, even in respect of issues to be reviewed of the Court's own motion, into a second-instance procedure for appraising the facts. They seek merely to detect any errors of law in the first-instance judgment, in accordance with the provisions of the first paragraph of Article 51 of the EEC Statute of the Court. Consequently, the Court's review in relation to whether the Polypropylene decision at issue presents substantial formal defects is limited, on the

34 — On the need for full evidence of such formal defects the Commission refers to the aforementioned *PVC* judgment and to the judgments in Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441; and Case T-34/95 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905 and Case T-35/92 *Deere* v *Commission* [1994] ECR II-957.

35 — Both non-existence and substantial procedural defects relied on by Hüls belong to the category of issues which the Court may review of its own motion. See, for example, judgments in Case 1/54 *France* v *High Authority* [1954] ECR 7, Case 2/54 *Italy* v *High Authority* [1954] ECR 73, Case 18/57 *Nold* v *High Authority* [1959] ECR 89, and in Cases C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 14, and C-304/89 *Oliveira* v *Commission* [1991] ECR I-2283, paragraph 18.

one hand, to review of the correct classification under the appropriate rule of law of the facts as found by the court trying the substantive issues and, on the other, if requested in the notice of appeal, whether corresponding factual submissions were made in a manner which was admissible before the court trying the substantive issues and that court failed to examine them.

31. The appellant's other submissions with which in particular it seeks to supplement its pleading of 4 March 1992 and which go beyond the bounds of appellate review, as mentioned in the previous paragraph, must be rejected. [36]

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

32. On the basis of the foregoing I would observe that the Court of First Instance did not err in law in identifying and appraising evidence from which there appeared to be substantial formal defects in the Polypropylene decision. 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.

33. It should be clarified that, of the procedural defects alleged above, the one with particular relevance is that concerning the non-existence of an authenticated original of the Commission decision, contrary to the provisions of Article 12 of the Commission's rules of procedure. The particular significance of that defect is clearly apparent from the abovementioned *PVC* judgment of the Court. Under the terms of that judgment, [37] authentication of acts is an essential procedural requirement which, if observed, renders possible the certain determination of content, language and the statement of reasons on which the act under review was based. It follows from that ground of the judgment that the omission of authentication directly entails the annulment of the act vitiated by the defect without there being any need to show to what extent its content was altered *ex post facto* or the linguistic regime was not observed.

34. In the present case, however, the Court of First Instance did not find an authenticated original of the Polypropylene decision in issue to have been lacking, nor does the

36 — It is not in my view correct to take the view that those defects which are immediately apparent on the face of the contested act contained in the file on which the judgment of the Court of First Instance was based may be raised for the first time in appeal proceedings. The act in question is not a procedural document in the proceedings at first instance and consequently cannot constitute a basis for the submission of grounds of appeal. As already mentioned, the rationale and position of appellate review in the procedural system of the Community legal order require as a fundamental principle the submission as grounds of appeal of solely those errors of law in the judgment at first instance which may be gleaned from the text of the judgment appealed against and of the other procedural documents. Rejection of grounds of appeal which refer to the text of the act against which the proceedings at first instance were brought flows from that principle. The contested act merely constitutes evidentiary material for the appraisal of which sole competence lies with the court trying the substantive issues, namely the Court of First Instance.

37 — See paragraphs 73 and 76 of the *PVC* judgment mentioned above at footnote 10.

appellant maintain that it had raised a corresponding plea in a clear and concrete manner or adduced full and cogent evidence from which such irregularities were apparent. Consequently, the Court of First Instance did not err in law in not holding that the Commission decision at issue revealed substantial procedural defects.

(iii) The correctness of paragraph 385 of the judgment appealed against

35. On the basis of the foregoing clarifications, I now proceed to examine the merits of the ground of appeal according to which the Court of First Instance misinterpreted and misapplied the legal concepts of the 'non-existent' act and the 'presumption of legality'.

36. Indeed, I do not consider the legal reasoning contained in paragraph 385 of the judgment appealed against to be correct. Its defects are to be found in the grounds on which it held there to be no reason to declare the act challenged before it to be non-existent. I think that those grounds are to be reviewed in a clear manner as to their correctness. [38] In the first place, reliance on the presumption of legality as a defence against non-existence is in my view wrong in law. On the one hand, as the appellant also states, and as is apparent from the abovementioned analysis of the Court in the *PVC* cases, judgment as to the existence of an act logically precedes the formation of a view on whether a presumption of legality, of which it is a necessary precondition, has arisen. On the other hand — and this is more important since it covers the case in which infringement of Article 12 of the Commission's internal rules of procedure entails the annulment and not the non-existence of the act vitiated on that ground — there cannot be reliance on the presumption of legality of an act against which proceedings have been brought in order to counter the arguments and pleas raised by the parties challenging that act. That is to say, a procedural defect in the contested act cannot be defended on the ground that it is covered by the presumption of legality, given that that presumption does not preclude judicial review.

37. Thus, the obligation to adduce 'concrete evidence' in support of a rebuttal of the presumption of legality required by the Court of First Instance in order for a plea of non-existence to be upheld gives rise to doubts as to the compatibility thereof with the rules governing the burden of proof. [39]

38. Those errors notwithstanding, I consider, however, that the judgment of the Court of First Instance is not liable to be

38 — On that point see below the section dealing with the refusal by the Court of First Instance in the light of the rules concerning the burden of proof.

39 — See paragraph 50 et seq. below.

quashed on appeal because the solution it adopts in response to the submissions of Hüls concerning non-existence of the act in question is correct, irrespective of the specific grounds of the contested judgment on that point. Thus, it was right to hold that the alleged relevant defects inherent in the Polypropylene decision, even if they are present, do not render the act non-existent. That position was also corroborated by the *PVC* judgment of the Court whose reasoning is cited and analysed in an earlier part of my Opinion. [40] As the Court has held, in the context of appellate review, where the reasoning of the Court is defective but the operative part is correct, the corresponding ground of appeal relied on by Hüls and the intervention by DSM must be rejected in their entirety. [41]

(c) As to the likelihood of the existence of substantial defects in the contested act

39. Even though the evidence submitted to the Court of First Instance does not indicate that there were substantial irregularities on the adoption of the contested act, it remains to examine whether that same evidence justified reopening of the oral procedure with a view to ordering fresh measures of organization of procedure.

— Arguments of the parties

40. The appellant maintains that, by rejecting its request for the oral procedure to be reopened, the Court of First Instance infringed Community law, misapplying Articles 62 and 64(3)(d) of the Rules of Procedure of the Court of First Instance and Article 21 of the EEC Statute of the Court. It emphasizes in that connection the particular position occupied by those provisions within the Community system of legal protection. It goes on to point out that they afford the necessary procedural guarantees for safeguarding the parties' rights of defence.

41: The Court of First Instance, Hüls maintains, does not have unfettered powers to decide on a request to reopen the oral procedure. Article 62 of the Rules of Procedure of the Court of First Instance must be interpreted as requiring that Court to reopen the oral procedure whenever a request to that effect is submitted by one of the parties and is founded on facts relevant to the resolution of the dispute of which the party concerned was unaware

40 — See paragraph 20 et seq. above.

41 — Judgment in Case C-36/92 P *SEP* v *Commission* [1994] ECR I-1911, paragraph 33.

and for that reason was unable to bring to the notice of the Court until after the oral procedure was concluded. [42] Facts of that kind, the appellant alleges, were those revealed on 10 December 1991 by officials of the Commission in the context of the *PVC* cases which, owing to their gravity and general import, go beyond the bounds of that case and directly concern the Polypropylene decision under consideration. On the basis of those disclosures, the Commission is said not to observe, first, the obligation of authentication of the original of its decisions, contrary to Article 12 of its rules of procedure, secondly, the rules concerning the linguistic regime governing its decisions and, thirdly, the rule precluding *ex post* alterations of the content of the act adopted. The appellant maintains that, prior to the disclosures of 10 December 1991, it was not in a position to know those facts because it had no indication of their concurrence. It goes on to stress that the presumption of legality of the Commission's Polypropylene decision was undermined by those facts. Those are, consequently, facts 'relevant' to the resolution of the dispute submitted to the Court of First Instance. Specifically the non-existence of an authenticated original, following the Court's holding in the *PVC* judgment, constitutes an infringement of an essential procedural requirement entailing annulment of the contested decision without the need to adduce any further evidence. As regards the time-limit for making the request to reopen the oral procedure, Hüls points out that it learnt of those relevant facts only on 10 December 1991. In any event, submission of a request for the reopening of the procedure was not subject to any legal period of limitation. The three-month limitation period in Article 125 of the Rules of Procedure of the Court of First Instance concerns solely the review procedure of application for revision and, consequently, as a limitation placed on a procedural right, cannot be applied by analogy to the case of a request to reopen the procedure.

42. The appellant, following more or less the same reasoning, submits that, by its judgment, the Court of First Instance is infringing the provisions of Article 64(3)(d) of the Rules of Procedure of the Court of First Instance, as those provisions are to be interpreted in conjunction with the provisions of Article 64(1) thereof and Article 21 of the EEC Statute of the Court. According to Hüls, the Court of First Instance, in the context of its obligation to assemble the evidence essential to the resolution of the dispute, is required to order measures of inquiry when the following three preconditions are cumulatively satisfied: first, the facts having evidential value must refer to arguments of the parties having a decisive influence on the outcome of the dispute; secondly, the Community judicature must be unable to reach a decision precisely because it does not know whether those facts are relevant or not and, thirdly, further evidence must be obtained in order to ascertain their concurrence. When the above preconditions are met, the Community judicature is bound to carry

42 — The appellant refers on that point to judgments in Joined Cases 2/62 and 3/62 *Commission* v *Luxembourg and Belgium* [1962] ECR 425 and Case 195/80 *Michel* v *Parliament* [1981] ECR 2861.

out the necessary measures of inquiry. On this point the appellant relies on the Opinion of Advocate General Lagrange in the *La Providence* case [43] and the position taken by the Court in the *Nölle* case. [44] According to the appellant, its request of 4 March 1992 satisfied the abovementioned preconditions and, consequently, ought to have led to the reopening of the oral procedure. That request entailed in all likelihood a submission as to the non-existence of the Polypropylene decision. The reply to that submission cannot have other than decisive importance for the resolution of the dispute. Likewise it founds its request on factual circumstances (non-existence of an original, breach of the linguistic regime, *ex post facto* alterations of the content of the act) which would be likely to be well founded. In order to ascertain those matters it was essential for further measures of inquiry to be carried out and specifically for the Commission to be requested to produce relevant documents in its possession. According to the appellant, the Court of First Instance was, therefore, obliged to accede to its request to carry out fresh measures of inquiry (as contained in its application for the reopening of the oral procedure). That application was not subject to a procedural time-limit or, consequently, to that laid down in Article 125 of the Rules of Procedure of the Court of First Instance which concerns solely the procedure for an application for revision. It ought, then, to have been acceded to, which was precisely what happened in similar circumstances during the proceedings in the *PVC* cases. Finally, Hüls considers that, in holding in its judgment appealed against that there had not been submitted to it adequate and concrete evidence capable of supporting its request for further measures of inquiry to be carried out, the Court of First Instance infringed the rules on the burden of proof.

43. For its part the Commission observes, to begin with, that the appellant is wrong to claim that the Court of First Instance was under an obligation to order the reopening of the oral procedure because that measure was not essential in the present case. In the Commission's view, the applicant's request for the reopening of the oral procedure was not based on facts of relevance to the resolution of the dispute, and was submitted out of time. The submissions concerning breach of the linguistic regime governing the act or concerning non-existence of an authenticated original of the contested act were rightly dismissed by the Court of First Instance because, as the Court subsequently held in its *PVC* judgment, those defects, even if they are present, do not render non-existent the act vitiated by them. As far as the matters relied on by the applicant as new facts are concerned, the Commission makes the following observation: inasmuch as they are related to the *PVC* judgment of the Court of First Instance they cannot be prayed in aid to support an application to reopen the oral procedure; it has been held that the content of a judicial decision

43 — Judgment in Joined Cases 29/63, 31/63, 36/63, 39/63 to 47/63, 50/63 and 51/63 *Usines de la Providence and Others* v *High Authority* [1965] ECR 911.

44 — Judgment in Case C-16/90 *Nölle* [1991] ECR I-5163.

cannot justify the reopening of the oral procedure in another case.[45] 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 Hüls in its request of 4 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 of First Instance. 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, Hüls knew of the facts on which it relied in its request for the reopening of the oral procedure.

44. The Commission further contends that the Court of First Instance rightly held that Hüls 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 4 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 bore the burden of proof as regards the existence of the relevant procedural defects and not the Commission. The contrary interpretation advocated by the appellant runs counter to the presumption of legality of acts of Community institutions in accordance with case- law.[46] Further, Hüls 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*.[47] 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 of First Instance, 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.[48]

45. As far as the interpretation of the provisions of Article 64(3)(d) of the Rules

45 — The Commission refers to the order 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.

46 — See judgments cited in footnote 35 in *Dunlop Slazenger* v *Commission*, *Fiatagri and New Holland Ford* v *Commission* and *Deere* v *Commission*.

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

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

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 organization 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 concerning also 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 to submit its applications within the time-limits together with evidence in support. Measures of organization 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. The Commission goes on to observe that the appellant's submission that there is a discrepancy between the *PVC* judgment and the present case on the relevant issue was put forward for the first time in the reply and is for that reason inadmissible. Finally, the *Nölle* judgment relied on by Hüls did not concern the Community judicature and does not interpret or apply any procedural rule relevant to the solution of the present dispute.

46. Concerning the observations and arguments of the intervener, I would refer to paragraph 10 et seq. of my Opinion.

— My reply on the above issues

47. In light of the foregoing, the question arises whether the Court of First Instance lawfully rejected the application to reopen the procedure which is directly linked with the likely existence of substantial procedural defects in the Commission's Polypropylene decision.

(i) Powers of the Community judicature in regard to the organization and conduct of proceedings

48. Neither from a literal or purposive interpretation of the provisions of Articles 49, 62 and 64 of the Rules of Procedure of the Court of First Instance,[49] nor from any other procedural rule, may an obligation on the Community judicature be inferred to grant applications by the parties to reopen the oral procedure or to order additional measures of inquiry. The Court of First Instance simply has the discretionary power to do so, in accordance with the general principle of procedural law whereby the Court is master of both procedure and evidence. Those powers of the Court are recognized both by the

49 — Corresponding to Articles 45 and 61 of the Rules of Procedure of the Court.

Community system of judicial protection and by the corresponding systems of the Member States. They cannot be regarded, moreover, as infringing the right of the parties to legal protection.

49. Nevertheless, there are certain limits in the exercise of the above powers which are imposed by two other fundamental procedural principles governing the performance of the judicial task. Those are, on the one hand, the principle requiring the courts to observe the rules concerning the burden of proof and, on the other hand, the rule whereby the court is prohibited from denying justice but is required to reply with a statement of reasons in a manner which is lawful and adequate to the submissions validly made before it with a view to adjudication.In the light of those principles, it is necessary to examine below the lawfulness of the refusal by the Court of First Instance to grant the application to reopen the procedure.

(ii) The refusal by the Court of First Instance in the light of the rules concerning the burden of proof

50. In the present case the appellant relied in the proceedings at first instance, after conclusion of the oral procedure, on the probable existence of substantial procedural irregularities vitiating, in its view, the act contested by it so as to render it non-existent. Thus it sought the reopening of the oral procedure and the adoption of fresh measures of inquiry. The Court of First Instance dismissed the application, taking the view that the applicant was not offering 'sufficient evidence' of the non-existence of the contested act. In particular, — save for the submission concerning infringement of the linguistic regime of the act on which mention was made in the judgment appealed against of the appropriate plea being raised out of time — the Court of First Instance held that the applicant did not sufficiently elucidate the grounds on which it considered it likely that the Commission made *ex post facto* alterations to the Polypropylene decision, or adduce 'concrete evidence' to rebut the presumption of legality of that act. Thus, the Court of First Instance considered that the applicant, in order to corroborate its submission as to the likely existence of procedural irregularities leading to a finding that the contested act is non-existent and justifying the reopening of the procedure, was under an obligation to support that submission with reasons and to fully prove it.

51. In the first place, the Court of First Instance did not err in holding that, even though the Commission had committed the irregularities raised, there was no ground for a declaration of non-existence. [50] Nevertheless, as mentioned earlier in my

50 — At this juncture I would refer to the Court's *PVC* judgment, discussed above, and to my observations relating to the legal classification of the defect constituted by the lack of an authenticated original. See also paragraphs 20 et seq. and 38 of my Opinion.

analysis, that fact does not of itself render the appeal liable to be dismissed. The relevant factor raised by the applicant at first instance does not consist in the likelihood that the contested act is non-existent but in the probability that the defects of the lack of an authenticated original, the *ex post facto* alteration of the content of the act and infringement of the linguistic regime are all concurrently present. For the courts it is not important which legal classification the parties give to the facts but the facts which they rely on, particularly when those facts, if present, may not render the act non-existent but constitute an infringement of an essential procedural requirement on the adoption of the act which is to be reviewed *ex officio* and entails its annulment.

As stated above,[51] the relevant matter brought to the attention of the Court of First Instance in the document of 4 March 1992 is that concerning the likely non-existence of an authenticated original of the act. In the event that that submission were to be proven, the result would be the annulment of the act. The Court of First Instance was therefore unable to reply to the applicant that the defect in question, on the supposition that it subsisted, could not avail it because purely and simply the applicant had pleaded non-existence and not annulment.

52. We are now at the nub of the problem which can be summarized in the following question: *Even in the light of the likelihood of an infringement of an essential procedural requirement, was the Court of First Instance required under any rule of Community law to order a reopening of the procedure and the adoption of further measures of inquiry?*

53. In line with the reasoning of the Court of First Instance, supported by the arguments of the Commission, the applicant's request was examined on its merits and refused because the applicant did not produce 'sufficient' or 'concrete' evidence in support of its submissions. Irrespective, then, of whether its submissions went to non-existence — to which the Court of First Instance refers — or concerned, as they should, the invalidity of the act, the important thing is that the Court of First Instance rejected them, considering the evidence submitted to be insufficient.

54. I do not consider that approach to be correct since it runs counter to the rules governing the burden of proof. As mentioned in an earlier paragraph, the Community judicature is master of the procedure and evidence, but is none the less required to exercise those powers in accordance with the rules governing the burden of proof. In principle each party bears the burden of proof in regard to the factual submissions which it puts forward. However, that rule is subject to exceptions whenever the evidentiary elements are in the sole possession of the other party,[52] or

51 — See above, paragraph 33 of my Opinion.

52 — Judgment in Case 45/64 *Commission* v *Italy* [1965] ECR 857, and the Opinion of Advocate General Lagrange in the *Usines de la Providence* case.

where that party by its conduct has rendered access to them impossible. [53] In those cases the party making that submission is, in my view, under the following obligations: first, to adduce evidence to show that the material unknown to it would be 'relevant to its defence'; [54] and secondly, to adduce at least prima facie evidence for the conjectures which it considers may be borne out by those materials to which it has no access. [55]

55. As regards the present case, the relevant matters are twofold: first, the applicant pleads the non-existence of an authenticated original of the act which appears likely to be the case, in its view, from a series of indications; secondly, the defect relied on by the applicant, if present, entails without further ado the annulment of the contested act. On that basis the Court of First Instance was required to accept that the applicant had complied with the rules governing the burden of proof. Thus, in its pleading it had submitted all the evidence which it could and was obliged to. Certainly, that evidence does not constitute full proof, or even detailed indications of the commission of an illegality. However, under the rules governing the burden of proof — at any rate in the present case — Hüls was under an obligation to adduce prima facie evidence of a suspected infringement and not full and sufficient evidence of such infringement.

56. It follows from the foregoing that the conclusion must be that the Court of First Instance, inasmuch as it accepted the pleading for examination on its merits, could not, without infringing the rules on the burden of proof, reject the applicant's request for reopening of the oral procedure on the grounds that the matters on which that request was based were insufficient to justify an appraisal by it.

(iii) Examination of submissions put forward after closure of the oral procedure

57. However, the above finding does not suffice to uphold the appeal. As has been repeatedly emphasized, the plea as to the existence of procedural defects in the

53 — Judgment in Case 49/65 *Acciaierie Napoletane* v *High Authority* [1966] ECR 73.

54 — Cf. judgment in Case T-145/89 *Baustahlgewebe* v *Commission* [1995] ECR II-987, paragraph 34.

55 — Judgment in Case 51/65 *ILFO* v *High Authority* [1966] ECR 87. I would observe that the party in question is not free from every procedural burden in making its submission because there would then be a presumption in favour of finding that the defects which he alleges are indeed present. The party must, in order to persuade the court to investigate further his submission and possibly to order further measures of inquiry, adduce prima facie evidence of the matters in respect of which he makes submissions. Certainly, prima facie evidence fluctuates according to the particular circumstances of each case and cannot be equated with full proof.
It would, moreover, be excessive to require a person to produce full proof before a court of matters of which he cannot have full knowledge, *a fortiori* when that is required of a party who, since he precisely does not have access to certain materials, on that ground is seeking a court order for further measures of inquiry, in order to produce 'sufficient evidence' of the irregularities which he surmises will emerge following the carrying out of such further measures of inquiry.

contested act was raised by the applicant at first instance, after closure of the oral procedure. It is therefore essential to examine the extent to which that fact justified the rejection of the application to reopen the oral procedure and the decision not to examine the pleading in general.

(iii. 1.) Prohibition on raising of fresh pleas after the closure of the oral procedure

58. The texts governing the procedure before the Community judicature impose on the parties rules and time-limits for the submission of their pleas and arguments. Norms circumscribing the manner in which the parties may participate in the conduct of the proceedings are essential to the optimal, speedy and proper administration of justice. Those procedural limitations stem from the fundamental principles of legal certainty and the proper administration of justice.

59. One such procedural limitation is that contained in Article 48(2) of the Rules of Procedure of the Court of First Instance. Under that provision 'no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.' Paragraph 1 thereof provides: 'In reply or rejoinder a party may offer further evidence. The party must, however, give reasons for the delay in offering it.' Those provisions are set out in the chapter of the Rules of Procedure concerning the written procedure. It may be observed, therefore, that with the commencement of the proceedings and already at the stage of the written procedure the parties are required, at the appropriate time and as quickly as possible, both to submit their pleas in law and to adduce the evidence in support. The Community judicature does not tolerate unjustified delays. In the Community procedural system the issues raised, from both a legal and a practical point of view, must be contained, albeit in summary form, in the originating application.[56] They may of course be developed and elaborated during the course of the written and oral procedures. Moreover, the trial procedure is conducted in the framework of the pleas and arguments put forward by the parties and on the basis of the evidence adduced and relied on by them during the proceedings.

60. Accordingly, the possibility of raising pleas in law based on matters which have come to light subsequently is provided for in Article 48(2) of the Rules of Procedure of the Court of First Instance but, since it is exceptional, must be narrowly construed.

56 — See Article 44(1) of the Rules of Procedure of the Court of First Instance.

In any event, it should not be overlooked that the possibility for the parties to raise pleas and submissions, to submit applications or to invoke facts is in principle limited to the end of the oral procedure. [57] That is the significance of Articles 60 and 61(2) of the Rules of Procedure of the Court of First Instance which lay down when the President is to declare the oral procedure closed. Thus, the closure of the oral procedure results in the parties' being precluded from altering the matters of law and fact in the pending case.

61. Moreover, even when the Court is requested to examine a matter or plea which was submitted late, albeit within the temporal limits of the written procedure, it assesses the extent to which that delay prevents the other party from effectively defending its interests, pursuant to the principle of equality as between the parties, or impedes the Court in the performance of its judicial tasks. [58] In the affirmative they are not examined. Extrapolating that reasoning to cases where pleas are raised and matters relied on after the closure of the oral procedure, I would observe that that is likely to affect the rights of the defence of the other party and at all events impedes by definition the work of the courts. In such a case they are being asked to adjudicate on a matter whose factual and legal aspects are constantly changing.

62. It follows from the foregoing that it is not in principle open to the parties to invoke matters of fact and make submissions after the closure of the oral procedure. [59] That preclusion must indeed be interpreted even more strictly than the preclusion on the raising in principle of new submissions in the reply and rejoinder prior to closure of the written procedure.

(iii.2.) Exceptions to the prohibition on raising pleas after closure of the oral procedure

63. None the less, the rule enunciated above is in my view subject to exceptions. I believe there to be two possible grounds which might justify derogations from the prohibition on the submission of new pleas after the closure of the oral procedure. The first is where the issue raised out of time by the party falls within the category of those which may be examined by the Community judicature of its own motion. In that event there is not essentially a reversal of that prohibition but a relativization of its

57 — That limitation is to be found in all national systems of procedure, stemming as it does from the fundamental principle of legal certainty and the proper administration of justice.

58 — See judgment in Case 74/74 *CNTA* v *Commission* [1975] ECR 157, paragraph 4: also judgment in Case T-109/92 *Bassols* v *Court of Justice* [1994] ECR II-105, paragraph 67.

59 — That is precisely the difference between the present case and the *PVC*, *LdPE* and *Soda Ash* cases. In the latter cases the parties' submissions as to the likely existence of formal defects in respect of the contested parts of the decision may have been raised belatedly but in any event before closure of the oral procedure.

effects, which will be examined in the next part of my Opinion; [60] the second exception is where the factual circumstances underlying the plea raised out of time by the party were not known to it earlier so as to enable submissions to be made on them at the appropriate time.

(iii.2.1) Whether the matters in respect of which late submissions were made became known after the end of the oral procedure

64. A derogation from the prohibition on raising new matters or pleas out of time, particularly where they were not known to the party concerned before closure of the oral procedure, must be accepted by Community procedural law. On the one hand, it follows from the general provision contained in Article 48(2) of the Rules of Procedure of the Court of First Instance. Even though that paragraph belongs schematically to the chapter concerning the written procedure, it refers generally to the submission of new pleas 'in the course of proceedings'. Consequently, as the Court has held, [61] it also includes the possibility of raising new pleas after the closure of the oral procedure. [62] It also flows from the fundamental right to judicial protection and the principle of the proper administration of justice, as implemented in the Community judicial system and in the corresponding systems of the Member States.

65. One further observation is of particular relevance: the grounds which would justify a reopening of the oral procedure are the same which, *a fortiori*, justify reversal of a judgment in the event of an application for revision. The link between the legal issue examined here and that arising when an application for revision is made is in fact very close and of particular relevance for an understanding and solution of the present case.

66. In accordance with the aforementioned provisions of Article 41 of the EEC Statute of the Court of Justice and Article 125 of the Rules of Procedure of the Court of First

60 — See below paragraph 77 et seq.

61 — Judgment in Case 77/70 *Prelle v Commission* [1971] ECR 873, paragraph 7.

62 — It should be noted that Article 64(4) of the Rules of Procedure of the Court of First Instance provides that 'each party may, at any stage of the procedure, propose the adoption (...) of measures of organization of procedure.' That request may be based on the existence or probability of new factual matters.

Instance, an application for revision must be based on the discovery of a fact which satisfies the following conditions:

— it is relevant to the solution of the dispute;

— it was not known to the party and to the Court prior to judgment being given;

— a period of three months has not elapsed after it came to the notice of the person seeking revision.

67. I am of the opinion that an application for reopening of the oral procedure should be upheld when the analogous conditions to those laid down for an application for revision to be deemed admissible are met. If it were otherwise, we would be faced with the legal absurdity that the party learning of a relevant matter after closure of the oral procedure not only would not be able to make submissions on it prior to delivery of judgment, but would also lose the right to apply for revision because that matter had become known prior to final judgment by the Court.

68. It will be necessary, then, to allow application to be made of the Community judicature for the reopening of the oral procedure, whenever a fact of importance to the judgment to be given, which was unknown to the Court and to the party seeking a reopening, becomes known prior to closure of the oral procedure. It remains to be determined whether it is essential for the application for reopening of the oral procedure to be submitted within three months of the date on which the fact came to the applicant's knowledge by analogy with Article 125 of the Rules of Procedure of the Court of First Instance in the case of an application for revision. Analogous interpretation of a procedural provision — particularly of a time-limit conditioning the exercise of a right — does not appear to be applied in the Community legal order in the same way as for other provisions in general. Nevertheless, it would be contrary to the fundamental principles requiring the speediest and best possible administration of justice for a party to be allowed complete freedom of choice as to the moment when it wishes to submit its application for reopening of the procedure. Such application will have to be made not only within a reasonable time of the date on which the relevant fact became known (which period ceases to be reasonable, again in my view, after the expiry of a three-month period)

but without delay, so as to avoid any further delay in the delivery of the judgment.

70. Certain preliminary observations are in my view essential.

69. In relation to the present case, I consider first and foremost that a fact which, if upheld, immediately entails annulment of the contested act for infringement of an essential procedural requirement is in the nature of a fact of significance for the judgment to be given, thus justifying reopening of the oral procedure in the same way as revision of the judgment delivered would be justified.[63] It remains to determine the moment in time when it became known to the appellant so as to demonstrate whether it was unknown to it until the closure of the oral procedure and whether it was brought before the Court of First Instance within a reasonable time. In the present case what is of relevance is when matters came to the appellant's knowledge which were capable of giving rise in its mind to doubts as to the formal legality of the contested Commission act and leading it on that ground to seek further measures of inquiry.

71. First I consider that the lack of knowledge, as a precondition of the submission of new pleas, must be strictly interpreted.[64] The party seeking a reopening of the procedure, in so far as it has brought proceedings against an act, is obliged to show all possible diligence in the marshalling of evidence in support of its arguments. Evidence of that kind is not only that which proves beyond any doubt the existence of a defect in the contested act capable of entailing its annulment but also evidence giving rise albeit to a mere suspicion that careful examination is likely to reveal a good ground for annulment of the act. If the party has ignored evidence coming within the latter category during the whole course of the written, evidential and oral procedures, it cannot rely on other facts which corroborate and supplement the suspicions which the original evidence ought to have aroused in it, in order to succeed in its claim for reopening of the procedure.

72. In the present case the moment when the fact of importance for the judgment

63 — It could be argued that the disclosures by the Commission representatives in the *PVC* cases, on which the applicant's pleading was founded, do not constitute 'facts' but rather an indirect means of covertly putting forward a series of grounds of annulment of the Polypropylene decision. Under that interpretation those grounds were raised out of time and are therefore inadmissible. I do not think that the above interpretation of the pleading needs to be followed, though it does not lack logical support. The pleas in law of the applicant presuppose a factual circumstance, namely breaches by the Commission on the adoption of the Polypropylene decision. What is important is to determine the moment in time when the applicant at first instance learnt or ought to have learnt of those irregularities.

64 — That viewpoint is also echoed by the Court when it examines the admissibility of an application for revision. It has been made clear in case-law that the application for revision, owing to its exceptional nature, is subject to particularly strict criteria of admissibility. 'Total absence of knowledge' of the fact underpinning the application for revision is required; that is not the case if knowledge of the fact was possible during the course of the original proceedings. See judgment in Case 116/78 Rev *Bellintani* v *Commission* [1980] ECR 23.

was learned, which determines whether the application for reopening the procedure was made within the time-limit, coincides with the moment in time when the party making that application had available to it sufficient evidence of suspicions that the contested act was likely to reveal certain substantial procedural defects. Thus, the relevant moment in time is not when the party's suspicions were confirmed or given more concrete form, but rather the moment when evidence came to light capable of giving rise to those suspicions. When the 'decisive fact' of importance to the judgment consists of doubts as to the lawfulness of an act which merit further examination, the party is presumed to have knowledge of that fact at the time when it obtains access to the evidence, albeit inchoate, giving rise to those doubts. If it disregards or underestimates that evidence it loses the right to raise it exceptionally after the expiry of the procedural time-limits. Thus, it is of relevance to establish not only when the party pleading the fact learnt of that fact but also when it ought to have learnt of it if it had shown due diligence. [65]

73. In the present case, especially on the issue as to the existence or not of an authenticated original of the Commission's Polypropylene Decision which, as stated above, is also the relevant issue, I conclude as follows: the appellant maintains that the evidence giving rise to doubts as to the existence of an authenticated original came to its notice no earlier than on the occasion of the statements made by the Commission officials at the hearing in the *PVC* cases. According to those disclosures, which were made on 10 December 1991, application of Article 12 of the Commission's internal rules of procedure, and other rules, concerning the form and procedure for adoption of its acts, had become attenuated over time and was disregarded not only in the case of the *PVC* decision but also in other related cases.

74. That evidence is, none the less, weighty inasmuch as it concerns the probability that an infringement of an essential procedural requirement occurred on adoption of the Polypropylene Decision at issue. Yet they do not constitute unknown facts of decisive importance to the judgment in the sense that they create doubts for the first time as to the formal legality of the contested act; they simply further reinforce the suspicions already aroused by the documents in the file which were available to the party prior to commencement of proceedings. The duty of diligence incumbent on the latter

65 — It should be observed that the party who through its own fault did not learn in due time of a fact cannot plead the delay in its information in order to succeed in its application for reopening of the oral procedure. That solution was adopted by the Court in Case 56/70 *Mandelli* v *Commission* [1971] ECR 1, in regard to the examination as to the admissibility of an application for revision. The party seeking revision relied on a report by the Italian authorities of which it learnt only after the end of the original proceedings. However, the Court held that the applicant could not have been unaware of the existence of that report and that there was nothing to prevent it from having 'suggested that the Court should make a preparatory inquiry directed towards the production... of the document in question and any other relevant information in the hands of the Italian administration.' On those grounds the application for revision was refused.
The Court will refuse an application for the adoption of further measures of inquiry submitted after closure of the oral procedure where the party had the possibility of submitting the application prior to closure thereof (judgment in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 54).

required it to have already discerned the likelihood of the non-existence of an authenticated original at the time when it lodged its action or at least by the time of closure of the oral procedure. [66]

75. Furthermore, the case-file must be complete and accessible to the parties so as to enable verification of its contents, as also the omission of other relevant material. That is the only way of ensuring equality of the means at the parties' disposal, at the same time as affording them the possibility of establishing whether a certain document exists and indeed whether in regard to its adoption the formalities required by the law were observed, in the same way as for example the question whether the body which adopted the act in question was competent to do so, whether it was lawfully convened (in the case of collegiate bodies) or whether it was lawfully constituted etc. Consequently, in the light of the foregoing considerations concerning also the rules on the burden of proof, it was sufficient for the applicant to raise at the appropriate time the issue of the possible absence of an original of the act in order for the Court of First Instance to order the carrying out of further measures of inquiry and, in particular, to order the Commission to produce evidence in its possession to prove or disprove the existence of the act.

76. Thus, the fact first giving rise to doubts as to the observance of the formal preconditions on the adoption of the Polypropylene decision by the Commission is constituted by the omission from the Court file of the case of such evidence as would prove beyond doubt observance of the formal preconditions in question. [67] Temporally it falls at a point in time clearly prior to the closure of the oral procedure. For that reason I do not consider that any fact of importance for the judgment came to the applicant's notice subsequently so as to permit the application for reopening the oral procedure to be made out of time. [68]

66 — Thus, the applicant was precluded from validly raising the substantial procedural defects after closure of the oral procedure. Because, either the Commission's infringements in that connection were apparent beyond doubt from the documents in the file, when they would have to have been raised not later than in the reply, or the documents in the file simply created doubts as to whether essential procedural requirements had been observed or not, when the applicant ought to have raised them at the appropriate time, at the same time requesting the Court of First Instance to conduct measures of inquiry with regard to that point.

67 — It could be argued that the first suspicions were already aroused on communication to the appellant of the Polypropylene decision, inasmuch as it is not apparent from the text notified that the essential formal requirements provided for in Article 12 of the Commission's rules of procedure had been observed.

68 — Even though the foregoing analysis may appear severe to the party raising the plea, it is in my opinion the most appropriate. On the other hand, I do not agree with the viewpoint of the Court of First Instance in the abovementioned *Soda Ash* and *LdPE* cases (footnotes 8 and 9 respectively) in which it was held that the applicants were right to await final judgment in the *PVC* cases before making the relevant factual submissions in their own cases. Irrespective of whether the disclosures made during the course of the procedure in the *PVC* cases were unknown or not to the parties to the other proceedings, those parties were bound in any event to examine diligently the formal legality of the act concerning them, even if only from a review of the case-file. The subsequent disclosures simply reinforced suspicions that the Commission had been guilty of irregularities.
Again, the appellant cannot rely on the presumption of legality of the contested act as a reason why it could not conceive that behind its apparent completeness lay significant defects. From the moment when a person challenges an act of a Community body before the courts, the presumption of legality ceases to operate against or in favour of that person. On the one hand, as has already been observed (see paragraph 36), the presumption of legality cannot be availed of in order to refute an admissible plea by the applicant going to the unlawfulness of the act. For its part, the applicant may not rely on the same presumption as a justificatory ground for its omission to identify at the appropriate time a legal defect in the contested act.

(iii.2.2) Whether the plea raised out of time is required to be reviewed by the Court of its own motion

77. It remains to be examined whether the consequences of the fact that a plea is raised out of time may be overcome in the event that that plea is to be reviewed of the Court's own motion. Indeed, the absence of an authenticated original of the Commission's decisions constitutes, as already stated, an infringement of an essential procedural requirement and as such may be reviewed by the Community judicature of its own motion.[69] The question arises, then, whether the Court of First Instance would need to proceed to an examination of the pleas of the parties raised out of time and to set aside the contested act or at least to order measures of inquiry to be conducted in order to establish the existence of any formal defect.

78. In order to answer that question it is necessary to examine the limits of the Court's *ex officio* power of review.[70] In cases where a ground of annulment is examined of the Court's own motion, the Court, without any application being made to it, may investigate on its own initiative the documents in the file in order to establish whether that plea is well founded. Investigation of its own motion by the judicature, as far as the facts are concerned, is in principle confined to the documents in the file submitted for judgment. Only if it appears from those documents that an act was adopted in breach of an essential procedural requirement, is the judicature obliged to annul the act. Certainly, it may avail itself of its discretion not to be satisfied by the evidence of the file and to order the carrying out of further measures of inquiry. That investigation is however optional and not mandatory. The fact alone that starting from certain indications from the already existing evidence concerning issues reviewed of the Court's own motion, the Court could have pursued its investigation further in order possibly to establish that the contested act is unlawful, does not suffice in order to set aside the judgment as having been delivered in breach of the rules on *ex officio* judicial review.

79. In the present case it is not apparent from the contested judgment, nor is it submitted that a fully proven factual submission was made, that there was a substantial procedural defect in the contested act which ought to have been established of its own motion by the Court of First Instance. Furthermore, the Court of First Instance did not infringe the rules on review of its own motion simply by virtue of the fact that it did not investigate in depth whether the requisite formalities and procedural requirements had been observed on adoption of the Commission's Polypropylene decision. As it correctly held in the judgment, '...Even though the Community court, in an action for annulment brought 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

69 — See footnote 36 above.

70 — See also section containing analysis of review by the Court of its own motion.

paragraph of Article 173 of the EEC Treaty the possibility that the contested measure is non-existent must automatically be investigated'. [71]

It follows from the foregoing that the application for reopening of the procedure submitted by the appellant prior to delivery of the judgment at first instance was rightly dismissed. All the grounds of appeal to contrary effect are unfounded and must be rejected.

B — *Pleas concerning the finding by the Court of First Instance of infringements of Article 85 of the Treaty*

80. In the second part of its application the appellant company points to a series of errors alleged to have been made by the Court of First Instance in its review and in the finding of the relevant facts in the present case.

71 — It might be observed that the obligation of judicial review of the Court's own motion is narrower than the duty of diligence incumbent on the parties which, as we have seen, obliges them to identify and then to make submissions in due time on the evidence implying possible procedural irregularities in the contested act. That finding should not occasion surprise. Review by the judicature of its own motion in annulment proceedings was not provided for in order to remedy omissions of the parties. It is intended to safeguard the legal order by identifying and condemning manifest and serious irregularities in acts adopted by the Community bodies. When those irregularities are not apparent from the file, the Community judicature is not obliged to conduct further measures of inquiry. The option to do so is a discretionary power and not an obligation.

81. The question arises, as the Commission rightly points out, whether and under which conditions the manner in which the facts were found by the court trying the substantive issues, on the one hand, and the content of those findings, on the other, constitute points of law in accordance with Article 51 of the EEC Statute of the Court and, as such, whether they may be reviewed by the appellate jurisdiction.

The issue of admissibility will be examined in the context of the investigation into the pleas raised by the appellant. In its pleadings, correctly construed, Hüls is challenging the findings of the Court of First Instance on three main issues: its participation, first, in regular meetings of Polypropylene producers, secondly in price initiatives and, thirdly, in the adoption of measures designed to facilitate the implementation of the price initiatives.

(1) *Arguments of the parties*

(a) Participation in regular meetings

82. According to the appellant, the Court of First Instance, in contravention of the rules of Community law on evidence, arrived at the mistaken conclusion that the company participated in meetings of

Polypropylene producers from the end of 1978 or the beginning of 1979. In actual fact, according to the appellant, the Court of First Instance based its finding, first, on a reply from a competing company, ICI, to a question from the Commission which states nothing concerning the duration of the appellant's participation in those meetings, secondly, on various tables in the possession of ICI, ATO and Hercules which, however, constitute particularly subjective evidence, just as there are several views as to how they were assembled, and do not enable conclusions to be drawn concerning the duration of participation in the relevant meetings and, finally, on the appellant's reply to the request for information addressed to it by the Commission from which it was inferred, against logic and in conjunction with the appellant's participation in the meetings in 1982 and 1983, that the company also participated 'regularly' in earlier meetings (see paragraphs 114 to 118 of the judgment appealed against). Consequently, Hüls maintains, the Court of First Instance based its conclusion on that point on evidence lacking conviction and, substantively, solely on the information provided by the competitor undertaking, ICI. In that connection the appellant relies on the Court's judgment in *Duraffour* v *Council*. [72]

Furthermore, the appellant maintains that, by requesting it to provide sufficient evidence to show that its participation in the meetings was without any anti-competitive intention (paragraph 126 of the judgment appealed against), the Court of First Instance infringed the rules governing the burden of proof and violated the presumption of innocence of the accused by, in fact, requiring the appellant to prove a negative fact: its non-participation in anti-competitive conduct. In that connection reference is made to the Opinion of Advocate General Sir Gordon Slynn in *Musique Diffusion Française* v *Commission*. [73] The appellant further maintains that the Court of First Instance, by inferring its regular participation in the meetings of Polypropylene producers without there being any prima facie evidence for that, is essentially establishing a presumption against the appellant, requiring the appellant to rebut that presumption, thus reversing the rules on the burden of proof.

83. The Commission considers that in its arguments Hüls is calling in question the facts as found by the Court of First Instance and that, accordingly, its plea in that connection must be rejected as inadmissible. In the alternative it stresses that the Court of First Instance did not base its finding concerning the period of time during which Hüls participated in the meetings of polypropylene producers solely on information supplied by ICI (paragraph 114 of the judgment appealed against) but also on the contents of the tables mentioned in paragraph 115 of the judgment appealed against. At the same time the Commission considers that paragraphs 116 and 117 of the judgment appealed against demonstrate the inaccuracy of the information produced by Hüls and hence remove the doubts in connection with the conclusions drawn in paragraphs 114 and 115. In those circumstances there can be no question, in the Commission's view, of a reversal of the burden of proof. Nor may any such thing, moreover, be upheld in connection with paragraph 126 of the judgment

72 — Judgment of the Court in Case 18/70 *Duraffour* v *Council* [1971] ECR 515.

73 — Judgment in Cases 100/80 to 103/80 *Musique Diffusion Française* v *Commission* [1983] ECR 1825.

appealed against. In that paragraph the Court of First Instance requires Hüls to substantiate the grounds on which it maintains that its participation in substantively unlawful evaluations are none the less not contrary to the rules on competition. That requirement by the Court of First Instance cannot be deemed to be contrary to the rules governing the burden of proof nor to violate the presumption of innocence.

(b) Participation in price initiatives

84. In that limb of its arguments the appellant challenges the findings at first instance that it took part in the periodic meetings of polypropylene producers to determine price targets and that it adhered to initiatives in that regard (paragraphs 167 and 168 of the judgment appealed against). Hüls maintains that its participation was proven only in a limited number of meetings. Furthermore, the fact that the Court of First Instance infers from that participation its collaboration in the price initiatives, requiring evidence to the contrary (paragraph 168 of the judgment appealed against), amounts to a reversal of the burden of proof and a violation of the presumption of innocence. That is all the more so, according to Hüls, since it rarely followed the target prices and the relevant price instructions which it issued in that connection were merely of an internal nature within the undertaking. The whole issue is linked, moreover, to a misunderstanding on the part of the Commission of the concept of a concerted practice: according to Hüls, for there to be a concerted practice the matters which were the subject of consultations must be implemented. The fact remains, according to the appellant, that its participation in all the price initiatives was not proven and, therefore, the deliberately vague finding by the Court of First Instance on that point (paragraph 173 of the judgment appealed against) is in contradiction with the facts as found and infringes Article 190 of the Treaty. At the same time, Hüls calls in question the evidentiary value of the reply by ICI to the questions addressed to it by the Commission (see paragraph 174 of the judgment appealed against) in connection with the appellant's participation in the price initiatives, certainly from as early as 1979. In light of the foregoing observations, finally, it casts doubt on the judgment at first instance holding it responsible for participation in the price initiatives (paragraph 177 of the judgment appealed against).

85. According to the Commission, in the present case the requirement to produce concrete evidence in support of the submission that participation in the meetings of polypropylene producers did not entail collaboration in the price initiatives which formed the subject-matter of those meetings (see paragraph 168 of the judgment appealed against) does not amount to a reversal of the burden of proof. In the same way the Court of First Instance adjudged that the price instructions issued by the appellant were not purely of an internal nature (paragraph 173 of the judgment appealed against). Finally, the reference to Article 190 of the Treaty, in relation to the reasoning contained in the judgment

appealed against, was, in the Commission's view, of no legal significance whatever: it also stresses that the calling in question of the value as evidence of the information supplied by ICI constitutes an inadmissible submission, inasmuch as it is directed against the appraisal of the evidence by the court trying the substantive issues.

(c) The measures designed to facilitate the implementation of the price initiatives

86. In that limb of its arguments the appellant challenges, first, the finding by the Court of First Instance that, by participating in the meetings at which a series of measures were adopted in order to create conditions favourable to price increases, Hüls subscribed to those measures, inasmuch as it adduces no evidence to the contrary (paragraph 190 of the judgment appealed against). According to the appellant, such reasoning based on an ill-defined reference to a 'set of measures' and which ignores the legal arguments and evidence adduced by Hüls at first instance, is not consistent with the obligation to provide a statement of reasons as provided for in Article 190 of the Treaty, or with the rules concerning the correct appraisal of evidence.

87. Particularly in connection with the system of account leadership, the appellant observes, on the one hand, that such a system was never adopted but was merely the subject of discussions and proposals (contrary to what was deemed to be the case in paragraph 191 of the judgment appealed against) and, on the other, that Hüls was never a leader within the meaning of that system, although it was a supplier in isolated cases. The system was never put into operation, as is apparent from the findings made in paragraph 192 of the judgment appealed against where there is mention of an 'attempt' to put it into operation and of the conduct which 'should not have been' followed.

88. As regards, finally, target tonnages and quotas, Hüls points out that the Court of First Instance imputed liability to it based on the mistaken finding that it regularly participated in the meetings of polypropylene producers (paragraph 231 of the judgment appealed against). Moreover, the reliance placed by the Court of First Instance on mention of the name Hüls in certain tables as supplementary evidence (paragraph 232) would appear to give the impression that there was a series of indications as to the participation by Hüls in the commission of the infringement. However, those tables, in light of the foregoing arguments, do not, in the appellant's view, constitute a reliable source, nor do they permit the inference of the conclusions drawn from them by the Court of First Instance.

89. The Commission observes, first, in connection with the criticisms made by the appellant of paragraph 190 of the judgment appealed against, that they are

based on an incomplete reading of the judgment of the Court of First Instance. Moreover, the arguments by Hüls concerning the system of account leadership disregard the finding by the Court of First Instance (paragraphs 192 and 193) that that system was partially operational for two months, even though the parties concerned were dissatisfied by its results.

90. As regards the target tonnages and quotas, criticism is levelled by Hüls at the findings made by the Court of First Instance in paragraphs 231 and 232, which are said to disregard both the existing evidence and the precise content of the tables, as is apparent from paragraph 233 of the judgment appealed against. Consequently, the appellant's arguments are inadmissible, inasmuch as they refer to the appraisal of the evidence by the Court of First Instance.

(2) *Legal appraisal of the pleas raised*

(a) Admissibility

91. As already stated, in accordance with Article 168a of the EC Treaty and Article 51 of the EEC Statute of the Court of Justice, an appeal is limited to points of law. It follows from those provisions, as the Court has consistently held, that an appeal can only be based on grounds of an infringement of rules of law to the exclusion of any appraisal of the facts. Therefore, the appellate court does not review the appraisal of the evidence by the court trying the substantive issues but only whether an admissible plea has been raised that the court below has misdirected itself by distorting the clear sense of the evidence. The Court has jurisdiction under the aforementioned Article 168a of the EC Treaty to review the legal classification of the facts as found, as well as the conclusions drawn from those facts by the Court of First Instance. [74] Thus, the Court is not competent to find the facts or, in principle, to examine the evidence accepted by the Court of First Instance in connection with those facts. Provided that the evidence was adduced and relied on lawfully and in accordance with the rules and general principles of law relating to the burden of proof and the procedural rules governing the obtaining of evidence, the Court of First Instance is competent to appraise the value to be given to the evidence before it. [75]

92. On the basis of the foregoing, it should be observed that the main thrust of the

74 — See recent judgment in *Commission* v *Brazzelli Lualdi*, cited in footnote 31 (paragraphs 48 and 49) and the order in *San Marco Impex Italiana* v *Commission*, cited in footnote 7 (paragraph 39).

75 — See *Commission* v *Brazelli Lualdi*, cited in footnote 31 (paragraph 66) and *San Marco Impex Italiana* v *Commission*, cited in footnote 7 (paragraph 40).

appellant's arguments is aimed at the appraisal of the existing evidence by the Court of First Instance on the basis of an essentially different interpretation of that evidence. In that context the evidential weight of various elements is called in question, such as the information supplied by ICI (paragraphs 114 and 174 of the judgment appealed against), the evidence gleaned from various tables (paragraphs 115 and 232 of the judgment) or that contained in notes of meetings of the polypropylene producers (paragraphs 191 and 192 of the judgment). In the appellant's view, that evidence cannot warrant the conclusions arrived at by the Court of First Instance concerning the participation by Hüls in the meetings of polypropylene producers during the whole of the period imputed to it, and its collaboration in the initiatives undertaken at those meetings. In doing so, however, the appellant is impugning the substantive evaluation of the evidence without pleading and proving that the Court of First Instance distorted the clear sense of the evidence, and consequently the allegations made in that regard are inadmissible and must be rejected.[76] Only in regard to the allegation of a reversal of the burden of proof by the Court of First Instance and the attendant violation of the presumption of innocence enuring to the appellant's benefit, does Hüls impute to the judgment at first instance an error reviewable on appeal.[77]

(b) Whether the pleas are well founded

93. In my opinion the Court of First Instance in the judgment appealed against did not infringe the rules on the burden of proof or the general principle of observance of the presumption of the innocence of the accused. Concerning those issues I refer to the analysis set out in the relevant paragraphs of my Opinion in the *Enichem and Montecatini* cases.[78]

76 — It is true that in all its arguments going to the legal content of the second part of the appeal the appellant is in fact seeking an elucidation by the appeal court in accordance with Article 51 of the EEC Statute of the Court. Moreover, it is worth noting that, under Article 112(1)(c) of the Rules of Procedure of the Court the appeal must contain, *inter alia*, 'the pleas in law and arguments relied on'. Strict adherence to the letter of that provision would perhaps, in light of the foregoing, lead to the conclusion also reached by the Commission that the whole of the arguments contained in the second part of the notice of appeal must be rejected as inadmissible on account of a lack of precision. I consider, however, that such a difficulty should be provided for in pleadings that leave no margin of legal appreciation at the appellate level. Where that is not done, and notwithstanding the margin of appreciation that must be left to the Court on that point, the best possible administration of justice indeed militates in favour of an interpretative approach which, by following the rules of grammar and logic, brings out the pleas in law contained in the pleading without however discovering them where they do not exist.

77 — It could be wondered whether, in the context of the interpretative approach adopted by the appellant in its pleading, what it is essentially pleading is the bad reasoning of the judgment appealed against. Such could be the inference to be drawn, for example, from the appellant's submission that the Court of First Instance based its conclusion, in connection with the appellant's participation in the meetings of polypropylene producers from the end of 1978 or the beginning of 1979, solely on the reply by ICI to the request for information. Yet I do not believe that it is the reasoning of the judgment in itself at which the appellant is levelling its criticism, given that it concedes that the Court of First Instance relies in that connection on other evidence as well (the tables mentioned in paragraph 115; but see also paragraph 116) whose probative force is simply refuted by the appellant. Thus, the plea is merely one going to appraisal of the existing factual evidence.

78 — See paragraph 50 et seq. of my Opinion in Case C-49/92 P *Commission* v *Enichem* delivered today, and paragraphs 53 to 68 of my Opinion in Case C-235/92 P *Montecatini* v *Commission*, also delivered today.

V — Conclusion

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

(1) Dismiss in its entirety the appeal brought by Hüls Aktiengesellschaft;

(2) Dismiss the intervention;

(3) Order the intervener to pay its costs;

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